

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

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer-Respondent,

- and -

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS
AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA,
AFL-CIO, LOCAL 395,
Charging Party - Labor Organization in Case No. C05 C-073,
Petitioner in Case No. R05 C-054.

APPEARANCES:

David J. Masson, Esq., Assistant General Counsel, for the Public Employer

Klimist, McKnight, Sale, McClow & Canzano, P.C., by David R. Radtke, Esq., for the Labor Organization

DECISION AND ORDER

On March 3, 2008, we issued our Decision and Order in the above-captioned matter finding that we require additional evidence to resolve the dispute between the parties. Therefore, we remanded the matter to an ALJ for further hearing. Subsequently, the parties voluntarily settled their dispute and mutually requested that further hearings be cancelled. Thus, our Order remanding this case for further hearing has been rendered moot. Accordingly, our Decision and Order in this matter, published at *Univ of Michigan*, 21 MPER 11 (2008) is hereby vacated.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

David J. Masson, Esq., Assistant General Counsel, for the Public Employer

Klimist, McKnight, Sale, McClow & Canzano, P.C., by Ellen F. Moss, Esq., for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on June 7, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10, 13 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, 423.213 and 423.216. Based on the record and post-hearing briefs filed by August 1, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge and Petition:

The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, AFL-CIO, Local 395 (IATSE), filed an unfair labor practice charge in Case No. C05 C-073 against the University of Michigan (the

University) on March 24, 2005, alleging that the Employer violated PERA by refusing to recognize it as the exclusive bargaining representative of its members who work for the University as stagehands during theatrical productions. In a petition filed on March 29, 2005, IATSE seeks an election in a bargaining unit of all stagehands.

Findings of Fact:

For over twenty years, the University and IATSE have entered into agreements that require IATSE to provide stagehands for the University's theatrical and musical productions. The latest agreement covers the period January 1, 2005 through August 31, 2007. It defines the scope of work to be performed by IATSE's members;¹ describes their duties and responsibilities; establishes procedures for initiating calls to work and staffing; contains pay rate and benefits information; and covers miscellaneous matters such as breaks, dues deductions and parking.

Stagehands perform entertainment work as carpenters; electricians; sound, property, video, makeup and wig technicians; wardrobe; loaders; riggers and forklift operators. Department heads serve as team leaders and coordinate the work of stagehands assigned to the electrical, carpentry, properties, wardrobe, sound and video departments. The agreement provides, and the parties stipulated, that department heads are appointed by IATSE's business agent. However, the business agent testified that if the University asks that a particular individual be assigned, that person is designated as department head. During those times when a department head is needed in programs produced by University Production, the University appoints the department head for the electricians. Stewards, also appointed by the business agent, serve as the team leader for stagehands, are responsible for recording and reporting their hours worked, and for their performance. Recently, after the University complained that two IATSE loaders failed to report that some equipment had been damaged, IATSE, not the University, handled the matter in a "privileged" union meeting in accordance with the membership's instructions.

All productions are presented during the school year, between September and May. At least twenty-eight days before a performance, the University notifies IATSE of the type and estimated number of stagehands needed. If IATSE accepts the call, members identified by the business agent may accept or reject the work assignment without retribution by the University. The University is not required to accept an individual selected by the business agent and does not require that any person become an IATSE member. Although it rarely happens, after providing an explanation and the documentation specified in the parties' agreement, the University has the right to reject a member that the business agent selects.² The University may also request that a particular person be assigned to a production and that person is generally designated as a department head. At the beginning of a show the road crew or University official may explain the show's set up to the stagehands. However, business agent Gary Smith testified that he has asked University officials to communicate with IATSE members only through the stewards or department heads.

¹The word "member" may include a stagehand who is not a member of IATSE but who pays dues/fees to Local 395 pursuant to the parties' agreement.

²The University last asked the business agent not to assign a particular member to a production in the fall of 2004.

The University supplies IATSE with temporary employment forms and related materials, such as tax, dues check-off and I-9 immigration forms. IATSE's business agent is responsible for ensuring that members complete the forms, which he forwards to the University. Pursuant to the parties' agreement, the University pays the stagehands' directly, with appropriate withholding for taxes and union dues, through its bi-weekly payroll system. The agreement also provides for the University to pay a percentage of the stagehands' wages into health and pension funds. IATSE members are assigned employee identification numbers, are issued W-2 forms, and they may purchase parking permits and use the University's parking lots.

No records exist that show the actual number of hours worked by any IATSE member individually, or as a group. Time records may show that an individual was paid for 5.5 or 6.5 hours. But the stagehands may have actually worked less hours since the parties' agreement provides, under certain circumstances, for the payment of a minimum number of hours. Time sheets covering the period September 20, 2002 – December 12, 2004, and summaries of hours worked, by production, were introduced. The parties have vastly different interpretations of these records. The University characterizes the hours worked by the stagehands as short and of an irregular duration. It notes that from 2002-2003, they averaged less than five hours per week, and, in some years, a substantial number did not work at all. The Union, on the other hand, indicates that the records show that individuals worked anywhere from 5 to over 1,000 hours per year. During the period September through December 2004, the Union calculates that 12 stagehands averaged over 6 hours per week (over 90 total hours) and 17 averaged 4 hours a week (over 60 total hours). Using all hours worked in 2004, the Union figures that 7 stagehands averaged over 10 hours per week (or more than 520 hours); 17 averaged over 6 hours per week (or more than 312 hours); 20 averaged over 4 hours per week (or over 208 hours); and that totals for the other years are similar.

