

## Illinois State Labor Relations Board

STATE OF ILLINOIS, DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND THE DEPARTMENT OF REHABILITATION SERVICES, EMPLOYER, AND SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, PETITIONER.

No. S-RC-115

December 18, 1985

**Related Index Numbers**

1.1 Jurisdiction

11.12 General Principles, Determination

**Judge / Administrative Officer**

Brogan, Chairman; and Manning and Hilliard, Board Members

**Case Summary**

Those persons who functioned as home health aides and housekeepers ("service providers") were not public employees and therefore Board lacked jurisdiction to consider union's representation petition on their behalf. Though state agency handled wage rates and matters pertaining to payment of salaries, this did not impute employer status where "clients," i.e., those handicapped persons for whom service providers worked, controlled basic employment relationship in that they hired, terminated, trained, supervised, scheduled and disciplined service providers. Such arrangement was not "typical" employment relationship contemplated by Act.

**Full Text****OPINION OF THE ILLINOIS****STATE LABOR RELATIONS BOARD**

On October 24, 1985, Hearing Officer Judith Mostovoy of the Illinois State Labor Relations Board (Board) issued a Recommended Opinion and Dismissal in the above-mentioned proceeding. Thereafter, in accordance with Section 1210.100(i) of the Rules and Regulations of the Illinois Labor Relations Boards, 80 Ill. Adm. Code Section 1200 et seq., exceptions to the Hearing Officer's Recommendation were timely filed by the Petitioner, and responses thereto were timely filed by the Employer. [FN1] After reviewing the record, exceptions, responses and briefs, the Board accepts the findings of the Hearing Officer, but modifies her conclusions of law to the extent inconsistent with the following.

The Hearing Officer found that the Illinois Department of Rehabilitation Services (DORS) and the service recipients were joint employers of the service providers at issue herein. She therefore found that the Board has no jurisdiction over this matter, as the service recipients are not public employers subject to our jurisdiction. Without

reaching the specific conclusions of the Hearing Officer as to the joint employer status, we agree that we lack jurisdiction in this case, for the reasons set forth below.

Embodied in Section 2 of the Illinois Public Labor Relations Act (Act), Ill. Rev. Stat. ch. 48 Section 1602 (1983 supp.), is a statement of the Act's fundamental purpose and this Board's resulting responsibility "to regulate labor relations between public employers and employees." An application of this Act to the relationship between DORS and the service providers would render this purpose meaningless. The facts herein present us with a very unique situation which is virtually impossible for us to regulate. There is no typical employment arrangement here, public or otherwise; rather, there simply exists an arrangement whereby the state of Illinois pays individuals (the service providers) to work under the direction and control of private third parties (the service recipients). [FN2]

An effective collective bargaining relationship under the Act requires the presence of the public employer or employers with sufficient "authority necessary to maintain a stable and effective bargaining process." DuPage County Board, 1 PERI ¶ 2003 (ISLRB 1985). It is undisputed that DORS is a public employer as defined in the Act. However, it is clear to us, upon the facts presented herein, that DORS does not exercise the type of control over the petitioned-for employees necessary to be considered, in the collective bargaining context envisioned by the Act, their "employer" or, at least, their sole employer. Accordingly, we lack jurisdiction in this matter.

## **ORDER**

IT IS HEREBY ORDERED that the petition in Case No. S-RC-115, be and hereby is, dismissed.

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## **HEARING OFFICER'S RECOMMENDED**

### **OPINION AND DISMISSAL**

On April 9, 1985, the Service Employees International Union, AFL-CIO (Petitioner) filed a Petition for Certification of Representative, pursuant to Section 9 of the Illinois Public Labor Relations Act. Ill. Rev. Stat. ch. 48 § 1601 *et seq.* (1984 Supp.) (Act) seeking certification in a unit comprised of chore attendants and nurses aides [FN1] working in the Home Services Program of the Department of Rehabilitation Services. State of Illinois, Central Management Services (Employer) in Chicago and Cook County Regions IV and V. The case was heard on June 10, July 11, 22, 23 and August 14, 1985, at which time all parties appeared and were given a full opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally and to file written briefs. [FN2] Briefs have been filed on behalf of Employer and Petition.

After full consideration of the parties' stipulations, evidence, arguments, and briefs and upon the entire record of the case, I make the following findings:

### **I. PRELIMINARY FINDINGS**

1. The parties stipulated, and I find, that the State of Illinois, Department of Central Management Services (CMS) and Department of Rehabilitation Services (DORS), is a public employer within the meaning of Section 3(n) of the Act.
2. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 3(i) of

the Act.

3. The parties stipulated, and I find, that there is no history of collective bargaining in the petitioned for unit and there is no contract bar to this proceeding.

4. The Employer has declined to recognize the Petitioner as the exclusive bargaining representative for the employees in the requested unit and, therefore, I find that there exists a question of representation in this case, as required by Section 9(a)(2) of the Act.

## II. ISSUES AND CONTENTIONS

The first issue is who is the employer of the petitioned for home health aides and housekeepers (service providers) who perform in-home care for individual handicapped DORS' clients. The Employer contends that the individual handicapped persons (clients) are the sole employers of these service providers. It further contends that the clients are private, not public employers, and that, therefore, the Board lacks jurisdiction in this case. Petitioner contends that DORS is either the sole employer or the joint employer with the individual clients of the service providers and that, therefore, the Board has jurisdiction because DORS is a public employer.

The second issue is whether the petitioned for unit is appropriate. The Employer contends that the petition is defective and should be dismissed because it includes only the home health aides and housekeepers who perform services for DORS' clients who reside in the Metropolitan Chicago area (Regions IV and V) but excludes service providers who perform the same services for DORS' clients in all other regions of the State. The Employer also contends that the petition should be dismissed because it does not include housekeepers who perform in-home services for persons over age 60 who are clients of the Department of Aging (DOA). The Employer further alleges that the existing RC-28-OCB statewide, paraprofessional, human services unit, which includes similar job titles, is the only appropriate unit for the petitioned for home health aides and housekeepers who serve both DORS and DOA clients. Petitioner argues that the services providers in the petitioned for unit have a unique community of interest separate from that of all other housekeepers, wherever they work, and that, therefore, the unit sought is appropriate.

## III. FINDINGS OF FACT

### A. DORS Home Services Program (HSP)

#### 1. Background

##### a. Introduction

The petitioned for workers provide services to individual eligible handicapped DORS' clients in the Metropolitan Chicago Area. The Home Services Program was created by P.A. 81-202 [FN3] in June 1979. The Home Services Program is administered by the State of Illinois, Department of Rehabilitation Services under a federal Medicaid waiver. A similar program for persons over age 60 was also created by P.A. 81-202 and is administered by the Illinois Department on Aging (DOA). (See section C *infra* ). The Home Services Program (HSP) as administered by both DORS and DOA is designed to prevent unnecessary institutionalization of individuals who may instead be satisfactorily maintained at home at less cost to the State. Eligible persons, either the handicapped or the elderly, must be either at imminent risk of institutionalization or unnecessarily institutionalized. With the provision of supportive services, these individuals are allowed to remain in their own homes or in other

noninstitutional living arrangements.

*b. Eligibility Criteria for DORS HSP Service*

The following requirements are conditions of eligibility for HSP. If any one of the criteria for eligibility is not met, the client is determined ineligible for HSP Services. [FN4]

*1.) Citizenship*

The client must be a United States citizen or a legal alien.

*2.) Residency*

The client must be a resident of the State of Illinois.

*3.) Age*

The client must be under age 60 at the time of referral although age is not a criteria for continuous service thereafter.

*4.) Disability*

All clients must be determined to have a severe physical or mental disability which will last for at least 12 months or result in death.

*5.) Need for Long Term Care*

The client must obtain certain minimum scores on the Determination of Need for Long Term Care Scale (DON).

*6.) Need for Physician's Statement*

A physician must certify appropriateness of the home services plan for serving the client at home.

*7.) Cost Effectiveness*

The cost of the client's service plan may not exceed the service cost maximum corresponding to the client's DON score, because this service cost maximum represents the cost the State would expect to pay for the institutional care of a client having a similar DON score. [FN5]

*8.) Assets*

The client may have no more than \$10,000 in nonexempt client only assets.

*9.) Cost Sharing*

The client must share in the cost of the HSP Service Plan ("cost share") if the total of client and family nonexempt income exceeds the "protected income level" for the client's family size as shown below:

Family Size

1 2 3

4 or more

Protected

\$426 \$639 \$722

add \$83 for each additional

Monthly Income

person

*c. HSP Services*

The Home Services Program provides six services: attendant/housekeeping; Supervision; homemaker; home health; home-delivered meals; and electronic home response. [FN6]

*1.) Attendant/Housekeeping*

Attendant/housekeeping (housekeeper) services are provided by individuals, (not agencies) who are for the most part selected, hired, trained, supervised and, if necessary, dismissed by the client or other responsible person, and who do not necessarily have formal training. DORS' counselors and the client share the responsibility of locating appropriate service providers. A variety of resources are available to assist in locating individual service providers for attendant/housekeeping, supervision, and individual home health service, including: clients, family members, neighbors, other service providers, Illinois Job Service, the Department of Public Aid, churches, some independent Living agencies or centers, rehabilitation facilities, public or private social service agencies, vocational rehabilitation counselors, other home services counselors, and Public Health departments.

Housekeepers are paid minimum wage, \$3.35 per hour. This wage is set by DORS. Housekeepers are paid only for the time spent doing housekeeping and personal care tasks for the client. With written permission from the client's attending physician, some home health tasks can be provided by an attendant housekeeper. Services are ordinarily to be provided only in the presence of the client and in the client's home, with the exception of some tasks such as shopping.

*2.) Home Health Services (Agency and Individual)*

Home health services may be provided only by properly licensed or certified persons including nurses, therapists and home health aides. Home health includes all services which may be rendered by these types of providers. Home health services must be prescribed or recommended by a licensed physician and be rendered by the type of home health professional appropriate to the skill level of care required. Home health rates are paid only during hours when health tasks are being performed. The individual provider must be able to provide certification from a recognized training program, or with a license appropriate to the type of home health service needed. The individual is then paid \$4.00---\$4.50 per hour. [FN7]

*3.) Supervision*

Supervision services are provided by individuals who are paid \$1.00 per hour. This fee is set by DORS. Supervi-

sion service is provided to clients who cannot be left unattended but who require no active service provision. During this time the vendor is just sitting with the client to be available in an emergency and may perform very minimal tasks. This service must be provided in the presence of the client in the client's home.

## *2. Operations of the HSP*

### *a. DORS' Staff Rule*

In each DORS field office in the State of Illinois there is an HSP team consisting of a home services counselor [FN8] and a coordinator. The coordinator performs clerical duties such as entering data into the computer system, typing forms and letters and processing vouchers. Coordinators also have paraprofessional responsibilities involving the processing of client or vendor complaints. In more populous areas the coordinators may assist the counselor in locating service providers for clients. More experienced coordinators may be given authorization over payroll of service providers.

The home services counselors provide professional counseling and guidance services to assist handicapped persons. Home services counselors are responsible for the HSP caseload in their offices. Counselors are supplied with printed materials explaining the program and have access to resource staff in Springfield. In addition, ongoing inservice training is required. Home services counselors receive primarily on the job training from more senior staff.

### *b. Case Processing and Service Planning*

Persons who are potentially eligible for home services are referred to home services counselors by hospitals, other clients, family members or nursing homes [FN9] Initially, the counselor goes to the home of every person referred for services, where the client or other responsible person must sign an application, a medical release and financial information forms. While at the client's home, the counselor completes the determination of need (DON) form. [FN10] The DON is an objective assessment instrument used to assess both the degree of a client's disability in 16 functional areas and the client's need for assistance in each of these areas.

The DON yields a numerical score. This score is then compared to the established cost of monthly institutionalization. [FN11] If the DON score indicates that the cost of home services would be no higher than that for institutional care, [FN12] the counselor and the client prepare and sign a service plan. The service plan includes the type of service to be provided, the number of hours of such service, the rate of payment to the service provider(s), and the service provider's general schedule of what days and/or hours services are to be provided.

After the service plan is prepared, counselors routinely ask the clients if they know of an individual to perform the services set in the plan. [FN13] Fifty percent of the service providers are obtained independently by the client. Service providers are frequently relatives, neighbors, friends or acquaintances of the client. The client may find service providers by contacting private agencies serving the handicapped, such as Access Living, or through more informal word of mouth contacts.

If the client does not know of a possible service provider, the client may request a referral from the counselor. Counselors maintain very informal "lists" [FN14] of potential service providers. These "lists" are obtained from persons interested in being housekeepers or home health aides who call the counselors to see if work is available. Counselors neither interview nor take references from service providers. The "applicant" simply gives his/her name and telephone number to the counselor who keeps this information for future reference. Counselors in-

form “applicants” of the wages and lack of benefits at the initial contact.

In addition, some counselors keep an informal record for referrals of present service providers. A provider may make a request to work additional hours for more than one client, or for a new client. [FN15] Counselors, when possible give the names of several service providers to the client, who is responsible for contacting the service provider to arrange a meeting. Counselors do not attend these client-service provider meetings.

If neither client nor counselor can obtain a suitable service provider, either may contact Ms. Sonney Bernard at the DORS office in Chicago, Illinois. [FN16] Bernard serves primarily as a referral resource for counselors in the Chicago area. [FN17] Any individual seeking to be a home health aide or attendant housekeeper who contacts Bernard is invited to come to her office for an interview. Those that come in fill out a short “application” form developed by Bernard for the HSP. These forms are filed for future reference. She conducts brief interviews, usually with a group of “applicants.” She first describes the HSP, the wages and lack of benefits. She inquires into the person's experience dealing with the disabled. She then evaluates the service providers' qualifications, particularly their personalities and their ability to work with the handicapped. She also asks for and checks their references. Bernard tries, when making a referral, to match the individual client's needs with the skills and attributes of the service provider. She also must verify the client's eligibility with the case counselor. Some clients interview many “applicants” who have been referred by Bernard. Bernard does not schedule client and service provider meetings and she is never present at such meetings. However, she checks with the client and service provider to see if the meetings were held.

DORS' staff provides no training for service providers; however, they may inform them about the availability of community based training programs for home health aide certification.

### *c. The Client's Role*

In those cases where a client must obtain services through a DORS' referral, the client has the responsibility to arrange for a service provider to come to the home for an interview. Both the client and “applicant” use this meeting to judge whether they would be able to get along with each other. The client informs the “applicant” of the service plan. The “applicant” in turn describes any previous work experience. They then try to work out mutually satisfactory agreements concerning a starting day and the hours and the days to be worked each week. If the client is satisfied with the qualifications of an “applicant” and the “applicant” agrees to work for the client, the counselor must be promptly informed of the service provider's name, address, telephone number and social security number before the agreed upon starting date, in order to process the payroll forms. The counselor generally has no veto power over either the arrangements made or the person selected. [FN18] The counselor makes follow up calls to both persons to verify that the client will be receiving the needed services.

The client tells the service provider how the work is to be performed. The client provides all equipment and supplies necessary for the performance of certain chores. The client pays any expenses incurred by the service provider in performing a chore, such as bus fare to the grocery store. Service providers receive a copy of the plan, which specifies the amount of time allotted on a daily, weekly or monthly basis for the performance of specific tasks. For example, if a client needs to be bathed every day, the service plan will set forth how much time a bath should take. The service plan also allots how much time should be spent on daily chores such as meal preparation, or on weekly chores such as laundry, vacuuming and shopping. Clients instruct service providers of the manner in which the chore is to be performed. Service providers must follow the client's instructions, even if the task takes longer than the time anticipated in the plan. For each chore area, clients direct and supervise the per-

formance of the task.

Many clients have more than one service provider. For example, a home health aide may arrive a few times a week to give a shot; a housekeeper may be needed daily to perform housekeeping chores; a person may be needed for supervision if the client cannot be left alone. Many service providers work for more than one client. Home health aides may go to several homes each week to give medicine or change dressings.

As a general rule, counselors do not intervene in an ongoing client-service provider relationship. However, if client abuse is suspected, the counselor must take steps to protect the client. Clients and service providers are free to adjust hours and days of work provided the service plan total number of hours is not exceeded. Counselors do not evaluate service providers. If a service provider quits, the client is informed. The client notifies the counselor of any changes in service providers. A client can be terminated from the program by his counselor if he does not cooperate with a service provider. [FN19]

Disagreements between a client and service provider are usually solved by the parties. If the problem is not resolved, in most cases the client directly terminates or disciplines the service provider. Counselors are notified by the client of the termination after the fact. In some cases a client asks a counselor to intercede in handling problems with a service provider. [FN20] A counselor encourages the client to work out the problem directly with the service provider. A counselor may suggest techniques to a client for dealing with specific problems. In some cases, a service provider contacts the counselor about problems he has with a client. The counselor may talk with him either in person or over the telephone to try to resolve the problem. There are occasions when a client asks the counselor to terminate a service provider and the counselor does so. [FN21]

Whenever possible, a service provider requests time off in advance from the client. Since it is essential for a client to continue receiving services, a substitute provider has to be found quickly. If there is sufficient advance notice and neither client nor service provider has an available substitute, the counselor may be asked to locate a replacement. There is no system for providing daily substitutes. The counselor will try to help find an individual, but may be unable to do so. Sometimes, a counselor sends a substitute to a client without an advance interview. Longer term substitutes would be interviewed by a client in the same manner as a new service provider. A client is required to tell the counselor in advance the name of the substitute so a voucher can be prepared. In an emergency, the counselor can be notified after the fact and the substitute will still be paid.

Under the HSP, annual reassessment of each client is required. Unless a counselor is notified of a change in the client's health or family structure, there may be no contact with a client once the service provider is initially put on the payroll, [FN22] until the yearly reassessment is conducted.

### *3. Administrative Organization of HSP*

HSP is administered on a Statewide basis. Departmental Rules and Regulations and the Client Service Manual establish the parameters of the operation of the program and are applicable throughout the State. The Home Service Program is directed by Theresa Roller, who is located at the DORS' Central Office in Springfield, Illinois. She and her staff of three are responsible for the development and implementation of policies and procedures. They conduct staff training and act as resource persons to field staff. [FN23]

The Springfield Office of Services for Adults directly supervises HSP field staff [FN24] in the State's five (5) geographic Regions. [FN25] Each Region is headed by a Regional Administrator and a Regional Program Officer. Each Region is sub-divided into several field offices, each of which is headed by an office supervisor.



There are 46 such offices Statewide.

The job description for DORS' counselors is part of the Statewide classification system. The HSP budget is prepared on a Statewide rather than a Regional basis. In-service staff training is on either a Statewide or Regional basis. [FN26]

#### *4. Funding of the Home Services Program*

##### *a. Medicaid*

The Social Security Act was amended by the Omnibus Budget Reconciliation Act of 1981. [FN27] The new sections authorized the Secretary of the Department of Health and Human Services (HHS), by waiver, to reimburse states for providing in-home services for individuals who would otherwise require institutional placement, as long as the cost of in-home services was less. Illinois' request for a waiver was granted by HHS in July 1984. The State Plan is administered on a Statewide basis and requires standardized forms and procedures. [FN28] The federal Medicaid program reimburses the state 50% of the costs for HSP recipients. The Medicaid funds go into the State's general revenue fund.

##### *b. Cost Sharing Program*

The Medicaid waiver sets a financial eligibility requirement. [FN29] Any DORS' client who is determined to have financial responsibility to share the cost of the service is required to sign an agreement to pay a predetermined share directly to the service provider. DORS must pay the balance, if any, of the \$3.35 per hour to the service provider. Should a client fail to pay the service provider, a counselor may set a payment schedule with the client. DORS pays the service provider the full hourly wage while the client makes his payments to DORS. If a client can pay but will not cooperate, DORS will terminate HSP services to the client. Clients have no authority to increase or decrease the wage set by the State.

##### *c. Social Security and Federal and State Tax*

In 1980, DORS applied to the IRS for, and was awarded, agency status on behalf of HSP clients. [FN30] pursuant to Titles XIX and XX of the Social Security Act. 42 U.S.C. § 1396 and 1397 (1982). DORS pays the client's share of the Social Security payments on behalf of a service provider. DORS does not withhold any state or federal taxes. Each service provider is responsible for his or her own income tax payment. In January, DORS does send W-2 forms to each service provider, indicating FICA contributions as well as the total wages paid for the year.

##### *d. Payment of Wages*

Service providers are paid monthly by a check sent to them from the Illinois Comptroller's office. DORS' counselors and case coordinators are responsible for a service provider being placed on the payroll, as well as for processing the monthly payroll checks. Initially, it takes up to seven (7) weeks for the vendor to be paid. At the beginning of each month, the service provider receives a voucher(s) in the mail with the number of hours authorized per client. [FN31] At the end of each month, the vendor signs the voucher(s). Both the client and the vendor sign a verification that the number of hours authorized were worked. Both forms are mailed monthly to the home services counselor responsible for the client. Counselors initiate prosecutions and dismiss service providers if fraud is discovered.

The Local DORS' field office staff checks the verification form and sends the paperwork to Springfield for further processing. [FN32] Complaints about the frequent delays in payment to service providers are handled by the local DORS' office staff.

*e. Benefits*

Service providers receive no benefits. They are not eligible for hospitalization, life insurance, or retirement benefits. They receive no paid vacations nor are they compensated for sick time. However, workers are covered by Worker's Compensation and Unemployment Compensation under the State system.

*B. The Existing RC-28-OCB Unit*

Under the Office of Collective Bargaining [FN33] a Statewide multi-agency paraprofessional human services unit was established. The job classifications in the unit are semi-skilled positions that do not require a college degree. The present contract for RC-28-OCB is in effect until February 10, 1986.

Within the unit is the job classification of Homemaker. [FN34] The Homemaker job description requires the equivalency of a high school education. The duties of a Homemaker are laundry, grocery shopping, dressing, grooming and routine household chores. The duties are described as being performed in the households of public aid recipients.

*C. Department on Aging "310" Program*

Individual housekeepers are also hired to provide necessary help to eligible clients age 60 and over to keep them living independently in their own homes. The "310" program is provided by the Illinois Department on Aging (DOA). [FN35] The program is similar to DORS' program in that the housekeepers are paid the same salary. [FN36] They are recruited, hired, supervised, discharged and disciplined by the individual clients. They receive their salaries from the Comptroller through a voucher system processed by DOA. They are not eligible for any benefits such as insurance, vacation or sick days. They are only paid for actual time worked and do not receive any pay when a client is in the hospital or nursing home. DOA deducts the worker's share of Social Security payments but does not deduct state or federal income taxes.

The major difference between the two programs is that the DOA has no staff involvement with clients. Questions from a client or housekeeper are referred to a toll-free "800" telephone number, located in Springfield and operated under a contract with DOA. All case coordination, including the annual reassessment of clients, is done by agencies under contract with DOA.

## **IV. DISCUSSION**

*A. The Employer*

SEIU has petitioned to represent home health aides and housekeepers in the DORS' home services program. The dispositive question raised by SEIU's petition is whether the Board has jurisdiction over this matter. To determine whether the Board has jurisdiction, the initial question is who is the employer, and secondly is the employer a "public employer" as that term is defined in Section 3(n) of the Act.

"The key consideration in determining employer status under the Act is the extent to which the entity is necessary to create an effective bargaining relationship." DuPage County Board, 1 PERI ¶ 2003 (ISLRB 1985). Nu-

merous cases have established that an employer-employee relationship is determined by a "right to control" test. [FN37] Many factors, none of which alone is determinative, are considered in determining whether the employer retains the right to control, including the extent of supervision over the work, the right to hire, fire, and discipline, the method of compensation, and who controls fringe benefits and the withholding of taxes and payment of Social Security [FN38]

Applying the foregoing factors to the facts in this case, it is apparent that both DORS and the individual clients each have the "right to control" different but essential elements of the employment relationship. DORS established the wage rate at the federal minimum wage. DORS pays the salaries and Social Security benefits on behalf of clients. All payroll processing and payment problems are handled by DORS. In addition, DORS monitors the payroll for fraud to assure that service providers do not get paid for work they did not perform.

The maximum number of hours and type of services a client may receive is written into the service plan by counselors and must be followed by service providers. DORS staff members assist 50 percent of the clients either formally or informally in locating possible service providers. This process can be likened to an employment agency function wherein DORS seeks to match service provider and client.

Counselors also advise both clients and service providers regarding problems they may have. They will on occasion dismiss a provider at a client's request. Moreover, counselors have dismissed providers for fraud or abuse without a client's request. These workers are covered under Illinois Workers Compensation and Unemployment Compensation plans. However, they receive no other benefits such as vacations, sick time or health and life insurance.

Clients control other essential elements of the employment relationship. While DORS pays most of the salary for most service providers, clients who are determined to have financial ability are required to pay a percentage of the hourly rate. [FN39] All clients must pay certain out of pocket expenses of the workers. Clients have the sole responsibility to hire, dismiss, train, supervise and discipline workers. Clients on occasion use a counselor as a resource person, but in general they make their own decisions and deal with their own problems with workers. Further, clients control the day to day working conditions of service providers including setting specific hours, days of work, time off and resolving any grievances. Equipment and supplies used by service providers in the client's home belong to the client. Neither party alone exerts significant control over the essential elements of labor relations with HSP workers. Therefore, collective bargaining which did not involve both DORS and the individual clients would be ineffective. *DuPage County Board, supra*; *Jackson County Public Hospital v. PERB*, 280 N.W. 2d 426 (Ia. 1979); *City of Bethlehem*, 16 PPER ¶ 16039 (PLRB 1985).

Based on the foregoing, it appears to me that DORS and the individual clients are both necessary parties to effectively negotiate economic as well as noneconomic terms and conditions of employment. Effective negotiations could not take place without the presence of both entities. *DuPage County Board, supra*. Therefore, DORS and the individual clients are joint employers of the employees working in the HSP.

#### B. Jurisdiction

The next question is whether the Board has jurisdiction over both the individual clients and DORS. The Board's jurisdiction is limited to employers who meet the definition of public employer as set forth in Section 3(n) of the Act. That section, in pertinent part, defines an employer as

... the State of Illinois; any political subdivision of the State, unit of local government or school district; author-

ities including departments, divisions, bureau, boards, commissions or other agencies of the foregoing entities and any person acting within the scope of his or her authority express or implied, on behalf of such entities in dealing with its employees.

DORS is undisputed to be a public employer as that term is defined in Section 3(n) of the Act, and therefore the Board has jurisdiction over DORS. The numerous DORS' clients, however, do not satisfy the statutory definition of a public employer under Section 3(n). Therefore, the Board does not have jurisdiction over clients served by the HSP program.

The final jurisdictional question is whether the Board can assert jurisdiction over joint employers when it lacks jurisdiction over one of them. Similarly to Section 2(2) of the National Labor Relations Act (NLRA), 29 U.S.C. § 152 (1982), this Act does not authorize the Board to assert jurisdiction in a joint employment situation where it has jurisdiction over only one employer. Power to govern only one of two necessary employers is insufficient for the Board to perform its regulatory function. Jackson County Hospital, *supra*. The weight of case law under both the NLRA and numerous state Public Employee Relations Acts is that the Board must have jurisdiction over all employers in order to assert jurisdiction. [FN40] When both employers have been found to exert necessary control over labor relations matters, and the agency lacks jurisdiction over one of them, the NLRB as well as State Labor Relations Boards decline to assert jurisdiction. National Transportation Service, 240 NLRB 565 (1979); Jackson County Hospital, *supra*. I recommend that this Board follow the prevailing authority and dismiss this petition for lack of jurisdiction over both joint employers. [FN41]

