

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of : Case 6
CITY OF MILWAUKEE : No. 41277 ME(u/c)-295
 : Decision No. 6960-J
Involving Certain Employees of : (originating as Case 6
CITY OF MILWAUKEE : No. 8633 ME-21)
 :

Appearances:

Mr. Grant F. Langley, City Attorney, by Mr. Stuart S. Mukamal,
Assistant City Attorney, City Hall, Milwaukee, Wisconsin 53202,
appearing on behalf of the City.
Mr. E. Campion Kersten, Kersten & McKinnon, 231 West Wisconsin Avenue,
Milwaukee, Wisconsin, appearing on behalf of Technicians, Engineers,
Architects of Milwaukee (TEAM).

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

On October 19, 1987, the City petitioned the Commission for an order clarifying an existing bargaining unit represented by TEAM so as to exclude either as supervisory or managerial, five Civil Engineer IV positions in the Construction Division of the City's DPW Bureau of Engineers currently included in that unit. Pursuant to notice, a hearing was conducted in the matter at Milwaukee City Hall on February 22, 1988 by Marshall L. Gratz, a member of the Commission's staff. The parties agreed that the Commission should take administrative notice of the contents of its case file in the proceedings that led to the establishment of the subject bargaining unit at issue herein, and the parties were afforded an opportunity to review those file materials during the hearing.

The City submitted its initial brief on March 17, 1988. TEAM submitted its initial brief on August 5, 1988. Briefing was completed with the City's submission of its reply brief on August 26, 1988. The Commission has considered the record and, being fully advised in the premises, issues the following Findings of Fact, Conclusions of Law and Order in this matter.

FINDINGS OF FACT

1. The City of Milwaukee (herein City) is a municipal employer with offices at City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202. The Construction Division of the Bureau of Engineers of the City's Department of Public Works (herein Division) is responsible for inspecting outside contractor's construction and reconstruction projects on public streets, sewers and water systems within the City.

2. Technicians, Engineers and Architects of Milwaukee, (herein TEAM), is a labor organization with a mailing address of c/o Mr. E. Campion Kersten, Kersten & McKinnon, 231 West Wisconsin Avenue, Milwaukee, Wisconsin 53202-2368.

3. On October 19, 1987, the City petitioned the Commission to clarify the bargaining unit of City employees represented by TEAM and described in Finding of Fact 4, below, by excluding therefrom the five Civil Engineer IVs in the Division. Specifically, the City requested exclusion of the positions held by Robert Hirsch, Walter Graetz, Donald Tabaska and Joseph Novotny (referred to herein as Field Engineers), on the grounds that their positions are supervisory. The City also requested the exclusion of the position held by Francis Rutkowski on the grounds that it is managerial. At the hearing conducted in the matter, the City modified its petition by adding that Rutkowski's position should also be excluded because it is supervisory.

4. On May 24, 1965, in Dec. No. 6960-A, following an election conducted by the Wisconsin Employment Relations Board (herein WERB), as the Commission was then known, TEAM was (and is presently) certified as exclusive representative of "all

regular professional engineering and architectural employees, including Engineering Technicians IV, V and VI employed by the City of Milwaukee, excluding all other employees, confidential employees, supervisory employees and executives." During the course of the adjudicative proceedings leading to that election and certification, the WERB ruled on a dispute as to whether the Civil Engineers IV in the Construction Division of the DPW Bureau of Engineers should be excluded as supervisory. The WERB ultimately concluded that none of these positions were supervisory and that all of them were properly included in the unit and among the eligibles. The WERB applied the same decisional standards as the Commission applies presently in resolving supervisory status disputes. The WERB did not have before it a separate question of whether any of said positions were managerial and, if it had, the Commission would not have applied the same decisional standards as the Commission presently applies in resolving managerial employee status disputes.

5. When those WERB determinations were rendered in late 1964 and 1965, three Division positions were excluded as supervisors, the Engineer in Charge and two Civil Engineers V. According to the City's Visual Organizational Inventory at those times, the Division was organized into three subdivisions, identified as "Office", "Sewer and Water Construction Section", and "Street Construction Section." Each of the latter two sections was headed by an excluded Civil Engineer V, and the Engineer in Charge headed both the Office subdivision and the Division as a whole. In contrast, the Division at present has come to have only two excluded positions, the Engineer in Charge (Jahnke) and one Civil Engineer V (Rach), with both of those supervisors supervising the office staff and with both bearing Division-wide responsibilities. The former separation between sewer and water/street functions has been eliminated such that all of those functions are performed by a combined technical staff consisting of some 36-40 Public Works Inspectors and Civil Engineers I and II. The City has been geographically divided into four parts, with Civil Engineers IV Hirsch, Graetz, Tabaska and Novotny responsible for the work of the combined technical staff in one of the four geographic areas. As a consequence, there is no longer a separate level of excluded supervision between the Division supervisor(s) with Division-wide responsibilities and the technical staff performing the inspection work in the field. That represents a material change in circumstances relative to the circumstances existing in 1964 and 1965.

7. The Division currently consists of approximately 52 positions, of which two are presently excluded as management (supervisory and/or managerial). The highest ranking and highest paid Division employees below Jahnke and Rach hold the five Civil Engineer IV positions at issue herein. The four Field Engineer positions held by Hirsch, Tabaska, Novotny and Graetz (referred to herein as Field Engineers and also known as Construction Supervisors) are the highest ranking individuals with responsibilities limited to the field work of the now-combined of sewer, water, street pool of subordinates in classifications of Public Works Inspector II (of whom there are 36, all represented by AFSCME), Civil Engineer II (of whom there are two, represented by TEAM) and Civil Engineer I (of whom there is one, represented by TEAM). The fifth Civil Engineer IV position, referred to herein as the Office Engineer and also known as the Office Engineer/Technical Studies/Road Life Research position, is held by Rutkowski who spends a majority of his work time in the downtown office and a minority of his time in the field. In addition, he has backup supervision responsibilities with respect to the office staff of four, and he fills-in in the field to cover for vacation and other absences of the other four Civil Engineers IV in the Division. The work performed by the Field Engineers differs from that performed by their subordinates. On any given day between 6 and 14 technical staff members are performing inspection work in a single geographic area.

position to observe, correct and report on the performance of those employees. The Field Engineers prepare semi-annual evaluations of the field inspection personnel, rating them in six performance categories, and sometimes adding additional comments. Relying on these evaluations, the Chief Construction Engineer produces a single, summary evaluation for each field inspection employee. The field inspection employees only see the summary, but the underlying Field Engineers' reports are preserved by the City. Poor evaluations can have adverse job status effects for individuals receiving them. The Field Engineers also prepare evaluations of probationary employees' progress, which evaluations can affect the future job status of those probationers, as well. The Field Engineers also have the authority to recommend disciplinary actions regarding the field inspection subordinates. Field Engineer Hirsch has initiated two such actions, both written warnings, in the last year. He discussed these actions with the Engineer in Charge who also signed the discipline notice and who issued it. No discipline recommended by Hirsch has been rejected by his superiors. Field inspection staff members' requests for sick leave or changes in a previously scheduled vacation pick are taken up with the Field Engineer only if the Chief Construction Engineer is unavailable. Subordinates' requests for emergency time off are directed to the Field Engineers, who decide whether the employee can be spared in light of their knowledge of the work needs in their area. The Field Engineers also serve as the first step recipients of field inspection staff members' grievances.

9. There are currently 12 other Civil Engineer IVs employed in the Bureau of Engineering. They are employed in three of the five other Divisions of the Bureau. Each of those Civil Engineer IVs is excluded from the TEAM bargaining unit as management. Some of those exclusions were imposed by the WERB when the initial decisions concerning disputed statuses were made in the mid-sixties, but others of them have come about since that time without WERC participation, apparently by mutual agreement or acquiescence of the parties.

10. Rutkowski's Office Engineer position, also known as the Office Engineer/Technical Studies/Road Life Research position, is responsible for preparing guarantee reports which determine whether contractors must make corrections in their work before being released from their three-year performance bonds. He also updates Road Life Files, which document the status of various road surfaces. He performs research and development, evaluating various new products. He develops and authorizes specialty contracts and contracts for work to be performed by outside consultants, but he does not himself present those requests to the Common Council. He is a member and secretary of the Pavement Type Committee which decides which type of pavement, asphalt or concrete shall be applied to various roads. He trains new field inspection personnel if they are unfamiliar with the requirements of that work. About ten percent of his work time is spent substituting for Field Engineers. Although he is thus able to observe the technical staff members in the field he does not formally participate in the evaluation process. Nor is there any evidence he has participated in any discipline of the technical staff. He supervises the office staff only in the absence of both Rach and Jahnke.

11. Each of the four Field Engineers possesses supervisory authority in sufficient combination and degree to render his position supervisory. Rutkowski, the Office Engineer, does not.

12. Rutkowski does not participate in the formulation, determination and implementation of management policy to a sufficiently significant degree to warrant his exclusion as a managerial employee. He does not possess the effective authority to commit the employer's resources in a manner that significantly affects the nature and direction of the employer's operations.

CONCLUSIONS OF LAW

1. The material change in circumstances noted in Finding of Fact 5, above, is sufficient to warrant Commission determination of the merits of the City's contention that the Civil Engineers IV at issue herein are supervisors.

2. The Commission's prior inclusion of Civil Engineers IV in the subject bargaining unit is not a sufficient basis for declining to consider the City's contention that the Civil Engineer IV position held by Rutkowski is managerial.

3. The Civil Engineer IV positions held by the four Field Engineers are supervisory within the meaning of Sec. 111.70(1)(o)1., Stats.

4. The Civil Engineer IV position held by the Office Engineer (Rutkowski) is neither managerial nor supervisory and thus Rutkowski is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

ORDER 1/

1. The Civil Engineer IV positions in the Division of Construction of the Bureau of Engineers of the City's Department of Public Works, currently held by Robert Hirsch, Walter Graetz, Donald Tabaska and Joseph Novotny, shall be and hereby are excluded from the subject bargaining unit represented by TEAM.

2. The Civil Engineer IV position in the Division of Construction of the Bureau of Engineers of the City's Department of Public Works, currently held by Francis Rutkowski, shall continue to be included in the subject bargaining unit represented by TEAM.

Given under our hands and seal at the City of
Madison, Wisconsin this 24th day of May, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner
A. Henry Hempe
A. Henry Hempe, Commissioner

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

(Footnote 1/ is continued on page 5.)

(Footnote 1/ continued from page 4.)

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.

(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.

CITY OF MILWAUKEE

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

POSITION OF THE CITY

The five disputed Civil Engineer IV positions in the Construction Division were erroneously included in the TEAM bargaining unit from the outset over 20 years ago. All the other Civil Engineers IV in the Bureau of Engineers, some of whom were at one time in the TEAM unit, have all come to be excluded, and there is no justification for treating the Construction Division's five Civil Engineers IVs differently. The City has sought TEAM's agreement to exclude these remaining five but despite the undisputed City needs in this regard, TEAM has been unwilling to address the City's effort to correct the situation.

The fact that these five individuals have been in the TEAM unit since its inception is irrelevant to the propriety of their continued inclusion under applicable statutory and caselaw standards. Commission criteria for supervisory, confidential and managerial determinations focus (and necessarily so) on the actual duties and responsibilities of the individuals concerned and the Commission must apply the various decisional criteria developed and consistently maintained over the years in determining such statuses. The Commission's criteria for determining supervisory and managerial status do not include any consideration of the fact or length of historical bargaining unit placement.

The four Civil Engineers IV serving as Field Engineers (referred to by the City as Construction Supervisors) supervise the Division's field operations. While highly skilled and responsible, the technical staff (some 36-40 employees in classifications of Public Works Inspectors and Civil Engineers I and II) requires supervisory direction and discipline from above. Most of that comes from the Field Engineers who are the only supervisors in the field with any regularity. The Construction Supervisors travel site to site, direct day-to-day operations of the technical staff in the field, and are primarily responsible for the ongoing oversight of the quality of the staff's work and the evaluation of its performance. The technical staff personnel work on worksites city-wide, whereas the two higher level supervisors in the Division work almost exclusively in the Downtown office and seldom have occasion to work or directly observe subordinates working in the field. The Field Engineers are management's representative at the first step of the grievance procedure, they initiate written warnings and recommendations for more severe disciplinary measures, and they provide data for performance evaluations affecting promotability and employment status of the technical staff.

The Field Engineers do not perform the same type of work as is performed by the Public Works Inspectors and Civil Engineers I and II comprising the technical staff. Even the professional engineering work performed by the Field Engineers in the field indirectly impacts upon their ability to supervise in that it affects the nature and type of follow-up work that they assign the technical staff, and it provides the only first-hand look that Division supervision has available to it regarding the quality of the contractor oversight performed by the technical staff members in the field.

Historically, the technical staff has decreased by 40% from 1965 to the present while the number of Field Engineers has been cut by 50% from 8 to 4 over the same period. The City's proposed ratio of Division supervisors to technical staff in the field is 6 to 39 which is by no means unreasonably high. In contrast, the existing ratio is a "bottom heavy" 2 to 43.

Despite its reduced ranks, the Division has been experiencing increasing demands for completion of projects in a speedy and minimally intrusive manner. As a result, there has been an increased need for field supervision on nights and weekends. This "off hours" supervision is now inappropriately being done by top division management (Jahnke and Rach) because of the undue cost and administrative difficulty imposed by the TEAM agreement if it were to be assigned to the Field Engineers where it belongs.

The fact that the Field Engineers' engineering expertise is needed in their exercise of supervisory responsibilities over the technical staff does not detract from their status as supervisors. Neither does the presence in the Division of

two higher-level supervisors, Rach and Jahnke. Of necessity, those two cannot spend much time in the field, and they are spending more than they should already. While those two may make final decisions on more serious matters of discipline and on the overall performance evaluations, it is the Field Engineers who will be effectively recommending discipline as regards all of their subordinates in the future. While it is true that disciplinary decisionmaking has been bucked up to top Division supervision with regard to fellow TEAM members to avoid an otherwise unseemly conflict of allegiances situation, the Field Engineers have exercised almost plenary supervisory and disciplinary authority over the AFSCME-represented inspectors and the other non-TEAM subordinates in the Division. However, the evidence also shows that their responsibility for discipline of TEAM unit members will be increasing in the future. The Field Engineers also provide the primary source of input for periodic performance evaluations of the technical staff, which recommendations and input are given great weight.

While the City does not consider it necessary for it to show that there has been "change of circumstances" in this case, there have been changes over time which illustrate the increasing share of the supervisory workload that must of necessity be assumed by the Field Engineers and the futility of nominally operating the field aspects of the Division's work under only two supervisors when there have, in reality, long been six. Those changes have included greater emphasis on Field Engineers' disciplinary authority, greater emphasis on reconstruction rather than new construction (with consequent increases in the need for weekend and evening inspection work), and a somewhat increased ratio of supervised to supervisors in the Division over that extant in 1965.

Accordingly, the Commission should conclude that the four Field Engineers Supervisors meet the MERA criteria for supervisory status in sufficient combination and degree to warrant their exclusion from the unit on that basis.

The same conclusion should follow as regards the Office Engineer position currently held by Francis Rutkowski. He spends approximately 10% of his time as a backup Field Engineer, filling in for the increasing absences of the relatively-senior Field Engineers. Rutkowski is also responsible for training and orienting new technical staff in the field, spending an estimated 5-15% of his time doing that. He also serves as backup supervisor of the Division's office personnel. In contrast, he spends virtually no time performing the same work as is performed by the non-Civil Engineer IV members of the TEAM bargaining unit.

In any event, Rutkowski's position is managerial. Rutkowski's responsibilities span a wide range of vital functions essential to the formulation and implementation of the policies guiding the work of the Division. As primary administrator of the "three-year guarantee" program, he determines whether contractors' work has stood the test of time. He implements policy frequently in effectively recommending whether to require a contractor to make repairs or instead to certify project completion allowing release of the contractor and sureties. In administering the Road Life Files, developing and implementing the Pavement Management System, evaluating new paving products and processes, managing specialty contracts with outside consultants, and serving as a member of and Secretary for the Pavement Type Committee, he has significant roles and responsibilities in the formulation and implementation of the City's critically important policies concerning how to meet the City's present and future paving needs. It is inevitable that Rutkowski would be consulted and influential with respect to whatever policies would be adopted by the Bureau in the areas affected by his work.

In the above functions, Rutkowski exercises significant independent judgment. For example, he decided on his own authority to add "house number" information to the most recent annual volume of the Bureau's annual "streets under guarantee" report. He personally inspects projects nearing the end of the three-year guarantee period and effectively recommends whether the City should or should not release the contractors and their sureties from further possible liability in connection with those projects. Predecessors in his position conceived of the idea, drafted specifications and worked closely with the consultant selected during preparation and issuance of the specialty consultant's report on comprehensive pavement testing. While higher authority approval was needed for the contract, it was Rutkowski's position that often conceived the need and scope of such a study. Rutkowski is personally directing a staff of three in studying and making recommendations as to the future of the guarantee program.

For those reasons, then, Rutkowski should be excluded as managerial and supervisory.

POSITION OF TEAM

The City has failed to show that any of the five positions are either supervisory or managerial.

The WERB long ago heard, decided and thereby settled questions as to the status of each of the positions in question. The stated reasons for inclusion were that these positions were paid more than their technical staff colleagues primarily because of their professional skills/contributions and not for supervisory functions and that the supervising they do is primarily of activities rather than of employees.

The City has shown no significant change of circumstances to warrant a review of this previously-adjudicated matter. The pertinent ratios of superiors to subordinates have remained about the same as in the 1960's. While the quantity of the work and demands concerning the manner and timing of its completion may have changed, the technology available for the Division to perform its work have made the Division's personnel more efficient. The City has claimed that changed demands on the Division have led the City to have higher officials do field supervision work during off hours to avoid having Civil Engineer IV's put in overtime. But the City's decision to do so stems from its desire to avoid paying TEAM contract overtime premiums, and that is obviously not a reason to change the status of the Construction Division employees in question.

Even if the Commission were to reach the merits of the City's supervisory contentions, the evidence shows that the Division's Civil Engineers IV are not supervisors. The City has made no substantial claim that the disputed positions have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign or reward other employees or to effectively recommend such action. Any recommendations they make regarding discipline and the adjustment of grievances, are not "effective" since they are not acted upon without meaningful review and approval by higher authority. Their mere authority to direct day-to-day work activities is not enough to render them supervisors.

The presence and availability of Division supervisors Rach and Jahnke means that any supervisory authority exercised by the Field Engineers does not involve a significant degree of independent judgment. They can give warning notices only in consultation with the Engineer in Charge. The Field Engineer's role in evaluation is limited to making observations and passing them along. The actual evaluations are made by higher-ups based on the forms checked off by the Field Engineers, but also upon independent one-on-one interviews conducted by the higher-ups with the technical staff subordinates involved. The Field Engineers primarily supervise the project inspection activity rather than the employees performing that activity, and their supervisory activity is routine in nature. They check and initial the field inspection personnel's reports and logs for completeness, check attendance, authorize simple project work, change orders and simply "pass through" any grievance matters. They can authorize subordinates' time off on their own authority only if the subordinates' jobs are complete and no other work is available. They merely receive telephone notice from employees that are not coming in, but they do not give permission for the sick leave involved. They do no transferring of personnel from one job site to another---Rach does that. Rach and Jahnke are primarily responsible for supervision of the office staff, not Rutkowski. While they can give verbal warnings on their own, Rach's office must be involved before any written warning or more serious discipline is imposed. They can generally recommend that discipline more serious than a verbal warning be imposed, but the decision whether and in what form discipline will be imposed rests with Rach and Jahnke.

Thus, even if the Commission sees fit to redécide the supervisory issue, the Civil Engineer IVs do not possess supervisory authority in sufficient combination and degree to warrant their exclusion as supervisors.

Nor is there merit in the City's contention that Rutkowski is managerial. Rutkowski's important role in the three-year guarantee program involves determining whether, from the engineering point of view, a contractor's project work has held up satisfactorily. This involves expert factual reporting, not policy-making. The same is true of his Road Life File role. Rutkowski's

involvement in the study of pavement voids, in the evaluation of new construction methods and products, and on the Pavement committee involve him in providing engineering expertise, not policy decisions. The mere providing of information---no matter how extensive or sophisticated---to policy makers is not the requisite formulation, determination or implementation of policy. For that reason, and because Rutkowski has not been shown to have been involved in original budgeting or reallocating items within an existing budget, his has not been shown to be a managerial position.

For the foregoing reasons, the City's petition should be dismissed.

DISCUSSION

Effect of Previous Agency Decision

We agree with the City that the mere history of inclusion of the disputed positions, alone, does not condition the City's right to a determination of a position's supervisory/managerial status upon a showing that there have been material changes in the duties and responsibilities of the position. However, where as here, our agency has previously resolved a dispute as to the merits of a claim that the disputed positions are supervisory, that previous determination is entitled to considerable weight unless some material change is shown to have occurred in the interim. Were we to operate otherwise, a party dissatisfied with a Commission position status determination issued on one day could require the agency to conduct a new hearing and make a new decision on the same dispute merely by filing a new petition. For that reason, we find it appropriate, as TEAM suggests, to expect that the party seeking a redetermination of the status of a position previously disputed and decided on its merits by the Commission to affirmatively show that there has been an interim material change in circumstances that warrants the Commission's redetermination of the previously-decided question. While the Commission could, in its discretion, choose unconditionally to entertain a petition raising a previously decided matter, for a petitioner to have such a matter heard and decided again as a matter of right, it must show a material change in circumstances has occurred.

Here there was a prior adjudication on the merits of a disputed claim that the Civil Engineer IV positions in the instant Division were supervisors. Specifically, on January 18, 1963, following a two-day hearing, the WERB issued a Direction of Election, Dec. No. 6215, in various units in the course of which decision it found it appropriate to establish a separate City-wide craft unit of professional engineers and architects. At the hearing involved, the parties had stipulated that the Board could determine the conflicting claims of supervisory and confidential functions by examining job description sheets, examination announcements, and the like furnished by the City. There was also limited testimony taken with regard to said issues. In the Bureau of Engineers Construction Division it had been stipulated that the Engineer in Charge was supervisory. The status of the following positions was "disputed" and the WERB decided (initially) that they should be excluded as supervisory:

Street Construction Section

Civil Engineer V (Joers)
Civil Engineer IV (Wapp, Seidel, Shapiro)
Civil Engineer III (Balconi, DeMaars, Fuhr, Krafchak,
Mills, White)

Sewer and Water Construction Section

Civil Engineer V (Gerschnke)
Civil Engineer IV (Manske, Richter)

November 30, 1964 union contentions that many positions excluded therein were not truly supervisory, or management, and after receiving December 4, 1964 City contentions to the contrary. In its December 28, 1964 decision, the WERB amended its previous determination so as to include among the eligibles all Civil Engineers IV in the DPW Bureau of Engineers Construction Division except one named (Charles E.) Joers. With regard to the Civil Engineers IV in the balance of the Bureau and City-wide, the Board's December 28, 1964 decision ordered their inclusion in several of the Bureau of Engineering Division and elsewhere in City employment, while continuing to exclude certain other designated Civil Engineer IV positions in some of the same work units. It was in that case that the WERB decided for the first time to exclude supervisors from bargaining units established under Sec. 111.70 even though as that law then existed it did not expressly define or so exclude supervisors. The WERB further stated that in determining whether an employee is a supervisor, the Board considers the following, now-familiar factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
2. The authority to direct and assign the work force.
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees.
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees.
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees.
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees.
7. The amount of independent judgment and discretion exercised in the supervision of employees.

By way of rationale for its amendments of its previous Direction, the WERB stated,

Considering the above factors, where applicable, we have reviewed the job descriptions and related materials furnished by the City of Milwaukee covering the engineering and architectural positions and we now conclude that a number of individuals, whom we previously determined to be supervisors, not included as eligibles in the appropriate bargaining unit, are in fact working supervisors, who, while they are assigned and perform very responsible duties, do not exercise such a degree of direction and control over employees so as to exclude them from the eligibles as supervisors. They are primarily paid for their professional skills and not for their supervisory function. Although they may make recommendations regarding job performances of employees involved in lower classifications in their department or division, they primarily supervise work activities rather than employees.

Prior to the conduct of a vote in that matter, there was further union correspondence to WERB on January 6, 1965, asserting that various additional positions should be moved from the excluded to the included list on the grounds that interim vacancies had been filled such that positions previously pressed into supervisory roles due to vacancies above them were no longer performing supervisory duties. On January 18, 1965, the City wrote WERB, opposing the Union's suggestions and objecting to the bases upon which WERB had reversed its prior determinations that various of the positions in the professional engineering unit were supervisory. The City also pointed out in that letter that the position held by Joers was at the Civil Engineer V level.

Then, on February 5, 1965, the Board issued an amended Direction in Dec. No. 6960-A, wherein it modified the Bureau of Engineers Construction Division

entries such that only the Engineer in Charge (Burmeister) and Civil Engineer V (Gerschke and Joers) were excluded as supervisory and all Civil Engineers IV were included among the eligibles. In the balance of the Bureau and City-wide, there remained some Civil Engineers IV excluded as supervisors and others among them were included among those eligible to vote.

On the basis of that amended Direction, the eligibility list was prepared and the election conducted. Following that election, the Board, on May 24, 1965, certified TEAM as exclusive representative of "all regular professional engineering and architectural employees, including Engineering Technicians IV, V and VI employed by the City of Milwaukee, excluding all other employees, confidential employees, supervisory employees and executives." Dec. No. 6960-A

Thus, this agency decided in the initial election proceeding giving rise to the instant unit that none of the Division's Civil Engineer IV positions are supervisory. That decision was made under the same decisional standards as are presently applied by the Commission. While that decision was made in a proceeding that dealt with a large number of positions, it unquestionably focused in part on a dispute as to whether the Civil Engineers IV in the Division at issue herein were supervisory. That the agency's ultimate decision was not casually reached is underscored by the fact that the agency reversed itself regarding these positions and several other Civil Engineer IV positions by including same in the TEAM unit in its December 28, 1964 decision. While that decision was issued prior to a formal legislative enactment of a statutory definition of a supervisor, the agency applied the very same decisional criteria that the Commission presently applies under the subsequently-enacted statutory definition of supervisor.

In the foregoing circumstances, we are satisfied that the City bears a burden herein of showing that there have been material intervening circumstances before it has a right to redetermination of whether the Division's Civil Engineer IV positions are supervisory.

Dispute as to Whether There Has Been a Material Change of Circumstances

The City has noted that, since the unit's creation, all the other previously-included Civil Engineers IV in the Bureau have been excluded from the TEAM bargaining unit and treated as part of management rather than municipal employees. TEAM has not disputed the City's contention in that regard and the City's evidence bears out that contention. However, there has been no contention or showing that any of those exclusions have been by reason of a Commission determination. The record herein does not indicate the bases on which those exclusions were accomplished. Thus, it cannot be known from the instant record whether there have been material changes in each of those positions which led to a conclusion that there was a basis for their exclusion from the unit. In any event, while TEAM may have been willing for whatever reasons to agree to the exclusion of those other Civil Engineer IV positions, it is clearly unwilling to agree to the exclusion of those at issue herein. Rather, TEAM takes the position that the City has not shown any material change in circumstances such as would warrant this agency's redetermination of the previous decision that these positions are supervisory. In our view, the parties' abovenoted exclusions of other Civil Engineer IV positions in the Bureau originally included by the WERB do not constitute the requisite change in circumstances such as would warrant a reconsideration of the status of the Civil Engineer IV positions in the Construction Division.

However, as noted in Finding 5, above, the "job descriptions and related materials furnished by the City of Milwaukee" which the WERB stated it had based its decision to include the instant positions in 1965 would have shown that at that time the Construction Division's Civil Engineers IV were the second level of supervision within the Division with less than Division-wide responsibility. In contrast, at present there is no longer a separate level of excluded supervision between the Division supervisors with Division-wide responsibilities (Jahnke and Rach) and the technical staff performing the inspection work in the field. We find that to be a material change in circumstances relative to the circumstances existing in 1964 and 1965.

We therefore conclude that the City has a right to have a determination made with regard to whether the Civil Engineer IVs at issue herein should continue to be included in the TEAM unit in light of those changed circumstances.

Dispute as to Supervisory Status of the Field Engineers

As noted above, the Commission applies the abovequoted seven criteria in determining supervisory status under MERA, and we have applied those criteria in reaching our decision in this case. While there is evidence supporting both parties' positions, we find the City's arguments to be, on balance, the more persuasive.

In particular, we find it significant that the four Field Engineers exercise independent judgment in evaluating and disciplining permanent subordinate employees and in recommending promotion of probationers to permanent status. Although the Chief Construction Engineer writes a single, summary evaluation for each inspector, that summary is based on evaluations he receives from the four Field Engineers. While the head of the Division, the Engineer-in-Charge, has final authority in matters of discipline, the Field Engineers effectively recommend disciplinary actions regarding field inspection subordinates and, when such action is taken, it is over the signature of both the Field Engineer and the Engineer-in-Charge or the Chief Construction Engineer. The City must, of necessity, rely heavily on the Field Engineers in these matters, since no other supervisors have the opportunity to observe the work of the Inspectors on a regular basis. Rach and Jahnke have some 50 subordinates in the Division, many of whom work in the field rather than in the office. The sheer number of subordinates involved as well as the geographic separation of Rach and Jahnke from the field personnel underscore the fact that the Field Engineers' evaluations are heavily relied upon in the evaluation process. Taken together with their relatively minor roles regarding some paid leave matters and first step grievance handling, we find the balance tipped in favor of supervisory status.

For the reasons advanced by the City as set forth above, and primarily because of the Field Engineers' essential role in subordinates' evaluation, we conclude that the Field Engineers are supervisors within the meaning of MERA.

Dispute as to the Supervisory Status of the Office Engineer

Unlike the Field Engineers, the Office Engineer does not provide evaluations of Inspectors to be included in the Chief Construction Engineer's summary. Moreover, there is no evidence of the Office Engineer's having initiated any discipline of the Inspectors. While the Office Engineer does train new personnel, the record does not demonstrate that he evaluates new personnel or participates in decisions regarding their permanent job status. For those reasons and because Rutkowski spends only 10% of his time filling in for Field Engineers, we find that his supervisory responsibilities as regards field personnel do not render his position supervisory.

Even when considered with the Office Engineer's supervisory authority in relation to the supervising the office staff, his position does not appear to us to be supervisory. The record does not establish that the Engineer in Charge and the Chief Construction Engineer are both gone from the office for such substantial periods of time that Rutkowski's supervisory responsibilities in their absence is of major significance. There is no evidence of specific supervisory actions taken by Rutkowski with respect to office staff that would indicate that he is called upon to exercise independent judgment in a meaningful range of supervisory authority so as to warrant exclusion of his position as a supervisor.

Dispute as to the Managerial Status of Office Engineer

In determining whether an individual is excluded from the definition of municipal employee set forth in Sec. 111.70(1)(i), Stats., by reason of being a managerial employee, the Commission considers whether the individual participates in the formulation, determination and implementation of management policy to a significant degree or possesses effective authority to commit the employer's resources. Effective authority to commit the employer's resources means authority to take actions which significantly affect the nature and direction of the employer's operations. 2/

2/ Village of Jackson, Dec. No. 25098 (WERC, 1/88); City of Milwaukee v. WERC, 71 Wis. 2d 107 (1976).

We basically concur with the arguments advanced by TEAM on this issue as summarized above.

In fulfilling his highly responsible and professionally demanding duties, the Office Engineer unquestionably utilizes his technical expertise in ways that have financial consequences for the City. Determining whether to release contractors' bonds under the three-year guarantee program, administering the Road Life Files and the Pavement Management Systems, evaluating new products, developing and managing specialty contracts and serving as Secretary of the Pavement Type Committee are all functions that entail considerable independent judgment. The City unquestionably benefits financially when the Office Engineer makes sound choices in these matters, just as an employer benefits when a purchasing agent is able to correctly predict which products will have the lowest life-cycle costs. Nevertheless, the evidence does not persuade us that the Office Engineer, himself, makes policy choices regarding the level of services that the City provides as regards streets, water mains and the like. Rather, we agree with TEAM that he is providing professional engineering advice to assist others in reaching policy decisions.

Arguments similar to those advanced herein by the City were advanced in our recent decision in City of Kaukauna 3/ regarding the alleged managerial status of the Utility Systems Operators who must exercise their expertise in anticipating peak electricity usage and then purchase additional power. The Commission responded to those arguments as follows:

The changes (made by the Systems Operators) require the gathering of information and the application of technical knowledge and experience to deal with the anticipated necessary changes at the lowest cost to the Utility. Although considerable judgment is needed, such does not constitute managerial authority. In essence, the system operators are implementing management policy in a sophisticated manner but are not formulating and determining same. Such a role is similar in nature to that of the City Treasurer in City of Whitewater where the Commission found said position not to be managerial since the duties were essentially advisory and ministerial, even though the duties involved the implementation of management fiscal policy through the research of available investment options and making investment recommendations.

The fact that the system operators perform responsible work with minimal supervision and that incorrect calculations could have an adverse impact on the Utility does not establish managerial status. (footnote omitted)

. . .

Our basic conclusion herein is analogous to that we have historically reached as to the managerial status of attorneys. While such employees possess substantial skill and exercise independent judgment when making decisions which may adversely affect the financial interests of the municipal client, their duties nonetheless fall short of the high policy level authority required of "managerial" employees. (footnote omitted)

We find the basic reasoning in that case applicable herein as well. 4/

For the reasons urged by TEAM and those specifically noted above, we conclude that the Office Engineer is not a managerial employee.

3/ City of Kaukauna (Electric & Water Department), Dec. No. 25580 (WERC, 7/88).

4/ See generally, cases cited at Note 2, above.

Since his position is neither supervisory nor managerial, we have concluded that his position properly remains included in the TEAM unit.

Dated at Madison, Wisconsin this 24th day of May, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner