

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
CITY OF MAUSTON EMPLOYEES
LOCAL 569-A, WCCME, AFSCME,
AFL-CIO
Involving Certain Employees of
CITY OF MAUSTON

Case 2
No. 36301 ME-63
Decision No. 21424-B

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, appearing on behalf of City of Mauston Employees, Local 569-A, WCCME, AFSCME, AFL-CIO.
Mr. James Gerlach, LaRowe, Gerlach, Chiquoine & Kahler, S.C., Attorneys at Law, 110 East Main Street, Reedsburg, Wisconsin 53959, appearing on behalf of the City of Mauston.

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

City of Mauston Employees, Local 569-A, WCCME, AFSCME, AFL-CIO, filed, on December 26, 1985, a petition requesting the Wisconsin Employment Relations Commission to clarify a bargaining unit of certain employees of the City of Mauston, by determining whether the position of City Crew Foreman/Assistant to the Director of Public Works should be included in that bargaining unit. The Commission, on April 4, 1986, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner to conduct a hearing and issue a final decision as provided in Section 227.09(3)(a), Stats. A hearing on the petition was conducted in Mauston, Wisconsin, on May 9, 1986. The parties offered oral argument at that hearing and agreed not to file written briefs. A transcript of the hearing was provided to the Examiner on July 24, 1986.

FINDINGS OF FACT

1. City of Mauston Employees, Local 569-A, WCCME, AFSCME, AFL-CIO, referred to below as AFSCME, is a labor organization which has its offices located at Route 1, Sparta, Wisconsin 54656.

2. The City of Mauston, referred to below as the City, is a municipal employer which has its offices located at 303 Mansion Street, Mauston, Wisconsin 53948.

3. On November 7, 1983, AFSCME filed with the Commission a petition for election involving certain employees of the City. The City and AFSCME ultimately filed a "Stipulation For Election Involving Municipal Employees." That stipulation was received by the Commission on February 17, 1984, and stated "(t)he collective bargaining unit agreed upon as appropriate for such election" thus: "All regular full-time and regular part-time employees of the City of Mauston, excluding managerial, supervisory, confidential and library employees." The list of City employees stipulated by AFSCME and the City to be included in the bargaining unit and eligible to vote in the election included Robert Peters. The Commission conducted the election on March 23, 1984, and AFSCME was selected by the majority of the voters to be their collective bargaining representative. The Commission certified the results of the election in Decision Number 21424, issued on April 25, 1984. The unit description from that certification decision reads thus: "all regular full-time and regular part-time employees of the City of Mauston, excluding managerial, supervisory, confidential and library employees." Since that certification, AFSCME and the City have been parties to at least two collective bargaining agreements, one of which is, by its terms, in effect for a period from January 1, 1986, to December 31, 1986. Article I of that agreement is headed "RECOGNITION." Section 1 of that Article is headed "Bargaining Unit and Representation" and reads as follows:

The City recognizes the Union as the exclusive bargaining representative for all regular full-time and regular

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part-time employees of the City, but excluding managerial, supervisory, confidential and library employees, and excluding temporary or casual part-time employees, as identified in Article I, Section 4.

Section 4 of Article I is headed "Temporary or Casual Part-Time Employees" and reads as follows:

A temporary or casual part-time employee is an employee who normally is hired for less than a calendar year, but no more than two hundred ten (210) calendar days, even though the employee may be scheduled for forty (40) hour work weeks while employed.

4. The City's Director of Public Works, Kenneth Tulley, started work for the City on September 17, 1984. At that time Robert Peters, mentioned in Finding of Fact 3 above, was the foreman of the street crew. Sometime in November of 1984, Peters asked Tulley to relieve him of his duties as foreman. Sometime after this, Tulley discussed with the City Council's Personnel Committee the hire of an assistant for Tulley. The City ultimately did decide to create and to fill such a position. Tulley, in consultation with the Personnel Committee, created a job description for this position which was entitled "CITY CREW FOREMAN/ASSISTANT TO THE D.P.W." and reads as follows:

POSITION DESCRIPTION:

Person in this position will supervise the city crew in the function of their daily duties serving the public works of the City of Mauston. He will be directly responsible to the D.P.W. This will be a salaried position.

