

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case 2
No. 10258 ME-190
Decision No. 7170-A

Mr. Richard W. Abelson, Staff Representative, Local 1747, AFSCME, AFL-CIO, City of Oconomowoc Employees, 2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of the Union.
Lindner & Marsack, S.C., Attorneys at Law, 700 North Water Street, Milwaukee, Wisconsin 53202, by Mr. Roger E. Walsh, appearing on behalf of the Municipal Employer.

Local 1747, AFSCME, AFL-CIO, City of Oconomowoc Employees, having filed the instant petition with the Wisconsin Employment Relations Commission on June 7, 1984, requesting that the Commission clarify a bargaining unit consisting of all regular full-time employees of the City of Oconomowoc employed in its Parks and Recreation Department and Waste Water Treatment Plant to include the position of Building and Grounds Supervisor; and a hearing having been held in Oconomowoc, Wisconsin, on August 20, 1984, before Sharon A. Gallagher, a member of the Commission's staff; and a stenographic transcript of the hearing having been made; and the period for briefing having ended November 6, 1984; and the Commission having considered the evidence and the arguments of the parties and being fully advised in the premises, hereby makes the following

3. That on July 7, 1965, the Union was certified in Dec. No. 7170 (WERC, 7/65) as the exclusive collective bargaining representative of certain City employees; that thereafter the City and the Union entered into a series of collective bargaining agreements, the most recent of which covers all "regular full-time employees of the City of Oconomowoc employed in its Department of Public Works, Parks and Forestry Department and Waste Water Treatment Plant, excluding Supervisors, Assistant City Engineer, Office Clerical Workers and all other employees of the Municipal Employer."

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4. That on January 3, 1984, the City hired David Simonis as Building and Grounds Supervisor in the Recreation Department; that at all material times the City has treated Simonis as outside the bargaining unit; that on May 15, 1984, the City Council voted to experimentally merge the Parks/Forestry Department with the Recreation Department, forming the Parks and Recreation Department, hereafter referred to as the P & RD; and that this merger was on a trial basis which is set to expire at the end of December 1985.

5. That on June 7, 1984, the Union filed the instant petition asserting that the position of Building and Grounds Supervisor, occupied by David Simonis, should be included in the current collective bargaining unit; and that, contrary to the Union, the City contends that the Building and Grounds Supervisor position is either supervisory or managerial and so should remain excluded from any appropriate collective bargaining unit.

6. That Simonis reports directly to the Director of the P & RD; that the Director is responsible for the combined operations of what formerly constituted the Parks/Forestry and Recreation Departments; that the Director has an Administrative Assistant working for him who types, does office work and payroll, and hires and supervises part-time summer employees (such as sports instructors at the City's parks); that there are approximately five full-time year-round Parks employees and four part-time summer Parks employees; that both before the departmental merger and thereafter to date, the Parks employees were supervised by the Parks Foreman (excluded from the unit) who reports directly to the P & RD Director; that Parks employees perform the following duties: parks maintenance, painting, operating equipment (such as tractors and mowers), building, installing and dismantling large capital improvements (such as the piers at City Park, Library Park and Chestnut Street), tree trimming, stump cutting, tree cutting, and tree planting; that there are four recreation positions that are not included in the unit: baseball coordinator, softball coordinator, aerobics instructor and aquatics supervisor; and that these four report directly to the P & RD Director and at the Director's request they all have submitted proposals with respect to the budgets for their areas of responsibility.

7. That the disputed Building and Grounds Supervisor is responsible for indoor and outdoor improvements, repairs and maintenance needed at City Park, including the beach, band shell, island, community center and warming house buildings; that such responsibility includes, among other things, assuring that the following activities are assigned to and completed by CETA Program and Restitution Program (hereafter RP) workers in the summer season (May through August): preparing softball diamonds, picking up trash, raking the beach, trimming trees, cutting stumps, grass and weeds, removing dead wood from the channel adjacent to the island, and cleaning, improving, painting and repairing the community center, warming house and band shell; that in the fall/winter season such responsibility includes assigning General Assistance Program workers (hereafter GAP workers) to tasks which the Building and Grounds Supervisor also performs such as preparing and repairing tools, building shelves, painting, maintaining and cleaning City Park buildings; and that Simonis, the current Building and Grounds Supervisor, basically performed these same duties and responsibilities before and after the merger.

