

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
LOCAL 1061, AFSCME, AFL-CIO
Involving Certain Employees of
VILLAGE OF JACKSON

Case 14
No. 63974
ME-1116

Decision No. 25098-D

Appearances:

Michael Wilson, Lee Gierke and on brief **Neil Rainford**, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717 1903, appearing on behalf of Local 1061, AFSCME, AFL-CIO.

Jonathan Swain, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, appearing on behalf of the Village of Jackson.

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

On September 8, 2004, Local 1061, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission seeking to clarify an existing collective bargaining unit of Village of Jackson employees to include the positions of Wastewater Treatment Plant Supervisor/Lead Operator, Water Utility Supervisor/Lead Operator, Assistant in the Water Department, and Utility Building Manager.

A hearing was held before Examiner Karen J. Mawhinney, a member of the Commission's staff, on January 13, 2005, in Jackson, Wisconsin. During the hearing, the parties resolved the status of the Assistant in the Water Department and the Utility Building Manager. As to the Wastewater Treatment Plant Supervisor/Lead Operator and Water Utility Supervisor/Lead Operator, the Village contests the inclusion of these positions in the Local 1061 unit arguing that they are held by supervisors.

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The parties completed filing briefs on November 3, 2005. On January 4, 2006, the record was supplemented with wage information as to the disputed individuals and the employees they allegedly supervise. Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Local 1061, AFSCME, AFL-CIO, herein the Union, is a labor organization with offices at P.O. Box 727, Thiensville, Wisconsin 53092-0727.

2. The Village of Jackson, herein the Village or Employer, is a municipal employer with offices at N168 W20733 Main Street, Jackson, Wisconsin 53037.

3. As reflected in the parties' 2003-2004 bargaining agreement, the Union is "the sole and exclusive bargaining agent for the regular full-time and regular part-time employees of the Village of Jackson, excluding seasonal, confidential, supervisory, managerial employees, the Village Clerk, and Police Department employees. . . ."

4. The Village is governed by a seven person Village Board. The Board employs a Village Administrator who, among other matters, supervises the Director of Public Works (Kober) who has general administrative and budgetary responsibility for the Village's streets, parks, physical plant, water, sewerage, trash pickup and recycling. Director Kober also serves as the Village engineer with responsibility for public works/capital improvement projects and residential development.

5. Director Kober supervises the Assistant Village Engineer, the Street Superintendent (Krueger) and the Utility Superintendent (Deitsch). Superintendent Deitsch manages the operation of the Village's sewage treatment plant and water system and supervises the two positions in dispute in this proceeding, the Wastewater Treatment Plant Supervisor/Lead Operator (Gagne) and the Water Utility Supervisor/Lead Operator (Rathke). In addition to meeting with/talking to Gagne and Rathke about any operational issues, Dietsch develops proposed operational budgets for the Village's water and wastewater operations, makes necessary purchases, and interacts with the State Department of Natural Resources (DNR). Because the Village is growing, he spends a substantial amount of time working with developers, contractors and engineers as to water and wastewater services in the context of development plans.

Director Kober conducts weekly staff meetings attended by Krueger, Dietsch, Gagne, and Rathke.

6. Water Utility Supervisor/Lead Operator Rathke is responsible for the day-to-day operation of the Water Utility. In addition to independently directing and monitoring the regular work of one full-time employee, Dale Thoma, and one part-time employee, Gordon Bell, Rathke prepares reports for the DNR, schedules work that needs to be coordinated with

citizens' availability, and reviews development plans. Rathke rarely performs the same work as Thoma or Bell.

Rathke approves requests for time off, such as vacation or personal leave and for work schedule changes. He independently determines whether other Village employees are needed to respond to emergencies and whether Water Utility employees will work overtime. Rathke has sent memos to employees telling them what times to work on weekends, and instructing them that all changes in the weekend work schedule must be requested through him.

Wastewater Treatment Plant Supervisor/Lead Operator Gagne directs the work of two full-time employees, Carl Radloff and Gary Classey, and one summer employee. His responsibilities and authority as to the Plant and the employees are comparable to Rathke's.

7. Rathke and Gagne are paid a salary which in 2005 equated to hourly rates of \$26.05 (Rathke) and \$25.05 (Gagne). Rathke does not punch a time clock but Gagne does. The full-time employees whose work they direct had 2005 hourly wage rates of \$20.07 (Classey), \$19.52 (Thoma) and \$19.24 (Radloff).

8. Gagne and Rathke have the independent authority to issue oral and written reprimands. They would likely be consulted regarding any higher levels of discipline but do not have the effective authority to recommend suspension or discharge

When a newly hired employee supervised by Rathke or Gagne nears the end of their six month probationary period, Rathke (or Gagne) meets with Superintendent Dietsch and Director Kober and reports on the employee's performance. Kober then makes a recommendation to the Village Board as to whether the employee should be hired on a permanent basis or be terminated.

9. When Water Utility employee Thoma was hired, Rathke, Kober and Deitsch reviewed the applications, narrowed the number of applicants to be interviewed, and then interviewed the finalists. They each then ranked the applicants and discussed who should be hired. As part of the hiring process, Rathke was responsible for checking references. Rathke's views were given significant weight in the decision-making process because he would be working directly with the person hired. Rathke called Thoma to tell him he would be hired.

If Wastewater employees are hired, Gagne's role would be the same as Rathke's.

10. Neither Gagne nor Rathke have the authority to adjust grievances that arise under the collective bargaining agreement.

11. Wastewater Treatment Plant Supervisor/Lead Operator Gagne and the Water Utility Supervisor/Lead Operator Rathke have supervisory authority in sufficient combination and degree to be supervisors.

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

CONCLUSION OF LAW

The Wastewater Treatment Plant Supervisor/Lead Operator and the Water Utility Supervisor/Lead Operator are supervisors within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore are not municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The Wastewater Treatment Plant Supervisor/Lead Operator and the Water Utility Supervisor/Lead Operator shall continue to be excluded from the bargaining unit represented by the Union.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

VILLAGE OF JACKSON

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

Section 111.70(1)(o)1, Stats., 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 effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Commission considers the following factors in determining whether a position is supervisory in nature:

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 persons exercising greater, similar or less authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his or her skills or for his or 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 or she spends a substantial majority of his or her time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. (CITY OF MILWAUKEE, DEC. NO. 6960-J (WERC, 5/89).

Not all of the above-quoted factors need to reflect supervisory status for us to find an individual to be a supervisor. Our task is to determine whether the factors appear in sufficient combination and degree to warrant finding an employee to be a supervisor. RICE LAKE HOUSING AUTHORITY, DEC. NO. 30066 (WERC, 2/01).

As to Factor 1, the evidence as to the Thoma hire persuades us that the incumbents of the two positions at issue here play a significant role in the hiring of employees. They review all applications, are part of the decision-making process as to who should be interviewed, participate in the interviews themselves, check references, and make recommendations as to who should be hired. Their superiors credibly testified that their recommendations are given serious consideration because it is Rathke or Gagne who will be working with the new employee. However, we agree with the Union that Rathke's and Gagne's involvement in the hiring process does not rise to the level of an effective recommendation.

The evidence also establishes that Rathke and Gagne have the independent authority to issue oral and written reprimands. As to more serious discipline, they are likely to be consulted but do not have the authority to effectively recommend or impose suspension or discharge. As to the role of Rathke and Gagne in decisions regarding the termination of probationary employees, the record is clear, contrary to the Union's arguments, that Kober will rely on their recommendation (and that of Deitsch) when presenting the matter to the Village Board for action.

Turning to Factor 2, we conclude that Rathke and Gagne have the independent authority to direct and assign employees. They hand out the assignments, determine who is to do what task, approve overtime, grant or deny time off, call in employees when necessary and see that the work is done. Their authority in emergency circumstances is particularly indicative of their independence. However, given the small number of employees and the relatively routine nature of work in question and of the granting of leave requests, Rathke and Gagne exercise this independent authority with limited regularity.

As to Factor 3, the number of employees allegedly supervised is small and the Village's organizational structure can certainly be viewed as top-heavy with Utility Supervisor Deitsch and Director of Public Works Kober exercising some supervisory authority over the Water and Wastewater employees.

Looking at Factor 4, Rathke and Gagne are paid approximately \$10,000 a year more than the employees whose work they direct. Particularly given the size of this disparity, we are persuaded that their salary is at least somewhat reflective of their authority over the employees whose work they direct.

Regarding Factors 5-7, Rathke and Gagne do not spend a significant amount of time directing the work of employees but do not perform the same work as those employees. As reflected in Factor 2 above, Rathke and Gagne exercise independent judgment when directing the work of employees.

Considering all of the foregoing, we conclude by the slimmest of margins that Rathke and Gagne are supervisors based on their significant involvement in the hiring process, their independent direction of employee work, their disciplinary authority and their level of compensation. In reaching this conclusion, we acknowledge the Union's strong arguments that

the number of employees supervised is small and that there are others who the Village could designate as the supervisors of the employees in question. Such arguments led the Commission to conclude in CITY OF SUN PRAIRIE, DEC. NO. 20841-E (WERC, 12/91) that an employee was not a supervisor even though he had some involvement in hiring and discipline and independently directed the work of other employees. Although it presents a very close question, we do not reach that result here. First, we note that the Commission in SUN PRAIRIE found it significant that the employee at issue there continued to perform the same work as the employees whose work he directed. That is not true here. More importantly, while the situation bears careful scrutiny, we are ultimately persuaded here that the Village has made a bona fide judgment as to its supervisory structure, based on organizational needs. The legitimacy of that judgment is supported in the record not only by the authority given to Rathke and Gagne but also by evidence that the two individuals in question clearly see themselves as supervisors and that the employees they supervise share that view.

Therefore, we conclude that the Wastewater Treatment Plant Supervisor/Lead Operator and the Water Utility Supervisor/Lead Operator are supervisors and shall continue to be excluded from the bargaining unit.

Dated at Madison, Wisconsin, this 23rd day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner