

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

DISTRICT NO. 10, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

Involving Certain Employees of

TOWN OF PEWAUKEE

Case I
No. 30775 ME-2166
Decision No. 20759

Appearances:

Mr. Patrick Herald, Business Representative, 624 North 24th Street,
Milwaukee, WI 53233, appearing on behalf of District No. 10,
International Association of Machinists and Aerospace Workers,
AFL-CIO.

Mr. Jon E. Anderson, Mulcahy & Wherry, S.C., Attorneys at Law,
815 East Mason Street, Suite 1600, Milwaukee, WI 53202-4080,
appearing on behalf of the Town of Pewaukee.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DIRECTION OF ELECTION

District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, having on December 6, 1982 filed a petition requesting the Wisconsin Employment Relations Commission (the Commission) to conduct an election among certain non-professional employees of the Town of Pewaukee, for the purpose of determining whether those employees wish to be represented by that Union for the purposes of collective bargaining; and hearing in the matter having been conducted on February 10, 1983, at Pewaukee, Wisconsin, before Richard McLaughlin, an Examiner on the staff of the Commission; and a stenographic transcript having been made of that hearing; and the parties having filed either a brief or a waiver of brief by March 29, 1983; and the Commission having reviewed the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Union, is a labor organization having its offices located at 624 North 24th Street, Milwaukee, Wisconsin 53233.

2. That the Town of Pewaukee, hereinafter referred to as the Town, is a municipal employer which has its offices located at the Pewaukee Town Hall, W240 N3065 Pewaukee Road, Pewaukee, WI 53072.

3. That this proceeding concerns a petition for election, filed by the Union, seeking an election among certain non-professional employees of the Town to determine whether those employees wish to be represented by the Union for purposes of collective bargaining; that the parties agree that the bargaining unit covering those employees can appropriately be described thus: All regular full-time and regular part-time non-professional employees of the Town of Pewaukee excluding any independent contractors, supervisors, confidential, managerial, executive, professional, casual, police, fire, seasonal, craft, and all other employees; that the Union contends that the only employees properly included within this unit description are the five full-time employees composing the Town's Highway Department, and the Town's Secretary/Receptionist; that the Town requests the Commission to rule on whether the employees occupying each of the Town's job

classifications should, or should not, be included in the bargaining unit thus described in order to avoid an undue proliferation of bargaining units; that the Town contends that the Highway Superintendent and the Town's Secretary/Receptionist must be excluded from the bargaining unit as, respectively, a supervisory employee, and a confidential employee; and that none of the Town's employees are presently represented by a labor organization.

4. That the Town operates a Fire Department composed of approximately 56 on-call employees who are paid only for work actually performed in fire fighting duties.

5. That the Town operates a Police Department which employs 11 regular part-time employees, and one regular full-time employee; and that all 12 employees possess the power of arrest.

6. That the Town maintains a Lake/Snowmobile Patrol which employs 9 officers on a regular part-time basis; and that each of these officers possesses the power of arrest.

7. That the Town employs approximately 56 Poll Workers who are appointed by the Board for a two-year term, and work only when called to assist with the conduct of an election; that these employees work, at a minimum, one time per year and, at a maximum, four times per year; and that the Poll Workers are casual employees.

8. That the Town employs three Crossing Guards who assist school children in crossing roads on their way to and from school; that the Crossing Guards work when students are present at the start of the school day, before and after lunch, and at the close of the school day; that two of these employees, Christine Price and Geraldine Seetin, are primary Crossing Guards; that the other employee, Vicki Nines, is a backup Crossing Guard who works only on a sporadic on-call basis; that the two primary Crossing Guards each worked 210 hours in the 1981-82 school year, and have been employed by the Town for at least the past four years; that the total hours worked by the backup Crossing Guard in the 1981-82 school year would equal five full crossing guard days of work; that the primary Crossing Guards are regular part-time non-professional employees; and that the backup Crossing Guard is a casual employee.

9. That the Town operates a Park Department which employs a Director, and a varying number of summer employees; that the Park Director works approximately four months per year and has the independent authority to advertise for, interview, hire, discipline, discharge, and assign Park Department employees; that the Park Director is responsible for the day-to-day operation of the Park Department during the summer season; that the decisions of the Park Director are subject to no review except by the Park and Recreation Board, which, at the end of the summer, formally evaluates the work performed by the employees hired by the Park Director; that both parties contend that the Park Director is a supervisory employee who should be excluded from the bargaining unit; that the Park Department's summer employees are typically students hired for one season; that these employees may return in a subsequent season, but must re-apply for the job; that any re-hiring of such employees is done on a case-by-case basis at the time of the request for re-hire in a subsequent season; that the Park Director is a supervisory employee; and that the Park Department's summer employees are seasonal employees having no reasonable expectation of re-employment.

10. That the Town employs one Building Inspector, one Plumbing Inspector, one Assistant Plumbing Inspector, and one Electrical Inspector; that the Building Inspector inspects building construction plans and on site work to determine whether the structural components of that work comply with relevant building codes; that the Plumbing and Electrical Inspectors perform similar duties with respect to the plumbing and electrical components of that work; that all of these Inspectors have state certification in their respective fields, and possess journeyman status or have experience equivalent to journeyman status; and that each of these Inspectors is a craft employee.

11. That the Town employs one Forester who works on call, when available, and is paid for work actually performed; that the Forester was never called for work in 1982; and that the Forester is a casual employee.

12. That the Town employs a Dog Catcher on an on-call, as available, basis, who is paid for work actually performed; that the Dog Catcher is not required to be available, is not paid to maintain specific hours, works out of her home, and worked a total of 105 hours in 1982; and that the Dog Catcher is a casual employee.

13. That the Town employs one Deputy Clerk in charge of elections, hereinafter referred to as Election Clerk; that the Election Clerk presently is Frances Swan, who has been employed by the Town in various capacities for about 30 years; that the Election Clerk organizes and coordinates election procedures under the supervision of the Town Clerk; that the Election Clerk works no set days, but works as required by her election duties; that the Election Clerk is paid per hour, can receive additional compensation for overtime hours worked, and worked a total of 674.5 hours in 1982 while servicing three elections; that in 1983, the Election Clerk can expect to work at two elections, and will have certain other duties pursuant to maintaining the Town's election procedures; that Ms. Swan does perform receptionist duties for the Town when the Secretary/Receptionist is absent from work; that Ms. Swan is not qualified to perform full-time typing duties; and that the Election Clerk is a regular part-time non-professional employee.

14. That the Town employs one Secretary/Receptionist, Gloria Brester; that Ms. Brester also serves as the Town's Deputy Clerk; that Ms. Brester is the only secretary employed by the Town; that the Secretary/Receptionist is required to have a high school diploma, three years of office experience, the ability to type 60 words per minute, and to take shorthand; that the Secretary/Receptionist performs all the typing duties required by the Town Chairman and the Town Board of Supervisors; that the Secretary/Receptionist answers the phone, assists the Town Clerk, handles certain duties incident to processing the Town's payroll, and performs the filing duties required by the Town Chairman and other elected officials; and that the Secretary/Receptionist is the only Town employee available to perform clerical duties of a confidential nature.

15. That the Town employs five full-time employees in its Highway Department; that these full-time employees can be identified as one full-time Highway Superintendent, Robert Stevens, one full-time Assistant Superintendent, Michael Newman, and three full-time crew members, Paul Mielke, Donald Stutz, and James Warner; that the Town employs three other employees who are used on an on-call, as needed, basis; that these on-call employees have no idea, if, or when, they will be called for duty, and are paid only for work actually performed; that the four full-time Highway Department employees below the Highway Superintendent receive the same vacation, paid holiday, sick leave, and insurance benefits; that the Highway Superintendent will receive the same fringe benefits as the remaining four full-time Highway Department employees when he achieves the appropriate years of service; that those employees used by the Town on an on-call basis receive no such fringe benefits; that Michael Newman receives \$9.99 per hour in wages; that the three full-time crew members receive \$9.35 per hour; that the Highway Superintendent receives \$11.63 per hour; that each of the five full-time Highway Department employees is responsible for certain routes within the Town's road system; that the five full-time Highway Department employees are responsible for performing all functions necessary to maintain town roads and to maintain and operate the equipment utilized to perform that road maintenance; that the Assistant Superintendent assigns certain work duties to crew members on the direction of the Highway Superintendent; that the Assistant Superintendent does not play any independent role in the assignment of work duties, or the hire and discipline of Highway Department employees; that the on-call employees are casual employees; and that the four full-time employees below the Highway Superintendent are regular full-time non-professional employees.

16. That the Highway Superintendent, Mr. Stevens, has been employed by the Town for approximately one year; that during his tenure, the Town has not hired, formally disciplined, laid off, or recalled any regular full-time Highway Department employees; that on the direction of the Town Chairman, he interviewed an applicant for the Highway Department's on-call list, and recommended that this person be placed on its on-call list; that this person was placed on the Highway Department's on-call list; that Mr. Stevens has, without prior Board approval, verbally disciplined a full-time Highway Department employee; that Mr. Stevens handles the individual work-related complaints of Highway Department employees;

that he is the sole independent authority in the Highway Department for assigning work duties which are not a function of an employee's standard route; that Highway Department employees meet with him at the beginning of each day to receive specific work assignments; that he monitors Highway Department employees' performance of their job assignments; that he is the person called by Highway Department employees in case of illness or equipment malfunctions; that he assigns all overtime, and is responsible for obtaining on-call help, as needed; that he has assigned overtime, and has obtained on-call help without prior Board approval, although he may seek such approval in a given case; that he is responsible for the day-to-day supervision of Highway Department employees, and does not report to the Board except as he deems necessary; that he has been afforded office space by the Board; and that in a typical eight hour day, not devoted to the managerial duties described in Finding of Fact 17, he spends approximately one hour in duties incident to assigning and overseeing the work of Highway Department employees; and that Mr. Stevens exercises supervisory responsibility in sufficient combination and degree to make him a supervisory employee.

17. That the Town hired Mr. Stevens for the position of Highway Superintendent to free the Board to the fullest extent possible from the day-to-day operation of that department; that Mr. Stevens does not report directly to the Town Board on the day-to-day management of the Highway Department except as he deems necessary; that he determines the day-to-day work priorities of the Highway Department; that the setting of such work priorities includes, for example, a determination of whether Department employees will perform highway work, or ditch work on a given day; that he independently sets such work priorities; that he taught Department employees a paving method, which was subsequently performed by those employees on a Town road at a cost of \$17,000; that he has directed paving work on Town roads without prior Board approval; that, in consultation with the Town Chairman, he prepared a five-year plan for the maintenance of all Town roads; that he is responsible for collecting Department employees' daily reports on duties performed, and for compiling these individual reports into daily and monthly departmental reports suitable to secure aid from the State of Wisconsin; that the preparation of these reports and other paper work demand his attention for entire work days at the beginning and at the end of each month; that the Town's Highway Department budget is composed of line items; that Mr. Stevens is responsible for the preparation of this budget; that this budget contains certain divisions; that his role in the preparation of this budget can be exemplified by his establishment of the equipment/maintenance and culvert divisions of the overall Department budget for 1983; that to prepare the equipment/maintenance budget division, he first examined the Highway Department's equipment to determine what, if any, repairs would be needed over the course of the coming year, then estimated the cost of those repairs, then totalled the cost thus established, and entered that cost on the appropriate line of the budget; that to prepare the culvert division of the budget, Mr. Stevens first obtained reports from Highway Department employees which, together with his own observations, determined what culvert repairs would be needed, then obtained bids on the materials necessitated by those repairs, estimated the labor cost incident to those repairs, and then entered the cost thus established on the appropriate line of the budget; that if budgeted projects raise legal or engineering problems, he is responsible for seeking advice from the Town's legal counsel, or from other appropriate consultants; that such consultation can be sought by Mr. Stevens without prior Town Board approval; that after the preparation of the initial budget document, he consults with the Town Board; that although the ultimate decision on the appropriate dollar figures to be budgeted for specific line items is made by the Board, the Board depends on Mr. Stevens for his recommendations and opinions on the level of service possible for given dollar amounts, and on the most pressing areas of need to be addressed by the budget; that capital expenditure items exceeding \$2,500 within the budget must be put out on bids; that Mr. Stevens is responsible for obtaining bids, and for ensuring that the specifications for those bids are correct; that the Town Board is responsible for opening such bids, but that the Board depends on him for a recommendation on the most appropriate bid, as illustrated by the Town Board's expenditure of \$40,000 per truck for certain trucks recommended by Mr. Stevens; and that Mr. Stevens participates to a significant degree in the formation, determination and implementation of management policy, and possesses the authority to commit the Town's resources.

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

CONCLUSIONS OF LAW

1. That all regular full-time and regular part-time non-professional employees of the Town of Pewaukee excluding any independent contractors, supervisors, confidential, managerial, executive, professional, casual, police, fire, seasonal, craft, and all other employees constitute an appropriate collective bargaining unit within the meaning of Sections 111.70(1)(e), and (4)(d)2.a. of the Municipal Employment Relations Act (MERA).

2. That the Town's Police, as well as its Fire employees, and Snowmobile/Lake Patrol, who possess the power of arrest, are properly excluded from the bargaining unit described in Conclusion of Law number 1 and are not eligible to vote in the election directed herein.

3. That the Town's election Poll Workers, Forester, and Dog Catcher are casual employees who are not eligible to vote in the election directed herein.

4. That the Town's two primary Crossing Guards, Christine Price and Geraldine Seetin, are regular part-time non-professional employees eligible to vote in the election directed herein, but that the Town's backup Crossing Guard, Vicki Nines, is a casual employee who is not eligible to vote in the election directed herein.

5. That the individual occupying the position of Parks Department Director is not a municipal employee within the meaning of Section 111.70(1)(b) of the MERA, but, rather, is a supervisor within the meaning of Section 111.70(1)(o)1. of the MERA, and is not eligible to vote in the election directed herein.

6. That the summer employees employed by the Town in its Parks Department are seasonal employees having no reasonable expectation of re-employment, and are not eligible to vote in the election directed herein.

7. That the Town's Building Inspector, Plumbing Inspector, Plumbing Inspector's Assistant, and Electrical Inspector are all craft employees within the meaning of Section 111.70(1)(f) of the MERA, and are not eligible to vote in the election directed herein.

8. That Gloria Brester, the individual occupying the position of Secretary/Receptionist, is not a municipal employee within the meaning of Section 111.70(1)(b) of the MERA, but is a confidential employee not eligible to vote in the election directed herein.

9. That Frances Swan, the individual occupying the position of Deputy Clerk in charge of elections, is a regular part-time non-professional employee eligible to vote in the election directed herein.

10. That Robert Stevens, the individual occupying the position of Highway Superintendent, is not a municipal employee within the meaning of Section 111.70(1)(b) of the MERA, but is a managerial and supervisory employee not eligible to vote in the election directed herein.

11. That a question of representation, within the meaning of Section 111.70(4)(d) of the MERA, has arisen among the municipal employees in the collective bargaining unit set forth in Conclusion of Law Number 1.

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

DIRECTION OF ELECTION

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this directive in the collective bargaining unit consisting of all regular full-time and regular part-time non-professional employees of the Town of Pewaukee excluding any independent contractors, supervisors, confidential, managerial, executive, professional, casual, police, fire, seasonal, craft, and all other employees who are employed by the Town of Pewaukee on June 21, 1983, except such employees as may, prior to the election, quit their employment, or be discharged for cause, for the purpose of determining whether a majority of said employees

desire to be represented by District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, for the purpose of collective bargaining with the Town of Pewaukee on wages, hours, and conditions of employment.

Given under our hands and seal at the City of
Madison, Wisconsin this 21st day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DIRECTION OF ELECTION

The Parties' Position:

The parties, at the hearing, agreed that the unit description set forth above was appropriate and also agreed that the individuals occupying the following positions should not appropriately be included in that bargaining unit: Fire, Police, Lake/Snowmobile Patrol, Building Inspector, Plumbing Inspector, Plumbing Inspector's Assistant, Electrical Inspector, Park Department Director, Park Department summer employees, and Dog Catcher. The Union contends that the Town's Poll Workers, Crossing Guards, Forester, Election Clerk, and on-call Highway Department employees are all casual employees. The Union also contends that the Town's Secretary/Receptionist is not a confidential employee, and that the Town's Highway Superintendent is a working foreman.

The Town has requested a ruling from the Commission on all of the Town's job classifications so that the Town can be assured of avoiding a proliferation of bargaining units. In the Town's estimation, then, the primary issues for determination here are whether, as the Town contends, the Highway Superintendent is a supervisory, managerial and/or executive employee, and whether the Town's Secretary/Receptionist is a confidential employee.

Discussion:

The Findings of Fact set forth sufficient information to establish that those positions which the parties agree should be excluded from the bargaining unit are, in fact, properly excluded from that unit. An examination of the remaining positions must now be made.

The Town's Election Clerk, in addition to her regular yearly duties as an Election Clerk, has performed a variety of duties for the Town for approximately the last 30 years. Her work has been substantial in terms of the number of hours involved (amounting, for example, to 674 some hours in 1982), and we find, based on past history, that she has a reasonable expectation of continued substantial part-time employment with the Town, warranting her inclusion in the unit.

The Forester, on-call Highway Department employees, and back-up Crossing Guards all work on an on-call basis and are free to accept or reject work when it is made available to them by the Town. While the hours of work actually performed by each of those employees over the last twelve months vary widely from employee to employee, neither party has argued that the circumstances revealed in the evidence warrant the conclusion that any of these employees are regular part-time employees properly to be included in the instant bargaining unit. We therefore have concluded that they are casual employees excluded from the bargaining unit involved herein.

The remaining issues concern the Secretary/Receptionist, and the Highway Superintendent. The Commission has consistently held that to be considered confidential, an employee must have access to, have knowledge of, or must participate in confidential matters relating to labor relations. In order for information to be confidential for such purposes, it must be the type of information that: (1) deals with the employer's strategy or position in collective bargaining, contract administration, litigation, or other similar matters pertaining to labor relations between the bargaining representative and the employer; and (2) is not available to the bargaining representative or its agents. The Commission has also held that a de minimus exposure to confidential labor relations material generally is insufficient grounds for excluding an employee from a bargaining unit. However, if the person in question is the only one available to perform such confidential duties, then that person is a confidential employee who, as such, must be excluded from the bargaining unit. 1/

1/ City of Port Washington (City Hall and Police Department), 18654-B 4/82.

The Town's Secretary/Receptionist is the Town's only full-time clerical employee, and the only employee who can proficiently type. Since the Secretary/Receptionist is the only clerical employee available to perform duties of a confidential nature for the Town, that position must be considered confidential.

The Town, contrary to the Union, contends that Mr. Stevens is a supervisory/managerial/executive employee. The Commission has defined the indicia of supervisory status thus:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees;
7. The amount of independent judgment exercised in the supervision of employees. 2/

In this case, the Highway Superintendent does possess indicia of supervisory status in sufficient combination and degree to establish that he is a supervisor. Mr. Stevens independently determines work priorities and independently directs and oversees highway department employees in the performance of those work priorities. In addition, he has effectively recommended the hire of an on-call employee 3/, and has verbally disciplined an employee. Mr. Stevens does drive a regular route, and does spend a significant portion of certain workdays working alongside his crew. However, the Town Board exercises little, if any, control over the day-to-day supervision of highway department employees, and does pay Mr. Stevens a premium for the responsibility he exercises in the day-to-day operations of the department.

The Commission has defined the indicia of managerial status as "the degree to which individuals participate in the formulation, determination, and implementation of management policy, and. . .the authority to commit the employer's resources." 4/ Mr. Stevens possesses all of these indicia of managerial status. The Town's five-year plan for the maintenance of its roads was created by Mr. Stevens in consultation with the Town Chairman, and has been implemented by Mr. Stevens. Similarly, Mr. Stevens has played a significant role in defining and in expanding the type of road work performed by his crew. In addition, Mr. Stevens' role in the preparation of the Town's highway department budget is crucial. His role in the budgetary process cannot be characterized as ministerial, but demands that he evaluate budget priorities, calculate the cost of effecting those priorities, and make effective recommendations on the services that can be provided within the ultimate dollar limits set by the Board.

2/ Northwood School District, 20022 10/82, at 5-6.

3/ The presence of supervisory authority can be found in the exercise of authority over non-bargaining unit personnel, see City of Cudahy, 19507 3/82.

4/ Northwood School District, 20022 10/82, at 5.

Since the supervisory and managerial authority possessed by Mr. Stevens warrants exclusion of his position from the unit, we find it unnecessary to address the alleged executive status of his position.

Dated at Madison, Wisconsin this 21st day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner