

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, LOCAL 251**

Involving Certain Employees of

CITY OF MADISON

Case 257
No. 65483
ME-4062

Decision No. 31997

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, Local 251.

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.

David White, Staff Representative, Wisconsin Council 40, AFSCME, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of AFSCME Local 60.

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

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 251, (herein Local 251) filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether certain employees (herein Stagehands) of the Madison Cultural Arts District (herein District) wished to be represented by Local 251 for the purposes of collective bargaining.

No. 31997

On July 13, 2004, the Commission dismissed the Local 251 petition based on its conclusion that Stagehands were not employees of the District.

On January 5, 2006, Local 251 filed a petition with the Commission seeking an election to determine whether the Stagehands employed by the City of Madison at the Overture Center and Monona Terrace wish to be represented for the purposes of collective bargaining by Local 251. The City opposes the petition arguing that the Stagehands are independent contractors and thus not City employees.

Hearing on the petition was held in Madison, Wisconsin, on May 31, 2006 and June 6, 2006 by Commission Examiner Peter G. Davis. The parties thereafter filed written argument-the last of which was received August 15, 2006.

On November 22, 2006, Examiner Davis asked that the record be supplemented and additional hearing was conducted on December 11, 2006 in Madison, Wisconsin. The parties thereafter filed supplemental argument-the last of which was received December 26, 2006.

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

FINDINGS OF FACT

1. The City of Madison, herein the City, is a municipal employer having its principal offices at 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin. The City operates the Monona Terrace Convention Center (herein Monona Terrace).

2. 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 Overture).

3. On June 28, 2001, the City and the District entered into an agreement allocating rights and responsibilities regarding the operation of the Overture. Among other matters, that agreement provides that the City is the employer of any employees working at Overture.

4. The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, Local 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 Overture, a City employee 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. For many events, the Stagehand staffing levels and hours of work are determined by the promoter of the event and then relayed to Local 251 by a City employee. Based on skill, seniority and availability, a Local 251 representative then determines which Stagehands will work the event. When making that determination, Local 251 considers and generally honors City requests that a specific Stagehand either be sent or not sent to work the event. Individual Stagehands have the option of declining to work.

At the event, one of the five full-time City employee Theater Technicians or the City employee Stage Maintenance Technician (these six City employees are represented for the purposes of collective bargaining by AFSCME Local 60) provide limited coordination of the activity of the Stagehands. Employees of the entity staging the event give specific direction to the Stagehands and the Stagehands serve as crew leaders/department heads of the various groups of Stagehands providing specific types of services. The City employed Theater Technicians are responsible for enforcing "Stage Hand Work Rules and Policies" regarding "No Smoking", Stagehand Dress Code", and "Use of Fall Restraint."

When they report for work, Stagehands are expected to bring a hammer, screw driver, crescent wrench and pliers. Stagehands perform some of the same work as do City employees working at Overture.

6. When City employees working at Monona Terrace determine that they need help to set up or tear down a room for an event, a City employee generally contacts the Local 251 hiring hall and requests that a specific number of Stagehands be provided at a specific date and time for a specific period of work. Based on skill, seniority and availability, a Local 251 representative then determines which Stagehands will work. When making that determination, Local 251 considers and generally honors any City request that a specific Stagehand either be sent or not sent to work the event. Stagehands have the option of declining to work.

Once the Stagehands report to Monona Terrace, they receive assignments and direction from City employees and generally work side by side with City employees (represented for the purposes of collective bargaining by AFSCME Local 60) performing the same work. As directed by City employees, Stagehands leave before the end of the scheduled assignment if work has been completed or work beyond the end of the scheduled assignment if work remains.

As is true for the cost of City employee labor, the cost of Stagehand labor for the set up and tear down of rooms is not billed directly to the customer using Monona Terrace but rather is one of many factors used when the City establishes the rental rates for the facility. The room rental rate is the same whether City employees or Stagehands (or some mix thereof) are performing the set up and tear down.

When the City employees working at Monona Terrace determine that they need help to perform needed audio-visual work, a City employee directly contacts/schedules Stagehands from a pre-established list of Local 251 Stagehands who are experienced in the use of the Terrace's equipment. Stagehands on the list have the option of declining to work.

Once the Stagehands report to Monona Terrace for audio-visual work, they often work alone but receive any needed direction from City employees.

As is true for the cost of City employee labor, the cost of Stagehand labor performing audio-visual work is partially built into the room rental cost and partially billed directly to the customer at an hourly rate. The room rental and hourly rates are the same whether City employees or Stagehands are performing the work.

When working at Monona Terrace, Stagehands wear the same uniform as do the City employees performing the same work.

7. Stagehands who work at Overture or Monona Terrace have not completed any application for City employment.

8. 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. The City may relieve a Stagehand from duty when necessary to end a workplace performance issue and may request that Stagehands whose work is not acceptable to the City not be referred for future work by Local 251. Such requests are generally honored.

