

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
LOCAL 33, AFSCME DISTRICT COUNCIL 48, AFL-CIO
Involving Certain Employees of
CITY OF MILWAUKEE

Case 100
No. 60844
ME-1043

Case 452
No. 56954
ME-964

Case 269
No. 60843
ME-1042

Case 453
No. 56955
ME-965

Decision No. 32661

Appearances:

Mark Sweet, Law Offices of Mark A. Sweet, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, appearing on behalf of Local 33, AFSCME District Council 48, AFL-CIO.

Thomas J. Beamish, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the City of Milwaukee.

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

On January 16, 2002, Local 33, Milwaukee District Council 48, AFSCME, AFL-CIO filed a petition with the Wisconsin Employment Relations Commission seeking to clarify a Local 33 represented bargaining unit of City of Milwaukee employees by including eight positions/employees. The City and the Housing Authority of the City of Milwaukee (HACM) opposed the petition because they believed the employees in question were employed solely by HACM and thus could not be added to a City employee bargaining unit. By agreement of the parties, the petition was held in abeyance.

On December 6, 2003, Local 33 filed an amended petition seeking to clarify an additional 13 positions and the incumbent employees into the Local 33 unit.

Hearing was held on April 22 and October 24, 2004 in Milwaukee, Wisconsin before Examiner Karen Mawhinney and the parties thereafter filed written argument-the last of which was received December 8, 2004.

After deliberating on the matter, in March 2005, the Commission reopened the record and directed that certain additional information be provided as to other positions/employees that the Local 33 petition did not then cover. Supplemental hearing was scheduled. Prior to the supplemental hearing. Local 33 again amended its petition to bring a total of approximately 90 employees within the scope of the clarification being sought.

Supplemental hearing was held on October 25, 2006 in Milwaukee, Wisconsin before Examiner Peter G. Davis.

Both the City and HACM continue to oppose the petition and amended petition contending, contrary to Local 33, that the employees in question are employed solely by HACM and thus cannot be included in a bargaining unit of City employees.

Post-hearing briefs were filed-the last of which was received November 30, 2007.

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 Milwaukee, herein the City, is a municipal employer.
2. Local 33, Milwaukee District Council 48, AFSCME, AFL-CIO, herein Local 33, is a labor organization that serves as the collective bargaining representative of certain City employees.
3. The Housing Authority of the City of Milwaukee, herein HACM, is a municipal employer that provides housing to residents of the City. Pursuant to Wisconsin's Housing Authorities Law, HACM is headed by a Commission whose members are nominated by the City Mayor and confirmed by the City Common Council.
4. HACM is funded by federal monies and rent payments. HACM receives no funding from the City.
5. HACM has the statutory authority to hire and discipline its own employees and to establish their qualifications, duties and compensation.

6. HACM has the statutory authority to enter into contracts for services and, pursuant thereto, has for many years contracted with the City for services provided by City employees. Pursuant to said agreement, HACM reimburses the City for the cost of City employees who provide services to HACM and HACM determines where and when the City employees will work and what duties they will perform. At many HACM work sites, City employees are directly supervised by a HACM employed supervisor. Almost no HACM employees are directly supervised by City supervisors.

7. HACM management made the decision as whether or not to hire each of the employees which Local 33 seeks to clarify into a City employee bargaining unit.

8. HACM management determines whether to discipline or discharge each of the employees which Local 33 seeks to clarify into a City employee bargaining unit.

9. HACM management determines the hours, duties, work location and compensation of each of the employees which Local 33 seeks to clarify into a City employee bargaining unit. At some work sites, HACM employees and City employees perform the same work during the same hours under HACM supervision.

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

CONCLUSIONS OF LAW

1. Within the meaning of Sec. 111.70(1)(j), Stats., the Housing Authority of the City of Milwaukee is a sole municipal employer of the employees that Local 33, District Council 48, AFSCME, AFL-CIO seeks to clarify into the City of Milwaukee employee bargaining unit that Local 33 currently represents for the purposes of collective bargaining.

2. Because the Housing Authority of the City of Milwaukee is a sole municipal employer of the employees that Local 33, District Council 48, AFSCME, AFL-CIO seeks to clarify into the City of Milwaukee employee bargaining unit that Local 33 currently represents for the purposes of collective bargaining, it is not appropriate to add said employees to the Local 33 bargaining unit.

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

ORDER

The employees/positions of the Housing Authority of the City of Milwaukee covered by the petition and amended petition for unit clarification shall continue to be excluded from the Local 33, District Council 48, AFSCME, AFL-CIO bargaining unit of City of Milwaukee employees.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of February, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

CITY OF MILWAUKEE

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

Since at least 1975, pursuant to a series of contractual cooperation agreements between the City of Milwaukee and the Housing Authority of the City of Milwaukee (HACM), employees of the City have provided various services to HACM. As of April, 2004, HACM was staffed by 160 HACM employees and 140 City employees, with the City employees largely from the City Department of Community Development and many of whom are represented for the purposes of collective bargaining by Local 33. Some of the Local 33 represented City employees work along side HACM employees doing much the same work. Some of the Local 33 represented City employees are directly supervised by HACM employees.

Local 33 contends that the City and HACM are either a single employer or a joint employer and that it is therefore appropriate to add the petitioned-for employees/positions to the Local 33 City bargaining unit. Both the City and HACM oppose the Local 33 effort contending that the disputed employees are HACM employees. We conclude that the employees in question are solely employed by HACM and thus have denied the Local 33 request to add the employees to the Local 33 unit.

HACM exists by virtue of Sec. 66.1201, Stats., which makes clear that it is a public entity with the statutory authority to “employ . . . employees, permanent and temporary and shall determine their qualifications, duties and compensation.” However, the fact that HACM has been statutorily empowered to be a municipal employer does not end the inquiry. Rather, the question is whether HACM exercises that statutory power in a manner that establishes that it is in fact the sole employer of the disputed employees or whether it has ceded or shared that power with the City to such an extent that it is not.¹

We begin our analysis by acknowledging that the members of the Board of Commissioners who head HACM are appointed by the City Mayor and confirmed by the City Common Council. While Local 33 makes much of this fact, this portion of the relationship between the City and HACM is in and of itself unremarkable. Such appointments are present in many of the cases where we are asked to decide which public entity is the employer and are never a significant part of the analysis. Rather, as noted above, the critical question is whether

¹ Local 33 urges us to adopt the reasoning of the Michigan Employment Relations Commission as reflected in CITY OF INKSTER, 1 MPER P 19081 (1988). The INKSTER decision reflects a general presumption under Michigan labor law that “commissions and boards” are not separate employers. We have no presumption either way in Wisconsin. Instead, as reflected herein, we base our decisions on a factual analysis of the critical factors of control of funding/budget and of employee wages, hours and conditions of employment. We do note that in INKSTER, the need for City approval for requests for funding and changes in employee compensation were key factors in the Michigan Commission’s determination that the Inkster Housing and Redevelopment Commission was not a separate employer. Neither need for approval is present here.

those City appointments translate into control of HACM and the disputed employees to such an extent that HACM is not an independent employer.

When resolving the question of who is the employer, the critical factors are control over budget/revenue sources and most importantly control over employee wages, hours and conditions of employment. CITY OF COLUMBUS (LIBRARY BOARD), DEC. NO. 29492 (WERC, 11/98).

HACM is fiscally independent from the City. HACM revenues come exclusively from tenants and the federal government. HACM constructs and adopts its own budget based on those revenues and its mission of providing low-income housing. HACM reimburses the City for personnel services received by virtue of the Cooperation Agreement between HACM and the City.

HACM independently determines the wages, hours and fringe benefits of the disputed employees. Although wage rates tend to be very close to or the same as those of comparable City employees represented by Local 33, the record nonetheless satisfies us that HACM is the decision-maker. We note in this regard that when HACM determined that it could independently employ its own painters at a lower cost than contracting with the City for such services, it did so. HACM fringe benefits closely track those of the City but again we are persuaded that HACM is the decision-maker. We note that HACM has its own payroll system, its own workers compensation carrier, its own unemployment compensation account, and its own deferred compensation program. HACM makes contributions directly to Social Security and Medicare. While Local 33 points to HACM participation in the City retirement system, the City and HACM correctly note that said participation is of no analytical consequence given that other admittedly separate employers (Milwaukee Public Schools, Milwaukee Area Technical College, Milwaukee Metropolitan Sewerage District) also so participate. HACM determines the work schedule of the disputed employees.

HACM independently hires and disciplines the disputed employees. While HACM contracts with the City for certain services relating to the hiring process, HACM employees make the hiring decision. As to discipline, all but two of the approximately 90 disputed employees are directly supervised by HACM supervisors who impose minor discipline. The HACM Executive Director is the decision-maker as to serious discipline for all HACM employees.

In support of its position, Local 33 places substantial emphasis on the involvement of HACM supervisors and management in the discipline of City employees who are supervised by HACM employees. First, we note that as to suspension or discharge of these City employees, the record makes clear that it is a City manager who makes the final disciplinary decision and that HACM managers' recommendations are not always followed. Second, and more importantly, for the Local 33 argument regarding the integration of City and HACM operations to be persuasive, there would need to be an equivalent involvement of City managers and supervisors in the discipline of HACM employees. There is virtually no record

of such involvement. Indeed, as noted above, only two of the HACM employees Local 33 seeks to add to its City employee bargaining unit are directly supervised by City employees.

We have a similar reaction to Local 33's argument regarding the supervision of City employees by HACM supervisors. While such supervision is present, there is almost no parallel supervision of HACM employees by City supervisors. Almost all of the disputed HACM employees are supervised by HACM supervisors. Thus the Local 33 argument regarding the integration of operations is substantially undermined.

Given all of the foregoing, we conclude HACM is the sole employer of the disputed employees.

In reaching our conclusion, we have carefully considered Local 33's argument that HACM and the City are a single employer. As to Local 33's "single employer" argument, of the four key components Local 33 asserts should be considered (interrelation of operations, centralized control of labor relations, common management and common ownership/financial control), only the "interrelation of operations" factor has support in this record given the side by side work of some HACM and City employees. There is virtually no factual support as to the "common management" and "common ownership/financial control" factors. As to "centralized control of labor relations", which Local 33 acknowledges is the most important factor in its "single employer" analysis, there is little factual support as evidenced by our Findings of Fact 5, 7, 8 and 9

As to Local 33's "joint employer" argument, substantial reliance is placed on HACM supervision of the City Local 33 represented employees who work side by side with HACM employees who are also HACM supervised. As noted earlier, there is almost no parallel supervision by City supervisors of HACM employees. Thus, this "joint employer" argument is seemingly stronger as to the HACM-assigned City employees Local 33 already represents than to the HACM employees sought by Local 33 through this proceeding. However, in the context of HACM control over the wages, hours and conditions of employment of the HACM employees sought in this proceeding, the record falls far short of establishing any joint City/HACM employer control over the disputed employees.

Local 33 makes much of the fact that HACM is listed as a City department or as part of the City Department of Community Development in various City documents, that City forms are used by HACM for some purposes and that there is some interchange of employees between HACM and City employment. While such facts do support Local 33's arguments in this matter, it is the evidence of actual control over revenue/budget and employee wages, hours and conditions of employment which governs. That evidence indicates that HACM is not a City department but rather is a separate municipal employer.

Local 33 points to the status of the Library as a separate City department despite what Local 33 views as even stronger statutory authority than that applicable to HACM for the Library to stand as its own municipal employer. However, as noted earlier herein, the issue is

not whether an entity can statutorily exist as a separate employer but rather whether it exercises that statutory authority or defers to another entity. Here, the evidence establishes that, in contrast to HACM, it is the City that hires and fires Library employees and has control over the Library's budget. Thus, unlike HACM, it is clear that the Library has not exercised its statutory authority to function as a separate municipal employer and that the City is the employer of the Library employees.

Given all of the foregoing, we have denied Local 33's request to have 90 HACM employees added to the existing City employee bargaining unit.

Dated at Madison, Wisconsin, this 3rd day of February, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner