

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 In the Matter of the Petition of :
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 MADISON EMPLOYEES, LOCAL 60, :
 AFSCME, AFL-CIO, WCCME #40 :
 :
 Involving Certain Employees of :
 :
 CITY OF MIDDLETON :
 :

Case I
 No. 14628 ME-653
 Decision No. 10381-B

Appearances:

Mr. Walter J. Klopp, District Representative, 5 Odana Court,
 Madison, Wisconsin, appearing on behalf of Madison Employees,
 Local 60 (Middleton Public Works Department Unit), AFSCME,
 AFL-CIO, WCCME #40.

Melli, Shiels, Walker & Pease, S.C., by Mr. Jack D. Walker,
 119 Monona Avenue, Madison, Wisconsin, appearing on behalf
 of the City of Middleton.

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

Madison Employees, Local 60 (Middleton Public Works Department Unit), AFSCME, AFL-CIO, WCCME #40, having, on February 6, 1981, filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing collective bargaining unit consisting of certain employees of the Public Works Department of the City of Middleton; and a hearing having been held on March 16, 1981, in Middleton, Wisconsin, before Examiner David E. Shaw; and the Commission, having considered the evidence and the arguments of the parties and being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. That Madison Employees, Local 60 (Middleton Public Works Department Unit), AFSCME, AFL-CIO, WCCME #40, hereinafter referred to as the Union, is a labor organization having its offices at 5 Odana Court, Madison, Wisconsin, 53719.
2. That City of Middleton, hereinafter referred to as the City, is a municipal employer having its principal offices at 7426 Hubbard Street, Middleton, Wisconsin, 53562.
3. That following an election conducted by it on July 29, 1971, the Wisconsin Employment Relations Commission, the Commission, on August 11, 1971, certified the Union as the exclusive collective bargaining representative of the following employees of the City: "all employees employed by the City of Middleton in its Department of Public Works, excluding supervisors, confidential employees, seasonal employees and craft employees . . ."; and that in the Direction issued by the Commission on June 22, 1971 leading to said election, the Commission determined that the "utility foreman" and the "public works foreman" were employees and not supervisors, as contended by the City. 1/
4. That subsequent to the certification of the Union as the exclusive collective bargaining representative of the Public Works Department collective bargaining unit, the parties voluntarily agreed to exclude the foreman positions in the Public Works Department from the bargaining unit.

1/ City of Middleton (10381).

5. That the parties' most recent collective bargaining agreement, executed on March 4, 1981, and effective from January 1, 1980 through December 31, 1980, contained the following recognition clause:

ARTICLE I - RECOGNITION

1.01 The Employer recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees employed by the Public Works Department of the City of Middleton, excluding office clerical, professional, craft, confidential, managerial and supervisory employees as defined in the Act, for the purpose of conferences and negotiations pertaining to wages, hours and conditions of employment.

6. That during the parties' negotiations for the 1980 agreement the Union attempted to negotiate the voluntary inclusion of the Street Foreman, Utility Foreman and Parks Foreman positions into the Public Works Department collective bargaining unit, but were unsuccessful; and that the parties' 1980 collective bargaining agreement does not provide for the inclusion of the foremen positions nor does it establish the wages, hours and working conditions applicable for those positions.

7. That in the instant proceeding the Union seeks to accrete the positions of Street Foreman, Utility Foreman and Parks Foreman, presently occupied by Jerome Hady, Michael Frey and Ed Haack, respectively, to the existing Public Works Department collective bargaining unit on the claim that said positions are not supervisory in nature, and that the City, contrary to the Union, contends that said positions are supervisory and therefore should remain excluded from the collective bargaining unit.

8. That the City's Public Works Department is composed of a streets division, utility division, parks division, inspection division, engineering division, with a supporting departmental clerical staff; that the Department is under the general supervision of the Director of Public Works, David Donoghue, and the Assistant Director of Public Works/Utility Business Manager, Toby Ginder, whose offices are located at the City Hall; and that Ginder, more so than Donoghue, is responsible for the daily overall supervision of the streets, utility and parks divisions.

9. That in 1977 the City adopted the following job descriptions, prepared by the Wisconsin Department of Administration at the request of the City, for the three positions in issue herein:

STREET FOREMAN

GENERAL STATEMENT OF DUTIES: Supervises and coordinates the work of crews engaged in street repair, construction and maintenance activities; does related work as required.

