

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :

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WISCONSIN COUNCIL 40, AFSCME, AFL-CIO : Case 5

: No. 45085 ME-466

: Decision No. 10585-A

Involving Certain Employes of :

:

MUSKEGO-NORWAY SCHOOL DISTRICT :

:

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME,
Quarles and Brady, S.C., Attorneys at Law, by Mr. Robert Duffy

AFL-CIO
and Ms. Carme

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

On January 4, 1991, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify a bargaining unit of municipal employes of the Muskego-Norway School District by including the Bay Lane Head Custodian position in the Union's bargaining unit. A hearing on the petition was held on March 20, 1991, in Muskego, Wisconsin before Examiner Raleigh Jones, a member of the Commission's staff. The record was closed on May 20, 1991, upon completion of the post-hearing briefing schedule. Being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, and its affiliated Muskego Area Public Employees Union, Local 2414, AFSCME, AFL-CIO, hereinafter collectively referred to as the Union, are labor organizations with offices located at 1203 Wilshire Place, Waukesha, Wisconsin.

2. Muskego-Norway School District, hereinafter the District, is a municipal employer with offices at P.O. Box 900, Muskego, Wisconsin.

3. In Muskego-Norway Consolidated Schools System, Dec. No. 10585 (WERC, 11/71), the Commission certified the Union as the exclusive collective bargaining representative of

All regular full-time and regular part-time maintenance and custodial employes of the Muskego-Norway Consolidated Schools System, excluding supervisory, confidential, clerical, food service employes, teacher aides and all other employes.

The parties later adopted this language for their contractual recognition clause. Although the Head Custodian positions at the District's four elementary schools were included in the bargaining unit when it was established in 1971, the Head Custodian positions at the High School and Bay Lane (the largest and second largest buildings, respectively, in the District) were excluded from the bargaining unit on supervisory grounds. These latter two positions (i.e., the Head Custodian at Bay Lane and the High School) have remained excluded from the bargaining unit since its inception on that basis.

These positions share a job description. The status of the Bay Lane Head Custodian has never been raised in contract negotiations or in a prior unit clarification proceeding.

4. On January 4, 1991, the Union filed a unit clarification petition with the Commission requesting that the Bay Lane Head Custodian position be included in the existing bargaining unit represented by the Union. The District opposes the inclusion on the basis that the position is supervisory.

5. The current Bay Lane Head Custodian, Raymond Kuehn, was hired as a custodian in 1988. In December, 1990, the Bay Lane Head Custodian position opened up when the incumbent became the High School Head Custodian. The District posted the Bay Lane Head Custodian vacancy and promoted Kuehn to the position. As the Bay Lane Head Custodian, Kuehn is responsible for maintaining the general cleanliness and safety of the Bay Lane physical plant and the areas outside the building such as the building grounds, sports fields and play areas. The Bay Lane physical plant includes Bay Lane Middle School, Country Meadows Elementary School and the District office complex. Kuehn reports to both the Building and Grounds Supervisor and the Principal of Country Meadows School. The Principal of Country Meadows School has been assigned oversight responsibilities for the operations and maintenance of the Bay Lane facility and is kept abreast by the Head Custodian of pertinent custodial matters. The Bay Lane Head Custodian oversees all the custodians in the Bay Lane facility on a day-to-day basis. In addition to Kuehn, six custodians are regularly assigned there: three bargaining unit employes and three contracted cleaning service employes who are not District employes. Additionally, floating custodians are occasionally assigned by the District to work there. Kuehn works a day shift, the three bargaining unit custodians work day and evening shifts and the three contracted service employes work various evening shifts. All the District employes are full-time while the contracted service employes work about half-time. The bargaining unit employes perform cleaning and maintenance duties while the contracted service employes perform cleaning duties exclusively.

6. All the custodians have assigned cleaning areas but Kuehn's only cleaning area is the gym which he spends 15 minutes daily sweeping. Kuehn decides what custodial work will be done in the facility. As examples, Kuehn decides when the floors are cleaned and waxed, when the walls are painted and when the boiler is cleaned. Kuehn then assigns custodians to do that work. As an example, if a special event is going to occur in the building, Kuehn will assign employes the set up or take down work that is involved. Kuehn also oversees all the custodial work performed in the building to ensure that it is properly done. He does this by checking the work done by others and speaking to teachers about it. If problems arise concerning the quality of work done by bargaining unit employes, the Head Custodian will address the matter directly with the affected employe. If problems arise concerning the quality of work done by the contracted service employes, the Head Custodian will contact either the Supervisor of Buildings and Grounds or the cleaning service to report the problem. Once when Kuehn was dissatisfied with the bathrooms cleaned by a cleaning service employe, he talked with the owner of the cleaning service and told him that he (Kuehn) wanted that employe replaced with someone who could do the job, and that the owner of the cleaning service responded by replacing the employe and bringing in a full crew on a Saturday to clean the bathrooms. The Bay Lane Head Custodian is responsible for establishing and implementing a preventative maintenance plan for the building's facilities, equipment and mechanical systems (i.e. heating, ventilating, plumbing and lighting). Kuehn schedules all maintenance activities performed in the building. If an outside contractor is needed for a maintenance job, Kuehn will make a recommendation concerning same to either the Building and Grounds Supervisor or the Country Meadows Principal which, to date, has been followed. Kuehn maintains a stock

of custodial supplies and insures that it is properly used. During the work day Kuehn is continuously paged by office personnel to deal with miscellaneous activities. When this happens, Kuehn either handles these matters himself or assigns someone else to handle it. During the workday Kuehn replaces a custodian at lunchtime so that the employe can eat; during that time he monitors the lunchroom and puts tables away.

7. Kuehn is paid a yearly salary unlike the custodians who are paid on an hourly basis. He is paid at the rate of \$14.09 per hour while the maintenance workers and head custodians at the elementary schools are paid \$13.53 per hour. Kuehn has made recommendations to his supervisors concerning custodial staffing needs. He has changed custodial work schedules and authorized custodial overtime for routine matters. He also approves custodial vacation and time off, subject to the final authority of the building and grounds supervisor or the Country Meadows Principal. Past Bay Lane Head Custodians have been involved in selecting new custodial employes. Their involvement in the hiring process included going over applicants' credentials, checking previous work records, sometimes attending applicant interviews where the actual interview questions were asked by a building principal and offering an opinion to the Principal as to which applicants met the criteria for the position. The Head Custodian would not make a direct recommendation to hire a specific person. There have not been any custodial hirings at Bay Lane since Kuehn became Head Custodian. The Bay Lane Head Custodian has historically formally evaluated custodians on a yearly basis. Kuehn has formally evaluated both the three bargaining unit custodians and the three contracted cleaning service employes. When he did so, Kuehn initially rated the custodians' performance and then met with the Country Meadows Principal to review same. After conferring over the contents of the evaluations, the Country Meadows Principal suggested that Kuehn change the evaluation of one employe from "acceptable" for attendance to "needs improvement", which he did. Thereafter, Kuehn met with the employes to go over the evaluations with them. These evaluations have no bearing on employe wages and benefits under the labor contract. The Bay Lane Head Custodian cannot independently suspend, discharge, lay off or recall employes. The final determination with regard to these matters is with the School Board. There were some instances where a previous Bay Lane Head Custodian (Norman Przyblka) was dissatisfied with the work performed by contracted service employes. When this happened Przyblka advised his Principal, John Egan, of same who, in turn, advised the cleaning service of the District's dissatisfaction whereupon the affected employe was taken off the job. When Przyblka was Head Custodian and custodians were disciplined, Egan wrote the letters of discipline. On one occasion Przyblka sent a letter admonishing an employe for not cleaning a particular area. Kuehn has not had to admonish or discipline any custodians since becoming Head Custodian. The Head Custodian is responsible for long-range planning for the building's future custodial needs. Kuehn is consulted by the Country Meadows and Bay Lane Principals in preparing an initial maintenance and operations budget for Bay Lane. Priorities for the equipment and supplies in this budget are set by the Country Meadows Principal or the Supervisor of Buildings and Grounds. After this initial budget request is prepared, it is submitted to the District office and School Board for review.

8. Kuehn does possess and exercise supervisory responsibilities in sufficient combination and degree so as to make him a supervisory employe.

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

CONCLUSION OF LAW

The occupant of the Bay Lane Head Custodian position is a supervisory

employe 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 foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

The position of Bay Lane Head Custodian hereby continues to be excluded from the bargaining unit set forth in Finding of Fact 3 above.

Given under our hands and seal at the City of
Madison, Wisconsin this 18th day of December,
1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

I concur.

A. Henry Hempe /s/
A. Henry Hempe, Chairperson

(Footnote 1/ appears on page 5.)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

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

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this 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.

(Footnote 1/ continues on page 6.)

(Footnote 1/ continues from page 5.)

(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.

MUSKEGO-NORWAY SCHOOL DISTRICT

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

BACKGROUND

The Union seeks to include the Bay Lane Head Custodian position in the collective bargaining unit represented by the Union. The District opposes the inclusion on the basis that the employe occupying the position is a supervisory employe.

POSITIONS OF THE PARTIES

The Union's position is that Kuehn is neither a supervisory nor managerial employe. With regard to his alleged supervisory status, the Union first contends that Kuehn has no authority to hire. It acknowledges in this regard that he reviews job applications and may sit in on interviews conducted by others, but it contends the Head Custodian would not make a direct recommendation to hire someone. Next, in the Union's view, Kuehn lacks the authority to discipline other employes. In support thereof, it points out that discipline has historically been meted out by the director of building and grounds. It submits that while the Bay Lane Head Custodian does evaluate employes, these evaluations have no bearing on the wages or benefits of employes and therefore should not be considered particularly significant. Finally, according to the Union, Kuehn's authority to assign work to the other custodians is strictly routine and does not involve the exercise of independent judgment. In its view, he is at best a working foreman who spends a great deal of his time performing the same work that is performed by the other bargaining unit employes. It further notes that Kuehn is paid only marginally more than the people who he is said to supervise. With regard to Kuehn's alleged managerial status, the Union contends that his role in the budget process is simply ministerial with all real decisions being made by others in the District. It therefore argues that inasmuch as Kuehn is neither a supervisor nor a managerial employe, he must be included in the unit.

The District's position is that Kuehn is a supervisory employe. It notes in this regard that the position of Bay Lane Head Custodian has been excluded from the bargaining unit since the unit was certified 20 years ago. In its view, nothing has occurred during that period to justify a change in status. It points out that the job duties for the position are the same as 20 years ago, as is the scope of the bargaining unit and the recognition clause. The District further contends that the Bay Lane Head Custodian's position meets the Commission's test for supervisory status. According to the District, although the Head Custodian performs some custodial tasks, his main responsibility is to supervise the day-to-day operations of his staff (i.e. the three bargaining unit employes and three contracted service employes) at Bay Lane. It notes that this involves assigning them work and insuring that it is performed correctly. The District also points out that Kuehn formally evaluates staff after conferring with the building principal regarding same. The City claims that past Head Custodians at Bay Lane have played an integral part in selecting new employes and have effectively influenced the hiring process. In support thereof it notes that they have gone over applicants' credentials, checked into their previous work records, and in many cases, been present for the interviewing of candidates. The District also points out that Kuehn approves vacation and time off for staff subject to the final authority of the Building and Grounds Supervisor or the building Principal and that he sometimes reschedules staff work assignments. The District also asserts that the head custodian is intricately involved in the District's long-range planning concerning the overall maintenance needs of the Bay Lane physical plant. Thus,

in its view, the Bay Lane Head Custodian is heavily involved in establishing maintenance priorities for the District. It therefore contends that the position should be excluded from the bargaining unit.

DISCUSSION

Supervisory Status

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

...Any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, or lay off, recall, promote, discharge, assign, reward or discipline other employes, or to adjust their grievances or effectively 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 considers the following factors in determining whether a position is supervisory in nature:

1. The authority to effectively recommend 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 persons exercising greater, similar or less authority over the same employes;
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 employes;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he or she spends a substantial majority of his or her time supervising employes; and
7. The amount of independent judgment exercised in the supervision of employes. 2/

Not all of the above factors need to be present for a position to be found supervisory. Rather, in each case, the inquiry is whether the factors are present in sufficient combination and degree to warrant the conclusion that the employe occupying the position is supervisory. 3/

2/ Portage County, Dec. No. 6478-D (WERC, 1/90); Town of Conover, Dec. No. 24371-A (WERC, 7/87).

3/ Somerset School District, Dec. No. 24968-A (WERC, 3/88); Kewaunee County, Dec. No. 11096-C (WERC, 2/86).

Applying these factors here, we find that the duties and responsibilities of the Bay Lane Head Custodian, currently occupied by Ray Kuehn, warrant the conclusion that the position is supervisory. Kuehn supervises three district custodians, three contract custodians and various supplemental/floater personnel who provide additional assistance when needed. Kuehn develops work schedules and assigns employes to clean and maintain various areas of the building. Kuehn assigns employes based upon extra curricular activity demands. This may include setting up rooms, as well as cleaning after the activity. When school is not in session, Kuehn will develop schedules for special cleaning and repair activities. When custodial or maintenance needs arise during the day, Kuehn is notified. He then decides whether he will perform the job or delegate it to a subordinate.

The record supports that Kuehn independently assigns work, evaluates work and is free to change schedules and assignments. He changed the hours of a second shift custodian to improve utilization. He approves vacations and time off requests. While these requests are also reviewed by the Supervisor of Building and Grounds or the Principal, the record does not show that Kuehn's decisions are modified or reversed. He maintains records of work hours, overtime hours, absences, tardiness and approves time cards. He assigns overtime when he determines it is necessary. Kuehn submitted a request, including documentation to the personnel department, for additional custodian assistance and identified what he felt was the improper use of a floating substitute. This action was taken independently without the input of higher authority.

The Bay Lane Head Custodian performs annual evaluations for the three district custodians and the three contract custodians. These evaluations are completed independently by the Head Custodian. After the evaluations are completed, but before discussion with the employe, the Principal reviews and signs the forms. On one occasion the Principal suggested that a change be made on one of the evaluation forms. Although Kuehn followed this suggestion, the principal was quite clear that he had not directed Kuehn to make the change. While these evaluation forms do not directly impact wages, they are meaningful and can serve as an early stage of a progressive discipline program. The evaluations identify responsibilities that are being done well and aspects of job performance that need improvement. As a part of formulating these evaluations the Head Custodian obtains input from individual teachers during the school year. Based upon Kuehn's request, the teachers provide continuing input about custodian job performance throughout the year. Kuehn discusses custodian performance and the teachers' perceptions with them throughout the year.

Kuehn is paid an annual salary that equates to \$14.09 per hour. Kuehn frequently extends his work day but receives the same amount of pay regardless of the number of hours he works. The top rated bargaining unit position is paid \$13.53 per hour. The bargaining unit employes are paid on an hourly basis and receive overtime compensation.

The record supports that disciplinary action does not occur frequently in the District. When queried about his role in the disciplinary process, Kuehn described a progressive disciplinary process that included three steps. He indicated that he would use the evaluation form to notify an employe about deficiencies. If the deficiency was not corrected, he would meet with the employe and a union representative to further discuss the matter. If the problem continued to go unresolved, Kuehn stated that he would draft a letter to the Building and Grounds Supervisor providing details about the matter and

recommend a suspension or that further action be taken. He indicated at that point the decision would be up to the Buildings and Grounds Supervisor. Although Egan, the former Bay Lane Principal and Building and Grounds Supervisor, stated that he had written the letters of reprimand when employees were disciplined, he also acknowledged that Kuehn's description of the Bay Lane Head Custodian position was the same as it was when he supervised the position. When Kuehn was dissatisfied with the performance of a contract custodian, he contacted the owner of the cleaning service and indicated that he wanted the employe removed and replaced with someone who could do the job. The employe was replaced by the cleaning service. The record supports that this action was taken by Kuehn independently. Based upon the foregoing, his previously discussed operational independence and his employe evaluation responsibilities, we conclude that the Bay Lane Head Custodian has the authority to effectively recommend the discipline of the employes.

The Head Custodian at the Bay Lane School plays a meaningful role in hiring. The Bay Lane Head Custodian reviews applicant's credentials, checks employment references, and most often interviews candidates with the principal. The recommendations provided by the Head Custodian are given serious consideration. While the evidence is not conclusive that the Head Custodian has the authority to effectively recommend hiring, it is clear that he is an integral component of and has meaningful involvement in the hiring process.

While Kuehn as Bay Lane Head Custodian does not exhibit all of the factors we consider in determining supervisory status, he exhibits a sufficient combination of these factors for us to find him to be a supervisor. We reached the same conclusion in Somerset School District, supra, in which the Head

Elementary Maintenance/Custodian functioned in a similar manner performing many of the same duties. For these reasons, we conclude that the position of Head Custodian of Bay Lane School is a supervisor and excluded from the bargaining unit.

Dated at Madison, Wisconsin this 18th day of December, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

MUSKEGO-NORWAY
SCHOOL DISTRICT

CONCURRENCE

Twenty years is a long time. It is sufficient in this state to establish adverse possession of real estate. It is sufficient to raise a child from infancy to adulthood -- with two years left over. Within a twenty year period, American involvement in both World Wars I and II could be fought more than twice over, and American involvement in only World War II could be fought -- five times over.

Though a sufficient period for accomplishment of these major endeavors with time left over, it is disappointing to acknowledge that the twenty plus years during which the Bay Lane head custodial position has been excluded from the bargaining unit has now proven inadequate for the parties to have achieved a final resolution of that status, even though the record establishes an absence of material change in circumstance, statutory repugnance to the exclusion, or egregious error. Based on past Commission action in a similar situation (although involving a voluntary unit recognition), 4/ the petitioner herein is entitled to a hearing, on the merits. Absent compelling reasons of equity or public policy not yet argued to the Commission, this entitlement seems unlikely to change.

In any event, I concur with the result reached by the majority and believe its rationale to have support from the record.

Dated at Madison, Wisconsin this 18th day of December, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

4/ City of Sheboygan (Water Department), Dec. No. 7378-A (WERC, 5/89), in which the Commission reviewed the merits of a 24 year exclusion of four foremen from the bargaining unit.