

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL OF COUNTY
AND MUNICIPAL EMPLOYEES NO. 40
LOCAL 97, AFSCME, AFL-CIO

Allegedly Involving Certain
Employees of

CITY OF WAUKESHA
(STREET AND PARKS DEPARTMENTS)

Case XLIX
No. 29973 ME-2122
Decision No. 21034

Appearances:

Mr. Richard Abelson, Staff Representative, AFSCME, Council 40, AFL-CIO,
2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of
Local 97.

Michael, Best & Friedrich, Attorneys at Law, 250 East Wisconsin Avenue,
Milwaukee, Wisconsin 53202, by Mr. Marshall Berkoff, appearing on
behalf of the Prairie Home Cemetery Commission and the City of Waukesha.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DISMISSING PETITION FOR UNIT CLARIFICATION

Wisconsin Council of County and Municipal Employees, Local 97, AFSCME, AFL-CIO, having on June 15, 1982 petitioned the Wisconsin Employment Relations Commission to clarify a bargaining unit of municipal employees employed by the City of Waukesha, Street and Parks Department, by accreting to said unit the employees of the "City of Waukesha Cemetery", excluding administrative, supervisory, clerical and confidential employees; and a hearing having been held on July 19, 1982 before Daniel J. Nielsen, an Examiner on the Commission's staff, at which time evidence was taken on the matter in general and on the Employer's motion to dismiss the petition in particular; and the hearing having been continued; and prior to any further hearing before the Commission, the Employer having filed a petition with the National Labor Relations Board (NLRB), requesting that the NLRB assert jurisdiction over the employees of the Cemetery and conduct an election in a unit of said employees; and the Examiner having on October 5, 1982 indefinitely postponed the proceedings before the Commission pending a determination by the NLRB; and the NLRB having, on April 28, 1983, dismissed the petition, overruling an initial decision of its Regional Director; and the parties having thereafter attempted to reach a stipulation; and the Examiner having on July 13, 1983 agreed to proceed on the record generated before the WERC and the NLRB without further hearing, at the request of the parties; and the record having been held open for the receipt of written arguments until August 5, 1983; and the Employer having submitted additional written argument on that date; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the City of Waukesha, hereinafter referred to as the City, is a municipality providing general governmental services to the people of Waukesha, Wisconsin; that the City maintains its principal offices at Waukesha City Hall, 201 Delafield, Waukesha, Wisconsin 53186; that among its governmental functions is the operation of a Street Department and a Parks Department; and that the City is a municipal employer.

2. That Wisconsin Council of County and Municipal Employees No. 40, Local 97, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization having its principal offices at 2216 Allen Lane, Waukesha,

Wisconsin 53186; that Richard Abelson is Local 97's Staff Representative; that, by virtue of a certification issued by the Wisconsin Employment Relations Commission in City of Waukesha, No. 6153 (11/30/62), Local 97 was certified as the exclusive bargaining representative for two collective bargaining units, as follows:

Unit Number I

All regular full-time and regular part-time employees of the City of Waukesha employed in the Street Department, excluding executives, supervisory and confidential employees.

Unit Number II

All regular full-time and regular part-time employees of the City of Waukesha employed in the Parks Department, excluding executives, supervisors and confidential employees.

that, in approximately 1965, without further action by the WERC, the City and the Union entered into a collective bargaining agreement covering employees of both the Street Department and Parks Department and containing the following recognition clause:

ARTICLE I - RECOGNITION

1.01 The City recognizes the Union as the exclusive bargaining agency for employees in the Street Department and Parks Department, but not including executives, supervisors and confidential employees, nor office employees, nor elected officials, for the purposes of conferring and negotiating with the City on the question of wages, hours and conditions of employment and the adjustment of employee complaints and grievances. The Union recognizes that on questions of wages, hours and conditions of employment that (sic) the Board of Public Works of the City or its designated representative shall be the bargaining agent for the City.

3. That the Prairie Home Cemetery, hereinafter referred to as the Cemetery, is an unincorporated cemetery association; that the Cemetery is located at 605 South Prairie Avenue; that, since 1897, the Cemetery has been governed by a five-person commission, composed of citizens of the City of Waukesha, appointed by the Mayor and confirmed by the Common Council; that the Commission is established by an ordinance adopted by the Common Council pursuant to Section 157.50, Wis. Stats., which provides, inter alia:

157.50 Municipal Cemeteries.

(1) Municipalities may acquire by gift, purchase or condemnation land for cemeteries within or without their boundaries. In the case of towns, acquisition and price must be authorized by the Town Meeting.

(2) The governing body of every municipality acquiring a cemetery shall by ordinance determine the system of management and operation. Any municipality may proceed under Section 157.07, 157.08, or Section 157.11(7), or otherwise as provided by ordinance. . .

and that the specific ordinance adopted by the City of Waukesha provides, inter alia, as follows:

BOARD AND COMMISSIONS 3.08

3.08 CEMETERY ADMINISTRATION. (1) CEMETERY BOARD.

(a) Membership. The Cemetery Board shall consist of 5 members appointed by the Mayor and confirmed by the City Council. It shall operate and manage all cemeteries for the City.

(b) Terms. One member shall be appointed on the third Tuesday of April of each year to serve for 5 years. Each member shall serve until his successor is chosen. In case of vacancies, appointment shall be for the unexpired term.

(c) Powers and Duties. The Cememtery(sic) Board shall have the following powers and duties: (Am. #3-71)

1. Make rules and regulations for the management and care of municipally-owned cemeteries.

2. Appoint a Cemetery Superintendent who shall hold office at the pleasure of the Cemetery Board and perform such duties as the Cemetery Board shall direct.

3. Make an annual report of its doings to the City Council at its first regular meeting in April.

(2) CEMETERY DEVELOPMENT FUND. (Rep. & recr. #35-78) The Cemetery Board shall determine the percentage of money derived from the sale of lots, parts of lots and single graves in the City Cemetery which shall be paid over by the Superintendent to the Treasurer of the Cemetery Board and which shall be kept by the Treasurer as a separate fund to be known as the "Cemetery Development Fund", and the Board shall control the expenditures of such fund for the improvement of the Cemetery ground. The Board shall not incur any liability nor create any debt which cannot be fully paid and discharged by the Cememtery(sic) Development Fund" than(sic) on hand, without first having submitted full and specific approval and secured its authorization therefor. If approved by the Council, the Council may authorize the improvement and may appropriate to the Board a sum sufficient to meet the necessary expenditures therefor.

(3) GENERAL CEMETERY FUND. All other income derived from the management from the operation of the cemetery shall be deposited with the City Treasurer and by him deposited in a non-lapsing account to be known as "General Cemetery Account". Such fund shall be used exclusively for the operation of the cemetery. Withdrawal therefrom shall be made upon voucher signed by the Cemetery Superintendent and a member of the Board.

(4) PERPETUAL CARE FUND. (Rep. & recr. 35-78) There shall be established and maintained an irrevocable Trust Fund for the perpetual care and maintenance of municipally owned cemeteries of the City. The Cemetery Board shall establish the amount of such perpetual care endowment, which amount shall be a portion of the sales price of lots, graves or plots and such fund is to be invested as provided in Ch. 881, Wis. Stats.

(5) ENDOWMENT TRUST FUND. There shall be created a Trust Fund entitled "Endowment Trust Fund". Such fund shall be placed in the possession of the trustee the same as the Perpetual Care Fund and shall be invested as provided in Ch. 881, Wis. Stats. The fund shall be comprised of money received for special services to grave sites or money received in the form of gifts to the City for Prairie Home Cemetery.

(6) INVESTMENT OF FUNDS. Both the Perpetual Care fund and the Endowment Fund may be combined for investment only and upon direction of the Cemetery Board, for bookkeeping purposes the funds will remain separate. Any interest or dividends received from both Trust Funds, whether invested separately or as provided herein, may, only upon the direction of the Cemetery Board, be withdrawn, on an annual, semi-annual, or quarterly basis, by the Cemetery Board and placed in the General Cemetery Fund, otherwise such interest and dividends will be prorated to each Trust account separately.

(7) PURCHASE RECEIPT. The Superintendent shall give to the purchaser of any lot, part of lot or single grave a written receipt for the purchase money and amount of money to

be deposited in the Perpetual Care and Maintenance Trust Fund paid to him for such lot, part of lot or single grave, describing the same according to the plat thereof and shall keep a duplicate copy of such receipt in his office in a book provided for that purpose.

(8) DEED TO CEMETERY LOT. The Superintendent shall have a deed executed by the Mayor and City Clerk to be delivered to any purchaser of a lot or part of a lot purchased, which deed shall be under the corporate seal of the City and shall be recorded by the Superintendent in a book to be kept for that purpose.

(9) CORPORATE FIDUCIARY TO ADMINISTER CEMETERY FUND. The Mayor, with the consent of the Council, shall appoint a corporate fiduciary to administer the Cemetery Fund. Such corporate fiduciary shall serve for 2 years or until a successor is appointed and shall be a banking institution and not required to furnish bond and shall invest the funds coming into its possession as provided in Ch. 881, Wis. Stats. For its services it shall receive a fee of 5% of the annual earnings of the fund.

4. That the City of Waukesha owns the land on which the Cemetery is located, except for those lots which have been conveyed; that the Cemetery has paid for and owns all of the buildings and improvements on the land; that the Cemetery Commission prepares an annual budget which is submitted to the Common Council for review and inclusion in the City's budget; that the Common Council has never made any alterations or amendments in this budget; that the Cemetery receives no tax moneys; that the Cemetery is operated entirely on revenues received from interment fees, lot purchases, endowments for the care of graves, and the sale of wreaths and like paraphernalia; that the City of Waukesha has neither ready access to, nor control over, the funds of the Cemetery; that the City of Waukesha performs certain accounting and clerical functions for the Cemetery, which are paid for from the interest on the Cemetery's general fund; that the employees of the Cemetery are paid via checks issued by the City of Waukesha for which the City is reimbursed on a biweekly basis; that the Cemetery Commission establishes the wages, hours, and working conditions of Cemetery employees which are separate and distinct from any group of City employees; that the City of Waukesha has performed construction and maintenance work in the Cemetery, which work was secured through competitive bidding; that City of Waukesha employees are given no preference in applying for vacancies at the Cemetery; that Cemetery employees are given no preference in applying for vacancies with the City of Waukesha; that employees of the Cemetery participate in the Wisconsin Retirement Fund; that participation in the Wisconsin Retirement Fund is limited to employees of counties, municipalities and school districts in the State of Wisconsin; that the Prairie Home Cemetery is a separate and distinct employer from the City of Waukesha; and that by virtue of its establishment by statute and ordinance, the appointment of its governing Commission by the political officials of the City, and the participation of its employees in the Wisconsin Retirement Fund, the Prairie Home Cemetery is a municipal employer.

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

CONCLUSIONS OF LAW

1. That the Wisconsin Council of County and Municipal Employees, Local 97, AFSCME, AFL-CIO is a labor organization within the meaning of Section 111.70(1)(j), MERA;

2. That the Prairie Home Cemetery Commission is a municipal employer within the meaning of Section 111.70(1)(a), MERA;

3. That certain employees of the Prairie Home Cemetery Commission are municipal employees within the meaning of Section 111.70(1)(b), MERA;

4. That the instant petition to clarify a unit of employees in the City of Waukesha Street and Parks Department would result in an inappropriate unit by mixing employees of the City of Waukesha with employees of the Prairie Home Cemetery, a separate municipal employer;

5. That the instant petition to clarify a unit of employees in the Street and Parks Departments of the City of Waukesha does not raise a question of representation among employees of the Prairie Home Cemetery, a separate municipal employer.

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

ORDER 1/

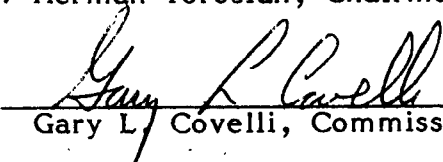
It is ordered that the instant petition be, and the same hereby is, dismissed.

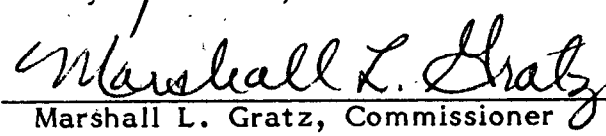
Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner

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- 1/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

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1/ (continued)

(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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. 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.

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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DISMISSING PETITION FOR UNIT CLARIFICATION

The instant proceeding was initiated through a petition to clarify a bargaining unit of employees in the Street and Parks Departments of the City of Waukesha. The Union takes the position that the three regular full-time employees of the Prairie Home Cemetery should be accreted to the existing unit, inasmuch as they share a general community of interest with the workers in the Street and Parks Departments. The Union contends that the establishment of a separate unit would constitute undue fragmentation of bargaining units in violation of Section 111.70(4)(d)(2a), MERA.

The Prairie Home Cemetery Commission and the City of Waukesha take the position that the petition should be dismissed since the Prairie Home Cemetery is a separate employing entity from the City. 1/ In the alternative, the City and the Cemetery urge that one of the full-time employees is a supervisor, and thus should be excluded from any bargaining unit, and that the seasonal employees share a community of interest with the other employees at the Cemetery and should be allowed to vote in any election ordered. The record demonstrates that the Prairie Home Cemetery is a separate municipal employer, and we therefore grant the employer's motion to dismiss.

The Cemetery receives no financial support from the City's taxpayers. All revenues are derived from the sale of lots and paraphernalia, as well as service and perpetual care fees. The City has no access to these funds and does not control the formulation or administration of the Cemetery's budget. 2/ The Cemetery controls its own personnel function and sets the wages, hours, and conditions of employment for its own employees. 3/ While the Cemetery Commission is established by ordinance and the members appointed by the City's Mayor, it is plain from the record that the Commission acts as an independent body and is not required to gain City approval for any of its actions in administering the Cemetery. 4/ There is no intermixing of Cemetery and City personnel and the two

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- 1/ Counsel for the Cemetery Commission made a motion to dismiss on these grounds at the hearing on this matter. The Examiner deferred a ruling until the record was complete and the matter was before the Commission. The question of a separate unit was still in issue as of the close of the record. See correspondence dated July 15, 1983.
 - 2/ Independent sources and control of revenues and budget are factors to be considered in determining whether a public entity may be said to be a separate employer from its parent municipality. See City of Sparta Water Utility, I, (12912), 8/5/74 at pages 3 and 4; Princeton Utility Commission, (15574), 6/14/77 at page 3.
 - 3/ A separation of personnel function is not, by itself, sufficient to establish separateness of employers. See Sauk County, (15315-A), 10/6/81 at page 7. It is, however, one important factor in the analysis. See City of Sparta Water Utility, supra, at page 3; Hales Corners Library Board, (15229-A), 4/13/78 at page 5.
 - 4/ The fact that the governing body of a public entity is appointed by the elected officials of the parent municipality will not prevent a finding of separateness if the involvement of the parent municipality is thereafter de minimus. See City of Sparta Water Utility, supra, at page 3; Princeton Utility Commission, supra, at page 3; Hales Corners Library Board, supra, at page 4.

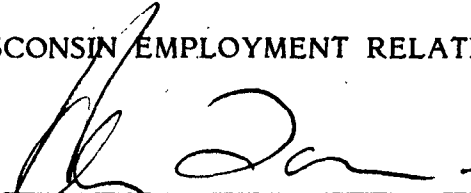
entities charge one another for any services performed. On the basis of the foregoing, the Commission concludes that the Prairie Home Cemetery Commission is a separate municipal employer from the City of Waukesha. As the instant matter came before the Commission by way of a petition to clarify a City bargaining unit, the Commission finds it inappropriate to order an election among the employees of a separate employer and thus dismisses the petition.

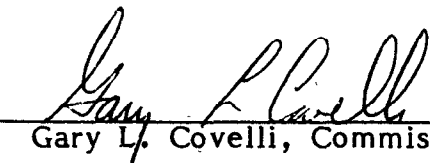
The parties fully litigated the supervisory status of Paul Krubsack and the question of whether the seasonal employees share a community of interest with full-time employees. To guide the parties as regards a possible future election petition filing, we find it appropriate to advise them that, on the record presented, we would have concluded: that Krubsack's position is not supervisory; that the seasonals are regular part-time employees; and that a unit of full-time employees, excluding the seasonals, would unduly fragment the Cemetery Association's work force.

Dated at Madison, Wisconsin this 3rd day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner