

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

NORTHEAST MICHIGAN COMMUNITY MENTAL
HEALTH DISTRICT BOARD,
Public Employer,

Case No. UC98 I-37

-and-

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 459,
Labor Organization-Petitioner.

APPEARANCES:

Gillard, Bauer, Mazrum, Florip & Smigelski, by James Mazrum, Esq., for the Employer

Bruce R. Lillie, Esq., for the Petitioner

DECISION AND ORDER

This case was heard at Lansing, Michigan on March 2, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, MSA 17.455(13), and based on the record, including briefs filed by the parties on or before May 27, 1999, the Commission finds as follows:

The Petition and Positions of the Parties:

The petition was filed on September 25, 1998, by the Office and Professional Employees International Union, Local 459. Petitioner represents a bargaining unit consisting of full-time and regular part-time residential training workers (RTWs), and activity therapists (ATs), employed by the Northeast Michigan Community Mental Health District Board. Excluded from this unit by contract are employees with these titles who work at the Employer's Ripley and Blue Horizons homes, confidential employees, supervisors, substitutes and casual employees, clerks and clerk-typists and all other employees. Petitioner seeks to add to its unit the positions of community service worker (CSW), and supported independence program worker (SIP). Petitioner contends that these positions share a community of interest with its bargaining unit. Petitioner also maintains that employees in the disputed positions were previously excluded from its unit as casuals, but that since January of 1998, they have been regularly scheduled employees.

The Employer asserts that the petition should be dismissed because the SIP and CSW positions

have been historically excluded from the unit. According to the Employer, the majority of SIPS and CSWs have been regular employees since these positions were created in 1991 and 1994, respectively. In January of 1998, the Employer's Board voted to begin paying CSWs and SIPs the same benefits it pays to its other unorganized regular full-time and part-time employees. The Employer alleges, however, that this action did not affect the employment status of the SIPs or CSWs. The Employer also maintains that the petition should be dismissed because CSWs and SIPs do not share a community of interest with Petitioner's bargaining unit.

Facts:

The Employer provides services to mentally ill and developmentally disabled individuals throughout Alpena, Alcona, Montmorency and Presque Isle Counties. The CSWs and SIPs are part of the division which provides services to the developmentally disabled, as are all of the employees in Petitioner's bargaining unit.

Petitioner has represented the unit of regular full-time and part-time ATs and RTWs working in homes for the developmentally disabled since 1990. Petitioner's contract defines a "full-time regular" employee as one regularly scheduled to work 40 hours per week; a "regular part-time" employee as an employee scheduled to work less than 40 hours but more than 15 hours per week; and a "casual employee" as an employee not regularly scheduled to work at least 15 hours per week. As noted above, casual employees are excluded from the unit.

The Employer operates 15 residential care homes for the developmentally disabled. These homes are staffed around the clock by two or more RTWs (or ATs) per shift. RTWs supervise and assist the residents in taking care of their personal needs. They also help train residents to perform these functions for themselves, in accordance with each resident's individual treatment plan. RTWs administer medications as prescribed, and help keep records, including incident reports. RTWs also assist with or perform general housekeeping tasks and transport residents to doctors' appointments and other places.

At the time of the hearing, the Employer was operating only two daytime activity centers for the developmentally disabled, and most of its ATs worked at residential care homes. ATs work between 8:00 a.m. and 4:00 p.m., Monday through Friday, in place of an RTW. ATs may also take clients on weekend or night outings. The record indicates that the original distinction between the AT and RTW positions has blurred, and that currently there are no significant differences between the duties generally performed by these classifications.

In 1991, the Employer began a Supported Independence Program to assist developmentally disabled clients who function at a higher level than the clients housed in its residential care homes. The purpose of this program is to enable such clients to live in a smaller setting and exercise more control over their living arrangements.¹ Under this program, clients live in an unlicensed apartment or home owned or leased by the client. Many of the clients in the Supported Independence Program

¹ In a handful of homes covered by the program, the client is, according to the Employer, the employer of the SIP.

previously lived in the Employer's residential homes, and clients sometimes move back into residential homes after a period in the Supported Independence Program.

SIPs come to their clients' homes. The amount of time a SIP spends with a particular client depends on that individual's needs. Some clients, particularly those with severe physical disabilities, may have a SIP with them 24 hours a day. Other clients have as little as four hours per week of assistance. With regard to job duties, SIPs take their direction from the client. For example, if a client wishes to go out to dinner instead of having the SIP cook, the SIP will take the client out. The record indicates, however, that the SIPs may perform all of the duties typically performed by RTWs and ATs.

The CSW position was created in 1994. CSWs serve clients who live in SIP homes, clients who live with their families, and some clients who live in residential group homes. The role of the CSW is to help clients participate in activities outside of their homes, including jobs, volunteer work, and social activities. CSWs frequently work during the evening or on weekends; their schedule depends on the needs and desires of the client. CSWs may also spend time with clients on job sites, helping the client adjust to the job, helping the client's employer understand the client's needs, or even filling in for the client when he or she is incapacitated. CSWs provide some personal care, but not as much as RTWs, ATs or SIPs.

The record indicates that most SIPs employed by the Employer work regularly scheduled hours, and have done so since the position was created. In SIP homes where a client needs round-the-clock assistance, a work schedule is posted. In other SIP homes, the clients request when their SIPs will work. CSWs do not work a regular schedule, but they do work a fixed number of hours per week or per pay period. At the time of the hearing, 18 SIPs and eight CSWs were working 40 hours per week, 25 SIPs and 12 CSWs were working less than 40 hours per week, but at least 40 hours per biweekly pay period, and one SIP and three CSWs were working less than 40 hours per pay period. RTWs and ATs generally work a regular schedule.

RTWs and ATs are assigned by the Employer to work at a particular home or center. They may change jobs in accordance with a bidding system based on seniority which is incorporated into the union contract. CSWs and SIPs, however, must be approved by a client and/or his family before being assigned to work for that client. If, at any time or for any reason, a client finds a CSW or SIP unacceptable, the Employer will provide the client with another CSW or SIP. The Employer then attempts to find alternate work for the CSW or SIP who was replaced. If the Employer cannot do so, the CSW or SIP may be terminated.

The prerequisites for hire are nearly identical for all four positions. The record indicates that employees have transferred from SIP positions to bargaining unit jobs, and vice-versa, without being required to undergo any additional training. The Employer maintains a substitute list for RTW work. Anyone with the proper qualifications may sign up for this list, and some CSWs and SIPs are on the list. On a few occasions, RTWs and ATs have filled in for SIPs.

Petitioner's president indicated that he was aware that the Supported Independence Program had been created, and that there were employees working in the program. Although he did not know exactly how employees in the program were scheduled, he believed that the employees were not

guaranteed any set number of hours per week and that they were casual employees under the contract.

Prior to January of 1998, SIPs and CSWs were referred to by the Employer as “contract” and/or “substitute” employees. SIPs and CSWs did not receive any paid leave or benefits. At its meeting on January 13, 1998, the Employer’s Board adopted a resolution to change the status of SIPs and CSWs to “regular” employees, and to set the leave accrual rate for new employees at two weeks. The minutes of the meeting establish that the Board’s intent was to provide CSWs and SIPs with the benefits the Employer provides to its “regular” employees not covered by a collective bargaining agreement. The record indicates that the Board’s decision had no effect on the way these employees were scheduled, nor did it in any way alter the number of hours they worked.

Petitioner received a copy of the minutes of the Board meeting in February of 1998. Sometime around August of 1998, Petitioner made a demand to represent the SIPs and CSWs. The record indicates that this was the first time that Petitioner had ever requested that the SIPs or CSWs be included in its unit. When this demand was refused, Petitioner filed the instant petition.

Discussion and Conclusions of Law:

It is well-established that unit clarification is not appropriate for disturbing an existing agreement or established practice concerning unit placement unless the position has undergone recent, substantial changes in the duties and responsibilities of the employee. See *Genesee County 1978 MERC Lab Op 552*. This is true even if the practice has become established by acquiescence and not by express consent, or if the agreement was entered into by one of the parties for what it claims to be mistaken reasons. See e.g., *Jackson Public Schools, 1997 MERC Lab Op 290*; *Charter Twp of Blackman, 1988 MERC Lab Op 419*, and cases cited therein at 423. Where an employee or a group of employees has been historically excluded from an established unit, a question of representation cannot be resolved through a unit clarification procedure, even if the excluded group shares a community of interest with the existing unit; a union seeking to add this group to its unit must file a representation petition. *City of Lansing, 1994 MERC Lab Op 261, 266*.

In *Lake Orion Community Schools, 1988 MERC Lab Op 296*, we dismissed a unit clarification petition even though the disputed position, reassignment room supervisor, was first held by a substitute who was not eligible for inclusion in the teachers’ unit. The substitute was later replaced by an individual who both coached and served as the reassignment room supervisor. We held that since the union did not make a demand to bargain until five years after the position was created, the position had been historically excluded from the unit.

Petitioner argues that prior to January of 1998, the SIPs and CSWs were considered casual employees by both parties, and were excluded from the bargaining unit for this reason. According to Petitioner, their status changed to that of regular employees in January of 1998. The facts, however, do not support Petitioner’s argument. The record indicates that the Employer did not substantially alter the employment status of the disputed positions in January 1998; rather, the SIPs and CSWs have been working as regular full-time and part-time employees since these positions were created. Even if Petitioner’s acquiescence to their exclusion was based upon a mistake, unit clarification is not appropriate in this case. Because the SIPs and CSWs have been historically excluded from the unit,

the positions form a residual unit and can be accreted to the bargaining unit only upon the filing of a proper petition for representation election. *Jackson Public Schools, supra; City of St Clair Shores, 1990 MERC Lab Op 99*. Accordingly, it is not necessary that we consider Petitioner’s argument that the CSWs and SIPs share a community of interest with its unit.

In accord with the discussion and findings of fact and law set forth above, we issue the following order:

ORDER

Petitioner’s request to add the positions of Supported Independence Worker, and Community Service Worker to its existing bargaining unit is hereby denied.²

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

Dated: _____

²Commissioner Ott did not participate in this decision.