

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :
DANE COUNTY : Case 13
Involving Certain Employees of : No. 34682 ME-10
DANE COUNTY : Decision No. 22976

Appearances:

Ms. Judith H. Toole, Assistant Corporation Counsel, Dane County, 210 Monona Avenue, Madison, Wisconsin 53709, appearing on behalf of Dane County.
Mr. Darold Lowe, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.

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

Dane County having, on February 18, 1985, filed a petition requesting that the Wisconsin Employment Relations Commission clarify an existing collective bargaining unit of its employees, represented by the Dane County Joint Council of Unions, Wisconsin Council 40, AFSCME, AFL-CIO, by determining whether the positions of Crew Leader (Lake Management) and Solid Waste Landfill Crew Leader should be excluded from said unit; and hearing in the matter having been held on May 15, 1985, in Madison, Wisconsin, before Examiner Jane B. Buffett, a member of the Commission's staff; and a transcript of the proceedings having been received on June 10, 1985; and the parties having filed briefs, the last of which was received July 16, 1985; and the Commission having considered the evidence and being fully advised in the premises, hereby makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That Dane County, hereinafter referred to as the County, is a municipal employer having its offices at the City-County Building, 210 Monona Avenue, Madison, Wisconsin.

2. That Dane County Joint Council of Unions, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization having its offices at 5 Odana Court, Madison, Wisconsin.

3. That the Union is the voluntarily recognized exclusive bargaining representative of the following employees of the County:

All regular full-time and regular part-time permanent employees of the County appointed according to the Civil Service procedure excluding supervisory employees; law enforcement employees of the Sheriff and Traffic Departments; non-clerical employees of the Highway Exposition Center and Airport Departments; confidential employees; professional employees as defined by Wisconsin Statutes 111.70 and craft employees so certified by the Wisconsin Employment Relations Commission.

4. That the County initiated the instant proceeding by petitioning, on February 18, 1985, the Commission to clarify the bargaining unit described in Finding of Fact 3, above, by excluding the positions of Crew Leader (Lake Management) and Solid Waste Landfill Crew Leader as supervisors; and that the Union, contrary to the County, asserts that said positions are not supervisory employees and should be included in said unit.

5. That through its Lake Management Division the County discharges its responsibilities to maintain lake levels, operate the Tenney Locks, and cut aquatic weeds; that the incumbent of the position of Crew Leader (Lake Manage-

ment), Richard Lintvedt, has held the position for four years; that during the winter months, from October to April, he spends roughly 40% of his time working with the two other permanent employes, the machine mechanics, performing such jobs as maintaining equipment, welding, running heavy equipment, and, during the winter of 1984-85, working on the vertical expansion of the City-County Building by moving furniture and other items; that during the remainder of his winter work hours, he performs administrative tasks such as working on the budget and ordering parts; that regarding the two permanent employes, he assigns shifts, approves vacation and time off, receives their notification when they are sick, and writes yearly performance evaluations which he submits to his supervisor, the Director of Public Works, Ken Koscik; that no permanent employe has been hired during his four years as Crew Leader, but the County followed his recommendation when it retained the probationary employe hired shortly before he became Crew Leader; that there is no evidence he has disciplined any permanent employes other than making verbal corrections that were not documented in personnel records; that during the summer, May through September, Lintvedt directs the work of roughly seventeen workers who run the lake weed cutters and perform related duties; that the summer workers for 1985 were hired by Life Style Employment Agency; that approximately five of these summer workers worked at the same job last year when they were hired directly by the County; that when Lintvedt needs summer workers, he calls Life Style, who sends him workers; that when individuals make direct application to him he sends them to Life Style, which processes the applications and returns the applicant to him; that he has never rejected an applicant sent by Life Style; that during the four years he has been Crew Leader he has discharged two summer workers who were not performing acceptably; that Lintvedt told Koscik the reasons for the discharge, and Koscik approved Lintvedt's action; that Lintvedt can assign shifts for the summer workers and grant them time off without pay; that at the end of the summer season, Lintvedt determines when the summer workers are no longer needed based on work needs and budgetary constraints, and informs the summer workers they should not return to work; that during summer months Lintvedt spends approximately 80% of his time checking on the weeds in the lake and assigning work to the crews; that Lintvedt does not himself cut weeds, but occasionally he welds and runs the heavy equipment at the landfill if the equipment is borrowed from the Parks Department; and that no other supervisor has day-to-day contact with Lintvedt's above-noted subordinates.

6. That the County operates two landfill sites through its Solid Waste Division of the Department of Public Works; that the incumbent of the position of Solid Waste Crew Leader, Michael DiMaggio, has held the position for eight years; that DiMaggio directs the work of three heavy equipment operators and two Scale Clerks, who are permanent employes, and members of the bargaining unit; that DiMaggio also directs a limited term employe, who is a member of the bargaining unit, and two workers from Manpower who are not members of the bargaining unit; that three equipment operators have been hired during DiMaggio's tenure; that DiMaggio gave the applicants a test in operating the heavy equipment, with his supervisor, the Director of Public Works Ken Koscik, present at the testing of applicants for two of the three positions; that both DiMaggio and Koscik were present at interviews of said applicants and that DiMaggio and Koscik jointly decided whom to hire; that the County has never failed to hire an applicant recommended by DiMaggio; that the two Scale Clerk positions were filled by transfer of bargaining unit employes from other positions, and neither DiMaggio nor Koscik participated in their selection; that the limited term position has been occupied by more than one individual; that DiMaggio selects the limited term employes based on his evaluation of the applicants' past experience; that Koscik also reads the applications, and in at least one instance DiMaggio discussed the applicants with Koscik before making the selection, but that DiMaggio himself made the selection; that the workers sent from Manpower have never been rejected; that on one occasion DiMaggio discharged a limited term employe pursuant to authority granted by Koscik who had told DiMaggio to terminate any unsatisfactory employes; that DiMaggio's report to Koscik of an incident and the ensuing conference between DiMaggio and Koscik resulted in a written reprimand to the involved employe, but the record does not show whether the reprimand was signed by Koscik only or was jointly signed by Koscik and DiMaggio; that DiMaggio evaluates these employes annually and makes recommendation regarding merit pay, which the County has a practice of granting to all employes not on probation or being disciplined; that DiMaggio grants vacation and other leave, basing his decisions on the number of other employes absent from work and the work needs; that DiMaggio assigns overtime based on work needs and budget; that DiMaggio can shift employes between the two work sites; that DiMaggio has adjusted an employe's work site complaint; that DiMaggio spends roughly 40% of his time performing work similar to that of other members of the bargaining unit, primarily running heavy equipment but

occasionally filling in for a Scale Clerk when replacements are needed and unavailable; and that DiMaggio also meets with solid waste haulers, and general citizens, works with data processing, and maintains and repairs equipment in case of a breakdown, and procures temporary substitute equipment, usually from the Highway Department.

7. That the position of Crew Leader (Lake Management) possess supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

8. That the position of Solid Waste Landfill Crew Leader possess supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

CONCLUSIONS OF LAW

1. That the position of Crew Leader (Lake Management) is supervisory within the meaning of Sec. 111.70(1)(o)1. of MERA, and therefore the occupant of said position is not a municipal employe within the meaning of Sec. 111.70(1)(i) of the Municipal Employment Relations Act.

2. That the position of Solid Waste Landfill Crew Leader is supervisory within the meaning of Sec. 111.70(1)(o)1. of MERA, and therefore the occupant of said position is not a municipal employe within the meaning of Sec. 111.70(1)(i) of the Municipal Employment Relations Act.

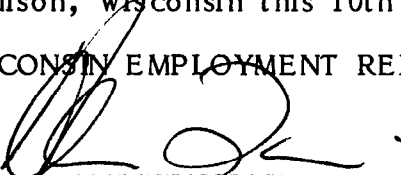
ORDER CLARIFYING BARGAINING UNIT 1/

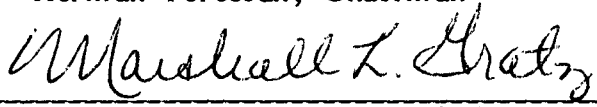
That the positions of Crew Leader (Lake Management) and Solid Waste Landfill Crew Leader be, and hereby are, excluded from the bargaining unit described in Finding of Fact 3 above.

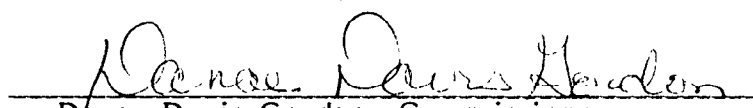
Given under our hands and seal at the City of
Madison, Wisconsin this 10th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


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.

(Footnote 1 continued on Page 4)

(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.

DANE COUNTY

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

BACKGROUND AND POSITIONS OF THE PARTIES

The County filed the instant Unit Clarification Petition asserting the Crew Leader (Lake Management) and Solid Waste Crew Leader exercise supervisory authority in sufficient combination and degree to render them supervisors within the meaning of MERA. In its brief, it enumerates the supervisory responsibilities and emphasizes the extent of independent judgment exercised by the incumbents in these positions. Additionally, it cites Commission precedent that the Commission will clarify a voluntarily recognized unit to determine whether a disputed position is properly included or excluded under the Statute.

The Union argues that both positions lack sufficient elements to be found supervisory and that incumbents in both positions receive substantial direction from the Director of Public Works. It points to Commission cases which require supervisory positions to encompass more than minimal and ministerial supervisory duties. At the hearing, the Union argued the Commission could not clarify the disputed positions since the original unit was voluntarily recognized.

