

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
STATE HIGHWAY ENGINEERS ASSOCIATION	:	
Involving Certain Employes of	:	
DEPARTMENT OF TRANSPORTATION	:	
STATE OF WISCONSIN	:	Case II
	:	No. 14646 SE-31
and	:	Decision No. 10592-F
	:	
ERIK HYLAND AND DENNIS BRUSH, on behalf	:	
of themselves and all others similarly	:	
situated,	:	
	:	
Intervenor.	:	
	:	

Appearances:

- Mr. Karl Hacker and Mr. William Posso, Field Representatives, appearing for Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO.
- Mr. Robert J. Mueller, Attorney at Law, appearing for State Highway Engineers Association.
- Mr. Russ R. Mueller, Attorney at Law, appearing for Erik Hyland and Dennis Brush and all others similarly situated.
- Mr. Gene Vernon, Attorney at Law, appearing for Department of Transportation, State of Wisconsin.

ORDER CLARIFYING BARGAINING UNIT

The Wisconsin Employment Relations Commission pursuant to a Direction of Election previously issued by it, on January 19, 1972 conducted an election among all employes engaged in the profession of engineering in the Department of Transportation, State of Wisconsin, excluding all other employes, limited term employes, non-permanent seasonal employes, confidential employes, supervisors and managerial employes, wherein State Highway Engineers Association was certified as the representative of the employes in said unit; 1/ and that during said election the ballots of 22 individuals occupying the classification of Civil Engineer 5 employed in the Central Office, Division of Highways, Bureau of Engineering, were taken by challenged ballot on the claim of said individuals that they were either supervisory or managerial and therefore should be excluded from the collective bargaining unit involved; 2/ and that while such challenges

1/ Certification of Representatives was issued by the Commission on January 28, 1972. (Decision No. 10592-A)

2/ On January 17, 1972, prior to the counting of the mail ballots, Erik Hyland and Dennis Brush filed a petition for clarification of bargaining unit on behalf of themselves and other employes similarly situated contending that 22 employes classified as Civil Engineer 5, performing staff functions were either supervisory or managerial and should be excluded from the unit.

did not affect the results of the election, and because of the claim of Hyland, et al, the Commission set hearing in the matter to take evidence with respect to whether the positions involved were supervisory and/or managerial and therefore should be excluded from the unit; and that said hearing was conducted before the Commission on March 7 and 24, 1972; that on June 20, 1972, Russ R. Mueller, Attorney for Hyland, et al, filed a Motion with the Commission requesting that the record be reopened; that on July 3, 1972, the Commission denied such Motion; that on July 24, 1972, Attorney Mueller, on behalf of Hyland, et al, filed a Motion to accept indirect offer of proof in the form of an affidavit executed by William R. Redmond, Highway Commission Vice Chairman, Division of Highways, Department of Transportation, State of Wisconsin, and the Commission having informally concluded to accept said indirect offer of proof and to consider the affidavit filed by William R. Redmond; and the Commission having considered the evidence, arguments of the parties and the brief filed by Attorney Mueller on behalf of Hyland, et al, and being fully advised in the premises, makes and issues the following

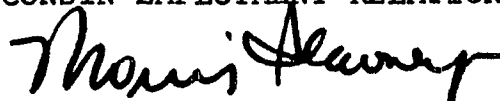
ORDER CLARIFYING BARGAINING UNIT

That, since the Civil Engineer 5 positions performing staff functions in the Department of Transportation are not supervisory nor managerial positions, but are employes within the meaning of the State Employment Labor Relations Act, therefore, such positions are appropriately included in the collective bargaining unit involved herein.

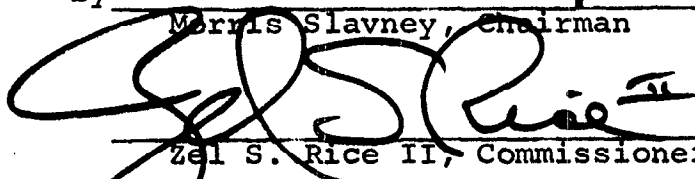
Given under our hands and seal at the City of Madison, Wisconsin, this 31st day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Morris Slavney, Chairman



Zel S. Rice II, Commissioner



Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING
ORDER CLARIFYING BARGAINING UNIT

On November 1, 1971, following a hearing conducted by it, the Wisconsin Employment Relations Commission directed an election among all employes engaged in the profession of engineering in the Department of Transportation, State of Wisconsin, excluding all other employes, limited term employes, non-permanent seasonal employes, confidential employes, supervisors and managerial employes. During the course of the hearing the State and the State Highway Engineers Association, the organization which was placed on the ballot, had agreed that 22 Civil Engineer 5 positions performing staff services were eligible in the unit and were neither supervisory nor managerial. The balloting was conducted by mail. Mail ballots were sent to the employes in the unit on December 29, 1971, and were required to be post marked by January 14, 1972, to be included in the tally of ballots.

Prior to the counting of the ballots, Attorney Russ R. Mueller, on behalf of Erik Hyland and Dennis Brush, two of the Civil Engineer 5's who were performing staff functions, as well as others similarly situated, moved to intervene in the proceeding and filed a petition for clarification of the bargaining unit, specifically requesting that the Civil Engineer 5 positions performing staff functions be excluded from the unit as either managerial or supervisory.

Prior to the opening of the mail ballots the ballots cast by the individuals occupying Civil Engineer 5 positions performing staff functions were marked as challenged ballots as a result of the Motion to clarify the bargaining unit. The remainder of the ballots were counted and said challenged ballots were insufficient to affect the results of the election, and thereupon the State Highway Engineers Association was certified as the collective bargaining representative for the employes in the unit involved.

Two days of hearing were had with regard to the matters in issue and following the hearing Attorney Mueller, as Counsel for Hyland, et al, hereinafter referred to as the Intervenor, filed a Motion to re-open the hearing, which the Commission denied, and thereafter the Intervenor filed a Motion to accept indirect offer of proof consisting of an affidavit filed by Highway Commission Vice Chairman Redmond. While the Commission made no formal order with respect thereto, it is to be noted that it has considered the affidavit filed by Redmond as part of the record. The issue to be determined herein is whether the individuals occupying the classification of Civil Engineer 5 performing central office staff functions should be excluded from the unit as supervisory and/or managerial personnel.

Positions of the Parties

Employer

The Employer announced intention to maintain a neutral position at the hearing. Originally the Employer had felt the CE5 positions performing staff functions should be excluded on the basis of managerial responsibility, but after reviewing the law and holding discussions with the Commission and the Association it became quite obvious that although these CE5's were performing and representing the Department

in the field with respect to cities and counties they were not managerial in the sense of formulating and implementing policies affecting the employer-employee relationship. Thus the Employer felt the CE5's should be included in the bargaining unit and stipulated to that effect with the Association.

State Highway Engineers Association

The Association firmly believes that the stipulation it entered into with the Employer was reached after thorough discussions and consideration of the intent of Section 111.80 and should not be disturbed as a result of the Intervenor's Petition. The factors upon which the Intervenor bases his Petition, such as managerial and supervisory responsibilities, were considered along with the extent of bargaining unit work that was involved before the stipulation was entered into. To entertain the Petition at this time would create chaos in the administration of Section 111.80 and render stipulations meaningless.

Intervenor

The Intervenor advances the position that the CE5's are managerial employees and that some of them additionally perform supervisory functions, and therefore should be excluded from the bargaining unit. The following points are made to substantiate the position:

1. It is established practice for the Department of Transportation to develop "guide lines" in addition to position descriptions for engineering positions CE5 through CE9 while no such guide lines are used for engineering positions below the CE5 level. The significance of this practice is that the guide lines are a position description tool used for a management function and are utilized at the CE5 level because that is the lowest level to which policy formulation reaches.
2. Authority for promotion to the CE5 level and above has been retained by the Highway Commission while promotions below that level are a delegated function and this fact demonstrates the close working relationship the CE5s have in administrative matters with the department.
3. The CE5 position carried with it the responsibility of exercising independent judgment in making decisions which are not within established limits set by higher authority.
4. The CE5 position is an integral part of the formulation, determination and effectuation of the policy of the Division of Highways.
5. The decision making function of the CE5 position involves more than routine matters.
6. The CE5 position involves an engineering liaison function which is also interchangeably described as a coordinating function or a review responsibility between the central and district offices of the Highway Commission, the purpose of which is to maintain uniformity of policy and requires the CE5 to review the work performed and administered by district office personnel. This function satisfies the proof required to establish "an employer-employee relationship". The evidence in this regard establishes that a necessary element of

this function is the critical review of the work of other engineering positions which are included in the bargaining unit.

Additionally the Intervenor points to a stipulation entered into between SHEA and the Employer, and condoned by the Commission, that excluded four non-CE5 positions on the basis of performance of managerial functions. It is maintained that the CE5 engineering liaison function is the same as the nature of the work performed by the four non-CE5 district positions excluded on the basis of managerial status and it would be inconsistent not to also exclude the CE5 positions.

The Intervenor further makes claim that some of the CE5 positions, in addition to being managerial, also involve supervisory responsibilities. These individuals have responsibility for programs, as contrasted to lower classifications handling only projects; the significance lies in the fact that a program is wider in scope and could encompass more than one project. This responsibility carries with it supervision of varying numbers of subordinates as to assigning work, scheduling vacations and making effective recommendations on merit increases. Again it is pointed out that a stipulation between SHEA and the Employer excluded a non-CE5 as a supervisor and the work of this individual is identical to that of the contested CE5 group.

The Intervenor argues that by amendment in 1972 to Section 111.70(b) of the Municipal Employment Relations Act, the legislature attempted to treat the term managerial in a more specific manner than had previously been the case when the term was not referred to in that statute. It is pointed out that the requirement of confidential knowledge of matters bearing on the employer-employee relationship is no longer the sole criteria in determining managerial status. "Management employes" is specifically and separately itemized in the recreated Section 111.81(15). Following from these facts the Intervenor believes the case of Association of Municipal Attorneys of Milwaukee and City of Milwaukee, WERC Decision No. 8100 no longer is applicable inasmuch as it dealt solely with the employer-employee aspect.

Position Responsibilities-Civil Engineer 5

The following is a composite summary of the testimony of several witnesses as to what duties make up the central office staff CE5 positions.

The central office staff CE5 position carries a liaison and surveillance responsibility as to programs and projects being handled by district engineering personnel. The liaison function keeps the district appraised on a current basis of changes in policies and procedures and at the same time serves to alert the central office as to current district progress on various programs and projects. The surveillance responsibility involves assuring that district personnel are adhering to established policies, procedures and engineering principles. In the event irregularities are encountered the CE5 seeks correction at the district level and failing such would pursue the matter through the central office.

In the case of some of the CE5 positions supervision of varying numbers of district engineering personnel is involved. This function is not a permanent one and depends on unique aspects of individual programs or projects. The supervisor-employee relationship in most

instances is of a transient nature and differs from that which would exist between district supervisors and their employes.

Discussion

The Commission attaches considerable importance to the fact the two prime parties entered into a stipulation to include the contested CE5 positions in the bargaining unit. Stipulations as to a collective bargaining unit, unless such are in direct contradiction with the provisions and intent of Section 111.81(3)(a), normally will not be voided through Commission action. After review of the testimony and record in this case it is concluded the stipulation by the parties herein is not in contradiction to the intent or provisions of the Section.

Analysis of the Intervenor Position

1. The Commission has repeatedly expressed the established fact that position descriptions and titles may fail to accurately reflect the actual duties performed by an employe. 3/ The fact that "guide lines" are developed for only positions of CE5 and above, may not, by itself, either denote or not denote a dividing point between management and non-management responsibilities. It could very well denote differing degrees of required professional competency completely aside from any managerial considerations. The testimony and record does not support the Intervenor's argument on this point.

2. The fact the Division of Highways retains the approval authority for promotions to CE5 and above, while delegating those below the CE5 level does not conclude that this distinction deals with the management level designation. Again the level of required professional competency, aside from any managerial responsibilities, could very well be the reasoning behind such non-delegation of promotional approval. The actual responsibilities and duties of the CE5 positions, and not an administrative procedure, are germane to the question at hand.

3. The requirement that the CE5 exercise independent judgments that are not within established limits set by higher authority, rather than denoting a managerial responsibility simply states what is universally accepted as part of any professional definition.

4. The claim that the CE5s play an integral part in the formulation, determination and effectuation of policy in the Division of Highways is not established by the testimony or record. It is stretching a point to assign policy ramifications to the independent engineering judgments made at the CE5 level. Very likely such judgments may influence the engineering direction taken on individual projects or programs and may survive to become permanent standard operating procedure for the agency. This is not the formulation of policy which in its most narrow definition would encompass an interrelation of many functions of the agency.

5. The fact that the decision making function of the CE5 position involves more than routine matters is far from a basis for managerial status. This claim should more reasonably be associated with the professional aspect of the position.

3/ Monroe County, 8166-B, 1/68; City of Milwaukee, 6215-M, 9/66; LaCrosse County, 8341, 1/68; 8341-C, 5/68.

6. The engineering liaison function of the CE5 contested positions also referred to as a coordinating function and review responsibility, is advanced as a justification to establish an "employer-employee relationship". A necessary element of this function is the critical review of other engineering positions which are included in the bargaining unit. An analysis of the record and testimony supports the conclusion that this function is purely a staff activity assuring that district offices, in total, are following established policies and procedures of the central office. Additionally, it serves to channel information in both directions. Very little, if any, management responsibility accrues to the CE5 position as a result of this liaison responsibility.

7. The Intervenor points to a stipulation entered into by the Employer and SHEA that excludes four non-CE5 positions as managerial. The argument is that the duties of these positions are identical to those of the contested CE5 positions. In reviewing the record and testimony such is not found to be the case for at least two factors:

(1) The positions stipulated to as managerial are area maintenance supervisors who carry a direct line responsibility of managing and supervising county highway maintenance in their area. In addition to supervising state and county employes in the maintenance activity the individual participates in the county highway budget development. In contrast the liaison function of the contested CE5 positions is purely a staff function exercising surveillance responsibility. The function of these positions is to review, observe, suggest, communicate between the central and district activities and evaluate. These CE5 positions do not encompass a direct line responsibility and are not directly accountable for the performance of the district activities they service.

(2) The positions the parties stipulated to as managerial carry full time twelve month responsibility as to those elements of the position that identify it as managerial while the contested CE5 positions have only recurring transient periods that require the exercise of supervisory authority and this applies to only part of the CE5 positions in question. The remaining CE5 positions fall short of meeting any acceptable managerial and/or supervisory criteria as attested to by the testimony of the Chief Design Engineer:

"I believe he (CE5) has Engineer 4's under him. Of course right now we're at a stage where depending on the work load, he may have one or two at the present time and a month from now he may have none assigned." "There may be situations when he (CE5) would not have any under his supervision."

Further testimony as to how much time the CE5's spend in the field, the activity that would be associated with their claimed supervisory duties, follows:

". . . it differs between units, but I'd say on the average some - if you have to take the entire design section, some probably go out once a month and some others maybe once a week or twice a week; so I'd say about 20 percent (of their total work time) if you want to take an average."

Section 111.81(20) as amended April 29, 1972 is as follows:


"Management includes those personnel engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads and employes exercising similar functions and responsibilities as determined by the Commission."

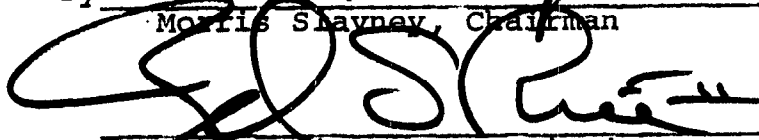
The Intervenor in its brief notes the lack of a legislative definition of a managerial position and, in fact, offered a definition of such a position as a guide for the Commission. The Commission feels Section 111.81(20) offers a clear guide for determining such positions particularly by its reference to specific positions such as bureau director. All of the positions itemized in the Section reflect a common ingredient: responsibility for overall management of several of the diverse elements of an activity. The language of the Section could in no way be interpreted to apply to the contested positions in this case.

Dated at Madison, Wisconsin, this 31st day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Shayney, Chairman


Mel S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner