

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of

WISCONSIN COUNCIL 40,  
AFSCME, AFL-CIO,

Involving Certain Employees of

CITY OF SHEBOYGAN  
(WATER DEPARTMENT)

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Case 2

No. 40632 ME-266

Decision No. 7378-A

5/89

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 925 Geele Avenue, Sheboygan, Wisconsin 53081, and

Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40, 5 Odana Court, Madison, Wisconsin 53719, for the Union.

Beck, Chaet, & Loomis, S.C., Suite 1085, 330 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, by Mr. John M. Loomis, for the City.

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

Wisconsin Council 40, AFSCME, AFL-CIO on May 10, 1988, filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing certified bargaining unit of certain employees of the City of Sheboygan (Water Department) to determine whether certain named employees should be included in said unit. Hearing in the matter was held in Sheboygan, Wisconsin on August 28, 1988, before Examiner Robert M. McCormick, a member of the Commission's staff. A stenographic transcript of the proceedings was completed and received by October 7, 1988. The parties submitted post-hearing briefs, the last of which was received November 15, 1988. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, herein the Union, is a labor organization and has its offices at 925 Geele Avenue, Sheboygan, Wisconsin 53081.
2. City of Sheboygan (Water Department), herein the City or the Utility, is a municipal employer and has its offices at 615 North Sixth Street, Sheboygan, Wisconsin 53081.
3. On November 2, 1965, the Union filed a petition for a representation election among certain employees of the Utility. The petition indicated the foremen (among others) should be excluded. Hearing was set for November 12, 1965, at which time the parties reached voluntary agreement on a list of eligible voters which excluded foremen from the unit as supervisors. Following an election, in City of Sheboygan, Dec. No. 7378 (WERC, 1/66) the Commission certified the Union as the exclusive bargaining representative of City employees in the following unit:  
  
all the employees of the City of Sheboygan, Wisconsin, employed in its Water Department, including pump room operators, filtration plant operators, meter department employees, outside crew, customer serviceman and office employees, but excluding Water Department Superintendent, Water Plant Superintendent and Assistant Superintendent and supervisors;
4. The parties' initial agreement, effective from January 1, 1966 to December 31, 1966 contained the following recognition clause:

## ARTICLE I - RECOGNITION

The Employer recognizes the Union as the exclusive bargaining agent of all employees of the City of Sheboygan Water Department excluding the Foreman, Office Manager, the Superintendent and supervisors.

5. The parties have executed a succession of collective bargaining agreements. The parties' 1988-1989 agreement contains the following recognition clause:

### ARTICLE I RECOGNITION AND MANAGEMENT

SECTION 1.1 EXCLUSIVE BARGAINING AGENT: The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer, excluding the Foreman, Office Manager, Superintendent, Supervisors, and Confidential Secretary with respect to wages, hours, and conditions of employment.

. . .

6. The Sheboygan Water Utility has an Operations Department headed by an Operations Supervisor, and a Construction-Maintenance Department, headed by the Construction-Maintenance Supervisor. 1/ Both of these department heads report to the Superintendent of the Utility. The Operations Department and the Construction-Maintenance Department each have two foremen at issue in this case.

7. Ron Marshman is the incumbent foreman at the Filter Plant in the Operations Department. He assigns work to nine employees including the positions of operator, relief operator, and operating helper by constructing a schedule of work. He can vary the work schedule when it is necessary to assign emergency duties. Once a month he has on-call duties. He is certified as a water plant operator.

8. Everett Olson is the incumbent foreman at the Meter Shop in the Operations Department. He makes daily assignments of work to three employees. He handles customer complaints and performs tasks relating to water meters.

9. Terry Ruge is an incumbent foreman in the Construction-Maintenance Department. He assigns work to six employees who perform outside construction and repair work. He also performs record-keeping duties relating to supplies and deliveries.

10. Ramsey Ronk is an incumbent foreman in the Construction-Maintenance Department. He primarily assigns and directs work to six employees in the Filter Plant, and to a lesser extent, in the indoor construction areas.

11. The foremen have no part in hiring employees. Their disciplinary authority is limited to making written comments about employees when they perceive performance problems and giving oral corrections to employees, which corrections are sometimes noted in personnel files. They have no part in the contractual grievance procedure. They receive requests for vacations which they forward to the department head for ultimate approval. They can approve time off for an employee's personal emergencies. They can temporarily assign employees out of their usual department when the need arises although they generally do so after consultation with their department head. The foremen in the Construction-Maintenance Department can authorize small amounts of overtime. The foreman in the Operations Department cannot authorize overtime. The foremen's base salaries are approximately 20 to 22% more than those of their subordinate employees. The foremen receive compensatory time off, but not overtime, for extra hours they work. Some of their subordinates work sufficient overtime to receive total monetary compensation equal the foreman's pay. The two foremen in the

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1/ The Utility also has an Engineering Department and an office staff, neither of which are pertinent to this case.

