

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of a Petition of
DANE COUNTY JOINT COUNCIL OF
UNIONS, AFSCME, AFL-CIO,
Involving Certain Employees of
DANE COUNTY

Case 13
No. 36528 ME-70
Decision No. 22976-B

Appearances:

Mr. Darold O. Lowe, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Petitioner.
Ms. Kristi A. Gullen, Assistant Corporation Counsel, appearing on behalf of the County.

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

Dane County Joint Council of Unions, AFSCME, AFL-CIO (hereafter the Union), having filed the instant petition with the Wisconsin Employment Relations Commission on April 24, 1986, requesting that the Commission clarify a voluntarily recognized bargaining unit by determining whether the recently created position of Assistant Food Service Manager at the Badger Prairie Health Care Center should be included in said unit, and a hearing having been held in Madison, Wisconsin, on July 1, 1986 before Sharon Gallagher Dobish, a member of the Commission's staff; and a stenographic transcript of the hearing having been made and received on August 15, 1986 and the Union having waived its right to file a brief herein on October 2, 1986 and the County's brief having been received on September 11, 1986 and sent to the Union by the Examiner on October 3, 1986; and the Commission having considered the evidence and the arguments of the parties and being fully advised in the premises, hereby makes the following

FINDINGS OF FACT

1. That Dane County, hereinafter referred to as the County, is a municipal employer with offices located at 210 Monona Avenue, Room 419, Madison, Wisconsin, 53709; that as part of its operations, the County operates and maintains the Dane County Hospitals and Home, of which the Badger Prairie Health Care Center (BPHCC) is a part; that the BPHCC has a Food Service Division which operates 107 hours per week, preparing meals for residents and staff, as well as for delivery to other customers such as County Home West, the Sheriff's Department and Senior Citizens Projects.

2. That Dane County Joint Council of Unions, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization with offices at 5 Odana Court, Madison, Wisconsin, 53719.

3. That for many years the County and the Union have had a collective bargaining relationship and that the County has voluntarily recognized the Union as the exclusive collective bargaining representative of:

all employees as hereinafter defined except the following: Supervisory employees, law enforcement employees of the Sheriff's Department, non-clerical employees of the Highway, Exposition Center and Airport Department, confidential employees, professional employees as defined by Wisconsin Statutes 111.70 and craft employees so certified by the Wisconsin Employment Relations Commission, for the purposes of conferences and negotiations with the Employer, or its authorized representative on question of wages, hours and other conditions of employment.

Employees defined as regular full-time or regular part-time (permanent) appointed according to the Civil Service procedure who shall have all of the rights, benefits and responsibilities of this Agreement.

. . .

Employees defined as Limited Term Employees (LTE) shall be covered by the terms of Article III and Appendix B;

that since that voluntary recognition, the parties have filed several unit clarification petitions, the most recent of which having issued on September 16, 1986 (Dec. No. 22976-A).

4. That at the BPHCC, the County currently employs approximately 196 unit employees; that 24.9 full-time equivalent positions and 26 employees are currently employed in the Food Service Division; that the BPHCC had previously 25.5 full-time equivalent positions and employed 26 employees in the Food Service Division, prior to the County's eliminating 2.6 full-time positions from Food Service at the BPHCC in early April, 1986; that there are also six vacant bargaining unit positions in the Food Service Division.

5. That in 1985, the County authorized and funded two new positions, called Assistant Food Service Managers, at the BPHCC; that the Assistant Food Service Managers (AFSM) were placed on the BPHCC organizational chart between the Food Service Manager (one position, current incumbent, Julie Allington) and the Food Service Lead Worker (one incumbent); that the Food Service Division currently consists of the Food Service Lead Worker, the Storekeeper (one position vacant since April 11, 1986), the Cooks (6 incumbents), the Food Service Helper/Drivers (3.5 incumbents), the Clerk Typist I - II's (1.7 incumbents), the Stock Clerk (0.7 incumbents), the Food Service Helpers (14 positions - 5 vacancies, 9 incumbents) and the Assistant Cook (one incumbent), one Food Service Manager and two AFSM positions (one vacancy and one incumbent, Dorothy Neuenschwander);

6. That the two AFSM positions were placed on the County's managerial and professional wage schedule at an M-13 level with pay ranging from \$10.70 to \$11.20 per hour; that in February, 1986 the current incumbent AFSM, Dorothy Neuenschwander was hired as an AFSM, at a rate of \$10.70 per hour; that prior to her hire as an AFSM, Ms. Neuenschwander had worked at the BPHCC as a baker paid on the Joint Council of Unions Salary schedule in Range 11 (between \$8.68 and \$9.71 per hour); that other Food Service Division employees' wages appear on the Joint Council of Unions Salary Schedule beginning at Range 7 (8.02 to \$8.86 per hour) for Food Service Helpers and a Range 4 (\$7.43 to \$8.10 per hour) for Clerk Typists and going up to Range 14 (\$9.28 to \$10.19 per hour) for the Storekeeper; that although the AFSM is shown on the County organizational chart as being above every Food Service job classification except the Food Service Manager, Neuenschwander does not direct the work of the Clerk Typist I-II's, although she does maintain a desk in the Clerk Typists' office and answers their questions regarding unclear information on menus and lists which the Clerk Typists complete for the cooks; that on a day-to-day basis, the AFSM has contact with all other Food Service employees as follows: that if there is a problem in the kitchen, Neuenschwander is available to answer questions of the Cooks and Assistant Cooks regarding meal preparation and substitution of dishes and this constitutes Neuenschwander's major daily contact with the Cooks and Assistant Cooks; that Neuenschwander's daily contact with the Food Service Helper/Drivers is to make sure they get proper orders regarding how many meals to deliver to each customer, to check that they deliver meals on time and that they clean up their trucks as well as the customer's premises after deliveries; that with regard to the Stock Clerk (who has also been performing some Storekeeper duties), Neuenschwander see to it that the Clerk orders the proper canned goods, unloads food delivery trucks, takes the proper items out of the freezer and out of storage for delivery to the kitchen for each day's meals; that Neuenschwander has assumed some of the duties of the Storekeeper such as ordering and buying food on her own authority, since April 1986 when that position became vacant, but that once the Storekeeper position is filled, Neuenschwander will supervise only the Storekeeper's ordering and issuing of food and she will maintain the inventory;

7. That after her hire as AFSM, Neuenschwander participated in the interview of candidates for the now-vacant second AFSM position along with County managers and, at that time, Neuenschwander recommended the hire of the person who

was ultimately hired to fill the second AFSM position; that on one occasion in 1986, Ms. Neuenschwander interviewed and hired one limited term employee (LTE); that Ms. Neuenschwander called Job Service and interviewed (alone) the applicants for the LTE position and she hired the successful applicant without receiving prior approval from any of her supervisors; that this LTE hired by Neuenschwander is currently employed at the BPHCC;

8. That as the AFSM, Neuenschwander works 8 hours per day, 40 hours per week, during which Food Service Manager Allington is not present nor is there any other BPHCC manager directing Food Service Division employees; that Neuenschwander's duties include authorizing and/or scheduling employees sick leave, vacations, personal leave, funeral leave and overtime; that Neuenschwander authorizes and/or schedules these items without seeking prior approval; that Neuenschwander has denied or canceled vacation time off to employees on several occasions when, in her sole judgment, there was insufficient Food Service staff to perform Division work; that Neuenschwander is responsible for scheduling employees' weekly work hours, for training Food Service employees, approving their time cards and keeping track of their hours for payroll purposes; that she is responsible for insuring that employees have adequate work to do, for calling in employees to replace those who are ill and for receiving employee calls requesting sick leave; that she has authority to approve employees' requests to go home sick or to seek medical treatment due to on-the-job injury; that Neuenschwander has the authority (and has exercised same on at least four occasions) to orally warn employees for such conduct as not properly performing their jobs and not cleaning up after themselves and for engaging in temper tantrums; that such oral warnings are not placed in employees' personnel files; that after the instant petition was filed, Neuenschwander was given the authority to evaluate Food Service employees and at the time of the instant hearing she had fully evaluated one employee; that Neuenschwander used and filled out a formal County evaluation form to evaluate the employee in question and, as part of the formal evaluation system, she discussed her evaluation with the employee before signing the form as the "first line supervisor" and asking the employee to sign the form; that this evaluation form was then placed in the employee's personnel file as part of the evaluation system; that at the time of this hearing, Neuenschwander was in the process of evaluating other Food Service employees but she had not completed all phases of the process - discussing the evaluations - with the employees in question; that Neuenschwander has the authority, and has exercised same on several occasions, to request that supervisors temporarily transfer their employees from other Divisions to the Food Service Division when Food Service staffing levels are too low to meet the work load; that for the majority of her workday she oversees the baking and cooking of food as well as its preparation and serving at the trayline by, inter alia, being present in the kitchen during cooking and serving times, answering employee questions, getting machinery repaired, ordering food, scheduling and replacing employees and that Neuenschwander spends from 80 to 85 percent of her workday in the kitchen and cafeteria supervising the preparation and service of food; is responsible for the quality of the ingredients, food and service at the BPHCC; that she regularly attends meetings with managers at BPHCC at which management policy matters such as lay-offs have been discussed; that Neuenschwander testified without contradiction that she spends 15 to 20 percent of her workday completing necessary paperwork at her desk, such as making ingredient lists for the cooks, copying menus, checking and recording employee work hours, making up bi-weekly work schedules and weekly cleaning schedules, ordering food from purveyors, requisitioning food and supplies from the BPHCC stores, calculating and monitoring food and supply costs, recording the number of meals served, writing and updating standardized recipes and completing sanitation surveys; that Neuenschwander, in the absence of Allington, has authority to conduct and has conducted meetings with Food Service employees; that Neuenschwander and Allington have different work hours and that when Allington is not present, Neuenschwander is in charge of the Food Service Division and its employees; that when neither Allington nor Neuenschwander are present, Food Service employees are unsupervised for 27 hours of operation time; that Neuenschwander has attended one, three-day, County-run management training course and one privately-run, two-day management seminar; that she has assisted in creating new forms for her and Allington's use regarding work flow and ingredient usage;

9. That Union Vice President Lease testified that, in Lease's opinion, Neuenschwander performs bargaining unit work 40 to 50 percent of her work time, including Neuenschwander's duties as Storekeeper; that on nine occasions between April 1 and June 20, 1986 Neuenschwander was observed by bargaining unit employees

doing unit work, such as baking, working on the tray line, making salads, or dishing up items; that specifically, Union representative Lease testified that on April 1 Neuenschwander and Jim Edwards (then-incumbent of the second, now-vacant AFSM position) were observed preparing bread and butter and granola cereal due to absences in the Division; that on April 2, Neuenschwander was observed assisting an Assistant Cook to prepare bread and butter and dish up desserts while Edwards spent about three hours making sandwiches, to complete necessary Division work; that on April 3, Neuenschwander arrived at work at 4:30 a.m. and when one employee called in sick and Neuenschwander could not find a replacement, Neuenschwander made jello and did the baking which the absent employee would have done and that Neuenschwander also moved bulk foods in the storeroom that day so that it could be plastered; that on April 11, Allington and Neuenschwander arrived at work early (5:30 and 5:45 a.m., respectively) and that Neuenschwander was observed serving food on the cafeteria line that day; that on May 12 Neuenschwander spent almost 8 hours training an employee in baking; that on May 14 Edwards unloaded a truck; that on May 28, Neuenschwander greased pots and pans, sorted laundry and mixed eggs; that on three occasions on and after June 8, bargaining unit cooks had to call in employees and supervise workers since neither Neuenschwander nor Allington was present; that on June 20, Neuenschwander assisted LTE Brissette in baking chores; that between May 19 and June 26, employee Nancy Parsley was employed to perform various work normally done by Food Service employees, Allington, Neuenschwander, and the storekeeper; that Neuenschwander testified that she rarely performs unit work but that when regular or limited term Food Service employees have been transferred to a job they do not ordinarily perform, Neuenschwander has assisted and/or trained them in the new job; that she has also performed unit work when the Division is short-handed for short periods of time or during emergencies; that there are many workdays when she has not performed any unit work;

10. That Neuenschwander does not generally assign Food Service employee tasks but rather, Allington makes up a schedule of each employee's daily tasks which is kept in a "black book"; that Neuenschwander is not involved in the budgetary process, but that Allington draws up, justifies and recommends the Division Budget to the County Board; that Neuenschwander has never permanently transferred a Food Service employee; that she has never sent a Food Service employee home for disciplinary reasons; that she has never discharged an employee or issued a written warning to an employee; that she has never promoted an employee - promotions are handled by the County Board; although she has never done so, Neuenschwander has the authority to recommend that employees receive or be denied merit pay increases; that Neuenschwander has the authority to evaluate and has formally evaluated an employee; that Neuenschwander has been involved in one grievance but her role was merely to give information regarding the facts underlying the grievance and she was not consulted nor was she involved in the ultimate settlement of the grievance; that Neuenschwander has never denied sick leave to an employee who has accumulated sick leave;

11. That Doris Neuenschwander, occupying the position of Assistant Food Service Manager possesses supervisory duties and responsibilities in sufficient combination and degree to be found a supervisor.

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

CONCLUSIONS OF LAW

1. That Dane County Joint Council of Unions, AFSCME, AFL-CIO is a "labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. That Dane County is a "municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. That Dorothy Neuenschwander, the occupant of the position of Assistant Food Service Manager at the Badger Prairie Health Care Center, exercises supervisory responsibilities in sufficient combination and degree, that a person occupying that position for Dane County is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

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

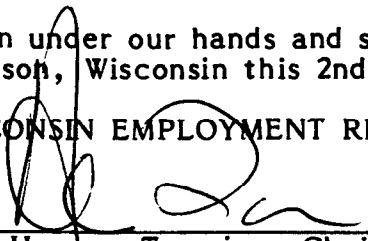
ORDER CLARIFYING BARGAINING UNIT 1/

That the position of Assistant Food Service Manager at the Badger Prairie Health Care Center held by Dorothy Neuenschwander shall be excluded from the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 2nd day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner

Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

- 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.

(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

(Footnote 1 continued on Page 6.)

(Footnote 1 continued from Page 5.)

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.

DANE COUNTY

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

BACKGROUND

The Union contends that the position of Assistant Food Service Manager (AFSM) at the Badger Prairie Health Care Center (BPHCC), which was created in 1985, should be included in the existing voluntarily recognized bargaining unit described in Finding of Fact 3, essentially because since April of 1986, 2.6 positions have been cut from the unit at the BPHCC and the AFSM is a lead person, not a supervisor, doing a large amount of bargaining unit work. In addition, the Union argues that the incumbent of the AFSM only supervises tasks, not employees, and that she lacks sufficient authority to require a conclusion that she is a statutory supervisor. Thus, the Union seeks an order including the two AFSM positions in the unit.

In contrast, the County contends that the AFSM position is clearly supervisory, having sufficient indicia and degree of supervisory authority. In this regard, the County points to the following factors as indicative of the supervisory status of the AFSM position as evidenced by the incumbent Neuenschwander's duties: (1) scheduling and authorizing employee work hours, overtime, vacations, sick leave, funeral leave and personal leave, including the denial of vacation time off upon her own authority on several occasions; (2) training and orally warning employees; (3) filling out performance evaluations; (4) hiring at least one LTE on her own authority following an interview between only Neuenschwander and the LTE applicants; (5) attending management meetings and training conferences and maintaining a separate desk in an office at the BPHCC; (6) spending very little time doing unit work (except that which is necessary to train and fill in on a short-time basis); (7) spending the majority of her time supervising, directing and assigning the 26 Division employees under her. The County also argues that Neuenschwander is paid more, specifically for her supervisory duties, and that if her position were determined to be within the unit, the County would have to reduce her pay to reflect only non-supervisory duties. Finally, the County asserts that the Union's argument that Neuenschwander performs a significant amount of unit work is without merit, as it is not supported by the evidence. The County seeks an order excluding the two AFSM positions from the unit.

DISCUSSION

Section 111.70(1)(o), Stats., defines the term "supervisor" as follows:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The Commission, in order to determine whether the statutory criteria are present in sufficient combination and degree to warrant the conclusion that the position in question is supervisory, considers the following factors:

1. The authority to recommend effectively 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 skills or for his supervision of employees;

5. Whether the supervisor is primarily supervising an activity or 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 and discretion exercised in the supervision of employees; 2/

Applying these factors to the instant case, we find that Neuenschwander, on balance, is a supervisor. We note that Neuenschwander spends a substantial amount of her work time making sure that Food Service employees properly perform their assigned tasks. She also spends a significant amount of time completing paperwork and calling in or scheduling employees. Of significance is the fact that no other person exercises day-to-day supervisory authority over Food Service employees during Neuenschwander's work hours and that approximately 26 Food Service employees would be unsupervised for 67 hours per week if Neuenschwander were not a supervisor. In addition, the record here indicates that Neuenschwander has temporarily transferred BPHCC employees, that she has orally warned employees on several occasions and that she has denied vacation time off, all on her own authority. Furthermore, Neuenschwander has been recently involved in evaluating unit employees and she has hired at least one LTE on her own authority. We note also that she is paid at a higher rate of pay than other Food Service employees.

The Union has asserted that Neuenschwander's performing bargaining unit work, indicates that Neuenschwander is a lead person. We disagree. First, we note that the Union has recounted seven situations where Neuenschwander was observed performing unit work and that the Union's witness stated that in four of those instances, on April 1, 2, 3, and May 12 Neuenschwander was either filling in when the Division was short-handed due to absences or she was training an employee. Second, we note that Neuenschwander testified that she rarely does unit work and (with the exception of her Storekeeper duties which will end as soon as the County hires a Storekeeper) she indicated that only in emergency situations or when an employee needed training has she performed unit work and that there are many work-days when she has not performed any unit work.

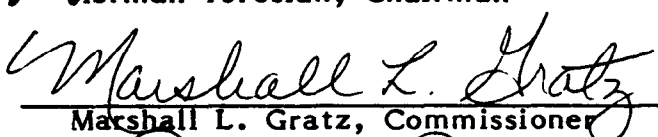
Based upon the evidence here, Neuenschwander spends a substantial amount of her time supervising employees, performing supervisory duties and completing Division paperwork. The record here satisfies us that, on balance, Neuenschwander possesses authority in sufficient degree and combination to warrant a conclusion that she is a supervisor under MERA. On that basis, we have ordered that her position remain excluded from the bargaining unit involved. It should be noted that the supervisory status of the vacant Assistant Food Service Manager position has not been determined. Such determination will depend on the actual responsibilities and duties performed by the person filling the vacant post.

Dated at Madison, Wisconsin this 2nd day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

2/ E.g., City of Milwaukee, Dec. No. 6960 (WERC, 12/64); Northwood School District, supra.