

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40,
AFSCME, AFL-CIO
Involving Certain Employees of
WASHBURN COUNTY

Case 16
No. 36621 ME-73
Decision No. 23874-A

Appearances:

Mr. Richard Rettke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 68, Rice Lake, Wisconsin, 54868, appearing on behalf of the Union.
Mr. Michael J. Burke and Mr. Edward J. Williams, Mulcahy & Wherry, Attorneys at Law, 21 South Barstow, Eau Claire, Wisconsin, 54702, appearing on behalf of the County.

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

Washburn County having, on February 28, 1986, filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of certain employees of Washburn County by determining whether the position of Assistant Forest Administrator should be excluded from said bargaining unit. The Commission, on August 7, 1986, appointed Douglas V. Knudson, a member of its staff, to act as Examiner to conduct a hearing and to issue a final decision as provided in Section 227.09(3)(a), Stats. A hearing on the petition was conducted in Spooner, Wisconsin on August 12, 1986. A transcript of the hearing was provided to the Examiner on September 22, 1986. The parties filed written post-hearing briefs the last of which was received on November 20, 1986.

FINDINGS OF FACT

1. That Wisconsin Council 40, AFSCME, AFL-CIO, herein referred to as the Union, is a labor organization which has its offices located at P. O. Box 68, Rice Lake, Wisconsin, 54868.
2. That Washburn County, herein referred to as the County, is a municipal employer which has its offices located at the Washburn County Courthouse, Shell Lake, Wisconsin, 54871.
3. That the Union is the certified exclusive bargaining representative of certain of the County's employees employed in a bargaining unit described as all regular full-time and regular part-time employees employed by Washburn County in the Courthouse, Department of Social Services and Related Departments, including professional employees, but excluding Highway Department, blue collar, law enforcement employees, elected officials, supervisory, managerial, confidential, and casual employees.
4. That the instant proceeding was initiated on February 28, 1986 by a petition filed by the County wherein it contends, contrary to the Union, that the position of Assistant Forest Administrator is supervisory in nature and, therefore, should be excluded from said bargaining unit; that hearing in the matter was postponed indefinitely pending efforts by the parties to voluntarily resolve the matter; and, that the efforts of the parties being unsuccessful in resolving the matter, a hearing was conducted on the matter on August 12, 1986.
5. That the County created the position of Assistant Forest Administrator at some point in 1985; that Barry Nielsen was placed in said position; that Nielsen has been employed by the County in its Forestry Department for approximately 18 years; that prior to his appointment to the position of Assistant

Forest Administrator, Nielsen was classified as a Forestry Technician II, which job title appears in the collective bargaining agreement between the Union and the County covering the bargaining unit described in Finding of Fact 3; that in addition to Nielsen, there are four other full-time positions in the County's Forestry Department, which positions are the County Forest Administrator, currently occupied by James Varro, a Secretary, a Forest Technician I, currently occupied by Harold Smith, and a vacant Park Ranger position which had been occupied by Bill Wagner until sometime in June, 1986; that the Park Ranger position is currently held by two temporary employees, until the County finds a permanent replacement employee; that the County utilizes certain other work crews which do not work on a full-time year-around basis; that for at least the past 18 years, with the exception of 1986, the County has used a planting crew consisting of between 30 to 35 individuals who work for approximately six to eight weeks in the spring for the purpose of planting trees; that the length of employment for the planting crew depends on the number of trees to be planted; that in addition, five to seven of the planting crew employees are kept in employment status for an additional four - five weeks as a brush cutting crew; that many of the individuals on the planting crew return on a year-to-year basis; that replacements for employees who do not return from the preceeding year are filled by referrals from the State of Wisconsin Job Service; that Nielsen reviews the applications from the State Job Service and selects the individuals needed to fill the vacant positions on the planting crew; that the planting crew individuals are paid by the County and are County employees; that Nielsen assigns the planting crew employees to specific work crews and meets with the planting crew on a daily basis to assign the crews to the planting sites; that Nielsen does, in addition to overseeing the work of the planting crews, engage in such activities as delivering trees to the planting sites for the crews; that Nielsen has given oral warnings to planting crew employees and has terminated planting crew employees, the last instance of which occurred in 1985; that Nielsen hires, reprimands, and discharges planting crew employees without the prior approval of his supervisor; that Nielsen directs the activities of other work crews whose members are not County employees but are engaged in work projects on County owned property, for example, WCC (Wisconsin Conservation Corps), YCC (Youth Conservation Corps), CEP, CETA, and Green Thumb; that a WCC crew of state employees has been utilized by the County for the past three years and in 1986 consisted of seven individuals; that the YCC crew in 1986 consisted of between five to seven individuals, who were participants at a State of Wisconsin camp for high school age individuals for a three or four month period; that in 1986 there were three CEP individuals who worked during the summer on County projects; that Nielsen oversees the work of such crews to make sure it is done to the County's specifications; and, that in the past Nielsen has discussed with the crew foremen problems with individual crew members which needed to be corrected.

6. That in 1985 Nielsen directed the activities of two full-time County employees, a tree planting crew of County employees numbering between 30 to 35 employees, and approximately 15 other crew members who were not County employees; that in 1986 Nielsen did not have a tree planting crew of County employees to direct, because the Forestry Department was reviewing its planting program and projects; that in 1986 the tree planting was done by the WCC crew; that in 1986, Nielsen did oversee one full-time employee, two temporary employees in the Park Ranger classification, and approximately 15 individuals working on government sponsored crews who were working on County lands; and, that Varro does not get involved with the direction and supervision of the work crews which are overseen solely by Nielsen.

7. That Nielsen considers himself to be the supervisor both of Smith, the Forest Technician I, and of the Park Ranger position; that the two temporary employees currently working in the Park Ranger position were interviewed and selected by Nielsen and the Forestry Committee Chairman; that Nielsen meets daily with Smith to discuss and assign various projects; that in the Spring of 1986 Nielsen issued an oral reprimand to Smith for the use of work time for personal business; that said oral reprimand was not grieved by Smith; that in the spring of 1985 Nielsen became aware that the Park Ranger, Bill Wagner, was not correcting maintenance problems which had been reported at County operated parks as Wagner was supposed to do; that Nielsen orally reprimanded Wagner for his failure to correct the problems; that, when Wagner's performance did not improve, Nielsen initiated discussions about the situation with Varro; that Wagner was given a series of written reprimands signed by Varro, and subsequently in the late spring of 1986 Wagner received a two-week suspension without pay, which suspension was issued in writing over the signature of Varro; that Nielsen approves vacation

requests and assigns overtime to Smith and the Park Rangers; that Nielsen attends meetings of the County's Forestry Committee; that Nielsen works closely with Varro in administering timber sales contracts to be performed on County-owned properties and in reviewing compliance with those contracts; and that Nielsen spends most of his time performing field work, while Varro spends the majority of his time in the office performing administrative and paperwork duties.

8. That the occupant of the position of Assistant Forest Administrator exercises supervisory responsibilities in sufficient combination and degree so as to make that person a supervisory employee.

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

CONCLUSION OF LAW

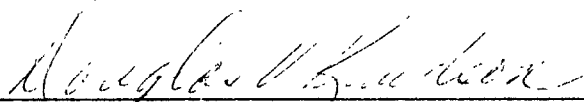
That the Assistant Forest Administrator is a supervisory employee within the meaning of Sec. 111.70(1)(o) of the Municipal Employment Relations Act and, therefore, the incumbent is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and appropriately is excluded from the collective bargaining unit described in Finding of Fact 3 above.

ORDER CLARIFYING BARGAINING UNIT 1/

That the position of Assistant Forest Administrator be, and the same hereby is, excluded from the bargaining unit set forth in Finding of Fact 3 above.

Dated at Madison, Wisconsin this 13th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Douglas N. Knudson, Examiner

-
- 1/ Pursuant to Sec. 227.11(2), Stats., the Examiner hereby notifies the parties that a petition for rehearing may be filed with the Examiner 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

(Footnote 1 continued on Page 4.)

(Footnote 1 continued from Page 3.)

the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

WASHBURN COUNTY

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

THE POSITIONS OF THE PARTIES

The Union

The Union notes that Nielsen is employed in a small department consisting of only five full-time employees, one of whom, Varro, is already excluded from the bargaining unit as a supervisor. The planting crew consists of casual and temporary employees, none of whom were employed by the County in 1986. The individuals performing work for the County through various work crews such as WCC and YCC are not even County employees and although Nielsen is involved with the activities performed by such work crews, he is not the supervisor of those employees. Nielsen receives a higher salary than the Forestry Technician I and Park Ranger because of his knowledge and responsibilities as a forester. Nielsen functions as a working foreman, as evidenced by the fact that when his verbal reprimand to Wagner was not successful, Nielsen then went to Varro who issued and signed a written reprimand to Wagner. Nielsen does not perform sufficient supervisory duties so as to warrant the exclusion of his position from the bargaining unit.

The County

The County believes that Nielsen has the authority to discipline employees as evidenced by the issuance of an oral reprimand to Smith, the oral reprimand issued to Wagner, the recommended suspension of Wagner, the recommended discipline of government project employees and the fact that he has terminated planting crew employees as recently as 1985 without prior approval from Varro. Nielsen has hired planting crew employees and was involved in the hire of two temporary Park Rangers. Further, Nielsen directs and assigns the field work force, which consists of two regular County employees, the planting crew, and several government project crews. Nielsen has the authority to approve overtime. The County asserts that Nielsen's primary responsibility is the supervision of employees and that his higher compensation is not only for his skill but also for his supervisory exercise of independent judgment.

DISCUSSION

The issue in the present matter is whether the occupant of the position of Assistant Forest Administrator, Barry Nielsen, is a supervisor and should be excluded from the existing bargaining unit.

The Union accurately notes that the Forestry Department contains a relatively small number of full-time year-around employees and that the Department Administrator, James Varro, is already excluded from the bargaining unit. However, it appears from the record that Varro and Nielsen have worked out a division of the duties within the Forestry Department whereby Varro primarily administers the office functions, while Nielsen is responsible primarily for the field activities of the Department. In such capacity Nielsen directs and assigns the employees both of the County and those who are not County employees but are working on crews performing projects for the County on County-owned properties. That workforce includes two regular full-time employees, the Forest Technician I and the Park Ranger, a planting crew in all years except 1986 consisting of between 30 and 35 temporary County employees, and a varied number of government project crews which range in size from three to seven employees. While Nielsen definitely spends part of his work time performing tasks similar to, or in support of, the functions being performed by those work crews, he is responsible for overseeing and directing their activities in the performance of the projects they are engaged in on behalf of the County.

Although Nielsen did not have a planting crew of temporary County employees to oversee in 1986, he has directed the activities of such planting crews in previous years. While many of the individuals employed on those planting crews have returned from preceding years, usually the returning employees do not fill all of

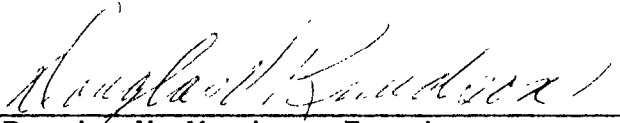
the positions on the planting crew. When vacancies in the planting crew have occurred in previous years Nielsen has screened the applicants and employed individuals for those vacancies without Varro's approval. Nielsen also interviewed and hired the two temporary employees in the Park Ranger position along with the Chairman of the Forestry Committee.

Nielsen has exercised authority to discipline employees. He issued an oral reprimand to Smith in the spring of 1986. In the spring of 1985 Nielsen issued an oral reprimand to the former Park Ranger, Wagner. When the oral reprimand did not correct Wagner's performance, Nielsen discussed the situation with Varro and Wagner received written reprimands and subsequently a suspension. Although Varro, rather than Nielsen, signed the written reprimands and suspension notice to Wagner, it is clear that those disciplinary actions were initiated by Nielsen's discussion of the situation with Varro. Inasmuch as Nielsen has been considered a bargaining unit employee, it does not seem unusual that Varro, rather than Nielsen, would sign a disciplinary action. Nielsen has terminated planting crew employees as recently as 1985, without the prior approval of Varro. Even though the employees of the planting crew are temporary County employees, it is clear that Nielsen has exercised the authority to discharge employees of the County.

Based on Nielsen's authority to hire, discipline, discharge and direct the work of employees of the County, it is concluded that the position of Assistant Forest Administrator possesses and exercises supervisory authority in sufficient degree and combination to warrant the exclusion of said position from the bargaining unit as a supervisor.

Dated at Madison, Wisconsin this 13th day of January, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Douglas V. Knudson, Examiner