

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Involving Certain Employees of

SAUK COUNTY

Case 1
No. 54512
ME-856

Decision No. 6762-A

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

Mr. Todd Lieberman, Corporation Counsel, Sauk County, 505 Broadway, Baraboo, Wisconsin 53913, appearing on behalf of Sauk County.

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

Wisconsin Council 40, AFSCME, AFL-CIO, on October 1, 1996, filed a petition requesting that the Wisconsin Employment Relations Commission clarify an existing collective bargaining unit consisting of certain employees of the Sauk County Highway Department to determine whether the position of Operations Foreperson in the Solid Waste Department should be included in the unit. The County opposes the petition arguing it is inappropriate to clarify a Solid Waste Department employe into a Highway Department unit; the Foreperson does not have a community of interest with the Highway Department employees; and that, in any event, the Foreperson should only be added to the unit if he so votes.

No. 6762-A

Hearing was held in Baraboo, Wisconsin, on May 13, 1997, by Examiner Debra L. Wojtowski. The hearing was transcribed and the transcript was received on May 22, 1997. Briefing was completed April 16, 1998. The record was closed July 16, 1998, upon receipt of a letter from Teamsters Local 695 disclaiming any interest in the Foreperson position.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Sauk County, herein the County, is a municipal employer and has its offices at 505 Broadway, Baraboo, Wisconsin 53913.

2. Wisconsin Council 40, AFSCME, AFL-CIO, and its affiliated Local 360, herein the Union, is a labor organization and has its offices at 8033 Excelsior Drive, Madison, Wisconsin 53717-1903.

3. On April 27, 1964, the Union filed a petition asking that an election be held among the members of the bargaining unit consisting of: "All employees of the Sauk County Highway Department except the highway commissioner, supervisory personnel, and the commissioner's confidential secretary." In SAUK COUNTY, DEC. NO. 6762 (WERC, 6/64) the Commission directed an election in the following unit:

All employees of Sauk County, employed in the Highway Department, including the timekeeper and excluding the Highway Commissioner, the Patrol Superintendent, Office Manager, confidential secretaries, and foremen.

Following an election, the Commission certified the Union as the exclusive collective bargaining representative of the Highway Department.

At all times germane to this matter, the parties have had a collective bargaining agreement containing a recognition clause essentially the same as the unit description set forth in Decision No. 6762.

In addition to the Highway unit, there is a County law enforcement unit represented by the Wisconsin Professional Police Association; a public health and human services unit represented by the United Professionals; a courthouse unit represented by the Teamsters; and a health care center unit represented by AFSCME.

4. The County Highway Department responsibilities include the maintenance of State, County and local highway systems and the construction of County roads. The Department is headed by a Highway Commissioner who reports to the Sauk County Transportation and Parks Committee, which Committee in turn reports to the County's Board of Supervisors.

The County also has a Solid Waste Department, whose responsibilities include the operation, construction and maintenance of the County's landfill. It is headed by a Solid Waste Manager who reports to the Environmental Resources Committee. That Committee reports to the County's Board of Supervisors.

5. When the first County landfill site opened in the early 1970's, the Highway Department provided the manpower and machinery for the operation of the landfill and billed the Solid Waste Department for the use of its personnel and machines. In March of 1983, the County opened its second, and still operating, landfill site on the same property as the first, and contracted the management and operation of the landfill to a private party. The contractor provided the machinery and manpower necessary to perform the day-to-day operation activities at the landfill.

In 1996, the County resumed management and operation of the existing landfill site and at that time employed two half-time scale operators in addition to the Solid Waste Manager in the Solid Waste Department. In November, 1996, the County undertook a reorganization of the Solid Waste Department in connection with its purchase of an automated scale. The County initially considered creating one full-time Assistant Facility Manager/Equipment Operator position and one half-time Equipment Operator position and eliminating both half-time scale operator positions. Ultimately the Board of Supervisors chose to employ instead one part-time scale operator, and one new full-time position called an Operations Foreperson. In a letter dated December 14, 1995, the County stated that the previously proposed position of Equipment Operator was more in line with those positions represented by the Union in Highway Department and therefore would be appropriately placed in that unit. The letter also invited the Teamsters and Union business representatives to discuss this issue and indicates that if the County did not hear from either representative, it would assume the position belonged in the Highway unit

The County Human Resources Director then sent the following letter dated July 16, 1996, to the Union:

With regard to your recent question regarding the Landfill Operation and it's (sic) staffing, after reviewing the sequence of events, I feel I can now accurately bring you up-to-date (sic) on the staffing situation.

INITIAL PROPOSAL: Both Part-Time Scale Operator positions (Teamsters) were to be eliminated in 1996 and replaced by an automated scale system. An Assistant Facility / Equipment Operator position was to be created and certified, that in the absence of the Facility Operator would meet statute requirements (WIS Admin Code - Chapter NR524 : Landfill Operator Certification Ruling). And finally, a Part-Time Equipment Operator position was to be created to fill in for the Assistant Facility / Equipment Operator as needed (i.e. sick leave, vacation, other periods of unavailability) - this was the position that Sauk County intended to be a represented position by AFSCME.

PROPOSAL THAT MADE IT THROUGH THE BUDGET PROCESS AND WAS IMPLEMENTED: What came out of the budget process was this proposal -One Part-Time Scale Operator position (Teamsters) was eliminated, the other Part-Time Scale Operator position was left intact to run the automated scale system, which was purchased and is due to go on line sometime in August 1996. The Assistant Facility / Equipment Operator (with state certification as a Site Operator per state statute cited above) was hired and put in place. The Part-Time position of Equipment Operator was withdrawn in the budget process, with the agreement that the Highway Department would provide relief operators as needed (this has actually transpired twice in 1996). Because of the 2nd in command role / responsibility and supervisory authority over the Landfill operations and staff in the absence of the Facility Operator, the Assistant Facility / Equipment Operator (State certified) is classified as a Non-Represented / Exempt position.

Hopefully, this letter clarifies the issue. If you have further questions, please feel free to contact me directly.

As part of its final determination of which positions were needed in the Solid Waste Department, the County decided to rely on Highway Department Equipment Operators for relief and fill-in work. This work includes the day-to-day site operations performed with three kinds of heavy machinery: a landfill compactor, bulldozer and a front-end loader. At the Highway Department, employees customarily use bulldozers and front-end loaders, but not landfill compactors. The landfill compactors are not dissimilar to soil compactors used in the Highway Department, but in landfill operations are used differently. The Highway Department employees providing relief work at the landfill site operate all three of the landfill machines.

6. On February 12, 1997, the County hired Steven Hartz into the newly created position of Operations Foreperson in the Solid Waste Department as a permanent County employee. During the month immediately preceding his hire as a permanent employee, Mr. Hartz worked in the same position as a limited term employee. Mr. Hartz also worked at the landfill prior to his hire in conjunction with the contractor who operated the site for the County. Mr. Hartz works full-time Monday through Friday. He reports to the Solid Waste Manager, a position occupied by John Carroll, who works the same schedule. Hartz, Carroll, and Jennifer Hartz, the part-time scale operator, comprise the entire Solid Waste Department. Jennifer Hartz was hired as a part-time scale operator in March of 1997, and works each Friday, the one day the landfill is open to the public, and Ms. Hartz, who is in the Teamsters' bargaining unit, is needed on that day to make change. The remaining days, i.e. Monday through Thursday, the landfill scale operations are automated and computer operated. At the time of the hearing Ms. Hartz had worked a total of four days.

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

CONCLUSION OF LAW

1. Where the bargaining unit is limited to employees of the Highway Department, the Union cannot obtain representational rights for any non-Highway Department positions by means of a unit clarification proceeding.

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

ORDER CLARIFYING BARGAINING UNIT

The Operations Foreperson in the Solid Waste Department shall continue to be excluded from the Highway Department unit.

Given under hands and seal at the City of Madison, Wisconsin, this 25th day of November, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

I concur:

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

SAUK COUNTY

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

DISCUSSION

Initially, we must determine whether the Union's effort to add the Operations Foreperson to the Highway Department unit through a unit clarification petition is barred by the scope of the collective bargaining unit. The Commission repeatedly has held that where the parties have agreed to include or exclude certain positions from the bargaining unit, it will not allow either party to alter the unit's scope through a unit clarification petition unless:

1. The positions in dispute did not exist at the time of the agreement; or
2. The positions in dispute were voluntarily included or excluded from the unit because the parties agreed that the positions were or were not supervisory, confidential etc.; or
3. The positions in dispute have been impacted by changed circumstances which materially affect their unit status; or
4. The existing unit is repugnant to the act

CITY OF SHEBOYGAN, DEC. NO. 7378-A (WERC, 5/89); MANITOWOC COUNTY, DEC. NO. 7116-C (WERC, 11/91); FOREST COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 27552 (WERC, 2/93). See, generally MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 16405-C (WERC, 1/76), and CITY OF CUDAHY, DEC. NO. 12897 (WERC, 9/74).

Here, the parties agree that Exception 1 should be the focal point of analysis. They disagree as to how Exception 1 should be applied to the facts of the case.

Citing our decision in CITY OF RICHLAND CENTER, DEC. NO. 17950-A (WERC, 2/96), the County argues that Exception 1 should be understood to apply here because other County employe positions existed at the time the Highway Department unit was created and that when the parties agreed to a Highway Department unit, the parties agreed to exclude all non-Highway Department positions. The Union counters by arguing that the Exception is inapplicable because the Foreperson position did not exist at the time the Highway Department unit was created.

We conclude the County has the better of the argument. As evidenced by the CITY OF RICHLAND CENTER decision cited by the County, Exception 1 is not to be applied in a literal manner. For instance, if clerical employees are excluded from a bargaining unit, that generic exclusion governs the bargaining unit status of a newly created clerical position, even though in a literal sense the newly created position did not exist at the time the parties agreed to exclude clerical employees. Where, as here, the parties have agreed to a departmental unit, they have necessarily also agreed that all non-department employees should be excluded. Thus, although the newly created Foreperson position obviously did not exist at the time the Highway Department unit was created in 1964, positions outside the Highway Department did exist. It is this generic view of Exception 1 which controls the outcome of this case. The Foreperson position is a non-Highway Department position. Non-Highway Department positions existed at the time of the creation of a Highway Department unit. Thus, the position in dispute existed at the time of the parties' agreement to a Highway unit and a unit clarification is not an available means by which to seek representation of the position.

In reaching this conclusion, we acknowledge that at one point in time the County was apparently willing to voluntarily place a Solid Waste Department Equipment Operator position (with duties very similar to the Operation Foreperson's) in the Highway Department unit. The County's willingness to modify the unit does not prejudice its position in this litigation. Parties are always free to modify existing bargaining units by mutual agreement. However, if such a voluntary modification does not take place, parties are entitled to continue to rely on the unit structure to which they have previously agreed.

Should the Union wish to seek to represent the employe in question, it may do so in the context of an election petition in a residual unit. CITY OF ANTIGO, DEC. NO. 29391 (WERC 6/98); CITY OF STURGEON BAY, DEC. NO. 27106 (WERC, 12/91); WAUKESHA COUNTY, DEC. NO. 26020-A (WERC, 9/89)

Dated at Madison, Wisconsin, this 25th day of November, 1998

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

CONCURRING OPINION OF COMMISSIONER A. HENRY HEMPE

I join my colleagues in denying the Union's petition for clarification of the bargaining unit. I do so because I regard a petition for unit clarification as an inappropriate procedural vehicle to carry the facts of this case.

The petition for unit clarification seeks to expand the existing bargaining unit by the accretion of one employe from outside the Highway Department, but fails to reckon with any remaining unrepresented Sauk County blue-collar employes. Moreover, while a community of interest sufficient to justify inclusion of the subject position in the Highway Department bargaining unit arguably exists, alteration of the composition and description of an existing bargaining unit should be by election, not accretion, if anti-fragmentation concerns can also be met. CITY OF WATERTOWN (WASTE WATER TREATMENT PLANT), DEC. NO. 24798 (WERC, 8/87)

Thus, I agree with the result reached by the majority. I am uncomfortable, however, with the route taken by the majority to the destination we both reach.

As the majority correctly notes, this Commission has repeatedly held that where the parties have agreed to include or exclude certain positions from the bargaining unit, it will not allow either party to alter the unit's scope through a unit clarification petition unless:

1. The positions in dispute did not exist at the time of the agreement; or
2. The positions in dispute were voluntarily included or excluded from the unit because the parties agreed that the positions were or were not supervisory, confidential etc.;
3. The positions in dispute have been materially impacted by changed circumstances which materially affect their unit status; or
4. The existing unit is repugnant to the Act.

FOREST COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 27552 (WERC, 2/93); CITY OF SHEBOYGAN (WATER DEPARTMENT), DEC. NO. 7378-A (WERC, 5/89)

Understandably, the parties have focused on Exception 1.

The parties agree that the position of (landfill) operation foreperson did not exist at the time of its agreement. Indeed, Sauk County's Solid Waste Department (that is responsible for landfill site operations) did not come into existence until several years following the County's voluntary recognition of the Highway Department bargaining unit.

The majority also recognizes this. The majority concludes, however, that “. . . the County has the better of the argument,” because “. . . Exception 1 is not to be applied in a literal manner.” Citing CITY OF RICHLAND CENTER, the majority decides that the existing unit description generates, by inference, a generic exclusion of positions not contained within the Highway Department: this, according to the majority, precludes any efforts to add positions to the unit from outside the County’s Highway Department.

But, in my view, CITY OF RICHLAND CENTER offers only tepid support, at best, for the more subjective interpretation of Exception 1 favored by the majority. Unlike the instant matter, CITY OF RICHLAND CENTER did not involve the proposed accretion of only one employe, but three. Unlike the instant matter, CITY OF RICHLAND CENTER did not deal with a bargaining unit limited to only one department, but one spread over five. Unlike the instant matter, in CITY OF RICHLAND CENTER the community of interest between the existing unit and the employes proposed for accretion was not compelling. And finally, unlike the existing matter, CITY OF RICHLAND CENTER did not raise any anti-fragmentation considerations.

Put another way, the interpretative subjectivity the majority invokes today to decide the issue of this case requires a more attenuated stretch than our rationale in CITY OF RICHLAND CENTER. Indeed, what seemed an allowable stretch in RICHLAND CENTER in this matter becomes a virtual leap. In any event, I am unsure reliance on our action in RICHLAND CENTER adequately spans the gap presented today.

However, in my opinion examination of Exception 4 yields the same result as that reached by the majority, but without the exertion of the additional interpretative stretch as to Exception 1. Exception 4 asks if the existing unit is repugnant to the Act. Consideration of this exception necessarily requires consideration of any relevant statutory mandate.

One such mandate is found in Sec. 111.70(4)(d) 2.a. and provides, in part, as follows:

2. a. The Commission shall determine the appropriate collective bargaining unit for the purpose of collective bargaining and shall, whenever possible, unless otherwise required under this subchapter, *avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force . . .*” (Emphasis supplied)

Applied to the instant matter, this mandate appears to require that disposition of any unrepresented Sauk County blue-collar employes not take place piece-meal, as would be the case if we were to approve the unit clarification petition. This is particularly true because accretion of the operator foreperson into the Highway Department unit without disposition of other unrepresented blue-collar Sauk County workers leaves open a potential alley of fragmentation with respect to them.

If, on the other hand (as the majority suggests) a representation election were proposed for a residual blue-collar unit (that included the operator foreperson), the anti-fragmentation statute is not a barrier.

Taking this a step further, if a majority of the proposed residual unit voted for the same collective bargaining representative as that of the Highway Department unit, there seems no legal reason why accretion of the residual unit to the other could not then take place. STEVENS POINT SCHOOLS, DEC. NO. 7713-A (WERC, 8/89) Under this circumstance, enforcement of the parties' original bargain restricting the Highway Department unit to only Highway Department positions would be as repugnant to the anti-fragmentation statute as accretion of a single blue-collar position from outside the Department appears to be today.

Dated at Madison, Wisconsin, this 25th day of November, 1998.

A. Henry Hempe /s/

A. Henry Hempe, Commissioner