DISCUSSION

I. Commission Jurisdiction To Determine Employee Status

At the hearing, the Union argued that since the instant unit was voluntarily recognized, the exclusion of unit members should be bargained between the parties rather than decided in a unit clarification proceeding before the Commission. Generally, the Commission will not, through a petition for unit clarification, exclude employees from a collective bargaining unit which the parties voluntarily had agreed upon as being appropriate, unless the continued inclusion of the contested positions contravenes the provisions of the Municipal Employment Relations Act. 2/ Here, the continued inclusions of the two positions in question would in fact contravene the provisions of MERA if they are found to be supervisory positions, as alleged by the County. Therefore, the Commission will clarify the petitioned-for positions.

II. Alleged Supervisory Status of Crew Leader (Lake Management) and Solid Waste Crew Leader

Section 111.70(1)(o)1 of MERA defines the term "supervisor" as follows:

. . . Any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend or lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or to effectively recommend such action is not of the merely routine or clerical nature, but requires the use of independent judgment.

In its interpretation of the above definition, the Commission has, on numerous occasions, listed the following factors as those to be considered in the determination of an individual's supervisory status:

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;

2/ City of Cudahy, Dec. No. 19451-A,B (WERC, 12/82) and Waukesha County, Dec. No. 14830 (WERC, 8/76).

4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skill or for his/her supervision of employees;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he/she spends a substantial majority of his/her time supervising employees;
7. The amount of independent judgment exercised in the supervision of employees. 3/

The Crew Leader (Lake Management) Richard Lintvedt has two groups of subordinates: two permanent employees whom he supervises throughout the year, and approximately seventeen temporary employees whom he supervises during summer. No permanent employee has been hired during the four years Lintvedt has been crew leader; however, he did effectively recommend the retention of the probationary employee hired shortly before Lintvedt's own appointment. Furthermore, he assigns shifts and overtime and approves vacation and other time off, as well as annually evaluating the performance of these two permanent employees.

As for the temporary summer employees, although Lintvedt apparently accepts all applicants sent to him by the employment agency, he has dismissed two such employees for inadequate performance without first consulting Director of Public Works Ken Koscik, and by himself determines when the temporary employees are no longer needed at the end of the season. In view of the foregoing and the absence of any other supervisor with day-to-day contact with the subordinates involved, we are satisfied that Lintvedt is a supervisor.

Solid Waste Crew Leader Michael DiMaggio exercises supervisory responsibility over five permanent employees, one limited term employee and two temporary employees. He has effectively recommended the hiring of three permanent employees and one limited term employee. Although he has accepted all the temporary employees sent to him by the employment service, he has discharged one limited term employee, and has effectively recommended that one employee receive a written reprimand. He approves vacation and other leaves, overtime and can shift employees from one work site to the other. He has adjusted a complaint from an employee about his job situation. The responsibility and authority manifested in these actions indicate that the solid waste crew leader should be excluded from the unit as a supervisor.

The Union correctly points out that the Commission will not find an employee supervisory if only a small quantum of the supervisory indicia, listed above, are present. However, the disputed employees in this case exercise sufficient supervisory responsibilities in a significantly greater amount than the disputed employees in the cases cited by the Union. In Brown County 4/ the disputed employee's only supervisory activity was sharing in joint interviews of job candidates and engaging in consensus decisions regarding hiring. In Door County 5/ the disputed employee had no authority to effectively recommend hiring, discharge, discipline or transfer and had only minimal authority to assign and direct the work force of three seasonal employees in summer and one seasonal employee in winter. Finally, in Shawano County (Maple Lane Health Care Center) 6/ the disputed employee's only supervisory activity was the approval of vacation and sick leave which she did in a ministerial manner according to County policy, and although she had been told she had authority to hire and fire she had

3/ City of Milwaukee, Dec. No. 6960 (WERC, 12/64); Eau Claire County, Dec. No. 17488-A (WERC, 3/81).

4/ Dec. No. 7954-C (WERC, 11/84).

5/ Dec. No. 7859-A (WERC, 5/85).

6/ Dec. No. 7197-A (WERC, 10/84).

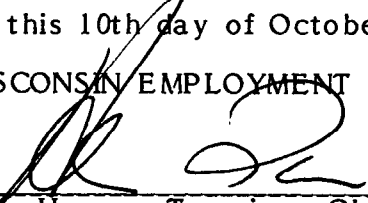
never done so, nor had she recommended such actions. Clearly, the supervisory responsibility exercised by the disputed employees in this case outweigh that exercised by the employees in the cited cases. 7/

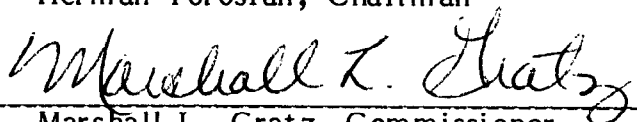
Based on the above, the Crew Leader (Lake Management) and Solid Waste Crew Leader positions are hereby excluded from the bargaining unit.


Dated at Madison, Wisconsin this 10th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

7/ The County's revised job descriptions for the two disputed positions were admitted to the record over the Union's objections. It should be noted, however, that the Commission relies upon the testimony of the disputed employees themselves and their superior, the Director of Public Works, as the best evidence of the supervisory duties that had in fact been exercised by the disputed employees.