

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :
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VERNON COUNTY HIGHWAY EMPLOYEES, : Case 1
LOCAL 1527, AFSCME, AFL-CIO : No. 49791 ME-670
: Decision No. 6163-B
Involving Certain Employes of :
: :
VERNON COUNTY :
: :
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Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Box 333, Sparta, Wisconsin 54656, appearing on behalf of Local 1527.
Klos, Flynn and Papenfuss, Attorneys at Law, 800 Lynne Tower Building, 318 Main Street

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER CLARIFYING BARGAINING UNIT

On September 13, 1993 Vernon County Highway Employees, Local 1527, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify an existing bargaining unit by including the position of Foreman. Hearing on the petition was held on December 15, 1993 in Viroqua, Wisconsin before Examiner David E. Shaw, a member of the Commission's staff. A stenographic transcript was made of the hearing and was received on January 12, 1994. Post-hearing briefs were submitted by May 9, 1994. The Commission, having considered the evidence and the arguments of the parties and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Vernon County, hereinafter the County, is a municipal employer with its principal offices located in Viroqua, Wisconsin 54665

2. Vernon County Highway Employees, Local 1527, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization with its principal offices located at Route 1, Sparta, Wisconsin 54656.

3. The County operates a Highway Department. The Highway Commissioner, William Stahl, is responsible for the overall administration of the Department. Stahl reports to a Highway Committee consisting of five members of the County Board that retains the final authority for the operation of the Department. The

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Patrol Superintendent, a non-bargaining unit position, assists Stahl in

supervising the bargaining unit employes who repair and maintain the highways within the County and, in Stahl's absence, he is in charge of the Department. There are approximately thirty bargaining unit employes engaged in such activities. Currently, there are six other bargaining unit employes, i.e., a shop clerk, a parts clerk, a janitor, a fabricator/welder and two mechanics, who are supervised by the Building, Grounds and Shop Supervisor. The equipment of the Highway Department includes approximately forty trucks, twenty-five mowers, three large loaders, small loaders, graders, bulldozers, an excavator, a small backhoe, a pavement stiper, compressors, and miscellaneous machines. The Highway Department has a main shop building, a storage building and a tire shop in Viroqua, satellite shops in three other locations in the County, and several other old buildings.

4. In Vernon County, Dec. No. 6163 (WERC, 1/63), the Union was certified as the bargaining representative of all employes of the Vernon County Highway Department, excluding the highway commissioner, supervisory personnel, and confidential clerical personnel. The County and the Union were parties to a collective bargaining agreement covering the period of January 1, 1992 through December 31, 1993. Said agreement contained the following language in the recognition clause: "The County hereby recognizes the Union as the exclusive bargaining agent for all Vernon County Highway Employees except the yearly salaried supervisory employes....".

5. On September 13, 1993 the Union filed a unit clarification petition requesting that the position of Building, Grounds, and Shop Supervisor be included in the bargaining unit. The County opposes such an inclusion on the basis that the position performs supervisory and managerial duties.

6. In 1992 the County created the classification of Building, Grounds and Shop Supervisor, hereinafter referred to as the Shop Supervisor. The job description for said position contained the following statement of duties and responsibilities:

Direct the daily activities of six employees; two mechanics, one welder, fabricator, one shop clerk, one parts man, and one janitor to effectively manage the maintenance and preservation of the Department's trucks, equipment, and buildings and grounds.

This position has the authority and responsibility to direct and assign the above employees with no assistance from others, using their independent judgement.

This position has the authority to discipline and/or recommend discipline up to a week suspension without pay and to recommend more severe discipline up to and including termination.

This position supervises (75%) of time primarily the activities of the employees in this operation and decides the feasibility of repairing or replacing

equipment and the most efficient and cost effective methods of repair. They (sic) analyzes the condition and recommends to the commissioner the equipment to be replaced each year.

While this position requires some mechanical ability to make sound decisions, the most important requirement is the effective supervision of subordinates.

This position also decides when outside contractors are to be used to supplement in house capabilities.

This position is responsible for replenishing at the most economically feasible cost a \$200,000 parts inventory to maintain all equipment.

The new position replaced a position of Working Foreman, which position was in the bargaining unit represented by the Union. The incumbent in the Working Foreman position retired in 1992. The Working Foreman spent approximately 25-35% of his time performing duties of a mechanic. The Working Foreman received \$10.42/hour in 1992 (\$21,673.60 annualized based on 2080 hours) and was to receive \$10.78/hour in 1993 (\$22,422.40) and the benefits provided in the parties' collective bargaining agreement, including overtime at the rate of time and one-half pay for hours worked outside the standard work day and/or the standard work week. The highest paid classification in the bargaining unit is Welder at \$10.62/hour in 1992 (\$22,089.60 annualized) and \$10.99/hour in 1993 (\$22,859.20 annualized).

Gerald Thurin was hired to fill the Shop Supervisor position in November of 1992. The Shop Supervisor position is placed in Range 15 of the County's Non-Union Salary Plan and in 1993 Thurin received \$23,670 and the maximum in Range 15 in 1993 was \$30,696 at Step 20. Thurin receives essentially the same fringe benefits as the employes in the bargaining unit except that he receives compensatory time at straight time rate for hours worked outside of his regular workday. Thurin spends approximately 75% of his work time at or around the Main Shop area supervising and assigning the work of the six employes and dealing with salesmen and making decisions regarding the repair or replacement of equipment, and approximately 25% of his work time picking up parts and checking on the outlying shops. Thurin spends very little of his time performing duties similar to those performed by bargaining unit members and performs no mechanic duties. Thurin reports directly to the Highway Commissioner, Stahl, but is subordinate to the Patrol Superintendent in Stahl's absence.

Thurin meets with Stahl at the start of the workday at which time Stahl will advise him of any priorities he might have regarding needing a certain piece of equipment by a certain time. Beyond such a priority, Thurin assigns the work to be performed and possesses and exercises the discretion to take employes under him off of one job and put them on another job as he deems necessary. There have been no grievances filed by an employe under Thurin's direction since he was hired, nor have there been any vacancies among those employes. It is anticipated that Thurin will be involved in interviewing job

applicants to fill future job vacancies and will make recommendations in that regard, but that Stahl and the Highway Committee will make the final selection.

Thurin has the discretion to approve/disapprove employe requests to work overtime and has exercised that discretion. He has called an employe into work on overtime on at least one occasion. There is no formal performance evaluation system. As of the hearing, there had not been any incidents wherein Thurin imposed formal discipline on an employe, although he had some discussions with employes, which discussions were intended to correct an employe's behavior or work performance. None of those discussions were recorded in an employe's personnel records. Thurin has the independent authority to discipline employees, up to and including suspension without pay, and then advising Stahl of the action.

7. The occupant of the position of Building, Grounds and Shop Supervisor possesses and exercises supervisory authority in sufficient combination and degree so as to be deemed a supervisory employe.

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

CONCLUSION OF LAW

The incumbent in the position of Building, Grounds and Shop Supervisor is a supervisor within the meaning of Sec. 111.70(1)(o)1., Stats.

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

ORDER CLARIFYING BARGAINING UNIT 1/

The bargaining unit described in Finding of Fact 4 is hereby clarified by the exclusion therefrom of the position of Building, Grounds and Shop Supervisor.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(Footnote 1/ appears on the next page.)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

VERNON COUNTY

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

POSITIONS OF THE PARTIES

The Union asserts that the supervision of the shop employes still rests with the Highway Commissioner. The authority exercised by the Shop Supervisor is only perfunctory and he is more of a lead worker than a supervisor. The Shop Supervisor did perform investigative work in several areas, but the changes were made only with the knowledge, input and final approval of the Highway Commissioner. The only area where the County could point to an independent commitment of the County's resources by the Shop Supervisor was when he paid more for a piece of equipment than the Highway Commissioner had envisioned. Such authority is de minimis and is not sufficient to exclude the position from the bargaining unit.

The County contends that, although the Shop Supervisor has had only limited occasion to exercise supervisory authority, in none of those instances where he has exercised his authority has the Highway Commissioner overruled his decisions. Moreover, the Shop Supervisor both has made numerous decisions which committed the resources of the County and has made numerous recommendations for committing resources which recommendations have been approved. The County believes that the record contains sufficient evidence to establish that the position of Shop Supervisor is both supervisory and managerial in nature.

DISCUSSION

The County has asserted that the position of Building, Grounds and Shop Supervisor is both supervisory and managerial and, therefore, not appropriately included in the bargaining unit.

Taking up first the claimed supervisory status of the position, the Commission considers the following factors in determining whether a position is supervisory in nature:

1. The authority to recommend effectively recommend the hiring, promotion, transfer, discipline, or discharge of employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised, and the number of other persons exercising greater, similar, or lesser authority over the same employes;
4. The level of pay, including an evaluation of whether the supervisor is paid for his skills or

for his supervision of employes;

5. Whether the supervisor is primarily supervising an activity or primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes;
7. The amount of independent judgment and discretion exercised in the supervision of employes. 2/

It is not necessary that all the indicia of supervisory status be present to find a position to be supervisory in nature, however it is necessary that those factors should be present in sufficient combination and degree to clearly establish such supervisory status. 3/ Job descriptions may be helpful in determining employment duties, but more critical to the determination of supervisory status, are the actual duties performed. 4/

In this case, the record establishes through the job description for the position and the unrebutted testimony of the incumbent and the Highway Commissioner that the position possesses the independent authority to discipline employes up to and including a suspension without pay. Although there has been no occasion to exercise that authority beyond informally counseling employes, it is clear from Thurin's testimony that he believes he has the authority to discipline employes and that it has been confirmed verbally to him by the Highway Commissioner, Stahl.

The record also establishes that Thurin directs and assigns the six employes for which he is responsible. Other than when Stahl sets a priority on a piece of equipment being repaired and ready when needed, Thurin determines the priorities and assigns the employes accordingly. Thurin alters their assignments where he deems it necessary. While Thurin keeps Stahl aware of what is going on in his area of responsibility, it is Thurin who is responsible for the daily supervision of the six employes and for handling any problems in that regard.

Unlike the former incumbent in the Working Foreman position, Thurin performs no mechanic duties and spends most of his time directing the employes, making assignments as to the repair of equipment and dealing with salespeople regarding the purchase of equipment, tools and services.

2/ City of Mauston, Dec. No. 21424-E (WERC, 11/93); Wood County, Dec. No. 9140-B (WERC, 5/92); City of Lancaster, Dec. No. 27180 (WERC, 2/92); Muskego-Norway School District, Dec. No. 1085-A (WERC, 12/91); Kenosha County (Brookside Care Center), Dec. No. 19435-C (WERC, 9/91).

3/ Id.

4/ City of Cudahy (Library), Dec. No. 26680 (WERC, 11/90).

We have concluded that the record establishes that the indicia of supervisory status are present in sufficient combination and degree to establish that the position of Building, Grounds and Shop Supervisor is supervisory in nature. Having reached that conclusion, we find it unnecessary to consider the claimed managerial status of the position.

Dated at Madison, Wisconsin this 7th day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner