

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
LOCAL 655-B, AFSCME, AFL-CIO
Involving Certain Employees of
FORT ATKINSON SCHOOL DISTRICT

Case 2
No. 38063 ME-140
Decision No. 24942

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, 1722 St. Lawrence Avenue, Beloit, WI 53511, appearing on behalf of Local 655-B, AFSCME, AFL-CIO.
Mr. William Bracken, Director, Employee Relations, Wisconsin Association of School Boards, Inc., 132 West Main Street, Box 160, Winneconne, WI 54986, appearing on behalf of Fort Atkinson School District.

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

Local 655-B, AFSCME, AFL-CIO having, on December 30, 1986, filed a petition requesting that the Wisconsin Employment Relations Commission clarify a collective bargaining unit represented by it to include part-time custodians employed at the Emery building and Rockwell School in the Fort Atkinson School District; and the parties having made attempts to settle the matter informally, which were unsuccessful; and hearing in the matter having been conducted on July 1, 1987, before Examiner Lionel L. Crowley, and a stenographic transcript of the proceedings having been prepared; and the parties having filed briefs which were received by August 17, 1987; and the Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Local 655-B, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization as defined in Sec. 111.70(1)(h), and has its offices at 1722 St. Lawrence Avenue, Beloit, WI 53511-4937.

2. That the Fort Atkinson School District, hereinafter referred to as the District, is a municipal employer as defined in Sec. 111.70(1)(j), and has its offices in Fort Atkinson, WI 53538.

3. That the Union is the exclusive collective bargaining representative for certain employees of the District in a bargaining unit described as follows:

all regular full-time and regular part-time employees including office employees, custodians, maintenance men, kitchen and laundry employees, but excluding supervisors, confidential clerical employees, and teaching personnel. 1/

4. That on December 30, 1986, the Union filed a unit clarification petition requesting that the part-time custodian positions at the Emery building and Rockwell School, currently held by Joyce Stackle and Arthur Stannard, be included in the existing bargaining unit described in Finding of Fact 3, above; that the District's contention is that the two positions in question are occupied by independent contractors and should be excluded from the unit.

1/ Joint School District #6, City of Fort Atkinson, Dec. No. 7177 (WERC, 7/65).

5. That Stackle is employed by the District for three to four hours per day as a cook helper in the bargaining unit described in Finding of Fact No. 3; that Stackle also performs general cleaning services for the District at the Emery Building using the District's equipment and supplies; that Stackle works as many hours per day as it takes her to complete her cleaning duties, generally three hours per day; that she requires little direct supervision; that she receives direction as to her duties from the District Administrator, when necessary; and that in Stackle's absence, a member of the bargaining unit performs her duties.

6. That Stannard has a written contract with the District which provides that Stannard will perform general custodial duties for the School District at Rockwell School, using the District's equipment and supplies, for approximately four hours per day (or as long as it takes to complete his duties) for 180 days during the school year, to be paid a total of \$3,520.00 in ten equal monthly installments; that Stannard is not on the District's payroll system, which means that the District does not withhold any state or federal income tax, Social Security or other deductions from his paycheck; that Stannard receives a Form 1099 from the District rather than a W-2 Form for tax purposes; that Stannard is covered by the District's health insurance plan, but pays his own premium; that Stannard receives direction from, and is supervised by, the building principal; and that the District employs Brad Schroedl, a full-time Custodian II, to clean those parts of the building not cleaned by Stannard.

7. That the District employs other custodians to perform in other District buildings the same or similar duties that Stackle and Stannard perform; that these custodians are members of the bargaining unit described in Finding of Fact No. 3 above; that the Director of Buildings and Grounds supervises the custodial staff for six buildings in the District; and that the custodial staff frequently works when neither the Director of Buildings and Grounds nor the building principal is in the building.

8. That the District has a written contract with other individuals, including Lloyd Rolfe, owner of "Interior Cleaning Services," for carpet cleaning; that Interior Cleaning Services is a professional cleaning service; that Interior Cleaning Services supplies all equipment and supplies for the performance of its services to the District; that, pursuant to the terms of its contract with the District, Interior Cleaning Services must carry liability insurance; that Johnson Controls also provides service to the District with respect to climate control equipment; that Johnson Controls brings its own tools and technicians in the performance of its services for the District; and that neither Interior Cleaning Services nor Johnson Controls is covered by the District's health insurance plan or is on the District's payroll for purposes of normal employee deductions.

9. That the District exercises sufficient control over the work function of the part-time custodians employed at the Emery Building and Rockwell School, currently occupied by Joyce Stackle and Arthur Stannard, so as to establish that they are "municipal employees" within the meaning of Section 111.70(1)(i) of the Municipal Employment Relations Act.

Upon the basis of the foregoing Findings of Fact, the undersigned make and issue the following

CONCLUSION OF LAW

That the part-time custodians employed at the Emery Building and Rockwell School are not independent contractors, but are "municipal employees" within the meaning of Section 111.70(1)(i) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the undersigned make and issue the following

ORDER CLARIFYING BARGAINING UNIT 2/

That the part-time custodians employed by the District at the Emery building and Rockwell School be, and hereby are, included in the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 30th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner

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- 2/ 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

(Footnote 2 continued on Page 4.)

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.

(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.

FORT ATKINSON SCHOOL DISTRICT

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

This proceeding involves the bargaining status of two positions, referred to as part-time custodians at the Emery building and Rockwell School in the Fort Atkinson School District, currently occupied by two individuals, Joyce Stackle and Arthur Stannard. Local 655-B, AFSCME, AFL-CIO filed a petition on December 30, 1986, requesting the Commission to clarify the existing collective bargaining unit described in Finding of Fact, No. 3, above, by including these part-time custodial positions. The District opposes their inclusion based on its contention that these positions are held by independent contractors.

POSITIONS OF THE PARTIES

The Union

The Union contends that Stackle and Stannard, who currently hold the part-time custodial positions at issue, are municipal employees within the meaning of Section 111.70(1)(i) of the Municipal Employment Relations Act and are not independent contractors as the District contends. The Union argues that, unlike Rolfe's Interior Cleaning Services and Johnson Controls, Stackle and Stannard do not have the earmarks of independent contractor status: neither Stackle nor Stannard provide their own equipment or supplies; neither brings any specialized skills or training to the job; neither has any entrepreneurial investment in their position. In addition, the Union argues that because other custodians in the District perform the same or similar duties as Stackle and Stannard and are included in the bargaining unit, Stackle and Stannard belong in that unit as well. With respect to Stackle, the Union argues that she should not have dual status as a member of the bargaining unit in her cook's helper position on the one hand, and independent contractor in her custodial position on the other. In sum, the Union takes the position that the District retains the right of control over the activities of Stackle and Stannard; therefore they cannot be independent contractors, but rather are municipal employees.

The District

The District argues that, under the right of control test as articulated by the Wisconsin Employment Relations Commission, Stackle and Stannard are in fact independent contractors and not municipal employees. With respect to Stackle, the District focuses on the historical exclusion of her position from the unit, as well as Stackle's ability to set her own hours and lack of "management supervision." With respect to Stannard, the District focuses chiefly on the fact that the District treats Stannard as an independent contractor regarding payroll deductions and fringe benefits. The District also relies on Stannard's ability to set his own hours and the lack of supervision and of evaluation on a formal basis.

DISCUSSION

The test to be applied in determining whether an individual is an employee or an independent contractor is the "right of control" test. 3/ In general, an individual is an employee if the employer for whom the services are performed has the right to control the manner and means by which the result of the services is accomplished. 4/ Conversely, where the employer has control only as to result, the individual providing the service is regarded as an independent contractor. 5/ No one factor is determinative in deciding whether an individual is an employee or an independent contractor. The determination of the relationship between the employee and the employer depends on the particular facts of each case, and requires a weighing of individual factors, such as the manner in which the employee is paid,

3/ Northern Pines Unified Services Center, Dec. No. 17590 (WERC, 2/80).

4/ Madison Metropolitan School District, Dec. No. 6746-E (WERC, 12/86).

5/ Id.

the benefits the employe receives, if any, the hours the employe works, the degree of supervision the employer exercises over the employe, and the entrepreneurial investment the employe has in the venture, if any. 6/

The record before us does not support the District's argument that these individuals are independent contractors. Stackle and Stannard do not have a financial investment in any enterprise related to the performance of the duties of these positions. Neither Stackle nor Stannard bring their own supplies or equipment to work; those items are provided by the District. While they have some control over when they do their jobs -- in terms of how long it takes them to complete it -- they exercise little initiative or independent judgment in how to accomplish the job. This is in direct contrast to Rolfe's Interior Cleaning Services and Johnson Controls, independent businesses performing services for the District for profit, without supervision, using their own equipment and supplies.

The District argues that Stackle and Stannard's limited supervision and job-time flexibility support its contention that they are independent contractors. Supervision is an important factor in the right to control test, but it carries little weight under the facts of this case. The record reflects that the Director of Buildings and Grounds -- one individual -- supervises the custodial staff for six buildings in the District. These custodians, members of the bargaining unit, sometimes work while the building principal is not in the building. Furthermore, the Wage Appendix attached to the parties' collective bargaining agreement refers to shifts running from 1:00 p.m. to 10:00 p.m., and from 10:00 p.m. to 7:00 a.m. It is apparent that these custodians are not subject to close supervision. Similarly, Stackle and Stannard are not subject to close supervision.

The critical factor here is the right to control the manner in which Stackle and Stannard perform their cleaning duties, rather than the actual exercise of that control. There is little doubt that the District has the right to control the manner in which Stackle and Stannard work. Indeed, by providing them with certain kinds of equipment and supplies, the District dictates, to some extent, how they work. Moreover, there is no evidence to suggest that the District has less of a right to control the manner in which they perform their jobs than it does with respect to other custodians in the District.

With respect to Stannard, the District relies heavily on the fact that he is not on the District's payroll in order to prove that he is an independent contractor. The District's failure to deduct for such things as Worker's Compensation and Social Security on behalf of Stannard is insufficient to prove that Stannard is an independent contractor. Stannard does not receive the benefits other employes receive (with the possible exception of health benefits); however, benefits are an element of the collective bargaining agreement which currently has no application to Stannard. While the existence of benefits may be a factor in determining employe status, it is insufficient to prove the District's case.

In sum, we conclude there are insufficient indicia in the record to establish an independent contractor relationship between these positions and the District. The District retains sufficient control over the manner and means of Stackle's and Stannard's job performance to indicate that an employer-employe relationship exists under the right of control test. Therefore, we conclude that the positions of part-time custodian at the Emery building and Rockwell School are occupied by employes and should be included within the bargaining unit.

Dated at Madison, Wisconsin this 30th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

6/ Northern Pines Unified Services Center, Dec. No. 17590 (WERC, 2/80);
Madison Metropolitan School District, Dec. No. 6746-E (WERC, 12/86).