In October 2004, the University refused IATSE's request to recognize it as the stagehands' bargaining representative. In March 2005, IATSE filed the unfair labor practice charge and the representation petition that are at issue in this case.

Conclusions of Law:

The issue presented in this case is whether IATSE members who work as stagehands during the University's theatrical and musicals productions are employees within the meaning of PERA, and, if they are, whether the University committed an unfair labor practice by failing to recognize IATSE as their exclusive bargaining representative. Charging Party claims that the agreements between the parties constitute de facto recognition and the University's refusal to recognize it is an unfair labor practice. In the alternative, Charging Party asserts that an election should be held among the stagehands. Respondent asserts that the facts clearly demonstrate that the stagehands are not employees. It argues that any employment relation that may exist between Local 395's members and the Employer is casual and irregular and, therefore, the stagehands are casual employees who have no expectation of permanent or regularly scheduled employment.

The general characteristics of employers are that they (1) select and engage the employee; (2) pay the wages; (3) have power of dismissal; and (4) have power and control over the employees' conduct. *AFSCME v St Clair Co*, 136 Mich App 721, 736 (1984), lv granted 422 Mich 856 (1985), quoting from *Wayne Co Civil Service Comm v Wayne Co Bd of Supervisors*, 22 Mich App 287, 294,

rev'd in part 384 Mich 363; *Saginaw Stage Employees, Local 35, IATSE v City of Saginaw*, 150 Mich App 132 (1986), rev'g 1984 MERC Lab Op 668.

The Commission has twice considered the question of whether IATSE members who work under somewhat similar conditions as the stagehands in this case are employees. In *Saginaw, supra*, an agreement between the City and IATSE required the City and all tenants to use IATSE members when the City's few full time stagehands were inadequate to staff events. The union's business agent determined which of its members would work a particular show, and, if the number of members requested reached a predetermined number, would also send a steward who supervised the stagehands. If a steward were not present, a full-time stagehand directed the union members' work. Payment was made to the union and disbursed by the union to its members. The union hired and screened all applicants and the business agent determined the workers' classifications. Occasionally, upon a tenant's request, the city specified union members that they did or did not want to work a show. The city never fired or disciplined a union member.

The Court of Appeals, in overturning a Commission order finding that the stagehands were employees and directing an election, found that the stagehands were not employees because the union determined who worked each show, the tenants paid the union members' wages and the city never fired a union member. The Court observed that the only time the city controlled the conduct of the union members was when a particular show did not require a large enough number of stagehands to merit sending a steward to supervise the union members.

Similarly, in *Greater Lansing Convention/Exhibition Authority*, 1987 MERC Lab Op 948 (no exceptions), the ALJ relying, on *Saginaw*, found that the stagehands were not employees. There the Authority did not have the right to select the stagehands although it could request certain individuals. Additionally, the stagehands worked only during a presentation and as directed by the exhibitor or its agents. The show producer or decorator paid them, or the union was paid and the union paid the stagehands. At times, the Authority paid the members at the union's request.

In this case, I find the insufficient support for Charging Party's argument that the stagehands are employees. The University's direct payment of wages to the stagehands is the only element of an employer-employee relationship that has been established. I find that this characteristic alone does not make the stagehands employees within the meaning of PERA. Power of control is the most important indicia of an employee-employer relationship. *Wayne Co Civil Svc Comm v Wayne Co*, 22 Mich App 287 (1970), aff'd 384 Mich 363 (1971). The business agent is responsible for selecting stagehands to perform the work required by the University. The business agent also selects the stewards and department heads. The University has no authority to determine which stagehands IATSE selects to meet the staffing quota, although the University sometimes requests that a specified individual be assigned to a particular production. Although the University has the authority to reject a stagehand selected by IATSE, this prerogative is rarely exercised.

The parties stipulated, and the record demonstrates, that the University has no power over the stagehands' conduct. The department heads appointed by the business agents coordinate the stagehands' work. The steward, who serves as team leader for all department heads, records and reports their hours of work and is responsible for the stagehands' performance. Except for initial instructions about how the show should be set up, all communications are made through the steward

or the department head. Finally, IATSE retains the right to discipline stagehands and recently exercised that authority when two loaders failed to report that they had damaged some equipment.

I conclude that IATSE's members are not employees of the University and the University did not commit an unfair labor practice by refusing IATSE's request to recognize it as their exclusive bargaining representative. I have considered all other arguments advanced by Charging Party and find that they do not warrant a change in the result. Included is its claim that the stagehands should be found to be employees because they are listed in the University's staff and student directory, may purchase parking passes and park in the University's parking lots and are issued identification numbers. These factors are not characteristics that determine whether an individual is an employee within the meaning of PERA. Moreover, I find no merit to Charging Party's claim that the over twenty-year history of agreements between the parties constitute de facto recognition. Provisions in a contract are not controlling in determining employer status. *State Judicial Council (3rd Judicial Cir Ct)*, 1984 MERC Lab Op 545, 552; *Sanilac Co Comm Mental Health Svcs*, 1984 MERC Lab Op 1180, 1183. Even if they were, the provisions in the latest agreement make clear that the stagehands are not employees. Based on the above discussion, it is unnecessary to determine whether the stagehands are casual employees. I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge and the representation petition are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated: _____