

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 139**

Involving Certain Employees of

GREEN LAKE COUNTY

Case 39
No. 55657
ME-911

Decision No. 24955-D

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the International Union of Operating Engineers, Local 139.

Mr. John B. Selsing, Corporation Counsel, Green Lake County, 120 East Huron Street, Berlin, Wisconsin 54923, appearing on behalf of Green Lake County.

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, 639 West Scott Street, #205, Fond du Lac, Wisconsin 54937, appearing on behalf of Green Lake County Courthouse Employees, Local 514-C, AFSCME, AFL-CIO.

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

International Union of Operating Engineers, Local 139, on June 27, 1997, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to determine whether the position of Zoning Administrator/Environmental Health Technician should be included in the existing Green Lake County professional employe collective bargaining unit represented by

No. 24955-D

Local 139. Hearing in the matter was held in abeyance with the agreement of the parties while they attempted to resolve the matter voluntarily. Both the County and Wisconsin Council 40, AFSCME subsequently advised the Commission in writing that neither party objected to the inclusion of the position of Zoning Administrator/Environmental Health Technician in the bargaining unit of professional employees represented by Local 139. The Commission, being satisfied that there was no need for a hearing, based on the written positions of the parties, dismissed the petition on August 12, 1997.

By letter of September 22, 1997, Green Lake County subsequently advised the Commission that a condition it felt was necessary to its agreement to include the former incumbent in the Zoning Administrator position in the bargaining unit represented by Local 139 had not been met, that the position had been eliminated, and that the functions and responsibilities of the position that individual would be offered had not yet been finalized, and that it was therefore reserving a decision as to whether the individual should be in a bargaining unit, and if so, in which bargaining unit. Local 139, on October 15, 1997, requested in writing that the Commission reinstate its petition filed on June 27, 1997.

Hearing was held before an Examiner on the Commission's staff, David E. Shaw, on January 6, 1998, in Green Lake, Wisconsin. At hearing, the County took the position that the Zoning Administrator/Environmental Health Technician position had been eliminated and a Code Enforcement Officer position created. Local 139 amended its petition to seek inclusion of the position of Code Enforcement Officer. The County opposed the amended petition asserting that the Code Enforcement Officer is not a professional employee and should be included in the existing non-professional employee AFSCME unit. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by March 4, 1998.

Having considered the record in the matter, and being fully apprised in the premises, the Commission now makes and issues the following

FINDINGS OF FACT

1. Green Lake County, herein the County, is a municipal employer and has its offices at Green Lake County Courthouse, 492 Hill Street, Green Lake, Wisconsin.

2. The International Union of Operating Engineers, Local 139, herein the Petitioner, is a labor organization and has its offices at N27 W23233 Roundy Drive, Pewaukee, Wisconsin. The Petitioner is the certified exclusive bargaining representative of County employees in the following unit as described in the 1995-1997 contract between Petitioner and the County:

“ . . . all full-time and regular part-time professional employees of Green Lake County, excluding supervisory, managerial, confidential, executive, temporary, craft and casual employees.”

3. Green Lake County Courthouse Employees, Local 514-C, AFSCME, AFL-CIO, herein AFSCME, is a labor organization and has its offices at 8033 Excelsior Drive, Suite B, Madison, Wisconsin. AFSCME appeared, but did not otherwise participate in this matter. AFSCME is the certified exclusive bargaining representative of County employees in a non-professional employe unit.

4. From December of 1988 to November of 1997, when the position was eliminated, James Jajewski held the position of Zoning Administrator/Environmental Health Technician with the County. The following was the position description for that position:

ZONING ADMINISTRATOR/ENVIRONMENTAL HEALTH TECHNICIAN

GENERAL STATEMENT OF DUTIES: Is responsible for the administration of the Zoning and Environmental Health Department, which is responsible for the zoning codes (floodplain, shoreline, building, and comprehensive), private sewage system code, solid waste management, recycling and related work such as nuisance complaints and other duties as may from time to time be assigned. The duties include supervising the department staff as well as technical and administrative work, which shall include public relations and education, planning, cooperation with other agencies, investigations, code enforcement and code development. The position reports to the Zoning Committee.

EXAMPLES OF WORK (Illustrative Only):

1. Assists applicants for zoning map amendments, variances and conditional use permits.
2. Conducts field investigations and researches the actions proposed above and prepares and schedules the related public hearings.
3. Issues land use permits based on information obtained from the application, field investigation and document searches.
4. Conducts field and complaint investigations.
5. Coordinates enforcement actions with other county, state and federal agencies, issuing orders or citations and preparing court action as necessary.
6. Drafts proposed ordinances and revisions, presenting them through the Zoning Committee to the County Board for adoption.
7. Develops and implements solid waste management programs, including

recycling for the County and assists local governments in their efforts.

8. Reviews all soil tests submitted and conducts field investigations where necessary, assisting soil testers with problems in difficult situations.
9. Reviews all plans for private sewage systems and issues the sanitary permits after finding them acceptable.
10. Investigates complaints on private sewage systems and septage disposal.
11. Conducts a training seminar annually for area plumbers and soil testers, providing them with updates on the codes.
12. Provides educational presentations for local schools and civic organizations on the environmental health and zoning programs.
13. Prepares forms, educational booklets and other materials used by the department.
14. Prepares budgets, progress reports and annual reports for County, State and federal agencies.
15. Participates in State audits of the programs.
16. Attends training seminars, meetings and hearings on new legislation and code changes to maintain expertise in the field.
17. Attends local government meetings making presentations on County programs.
18. Does related work as required.

ACCEPTABLE EXPERIENCE AND TRAINING: A college degree in resource management, environmental health or a closely related field; experience in land use planning, zoning, sanitation, solid waste management, recycling, surveying and code enforcement is desirable; any combination of training, education and experience that prepares the individual for the responsibilities of this position.

SPECIAL REQUIREMENTS: Must possess a Wisconsin Driver's License; must be a State-certified/licensed soil tester, plumbing inspector, and a registered sanitarian.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES: Knowledge of local, state and federal laws, codes and regulations that pertain to the duties assigned; knowledge of environmental health and land use laws and principles; ability to apply zoning and sanitation codes to individual situations; ability to obtain and interpret facts through inspection and investigation; ability to create accurate and well-written reports that will be suitable for official reports and as evidence in court actions; ability to deal effectively with the public, other agencies and co-workers.

When Jajewski was hired into the Zoning Administrator position, he possessed the following certifications:

Certified Uniform Dwelling Construction Inspector (Certified 1-86)
Certified Dwelling Energy Conservation Inspector (Certified 4-86)
Certified Dwelling Heating, Ventilation and Air Conditioning Inspector (Certified 4-86)
Certified Commercial Building Inspector (Certified 5-86)
Certified Rental Unit Energy Inspector (Certified 6-84)
Certified Soil Tester (Certified 8-84)
Certified Plumbing Inspector II (Certified 7-85)

He was also certified as a Property Appraiser with the Wisconsin Department of Revenue and was a licensed insurance agent. In addition, Jajewski had completed the following courses:

Blueprint Reading Construction Trades (Course Completed 3-86)
Existing Housing Inspection (Course Completed 1-86) University of Wisconsin-Madison
Building Inspection (Course Completed 1-86) University of Wisconsin-Madison

The Blueprint Reading course and the courses required to obtain Soil Tester certification and to obtain Plumbing Inspector II certification were eight-week courses at an area technical college and the Soil Tester and Plumbing Inspector II certifications also required passing an examination for certification. Jajewski is also required to take six hours of continuing education every two years to maintain his Soil Tester certification and six hours of continuing education each year for his Plumbing Inspector II certification. In addition, Jajewski had also taken a number of seminars not directly related to the duties of his position.

Prior to becoming the Zoning Administrator for the County in 1988, Jajewski had also been a licensed insurance agent and real estate broker, and previous to that had owned and operated a beer distributorship for approximately thirty years. Jajewski does not possess a college degree.

5. In June of 1992, the County filed petitions to clarify the bargaining unit in Case 12, No. 47768, ME(u/c)-587 asking that the position of Zoning Administrator held by Jajewski be excluded from the bargaining unit represented by AFSCME. As a result of a mediation session regarding that petition and others, a number of agreements were reached between the County, Petitioner and AFSCME, including an agreement that the Zoning Administrator position was to be excluded from the bargaining unit represented by AFSCME on the basis that it was currently occupied by a professional employe and that it was to be excluded from the bargaining unit represented by Petitioner on the basis Jajewski was then functioning as a supervisor.

6. As the Zoning Administrator, Jajewski had, prior to 1997, been in charge of the Zoning Office, including two clerical positions, the Administrative Assistant and the Secretary/

Bookkeeper. In 1997, the County began restructuring and created the position of Director of Land Use Planning and Zoning and eliminated the Zoning Administrator position. The new position was to be the department head over both the Zoning and the Surveying Departments and the employees for those departments.

In eliminating the Zoning Administrator position, the County intended to create and fill a Code Enforcement Officer (CEO) position to be filled by Jajewski and to create a second CEO position later to be filled by the individual in the Administrative Assistant position, Leone Daniels, once she acquired the needed certification. Jajewski held the CEO position from the fall of 1997 to his retirement on January 2, 1998.

By July of 1997, the County hired Bruce Roskom as the Director of Land Use Planning and Zoning. Roskom has a Bachelor of Science degree in Urban Regional Planning and had been the principal City Planner for the City of Oshkosh, Wisconsin before taking the position. Roskom was hired to create a comprehensive long-range plan regarding land use in the County, oversee current land use activities in the County and to review the County's existing land use codes for possible updating and modifications with the emphasis on the planning aspect. Roskom's position requires a four-year college degree. Roskom does not consider a four-year college degree to be necessary for the CEO position, rather, he considers only the certifications required to review soil tests and applications for sanitary permits to be necessary. Roskom participated in drafting the current job description for the Code Enforcement Officer position which reads, in relevant part, as follows:

Title/Position: Code Enforcement Officer

Department: Land Use Planning and Zoning Department

Location: Green Lake County Courthouse

Reports To: Director of Land Use Planning and Zoning

Purpose of Position: Responsible for enforcing County Ordinances regarding private sewage systems (private sewage system code), land use and zoning including, but not limited to, the subdivision, floodplain and shoreland ordinances, issuing zoning/land use permits, and related work including complaint research and following up, and processing variance requests. Duties include technical and administrative work, which shall include public relations, education, and cooperation with other agencies, investigations and code enforcement. Other duties as be assigned.

Fundamental Job Duties and Responsibilities:

- 1) Reviews and issues county permits for private sewage systems and zoning/land use permits in accordance with land use regulations.
- 2) Evaluates, interprets and enforces county land use ordinances and other laws and regulations affecting land use control and soil boring and percolation tests data related to private sewage systems.
- 3) Compiles and maintains records relating to permit issuance, private sewage system maintenance and construction records.
- 4) Performs field inspections to:
 - a) verify soil boring and percolation test data.
 - b) verify private sewage system code compliance.
 - c) obtain necessary data for permit issuance.
 - d) investigate complaints of violations regarding land use regulations or failing private sewage system.
 - e) preview the need for variance requests.
- 5) Issues citations.
- 6) Issues Certificates of Compliance regarding verification of structures constructed as shown on the Zoning/Land Use Permit site plan.
- 7) Coordinates Wisconsin Fund Program which provides financial assistance to property owners with failing private sewage system.
- 8) Reviews private sewage system plans to ensure State approval.
- 9) Assist property owners, builders and developers determine right-of-way or shore-yard setbacks, floodplain restrictions and wetland restrictions.
- 10) Makes interpretations and recommendations for land use and assists licensed plumbers in designing private sewage systems relative to on-site waste disposal.
- 11) Enforces sanctions against zoning ordinance violations including intake of complaint, on-site for verification, Notice of Violation, Citation, all contacts with alleged violator and, if required, all subsequent court appearances to bring about compliance.
- 12) Serves as the technical advisor/liaison person to the County Board of Adjustments, including writing of Public Hearing Notices, staff reports, and decision letters, attending public hearing, viewing, and deliberatively sessions, and representing the Board in all court matters regarding decision appeals.
- 13) All other applicable and appropriate duties as required by the Director of the Department of the Planning and Zoning Committee.

- 14) Has a working understanding and the ability to utilize PC computer technology.

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Required Knowledge, Skills and Abilities: Knowledge of local, state and federal laws, codes and regulations that pertain to the duties assigned, knowledge of environmental health and land use laws and principals; ability to apply zoning/land use and sanitation codes to individual situations; ability to obtain and interpret facts through inspection and investigation; ability to create accurate and well-written reports that will be suitable for official reports and as evidence in court actions; ability to deal effectively with the public, other agencies and co-workers. Familiarity with Windows/NT and MicroSoft Office.

Acceptable Experience and Training: A college degree in resource management, environmental health or a closely related field; experience in zoning/land use, sanitation and code enforcement is desirable; any combination of training, education and experience that prepares the individual for the responsibilities of this position.

Special Requirements: Must possess a valid Wisconsin Drivers License; must be a State-Certified/Licensed Soil Tester and plumbing inspector. Being an Environmental Specialist desirable.

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7. As a CEO, Jajewski no longer signed certified survey maps, was no longer in charge of other personnel and was no longer responsible for the Zoning Office budget - functions he was responsible for as the Zoning Administrator.

Jajewski's duties as a CEO were primarily to review applications for sanitary permits and for land use and building permits, review soil tests, assist individuals with regard to identifying wetlands, floodplains, and shorelands, assist applicants for zoning map amendments, and investigate complaints of violations of County land use ordinances. In carrying out those duties, Jajewski usually had to do an on-site inspection to determine whether there was compliance with the setback requirements and/or with other County land use ordinances, and if there is non-compliance, make an initial determination as to whether the violation should be abated or recommend that a variance be granted. When Jajewski had deemed it necessary, based on his knowledge of soils in the area and his familiarity with area

soil testers, he had required that another soil test be done for a sanitary permit and then observed the re-test in person to verify the results.

In cases where Jajewski found a violation, he issued a letter giving the person or entity a time by which the violation must be abated or corrected. A violation may be corrected by seeking and obtaining a variance from the County Board of Adjustment. When a violation was not abated or corrected, Jajewski turned the matter over to the County's Corporation Counsel for enforcement. When court action was necessary, Jajewski would testify at the pre-trial hearing and make recommendations as to what needed to be done to abate the violation. The judge usually accepted that recommendation and had Jajewski monitor the matter for 30-60 days to make sure the violation was corrected. If the violation was not corrected, another pre-trial was held and, in most cases, based upon Jajewski's testimony as to whether or not the violation was properly corrected, the judge ordered a fine or further action.

Where a variance was requested, Jajewski did an on-site inspection and then issued a report along with his recommendation to the Board of Adjustment, a three-person committee. He then took the Board members out to the site for a field inspection and to meet the applicant. The Board of Adjustment then held a public hearing and made a final determination upon the request. Jajewski's recommendations were followed by the Board of Adjustment approximately 25% of the time.

In issuing sanitary permits, which took up at least 50% of his work time, Jajewski reviewed the application, which included a soil test. By reviewing the soil test and having knowledge of the area in question, Jajewski would issue the permit if he concluded everything was in order. If he questioned the results of the soil test, based upon how long ago the test was done and his knowledge of the soil in the area in question, he required that another soil test be done and would be present on-site to make sure it was done properly and to verify the result. In reviewing plans for private sewerage systems, Jajewski reviewed the plans to make sure the appropriate system was used, based on the soil test results, and that the setback requirements were being followed. Jajewski was the only individual in the Land Use Planning and Zoning Office who had the State-required certifications (Soil Tester and Plumbing Inspector II) to issue sanitary permits.

In investigating complaints regarding private sewerage systems, Jajewski performed an on-site inspection and a soil boring to determine whether the soils were adequate for the system in use. Based upon the results of the soil boring, Jajewski determined whether or not to condemn the system. If he condemned the system, the party was given a year to correct the violation. If there were additional circumstances which would mitigate against replacing or correcting the system, e.g., sewer is to be installed in that area within the next year or two,

Jajewski could decide, in his judgment, to permit the party to continue to use the system and not require it to be replaced in the meantime.

In coordinating the Wisconsin Fund Program, Jajewski made the determination of whether a septic system had failed, and, if so, after condemning the system, he applied set criteria in determining whether the party qualified for a state grant to assist in paying for the cost of replacing the system.

Advising citizens of the zoning and setback requirements for their property was a responsibility shared with the Administrative Assistant, Leone Daniels, who was trained in that regard by Jajewski.

In the CEO position, all of the reports Jajewski filed and the permit applications he approved or denied, except for the sanitary permits that Jajewski approved the same day application was made, were reviewed by Roskom, but only for the purpose of ensuring proper procedure was followed and not to review Jajewski's decision.

8. Section 145.19, Stats., provides, in relevant part, as follows:

145.19. Sanitary Permit

(1) Requirement; information; forms. No septic tank may be purchased and no private sewage system may be installed unless the owner of the property on which the private sewage system is to be installed holds a valid sanitary permit from the governmental unit responsible for the regulation of private sewage systems in which the property is located. The department shall prescribe the information to be included in the sanitary permit and furnish sanitary permit forms to the governmental unit. The applicant shall submit the completed sanitary permit to the governmental unit. The governmental unit shall approve or disapprove the sanitary permit according to the rules promulgated by the department under this chapter. No person may sell at retail, as defined under s. 100.201(1)(d), a septic tank for installation in this state unless the purchaser holds a valid sanitary permit issued under this section.

Section 145.20, Stats., provides, in relevant part, as follows:

145.20 Private sewage systems

(1) Organization and personnel. (a) The governing body of the governmental unit responsible for the regulation of private sewage systems may assign the duties of administering the private sewage system program to any office, department, committee, board, commission, position or employe of that governmental unit.

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(b) The governmental unit responsible for the regulation of private sewage systems shall obtain the services of a certified soil tester, either as an employe or under contract, to review and verify certified soil tester reports under sub. (2).

(2) Governmental unit responsibilities. The governmental unit responsible for the regulation of private sewage systems shall:

- (a) Review certified soil tester reports for proposed private sewage systems and verify the report at the proposed site, if necessary.
- (b) Approve or disapprove applications for sanitary permits and assist applicants in preparing an approvable application.
- (c) Issue written notice to each applicant whose sanitary permit application is disapproved. Each notice shall state the specific reasons for disapproval and amendments to the application, if any, which render the application approvable. Each notice shall also give notice of the applicant's right to appeal and the procedures for conducting an appeal under ch. 68.
- (d) Inspect all private sewage systems after construction but before backfilling no later than the end of the next workday, excluding Saturdays, Sundays and holidays, after receiving notice from the plumber in charge.
- (e) File reports and conduct surveys and inspections as required by the governmental unit responsible for the regulation of private sewage systems or the department.
- (f) Investigate violations of the private sewage system ordinance and s.254.59(2), issue orders to abate the violations and submit

orders to the district attorney, corporation counsel and attorney general for enforcement.

- (g) Perform other duties regarding private sewage systems as considered appropriate by the governmental unit responsible for the regulation of private sewage systems or as required by the rules of the department.
- (h) Inspect existing private sewage systems to determine compliance with s.66.036 if a building or structure is being constructed which requires connection to an existing private sewage system. The county is not required to conduct an on-site inspection if a building or structure is being constructed which does not require connection to an existing private sewage system.

9. The Code Enforcement Officer spends the majority of his time reviewing applications for, and issuing, sanitary permits and investigating complaints regarding private sewage systems. The Officer's duties are predominantly intellectual and varied in character involving the consistent exercise of discretion and judgement in their performance. The character of the work and results accomplished cannot be standardized in relation to a given period of time, but the Officer's work does not require knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.

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

CONCLUSION OF LAW

The occupant of the position of Code Enforcement Officer is not a professional employe within the meaning of Sec. 111.70(1)(L), Stats.

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

ORDER CLARIFYING BARGAINING UNIT

The position of Code Enforcement Officer is included in the bargaining unit of the County's non-professional employes represented by Local 514-C, AFSCME, AFL-CIO.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

GREEN LAKE COUNTY

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

POSITIONS OF THE PARTIES

Petitioner

The Petitioner first asserts that the evidence the County presented as to the criteria it has utilized in the past in order to determine whether or not an employee is a professional is irrelevant, as the criteria for that determination is set forth in Section 111.70(1)(L), Stats., and the County cannot adopt its own set of criteria that differs from the statute.

The job description and actual duties of the Code Enforcement Officer (CEO) position demonstrate that it satisfies the statutory criteria. The job description sets forth several functions and purposes that are intellectual and varied, e.g., “public relations, education, and cooperating with other agencies.” Those duties are not routine mental tasks, and involve the use of communications skills, listening skills, judgment, and intellectual skills to communicate and respond to questions. A fundamental duty of the position is to review and issue permits for private sewage systems and land use permits. Jajewski testified that function often involves more than reviewing a permit application, and often involves reviewing a soil test, making a judgment as to whether the test is acceptable, doing on site inspections of the premises, and making a judgement as to whether a variance from the regulations is warranted. Another fundamental duty is to “evaluate, interpret and enforce” the County land use ordinances and other laws and regulations. Evaluating and interpreting ordinances, laws and regulations necessarily requires the individual to engage in intellectual and varied work. The Code Enforcement Officer has the authority to determine if there is a violation, if the violation should be allowed to exist for a period of time or if it should be corrected, and recommends how the violation should be handled. He makes recommendations to judges presiding over the adjudication of violations and has primary responsibility for preparing and presenting information at the adjudication, with the result usually depending heavily on his recommendations and testimony. While the County attempted to liken the Code Enforcement Officer’s enforcement duties to that of a police officer, a police officer is not required to evaluate and interpret the law, and while the Code Enforcement Officer issues citations, the judgment involved in that decision is more technical and intellectual than the judgment exercised by a police officer.

The field inspections also require significant intellectual expertise and are varied in character. According to the job description, the CEO must evaluate and consider a number of factors in doing a field inspection. Soil boring and percolation test data must be verified, which

requires knowing when the test was done, whether any changes have occurred in the land since the testing, and evaluating whether there is a need for a new soil test. Evaluating a soil test requires knowledge of soil testing and soil conditions in the area tested. Similarly, verifying private sewage system code compliance requires a knowledge of soil conditions, the ability to read and interpret soil tests, a knowledge of the sewage system codes, and an ability to apply those codes to each unique sewage system. Also, obtaining the necessary data to issue permits involves much the same evaluative and interpretive tasks as described above. Investigating complaints of violations requires the CEO to apply the ordinances and statutes to unique and individual circumstances, applying his knowledge of soils, setbacks, and sewage systems, and making judgments as to whether a location should be “red tagged”, or whether a variance should be recommended or a violation immediately remedied. The position description states that field inspections are also done to “preview the need for variance requests”, suggesting that the CEO actually makes a determination as to whether there is a need for a variance. That judgement involves the application and interpretation of ordinances and codes, as well as application of the CEO’s specialized knowledge of soils and sewage systems. As a Zoning Administrator and as a CEO, Jajewski was involved in other intellectual projects and has served on a DNR team studying water quality management. He twice attended the DNR’s Lands Delineation Training Workshop and served on the Green Lake County Land Information Committee, comprised mostly of department heads, and responsible for starting the Global Information System in the County.

The CEO position also involves the consistent exercise of discretion and judgment in reviewing soil tests, determining violations, determining whether a variance is justified and determining the appropriate response to a possible violation, as to whether it should be abated immediately or whether a variance should be obtained. The CEO’s decisions are rarely subject to any review, and the Code Enforcement Officer has the sole authority to require reinspection of soils if he believes the soil test is no longer accurate. In reviewing applications for variances, the CEO inspects the property and makes a recommendation directly to the Board of Adjustment as to whether or not the variance should be received. While the Board has final say on whether a variance is to be granted, there is no intermediate review of the Code Enforcement Officer’s recommendation before it is received by the Board. In deciding whether to issue a citation, the CEO determines if a violation exists and if so, has the discretion to immediately order immediate abatement or to permit the individual additional time to abate the violation. Jajewski’s new supervisor, Roskom, testified that he does not review the CEO’s decisions to approve or deny sanitary permit applications, as the CEO has the expertise to make such determinations. He testified that he has not overturned any of Jajewski’s decisions that have crossed his desk.

It also is not possible to give a numerical value to the CEO’s work output or results. Rather, the CEO has the duty of giving effect to the relevant ordinances and statutes within the County, and his workload changes depending on the amount and quality of construction occurring in the County.

With regard to the knowledge required for the position, there are two flaws in the County's claim that position does not require a college degree, and therefore is not a professional. First, the position need not require a college degree to be classified as "professional" under the statute. The statute asks whether the position requires knowledge of a sort customarily acquired by some level of college study and makes no mention of a four-year degree. Second, the CEO position does require a college degree or equivalent experience and training. The CEO position requires knowledge that is normally acquired by a prolonged course of specialized study and instruction in an institution of higher education, and therefore meets the statutory requirement. This is demonstrated by Jajewski's experience and background. While he does not have a four-year college degree, he does have an extensive educational background, much of it obtained at institutions of higher learning and additionally has 30 years of experience running his own business. While the County suggested at hearing that all Jajewski needed to obtain the CEO position was his soil tester's license and his Plumber II inspector's license, the County's representative also stated that Jajewski was not overqualified when he took the job with the County. However, beyond having a Soil Tester's license and Plumbing Inspector II's license, Jajewski also was qualified due to his varied and thorough background in housing, land use and management. For the County to claim that it does not need Jajewski to take any particular seminar or obtain any particular form of training in order to do the Zoning Administrator job is like claiming that it did not need Roskom to take philosophy or political science during his four-year college education. That any particular piece of the total package may not have been necessary, does not change the fact that the County was looking to hire a total package, in Roskom's case, a person with a four-year degree. In Jajewski's case, the County hired a person with 30 years of management experience, ten certifications in housing and real estate, an insurance agent's license, a real estate broker's license, and nearly 20 courses and seminars completed, many at the UW-Madison. In order for a 25-year old to come to the CEO position with the same kind of experience Jajewski brought to the Zoning Administrator position, the 25-year old would have had to have completed at least four years of college instruction. Furthermore, the job description drafted by the County actually requires a college degree. Roskom drafted the job description for a CEO, and on page 3 of that job description it states:

Acceptable Experience and Training: A college degree in resource management, environmental health or a closely related field; experience in zoning/land use, sanitation and code enforcement is desirable; any combination of training, education and experience that prepares the individual for the responsibilities of this position.

Thus, the job customarily requires a college degree and the County would like to have the position filled by someone with experience in addition to the degree. However, if someone such as Jajewski has the combination of training and experience equivalent to a college degree, that person may also be qualified. Thus, despite its hedging, the County clearly believes it needs someone with a college degree or the equivalent to fill the CEO position.

County

While conceding that the CEO position is “union-eligible”, the County asserts the position appropriately belongs in the non-professional unit. The record clearly shows that in the unit clarification proceedings originally held by the Commission, one of the primary criteria used was whether a position required a four-year degree. The testimony of all the witnesses, including the County Clerk and the Union’s original steward, clearly established that the criterion historically used to distinguish between the employees represented by Petitioner and those represented by AFSCME has always been a four-year degree, and that the practice has been consistently followed over the last ten years.

The County also asserts that the statutory definition for “professional” employe supports its position. Roskom testified that the CEO does not require independent thought or any creative or free flow of thought. Roskom compared the position in many ways to that of a police officer, as requiring very little independent judgment and knowledge that can be obtained over a relatively short period of study. Roskom testified that there is a difference between obtaining a credential that takes six months to obtain and educational credentials that take four years. The CEO position is one where you read the book, and then do what the book tells you to do. Roskom also testified as to the differences between his professional position as a Planner, responsible for overseeing a department, creating plans and problem solving, using independent judgment, and the CEO position, which is simply code enforcement. The County also relies on the Commission’s decision in MILWAUKEE COUNTY, DEC. NO. 8765-G (WERC, 9/84), involving employes who are not required to consistently exercise discretion and judgment and whose position did not require knowledge of the sort set forth in Sec. 111.70(1)(L)1, d, Stats. Those employes were found to be non-professional employes. The Commission’s decision in MARINETTE COUNTY, DEC. NO. 26675 (WERC, 11/90), indicates that while the educational background of an incumbent may be relevant in determining the manner in which the knowledge was acquired to do the work, it is the nature of the work that is required of the employe on which the statute focuses. While it is relevant and significant that the County has always required a four-year college degree for positions in the bargaining unit represented by Petitioner, it is also necessary to look at the essential functions of the position being reviewed. The County has repeatedly shown that the past Zoning Administrator position, and the current CEO position, are strictly to enforce existing codes and rules, and they do not possess the required independent knowledge or discretion customarily exercised by a professional employe.

While the past Zoning Administrator did a good job, the County decided to expand its work in land use planning and development and for that reason hired a Planner, the intellectual position necessary to update the code and to make changes. The former position of Zoning Administrator had always focused on code enforcement, which requires education of the type acquired through a six-month training course, and not comparable to the education required in order to obtain a four-

year college degree. The CEO simply takes the code and enforces it, while it is the professional, the Planner, that reviews the code and uses independent judgement to determine whether changes should be made.

In its reply brief, the County notes that it has not objected to the position being in a bargaining unit, but has always objected to it being in the bargaining unit of professionals represented by Petitioner. Secondly, in regard to the Union's reference that Jajewski owned and operated his own business for 30 years, Petitioner failed to mention that this business was that of a beer distributor, and has nothing to do with being a professional. Third, the County asserts that its criteria for determining whether a position is a professional position are that established by the Commission in the prior unit clarification and is consistent with the statute and Commission case law. Fourth, the County disputes the analogy of the position to that of a district attorney, rather than to a police officer. It is the County's Corporation Counsel's office that prosecutes zoning violations, and the investigation and testimony by Jajewski was very comparable to that of a police officer.

DISCUSSION

We initially note that the position in issue is that of Code Enforcement Officer, as opposed to the Zoning Administrator/Environmental Health Technician position that was initially the subject of the petition for unit clarification but which has since been eliminated. Thus, any prior agreement of the parties regarding the professional status of the Zoning Administrator position is irrelevant. More importantly, we have consistently held that we independently determine whether an employe is or is not a professional without regard to prior stipulations of the parties. MILWAUKEE AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, DEC. NO. 6343-E (WERC, 1/93).

Section 111.70(1)(L), Stats., defines a "professional employe" as:

1. Any employe engaged in work:
 - a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
 - b. Involving the consistent exercise of discretion and judgment in its performance;
 - c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or

2. Any employe who:

a. Has completed the courses of specialized intellectual instruction and study described in subd. 1.d;

b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in subd. 1.

All the criteria found in either subsection 1 or subsection 2 must be present in order to find a particular employe is professional. CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97); DANE COUNTY, DEC. NO. 10492-D (WERC, 4/85); MILWAUKEE COUNTY, DEC. NO. 14786-B (WERC, 4/80). The above definition does not limit professional employes to those possessing college degrees or to those possessing specialized bachelor's degrees, and professional status is not determined solely on the basis of state certification and licensing. MILWAUKEE VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, SUPRA; CHIPPEWA COUNTY, SUPRA; OUTAGAMIE COUNTY (DISTRICT ATTORNEY'S OFFICE), DEC. NO. 21143-A (WERC, 10/86); MILWAUKEE COUNTY, SUPRA. As the Commission explained in CITY OF SUN PRAIRIE, DEC. NO. 20841-B (WERC, 10/86):

While an incumbent's actual credentials and the employer's actual hiring criteria are relevant in determining whether a position falls within the meaning of Sec. 111.70(1)(L)1.d., above, they are not necessarily determinative. Rather, that issue ultimately depends upon the nature of the work and the means by which the knowledge required to perform that work is customarily acquired. Thus, we have previously held that the statutory definition does not limit professional status only to those possessing specialized bachelor's degrees, nor is it essential that the incumbent possess (or that the employer seek candidates with) state certification or licensing as a professional. What is essential under 1.d. is that the knowledge required for the incumbent's job duties must be of a type customarily acquired through the means specified in 1.d. (footnote omitted).

(At 9).

See also, CHIPPEWA COUNTY, SUPRA; BROWN COUNTY, DEC. NO. 7954-F (WERC, 3/91).

In this case, we have found that while the Code Enforcement Officer's duties are predominantly intellectual and varied in character and involve the consistent exercise of discretion and judgment, and that work output cannot be standardized in relation to a given period of time, the knowledge required to perform those duties is not of a type customarily acquired through the means specified in 1.d.

The record indicates that the basic requirements to perform the majority of the functions performed by a Code Enforcement Officer are the Soil Tester certification and the Plumber Inspector II certification. Those certifications are needed for reviewing and approving soil tests and sanitary permit applications and investigating and making determinations on complaints regarding private sewerage systems. Each of these certifications require an eight-week course of study and passing a final examination, as well as continuing education to maintain certification. Although a college degree in resource management or environmental health would undoubtedly be helpful in performing the entire scope of the position's functions, it is not a necessity. This conclusion is further supported by the County's intent to place the person in the Administrative Assistant position, Leone Daniels, in a second Code Enforcement Officer position, once she obtains the necessary certifications. Therefore, the knowledge required to perform the functions of a Code Enforcement Officer is not of the type acquired through the means described in Sec. 111.70(1)(L), 1.d., Stats.

Having concluded that the knowledge required to perform the Code Enforcement Officer work does not meet the requirements of Sec. 111.70(1)(L), Stats., we further conclude that the Officer is not "professional" within the meaning of that statute. Therefore, the Code Enforcement Officer is not properly included in the bargaining unit of professional employees represented by Petitioner, and we have instead directed its inclusion in the bargaining unit of the County's non-professional Courthouse employees represented by AFSCME.

Dated at the City of Madison, Wisconsin this 14th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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