8. That during the summer season, 1984, six CETA Program and two RP workers were accepted by the P & RD Director to work for the City under the Building and Grounds Supervisor's direction; that these eight workers were accepted after they were interviewed either by the P & RD Director and Simonis or Simonis and the P & RD Administrative Assistant; that Simonis has never interviewed any applicant alone; that the interviews were not to select individuals but were to determine if the potential workers had any undesirable characteristics and to advise them of City work rules; that the P and RD Director has directed Simonis to cooperate with the RP; that Simonis has no control over the pool of RP applicants referred for work; that Simonis recommended that each of the RP and CETA workers he interviewed be accepted for work by the P & RD Director; that the Director has never rejected an applicant from CETA or the RP; that CETA workers are referred to the City by the Wisconsin Job Service while RP workers are persons who would otherwise pay a fine and/or serve time in jail if they did not work off the fine and/or jail time in the City's "employ"; that RP workers are not paid for their work; that during the summer season Simonis spends approximately 80-90% of his work time on the following duties: assigning tasks to and watching the work of CETA, RP and, at times, transferred Parks workers and transferring, at the Parks Foreman's request, CETA and RP workers to Parks and

requesting that Parks employees be transferred to his section; that during the summer Simonis spends about 10-20% of his time instructing workers on how to perform assigned tasks, personally sharpening mower blades, filling out monthly reports and calling potential suppliers for estimates; that during the 1984 fall/winter season, 4-5 GAP workers were assigned to Simonis; that no RP workers were so assigned during the 1984 fall/winter season; that during the fall/winter season Simonis spends about 30-40% of his time assigning work to and overseeing GAP workers, 30-40% working on his own projects such as building shelves and painting and the remainder of his time doing paper work and getting estimates; that Simonis twice evaluated the four CETA workers in 1984 on CETA-prepared forms; that Simonis has required CETA and RP workers to work beyond their normally scheduled work hours but such assignments have never resulted in the City having to pay any premium, overtime or holiday pay since these extra hours are merely deducted from CETA and RP workers' weekly required hours of work; that Simonis wrote a letter recommending a former GAP worker, Larry Dowe, for City employment, but Dowe was not hired by the City; that Simonis has given several verbal warnings to two RP workers for absenteeism; that one of these RP worker's absenteeism improved after Simonis' verbal warnings and this RP worker is now a CETA employee under Simonis; that in the summer of 1984 Simonis orally warned another RP worker about his absenteeism several times; that this RP worker had worked only 29 of 64 scheduled hours and did not call in on two of the four days he was absent; that Simonis decided this RP worker should be terminated and Simonis then discussed the situation with the P & RD Director; that on July 13, 1984, a letter terminating this RP worker from his work in the Department was issued under the signatures of the Director and Simonis; that no other RP, CETA or GAP workers have been removed from Department work; that the oral warnings issued by Simonis have not been memorialized; that Simonis has received no training in his position other than the practical training in interviewing workers provided by the P & RD Director in the first interviews described above; that Simonis is paid a salary as are the P & RD Director, the Administrative Assistant and the Parks Foreman but Simonis' salary would translate to an hourly rate that is approximately \$3 per hour less than that listed in the most recent collective bargaining agreement for unit employees doing Parks work; that Simonis, as do all salaried employees of the City, receives compensatory time off but no cash for overtime worked; that his fringe benefits are the same as those of other salaried personnel and those benefits are similar to those given unit employees; and that Simonis and employees such as the baseball coordinator and aquatics instructor receive mileage if they use their personal vehicles for work and the vouchers they submit must be approved by the Director; that no other person exercises day to day supervisory authority over any of these employees; that Simonis' activities are not routine in nature; that Simonis primarily supervises employees rather than supervising activities; and that although Simonis spends a portion of his time on nonsupervisory duties such as personally sharpening mower blades, filling out monthly reports and calling potential suppliers for cost estimates, he possesses supervisory duties and responsibilities in sufficient combination and degree to be found a supervisor.

9. That Simonis submitted a proposed budget to the P & RD Director at the Director's request but none of Simonis' suggestions were made part of the Director's proposed budget; that the Director has the sole authority to submit a proposed departmental budget to the City; that Simonis has used the phone book to identify firms and get estimates of the costs of materials or tools for possible City purchase, but he has not placed ads or formally opened bidding on materials or jobs; that although Simonis can purchase small items for the City, he gets a voucher from the Director's Administrative Assistant who calls the City Administrator for authorization and a voucher number, (if the item costs \$100 or less and is a budgetary item); but that both the Director and the City Administrator must give their approval for larger expenditures (up to \$1,000 and if the expenditure is a budgetary item); that if the item is worth more than \$100 and is not a budgetary item, then the Common Council must approve it while the full City Council must approve any purchase over \$5,000; that Simonis has purchased City tools and materials costing from \$2,000 to \$2,500 since his employment began on January 3, 1984, always with prior approval; and that Simonis has not been involved in formulating, determining or implementing policy decisions since his employment as Building and Grounds Supervisor.

10. That the P and RD Director is primarily responsible for the departmental budget; that since Simonis neither participates in the formulation, determination and implementation of management policy nor does he effectively commit the City's resources, his position is not managerial in nature.

On the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

That the occupant of the position of Building and Grounds Supervisor is a supervisor but not a managerial employee, and therefore, is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

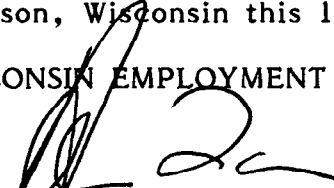
ORDER CLARIFYING BARGAINING UNIT 2/

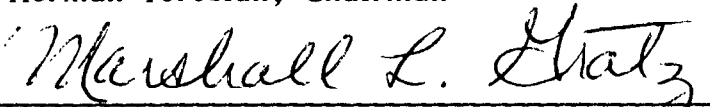
That the position of Building and Grounds Supervisor shall remain excluded from the bargaining unit described in Finding of Fact 3, above, as it relates to the merged Department.


Given under our hands and seal at the City of
Madison, Wisconsin this 15th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

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- 2/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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
(Continued on Page 5)

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. 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. 227.20 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 OCONOMOWOC

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

BACKGROUND

The Union contends that the position of Building and Grounds Supervisor should be included in the existing collective bargaining unit described in Finding of Fact 3 above. The Union points to the City's action in May, 1984, merging the Parks/Forestry Department with the Recreation Department and contends that the position of Building and Grounds Supervisor in what was the Recreation Department ought to be included in the unit.

The City contended to the contrary at both the hearing and in its brief. Specifically, the City asserts that the Building and Grounds Supervisor position has sufficient indicia and degree of supervisory authority based, inter alia, on incumbent Simonis' asserted use of independent judgment regarding interviewing CETA and RP applicants, his evaluating CETA workers, giving oral warnings for absenteeism, writing one letter of recommendation and recommending the removal of one worker from the Department's RP program for absenteeism and assigning and directing employees for more than 50% of his time during the summer season. The City also contends that the position is managerial, based upon the incumbent's having purchased supplies using City vouchers or a City credit card, his having taken estimates for goods, his having submitted a proposed budget to the P and RD Director and his having influenced what maintenance projects the City initiated in his area.

DISCUSSION

Disputed Managerial Status

In determining whether a position has managerial status, the Commission considers the degree to which the incumbent participates in the formulation, determination and implementation of management policy or possesses the authority to commit the Employer's resources. 4/

Simonis is clearly not a managerial employee. Simonis possesses limited discretion to purchase tools and supplies for the City. Each time he has purchased an item, he has gotten an approved voucher or approved use of a credit card prior to making the purchase. Simonis has never let bids for necessary materials in the traditional sense. Rather, he uses the telephone book to identify firms and to get estimates of the costs of materials or tools for possible City purchase.

Furthermore, it is clear from the record that the person responsible for drafting and presenting each part of the Department's budget is the Director of the P and RD, not Simonis. Although Simonis has made some specific requests for new budgetary items or increases in established budgetary items by submitting a list thereof to the Director, none of his requests were granted. Also, we note that Simonis is not authorized to submit a recommended budget to the City.

Finally, his testimony shows that he has never been involved in, or consulted, concerning the formulation, determination or implementation of management policy.

4/ Milwaukee VTAE, Dec. No. 8736-B (WERC, 6/79); Northwood School District, Dec. No. 20022 (WERC, 10/82).

Disputed Supervisory Status

Section 111.70(1)(o), Stats., defines the term "supervisor" as follows:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The Commission, in order to determine whether the statutory criteria are present in sufficient combination and degree to warrant the conclusion that the position in question is supervisory, considers the following factors:

1. The authority to recommend effectively 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 skills or for his supervision of employees;
5. Whether the supervisor is primarily supervising an activity or 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. 5/

Whether Simonis is a supervisor or not under the circumstances presented is, in our view, a close question. On balance, we find Simonis to be a supervisory employee for the following reasons.

Simonis spends a substantial amount of his work time, particularly in the summer, assigning work and making sure CETA, RP and GAP workers perform assigned tasks. He spends a significantly lesser amount of time actually doing the work himself or performing such tasks as filing monthly reports and getting estimates for supplies. Of significance is the fact that no other person exercises day-to-day supervisory authority over these same workers. Additionally, the record indicates that Simonis has disciplined two RP workers and was chiefly responsible for the resulting discharge of one of them. Moreover, at the request of the Parks foreman, Simonis transferred some CETA and RP workers to Parks and requested that some Parks employees be transferred to his section.

Simonis also interviews prospective CETA and RP workers before they assume their duties but this role involves limited independent judgment since he has never refused to accept such workers referred to him by the Wisconsin Job Service. We also note that Simonis evaluates these employees using CETA-prepared forms, though the implications for employees is unclear. While Simonis earns about

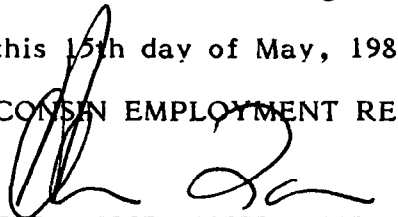
5/ E.g., City of Milwaukee, Dec. No. 6960 (WERC, 12/64); Northwood School District, supra.

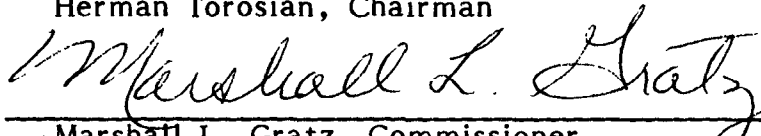
\$3 less than bargaining unit Parks laborers, the foregoing, on balance, satisfies us that Simonis possesses authority in sufficient degree and combination to warrant a conclusion that he is a supervisor under MERA. 6/ On that basis we have ordered that his position remain excluded from the bargaining unit involved.

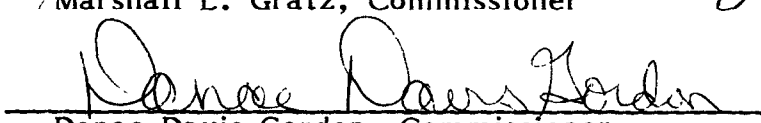
Dated at Madison, Wisconsin this 15th day of May, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

6/ As the City correctly states, we have held that all factors for supervisory status need not be present as long as a sufficient number of such factors are present in a given case to constitute sufficient indicia of supervisory authority. Dunn County, Dec. No. 21198 (WERC, 11/83).