

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 SOUTH WEST EDUCATION ASSOCIATION : Case 13
 : No. 43341 ME-382
 Involving Certain Employes of : Decision No. 26173-B
 :
 BLACK HAWK SCHOOL DISTRICT :
 :

Appearances:

Mr. Kenneth Pfile, Executive Director, South West Education Association,
 Barnard and Daugherty, Attorneys at Law, 419 Main Street, P.O. Box 187,

960 No
 Darlin

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

On December 12, 1989, the South West Education Association filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing bargaining unit by including the individual who performs bus maintenance and repair. Hearing in the matter was delayed pending attempts to resolve the matter. Hearing in the matter was held in South Wayne, Wisconsin on June 5, 1990 before Coleen A. Burns, a member of the Commission's staff. A stenographic transcript of the hearing was received on June 19, 1990. The record was closed upon receipt of post-hearing briefs on July 24, 1990. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. South West Education Association, hereinafter the Association, is a labor organization and has its principal offices at 960 North Washington Street, P.O. Box 722, Platteville, Wisconsin 53818-0722.
2. Black Hawk School District, hereinafter the District, is a municipal employer and has its principal offices at South Wayne, Wisconsin 53587.
3. Pursuant to an election conducted by the Wisconsin Employment Relations Commission, 3/ Black Hawk Educational Support Personnel, SWEAC, WEAC was certified as the bargaining representative of all regular full-time and regular part-time employes of the Black Hawk School District, excluding professional, supervisory, managerial and confidential employes.
4. On December 12, 1989, the Association, on behalf of the Black Hawk Educational Support Personnel, SWEAC, WEAC, filed a unit clarification petition with the Commission seeking to include the individual performing bus maintenance and repair in the bargaining unit set forth in Finding of Fact 3. The Employer opposes such inclusion solely on the basis that the position in question is occupied by an independent contractor.
5. Dale L. Schliem, the individual who occupies the position in dispute, maintains the District's school buses, pick-up trucks, school van, driver's education car and lawn mowing tractors. Schliem does this maintenance work at the school bus garage, which is adjacent to the high school. The District supplies large tools such as jacks, tire changers, tire cages, safety stands and a chain hoist. Although Schliem provides his own hand tools, the District would provide these tools to Schliem if requested to do so. For the 1989-90 school year, Schliem and the District entered into the following:

BUS REPAIR AND MAINTENANCE CONTRACT

This contract is between the School District of Black Hawk and Dale Schliem. Mr. Schliem is to provide repair and maintenance of school owned vehicles as follows:

1. Bi-monthly washing of vehicles
2. Oil change and service (busses at 2,000 miles)
3. Check and maintain braking system
4. Maintain light and electrical systems
5. Maintain heater and air conditioning systems
6. Maintain windshield wiper blades and fluid levels
7. Check and change tires as required
8. Do engine repair, including the radiator
9. Check and replace worn and broken hoses, belts and plugs
10. Do front end work including king pins, toe-in and balancing
11. Maintain the exhaust system
12. Maintain and repair transmission and driveshaft
13. Other work as requested

For satisfactory services rendered the School District of Black Hawk agrees to pay Mr. Schliem Eight hundred ninety-eight and no/100 dollars per month (\$898.00) for an eleven-month period beginning July 25, 1989 and concluding June 30, 1990.

Parts used in the repair and maintenance of school owned vehicles are to be purchased at verifiable school prices, not at retail cost.

_____ President of the School Board	_____ Date
_____ Clerk of the School Board	_____ Date
_____ Treasurer of the School Board	_____ Date
_____ Employee	_____ Date

When Schliem began his maintenance work for the District, in 1985, Schliem and another firm shared responsibilities for bus maintenance. At that time, Schliem did not have a contract with the District, but rather, was paid on a per job basis. In 1986, the District sought bids to perform vehicle maintenance work on school premises using parts furnished by the District. Schliem was one of three bidders. The District accepted Schliem's bid and Schliem entered into a contract with the District to maintain the District's vehicles. The following year, the District offered Schliem a contract which adjusted the previous years' amount to reflect the percentage increase given to the District's support personnel. Schliem rejected that offer, indicating to the Board that he was an independent contractor. Thereafter, the District solicited bids for a bus maintenance and repair contract. Schliem was one of two bidders. The District accepted Schliem's bid for the 1987-88 contract. The District did not solicit bids for the 1988-89 or 1989-90 contract. For each of these years, Schliem's 1987-88 contract was renewed without modification except for a change in dates. Schliem's contracts have differed from the 1989-90 contract only in the amount of payments to be made to Schliem and the dates of the contract. For 1986-87, Schliem received a nine-month contract at \$700. Subsequently, Schliem indicated that he required more time to perform the required work. In 1987-88, Schliem received an eleven-month contract at \$898.00. Schliem, who works as an auto mechanic at a garage in Monroe, Wisconsin, performs District work after his normal working hours at the Monroe garage. The District's buses are normally housed on the Bus Driver's premises. When the buses require repairs or maintenance, the Bus Drivers prepare a repair ticket which identifies the maintenance problem, indicates when the vehicle will be returned to the District's garage and made available for repair, and sets forth a deadline for the repair. As long as the work is completed by the deadline, Schliem has discretion to determine when he will perform the repair and maintenance work. The Bus Drivers forward the repair tickets to the District's Bus Coordinator, Chuck Parsons, who countersigns the tickets and mails the tickets to Schliem. At times, Schliem will find a bus parked in the District parking lot which contains a repair request which he has

not yet received from Parsons. Schliem will perform the repairs or maintenance described on the request. Generally, Schliem performs his maintenance work on Thursday nights, Friday nights or over the weekend. In emergency situations, Parsons may convey repair and maintenance requests by telephone. Neither Parsons, nor any other District employe, evaluates Schliem or reviews Schliem's work. If, following repair or maintenance by Schliem, a Bus Driver is not satisfied with the performance of a bus, the Bus Driver returns the bus to Schliem for further service. Parsons is also a District Principal. Schliem orders parts for the District at school district rates. The District pays for the parts ordered and used by Schliem. Schliem does not provide any insurance for the work which he performs for the District. The District has not provided Schliem with any health insurance, vacation pay, holiday pay or sick leave. Schliem told Parsons that when he (Schliem) was not available to work, Schliem's son Randy would perform the work. On two occasions Parsons called Randy to perform Schliem's work. The District did not compensate Randy for this work. On one occasion, Schliem was injured and on the other occasion, Schliem was on vacation.

6. In January of 1990, while the District and the Black Hawk Educational Support Personnel, SWEA, WEAC were bargaining the initial contract for the bargaining unit described in Finding of Fact 3, the District agreed to place bargaining unit members in the state retirement system. The District placed Schliem in the retirement system with the intent to withdraw Schliem from the system should the Commission not include Schliem in the collective bargaining unit. Schliem, like the support personnel bargaining unit employes, pays the employe share of the retirement contribution. Prior to the point in time that the Black Hawk Educational Support Personnel, SWEA, WEAC became the certified bargaining representative of the bargaining unit described in Finding of Fact 3, all employes included in this unit, hereinafter support personnel, were issued individual contracts. Support personnel positions include part-time custodian, full-time custodian, office personnel, library aide, teacher aide, hot lunch personnel and bus driver. The support personnel contracts were issued annually and provided paid sick leave, emergency leave and personal leave. Some, but not all, of the support personnel also received health insurance, vacations and holidays. There are some District bus drivers who arrange to have a family member substitute for them. When such substitutions are made, the bus driver receives compensation as if the bus driver had worked. The family member does not receive any compensation for the work. Bargaining unit employes may ask other bargaining unit employes to substitute for them. In such cases, the District pays the substitute for hours worked by the substitute. The absent employe does not receive any compensation unless he/she is entitled to receive time-off with pay such as sick leave or vacation. The individual contracts of the part-time custodian, full-time custodian, teacher aide and hot lunch personnel contained an hourly wage. The individual contracts of the office personnel and library aide contained an annual salary amount. The individual contracts for drivers contained route rates.

7. Brad Gillaspie has been the District Administrator since November of 1985. During the term of Schliem's 1986-87 school year contract, Schliem asked Gillaspie if the District would withhold federal income tax from his check as a convenience to Schliem. Gillaspie, without seeking the approval of the District's Board of Education, authorized the income tax withholding. Although Schliem did not request the District to deduct FICA, such deductions commenced at the time that the District began the income tax withholding. The District's Board of Education did not expressly authorize either the income tax withholding or FICA deductions. Schliem is paid by checks which are authorized by the District Board of Education Clerk, Treasurer and President. These checks contain information which indicates that the District is deducting income taxes and FICA taxes from payments made to Schliem.

8. The District does not retain the right to control the manner and means by which Schliem performs maintenance and repair work for the District, but rather retains control only as to the result.

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

CONCLUSION OF LAW

Dale Schliem, the individual who maintains and repairs District vehicles, is not a municipal employe within the meaning of Sec. 111.70(1)(i), but rather, is an independent contractor.

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

ORDER 2/

The position occupied by Dale Schliem shall continue to be excluded from the bargaining unit represented by Black Hawk Educational Support Personnel, SWEAC, WEAC.

Given under our hands and seal at the City of
Madison, Wisconsin this 9th day of November,

1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

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.

(Footnote 2/ continues on the next page.)

(Footnote 2/ continues)

(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.

(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.

BLACK HAWK SCHOOL DISTRICT

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

The sole issue in dispute is whether the individual performing bus repair and maintenance work for the District, Dale Schliem, is an independent contractor or a municipal employe.

POSITIONS OF THE PARTIES

The Association

The Association contends that Dale Schliem is not an independent contractor, but rather is a municipal employe who is appropriately included in the collective bargaining unit represented by Black Hawk Educational Support Personnel, SWEA, WEAC. The Association argues that, in determining whether an individual is an employe or an independent contractor, the Commission has applied the "right of control" test, i.e., when the employer for whom the services are performed retains the right to control the manner and means by which the result is accomplished, the relationship is one of employment, and where the employer retains control only as to the result, the relationship is that of independent contractor. The Association further argues that the Commission has recognized that the determination of the relationship depends upon the particular facts of each case, all the incidents of the relationship must be weighed and assessed, and no one factor is dispositive.

The Association argues that Schliem's employment relationship is evidenced by the following facts: since August of 1986, Dale Schliem has been issued payroll checks from which withholding tax and FICA tax has been deducted; in January of 1990, the District began paying the Employer's portion of the Wisconsin Retirement Fund contribution on Dale Schliem's behalf; the District provides the facility and the equipment which Dale Schliem uses to perform his work; although Schliem provides his own hand tools, he is not required to do so; Schliem purchases parts for use in his work, which parts are paid for by the District; and Schliem does not provide any insurance to cover his work. The Association contends that, in these respects, the District treats Schliem in the same manner as it treats other employes represented by Black Hawk Educational Support Personnel, SWEA, WEAC. The Association maintains that the employment relationship is also evidenced by the fact that Schliem is supervised by a member of the School District administration, Chuck Parsons. The Association contends that Parsons supervisory status is evidenced by the fact that Parsons issues Schliem work orders identifying the work to be performed and a time frame in which to perform this work, and, in emergency situations, Parsons has contacted Schliem at home to notify Schliem of repair work.

The Association asserts that, while Schliem is allowed a good deal of discretion in performing his duties, he performs his work for the District based upon specifications developed by the District. The Association maintains that the District exercises control beyond the result of Schliem's work, and has retained the right to control the manner and means by which the result is accomplished. The Association asserts, therefore, that Schliem is not an independent contractor, but rather, is a municipal employe who is appropriately included in the bargaining unit represented by the Association.

The District

The District acknowledges that, between the time that Dale Schliem entered into his relationship with the School District and the hearing in this matter, there have been changes in this relationship. Specifically, payroll deductions and FICA tax were deducted from Schliem's compensation and, in January of 1990, Schliem was placed into the state retirement system. The District asserts that, in all other respects, i.e., job description, supervision, freedom to perform the work at Schliem's will and pleasure (providing only that the job was finished by a certain time), the furnishing of replacement help by Schliem, accountability, lack of supervision and lack of normal employer fringe benefits, Schliem's relationship to the District has remained unchanged.

The District asserts that the record demonstrates that Schliem was placed on the Retirement System, not because the District considered Schliem to be an employe, but rather, for administrative convenience, i.e., the District determined that it would be easier to remove Schliem from the Wisconsin Retirement Fund in the event that the Commission upheld the District's position that Schliem was an independent contractor, than it would be to retroactively place Schliem in the Retirement System should the Association prevail in its position that Schliem was a municipal employe.

The District argues that after Schliem commenced providing services for the District, he requested the District Administrator to withhold income tax so that Schliem could meet his income tax obligation. Deductions of the FICA tax and the matching of the same by the District, was an inadvertent error on the part of the District's staff. The Board of Education did not approve, or for

that matter, have knowledge of the fact that payments made to Schliem contained deductions for income tax and FICA. The District maintains that the circumstances surrounding the deduction of Schliem's FICA and withholding tax, and his enrollment in the retirement system, do not demonstrate that Schliem is a municipal employe.

The District denies that the record demonstrates that Parsons' role is that of a supervisor, and argues that Parsons functions solely as a conduit between the bus drivers and Schliem, i.e., obtaining information regarding needed repairs and availability of buses from the bus drivers and relaying the same to Schliem. According to the District, Parson's lack of supervisory status is evidenced by the fact that Parsons has never supervised the repair work, has not directed the manner or method of the repair work (except to identify a completion time), has not conducted any inspections of the finished work, and has not performed any evaluation of Schliem's services. Rather, the how, when, where or by whom the repair work was to be performed, has remained solely under the control and the discretion of Schliem. The District argues that, since Schliem is an independent contractor, he is not appropriately included in the collective bargaining unit represented by Black Hawk Educational Support Personnel, SWEAC, WEAC.

DISCUSSION

The standard for determining independent contractor status is set forth in The Human Services Board of Forest, Oneida and Vilas Counties, Decision No. 20728-B (WERC, 7/90) wherein the Commission stated as follows: 4/

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 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

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

that the independent contractor exercises independent judgment and initiative in determining when, where, and how to accomplish the job.

In the Spring of 1986, the District sought bids for a contract to maintain and repair District vehicles during the 1986-87 school year. Dale Schliem was one of three bidders for the contract. After accepting Schliem's bid, Schliem and District representatives entered into a contract in which Schliem agreed to maintain and repair the District's vehicles for the sum of \$700.00. The following year, the District offered to renew the contract with Schliem. When Schliem rejected the District's monetary offer, the District again sought bids for the vehicle maintenance and repair contract. Dale Schliem was one of two bidders for the contract. After accepting Schliem's bid, Schliem and District representatives entered into a 1987-88 contract in which Schliem agreed to maintain and repair the District's vehicles for the sum of \$898.00. The District did not solicit bids for the 1988-89 and 1989-90 vehicle maintenance and repair contract, but rather, with Schliem's agreement, renewed Schliem's 1987-88 contract without modification.

All of the vehicle maintenance and repair contracts issued to Schliem were entitled "Bus Repair and Maintenance Contract" and contain a signature line for the President of the School Board, Clerk of the School Board and Treasurer of the School Board. Under the space reserved for Schliem's signature, the word "Employee" was printed. We are persuaded, however, that the solicitation and acceptance of bids for the "Bus Maintenance and Repair Contract" is more indicative of independent contractor status than employe status. Independent contractor status is also supported by the fact that the contract does not provide payment on the basis of hours needed to reach a result, but rather provides payment for by the result itself, i.e., the repair and maintenance of District vehicles.

Inasmuch as the District provides Schliem with the facilities, equipment and supplies necessary to repair and maintain the District's vehicles, Schliem's work for the District has not required any financial investment by Schliem. 5/ However, where, as here, there is a fee for services which is independent of actual hours worked, there is a risk of profit or loss dependent on Schliem's skill and efficiency and on the volume of repair work. Such a risk of profit or loss is an indicator of independent contractor status.

Prior to the certification of the support personnel bargaining unit, all support personnel were issued individual contracts on an annual basis. It is not evident, however, that the support personnel contracts were let to bids. Moreover, the support personnel contracts, unlike Schliem's contract, provided some type of fringe benefit 6/ and either expressed hours of employment or provided that hours of employment would be determined by the District. On one occasion, the District offered to renew Schliem's contract by increasing his compensation by the same percentage increase granted to the support personnel, which offer was rejected by Schliem. At the time of this rejection, Schliem indicated that he was an independent contractor. The distinctions between the contracts issued to Schliem and the contracts issued to other support personnel lend support to the District's argument that Schliem has functioned as an independent contractor, rather than as an employe of the District.

Chuck Parsons is a District Principal, as well as the District's Bus Coordinator. Parsons receives repair and maintenance requests from the Bus Drivers, countersigns these requests, and transmits the same to Schliem. At the time that Schliem receives the requests, he is told when the bus must be returned to service. Upon receipt of the requests for service, Schliem determines when the vehicle will be serviced, subject only to the return to service deadline established by the District. 7/ Schliem utilizes independent judgment and initiative to determine the manner and means to service the vehicle. Neither Parsons, nor any other District employe reviews Schliem's repair work. Rather, if a bus driver is not satisfied with the performance of a vehicle which has been serviced by Schliem, the vehicle is returned to Schliem for further servicing. When Schliem is not available to provide the service required of his contract, by Schliem's designation, the service is provided by his son at no extra cost to the District.

Contrary to the argument of the Association, the record does not warrant the conclusion that Schliem is supervised by Parsons, or any other District employe. Rather, the record warrants the conclusion that Schliem exercises independent judgment and initiative in determining when and how to accomplish the work performed for the District.

4/ It is Schliem's choice to use his own hand tools. The District is willing to provide all of Schliem's tools.

5/ All of the support personnel contracts provided for paid sick leave, emergency leave and personal days. Some, but not all, of the contracts also provided vacation, holiday, and health insurance benefits.

6/ Schliem, who is employed as an auto mechanic at a local garage, normally services District vehicles in the evening and on weekends.

In January, 1990, the District agreed to enroll members of the support personnel bargaining unit in the state retirement system. For administrative convenience, Schliem was enrolled in the retirement system pending the outcome of the instant proceeding. Given the circumstances, Schliem's enrollment in the retirement system is not an indicator of employe status.

It is undisputed that, since August of 1986, payments made to Schliem pursuant to his "Bus Repair and Maintenance Contract" were subject to income tax and FICA deductions. Regardless of whether or not the Board of Education expressly authorized these deductions, the deductions give rise to the inference that Schliem is an employe, rather than an independent contractor.

As set forth supra., no one factor is dispositive, but rather, all the relevant indicia of the relationship must be weighed and assessed. Upon balancing all of the relevant indicia of the relationship, we do not find that the District retains sufficient right to control the manner and means by which Schliem performs his vehicle repair and maintenance services so as to warrant the conclusion that Schliem is a municipal employe of the District. Rather, we are persuaded that the District retains control only as to the result and, thus, Schliem's relationship to the District is that of independent contractor. Accordingly, we have not granted the Association's request to clarify the support personnel bargaining unit by including Schliem's position therein.

Dated at Madison, Wisconsin this 9th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner