BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 2484

and

LaCROSSE COUNTY

Case 163
No. 55655
MA-10066

(Contracted Employes Grievance)

Appearances:

Mr. Daniel R. Pfeifer and **Mr. Laurence Rodenstein**, Staff Representatives, for the Union.

Mr. William A. Shepherd, Corporation Counsel, for the County.

ARBITRATION AWARD

Pursuant to the joint request of LaCrosse County and AFSCME Local 2484, the Wisconsin Employment Relations Commission assigned me to act as arbitrator of a grievance filed March 31, 1997.

Hearing was held in LaCrosse, Wisconsin on January 30, February 9, and March 3, 1998. A stenographic hearing transcript was prepared and the parties agreed that said transcript was the official record of the proceedings. The parties filed post-hearing briefs and reply briefs, the last of which was received June 9, 1998.

ISSUES

In its post-hearing brief, the Union states the issues as:

1. Did the County violate the collective bargaining agreement by failing to recognize the persons in question as regular full-time or regular part-time employes of LaCrosse County? Are said persons municipal employes?

2. If the answer to number 1 is yes, then "did the County violate the collective bargaining agreement by not applying the terms of the collective bargaining agreement to the positions filled by the persons in number 1?"

3. If the answer to either number 1 or number 2 is yes, then "what is the appropriate remedy?"

The County did not concur with the Union's proposed statement of the issues but did not propose a specific alternative in its post-hearing briefs.

The parties agreed that I could frame the issue after giving appropriate consideration to their respective positions. I state the issue as follows:

> Did the County violate the parties' collective bargaining agreement by failing to apply the terms of said agreement to individuals performing work for the County pursuant to contracts between the County and Manpower, Inc., Olsten and/or American Business Resource Corporation? If so, what remedy is appropriate?

DISCUSSION

The Union acknowledges that the applicable collective bargaining agreement gives the County the right to subcontract. However, the Union asserts that if the County wishes to exercise that right, the County must relinquish control over the method and means by which the work is performed. The Union argues that the County continues to control the method and means by which work is performed and thus does not have a subcontracting relationship with Manpower, Olsten and American Business Resource Corporation. The Union contends that the County is in fact either the sole employer or a joint employer of the individuals in question.

Given the foregoing, the initial question to be answered is whether the County is the sole employer or, in the alternative, a joint employer of certain individuals performing work for the County pursuant to contracts with Manpower, Inc., Olsten and/or American Business Resource Corporation (ABR).

When evaluating whether the County is the sole employer of the disputed individuals, I apply Wisconsin law as reflected in the decisions of the Wisconsin Employment Relations Commission in CESA #14, DEC. NO. 17235 (WERC, 8/79); SHEBOYGAN COUNTY UNIFIED BOARD, DEC. NO. 23031-A (WERC, 4/86); and WASHBURN COUNTY, DEC. NO. 21674-A (WERC, 7/97). These decisions reflect that the critical questions that determine employer identity are who controls the employes' wages, hours and conditions of employment and who controls the hiring and firing of employes.

By applying this law, I reject the Union's contention that the applicable analysis should focus on the question of whether Manpower, Olsten and ABR are "independent contractors." As persuasively pointed out by the County, the cases cited by the Union in support of this contention (HUMAN SERVICES BOARD OF FOREST, ONEIDA AND VILAS COUNTIES, DEC. NO. 20728-B (WERC, 7/90) and MADISON SCHOOLS, DEC. NO. 6746-E (WERC, 12/86) litigate the question of whether **individuals** are independent contractors or employes. No one is asserting in this case that the **individuals** in question are independent contractors. Rather the question here is who employs the individuals-the County or Manpower, Olsten and ABR. Therefore, the "independent contractor" cases are not directly applicable to the resolution of this case.

This is not to say that control of the method and means by which the work is performed is irrelevant to the issue at hand. Clearly, to the extent the County retains control over such matters through supervision of the individuals in question, such retention of control is relevant to and supportive of the Union's position in this litigation.

The critical questions of who establishes wages, hours and conditions of employment and who controls hiring and firing are answered through a consideration of the facts presented by the parties. I proceed to that consideration.

As would be expected in litigation involving three different contracting agencies and in excess of 20 individuals performing various types of services, the factual record is not the same for each contracting agency or for each disputed individual. However, none of these factual distinctions are sufficient to produce differing outcomes and thus the parties have correctly chosen to litigate this case on an all or nothing basis.

The parties do not significantly dispute the following facts:

1. Manpower, Olsten and ABR establish and directly pay the wages and fringe benefits received by the individuals in question. Said wages and fringe benefits are substantially less than those received by bargaining unit employes represented by the Union.

2. Manpower, Olsten and ABR take responsibility for matters such as social security payments, tax withholding, unemployment compensation, and worker's compensation.

3. The County determines the hours of work(when and how many) of the individuals provided by Manpower, Olsten and ABR. The County makes payment to Manpower, Olsten and ABR based on the number of hours worked by the individuals in question.

4. The County reserves the right to refuse the services of any individual provided by Manpower, Olsten or ABR. In such circumstances, Manpower, Olsten and ABR may give that individual a work assignment with a different employer. Some of the individuals in dispute in this proceeding had previously performed work for entities other than the County.

5. Once the individuals provided through Olsten and ABR arrive at the County work site, the County generally provides whatever materials and equipment are necessary to perform the work. Manpower individuals using a car to perform their work provide their own vehicle. Most of the individuals provided to the County through Manpower are directly trained and supervised by individuals who are also provided to the County by Manpower. The individuals provided to the County through Olsten and ABR are generally trained and supervised by County employes.

The parties significantly disagree when it comes to the question of who hires, disciplines and discharges the individuals in dispute.

As to hiring, representatives of Manpower, Olsten and ABR credibly testified that their organizations make the hiring decisions and that individuals who did not meet their qualifications would not be hired even if recommended for hire by the County. The Union counters with credible testimony that County employes were actively involved in locating and interviewing some prospective workers.

As to discipline and discharge, representatives of Manpower, Olsten and ABR again credibly testified that their organizations independently investigate disciplinary issues and make disciplinary decisions. The Union counters by citing the County's right to refuse the services of any individual provided to them by Manpower, Olsten and ABR- a right generally exercised due to unsatisfactory performance.

From my review of the record as a whole, I am satisfied that Manpower, Olsten and ABR have the ultimate right to hire, discipline, and terminate the individuals in question.

When the County successfully refers individuals to Manpower, Olsten or ABR for initial hire and/or assignment following an interview with a County employe, the County obviously played a significant role in the hiring/assignment decision. Nonetheless, I find no persuasive basis for discounting the testimony that if such referred individuals do not meet the standards of the Manpower, Olsten or ABR, they will not be hired.

The County's ability to refuse the services of a referred individual does not terminate that individual's employment. Such individuals may be referred to another employer. Similarly, if Manpower, Olsten or ABR determine that an individual engaged in misconduct (Manpower was in the process of making such a determination at the time of hearing), the record persuades me that they will take whatever disciplinary action they deem appropriate-even if the County has no objection to continuing to receive the individual's services.

Given all of the foregoing, I am persuaded that Manpower, Olsten and ABR control the hiring and firing of the individuals in question and establish their wages and fringe benefits. Therefore, although the County establishes the hours of work and, as to some individuals, provides training and supervision, I think it clear that under the CESA # 14, SHEBOYGAN, and WASHBURN decisions, the County is not the sole employer of the individuals in question.

The issue of joint employer status is a closer one.

I begin by noting that existing Wisconsin law (MILWAUKEE AUDITORIUM BOARD, DEC. NO. 6543, WERC, 11/63; CESA #4, DEC. NO. 13100-E (YAFFE, 12/77, p. 57); MILWAUKEE AREA VTAE, DEC. NO. 16507-A (WERC, 6/79) primarily focuses on the question of whether separate entities are so integrated by virtue of common management, common ownership, functional integration of operations and centralized control of labor relations that they should be viewed **a single employer**. This analytical approach is not applicable to a **joint employer** dispute. As noted by the Third Circuit Court of Appeals in a case cited by the Union herein (NLRB V. BROWNING-FERRIS INDUSTRIES, 691 F. 2D 1117, CA 3 1982), litigation of **joint employer** status does not focus on the alleged existence of a single integrated enterprise but rather assumes the existence of independent entities and asks whether "they share or co-determine those matters governing essential terms and conditions of employment . . ."

Under a **joint employer** analysis, the question in this case thus becomes whether the County's establishment of hours of work and its role in supervision is sufficient to make it a joint employer with Manpower, Olsten, and ABR.

Because hours of work and supervision are central to the employer-employe relationship, I conclude that the County is a joint employer with Manpower, Olsten and ABR. The question now becomes one of determining what impact this determination has on this case.

Citing CITY OF RACINE, DEC. NO. 24949-A (CROWLEY, 6/88), AFFD. DEC. NO. 24949-B (WERC, 1/89), the Union argues that if the County and Manpower, Olsten and ABR are joint employers, there is no valid subcontract between the County and these contracting agencies. Under CITY OF RACINE, the Union argues that given the invalidity of the subcontract, the County should be obligated to apply the entire collective bargaining to the individuals in question.

First, I note that in CITY OF RACINE, the primary issue litigated was whether the City violated a contract provision which allowed subcontracting so long as no layoff or reduction in hours occurred. The Examiner/Commission concluded this provision was violated and ordered that the affected employes receive the contractually established wages and fringe benefits. Thus, the issue in RACINE was different than the issue present here. I also note that here there is no evidence that the contracts with Manpower, Olsten and ABR have caused any layoffs or reduction in hours.

The Examiner/Commission in RACINE did go on to find that the City and Kelly Services were joint employers and that the contractual relationship between the City and Kelly therefore was not a "true" subcontract. However, it should be noted that in CITY OF RACINE, the evidence established that the City "did everything" except physically pay the Kelly employes-including setting the wage rate and hours and selecting and supervising the employes. Here, although I have found the County to be a joint employer with Manpower, Olsten and ABR, I have also found that these latter three entities have control over far more of the employment relationship than was the case in RACINE.

Given all of the foregoing, I conclude that RACINE is a substantially different case than the one before me. To the extent there are underlying similarities, I simply do not find RACINE persuasive to the extent it can be read to hold that joint employer status cannot co-exist with a subcontracting relationship.

The issue before me is limited to alleged violations of the contract between the County and the Union. Because the County is not the sole employer of the individuals in question, the County's obligation to honor the Union contract as to these individuals is limited to those portions of the employer-employe relationship which the County controls (i.e. those dealing with hours and supervision). I have reviewed the contract between the Union and the County as to these matters and find no violation. As to the portions of the employer-employe

relationship controlled by Manpower, Olsten and ABR (i.e. wages, fringe benefits, hiring, discipline and discharge), there is no collective bargaining agreement before me. Thus, I have no authority to address these matters.

Given all of the foregoing, I conclude that the County has not violated the collective bargaining agreement with the Union. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 21st day of May, 1999.

Peter G. Davis /s/

Peter G. Davis, Arbitrator

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