### C. Appropriate Unit

Should the Board not dismiss the petition on jurisdictional grounds, I recommend that the petition be dismissed because the petitioned for unit is inappropriate. The Board in DuPage County Board, *supra* stated:

. . . where the employing public entity has an established and centralized job classification system, a presumption of inappropriateness is warranted solely by virtue of the fact that the Petitioner has sought *only a portion of employees who perform duties in identical job classifications*. In the public sector, a commonality of functions and [a] community of interest generally exists among people in the same job classification which . . . would often override such specific factors as common supervision and functional integration. (emphasis added)

The employing public entity, the State of Illinois, has established a centralized job classification system. State of Illinois and Teamsters and AFSCME, 1 PERI ¶ 2027 (ISLRB 1985). This petition seeks only persons in the home health aide and housekeeper job classifications who work in Regions IV and V. Petitioner does not seek to represent persons in these same job classifications who work in Regions I, II and III. There is no substantial evidence in the record to distinguish the work of the employees who are located in the Metropolitan Chicago area (Regions IV and V) from those who work elsewhere in the state (Regions I, II, and III). Indeed, the contrary is true. Salaries and working conditions are the same Statewide. [FN42] In addition, the petition does not seek to include DOA "310" housekeepers who perform the same duties throughout the State in an identical job classification as those sought to be represented herein. Finally, the existing RC-28-OCB Statewide bargaining unit also includes persons with similar job titles who perform work similar to the petitioned for employees. For the foregoing reasons, the proposed unit is presumptively inappropriate and the petition should be dismissed.

## V. CONCLUSIONS OF LAW

For all the foregoing reasons, I find and conclude that:

1. DORS and HSP clients are joint employers of the service providers, and DOA and "310" clients are joint employers of "310" workers.
2. The HSP clients and "310" clients are not public employers as defined in Section 3(n) of the Act.
3. The Board must have jurisdiction over each joint employer in order to assert jurisdiction.
4. The Board lacks jurisdiction over both HSP and "310" clients; therefore, the Board lacks jurisdiction over this matter.
5. The unit sought is inappropriate.

#### **VI. RECOMMENDED ORDER AND DISMISSAL**

IT IS HEREBY ORDERED that the petition in Case No. S-RC-115 be dismissed.

#### **VII. EXCEPTIONS**

Pursuant to Section 1210.100(i) of the Rules and Regulations of the Board, parties may file exceptions to the Hearing Officer's recommendation and briefs in support of those exceptions no later than 14 days after receipt of this recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after receipt of the exception. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

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FN1. On December 3, 1985, we received a letter from the American Federation of State, County and Municipal Employees setting forth its interest in this case. We are treating this letter as an amicus brief.

FN2. Indeed, the facts even show that certain of the service recipients, depending on their income levels, are required to pay a portion of the cost of the provider's service.

FN1. Attendant/Housekeepers (Housekeepers) and Home Health Aides (HHA) are the correct job titles for chore housekeeper and service aides.

FN2. Employer filed a Motion to Dismiss on April 24, 1985, which is herein granted for the reasons stated.

FN3. Ill. Rev. Stat. (1983) ch. 23 §§ 9-1, 9-8, 12-4.11, 6104.01, 6104.02, 3434.

FN4. Medicaid requires that HSP be operated on an entitlement, rather than a discretionary basis, such that in an entitlement program, any eligible person referred to the program *must* be served according to the timelines in the administrative rules rather than being "wait listed."

FN5. For example, if a person has a DON score of 88-96, the State has determined that it would cost \$980 per month to help this individual in a nursing home. The cost for in-home services can be no more than \$980 per month for that individual.

FN6. The petition seeks individuals who provide attendant-housekeeping, supervision or home health services to DORS' clients.

FN7. The variation in rate is based on the geographical location of the client, not on the degree of the client's disability.

FN8. Some full-time Home Services counselors in Regions IV and V have caseloads of 200-300 cases. Some offices have two Home Services counselors. Smaller offices may have a half-time Home Services counselor.

FN9. Some handicapped individuals may either contact DORS directly, or may be referred by DORS' vocational counselors.

FN10. The Medicaid waiver requires that the DON is to be used on a Statewide basis by both DORS and the Department on Aging (DOA).

FN11. The counselor may arrange for agency supervised Homemaker services, if the client is unable to supervise the service provider.

FN12. Assuming all other eligibility criteria have been met. (See Section IV A.I.C.)

FN13. Legally responsible relatives, for example, parents or the spouse of the client, may not be paid for services.

FN14. The "list" may be as informal as the names and telephone numbers written on a scrap of paper taped on the counselor's wall.

FN15. Some counselors refer service providers who were terminated by a client to a new client, if the service provider does not have a reputation as a "problem," i.e. alcoholic or chronically late or absent.

FN16. Bernard is the only DORS' employee in the State who performs this function.

FN17. Some counselors call her periodically for names of possible service providers. Other counselors only ask her to send them a written list of names.

FN18. The only oversight authority the counselor has is to make sure that the hours per month worked do not exceed the hours permitted under the service plan. The counselor also could not authorize payment for an impermissible family member, such as a spouse or parent.

FN19. Counselors have the option to assign homemakers rather than housekeepers to clients who have difficulty accepting help, or who are otherwise difficult to work for.

FN20. Disabled clients are frequently justifiably afraid to confront hostile service providers.

FN21. Counselors only intervene in client-service provider problems when asked.

FN22. A client may seek an earlier reassessment if there is a change in circumstances, i.e. a client who has no use of his arms, may suffer a broken leg. As a result of this emergency, additional hours of help may be needed. No additional hours are authorized without an in-person reassessment. However, in an emergency the hours may be authorized over the telephone.

FN23. This office has no supervisory function over field staff. However, field staff throughout the state frequently contact Roller and her staff to ask questions about policies and procedures.

FN24. Vocational Rehabilitation Services, another DORS' program, also administratively reports to Services for Adults.

FN25. Region I covers counties in Southern Illinois. There are 11 field offices. Region II covers counties in Central Illinois. There are nine field offices. Region III covers counties in Northern Illinois, except for Cook, DuPage, and Lake Counties. There are 15 field offices. Region IV covers southern Cook County including the south side of Chicago. There are six field offices. Region V covers northern Cook County including the north side of Chicago, DuPage and Lake Counties. There are five field offices.

FN26. Persons from Regions IV and V would not have inservice training together unless persons from Regions I, II, and III were included.

FN27. 42 U.S.C. §§ 1396a, 1396n (c) 1982.

FN28. The plan also applies to clients over age 60 who are served by the Department on Aging (DOA). See section C *infra*.

FN29. See Section A 1 c(9) *infra* for financial criteria.

FN30. Rev. Pro. 6, 1970-1, C.B. 420; Rev. Pro. 4, 1980-1, C.B. 581.

FN31. There is some office variation in this system. In the busier offices, all vouchers are based on a 30-day month; in other offices the vouchers are individually calculated based on the actual number of days in the month. There is no set policy on this Statewide.

FN32. These forms are monitored for possible fraud. If fraud is suspected, an investigation is conducted which could lead to prosecution and termination of the service provider from the program.

FN33. Executive Order No. 6 (1973).

FN34. The Housekeepers job classification is also included in the unit. The duties of housekeepers are performed in institutions rather than in homes, but the type of work and skills are similar.

FN35. The "310" program was established by the same legislation that created the DORS program. Both programs require the use of the same DON, service plan and other forms discussed above.

FN36. The "310" program does not provide home health aide services.

FN37. *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254 (1968); *Hiltna International Co. v. N.L.R.B.*, 690 F.2d 319 (2nd Cir. 1982); *H. Prang Trucking Co. v. Local 469*, 114 LRRM 3617 (D.C. N.J. 1983) *Michigan Eye Bank*, 265 NLRB 1377 (1982); *Standard Oil Co.*, 230 NLRB 967 (1977); *Century Broadcasting Corp.*, 198 NLRB 923 (1972), *Beacon Journal Publishing Co.*, 188 NLRB 218 (1971).

FN38. *Id.*

FN39. This amount could be 100 percent of the \$3.35 per hour or any fraction thereof based on the amount of the client's income over a certain minimum. However, clients have no authority to set wages.

FN40. *Lutheran Welfare Services v. N.L.R.B.*, 607 F.2d 777 (7th Cir. 1979); *Target Inc.* 263 NLRB 781 (1982);

Youth Guidance Center, 263 NLRB 1330 (1982); Jackson County Hospital, *supra*; Lancaster Guidance Center, 16 PPER ¶ 16025 (Pa. 1984); Santa Rosa Hospital, 8 FPER ¶ 13095 (Fla. 1982); Fresno Unified School District/Abbey Transportation System, Inc., 3 PERC ¶ 10012 (Ca. 1979).

FN41. See Chief Administrators dismissal in Illinois Nurses Association v. State of Illinois, 1 PERI ¶ 2028 (ISLRB 1985).

FN42. Bernard's interviewing and placing service providers with clients in Region IV and V, does not overcome the presumption of inappropriateness established by this Board in DuPage County Board, *supra*.

END OF DOCUMENT