DISTINGUISHING FEATURES OF THE CLASS: This is supervisory work involving mature judgment and the ability to plan and perform tasks in the maintenance and development of city owned streets. The work often necessitates on the spot decisions, although general supervision and direction is exercised by the Director of Public Works.

EXAMPLES OF WORK: (Illustrative only)

Directs and coordinates the repair, construction and maintenance of streets, sidewalks, ditches and street appurtenances;
Plans work, schedules activities and sets standards for the various activities;
Supervises equipment operators and skilled and unskilled laborers in various phases of work assignments;

Discusses work progress and ascertains the amount of materials and supplies needed;
Maintains appropriate records including time cards and time sheets;
Supervises and assists with all the mechanical work performed on vehicles and city equipment;
Investigates and resolves complaints;
Coordinates the snow removal activities of the city under the direction of the Director of Public Works;
Makes recommendations for improvement of working procedures and departmental practices;
Assists with the preparation of the annual budget;
Does related work as required.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES: Thorough knowledge of methods, materials and techniques used in street maintenance and construction projects; good knowledge of city street system; knowledge of the occupational hazards and safety precautions of street maintenance and construction work; ability to read plans and specifications; ability to supervise; ability to direct the work of skilled and semi-skilled employees; ability to get along well with the public; good physical condition.

ACCEPTABLE EXPERIENCE AND TRAINING: Considerable experience in street and public works construction or maintenance preferably including some supervisory experience, and completion of a standard high school course; or any equivalent combination of experience and training which provides the required knowledge, skills and abilities.

UTILITY FOREMAN

GENERAL STATEMENT OF DUTIES: Coordinates and directs all of the tasks involved in the installation, maintenance, repair and operation of the water and sewer system of the City of Middleton; does related work as required.

DISTINGUISHING FEATURES OF THE CLASS: This position requires the ability to plan and supervise maintenance crews engaged in the installation, maintenance and repair of the water and sewer systems within the city limits of Middleton.

EXAMPLES OF WORK: (Illustrative only)

Locates and marks water mains, services and valve boxes to avoid damage when other construction is being performed in the area;
Consults with consumers regarding high water usage and high bill complaints;
Checks construction of new water mains and sewers;
Supervises the flushing of hydrants, mains and other required maintenance procedures;
Maintains equipment at the well houses, such as flouride pumps, chlorine pumps, filters and other related controls;
Checks each of the wells daily and records meter readings;
Makes out daily and monthly reports including time and labor distribution sheets and required reports on Water Plant Operations;
Responds to emergency calls for water main breaks, damaged fire hydrants or inoperative valves;
Supervises the cleaning and maintenance of sewer mains and blocked lateral complaints;
Inspects various jobs in process from time to time and makes recommendations for changes or improvements;
Does related work as required.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES: Thorough knowledge of water and sewer systems and material used in installation and maintenance of same; skill in operating equipment effectively and faithfully; ability to plan and supervise the work of others; good judgment; ability to maintain effective working relationships with subordinates and others and the general public; ability to work under adverse conditions and in emergency situations; good physical condition.

ACCEPTABLE EXPERIENCE AND TRAINING: Considerable responsible experience in the construction, repair and maintenance of a water distribution system and completion of a standard high school course; or any equivalent combination of experience and training which provides the required knowledge, skills and abilities.

ADDITIONAL REQUIREMENTS: State certification for operation of a class "C" water utility, (P-1 water utility operator's license), and first level sewer works operator's certificate.

PARKS FOREMAN

GENERAL STATEMENT OF DUTIES: Coordinates and inspects the work of park groundsmen and maintenance men engaged in park maintenance and repair activities; does related work as required.

DISTINGUISHING FEATURES OF THE CLASS: This work entails responsibility for satisfactory maintenance of parks, playgrounds, buildings, equipment and other related facilities. The work performed is largely of a routine nature and procedures and standards to be followed are generally outlined. General supervision and direction is exercised by the Director of Public Works.

EXAMPLES OF WORK: (Illustrative only)

Assigns work, supervises and trains park groundsmen and laborers;
Evaluates parks and facilities for repairs, replacements and damages and assigns crews to perform necessary work;
Plans and makes work assignments for fertilizing, spraying and mowing grass;
Keeps work and time records of parks workers;
Performs maintenance tasks at the swimming pool;
Installs and maintains boat piers;
Maintains winter ice skating [sic] facilities;
Checks and coordinates the weekend work activities;
Advises the Director of Public Works regarding capital and expenditure items to be included in the annual budget;
Plans and cares for trees;
Does related work as required.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES: Thorough knowledge of grounds and other park maintenance operations; thorough knowledge of safety precautions applicable to the use of equipment and when working in the vicinity of traffic and parks users; ability to give clear instruction and train others in the use of common hand tools, mowers and other general usage equipment; ability to supervise personnel; good physical condition.

ACCEPTABLE EXPERIENCE AND TRAINING: Considerable grounds maintenance experience including some supervisory experience; and completion of a standard high school course; or any equivalent combination of experience and training which provides the required knowledge, skills and abilities.

10. That Donoghue, as the Director of the Public Works Department, makes the final determination on individuals to be hired to fill bargaining unit positions.

11. That the City has no set policy for authorizing overtime in the Public Works Department, other than that overtime should only be utilized when there is an immediate need to have the work done, i.e., an emergency situation; that the foremen in the Public Works Department have the authority to independently authorize overtime and have exercised that authority on a regular basis; and that in the absence of a foreman, his assistant, or whoever is in charge in his absence, has the authority to authorize overtime.

12. That Donoghue and Ginder have their offices at City Hall and do not attempt to check on the streets, utility and parks divisions on a daily basis to determine what is being done.

13. That the foremen are required to report to City Hall at least once a day to pick up work orders and correspondence in their mail boxes; that the Street Foreman reports to the municipal garage at the beginning of the work day along with the streets division employes; that the Utility Foreman reports to one of the well houses at the beginning of the work day; and that the Park Foreman reports to the parks garage at the beginning of the work day along with the parks division employes.

14. That the Street Foreman has a desk and office at the municipal garage; that the Utility Foreman has a desk at one of the well houses; and that the Parks Foreman has a desk at the parks garage.

15. That the Street, Utility and Park Foremen attend weekly meetings with the Director and Assistant Director of Public Works, the building inspector, the chief engineer and technician for the purpose of discussing with the Director what has taken place and what work is scheduled to be done the following week; and that no members of the bargaining unit attend said meetings.

16. That the foremen in the Public Works Department are authorized to purchase parts and materials they need, as long as they do so consistent with the City's purchasing policy, which applies to all employes who have purchasing authority, and which allows purchases from a supplier covered by a "blanket purchase order," but requires a specific purchase order if the supplier is not covered by a "blanket purchase order" and the purchase exceeds \$10.00 in amount.

17. That the City's non-represented employes, from the City Administrator to the foremen in the Public Works Department, receive the same fringe benefits; that the foremen's fringe benefits are the same as those received by the employes in the Public Works Department bargaining unit, with the exception that in 1981 the foremen received a 9% wage increase, a longevity plan and the City pays the full cost of their dental insurance, as opposed to the \$16.00 limit on the City's contribution on behalf of the bargaining unit employes, and the foremen receive their vacation time on their anniversary date, as opposed to the first of the year for the bargaining unit employes.

18. That the Street Foreman, Jerome Hady, has been employed in the Public Works Department for twenty years and has held the foreman position for slightly less than one year; that Hady is directly responsible to Donoghue for the work performed by the streets division, but also reports to Ginder when Donoghue is unavailable; that although he was not expressly informed of such in writing, Hady has the authority to effectively recommend the hiring of employes and, in the exercise of that authority, has effectively recommended the hiring of one regular full-time employe in the streets division since becoming foreman; that Hady possesses the authority to interview and hire two part-time summer employes for 1981 on his own, the number of part-time employes he is authorized to hire being determined by the budget; that

Hady has only minimal authority to discipline, but has issued a verbal warning to an employe for attendance problems after first discussing the problem with Donoghue; that Hady has the authority to direct and assign the work force and exercises that authority by scheduling the work to be done, and by assigning the work to the five full-time employes and the part-time summer employes in the streets division, including assigning the employe to be in charge of the crew he will not be working with; that Hady receives pay for overtime work at the same rate as the other employes, and punches a time clock as do the other employes; that Hady receives a significantly higher wage (\$15,656 in 1980) than does the next highest paid position in the streets division (\$13,790) due to the additional responsibilities of the foreman position; that Hady spends a majority of his time, approximately seventy to eighty percent, working along side the men plowing snow in the winter and painting, mowing and patching streets during the warmer months, receiving and investigating citizens' complaints or requests and recordkeeping, and spends the remainder of his time planning and scheduling work, completing work summary and work projection reports, overseeing and checking the work of the streets division employes, and reporting to City Hall to pick up work orders or correspondence; that Hady exercises independent judgment as to when work projects will be scheduled, whether the work schedule will be altered, the assignment of employes to particular projects, the assignment of overtime, whether and when the streets need to be plowed, sanded or salted during the winter months, and in investigating citizen requests, whether the work needs to be done immediately or can wait, although Hady checks with the Director before making a decision where major work is involved; that streets division employes must contact Hady when they will be absent because of illness, or before leaving work if they are ill; and that streets division employes must first submit their vacation requests to Hady for approval before Hady forwards their requests to Donoghue for final action, which action is based on Hady's approval or disapproval.

19. That the Utility Foreman, Michael Frey, has been employed in the Department of Public Works for approximately eight years, and has held the foreman position for the last three years; that he is immediately responsible to Ginder, and ultimately to Donoghue, for the operation and work of the utility division; that although he was not expressly informed of such in writing, Frey has the authority to effectively recommend the hiring of employes and has effectively recommended the hiring of a full-time employe in his division since becoming foreman; that Frey has only minimal authority to discipline employes, but has given an employe a verbal warning for drinking on the job after discussing the problem with Donoghue and Ginder, and has warned two employes concerning their work performance; that Frey has the authority to direct and assign the four full-time employes in the utility division and exercises such authority by scheduling the work to be done, although there is seasonal scheduling, e.g., during the winter the four employes work on water meters and the maintenance of the facilities, and in the summer perform sewer and sanitary sewer maintenance, water main flushing and install meters; that he issues weekly work assignments and has the independent authority to deviate from the work schedule, and to reassign employes from one project to another as he deems necessary; that Frey receives a significantly higher wage (\$16,083 in 1980) than the next highest paid position in the utility division (\$13,395) due, for the most part, to the additional responsibilities of the foreman position; 2/ that Frey is not the most senior employe in the utility division and that one other employe in the utility division has the same level of state certification as Frey; that Frey spends approximately twenty-five percent of his time scheduling work, assigning employes, directing the work, inspecting the work, filling out time sheets, and reporting to City Hall to pick up work orders or correspondence, and that a small part

2/ The City Administrator testified that Frey's state certification may have been part of the consideration, but that it was due for the most part to Frey's being a "department head."

of that time is spent collecting water samples; that Frey spends the remainder of his time filling out monthly, weekly and daily reports receiving and checking on citizen inquiries or complaints and performing some maintenance work; that Frey does not set meters or work on sewer maintenance, unless in emergencies; that utility division employees check with Frey when they want time off; and that Frey exercises independent judgment as to the scheduling and assignment of work and overtime.

20. That the Parks Foreman, Ed Haack, has been in that position at least since 1976; that Haack is directly responsible to Ginder and Donoghue for the operation of the parks division; that Haack has the authority to effectively recommend the hire of employees and has exercised that authority by interviewing and hiring part-time summer employees on his own, and he is authorized to hire three part-time employees for the summer of 1981; that there have been no full-time employees hired in the parks division since Haack has been foreman; that Haack, at most, possesses only minimal authority to discipline employees; that Haack schedules the work to be done in the parks division, but that this work is largely of a routine nature; that Haack assigns the work to the one other full-time employee in the division, and during the summer months assigns the three part-time summer employees; that Haack receives a significantly higher wage (\$15,334 in 1980) than the highest paid position in the bargaining unit (\$13,790) due to additional responsibilities; that Haack spends approximately fifteen to twenty-five percent of his time in scheduling and assigning work keeping time records, training park groundsmen and laborers and reporting to City Hall to pick up work orders or correspondence; that Haack spends the remainder of his time performing inspection and maintenance work at the City's parks and facilities; and that Haack exercises independent judgment in scheduling and assigning work, hiring part-time summer employees and authorizing overtime.

21. That Hady, Frey and Haack, in their respective positions of Street Foreman, Utility Foreman and Park Foreman, exercise supervisory responsibilities in sufficient combination and degree so as to make them supervisory employees.

CONCLUSION OF LAW

That the incumbents of the positions of Street Foreman, Utility Foreman and Park Foreman, are supervisors within the meaning of Section 111.70(1)(o)1, of the Municipal Employment Relations Act, and therefore are not municipal employees within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

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

ORDER CLARIFYING BARGAINING UNIT

That the positions of Street Foreman, Utility Foreman and Park Foreman shall be, and hereby are, excluded from the collective bargaining unit involved herein.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of August, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman
Morris Slavney
Morris Slavney, Commissioner
Herman Torosian
Herman Torosian, Commissioner

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

In this proceeding the Union seeks to include the foremen positions in the Public Works Department collective bargaining unit. As indicated in our Findings of Fact, the collective bargaining unit involved was not voluntarily recognized, and the Commission has previously, in 1971, considered the supervisory status of the Streets and Utility foremen positions, and determined that they were not supervisory in nature. As also noted above, subsequent to that determination the parties agreed to exclude said positions from the bargaining unit.

On the basis of the parties' voluntary exclusion of the foremen positions, the City contends that a petition for unit clarification is not an appropriate mechanism to secure the accretion of these positions. In support of its contention the City cites our decisions in Cumberland Community Schools, Joint District No. 2 3/ and Amery Joint School District No. 5. 4/ We concluded in those cases that:

Nevertheless, the petition for unit clarification is deemed inappropriate, since the Commission will neither accrete employees to a unit where they were previously specifically excluded therefrom, nor will it clarify the unit to include such employees under the same circumstances. Where there exists a voluntarily recognized unit and where certain classifications have been excluded from the unit, and a party involved in the recognition agreement opposes the proposed expansion, the Commission will not expand said unit without an election in the unit deemed appropriate.

The Commission, in more recent cases, has refined this policy as follows:

The Commission will not expand a voluntarily recognized collective bargaining unit without an election in the unit deemed appropriate where certain classifications of employees have been implicitly or explicitly excluded from the unit; a party involved in the recognition agreement opposes the proposed expansion; the original exclusion was not based on statutory grounds, the unit is not repugnant to the provisions of the Municipal Employment Relations Act and there has not been any intervening events which would materially affect the status of the affected employees. 5/

However, we find that this policy is inapplicable in the instant situation. Initially, in the original election proceeding, the Commission concluded that the occupants of the foremen positions were not supervisors, but employees under MERA, and therefore to be included in the unit involved. Regardless, for a reason not disclosed in the record, the parties thereafter voluntarily excluded the foremen positions from the unit. Since the original inclusion of those positions was by a Commission determination in an election proceeding, we are not inclined to defer to a subsequent agreement that contradicts our findings.

3/ (15214) 1/77.

4/ (15793-A and 15974-A) 4/78.

5/ City of Cudahy (Fire Department) (18502) 3/81; Germantown School District (17494) 12/79.

Even if it is assumed that the positions were voluntarily excluded by the parties on the basis of a good faith belief that they were then supervisors, we are not bound by such a voluntary exclusion since it concerns a statutory basis for exclusion and such a determination is within the purview of the Commission. Therefore, we deem it proper to determine whether the positions in issue herein should or should not be accreted to the existing unit and should we determine that they should be accreted we will do so without the need for an election.

The Union contends, contrary to the City, that the Street Foreman, Utility Foreman and Park Foreman positions are not supervisory in nature. The term "supervisor" is defined in Sec. 111.70(1)(o)1 of MERA as follows:

As to other than municipal and county firefighters, 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 employes, 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.

The Commission, in determining whether the statutory criteria are present in sufficient combination and degree in order to warrant a 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 employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised, and the number of other persons exercising greater, similar or lesser authority of the same employes;
4. The level of pay, including an evaluation of whether the supervisor is paid for his skills or for his supervision of employes;
5. Whether the supervisor is primarily supervising an activity or primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes;
7. The amount of independent judgment and discretion exercised in the supervision of employes. 6/

The Commission has held that it is not necessary that all of the above factors be present, but that if there is present a sufficient combination of the factors, it will find the employe to be a supervisor. 7/

6/ City of Milwaukee (6960) 12/64; Eau Claire County (17488-A) 3/81.

7/ Eau Claire County, supra.

We would note that all three of the foremen are essentially totally responsible for scheduling and assigning the work in their respective divisions and have the independent authority to assign overtime. Both Hady and Frey have effectively recommended the hire of one full-time employe in their divisions, and both Hady and Haack have the independent authority to hire part-time summer help for their divisions on their own.

On the basis of the duties, responsibilities and authority of the incumbents in the foremen positions, as detailed in the Findings of Fact, we are satisfied that there are a sufficient number of the necessary factors present to conclude that said positions are supervisory in nature, and therefore cannot be included in the unit.

Dated at Madison, Wisconsin this 27th day of August, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

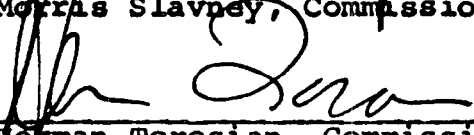
By



Gary J. Covelli, Chairman



Morris Slavney, Commissioner



Herman Torosian, Commissioner