Construction-Maintenance Department, into which new employees are hired, evaluate probationary employees and make recommendations regarding those employees' retention which are considered by the Superintendent and the Utility Board. The foremen spend a significant amount of time performing work which is similar to that performed by unit employees.

12. The parties' specific exclusion of the foremen from the bargaining unit is based on their agreement that the foremen are supervisors within the meaning of the Municipal Employment Relations Act.

13. The foremen do not possess supervisory authority in sufficient combination and degree to render them supervisory employees.

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

#### CONCLUSIONS OF LAW

1. The Union's unit clarification petition is not barred by the recognition clause in the parties' collective bargaining agreement noted in Finding of Fact 3, above.

2. The incumbents of the positions of foreman identified in Findings of Fact 7 through 10 above are not supervisors within the meaning of Sec. 111.70(1)(o)(1), Stats., and therefore are municipal employees within in the meaning of Sec. 111.70(1)(i), Stats.

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

#### ORDER CLARIFYING BARGAINING UNIT 2/

The four foreman positions identified in Findings of Fact 7 through 10 above shall be, and hereby are, included in the bargaining unit represented by Wisconsin Council 40, AFSCME, AFL-CIO.

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/  
S. H. Schoenfeld, Chairman

Herman Torosian /s/  
Herman Torosian, Commissioner

A. Henry Hempe /s/  
A. Henry Hempe, Commissioner

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2/ 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,

(Footnote two continued on page four)

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(Footnote two continued from page three)

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

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

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

(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 SHEBOYGAN  
(WATER DEPARTMENT)

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

BACKGROUND

This case was initiated by the Union's petition for a unit clarification which sought to bring into the unit the four employees in the following excluded positions: Meter Shop Foreman, Filter Plant Foreman, and two Construction-Maintenance Foremen.

In November, 1965 when the original election petition was filed by the Union, the Union specified that the foremen should be excluded. By agreement of the parties that the positions were supervisory, the individuals holding those positions were excluded from the list of those employees eligible to vote in the representation election, and thus from the bargaining unit. All of the parties' collective bargaining agreements, from the first to the most recent, have specifically excluded the foremen. The parties now dispute whether the Commission can properly entertain such a unit clarification proceeding, and if it should, whether the disputed positions are supervisory and thus not municipal employees within the meaning of MERA.

POSITIONS OF THE PARTIES

The Union

The Union asserts it has the right to have the Commission clarify this unit, and it vigorously denies the City's argument that the exclusion of the foremen in the recognition clause waives that right. It asserts the Commission case law regarding such waiver applies only to voluntarily recognized units, not certified units such as this one. It further points to the unit description in the original Certification of Representative. Finally, it argues that the Commission must clarify the unit since the City's 1978 reorganization of the Water Utility constituted a material change and the foremen are now performing more bargaining unit work than they did previously.

The Union asserts that the disputed employees do not meet the statutory definition of supervisor because they do not hire, promote, transfer or discipline employees. The Union discounts the undocumented, verbal corrections the foremen make, arguing these are not discipline. The Union alleged that these foremen make only routine assignments of work and that they can make only minor overtime assignments. It asserts that the current ratio of supervisors to subordinates is too low and the foremen's pay does not reflect the additional compensation for supervision.

The City

The City asserts the Commission should not clarify this unit to include the foremen since the parties have negotiated an express agreement excluding them. It cites several Commission cases for the proposition a voluntarily recognized unit cannot be expanded through a unit clarification proceeding. The City further argues that there has been no material change in circumstances as the foremen's duties have not significantly changed.

The City asserts the disputed employees meet the statutory criteria for supervisors by performing various functions: assigning work, evaluating probationary employees and making recommendations for permanent status, issuing oral reprimands, scheduling vacations and other time off, assigning employees for emergency work and acting as supervisors in charge when the Superintendent is gone and when assigned to on-call duty.

## DISCUSSION

The City has correctly argued that in a unit clarification proceeding the Commission will not alter the voluntarily agreed upon composition of a bargaining unit 3/ over the objection by one of the parties to said agreement unless:

1. The position(s) in dispute did not exist at the time of the agreement; 4/ or
2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential etc. 5/ or
3. The position(s) in dispute have been impacted by changed circumstances which materially affect their unit status; 6/ or
4. The existing unit is repugnant to the Act. 7/

The City asserts that none of the above noted exceptions are present because the foreman positions existed at the time the parties agreed to the unit's composition; the foreman positions were not excluded on statutory grounds; there has been no material change in circumstances; and the existing unit is not repugnant to the Municipal Employment Relations Act. However, contrary to the City's assertions, the record establishes that the second exception noted above exists. It is clear that the parties agreed foremen were not eligible to vote in the representation election because of their alleged supervisory status. Exhibit 10 reveals that during our November 1965 hearing on the Union's election petition, the names of the three foremen then employed were crossed off the list of Water Department employees and said exhibit states "Names crossed out are those in supervisory positions excluded in petition, or which should have been so excluded". The record also clearly establishes that the City continues to believe that the foreman positions are supervisory. Not only is that the position taken at hearing but City-generated Exhibits 14-16 list the foreman position as "supervisory". Despite the foregoing, the City argues that because the position of foreman has always been a specifically identified exclusion in the contractual recognition clause, the Commission should conclude that sometime between the parties' November 1965 agreement to exclude foremen as supervisors and the completion of the bargaining of the parties' first contract in April 1966, the parties agreed to exclude the foremen on some basis other than alleged supervisory status. An inference can be drawn to that effect because the contractual recognition clause excludes "the Foremen, Office Manager, the Superintendent and supervisors". (Emphasis added) However, there is no other evidence in the record which is supportive of this inference. Thus, when this inference is viewed in the context of the record evidence noted above which supports the existence of an ongoing agreement to exclude the foreman position because of its allegedly supervisory status, the City's position is not found to be a persuasive one. Given the foregoing, it is not necessary to address the argument that the third exception (i.e. material change in circumstances) also exists.

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- 3/ See generally Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76); West Allis - West Milwaukee, Dec. No. 16405 (WERC, 1/89); City of Cudahy, Dec. No. 12997 (WERC, 9/74).
  - 4/ Dane County, Dec. No. 15696-A (WERC, 12/88); Tomahawk Unified School District No. 1, Dec. No. 12483-A (WERC, 5/74).
  - 5/ CESA #4, Dec. No. 14177-A (WERC, 7/80); City of Cudahy, Dec. Nos. 19451-A, 19452-A (WERC, 12/82); Dane County, Dec. No. 22976 (WERC, 10/85).
  - 6/ Manitowoc County, Dec. No. 13434 (WERC, 3/75); City of Milwaukee, Dec. No. 26019 (WERC, 5/89).
  - 7/ Waukesha County, Dec. No. 14830, (WERC, 8/76); Walworth County, Dec. No. 9394-A (WERC, 3/73).

Having concluded that it is appropriate to determine the merits of the parties dispute, we turn to the issue of whether the foremen in question are indeed supervisory and thus ineligible for unit inclusion.

#### Alleged Supervisory Status

In determining if a position is supervisory, the Commission considers the following criteria:

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 or her skills or for his or her 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 or she spends a substantial majority of his or her time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. 8/

The City notes that the foremen have responsibility for the day to day direction of the work of the three to six employees in their areas and that the foremen also have some discretion in shifting employees from one task to another, temporarily transferring them to a different department, and granting time off for personal emergencies. 9/ The Construction-Maintenance foremen can authorize small amounts of overtime. All four foremen orally correct employees and occasionally document employees' performance deficiencies. Foremen are also called upon to evaluate probationary employees and their evaluations are utilized by the City when determining whether to retain its employees.

However, the record also demonstrates that the foremen have no role in hiring unit employees. Their disciplinary authority is very limited and they have no effective decision-making role as to discipline ranging from written reprimands to discharge. All disciplinary recommendations and decisions in excess of a verbal warning are made by the department heads in close consultation with the Superintendent. Foremen have no role in the contractual grievance procedure. Employees call the department heads and not the foreman when they call in sick. The foremen spend significant amounts of time performing work similar to that of unit employees and the exercise of independent judgement is essentially limited to using their expertise to ensure that the job assignments are properly performed. Although the foreman's salary translates into an hourly wage approximately 20 to 22% more than the hourly wage of the employees they direct, several employees receive compensation equivalent to the foreman because they, unlike the foreman, receive overtime pay.

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8/ City of Milwaukee, Dec. No. 6960 (WERC, 12/64), Calumet County, Dec. No. 11158-A (WERC, 9/88).

9/ Authority to grant vacations does not reside in the foremen who merely communicate vacation requests to the department heads.

Based on the above considerations, we find that the foremen are not supervisors within the meaning of the Municipal Employment Relations Act and should, therefore, be included in the bargaining unit.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld /s/  
S. H. Schoenfeld, Chairman

Herman Torosian /s/  
Herman Torosian, Commissioner

A. Henry Hempe /s/  
A. Henry Hempe, Commissioner