

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :

WISCONSIN COUNCIL 40, AMERICAN :
FEDERATION OF STATE, COUNTY AND :
MUNICIPAL EMPLOYEES, AFL-CIO :

Case 77
No. 35833 ME-2520
Decision No. 23031-A

Involving Certain Employes of :

SHEBOYGAN COUNTY :
(UNIFIED BOARD) :

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2323 North 29th Street, Sheboygan, WI 53081, appearing on behalf of the Petitioner.

Mr. Alexander Hopp, Corporation Counsel, Sheboygan County Courthouse, 615 North 6th Street, Sheboygan, WI 53081, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
ORDER, AND DIRECTION OF ELECTION

On October 10, 1985, the abovenamed labor organization having filed the petition described in Finding of Fact 5, below; and pursuant to notice a hearing having been conducted in the matter on November 21, 1985, at Sheboygan, Wisconsin, by Examiner Deborah A. Ford, a member of the Commission's staff; and a transcript of the proceeding having been received on December 11, 1985; and the Union having filed a brief on December 26, 1985; and the County having declined to file a brief; and the Commission having considered the evidence and arguments of the parties as supplemented at the Commission's request by a stipulation obtained by telephone calls to the abovenoted principal representatives of the parties on April 10 and 16, 1986; and the Commission, being fully advised in the premises, hereby makes and issues the following Findings of Fact, Conclusions of Law, Order and Direction of Election.

FINDINGS OF FACT

1. That Wisconsin Council 40, AFSCME, AFL-CIO, individually referred to herein as Petitioner or Council 40, is a labor organization with an office at c/o Helen Isferding, Staff Representative, 2323 North 29th Street, Sheboygan, Wisconsin 53081; and that Local 110, Sheboygan County Supportive Services AFSCME, AFL-CIO, referred to individually herein as Local 110, is a labor organization affiliated with and serviced by Council 40; and that Local 110 and Council 40 are jointly referred to herein as the Union.

2. That Sheboygan County, referred to herein as the County, is a municipal employer; that the Sheboygan County Unified Board, referred to herein as the Unified Board, is an agent of the County which operates a subdivision of County government; that the County and the Unified Board have their principal offices at the Sheboygan County Courthouse, 615 North 6th Street, Sheboygan, Wisconsin 53081; that the Unified Board was established by the County under Chapters 51 and 55, Stats., to assure availability of diagnostic, treatment and rehabilitation services for residents of the County who have problems associated with mental illness, alcohol and drug abuse or developmental disabilities; that the Unified Board is licensed to operate and operates two community-based residential treatment centers, Rebos Center (for the treatment of alcohol and drug abuse) and Hillcrest Group Home (for the treatment of chronic and acute mental illness); and that among the individuals working at those facilities are 13 House Aides (also referred to as House Managers) who engage the residents at those facilities in conversation and activities, remind them to take medications, monitor the residents' conduct, condition, attitudes and compliance with prescribed drugs and treatments, and report on same to other House Aides and to individuals responsible for monitoring and directing the residents' program of treatment, including the Unified Board's Supervisor of Residential Facilities, Michael Presto.

3. That Local 110 is the exclusive representative of a bargaining unit of County employes described in Local 110's most recent collective bargaining with the County (for calendar years 1985 and 1986) as follows:

all regular full-time and part-time personnel employed by Sheboygan County in the Court House and in auxiliary departments and buildings (but specifically excluding therefrom all elected public officials, supervisors, professional employees of the Welfare Department, all employees of the Unified Board, all deputized employees of the Sheriff's Department, all nurses, all confidential employees, the Welfare Department Office Supervisor and the Welfare Department Income Maintenance Supervisor). (emphasis added);

that said unit presently consists of approximately 155 employees.

4. That in Sheboygan County, Dec. No. 8256-B (WERC, 2/68), the Commission certified Local 1749, WCCME, AFSCME, AFL-CIO as representative of a bargaining unit consisting of

all regular full-time and regular part-time clerical employes employed in the Sheboygan County Public Welfare Department, excluding public officials, professional employes, supervisors and all other employes;

and that since that certification, the name of the recognized representative and the contours of the unit in which it is recognized have been changed to those set forth in the latest agreement noted in Finding 3, above.

5. That Council 40 initiated the instant proceeding by filing a petition for unit clarification wherein it requested the Commission to order that the unit described in Finding 3, above, be clarified (without a vote among affected employes) to include "all regular full-time and regular part-time employes of the Employer of the Unified Board (sic) excluding professional, supervisory, confidential and managerial employes."

6. That the County objects to the inclusion of any Unified Board employes in the above unit without a vote, but the County agrees to the inclusion of the nonprofessional Unified Board employe group in that unit if a majority of the eligibles voting in that group favor representation by Local 110; that the Union contends that it would be proper for the Commission to issue the requested unit clarification order without a vote among the affected employes, but the Union requests that an election be conducted if the Commission requires it as a condition precedent to the petitioned-for change in the unit described in Finding 3, above.

7. That the Union contends that all individuals employed as House Aides at the Rebois Manor and Hillcrest facilities referred to in Finding of Fact 2, above, are employes of the Unified Board and, hence, of the County; that the County contends that such individuals are not employes of the County and further contends that they are employes of a contract service provider, Therapy and Support Services, 1044 St. Augustine Road, Hubertus, Wisconsin 53033, hereinafter referred to as TSS; that the following individuals were employed as House Aides at the two facilities at the time of the instant hearing:

Maria Piccolo
Rhonda Austin
Donna DeMey
Joyce Plummer (nee Garcia)
Jennifer James
Steve Jones
Debby McCue
Elizabeth McCue
Tina Ottman
Steve Presto
Lynn Olson
Kim Neal
Marilyn Smith

8. That Union and County agree that positions in the following classifications (occupied at the time of the hearing by the listed individuals) are nonprofessional municipal employees employed by the County and properly included in the group that is to be the subject of the Commission's Order or Direction in this case:

Administrative Secretary	Diana Brandt
Clerk	Cathy Conrad Ruth Klessig Beverly Mulder Marsha Sherven
Secretary	Dorothy Anderson Alyce Couwenhoven Lisa Thrall Jamie Taubenheim Judy TeBeest
Clerk Typist	Debby Bricnker Shelley Schleicher Marlene Beyer.

9. The Union and County agree that the following County and employed Unified Board positions (occupied at the time of the hearing by the listed individuals) are not nonprofessional municipal employee positions and, hence, not properly included in the group that is the subject of the Commission's Order or Direction in this case:

Program Director	Matzek, Robert
Deputy Program Director	Gyllander, Nikki
Manager, Administrative Services	Passehl, Mary Ann
Clinical Director	Arndt, George, M.D.
Psychiatrist	
Consulting Psychologist Specialist	
Community Services	
Coordinator, Mental Health Services	Wick, Robert Lee
Coordinator, Mental Health Center	Burg, Eldon
Supervisor, Outpatient Mental Health Services	Bonnet-Brunnich, Eric
Supervisor, Outpatient AODA Services	Hoffmann, Ray, Jr.
Supervisor, Community Support Program	Kohl, Mary Frances
Supervisor, Medical Day Treatment	Shaul, Elizabeth
Supervisor, Residential Facilities	Presto, Michael
Clinical Psychologist	Adams, Duncan
Psychologist	Silverglate, Beverly
Protective Services Specialist	De Bauche, Julie
Psychiatric Nurse	Daane, Joan Klug, John
Psychiatric Social Worker	Fehling, Thomas Moths, Debra Sutherland, Cindy Van Der Weele, Debby

Registered Occupational Therapist	Chase, Janet
Alcohol and Drug Abuse Counselor II	Jahnke, Tod
Alcohol and Drug Abuse Counselor I	Beauprey, Gloria Beck, Fred
Chronic Care Outreach Worker	Traas, Leonard
Developmental Disability Specialist	Hertel, Anne Ketterman, Joan
Mental Health Counselor	Goeser, Lorie Larson, Monika
Administrative Assistant	Matin, Frances

10. That on October 15, 1985, the County (by Unified Board Program Director Robert J. Matzek) and TSS (by its Executive Director Claire Oberbreckling) entered into a purchase of services agreement covering the period October 13, 1985 to December 31, 1986; that said agreement is subject to termination by either party on 30 days written notice; that under said agreement TSS is to furnish specified number of hours per week of staff services for the supervision of and assistance with activities of daily living of residents of the Hillcrest facility, to provide 24-hour coverage in the facility at all times, to be responsible for staff performance and for personnel services in compliance with HSS 3.13 Wis. Adm Code, to make available staff who are trained to provide those services, to meet Unemployment Compensation and Workers Compensation requirements and comply with the Fair Labor Standards Act, to hold the County harmless from losses resulting from claims resulting from alleged TSS negligence, and to schedule and authorize House Aide staff overtime; and that under said agreement the County is to make specified monthly payments for services pursuant to invoices submitted by TSS, to reimburse TSS for "any legitimate expenditures paid to staff as reimbursement for travel and as authorized by the county" (up to a specified dollar maximum for the contract term), to reimburse TSS for the cost of individual liability insurance which TSS may purchase for its staff furnishing the abovenoted services (not to exceed a stated amount for the contract term), to cooperate with and assist TSS in selecting qualified staff to provide the services, to make available to TSS' employes any appropriate training available to the County's own employes or to other contract agencies, and to be responsible for the development of a treatment program relating to any and all clients admitted to the facility.

11. That on November 13, 1985, the County and TSS executed an amendment to the above agreement, effective November 13, 1985, calling for similar services at Rebos Manor, requiring that the services provided include an average of 4 hours of organized activity therapy per resident per week, and increasing the County's payment obligations.

12. That the County entered into the above agreements with TSS after having solicited multiple sets of bids from potential service providers; that the initial bid invitations did not specify a contract price or a number of staff hours to be provided, but the resultant bids were all rejected by the County; that the County's bid specifications called upon the successful bidder to give first consideration in hiring to the individuals there providing House Aide services at the facilities; that the County encouraged each bidder to meet with the current House Aides to discuss the latter group's expectations concerning wages and working conditions; that each of the prospective bidders had such discussions with the House Aides prior to submitting its initial bid; that the County's last bid invitation specified both the total cost of the contract to the County and the total number of staff hours per week to be provided by the successful bidder, and it called upon the bidders to specify, at a minimum, the bidder's proposed distribution of expenses as among the following:

Salaries (Direct Service Staff)	Total Salary
Salaries (Direct Service Staff)	Hourly Rates
Fringes - Mandatory	
Fringes - Optional	
Administration/Profit	

and that in its September 24, 1985, letter announcing its decision to select TSS' bid, the Unified Board stated that its decision was based upon a "review of the

direct salaries proposed, the range of fringe benefits offered, and the contractual amounts required for management and administration. Consideration was also given to agency experience and viability."

13. That from 1976 through July of 1984, the County had employed married couples as live-in House Managers (then also known as Houseparents) at Rebos Manor, along with certain part-time relief personnel; that those House Managers held authorized positions in County service and were compensated through and otherwise treated as on the County payroll; that shortly thereafter, on the retirement of the last of those couples, the County Board eliminated the House Manager classification from its table of organization and authorized the Unified Board to engage individuals to work in that capacity on a temporary contract basis; that after acquiring the license to operate Hillcrest in October of 1984, the County similarly authorized temporary contract basis employment of individuals to serve as House Managers; that as a result of the foregoing, during the several months immediately preceding the effective dates of TSS' abovenoted agreements to provide House Aide services at the two facilities, the County was engaging the services of the House Aides under individual "professional services agreements" wherein the House Aide I or II was expressly indentified as "an independent contractor"; that pursuant to the terms of those individual contracts, the County paid each House Aide a per hour rate of compensation, reimbursement of certain expenses, and no fringe benefits; that the County was then paying the House Aides the way it pays vendors (no deductions of taxes or social security from amounts paid) rather than the way it pays employes on its payroll; and that the last of those temporary contracts were effective beginning in June of 1985 for a term ending upon the earlier of the passage of three months or the selection of a contract agency by the County.

14. That sometime prior to April of 1985, the County resolved to "find a permanent employment process" to replace the then-existing series of short-term temporary contracts with individual House Aides; that the County thereupon undertook to select a contract service provider through the competitive bidding process described above in Finding of Fact 12.

15. That following the execution of each of the agreements between TSS and the County noted in Findings of Fact 10 and 11, above, TSS' Executive Director Oberbreckling offered employment contracts to all of the individuals then working as House Aides at the respective facilities; that those contracts were drafted by Oberbreckling and her husband; that those contracts set forth (in at least some instances) hourly rates of compensation almost identical to those the individuals were therefore receiving under their respective contracts with the County, except that the House Aides were also offered optional fringe benefits at their own expense; that on the first occasion on which Oberbreckling tendered contracts to the House Aides for their signatures, the House Aides refused to sign because they questioned the legality of certain of the termination language and because they considered certain aspects of Oberbreckling's background presentation concerning the amount TSS would be charging for certain optional fringe benefits to be flawed; that the House Aides requested that Oberbreckling correct the fringe benefit cost information and either change or confirm with legal counsel the legality of the questioned termination language; the Oberbreckling did as the House Aides requested in those respects and met with them again; that after hearing from Oberbreckling and reviewing the individual contracts that she tendered at that time, each of the House Aides ultimately signed his/her agreement with TSS, the last being Steven J. Presto (brother of Michael) whose agreement was executed on November 4, 1985; that the House Aides had been informed by Michael Presto that once TSS became the contract provider, the County would no longer employ the House Aides; that all House Aides worked and were paid by TSS from and after the time the TSS agreements with the County took effect, even though the House Aides' individual contracts with TSS were not executed until sometime thereafter; that each of the individual employment contracts is for a term of one year and automatically renewed from year to year unless either party notifies the other in writing to the contrary; that each of the individual employment contracts specifies, among other things, an hourly rate of pay, a statement that the House Aide is engaged to furnish House Aide services as assigned by TSS, a statement that TSS has the right to terminate the House Aide for cause immediately and without prior notice and without cause on 30 days written notice, and certain restrictions on House Aides' employment by other employers in the future; and that TSS has paid the House Aides with its own bi-weekly paychecks from which it has withheld taxes, social security, and the cost of any of the fringe benefits for which the individual has opted.

16. That prior to the effective dates of the above agreements between TSS and County, Michael Presto, the Unified Board's Supervisor of Resident Facilities, had selected and engaged the services of the House Aides and provided on-site day-to-day supervision of the House Aides' work at the two facilities.

17. That since TSS has been the contract provider of House Aide services, TSS has designated Claire Oberbreckling as the person with final decisional authority on major personnel matters, though there is no evidence that any new House Aide has been hired or that any House Aide has been discharged or suspended during that period of time; that TSS has also designated several of the House Aides as working supervisors and one of them, Joyce Plummer, as the primary House Supervisor to whom House Aides are to bring questions and complaints and through whom the TSS office is to maintain its liaison with the facilities; that in addition to that function, Plummer has also been receiving and approving House Aide time-worked reports and dealing with matters of employe scheduling and other minor problems; but that Michael Presto continues to be involved in various day-to-day personnel matters, as well, as noted in the following Finding of Fact.

18. That since TSS has been the contract provider of the House Aide services in the respective facilities, Michael Presto has continued to routinely spend substantial portions of his work days in the facilities, and no one from TSS (other than its designated working supervisors among the House Aides) is routinely present in either of the facilities; that Presto remains responsible for seeing to it that the residents in each facility are being provided with the treatment and care that has been prescribed for them by the Unified Board through appropriate treatment professionals; that Presto has occasion to receive reports from the House Aides concerning the residents and their cooperation with and responses to treatment, and he confers with House Aides at various times during their working hours; that Presto continues to be viewed by at least some of the House Aides as their supervisor; that Presto was invited to sit in on a House Aide staff meeting conducted by TSS; that during that meeting one of the House Aides raised questions about the treatment prescribed for a particular resident and Presto angrily responded that the questioning House Aide lacked the professionalism to ask such a question and should confine her questions and comments to the limits of her own job responsibilities; that Presto told another House Aide that the latter's days as a House Aide were numbered on account of failures to report for work when scheduled; that Presto participated with Joyce Plummer in making a decision to grant a House Aide's request for a transfer from one facility to the other, but Plummer informed the House Aide of the decision without Presto being present; that Presto has received and responded to at least one House Aide's shift change request without referring to any discussion of the matter with Joyce Plummer, Claire Oberbreckling or anyone else; and that on one occasion, an individual came to Presto's office at Hillcrest for an interview about possible future employment and met privately with Presto, apparently for that purpose.

19. That in the circumstances as they appear in the instant record, although the County has the right to entirely terminate its agreements with TSS on 30 days written notice, TSS has the authority to hire, fire and settle wage and working condition matters affecting the House Aides referred to in Finding of Fact 7, and the County and its Unified Board do not.

CONCLUSIONS OF LAW

1. That a question of representation presently exists concerning the representation of the employes in the voting group described in Finding of Fact 8 and consisting of

all regular full-time and regular part-time employes of Sheboygan County employed by the Sheboygan County Unified Board, excluding professional, supervisory, confidential and managerial employes.

2. That in the circumstances described in Findings 3-6, above, a vote among the members of the voting group described in Conclusion of Law 1 is a necessary condition precedent to Local 110 obtaining exclusive representative status with respect to the positions in that voting group and to the inclusion of those positions in the bargaining unit described in Finding of Fact 3.

3. That by reason of Council 40's request and the County's agreement to this effect, the foregoing voting group shall be included in the bargaining unit

described in Finding of Fact 3 if a voting majority of the above voting group favors representation by Local 110.

4. That neither the County nor its Unified Board is functioning as a municipal employer with respect to the occupants of the House Aide positions described in Finding of Fact 7; that the occupants of those positions are not employes of the Unified Board or the County; and that those positions therefore are not includable in the bargaining unit described in Finding 3 and are not a part of the voting group described in Conclusion of Law 1, above.

ORDER

1. That Council 40's request herein for a unit clarification order including, without a vote, the employe group described in Conclusion of Law 1 in the bargaining unit described in Finding of Fact 3, shall be and hereby is denied.

2. That Council 40's petition is dismissed as it relates to the House Aide positions described in Finding of Fact 7.

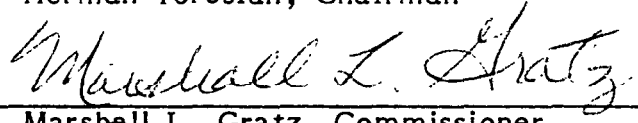
DIRECTION OF ELECTION

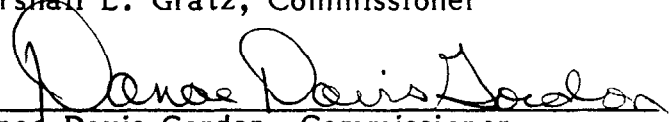
That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this directive in the voting group consisting of all regular full-time and regular part-time employes of Sheboygan County employed by the Sheboygan County Unified Board, but excluding professional, managerial, supervisory and confidential employes, who were so employed on April 24, 1986, except such employes as may prior to election quit their employment or be discharged for cause, for the purpose of determining whether a majority of said employes voting desire to be represented by the Local 110, Sheboygan County Supportive Services, AFL-CIO, AFSCME, as part of the existing bargaining unit of Sheboygan County employes described in Finding 3, above, or by no representative, for the purpose of collective bargaining with Sheboygan County on wages, hours and conditions of employment.

Given under our hands and seal at the City of
Madison, Wisconsin this 24th day of April, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  
Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

SHEBOYGAN COUNTY (UNIFIED BOARD)

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSIONS OF LAW, ORDER
AND DIRECTION OF ELECTION

BACKGROUND AND POSITIONS OF THE PARTIES

The basic facts and positions of the parties are noted in the Findings and need not be repeated here.

The matters in dispute are the Union's assertions, contrary to the County, that the House Aides are employes of the County and that a vote among the employes should not be a necessary condition precedent to their inclusion in the unit described in Finding of Fact 3.

The Union focused on the first of those issues in its brief. It contends that TSS is merely an extension of the payment department of Sheboygan County, rather than the employer of the House Aides in any meaningful sense.

The Union also asserts that the October and November, 1985, agreements between the Unified Board and TSS were both entered into after the instant petition was filed and brought about no change whatever in the identity or job duties of the House Aides. The Union argues that the Unified Board's Supervisor of Residential Facilities, Michael Presto, continues to be viewed by the House Aides as their supervisor; continues to be responsible for directing the work of House Aides regarding how to meet residents' needs; attends at least some House Aide staff meetings; has reprimanded a House Aide during a staff meeting and reprimanded another House Aide by telling him his "days were numbered" because of failures to report to work as scheduled on certain occasions; continues to personally interview candidates for employment; and has either decided or had a significant role in decisions regarding shift changes and scheduling of House Aides.

The Union further argues that the contracts between TSS and the House Aides do not prove that TSS is their true employer since the House Aides were allowed to work and were paid for periods of time when those agreements were not signed or in effect and since the House Aides signed those contracts in the context of a choice between doing so or losing their jobs.

DISCUSSION

Petitioner's Claim that the County Employs the House Aides

In determining whether the County (though its Unified Board) functions as a municipal employer with respect to the House Aides, a range of factors relating to the extent of County control over the individuals' work lives are relevant, including but not limited to whether the County controls "the hiring, firing and settling of wages, hours and conditions of employment" of House Aides. 1/

The County Board and the County's Unified Board have taken formal actions that clearly reflect their intent and desire not to be deemed an employer of the House Aides, by expressly deauthorizing positions and by expressly authorizing a contract for services with TSS, respectively. However, despite the clarity of the County's intentions, the actions of its agents in several respects make this a relatively close case in our view, under the foregoing legal standards.

First, the County has exercised considerable influence on the selection of the current House Aides by requiring bidders to give the existing staff first consideration. TSS hired the entire existing complement of House Aides, each of whom had been originally selected by Michael Presto and oriented to the work by the County. The County is also expressly called upon in its agreement with TSS to

1/ E.g., CESA #14, Dec. No. 17235 (WERC, 8/79).

cooperate with and assist TSS in selection of qualified staff in the future and to provide the House Aides with the same training it provides to its own employes and to other contracted-for staff. The record does not reveal any new House Aide hiring activity since the effective date of the TSS contract, but House Aide Jones did testify without contradiction that he observed Presto meeting privately with an individual who had come to the facility, asked for Presto, and stated that he was there to be interviewed for a job by Presto.

Second, the County has exercised considerable influence on the wages currently paid the House Aides. Although its initial bid specifications were open-ended as to the amount the County would spend, the County rejected initial bids and the matter was ultimately rebid in response to a stated County contract price and a specified number of employe hours, with the bidders being called upon to specify, among other information, what salaries, wage rates, paid fringes and optional fringes they would be providing to employes. The resultant wage rates are, in at least some cases, nearly identical to those that were being paid to the individuals prior to TSS' involvement.

Third, the County has exercised a measure of control over day-to-day supervision of the House Aides. Michael Presto, who is employed by the County and its Unified Board, is in many respects actively involved in observing, correcting and controlling the work of the House Aides. He spends several hours each day in the subject facilities; whereas TSS has designated some of the House Aides as working supervisors and has provided no other regular supervisory presence at the facilities. Michael Presto also has acted on occasion as if he has the authority to reprimand and to effectively recommend discipline or discharge, though the evidence bearing on these matters is limited and open to differing interpretations. He has also been involved in decisions on whether to transfer employes, and, as noted, he interviewed an individual concerning hiring, though it is unclear from that fact what impact Presto's recommendations or advice would have on the ultimate decision to hire or not hire.

And fourth, the County's contract with TSS retains County control or County input into various other areas of significance. TSS is required to maintain compliance with State Health regulations, but the County retains full program and treatment control. TSS is required to provide adequately trained individuals, but the County is to cooperate and assist in the selection of personnel and to provide the House Aides with whatever training it provides to its own personnel.

In our view, however, the foregoing factors are outweighed by several others which indicate that ultimate decisionmaking authority in critical areas rests with TSS and not the County.

TSS' contracts with the House Aides reflect an understanding that TSS has the authority to exercise ultimate control of employe discipline and discharge. The fact that the House Aides worked and were paid by TSS for a period of time prior to their execution of employment contracts with TSS does not persuade us that TSS merely took over the payment functions previously performed by the County. It only establishes that the House Aides were willing to work for and be paid by TSS for the period of time involved without having a formal employment agreement defining their relationship with TSS. Moreover, the Union's contention, that the House Aides were forced to sign the employment agreements with TSS in order to keep their jobs, is merely another way of saying that by signing those contracts the House Aides showed that they preferred entering into a contractual employe-employer relationship with TSS to giving up further gainful work as House Aides. That tends to support rather than negate the existence of an employer-employe relationship between TSS and the House Aides.

TSS' agreements with the County reflect an understanding that TSS has primary authority to hire new House Aides with whatever cooperation and assistance TSS requests from the County. The fact that the TSS contract was entered into after the instant petition was filed does not bear directly on whether the County can be said to be functioning as an employer of the House Aides. Especially so where, as here, the Unified Board's decision to seek bids had been made and implemented well in advance of the Union's petition.

With regard to establishment of wages and other conditions of employment, TSS and the other bidders had discussions with the House Aides concerning their wage, fringe and working condition expectations of whatever provider was ultimately selected by the County. While the impact of those discussions on the compensation arrangements ultimately offered the House Aides may well have been reduced

substantially by the inclusion of contract price and total hours of service in the County's last set of bid specifications, it is nonetheless significant that the bidders (including TSS) has such discussions prior to bidding and, hence, prior to TSS' tender of individual contracts to the House Aides.

After being selected as provider, TSS' Executive Director offered each House Aide then working in the facilities a contract (drafted by Oberbreckling and her husband) for employment with TSS in that capacity, but the House Aides initially refused to sign because of flaws in TSS' background information regarding the cost to employes of optional fringe benefits and because of questions regarding the legality of certain of the language regarding termination. The House Aides asked Oberbreckling to correct the fringe benefit information and to at least confer with legal counsel to confirm the legality of the termination language, and she did so before again tendering contracts for the House Aides' signatures. Only after those developments had occurred did each of the House Aides eventually sign an employment agreement with TSS. Each such agreement recognized TSS' right to terminate the employment relationship for cause without notice or delay and without cause on 30 days written notice.

Moreover, the fringe benefits available to the House Aides through TSS are not tied into or comparable to those provided by the County to its represented or nonrepresented employes.

Finally, although Michael Presto is present in the facilities daily and actively interacting with the House Aides in several respects, the evidence shows that TSS is also exercising a significant degree of control over day-to-day House Aide activities through its designated House Supervisor and liaison person, House Aide Joyce Plummer. While there have apparently not been hiring, firing or other major personnel matters since the employment agreements with the House Aides were developed, tendered and executed, TSS' Executive Director Claire Oberbreckling handled the employment contract matters, and we conclude from the record that she would similarly be involved in future major personnel matters as they arise. 2/

In view of the foregoing, we are satisfied that TSS has the ultimate authority for hiring, firing and settling wages and working conditions matters involving the House Aides, and that the County and its Unified Board are not functioning as a municipal employer of the House Aides. Collective bargaining with the County would not, therefore, affect the House Aides in the context of the relationships as they presently exist.

Because of the short period of time since the TSS contract was entered into, the record contains no actual experience with how, when and by whom wage and benefit arrangements will be changed and/or House Aides will be newly hired or fired. If future developments occur which clarify those matters in such a way as to indicate that the County is exercising significant control over those or other relevant matters, the Union will be free to again pursue in a representation proceeding its assertion that the House Aides are County employes and eligible for inclusion in a unit with other County employes.

Since we have concluded that the House Aides are not employes of the County (through its Unified Board or otherwise), we have further concluded that the House Aides are not properly includable in a bargaining unit with County employes. Accordingly, we have dismissed the instant petition as it relates to the House Aides.

Petitioner's Request for Inclusion in Unit Without a Vote

Local 110's 1985-86 agreement with the County describes the existing unit represented by Local 110 as noted in Finding of Fact 3. That unit description,

2/ For example, House Aide Steve Jones testified that employes with questions or complaints take them to Joyce Plummer or in her absence to one of the other working supervisors designated by TSS (tr. 38), and that it was his understanding and expectation that Claire Oberbreckling and Joyce Plummer would be the individuals that would handle discipline or discharge matters (tr. 37), and that one or both of them would probably be responsible for deciding how long a House Aide's lunch hour would be and when it would be taken. (tr. 40).

which has been modified over time by mutual agreement, expressly excludes Unified Board employees. Nevertheless, the County has agreed herein to include the nonprofessional Unified Board municipal employees employed in that existing unit if, but only if, majority of the eligibles voting in that group choose representation by Local 110 in a secret ballot election.

In the foregoing circumstances, we find it appropriate to condition inclusion of the voting group in the existing unit on the outcome of a representation vote among the affected employees. 3/ We expressly so held with regard to the same request with respect to essentially the same Unified Board positions by this same Union in a previous case, 4/ and such remains our view herein.

Because the Union has asked that we conduct an election in the event that we consider it a necessary condition precedent to inclusion of the nonprofessional Unified Board employees in the existing Local 110 bargaining unit, we have directed such election as part of our disposition of this case.

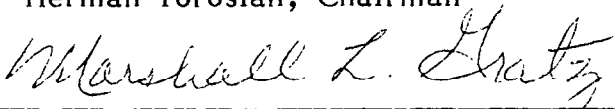
If a voting majority of the voting group favors representation by Local 110, then the bargaining unit described in Finding of Fact 3 shall be deemed modified to include the positions in the voting group description in Conclusion of Law 1. In that event, the existing agreement will not automatically apply to the newly included group, but rather the terms and conditions of employment for that group shall be subject to collective bargaining between Local 110 and the County.


Dated at Madison, Wisconsin this 24th day of April, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Dahae Davis Gordon, Commissioner

3/ E.g., Manitowoc County (Sheriff's Department), Dec. No. 18351-A (WERC, 3/83); Amery Jt. School District, Dec. Nos. 15793-A, 15794-A (WERC, 4/78).

4/ Sheboygan County, Dec. No. 17598 (WERC, 2/80).