

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
NORTHWEST UNITED EDUCATORS
Involving Certain Employes of
AMERY SCHOOL DISTRICT

Case 21
No. 51542 ME-729
Decision No. 24940-C

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, WI 54868, appearing for the Petitioner.

Weld, Riley, Prenn & Ricci, S. C., by Mr. Jeffrey P. Hansen, Attorneys at Law, 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, WI 54702-1030, appearing for the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER CLARIFYING BARGAINING UNIT

On September 19, 1994, Northwest United Educators filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify an existing bargaining unit by including the position of After School Kids' Club Supervisor. Hearing on the petition was held before Commission Examiner Douglas V. Knudson on March 15, 1995, in Amery, Wisconsin. A stenographic transcript of the hearing was received on March 31, 1995. The record was closed on April 17, 1995 upon receipt of post-hearing briefs from the parties. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Amery School District, herein the District, is a municipal employer and has its principal offices at 115 Birch Terrace, Amery, Wisconsin 54001.
2. Northwest United Educators, herein NUE, is a labor organization and has its offices at 16 West John Street, Rice Lake, Wisconsin 58468.
3. NUE is the certified bargaining representative (Dec. No. 24940 WERC, 12/87) of

No. 24940-C

"all regular full-time and regular part-time non-professional employees of the Amery School District, excluding supervisory, managerial, confidential and professional employees."

4. On September 19, 1994, NUE filed a unit clarification petition requesting that the position of After School Kids' Club Supervisor be included in the bargaining unit.

5. Approximately thirteen years ago, the District created a Community Education Program, herein referred to as CEP, as a means of providing educational opportunities to members of the community outside of the structured school day. The District's CEP presently operates under the guidance of a self-appointed Advisory Council which the District created about five years ago. The Council consists of twelve members, one of whom is also a member of the District's Board of Education. In the current year, CEP will offer approximately 56 programs, which will have almost 3,000 participants.

6. CEP is administered by a part-time Director and a part-time clerical person, both of whom are employees of the District. CEP does not have a separate checking account, however, the District maintains a separate account to which revenues from CEP programs are deposited and from which payments for CEP expenditures are deducted. The District issues paychecks for all CEP instructors, including the Club Supervisors, except for those paid by a college or VTAE district. Some of the instructors are unpaid volunteers. CEP does not pay any rent to the District for the use of its facilities for any of its programs, including the After School Kids' Club. CESA operates a Head Start program in the same building as the After School Kids' Club is located and pays the District an annual rent of \$1.00. The Northern Pines Center also has a birth to age three children's program in the same building and does not pay any rent to the District. CEP does not have an employer identification number.

7. In the summer of 1993, at the urging of community members, the District decided its CEP should establish an after school day care program so long as the program could be funded by users' fees. In the fall of 1993, CEP began an after school day care center for children in grades K-5 from 3:05-6:00 p.m. on days when school is in session. Said program is the After School Kids' Club, herein the Club. The Director set the hours of operation and the fees for the Club. The Club operates rent free in a part of a school building which the District no longer used for classes. The Club is not funded by the District. The Club is funded by the fees paid by the users of its services. In addition, it receives donations and funds from various sources, including the United Way. It reimburses the District for any food and/or supplies which it obtains through the District, except the District provides some funds for the purpose of printing brochures and forms for CEP programs.

During the past school year, there were three high school students who helped at the Club on a volunteer basis. High school students can earn a letter, through such community service, similar to a letter earned by participation in an athletic sport.

8. The two part-time After School Kids' Club Supervisors who currently staff the Club

were hired by the Director at an hourly wage rate set by the Director and the Advisory Council. The Director informed the District's Administrator and Board of Education of the hires. The two Supervisors work out their schedules of work, with only one of them working any given day. They do not receive any fringe benefits and each has signed a contract with CEP by which they agreed to work for an hourly rate of \$6.50. Neither of the staff provides child care services for profit for any other parties nor has either sought to do so. They do not furnish any equipment or supplies for the Club. The staff has considerable latitude in developing and conducting the daily activities for the Club participants, although they have frequent contact with the CEP Director concerning those activities.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Director of Community Education is an employe of the Amery School District and was acting on behalf of the District when she engaged the services of the After School Kids' Club Supervisors.

2. The individuals occupying the position of After School Kids' Club Supervisor are not independent contractors within the meaning of Sec. 111.70(1)(i), Stats.

3. The individuals occupying the position of After School Kids' Club Supervisor are regular part-time municipal employes of the Amery School District within the meaning of Sec. 111.70(1)(i), Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

The individuals occupying the position of After School Kids' Club Supervisor are hereby included in the collective bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin,
this 3rd day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ (See footnote on Pages 4 and 5.)

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner

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- 1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b),

182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(footnote continued on Page 5.)

1/ (footnote continued from Page 4.)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

...

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

AMERY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT

POSITIONS OF THE PARTIES

NUE argues that there is insufficient evidence to find that the Club Supervisors are independent contractors. Further, the record shows that Amery School District, rather than the Community Education Program, is the employer of the Club Supervisors.

The District contends that the Club Supervisors are independent contractors, rather than employees. The District asserts that if the Supervisors are not independent contractors, then they are employees of CEP, rather than employees of the District. While the District funds the CEP Director and a clerical, CEP operates as a separate entity, under its Advisory Council, in determining the activities and courses to be offered to the community and the fees to be charged for same. CEP hires the staff (including these Supervisors) needed for its activities and courses and sets the level of compensation, if any, for the staff.

DISCUSSION

There can be little doubt that Amery's Community Education Program (CEP) is a tremendous community asset. Created by the vision and leadership of the Amery School District Board of Education some thirteen years ago to provide non-traditional educational opportunities to a broad cross-section of the community and promote the increased use of school district facilities, CEP currently benefits an annual estimated total of almost 3,000 persons through its sponsorship, coordination and direction of some 56 programs ranging from aerobics, computer and chair caning classes to baby-sitting clinics.

Less clear is the legal status of its organizational structure. Undisputed is the fact that CEP was founded through the efforts of the Amery School District Board of Education which also subsequently created a CEP Advisory Council. The Advisory Council's membership consists of 12 persons from the community, including a member of the school board. The Advisory Council has by-laws which provide *inter alia* for filling Council slots and vacancies and meets regularly with the CEP Director. Certainly, new programs and new hires are discussed with the Council; however, the Amery School Board also initiates programs and gives at least perfunctory approval to new hires.

It is further undisputed that the CEP Director who serves as a part-time coordinator and community liaison in organizing and implementing CEP programs is (along with her secretary)

paid for these professional services by the Amery School District and is regarded by all parties as an employe of the District. 2/ While CEP-sponsored programs are supposed to be self-sustaining through enrollment fees, besides totally underwriting the salaries of the Director and her secretary, the Amery School District also subsidizes CEP's printing costs, allows it to use School District facilities rent free, provides coverage for CEP activities in the District's liability insurance policies, and further deposits and disburses CEP revenues out of District bank accounts without charge.

CEP makes no independent representations as to what manner of legal entity it professes to be. Inferentially from the record, however, it seems safe to conclude that it is not a "sole proprietorship," a "partnership," or either a "business" or "non-stock corporation" within the meaning of the law. From this it would seem to follow that the CEP Advisory Council is exactly what its title suggests: an advisory council -- no more, no less.

Under these circumstances we believe it follows that unless the Supervisors in question are found to be "independent contractors," it is the Amery School District, not the CEP Advisory Council, which is the employer of the position incumbents.

Thus, we turn to evaluate the independent contractor claim.

The standard for determining independent contractor status is set forth in The Human Services Board of Forest, Oneida and Vilas Counties, Dec. No. 20728-B (WERC, 7/90) wherein the Commission stated as follows: 3/

Section 111.70(1)(i), Stats., defines a municipal employe in pertinent part as: "Any individual employed by a municipal employer other than an independent contractor . . ." When a question has arisen as to whether an individual is an employe or an

2/ Clearly, since it is the District (not the CEP Advisory Council) which hired her, it would be the District, not the CEP Advisory Board, which would fire her if dissatisfied with her services. As a District employe, the CEP Director administers the CEP program, hires individuals, and sets their wages, hours and conditions of employment. While the District has granted her broad discretion in the discharge of her responsibilities and she receives policy suggestions from the Advisory Council, we are unable to conclude that these factors alter employer-employe relationship between her and the District, and a resultant employer-employe relationship between the two Supervisors and the District.

3/ See also: Town of Vernon, Dec. No. 24967 (WERC, 11/87); Madison Metropolitan School District, Dec. No. 6746-E (WERC, 12/86); and Monroe County (Department of Social Services), Dec. No. 16280-B (2/85).

independent contractor, the Commission has applied the "right of control" test. This test provides that where the employer for whom the services are performed retains sufficient right to control the manner and means by which the result is accomplished, the relationship is one of employment. Where the employer retains control only as to the result, the relationship is that of an independent contractor. The determination of which relationship exists depends on the particular facts of each case and all the relevant indicia of the relationship must be weighed and assessed, with no one factor being dispositive. The earmarks of an independent contractor are that there is usually an engagement in a venture involving a financial investment and an assumption of the risks involved in the undertaking; that profit and loss are dependent on the efficiency and ability of the independent contractor; that pay for services or goods is based on the result rather than solely on the time to reach the result; and that the independent contractor exercises independent judgment and initiative in determining when, where, and how to accomplish the job. (footnote omitted)

The record does not support the District's contention that the Club Supervisors are independent contractors. Although the two Supervisors have the discretion to decide which of them works on any given day, the hours of operation of the Club were not set by them. Rather, the hours during which the Club would operate were set by the Director. The Director also decided what ages of children could attend the Club, set the wage rate for the Club Supervisors, and seeks contributions of funds and supplies for the Club. Although the Club Supervisors develop the daily activities and programs for the Club, they are in frequent contact with the CEP Director concerning those matters. There is no financial investment by the Club Supervisors, since the Club operates in a District facility and CEP provides the supplies (toys, games, etc.) used by the Club. The Supervisors are paid an hourly wage rate for their actual hours of work. Fees received from Club participants are deposited in the CEP account maintained by the District, from which account the Club Supervisors are paid. There is no evidence in the record to show that either of the Supervisors provides or seeks to provide similar services for other employers. The Supervisors have no responsibility for the printing of information pamphlets and enrollment forms for the Club.

The Commission concludes that there are insufficient indicia present to establish an independent contractor status, in light of the facts that: neither of the Club Supervisors offer their services to other employers; their compensation is directly related to the time worked and not to the result; they do not provide facilities, supplies and equipment; and, there is no risk of profit or loss based on the skill or efficiency of the Club Supervisors.

Given the foregoing, the Supervisors are not independent contractors and are employed by the District. Accordingly, they are appropriately included in the NUE unit.

Dated at Madison, Wisconsin, this 3rd day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner