

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
**CITY OF FOND DU LAC EMPLOYEES LOCAL 1366,
AFSCME, AFL-CIO**

Involving Certain Employees of
CITY OF FOND DU LAC

Case 5
No. 55819
ME-919

Decision No. 8168-D

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 639 West Scott Street, #205, Fond du Lac, Wisconsin 54937, appearing on behalf of City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO.

Godfrey & Kahn, S.C., by **Mr. William G. Bracken**, Coordinator of Collective Bargaining Services, 219 Washington Avenue, P. O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the City of Fond du Lac.

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

On November 18, 1997, City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO filed a petition to clarify bargaining unit with the Wisconsin Employment Relations Commission seeking to include the position of Chemist in the Wastewater Treatment Plant in an existing non-professional unit which Local 1366 represents. The City opposes the petition because it believes the Chemist is a supervisor and a professional employee.

Hearing was held in Fond du Lac, Wisconsin, on March 10, 1998. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which was received on May 4, 1998.

No. 8168-D

The Commission, having reviewed the evidence and arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization and has its offices c/o James E. Miller, 639 West Scott Street, #205, Fond du Lac, Wisconsin 54937. The Union is the recognized exclusive collective bargaining representative for all permanent full-time and permanent part-time employees in the Public Works Department, Department of Community Development, clericals in the Fire Department, Departments of Administration, Engineering, Water Utility, Police Department, Communications Officers and seasonal employees of the Parks Department working six (6) months or more for the City, excluding elected and appointed officials, department heads, professional employees, confidential employees and supervisors.

2. The City of Fond du Lac, hereinafter referred to as the City, is a municipal employer and has its offices located at the City/County Complex, 160 South Macy Street, P.O. Box 150, Fond du Lac, Wisconsin 54936-0150.

3. The City's Wastewater Treatment Division consists of the Wastewater Treatment Superintendent who supervises the Plant Engineer, who in turn has fourteen employees reporting to him, the Maintenance Foreman, who in turn has seven employees reporting to him, and the Chemist who has one employee (the Lab Technician) reporting to him. The Superintendent also supervises the Building Custodian and Computations Clerk.

4. The position description of the Chemist reads, in part, as follows:

Purpose of Position

The purpose of this position is to supervise and perform chemical, bacteriological, and physical tests on industrial, raw, and treated wastewater, ensuring that proper safety and quality control procedures are followed at all times.

Essential Duties and Responsibilities

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Ensures that laboratory certification is maintained and that quality control testing for the DNR and EPA is performed as required; monitors and ensures the quality control of laboratory procedures and data records.
- Ensures that proper safety procedures are followed and that safety equipment is properly used and maintained; ensures proper handling and control of hazardous materials.
- Supervises and directs the Lab Technician and Industrial Pretreatment Crew; provides training in lab procedures and the use of lab equipment.
- Performs chemical, bacteriological, and physical tests on industrial, raw, and treated wastewater; performs analytical equipment operations and maintenance as required; prepares and standardizes chemical reagents required for testing procedures.
- Prepares records and reports from plant files and industrial distribution; enters laboratory information into computer, conducts analyses, makes recommendations, and prepares reports as required; prepares violation reports and notices as required.
- Coordinates the industrial pretreatment program sampling schedule, equipment installation, data accumulation, and program cost analyses; maintains contact with Plant Engineers and Process Supervisors from local industries regarding the industrial pretreatment program.
- Conducts various special projects such as City-wide collection system survey and bioassay sampling as required as assigned.
- Maintains current inventory of supplies and equipment as required.
- Ensures proper lab cleanliness and orderliness of equipment and materials.

Minimum Training and Experience Required to Perform Essential Job Functions

Bachelor's degree in Chemistry with three to five years chemical laboratory experience, or any combination of education and experience that provides equivalent knowledge, skills, and abilities.

5. The Chemist position has been occupied by James Kaiser for the last 15 years. Kaiser has a BS degree in Chemistry and Environmental Science and is in charge of all lab activities. Kaiser has one Lab Technician, Richard Graham, who reports to him. Graham has been employed by the City for almost 30 years, and is always on time, works a full eight-hour day, never uses sick leave and forfeits vacation time, does whatever he is told to do and thus requires little or no supervision. The Chemist is also responsible for the Industrial Pretreatment crew and trains summer interns who work in the lab. He is in charge of the interns when they are working in the lab.

The Chemist is paid a salary, which calculated hourly is \$19.97 per hour, and the January 1, 1997 rate for the Lab Technician is \$15.39.

The City does not have a formal evaluation program and all evaluations to date have been informal.

Given the Lab Technician's tenure and job performance, the Chemist has not hired, fired, promoted, transferred, demoted or discharged anyone or effectively recommended same.

Although he has no significant independent disciplinary authority, Kaiser can make effective disciplinary recommendations. If the Lab Technician were to retire, Kaiser would play a significant role in the hiring of a replacement. The Chemist does have the authority to direct and assign the Lab Technician, the summer interns while in the lab, and the crew of the Industrial Pretreatment Program.

Kaiser attends weekly staff meetings for supervisors but for the last six months these meetings have been attended by the Computations Clerk and the operation crew leader, bargaining unit members.

6. Kaiser has supervisory authority in sufficient combination and degree to be deemed a supervisor.

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

CONCLUSION OF LAW

1. James Kaiser, occupying the position of Chemist, is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT

The Chemist shall continue to be excluded from the bargaining unit set forth in Finding of Fact 1.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

CITY OF FOND DU LAC

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

POSITIONS OF THE PARTIES

Union

The Union contends that the Chemist is not a supervisor and that the distribution of responsibilities within the Wastewater Division does not justify a supervisor for the one Lab Technician.

It submits that the evidence shows that the Chemist never recommended discipline against anyone nor has he been given the authority to effectively recommend discipline. It admits that the Chemist does give work assignments to other employees but argues employees are experienced and qualified to perform these assignments with no need for immediate supervision. The Union contends that the interns are trained for a short period to perform weekend tests and they work with plant operators and the direction by the Chemist is very limited. It points out that the number of employees supposedly supervised by the Chemist is minimal as the Lab Technician needs little supervision. As crew leader for the Pretreatment Program, the Chemist's duties are that of a working foreman.

The Union claims that the level of pay for the Chemist reflects his qualifications and skills and not any supervisory authority. The Union maintains that the Chemist supervises an activity and not individuals and, at most, the Chemist is a working foreman. It asks that the position be included in the bargaining unit.

City

The City contends that the Chemist is a supervisor because he has direct supervisory authority over the Lab Technician and directly supervises the Pretreatment crew and interns. It asserts that the Chemist has the authority to discipline but has had no reason to exercise it because his subordinate is an excellent employee. It relies on the Chemist's job description which lists his duties to supervise and direct employees including interns. It alleges that the Chemist is in charge of the lab and Pretreatment operations.

The City points out that the approximately \$3.00 per hour pay differential between the Chemist and the Lab Technician is explained in part by the training and experience requirements of the Chemist but also his supervisory duties. The City insists that the Chemist primarily supervises

employees and because of the limited number of employees actually supervised, the majority of his time is spent doing laboratory tests and administrative tasks. It argues that time alone is not decisive when determining supervisory status. The City submits that the Chemist exercises a great deal of latitude and discretion in supervising employees.

The City argues that even if the Chemist is not found to be a supervisor, he should be excluded from the unit as a professional employee under Sec. 111.70(1)(L), Stats. It refers to the job description that requires a Bachelor's degree in Chemistry with three to five years of laboratory experience and the Chemist's duties which involve considerable exercise of discretion in judgment in performance of the job. The City argues that the unit excludes professionals and the Chemist cannot be added because inclusion would violate the Recognition Clause and would require a vote. The City requests continuing exclusion of the Chemist as a supervisor or professional or both.

Union's Reply

The Union objects to the City's raising the issue of the professional status of the Chemist in its brief because the issue was not raised at the hearing and no testimony was presented on it. It asserts that the only evidence in the record regarding professional status is the job description which the City cites. It claims that the City has not applied the appropriate criteria to determine whether the position is professional and argues that by raising this issue, the City shows its lack of confidence that the Chemist is a supervisor.

The Union argues that the Chemist does not have the authority to effectively recommend the hiring, disciplining or discharge of employees because he has never been told he has the effective power to do so and has never used it. It submits that the power to discipline is at best a hypothetical power.

The Union argues that the difference in pay between the Chemist and the Technician is due to the education background and the fact that the Chemist holds a Grade IV Wastewater Certification from the Department of Natural Resources -- not because he is a supervisor. It insists that the Chemist has never been treated as a supervisor but is better characterized as a crew leader or working foreman. It states that the Chemist should be placed in the bargaining unit because he is neither a supervisor nor a professional employee.

City's Reply

The City contends that the Chemist has supervisory authority and responsibility over the Lab Technician and the mere fact that he has not had to exercise it because the Lab Technician is an exemplary employee does not establish he does not have such supervisory authority. It claims that the Chemist has the authority to discipline should the need arise to exercise such authority and the fact it has not been exercised does not mean the authority is lacking. The City observes that both it and the Union used the same factors in determining supervisory status but reach radically different

results. It argues that the Union downplays the Chemist's duties and responsibilities. The City points out that the parties differ on the significance of the pay differential but assert part is attributable to supervisory duties which are an integral part of his job. It reiterates that the amount of time spent supervising employees is not determinative in finding supervisory status.

It alleges that as the Chemist is the only person in the entire department who is in charge of the laboratory, it follows that he is a supervisor from an organizational standpoint. The City claims that the Chemist is a supervisor and a professional employee for the reasons cited in its original brief. It seeks exclusion of the Chemist from the unit.

DISCUSSION

Section 111.70(1)(o)1, Stats., defines a supervisor as:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, 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 of a merely routine or clerical nature, but requires the use of independent judgment.

Under that statute, the Commission considers the following factors in determining if the occupant of a position is a supervisor:

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 skills 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; and

7. The amount of independent judgment exercised in the supervision of employees.

The Commission has historically held that not all of the above-quoted factors need to reflect supervisory status for an individual to be a supervisor and that if the factors appear in sufficient number and degree, the Commission will find an employee to be a supervisor. WALWORTH COUNTY, DEC. NO. 29040 (WERC, 4/97).

In most unit clarification cases involving an issue of alleged supervisory status, we have the opportunity to assess evidence as to: (1) the supervisory authority an employee has been given through a job description or management directive; and (2) how the employee has or has not used that alleged authority when the need has arisen. Here, because the Lab Technician is the only employee the Chemist allegedly supervises on an ongoing basis and because the Lab Technician is a high quality 30-year employee, we do not have any significant evidence as to how the Chemist has or has not used the supervisory authority the City alleges he has been given. The need to supervise has not arisen. The Lab Technician's long tenure means there has been no hiring process to evaluate. The Lab Technician's good performance means there has been no need for discipline. The Chemist and Lab Technician have agreed on and follow a standard allocation of the work that needs to be performed so there is no need for the Chemist to direct or assign the Lab Technician's work.

The absence of evidence as to how an employee has exercised alleged supervisory authority does not preclude a finding that an employee is a supervisor. Instead, we must focus on determining whether the evidence we have regarding the authority the employee has been given is sufficient to establish supervisory status.

Here, the Chemist's job description speaks generally about his responsibility to "supervise" the Lab Technician, and the Wastewater Treatment Division's table of organization is consistent with a supervisory relationship between the Chemist and the Lab Technician. However, it is the testimony of the Wastewater Treatment Superintendent which ultimately persuades us that the Chemist is a supervisor. From the Superintendent's testimony, we conclude that if discipline were needed, the Chemist's recommendation as to the level of discipline would be an effective one. From the Superintendent's testimony, it is clear that the Chemist would play a significant role if there were ever a need to hire a replacement for the Lab Technician. From the Superintendent's testimony, it is clear that to the extent it is ever necessary, the Chemist is to exercise his independent judgment when he directs and assigns the work of the Lab Technician and that the Chemist is the only individual with line supervisory authority over the Technician. Thus, although the Chemist spends very little time supervising the Lab Technician and it is not clear whether his pay rate is directly attributable to his supervisory authority, we conclude the Chemist is a supervisor. Therefore, he shall continue to be excluded from the bargaining unit.

Given our conclusion, we need not determine whether the Chemist is a professional employee.

Dated at Madison, Wisconsin, this 23rd day of July, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner