

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES,
MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES, ITS TERRITORIES AND CANADA**

Involving Certain Employees of

MADISON CULTURAL ARTS DISTRICT

Case 1
No. 63196
E-3115

Decision No. 30964

Appearances:

Bruce M. Davey, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada.

Steven C. Zach, Boardman, Suhr, Curry & Field, Attorneys at Law, 410 Firststar Plaza, One South Pinckney Street, Madison, WI 53701-0927, appearing on behalf of Madison Cultural Arts District.

Larry W. O'Brien, Assistant City Attorney, City of Madison, City-County Building, Room 401, 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin 53703-3345, appearing on behalf of the City of Madison.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 6, 2003, the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, Local No. 251, filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether certain employees of the Madison Cultural Arts District (herein Stagehands) wish to be represented by Local No. 251 for the purposes of collective bargaining. The petition was held in abeyance during settlement discussions between the parties.

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Hearing on the petition was ultimately held on March 10, 2004 in Madison, Wisconsin by Commission Examiner Peter G. Davis. At the hearing, the City of Madison entered an appearance and participated in the proceeding.

The parties filed post-hearing briefs, the last of which was received May 4, 2004.

The Commission sought and received supplemental position statements from the parties -- the last of which was received June 22, 2004.

The District and the City assert that the Stagehands are independent contractors. If they are not independent contractors, the District and the City then contend that the Stagehands are casual or temporary City employees who lack a sufficient expectation of continued employment to constitute an appropriate bargaining unit.

The District further argues that if the Stagehands are City employees who are entitled to seek union representation, the unit sought by Local No. 251 is not appropriate because only some of the Stagehands are craft employees and thus do not share a community of interest with the non-craft Stagehands. Local No. 251 also seeks to represent.

The City further argues that if the Stagehands are City employees who are entitled to seek union representation, it may be inappropriate to establish the separate unit sought by Local No. 251 because City employees performing similar duties are currently included in a City employee unit represented by AFSCME Local 60.

Local No. 251 asserts that the Stagehands are not independent contractors or casual employees but instead are City craft employees who constitute an appropriate bargaining unit for the purposes of seeking union representation.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Madison Cultural Arts District, herein the District, is a body politic and corporate created under Wisconsin law to facilitate operation of the Madison Civic Center and the Overture Center (herein collectively referred to as Center).

2. The City of Madison, herein the City, is a municipal employer having its principal offices at 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin.

3. On June 28, 2001, the City and the District entered into an agreement allocating rights and responsibilities regarding the operation of the Center.

4. The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, Local No. 251, herein Local 251, is a labor organization. Local 251 operates a hiring hall in Madison, Wisconsin through which employers can obtain the services of Stagehands for events at various venues in the Madison area. Stagehands perform a wide variety of services at such events including unloading, setting up, tearing down, and loading equipment and sets, carpentry, lighting, sound, and wardrobe assistance.

5. When Stagehands are needed for an event at the Center, one of the three full-time City employee Theater Technicians (who are in a City employee bargaining unit represented by AFSCME Local 60) contacts the Local 251 hiring hall and requests that a specific number of Stagehands with specified skills be provided at a specific date and time. Based on skill, seniority and availability, a Local 251 representative then determines which Stagehands will work the event. When they report for work, Stagehands are expected to bring a hammer, screw driver, crescent wrench and pliers. At the event, one of the Theater Technicians generally coordinates the activity of the Stagehands with Stagehands themselves serving a crew leaders/department heads of the various groups of Stagehands providing specific types of services.

6. When disputes arise as to the job performance of a Stagehand, representatives of Local 251 and the City meet to determine an appropriate resolution of the dispute. If the City requests that a specific Stagehand not be assigned to a specific Center event, Local 251 will consider that request when selecting Stagehands for that event.

7. Stagehands are paid by the hour for time worked at a wage rate set by City ordinance. Stagehands receive a paycheck and W-2 from the City. Stagehands are eligible for unemployment compensation and workers compensation benefits through the City.

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

CONCLUSIONS OF LAW

1. Section 111.70(1)(j), Stats., provides that the District is not a municipal employer.

2. Section 111.02(7), Stats. provides that the District is an employer within the meaning of the Wisconsin Employment Peace Act.

3. Pursuant to the terms of the agreement between the City and the District referenced in Finding of Fact 3, the City is the employer of any employees working at the Center and thus the District presently has no employees within the meaning of Sec. 111.02 (6), Stats.

4. The Stagehands are not independent contractors within the meaning of Sec. 111.70(1)(i), Stats., but are municipal employees of the City within the meaning of Sec. 111.70(1)(i), Stats.

5. The Stagehands are craft employees within the meaning of Sec. 111.70(1)(d), Stats.

6. A question concerning representation has not arisen because the scope of the petition for election is limited to employees of the District

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

ORDER

The petition for election is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate this matter.

Madison Cultural Arts District

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The petition for election before us seeks an election among employees of the Madison Cultural Arts District. Although the City fully participated in the hearing, the petition for election was not amended to seek an election if the Stagehands are found to be municipal employees of the City. As reflected in our Conclusions of Law, we have concluded that the Stagehands are municipal employees of the City of Madison and thus we have determined that dismissal of the petition is appropriate. However, because the issues of the municipal employee/independent contractor status and craft status of the Stagehands have been fully litigated in this proceeding by all parties, we have resolved such issues and they will not be subject to re-litigation in any subsequent proceeding.

If the Union files a petition seeking to represent the Stagehands as City employees, issues regarding the appropriate unit and any applicable voter eligibility standard will then be resolved.

Is the District the Employer of the Stagehands?

Section 111.70(1)(j) of the Municipal Employment Relations Act provides in pertinent part that a “municipal employer” “specifically does not include a local cultural arts district created under subch. V of ch. 229.” Thus, as reflected in Conclusion of Law 1, the District is not a municipal employer.

Section 111.02(7), of the Wisconsin Employment Peace Act provides in pertinent part that an “employer” “includes . . . a local cultural arts district created under subch. V of ch. 229. Thus, as reflected in our Conclusion of Law 2, the District is a private sector employer within the meaning of the Wisconsin Employment Peace Act.

However, as reflected in Conclusion of Law 3, by virtue of the agreement between the City and District referenced in Finding of Fact 3, all parties in this proceeding agree that the District presently has no employees. Therefore, if the Stagehands are employees and not independent contractors, it is the City who is their employer.

We proceed to the question of whether the Stagehands are City employees or independent contractors.

City Employees or Independent Contractors?

Independent contractors are specifically excluded from the definition of “municipal employee” contained in Sec. 111.70(1)(i), Stats. Thus, if the Stagehands are independent contractors, Local 251 has no right to seek to represent them.

When determining whether an individual is an employee or an independent contractor, we apply 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. HUMAN SERVICES BOARD OF FOREST, ONEIDA AND VILAS COUNTIES, DEC. NO. 20728-B (WERC, 7/90); BLACKHAWK SCHOOL DISTRICT, DEC. NO. 26173-B (WERC, 11/90).

Here, the record establishes the following facts that are generally supportive of employee status:

1. Stagehands are paid by the hour at a rate determined by City ordinance and thus assume no risk/have no profit loss stake.
2. Stagehands do not exercise initiative in determining when and where work will be performed.
3. Stagehands have a minimal financial investment in tools.
4. Stagehands receive a pay check and W-2 from the City and are eligible for unemployment/workers compensation benefits through the City.

On the other hand, the following facts are more generally more supportive of independent contractor status:

1. Stagehands are available to work at various venues other than the Center.
2. Stagehands receive very limited supervision from City employees.

Considering the foregoing, we are persuaded that the City retains sufficient right to control the manner and means by which the Stagehands work is accomplished for the Stagehands to be employees rather than independent contractors. We find the City's exercise of limited authority over the "who works" issue to simply be a result of the City's choice to utilize the hiring hall as a labor source and thus not a significant consideration in the employee/independent contractor analysis.

Impact of Casual/Temporary Status on Right to Representation

Having concluded that the Stagehands are employees of the City, we turn to the contention that because many of the Stagehands work on an occasional basis, there is no appropriate unit within which they can seek union representation. The statutory definition of municipal employee found in Sec. 111.70(1)(i), Stats., does not exclude casual or temporary employees. Thus, to the extent the Stagehands are casual or temporary employees, they are nonetheless municipal employees who have the right to union representation. As noted earlier in this decision, a determination of the bargaining unit configuration within which that representation can be sought is deferred to a future decision should the Union file another petition for election.

Craft Employee Status

Although the question of the Stagehands' craft employee status is a component of the appropriate unit issue, craft status has been fully litigated in this proceeding and we find it appropriate to resolve the matter in this decision.

Section 111.70(1)(d), Stats., defines a craft employee as:

. . . a skilled journeyman craftsman, including the skilled journeyman craftsman's apprentices and helpers, but shall not include employees not in direct line of progression in the craft.

In DANE COUNTY, DEC. NO. 16946 (WERC, 4/79), the Commission concluded that an employee who had many of the same duties being performed by the Stagehands here was a craft employee. Consistent with DANE COUNTY, we conclude that the Stagehands are craft employees. While the record establishes that there are a variety of skills and experience levels within the craft, we note that the statutory definition of a craft employee includes "apprentices

and helpers.” Thus, given the breadth of this statutory definition, we are satisfied that those who, for instance, begin their progression in the craft by unloading and loading trucks fall within the craft employee definition.

Dated at Madison, Wisconsin, this 13th day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.