9. Stagehands receive a paycheck and W-2 wage statement from the City for hours worked at the Overture and Monona Terrace. The hourly rate Stagehands receive for such work is established by a City ordinance which states:

When IATSE Local N. 251 union members are employed at an hourly rate to work at the Madison Civic Center on a temporary basis as stagehands, spotlight operators, projectionists, riggers, truck loaders, or otherwise, and when no other wage rate for such work has been established by the City, they shall be paid at the prevailing hourly rate in the Madison community for such work and shall receive no other compensation or benefit incidental to said employment except as required by State or Federal law, notwithstanding any other ordinance or resolution to the contrary.

The “prevailing hourly rate in the Madison community” is the rate established by negotiations between Local 251 and Frank Productions, Inc. - a Madison based promoter that utilizes the services of Stagehands at various Madison area venues.

Stagehands are eligible for unemployment compensation and workers compensation benefits through the City. The City does not make Wisconsin Retirement System contributions for the Stagehands.

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

CONCLUSIONS OF LAW

1. 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.

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

3. A question concerning representation within the meaning of Sec. 111.70(4)(d)2.a., Stats. has arisen within the following appropriate collective bargaining unit:

All craft employees of the City of Madison performing stagehand services at the Overture Center and the Monona Terrace Convention Center including audio-visual technicians, stage carpenters, stage electricians, property persons, wardrobe attendants, riggers, flymen/women, moving picture or video operators, cameramen and technicians, spot light operators, studio mechanics, sound technicians, truck loaders and unloaders and set up and tear down personnel excluding all employees included in the AFSCME Local 60 bargaining unit, supervisors, and managerial, confidential and executive employees.

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

DIRECTION OF ELECTION

That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days of the date of this Direction among all craft employees of the City of Madison referenced in Conclusion of Law 3 above who were available to work as of January 23, 2007 and who worked during four or more of the 26 payroll periods immediately preceding the date of the Direction and who do not subsequently quit their employment or are not subsequently discharged for cause, for the purposes of determining whether all craft employees of the City of Madison performing stagehand services at the Overture Center and the Monona Terrace Convention Center including audio-visual technicians, stage carpenters, stage electricians, property persons, wardrobe attendants, riggers, flymen/women, moving picture or video operators, cameramen and technicians, spot light operators, studio mechanics, sound technicians, truck loaders and unloaders and set up and tear down personnel excluding all employees included in the AFSCME Local 60 bargaining unit, supervisors, and managerial, confidential and executive employees desire to be represented by the International Alliance of Theatrical Stage

Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, Local 251, for the purpose of collective bargaining with the City of Madison over wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of January, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J. Bauman did not participate.

CITY OF MADISON

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

In our July 2004 decision, we concluded that the Stagehands working at Overture were not employees of the Madison Cultural Arts District, were not independent contractors, and were employees of the City. However, because the Local 251 election petition only sought to represent Stagehands if they were employees of the District, that decision did not direct that an election be held to determine if the Stagehands wished to be represented by Local 251 for the purpose of collective bargaining with the City.

In January 2006, Local 251 filed an election petition seeking to represent the Stagehands at both Overture and Monona Terrace as City employees.

Although we have previously concluded that the Stagehands working at Overture are City employees, the current petition broadens the scope of the proposed bargaining unit to include Stagehands working at Monona Terrace. Thus, we find it appropriate to revisit the issue of Stagehand employee status in the context of this decision.¹

In our July 2004 decision, we stated that following as to the issue 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

¹ In our July 2004 decision we concluded that Stagehands were craft employees within the meaning of Sec. 111.70 (1) (d), Stats. No party has asked us to revisit that issue and, based on the record now before us, we reaffirm that conclusion.

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.

The record now before us affirms and strengthens the validity of the result we reached in July 2004. While it remains true that Stagehands working at Overture receive very limited direction from City employees, Stagehands working at Monona Terrace (particularly those performing set up and tear down work) receive direct supervision from City employees as to how and where the work should be performed. Indeed, at Monona Terrace, the City directly determines the Stagehands' hours of work for almost all events. In addition, even at Overture,

Stagehands must comply with certain City work rules as to their conduct. Thus, we remain persuaded that on balance the Stagehands are City employees.

To some extent, the City's continued disagreement with our analysis flows from the City's assumption that an independent contractor/employer analysis is the same analysis used to determine which of two entities employs an employee (see SHEBOYGAN COUNTY, DEC. NO. 23013-A (WERC, 4/86); WASHBURN COUNTY, DEC. NO. 21674-A (WERC, 7/97); CITY OF COLUMBUS (LIBRARY BOARD), DEC. NO. 29492 (WERC, 11/98) or whether two employers jointly employ an employee (see WASHBURN COUNTY, *supra*). We do not share the City's view in this regard. Thus, the City places far too much analytical emphasis on matters such as hiring, evaluation and discipline. While such matters are relevant to an independent contractor analysis, they are secondary to the analytical factors recited in HUMAN SERVICES BOARD. Further, while Local 251 retains ultimate control over who is "hired" or "fired" for a specific event, it apparent that the City does informally evaluate the work performance of Stagehands and can and does "effectively recommend" that individuals whose work is unsatisfactory not be referred for future work.

The City continues to make much of the fact that Local 251 retains ultimate control over which Stagehands work. While we agree that this fact is more indicative of independent contractor status than employee status, it remains our view that this fact is not a dominant one in terms of the multi-faceted analysis the law requires that we undertake. The City also takes us to task for concluding that the City's lack of control over who works is simply a consequence of the "choice" the City makes to use the hiring hall as its labor source. As to those events where the promoter mandates use of Local 251 Stagehand labor, this criticism is well founded. However, as to other events, and particularly as to the less skilled tasks of set up and tear down at Monona Terrace, use of the hiring hall as a source of labor is a convenient choice but not the City's only option.

The City also contends that we erred by concluding that the City determines the wage rate paid to Stagehands. We disagree. While the City is correct that it does not establish the "prevailing wage rate" for Stagehands, it remains true that it was and is the City that chose by ordinance to adopt that "prevailing wage rate" as the compensation level for Stagehands.

The City also asserts that it has no profit/loss risk at Overture and Monona Terrace related to the number of Stagehands working or the cost thereof and that this factor is relevant to the independent contractor status of the Stagehands. We disagree. At least at Monona Terrace, it is apparent that the City generally determines Stagehand staffing levels and hours worked and that these factors do play a role in the profit/loss realities at that facility. However, more fundamentally, we conclude that the City's profit/loss exposure is irrelevant to the analysis. It is the risk of profit or loss for the Stagehands at any particular event that is relevant to our analysis of independent contractor status. As is apparent by the hourly nature of their compensation, Stagehands individually have no profit/loss risk when they work. The more cosmic risk cited by the City of loss of work for Stagehands at Overture or Monona Terrace if Stagehand costs become too high is also irrelevant to our analysis. Such risks are

grist for the bargaining table if the Stagehands vote for representation by Local 251 but are irrelevant as part of an independent contractor analysis.

The City also points to the ability of an individual Stagehand to determine whether to accept any specific work assignment as support for an independent contractor result. While the ability of an individual to turn down work may be more typical of an independent contractor, that ability is not inconsistent with being the employee of an employer. Thus, as we held in our July 2004 decision, individuals who elect to work infrequently may be casual instead of regular part-time employees but nonetheless retain “municipal employee” status. The City also argues that the ability to turn down work should be equated with risk of financial profit/loss that is a hallmark of an independent contractor. We disagree. It is the profit/loss exposure of the individuals working a specific event which is relevant and said individuals have no risk given their hourly rate.

As to events at Overture (unlike those at Monona Terrace), the City correctly points out that it is the promoters of the event who control how the work is performed. Thus, the City argues that because it does not control the result, it is not the employer. However, it is important to note that in an independent contractor analysis, the question is one of determining whether the independent contractor or the employing entity controls how the work is performed. Here, as to events at the Overture, neither the Stagehands nor the City have such control. Instead, control is exerted by the promoter and its employees. Thus, in these unique circumstances, the question of control of how the work is performed at Overture plays no role in the analysis because it is a third party that controls such matters. As noted in our Findings, it is clear that at most Monona Terrace events, the City controls how the work is performed.

The City contends that we erred by considering the City’s role as to Stagehand payroll checks, W-2’s and unemployment and workers compensation benefits as being supportive of employee status. While such evidence is not determinative, it is relevant to the analysis and thus is appropriate for us to consider. BLACKHAWK SCHOOL DISTRICT, DEC. NO. 26173-B (WERC, 11/90); CITY OF GREENFIELD, DEC. NO. 25646-A (WERC, 7/90); TOWN OF VERNON, DEC. NO. 24967 (WERC, 4/88); MONROE COUNTY, DEC. NO. 16280-B (WERC, 2/85); FORT ATKINSON SCHOOL DISTRICT, DEC. NO. 24942 (WERC, 10/87).

Lastly, the City makes a brief reference to the possibility that if the Stagehands are not independent contractors, they may be employees of some entity other than the City. We find no persuasive support for that proposition in the record. For instance, although Frank Productions works with Local 251 to establish a prevailing wage rate for Stagehand services, it remains the case that the City has chosen to adopt that rate when compensating the Stagehands for their work.

Given all of the foregoing, we have concluded that the Stagehands working at Overture and Monona Terrace are City employees. Stagehands have none of the usual “earmarks” of independent contractor status in that they have no investment or assumption of risk as to the work they perform; no profit or loss dependent on their efficiency and ability; their pay is

based solely on time worked rather than result; and they do not exercise independent judgment and initiative in determining when, where and how to accomplish the job.

Thus, we have directed the election sought by Local 251.² The parties have agreed that eligibility to vote in the election should be limited to those employees who have worked during four or more of the 26 payroll periods immediately preceding the date of this Direction.

Dated at the City of Madison, Wisconsin, this 23rd day of January, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J. Bauman did not participate.

² Local 251 does not seek to represent any full-time or part-time employees who work at Overture or Monona Terrace and fall within the scope of the existing City bargaining unit represented by AFSCME Local 60. AFSCME Local 60 does not seek to represent any of the employees who fall within the scope of the unit Local 251 proposes to represent.