

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 32

: No. 45722 ME-495

Involving Certain Employees of : Decision No. 15112-C

:

CITY OF БЕЛОIT :

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Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, appearing on behalf of the Union.
Mr. Bruce K. Patterson, Employee Relations Consultant, 3685 South Oakdale Drive, New Berlin, Wisconsin 53151, appearing on behalf of the City.

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

Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission on April 30, 1991, asking that the position of Parks Patrol be included in a bargaining unit of City of Beloit employees represented by Local Union 2537, AFSCME. A hearing in the matter was held in Beloit, Wisconsin, on November 7, 1991, before Examiner Karen J. Mawhinney, a member of the Commission's staff. The parties completed filing post-hearing briefs on January 23, 1992. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, and Local Union 2537, AFSCME, herein the Union, are labor organizations with an address of 1734 Arrowhead Drive, Beloit, Wisconsin 53511.
2. The City of Beloit, herein the City, is a municipal employer with a mailing address of 100 State Street, Beloit, Wisconsin 53511.
3. The Union seeks to have the position of Parks Patrol accreted to the bargaining unit represented by Local 2537, AFSCME. The City argues inclusion is inappropriate because the position lacks a community of interest with other unit positions and because it believes Local 2537 should be bound by an agreement between the City and Local Union 643, AFSCME, regarding use of seasonal employees. The most recent collective bargaining agreement between Local 2537 and the City contained the following recognition clause:

ARTICLE I

RECOGNITION AND DEFINITION OF EMPLOYEES

1.01 The Employer recognizes the Union as the exclusive collective bargaining agent for all regular full-time and regular part-time employees of the City of Beloit, including all regular full-time and regular part-time craft employees (Building, Housing, Plumbing,

Electrical Officials), employed at the Beloit City Hall, Engineering Department, Library, Health Department, Fire Department, Police Department, Housing Authority, and Department of Public Works; but excluding law enforcement personnel, fire fighters, supervisory, confidential, professional and casual employees, and all employees of the Department of Public Works presently represented by Local #643, AFSCME, AFL-CIO, pursuant to the Certification of the WERC Decision No. 15111-13 dated March 1, 1977 for the purpose of collective bargaining on matters concerning wages, hours and conditions of employment.

1.02 Definition of employee status:

a) Regular full-time is defined as an employee who works eight (8) hours per day or forty (40) hours per week.

b) Regular part-time is defined as an employee who works less than eight (8) hours per day or forty (40) hours per week and on a regular schedule.

c) Casual employee is defined as an employee who is normally on call and works for a specific period of time or for a specific job. Casual employees will receive no fringe benefits under the terms of this Agreement. Hours of work of casual employees shall be kept at the lowest possible minimum, not to exceed six hundred (600) hours per year.

Local 2537 represents a variety of positions, including part-time positions, and positions that regularly work outside of City buildings or offices, such as crossing guards, building officials, public safety technicians, housing officials, home health aides, custodians, engineering aides, humane officer, animal control warden, and inspection officials. Local 2537 represents two account clerks that work in the DPW, an account clerk at the Transit System, a part-time clerk at the cemetery which is under the scope of the DPW, and a part-time clerk-typist at Telfer Park facility who works for the Parks and Recreation Division, and a part-time clerk-typist at the Senior Center. Local 2537 represents a purchasing technician that works at the DPW building but reports to the risk purchasing manager. Local 2537 also represents public safety technicians who dispatch for the Police and Fire Departments, and have other duties which may relieve patrol officers of functions that do not require a sworn officer to perform.

4. Local Union 643, AFSCME, is the collective bargaining representative for certain City employes. The most recent collective bargaining agreement between Local 643, AFSCME, and the City contained the following recognition clause:

ARTICLE I
RECOGNITION

1.01 The City recognizes the Union as the exclusive bargaining agent for the regular full-time employees of

the Department of Public Works, Beloit Transit System and Wastewater Treatment Plant of the City of Beloit, including employees of the golf course, cemeteries, street department, park and forestry departments, refuse collectors and bus drivers, but excluding employees in central stores, City swimming pools, recreational programs, wastewater treatment laboratory, clerical personnel, supervisory and executive personnel. Regular full-time employees shall be defined as those employees who work forty (40) hours or more per week. Executive and supervisory personnel shall be defined as department heads or division heads and those personnel in a position to hire or discharge, or effectively recommend discipline for another employee.

1.02 City employees excluded from the bargaining unit shall not perform work normally performed by bargaining unit members. This provision shall not, however, preclude supervisors from instructing bargaining unit members or performing bargaining unit work in an emergency when qualified employees are not available, except Greenskeeper and the Working Supervisors in the cemetery, parks and Beloit Transit System.

5. The incumbent of the Parks Patrol position is Havisteen Lomax, who has held the position since 1988. The following is part of the job description for the position:

CONCEPT:

Regular patrol of all city park facilities in a manner which is visible to the park patrons. The patrol will travel in a parks vehicle, will have radio contact with the Police Depart., and will wear a Parks Patrol uniform. The patrol will immediately contact the Police Dept. of problems or situations develop which are better handled by the police. The park patrol is not regarded as an enforcement officer, but rather a person who can spot potential problems and contact the police for assistance.

EXAMPLE OF DUTIES:

Conduct regular patrol of park facilities by vehicle and foot.
Periodic check of restroom facilities for problems and proper functioning.
Assist park patrons by answering their questions.
Post picnic permits.
Encourage park patrons to use the park facilities in a wholesome and safe manner.
Contact the Police Department when assistance is needed.
Close and lock restroom facilities at park closing time.
Clear parks of any park patrons at park closing time.

Pick-up excessive litter, upright trash barrels, etc.
Assist with supervision of special recreational events.
Maintain a log of park activity.
Prepare a daily report of park activity.

POSITION REQUIREMENTS:

Good public relations skills.
A good driving record verified by a check with the Wisconsin Motor Vehicle Division.

SCHEDULE:

Weekday afternoons, 3:00 - 11:00 p.m., and weekend/holiday shift which may include a combination of day/evening periods. Total of 36 hours per week.

Park patrol is expected to work all holidays and weekends.

Duties to commence May 16 or May 23, 1988, depending upon availability. Work to continue through August 21 or 28, 1988, depending upon availability. Also Labor Day weekend, if available.

Other part-time work is discouraged. Patrols will be expected to substitute for each other when needed.

6. The Department of Public Works, herein called the DPW, has a single superintendent, Lee Fassett. The divisions under him include Parks and Recreation, Streets, Refuse, Wastewater Treatment Plant, Engineering and the Transit System. The Supervisor of Parks is Ed Melendez, and the Park Foreman is Jesse Harrell. Both Melendez and Harrell supervise Lomax. Melendez directs the work of Lomax on a daily basis, although he does not work on the weekends and Lomax always works on the weekends. He is on duty for the first hour that Lomax is working. Either he or Harrell are on call during the weekends. Lomax knows her duties and routine and does not need a lot of daily direction. Melendez supervises five heavy equipment and special equipment operators on the forestry crew, a maintenance specialist, three working foremen, all of which are positions represented by Local 643 and which perform manual labor and work with power equipment. During the summer months, Melendez supervises about three seasonal employes, who perform duties such as light maintenance, mowing, litter pickup, and use smaller pieces of power equipment.

7. When performing her Parks Patrol duties, Lomax drives a city vehicle furnished by the DPW and travels a route through 18 to 20 parks on an eight hour shift. She checks for vandalism and posts permits for picnics. She punches in and out at the DPW. She wears a uniform furnished by the DPW. She picks up a radio at the Police Department, uses it to speak to police dispatchers if necessary, and drops it off each night at the Police Department. She checks the beer permits at the Police Department to see who has obtained a permit for a particular park. She completes daily work reports and gives them to the DPW with a copy to the Police Department. Lomax reports certain problems to Melendez and some to the Police Department, with about the same frequency.

8. The parties stipulate that there is a reasonable expectation the position of Parks Patrol will continue to exist in 1992. Further, Lomax has worked as Parks Patrol for the 1988, 1989, 1990 and 1991 seasons. Between

February 5 and November 23 of 1988, Lomax worked 785 regular hours and 15.5 overtime hours for a total of 800.5 hours. Between March 3 and October 27 of 1989, Lomax worked 785.75 regular hours and 20.5 overtime hours for a total of 806.25 hours. Between January 19 and November 21 of 1990, Lomax worked 839 regular hours and 21.5 overtime hours for a total of 860.5 hours. Between January 18 and October 25 of 1991, Lomax worked 913 regular hours and 51.5 overtime hours, for a total of 964.5 hours. In addition to her work for the City as Parks Patrol, Lomax has worked as a substitute crossing guard about twice a month for four years, a position paid by the City. She also worked for the City during the winter at a lagoon where she issued ice skates, and supervised children on sleds and toboggans at the Olympic Center Ski Hill. She operated a warming shed for youngsters at the ski hill.

9. On April 4, 1990, the City and Local 643 entered into the following agreement:

1. The City and Union have entered into a collective bargaining agreement dated October 20, 1989 for a term from January 1, 1989 to December 31, 1990 (the "AGREEMENT").

2. Section 4.02 of the agreement provides as follows:

The term of employment of a Seasonal employee while in that class shall not exceed six (6) months and the duties and responsibilities of such employees shall, so far as is practical, be of a seasonal nature. Seasonal employees shall be covered by this Agreement only to such other extent that they are specifically mentioned in the Agreement.

3. The UNION filed a grievance with the City on September 21, 1989 claiming the CITY had violated Section 4.02 by the CITY practices in hiring of seasonal employees.

4. The grievance was processed and not resolved and submitted for arbitration.

5. The CITY and UNION have resolved the grievance and the arbitration has been withdrawn.

6. The CITY and the UNION agree that Section 4.02 is clarified as follows:

A. The CITY may employ seasonal employees between April 1 and October 15 of each year.

B. The CITY may extend the employment period of seasonal employees from October 16 to October 31, provided the CITY notifies the UNION in writing of its intention to do so before October 1, with an explanation of the reasons for so doing and listing the seasonal employees to be retained until October 31.

C. Each seasonal employee shall not be employed more than a total of six (6) months in any calendar year.

D. Seasonal employees may be any available person.

E. The limitation as to April 1 to October 15 hiring shall not apply to seasonal employees hired to perform seasonal work at Telfer Park.

F. The limitations on hiring of seasonal employees does not apply to persons hired as part of the recreation programs funded from recreation department funds, not doing Union's bargaining unit work. This exclusion applies to, but it not limited to, the Zamboni ice machine driver, the recreation supervisor and playground personnel.

G. The seasonal employee classification and limitations shall not, include or apply to the specialized work programs engaged in the City including:

the INROADS program;
the Wisconsin Conservation
Corps;
the High School Intern Program;

and such other programs engaged in by the CITY.

The CITY agrees to notify the UNION of persons participating in these CITY programs, including information as to the duties and duration of participation.

7. The CITY Personnel Director shall provide any notices required by this agreement to the UNION President.

The City contends that this agreement excludes the Parks Patrol position from the Local 643 unit and should be interpreted as prohibiting Local 2537 from seeking to represent the Parks Patrol position.

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

CONCLUSIONS OF LAW

1. The agreement set forth in Finding of Fact 9 does not bar Local 2537, AFSCME from seeking to include the position of Parks Patrol within the bargaining unit represented by Local 2537.

2. The incumbent in the Parks Patrol position is a regular part-time

employees of the Department of Public Works.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

The bargaining unit represented by Local 2537, AFSCME, is hereby clarified to include the position of Parks Patrol.

Given under our hands and seal at the City of
Madison, Wisconsin this 7th day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

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.

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(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. 7.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF БЕЛОIT

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

THE PARTIES' POSITIONS:

The Union:

The Union requests that the position of Parks Patrol be included in the bargaining unit represented by Local 2537. The choice is between a bargaining unit composed of blue-collar jobs and a unit composed of general government employees performing a wide variety of jobs. The unit represented by Local 643 is composed of full-time employees operating heavy vehicles, power equipment and performing manual labor. Employees in the unit represented by Local 2537 work as public safety technicians (dispatchers), building inspectors, crossing guards, animal control wardens, as well as clerical jobs.

The Union asserts that one of the distinguishing features of the Parks Patrol position is its part-time nature. In 1991, Lomax worked on a full-time basis during only six pay periods, and did not work at all during some pay periods. This is similar to crossing guards who do not work during the summer or during school holidays. In contrast, Local 643 employees are by definition in the recognition clause full-time employees, and a position with irregular hours such as the Parks Patrol does not share a community of interest with any of the Local 643 represented positions as far as hours of work. The wage level of the Parks Patrol is another consideration. The pay levels of employees in the Local 2537 unit varied in 1990 from a low of \$5.56 to a maximum of \$16.80, reflecting the diversity of positions represented by Local 2537. The Parks Patrol position's wages for 1990 were \$6.25 and \$6.50. The lowest wage level for Local 643 employees is \$8.47. The Union notes that other employees of the DPW work at the DPW building on Yates Avenue and are represented by Local 2537. Other Local 2537 employees work at the transit system, cemetery, recreation department, senior center, and wastewater treatment plant. The position of Parks Patrol and Public Safety Technician are similar in that they involve perform some functions that might normally be performed by a sworn police officer. The Parks Patrol is expected to report problems to police, and is in radio contract with Public Safety Technicians (dispatchers) who are represented by Local 2537.

While the City has raised the separate agreement between it and Local 643 as a bar to inclusion of the Parks Patrol position, the Union contends that this agreement is not relevant, as Local 2537 was not a party to that agreement and the position of Parks Patrol is not specifically mentioned therein even though that position existed at the time the agreement was made.

Thus, the Union concludes that the position of Parks Patrol shares a community of interest as exhibited by wages, hours and working conditions with employees of the Local 2537 bargaining unit and should be included in said unit.

The City:

The City objects to the inclusion of the position in question based on a lack of a community of interest between the Parks Patrol position and the positions in the existing bargaining unit, citing a comparison of the duties and skills of the position with other unit positions, the lack of common supervision, and the lack of a common work place of the Parks Patrol position

and positions in Local 2537.

The City notes that the position is established in the DPW's Division of Parks and Recreation, and functions between May and October. While Lomax has worked in two other positions for the City, those positions are not subject to inclusion in any bargaining agreement. Lomax worked infrequently as a crossing guard, and regular crossing guards are represented by Local 2537. Lomax is supervised by the Supervisor of Parks and the Park Foreman, who are employees of the DPW and who supervise no other employees represented by Local 2537. Lomax reports to the DPW office to punch in and out, uses a DPW truck, receives work instructions from the DPW supervisors, and her contacts with other departments are infrequent. Lomax maintains a log or daily report of park activity, which is used to identify work projects and problems for work assigned to park crews by Park Supervision.

The City argues that the Parks Patrol duties are similar to the outdoor work of Local 643 employees. Local 2537 is dominated by technical and clerical type positions in which the predominant numbers function in an office or indoor environment, while Local 643 positions are predominately working outside.

Furthermore, the agreement between Local 643 and the City captures the intent of the parties to exclude the position from representation. The City believes that Local 643's sister Local 2537 has made an end run to circumvent a voluntary agreement.

The City asks that the petition be dismissed.

DISCUSSION:

The outcome of this case is determined by the scope of the Local 2537 unit as set forth in Finding of Fact 3. The Local 2537 unit includes regular part-time DPW employees. Lomax is a regular part-time DPW employee. Thus, the position of Parks Patrol and the employee filling the position (Lomax) fall within the scope of the bargaining unit represented by Local 2537. Therefore, she is included in the unit.

As reflected in Finding of Fact 4, the unit represented by Local 643 includes only full-time DPW employees. Such a unit is not repugnant to MERA and clearly cannot include Lomax.

Under the circumstances present herein, a community of interest analysis is not necessary or appropriate. The contours of the unit were established in 1976 through Dec. No. 15112 and the unit status of regular part-time DPW employees thereby determined.

Insofar as we have determined that the appropriate bargaining unit for Lomax is that represented by Local 2537, it is unnecessary to consider the agreement as to seasonal employees between Local 643 and the City since Local 2537 was not a party to it.

Given all of the foregoing, we have included the position in the Local 2537 unit.

Dated at Madison, Wisconsin this 7th day of April, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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