DUTIES:

a. Subject to the direction of the Director of Public Works, he shall be responsible for the supervision of the city crew in the performance of their daily routine. ie: the maintenance, repair and construction of streets, alleys, curbs and gutters (sic) sidewalks, bridges, street signs, traffic control devices, signs and markings, storm sewers (sic) culverts and drainage facilities, sanitary sewers and all machinery and equipment used.

b. He shall supervise the city crew in functions of public service such as snow and ice removal, street cleaning, brush and tree control.

c. He shall assist the director of public works in establishment of and the on going keeping of all records relating to the cost and maintenance of equipment, machinery, tools and buildings for maintnance (sic) purposes.

d. He shall maintain daily work records of the city crew. ie: daily time records, vacations and any and all excused or other absences for the city crew.

e. He shall develop an effective working relationship with his fellow workers, so as to maintain an effective work force.

f. He shall enforce all work rules pertaining to the Public Works Department and the City of Mauston.

g. He shall assist the Director of Public Works in preparation of annual budgets, cost estimates and any and all field work assigned to him by the Director.

h. He shall advise the Director of Public Works of problems arising in the performance of his duties and or any problems arising with the city crew in the performance of their daily routine.

i. He shall advise the Director of problems and or malfunctions which may arise with the equipment, machinery, tools and buildings.

j. He shall stay abreast of current developments in performance of the functions of his duties and to ensure the updated and current working conditions, and use of equipment with latest technology.

k. He shall make himself available to assist in any and all emergency services which might require the service of himself and or the call in of the city crew. Such as, but not limited to snow storms or snow removal, emergency water breaks, flooding etc. as directed and or required for the safety and or betterment of the City of Mauston. (sic)

l. He shall be familiar with and adhere to all safety standards. He shall assist the Director in the establishment of safety programs and on the job safety training in the performance of the city crews (sic) daily routine.

m. He shall coordinate and assist the other city departments such as the sewer, water and parks in their daily routine when the need occurs.

n. He shall assist the Director in the promotion, training and hiring process. He also shall have the authority to take informal disciplinary action, however Formal Disciplinary Action will be coordinated with the Director.

QUALIFICATIONS:

a. Education - High School Graduate.

b. Knowledge and skill in the use of tools and equipment applicable to maintenance and repair of equipment.

c. Knowledge and experience in the operation of construction type equipment.

d. Ability to supervise and coordinate the work of others.

e. Ability to communicate both orally and in writing.

f. Possession of a valid Wisconsin Driver's license.

g. Ability to set up and maintain written records and maintenance data.

h. Must reside within a five mile radius of City Hall.

i. Ability to plan, assign and direct work of others.

DESIRED KNOWLEDGE SKILLS AND ABILITIES:

a. Knowledge of public works administration and organization.

b. Ability to establish and maintain effective working relationships with city officials, various boards and general public.

c. Training in Mechanical techniques of maintenance and repair of equipment and vehicles.

The City of Mauston is an equal opportunity employer.

The City publically advertised this position and on January 29, 1985, approved the appointment of Lawrence Hamm to fill the position. Hamm started work for the City on February 4, 1985. Hamm's name is not included on the list of voters eligible to participate in the election described in Finding of Fact 3. The wage appendix to the collective bargaining agreements in effect for 1985 and 1986 does not include the position of Foreman or a wage rate for such a position. City ordinance number 664, adopted by the City on February 14, 1984, to establish "THE SALARIES OF THE CITY OF MAUSTON EMPLOYEES FOR 1984" includes an entry for the position of "City Crew Foreman (Hourly)." There is no job description for such a position.

5. Hamm is leaving City employment and the City, as of May 9, 1986, had already publically advertised for a successor to Hamm. The job description set forth in Finding of Fact 4 has been supplied by the City to applicants for the position of City Crew Foreman/Assistant to the Director of Public Works. The City expects the person ultimately hired to perform the same duties as did Hamm.

6. The City did not hire, promote, transfer, suspend or discharge any employees in the bargaining unit described in Finding of Fact 3 during Hamm's tenure with the City. The 1985 and 1986 labor agreements between the City and AFSCME contain the same formal grievance procedure which includes three steps for the processing of a grievance. This formal procedure has not yet been used. No one on behalf of the City has ever informed Hamm what, if any, authority he has to issue a formal response for the City under that procedure. Incidents in which the City may have a disciplinary interest are handled by an informal procedure calling for a verbal warning followed by a written warning, followed by more serious action. This informal procedure resulted from a conference involving Hamm, Tulley, Dean Clark, the President of the Local, and David and Susan Bosgraaf who are also officials of the Local. The conference was called because Hamm had observed a continuing problem of street crew employees driving City trucks to the site at which they would take a coffee break. Hamm had verbally warned the employees to stop using the trucks for that purpose, and had decided to issue the employees a written warning, but had discovered no established disciplinary policy existed. The conference noted above was to address the absence of such a policy, and resulted in the procedure noted above. At this conference Hamm recommended that the employees be treated as if no prior warnings had been issued, since none of the verbal warnings Hamm had issued had been identified by time or date. Tulley accepted Hamm's recommendation, directed Hamm to issue the verbal warning, and Hamm did so. Hamm counsels employees on matters such as tardiness in which the City has a disciplinary interest. He has issued verbal warnings in such cases, and may or may not consult Tulley depending on the severity of the problem. Hamm consults with Clark, who is not a member of the street crew, on an ongoing basis regarding problems with employees or their work related gripes. Such conferences have resulted in the City purchase of work boots and rain gear. One such conference concerned the procedures by which employees should be called in for emergency work on sewer lines.

7. Among the employees covered by the unit description noted in Finding of Fact 3 are employees in the City Street, Sanitation, Water and Waste Water Divisions. Hamm is authorized to, and does, direct and assign the regular day to day and the non-repetitive preplanned project duties of the street crew. He also directs the activities of the sanitation crew if they complete their work prior to the close of their scheduled shift. Hamm will direct and assign the work of Water and Waste Water Division employees only if such work also requires the use of street crew employees or occurs on an emergency call in. Hamm also directs and assigns the work of any summertime seasonal help the City hires into its Parks Department. Hamm is authorized to approve any overtime necessary to accomplish the duties he assigns the street crew.

8. The City employs six employees in its Street Division, two employees in the Sanitation Division, two employees in the Water Division and two employees in the Waste Water Division. Tulley is the ultimate supervisor of all Department of Public Works employees. Hamm's primary responsibility is the employees in the Street Division. However, if the sanitation workers complete their route before the close of the shift, Hamm will assign and direct the duties they are to perform for the balance of their shift. If emergency situations occur which implicate the Street and the Water or the Waste Water Divisions such as the rupture of an underground water main or sewer line, demanding the operation of street equipment, Hamm has the responsibility to direct and to coordinate the work of the Divisions involved. Street crew employees who wish to take leave or vacation apply to Hamm for approval. Members of the other Divisions report directly to Tulley.

9. The Work schedules for the employees in the Street, Water, Wastewater and Sanitation Divisions are addressed in Article VII of the 1986 collective bargaining agreement thus:

Section 2. Work Schedules by Department. The work schedule for all bargaining unit employees shall be as follows unless otherwise mutually agreed between the parties:

(A) Public Works Department - Director of Public Works, Supervisor

Street Division:

Days: Monday through Friday
Hours: 7:30 a.m. to 4:30 p.m.
Lunch Break: 12:00 noon to 1:00 p.m.

Water Division:

Days: Monday through Friday
Hours: 7:30 a.m. to 4:30 p.m.
Lunch Break: 12:00 noon to 1:00 p.m.
Saturday and Sunday: One (1) hour each day

Waste Water Division:

Days: Monday through Friday
Hours: 6:00 a.m. to 2:30 p.m.
7:30 a.m. to 4:00 p.m.
Lunch Break: 11:00 a.m. to 11:30 a.m.
12:00 noon to 12:30 p.m.
Saturday and Sunday: Two (2) hours each day

Sanitation Division:

Days: Monday through Friday
Hours: 3:00 a.m. to 11:30 a.m.
Lunch Break: 7:00 a.m. to 7:30 a.m.

Section 1 of Article XII of that collective bargaining agreement provides overtime for these employees thus: " . . . employees shall be compensated at the rate of time and one-half (1-1/2) for all time worked in excess of the regularly scheduled forty (40) hour work week or eight (8) hour work day." Hamm does not have a regular schedule of hours but reports to work prior to the arrival of the members of the various divisions described above. Hamm's salary is not determined by the amount of hours he works, and he does not receive any overtime premium for hours worked in excess of eight per day or forty per week. He may, however, receive compensatory time off although such time off is not specifically calculated to afford one hour off for each "overtime" hour worked, and is afforded to Hamm on a "hit and miss" basis. Ordinance 664, referred to in Finding of Fact 4 above, which fixed the wage rates for City employees in 1984, included an entry for the position of "City Crew foreman (Hourly)" and a wage rate for that position of "8.00." That ordinance also included an entry for the position of "Skilled Equipment Operator (Hourly)" and a wage rate for that position of "7.23." The minutes of the City Council meeting of January 29, 1985, at which the City approved the hire of Hamm, addressed his rate of pay thus:

APPOINTMENT ASSISTANT DIRECTOR OF PUBLIC WORKS/CITY FOREMAN Director of Public Works Tulley stated that position of Assistant Director of Public Works/City foreman would be a salaried position with the starting salary during the

probationary period to be based on the ordinance fixing the salaries and wages for 1985 (Ordinance No. 686), that being Eight Dollars and Thirty-one Cents (8.31) per hour, or One-thousand-four-hundred-forty Dollars and Forty Cents (\$1,440.40) per month. The Personnel Committee conferred briefly and recommended that the salary for said position be established at the equivalent of Eight-Dollars and Fifty Cents (8.50) per hour or One-thousand-Four-hundred-seventy-three Dollars and Thirty-three Cents (\$1,473.33) per month.

The 1985 collective bargaining agreement between AFSCME and the City contained a wage appendix which, in relevant part, states:

<u>Public Works Department</u>	<u>Start</u>	<u>After Six Months (1/1/85)</u>	<u>After Six Months (7/1/85)</u>
Street Division			
Equipment Operator I	\$7.23	\$7.52	\$7.90
Equipment Operator II	6.91	7.19	7.55
Laborer I	6.59	6.85	7.19
Laborer II	5.70	5.93	6.23
Water Division			
Waterworks Operator I	7.34	7.63	8.01
Waterworks Operator II	6.59	6.85	7.19
Waste Water Division			
Disposal Plant Operator I	7.34	7.63	8.01
Disposal Plant Operator II	6.63	6.90	7.25
Sanitation Division			
Sanitation I	6.98	7.26	7.62
Sanitation II	5.94	6.18	6.49

The same appendix from the parties' 1986 labor agreement reads as follows:

<u>Public Works Department</u>	<u>Start</u>	<u>Six Months (1/1/86)</u>	<u>Six Months (7/1/86)</u>
Street Division			
Equipment Operator I	\$7.90	\$8.07	\$8.30
Equipment Operator II	7.55	7.72	7.95
Laborer I	7.19	7.36	7.59
Laborer II	6.23	6.40	6.63
Water Division			
Waterworks Operator I	8.01	8.18	8.41
Waterworks Operator II	7.19	7.36	7.59
Waste Water Division			
Disposal Plant Operator I	8.01	8.18	8.41
Disposal Plant Operator II	7.25	7.42	7.65
Sanitation Division			
Sanitation I	7.62	7.79	8.02
Sanitation II	7.19	7.36	7.59

Hamm, as of May 9, 1986, earned an annual salary of roughly \$19,000.

10. Hamm, as of May 9, 1986, spent about twenty-five to thirty percent of his work time performing the hands on labor of the street crew. He spent about the same amount of time attending meetings with Tulley, other City officials, independent contractors performing or hoping to perform City work, and assisting with the preparation and administration of the Department of Public Works budget. He spent the balance of his time overseeing the work of the street crew and bargaining unit members. Such oversight includes the direction and assignment of the work of bargaining unit members, the determination of work methods, and the coordination of various work projects. His work in the latter area includes, for example, travel to and inspection of different work sites as well as duties to

expedite the work at such sites such as the acquisition of needed tools or materials. The estimates noted above are rough approximations of his experience over time since he does not have a "typical" day and his actual duties may vary considerably. For example, in the work week of May 9, 1986, Hamm spent less than four hours operating equipment or performing manual labor. His time spent performing work such as that performed by bargaining unit members has declined since his hire. At the time of his hire, he spent time assisting and instructing the street crew in the maintenance of City machinery, a duty he no longer must devote much time to. He spends very little time in the direct supervision of employees.

11. Hamm does not discuss with Tulley personnel matters in which he counsels or verbally reprimands Street Division employees unless or until Hamm believes such consultation is warranted. Both Hamm and Tulley anticipate that Hamm would discuss the imposition of a termination from work with Tulley before taking any such action, although no such instance has occurred. Tulley plays no role in Hamm's assignment of the day to day routine or project activities of the street crew. The street crew does perform work on preplanned projects which are non-repetitive in nature, such as the extension of water and sewer lines on the City's Union Street. The bulk of the work involved in that project was performed by an independent contractor. The City determined, however, to perform some of the work by using employees of the street crew. Hamm selected from among the employees of the street crew those he deemed best qualified to perform the work involved. Hamm selected this crew with no involvement of Tulley, with the exception of one employee. For that employee, Hamm, Tulley and David Bosgraaf, a bargaining unit employee who was scheduled to be on vacation when the project began, jointly selected the employee to replace Bosgraaf. Tulley exercises a limited role in Hamm's approval of overtime, leave or vacation requests. Hamm has, for example, denied an employee's request for a vacation day when Hamm felt that the employee's absence would interfere with the street crew's ability to complete necessary work. Such decisions may, however, be appealed to Tulley. Requests for emergency work are made directly to Hamm or to employees in the Water or Waste Water Division. Hamm calls in and directs employees in such situations without first consulting Tulley. Hamm will ultimately apprise Tulley of the situations when Hamm deems it necessary.

12. Tulley prepares, with Hamm's participation, a budget for the Department of Public Works for submission to the City Council. Hamm actively participates in the preparation of the budget document by consulting with, and securing information for, Tulley. For example, Tulley asked for, and received Hamm's recommendation on an appropriate wage increase for the members of the street crew. Hamm and Tulley also discussed the decision whether to maintain or replace existing machinery. The City was, as of May 9, 1986, considering whether to purchase a backhoe. Hamm secured background information from suppliers on the units available and their cost. Tulley expects Hamm to evaluate such data and to make a recommendation to him of the appropriate choice. The City's present budget for machinery is about \$30,000, and the purchase of a major item of machinery could affect one-third of that amount. Hamm also assists Tulley in estimating the appropriate amounts to be budgeted for uncertain expenditures such as overtime and snow removal. Tulley also has conferred with Hamm on the need and desirability of repairing or replacing existing storm sewers and drains. Once a budget is approved, specific expenditures are effected by means of a purchase order system. Only Tulley and Hamm can approve purchase orders for amounts exceeding a petty cash fund of \$25. Hamm will approve purchase orders from the Waste Water Division if Tulley is not available. Hamm can approve, by purchase order, virtually any amount if the item has been specifically budgeted. If the item has not been specifically budgeted, neither Tulley nor Hamm will approve or request amounts exceeding \$2,000 without the approval of the Public Works Commission or the Council Director. Hamm has recommended, and Tulley approved, the unanticipated repair of the transmission of a City garbage truck which broke down while on route to a repair facility for other repairs. The cost of the transmission repair was about \$4700. Hamm recently purchased two fuel pumps to replace a City pump which had broken down and had forced the City to buy diesel fuel from a commercial retail outlet. Tulley was aware of the break-down of the pump and of Hamm's desire to replace it. Hamm, however, independently found a commercial operator selling such pumps. Hamm independently negotiated a price in a meeting with the vendor, and accepted the vendor's offered price. Hamm informed Tulley of the decision, but, as of May 9, 1986, had not informed Tulley of the actual price, which was in the neighborhood of \$1,000. The pumps had not been specifically budgeted for and Hamm believed the pumps' purchase would be accounted for as part of the gas and oil budget, which is created for the actual purchase of fuel. The

actual accounting for the pumps' purchase had, as of May 9, 1986, not been decided upon by Hamm and Tulley. Hamm, from the time of his hire, has trained street crew employees in equipment maintenance in order to reduce or to eliminate the City's need to independently contract for the repair and maintenance of that equipment. The decision to perform more maintenance with City employees was effected to maximize the use of available City funds. Hamm recommended the increased use of City employees and Tulley accepted his recommendation. Hamm has independently effected the necessary training. Hamm also participates with Tulley in the planning of specific projects. For example, Tulley and Hamm jointly discuss the decision to use recycled or quarried materials for fill for road construction and whether independent contractors or City employees should be used to perform certain projects.

13. The occupant of the position of City Crew Foreman/Assistant to the Director of Public Works exercises supervisory and managerial responsibilities in sufficient combination and degree so as to make that person a supervisory and managerial employee.

CONCLUSIONS OF LAW

1. City of Mauston Employees Local 569-A, WCCME, AFSCME, AFL-CIO, is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The City of Mauston is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The occupant of the position of City Crew Foreman/Assistant to the Director of Public Works exercises supervisory and managerial responsibilities in sufficient combination and degree that a person occupying that position for the City of Mauston is not a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

ORDER CLARIFYING BARGAINING UNIT 1/

The position of City Crew Foreman/Assistant to the Director of Public Works is excluded from the bargaining unit, mentioned in Finding of Fact 3, of certain City of Mauston employees currently represented by City of Mauston Employees Local 569-A, WCCME, AFSCME, AFL-CIO.

Dated at Madison, Wisconsin this 3rd day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin
Richard B. McLaughlin, Examiner

1/ Pursuant to Sec. 227.11(2), Stats., the Examiner, on behalf of the Commission, 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.

(Footnote 1 continued on Page 9)

(Footnote 1 continued)

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.

(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.

(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. 227.20 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 MAUSTON

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

BACKGROUND:

This proceeding was initiated by a unit clarification petition filed by the Union to include the position of "Foreman (Street Crew)" within the bargaining unit described in Finding of Fact 3. At the hearing, the Union referred to the position as "Foreman", while the City referred to the position as "Assistant Public Works Director." The disputed position is referred to in this decision as the "City Crew Foreman/Assistant to the Director of Public Works."

THE POSITIONS OF THE PARTIES

The Union

The Union notes that the present matter has a long history dating back to the Union's original petition for an election among certain City employees, including the street crew. The Union won that election, and subsequently engaged in bargaining with the City. The Union asserts that during the course of the negotiations for an initial collective bargaining agreement, the parties could not reach agreement on whether the position of foreman should be included or excluded from the bargaining unit, with the City contending that certain contemplated changes in the position would make the position supervisory in nature. According to the Union, the Union contends that its own position was that "we will at this point withhold the foreman position from the collective bargaining agreement and wait and see what happens as far as the supervisory nature of that position goes." Sometime after this, the Union filed a unit clarification petition requesting that the Commission place the position in the bargaining unit. That petition was held in abeyance pending the parties' then on-going negotiations for a 1986 labor agreement. Because the parties failed to reach agreement on the unit status of the position during those negotiations, the Union asserts that the matter must be formally resolved. According to the Union, the appropriate resolution of the matter is a determination that the position in question does not have sufficient supervisory or managerial duties to warrant its exclusion from the bargaining unit under the provisions of the Municipal Employment Relations Act.

The City's Position

The City notes that although it agrees with the Union that the present matter has a long history, it disagrees with the Union regarding what constitutes that history. The City notes that it returned the incumbent of the foreman position, who did vote in the election by which the Union became certified as the exclusive bargaining representative of the unit involved here, on his own request, to the work force. The City also notes that it determined to create a position of Assistant Public Works Director to supplant the old foreman's position without reducing the City's work force. The City asserts that, with this as background, the parties agreed in bargaining that the Assistant Public Works Director position, as described in its published job description, would be excluded from the bargaining unit. It follows from this, according to the City, that the burden in the present matter is on the Union to demonstrate that the duties of the Assistant Public Works Director differ from the job description in sufficient degree to warrant the inclusion of the position in the bargaining unit. Whatever the burden may be, however, the City contends that the evidence demonstrates that the Assistant Public Works Director is a "supervisory-managerial position."

DISCUSSION

The issue in the present matter is whether the occupant of the position of City Crew Foreman/Assistant to the Director of Public Works can be considered a municipal employee appropriately included in the bargaining unit represented by AFSCME. This issue is statutory. The background above and the Findings of Fact establish that the parties have noted certain contractual ramifications of the present matter. The City has argued that the parties agreed in bargaining to exclude the position from the bargaining unit. In addition, the parties have added a definition of "Temporary or Casual Part-Time Employees" to the unit description originally certified by the Commission.

Whatever contractual dimensions there may be to the present dispute are irrelevant to the present decision. The exclusion of supervisory and managerial employees from the bargaining unit is statutory in origin and in nature apart from the parties' bargaining. The parties have, in addition, appropriately agreed that the present matter raises the purely statutory issue of whether the occupant of the position at issue is a municipal employee within the meaning of the MERA.

Resolution of the statutory issue turns on established Commission case law. Initially, in response to one City contention, it must be noted that assertions regarding the burden of proof are not relevant to this proceeding. Representation proceedings, apart from their practical effect on the parties, are, from the Commission's perspective, more investigatory than adversarial in nature. 2/ To the extent a burden can be said to exist in representation cases, the burden is on both parties to adduce all the relevant evidence available to them.

As evident in the disputed position's job description and in the parties' arguments, the present dispute centers on the supervisory/managerial nature of the position of City Crew Foreman/Assistant to the Director of Public Works. The job description combines supervisory oversight duties with budgetary responsibilities. That the City is a small employer underscores the slurring of the distinction between a managerial and a supervisory employee since the division of labor in a small employer is not necessarily as clear as in a large employer.

It is not necessary to artificially separate the supervisory and managerial elements of the position to determine if its occupant can appropriately be considered a municipal employee under Sec. 111.70(1)(i), Stats. To determine whether the interests of the City Crew Foreman/Assistant to the Director of Public Works are more aligned with management than with the bargaining unit, any supervisory and managerial authority possessed by the occupant of the position may be considered in conjunction. 3/

Before discussing the combination of supervisory and managerial elements in the disputed position, it is necessary to isolate those elements. In determining whether a position is supervisory in nature, the Commission has consistently considered the following factors:

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/her skills or for his/her supervision of employees;
5. Whether the supervisor is supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he/she spends a substantial majority of his/her time supervising employees;

2/ See Durand Unified Schools, Dec. No. 13552 (WERC, 4/75). That case involved an election petition and the present case involves a unit clarification petition. There is, however, no reason to distinguish between the two proceedings. In neither is the Commission asked to determine, or to remedy, a statutory violation. The MERA imposes no burden of proof (cf. Sec. 111.07(3), Stats., governing prohibited practice proceedings under Sec. 111.70(4)(a), Stats.).

3/ Milwaukee Board of School Directors, Dec. No. 17009-C (WERC, 7/82); citing Lakeland Union High School District, Dec. No. 17677 (WERC, 4/80) and Mid-State VTAE District No. 14, Dec. No. 16094-C (WERC, 4/78).

7. The amount of independent judgement exercised in the supervision of employees.

The Commission has also held that not all of the above factors need to be present, but if a sufficient number of those factors appear in any given case, they will find an employee to be supervisor. 4/

There is limited evidence regarding the first of the Commission's seven criteria of supervisory status. The City has not hired, promoted, transferred, or discharged an employee during Hamm's tenure. His job description anticipates a role in hiring, but such a role is purely speculative on the present facts. The record does demonstrate that Hamm can and has verbally reprimanded employees. He also confers on an ongoing basis with the Local's President, Clark, regarding work related problems and does so without necessarily consulting Tulley. It is of some significance that Clark is not a member of the street crew. This indicates that Hamm possesses authority beyond that of a lead worker over the street crew. The extent of Hamm's disciplinary authority is, however, more difficult to assess. The City has not informed him of any role he may be expected to play in the formal grievance procedure, and Tulley did instruct him to reprimand the employees involved in the use of City trucks for coffee breaks. It is significant, however, that Hamm played an active role in the creation of the disciplinary procedure that emerged from the City's and AFSCME's discussion of the incident. Hamm did in fact effectively recommend to Tulley that the newly created procedure be started from scratch with the employees involved, ignoring the previous reprimands.

Hamm's authority to direct and to assign the street crew in its day to day and in its special project duties can not be disputed. Nor can his authority to direct the duties of Sanitation Division employees who complete their routes prior to the close of their shift. It also appears Hamm's authority extends to any seasonal Parks Department employees hired by the City. In addition, Hamm's authority extends to Water and Waste Water Division employees in emergency situations. In any case in which Hamm directs and assigns employees, Tulley exercises limited oversight over him.

Hamm directly supervises six employees in the street crew, and potentially more on other crews depending on the existence of the circumstances described in the paragraph above. Tulley, as Article VII of the 1986 labor agreement makes clear, is the ultimate supervisory authority for each employee in the Department of Public Works. Nevertheless, Hamm approves sick leave, vacation as well as other leave requests, and authorizes overtime for the street crew. Employees in the other divisions report directly to Tulley, who can also hear the appeals of street crew employees of Hamm's decisions. Tulley's ultimate authority over the department, and his overlapping responsibility with Hamm for the street crew means the extent of Hamm's supervisory authority in this area must not be exaggerated. However, Hamm's authorization of overtime and his denial of a vacation request means indicia of supervisory status do exist to a meaningful degree.

The record does not precisely establish Hamm's present rate of pay. His 1985 rate after the completion of his probationary period, on an hourly basis, represents a sixty cent premium over the rate of pay of an Equipment Operator I. This differential is consistent with a premium paid him for his exercise of supervisory duties. It is, however, also consistent with a premium paid him for his expertise. Along the latter line, it is worthy of some note that in 1984, the City ordinance setting the wages of street crew members established a seventy-seven cent differential between the positions of "City Crew Foreman" and "Skilled Equipment Operator (Hourly)." It is impossible to know if an Equipment Operator I in the 1985 labor agreement performed the same duties as a Skilled Equipment Operator in 1984, but the differential between each classification in the street crew and the supervisory or quasi-supervisory position above it appears to have narrowed from 1984 to 1985. Ultimately, the most that can, or in this case need be said of this criteria of supervisory status is that Hamm's rate of

4/ Kewaunee County, Dec. No. 11096-C (WERC, 2/86).

pay is not inconsistent with the conclusion that he exercises supervisory authority. That he does not have regular hours and does not receive overtime or equivalent compensatory time for hours worked in excess of a regular schedule underscores the conclusion that his position is supervisory in nature.

The Commission's fifth and sixth criteria are closely related. Hamm spends only about twenty-five percent of his time doing the work of a street crew member. He does, however, spend a considerable amount of time serving as an expeditor for such work. His work coordinating and expediting the work of his various crews is not in itself evidence of supervisory status. In addition, Hamm spends very little time directly supervising employees. This is not necessarily unusual in a small unit with little turnover, but is in any event indicative of lead worker, rather than supervisory, status. On balance, however, it appears that while Hamm does supervise the activity of street maintenance and construction, the indicia of supervisory status already discussed militate toward the conclusion that he also supervises employees.

The final of the seven criteria of supervisory status has been touched upon already, and the record establishes that Tulley gives Hamm a free rein in his oversight of the street crew. Tulley exercises no role in Hamm's assignment or supervision of the crew's day to day activities, and only a limited role in Hamm's supervision of project and emergency activities. While Tulley has played a role in employee discipline, that role is dependent on Hamm's first consulting Tulley as well as on Hamm's recommendations.

In sum, the record demonstrates, at a minimum, that Hamm's duties as City Crew Foreman/Assistant to the Director of Public Works manifest significant indicia of supervisory status. 5/

The Commission's analysis of the indicia of managerial status is well established:

The Commission has consistently held that in order for an employee to be found to be a managerial employee, said employee must participate in the formulation, determination and implementation of policy to a significant degree or possess effective authority to commit the employer's resources. We have interpreted the authority "to commit the employer's resources" to mean the authority to establish an original budget or to allocate funds for differing program purposes from such an original budget. 6/

Tulley holds the ultimate responsibility for the preparation of the budget. As the evidence, including the relevant job description, demonstrates, Hamm's role is to assist Tulley. The nature of his assistance is, however, significant under the test noted above. Tulley asked Hamm to evaluate his crew and recommend an appropriate pay increase. The cost estimation Hamm assists Tulley with extends to the planning for uncertain events such as the appropriation for snow removal and for overtime, and to the implementation of policy through the budget such as the purchase, as opposed to the repair, of a significant piece of equipment. It is evident that Tulley relies on Hamm's recommendation, and from this, evident that Hamm's role has an impact on City policy as reflected in the budget.

More significant here, however, is Hamm's role in the purchase order system. His exercise of this role demonstrates the "effective authority to allocate funds for differing program purposes from . . . an original budget." The most striking example of his authority is his purchase of two fuel pumps at a cost of \$1,000. He made the purchase independently, and did so knowing the item had not been specifically budgeted. His belief that the pumps could be accounted for in the oil and gas budget entry, which was set up for the actual purchase of fuel,

5/ As noted above, it is not necessary in this case to determine if these indicia of supervisory status, standing alone, establish that the position must be excluded from the bargaining unit. Doing so would make this a closer case, but would not change the ultimate result.

6/ Kewaunee County, Dec. No. 11096-C (WERC, 2/86).

establishes that his authority to commit the City's resources is not the ministerial implementation of preplanned and designated items, but the allocation of funds for a different purpose. His decision to purchase the pumps will determine the accounting entry and not the other way around. In addition, that employees of divisions other than the Street Division come to Hamm with purchase orders when Tulley is not available emphasizes both the existence and the extent of his authority to allocate City funds.

The final point regarding Hamm's exercise of managerial authority turns on his role in the formulation and implementation of departmental policy. Hamm and Tulley determined that the City's budget could best be utilized if City employees played a greater role in the maintenance and repair of City equipment. Hamm played a vital role in the decision to implement such a policy, and he independently implemented the policy by training the crew. In addition to this, Tulley relies on Hamm's judgment to decide the appropriate use of City machinery and personnel for special projects such as road construction. Of greatest significance to this matter, such decisions include whether to utilize City personnel or independent contractors. Such policy decisions align Hamm's position more with City management than with the bargaining unit.

On balance, Hamm possesses significant indicia of supervisory authority which, when considered in conjunction with the indicia of managerial authority discussed above, establish that the interests of the position of City Crew Foreman/Assistant to the Director of Public Works are more aligned with management than with the bargaining unit. It follows that as a supervisory/managerial position, it must be excluded from the bargaining unit.

Dated at Madison, Wisconsin this 3rd day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner