

In the Matter of Petition of  
AFSCME, COUNCIL 40, AFL-CIO  
Involving Certain Employees of  
VILLAGE OF JACKSON

Case 1  
No. 38733 ME-2692  
Decision No. 25098

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Robert W. Mulcahy,  
815 East Mason Street, Suite 1600, Milwaukee, WI 53202-4080, appearing  
on behalf of the Village.

Mr. Richard W. Abelson, Staff Representative, Wisconsin Council 40, AFSCME,  
AFL-CIO, 2216 Allen Lane, Waukesha, WI 53186, appearing on behalf of  
AFSCME.

On April 24, 1987, AFSCME, Council 40, AFL-CIO, filed a petition requesting the Wisconsin Employment Relations Commission to conduct an election among certain employees of the Village of Jackson, to determine whether said employees desire to be represented by said petitioner for the purposes of collective bargaining. Hearing in this matter was held on June 16, 1987, before Raleigh Jones, a member of the Commission's staff. At the hearing, the parties agreed to the description of the proposed bargaining unit except for a disagreement over whether one position should be included or excluded. Transcript of said hearing was prepared and submitted to the parties by October 9, 1987.

On June 22, 1987, the Commission directed a representation election be conducted within 45 days of that date; on July 6, 1987, the Commission issued an Order Amending the Direction of Election, and ordered that an election by secret ballot be conducted among the members of two voting groups. Such election was conducted under the auspices of the Commission on July 27, 1987. On July 31, 1987, the Village timely filed objections to the conduct of the election, pursuant to Sec. ERB 11.10, Wis. Admin. Code; the Union filed a response to such objections on August 6, 1987. The parties agreed to a stipulation of facts and submitted further written argument, the last of which was received on September 22, 1987. On October 15, 1987, the Commission ordered the dismissal of the objections to the conduct of the election; on October 19, 1987, the Commission certified AFSCME, Council 40, AFL-CIO as the exclusive collective bargaining representative for a unit consisting of: all regular full-time and regular part-time employees of the Village of Jackson, including professional employees, but excluding seasonal, confidential, supervisory, managerial employees, the Village Clerk, and Police Department employees.

There remained a dispute between the Village and the Union as to the bargaining unit status of one employee. The Village submitted written argument on November 9, 1987; the Union informed the Commission on November 16, 1987, that it would not be submitting written argument.

Now, Therefore, the Commission, having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

1. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization and has its principal office at 5 Odana Court, Madison, Wisconsin.

2. The Village of Jackson, hereinafter referred to as the Village, is a municipal employer and has its principal offices at N168 W20733 Main Street, Jackson, Wisconsin.

3. On October 19, 1987, the Commission certified the Union as the exclusive collective bargaining representative for a unit consisting of all regular full-time and regular part-time employees of the Village, including professional employees, but excluding seasonal, confidential, supervisory, managerial employees, the Village Clerk, and Police Department employees.

4. Gordon Rose, hereinafter referred to as Rose, is the incumbent Superintendent of the Department of Public Works and incumbent Superintendent of the Water Utility. There are, in addition, two full-time positions, one part-time position and several seasonal positions in the Department of Public Works. There are no permanent employees in the Water Utility Department; the work of this department is performed by part-time employees on occasional detail from the Department of Public Works.

5. The duties, responsibilities and authorized activities of Rose include the following: responsibility for residential and industrial water in the Village; reporting directly to the Village Board, not the Village Clerk; attending a meeting on state water utility regulations sponsored by the DNR on behalf of the Village and at the direct request of the Village Board President; serving as a member of the Village Board's Sewer and Water Committee with various Board members and Brian Schultz, Supervisor of the Village Water Treatment Plant, a position which is managerial and supervisory by stipulation of the parties; required attendance at all meetings of the Village Board Personnel Committee (except executive sessions); and active participation in matters involving personnel from the Water Utility or Public Works departments of the Village; required attendance at all Village Board meetings as the exclusive representative of the Water Utility and Public Works departments of the Village for the purpose of reporting on the status of various projects and activities (for which he is paid an additional \$10 per meeting); preparing job descriptions for both of his positions which descriptions were adopted in their entireties by the Village Board; making effective recommendations to the Village Board as to the needs of the Water Utility and Public Works departments, including major capital expenditures for new equipment by preparation of the annual budgets for said departments (with the assistance of the Village Clerk); personally justifying the proposed budget(s) to the Village Board; through the major role he occupies in the budget preparation and justification process, making effective recommendations to the Village Board as to street repairs which he believes necessary; actual obtaining of estimates in his budget preparation efforts (as opposed to merely taking the previous year's budget and increasing the figures which appear thereon); acting as the designated representative of the Village to the American Water Works Association and the Wisconsin Water Works Association; devising (on his own initiative) an employee probation evaluation form which he has used for said purpose; responsibility for reporting rules infractions by employees whose work he directs and recommending discipline; effectively recommending policy to the Village Board which may place his interests at odds with those of other employees as manifested by his recommending the purchase of a new lawn mower to eliminate a summer position, which was adopted by the Village Board; hiring emergency part-time help at such times as he deems necessary; certified (to State Department of Natural Resources) operator of Village sewage treatment plant since at least 1970 and holds appropriate licenses pertaining thereto.

6. Rose is paid \$11.50 per hour, plus \$10 per Village Board meeting; the next highest paid employee whose work he directs receives wages of \$9.33 per hour.

7. Rose participates in the formulation, determination, and implementation of Public Works Department policy. His role in the adoption by the Village Board of the annual budgets for the Public Works and Water Utility Departments is significant and demonstrates an effective authority to commit the resources of the Village.

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

#### CONCLUSION OF LAW

1. The position of Superintendent of Public Works/Superintendent of the Water Utility, currently occupied by Gordon Rose, is a managerial position within the meaning of Sec. 111.70(1)(i), Stats., and thus Rose is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and may not be properly included in the bargaining unit described in Finding of Fact 3.

Upon 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 1/

The position of Superintendent of Public Works/Superintendent of the Water Utility shall be excluded from the above described bargaining unit.

Given under our hands and seal at the City of  
Madison, Wisconsin this 21st day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Hempe  
A. Henry Hempe, Commissioner

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- 1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a

(Footnote 1 continued on page 4.)

(Footnote 1 continued from page 3.)

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. 227.57 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.

## VILLAGE OF JACKSON

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

The sole issue before the Commission is the employment status of Gordon Rose who holds the positions of both Public Works and Water Utility Superintendent.

#### POSITION OF THE PARTIES

The Village contends that Gordon Rose is a managerial and/or supervisory employe within the meaning of Sec. 111.70(1)(i), Wis. Stats., and should therefore be excluded from the collective bargaining unit. In support of the claimed managerial status, the Village argues that Rose participates in the formulation, determination and implementation of management policy and that his interests are at odds with those of other employes. The Village further argues that Rose plays a significant role in the budget process thus demonstrating his authority to commit the employer's resources.

The Union believes Mr. Rose occupies positions which are neither managerial nor supervisory, and that he should accordingly be included within the bargaining unit.

#### DISCUSSION

"Managerial employes' are expressly excluded from the definition of 'municipal employe' set forth in Sec. 111.70(1)(i) of MERA, but the precise meaning of that term is not statutorily provided." 2/ It has, instead, been developed by Commission case law, from which process it has emerged in relatively detailed relief.

"The Commission has consistently held that a managerial employe is one who participates in the formulation, determination, and implementation of policy to a significant degree or who possesses effective authority to commit the employer's resources." 3/

To qualify as "managerial," this involvement with management policies must be ". . . at a relatively high level of responsibility." 4/ It usually results in managerial employes becoming imbued with additional interests and perspectives to which other employes may be indifferent or even ". . . significantly at variance." 5/

Effective allocation of the employer's resources means actions which significantly affect the nature and direction of the employer's operations. 6/ Exercising the authority to establish an original budget is one means of meeting

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2/ Jackson County, Dec. No. 17828-B (WERC, 10/86) at 6, citing City of Milwaukee, Dec. No. 12035-A (WERC, 6/73), aff'd Dane Co. Cir. Ct., #142-170 (7/74).

3/ Kewaunee County, Dec. No. 13185-D (WERC, 1/86) at 8 citing: Kenosha County (Sheriff's Department), Dec. No. 21909 (WERC, 8/84); City of Cudahy (Fire Department), Dec. No. 18502 (WERC, 3/81); Village of Whitefish Bay (Police Department), Dec. No. 16928 (WERC, 3/79); aff'd in Kewaunee County v. WERC, 86-1880 (Ct. App. August 11, 1987).

The Commission's definition of managerial employe was approved by the Wisconsin Supreme Court in City of Milwaukee v. WERC, 71 Wis.2d 709, 716-17 (1976). Also see Eau Claire County v. WERC, 122 Wis.2d 363, 362 NW 2d 429 (Ct. App. 1984).

4/ Jackson County, op. cit. at 6, citing City of Milwaukee, Dec. No. 11917 (WERC, 7/73).

5/ Id.

6/ Portage County, Dec. No. 6478-C (WERC, 7/87) at 11.

this test 7/, provided that the budget preparation activity in which the employee engages in not merely routine or ministerial. 8/

In the instant case, it is clear that Rose participates in the formulation, determination, and implementation of management policy as it pertains to public works improvements and water utility operations. He serves as a full member on the Village Board Sewer and Water Committee with both other Board members and the Village Water Treatment Plant Supervisor (on whose managerial supervisory status both parties are agreed). He is required to attend all Village Board meetings (for which he is paid an additional stipend) at which he not only reports on the status of various projects and activities of the two departments with which he is involved, but actively participates in discussions of these matters. He also is required to attend meetings of the Village Board Personnel Committee, at which, though not a committee member, he actively participates in personnel matters affecting his areas of operation.

In addition, Mr. Rose formulates and determines the content and parameters of the recommended budgets for both departments for which he has responsibilities. Such preparation involves a substantial exercise of initiative and judgment. It then becomes the shared responsibility of Rose and the Village Clerk, to "sell" the budget to the Village Board, a task for which there were no reported failures.

Through his preparation of the budget, Rose determines, inter alia, which streets are to be repaired and to what extent, what equipment should be purchased to implement the proper functioning of his departmental concerns, whether to hire summer help, and whether to hire emergency part-time help. It was Rose who devised an employee evaluation form (on his own initiative) which is now in use; it was Rose who wrote his own job(s) descriptions which were adopted in their entirety and without change by the Village Board.

It was also Rose who recommended the purchase of a new lawn mower for the Department of Public Works on the grounds that the new equipment would reduce the summer employment needs of the Village -- a prediction which proved to be true -- but which also quite obviously demonstrates an interest or perspective held by Rose to which other municipal employees may be indifferent or at variance.

In summary, Gordon Rose fills a highly important role(s) in the Village, the duties of which he appears to have discharged with diligence and competence. On the state of the record presented, the Commission finds these roles to be managerial. For this reason, he must be excluded from the newly formed bargaining unit as a matter of law.

This exclusion is not diluted by consideration of whether or not Rose is also a supervisory employee. Since the Commission has already excluded him from the bargaining unit on the sole basis of the managerial status of both of his positions, it is simply unnecessary to determine whether supervisory factors are present in sufficient combination as to establish an additional basis for the exclusion.

Dated at Madison, Wisconsin this 21st day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman  
Herman Torosian  
Herman Torosian, Commissioner  
A. Henry Hempe  
A. Henry Hempe, Commissioner

7/ Town of Conover, Dec. No. 24371-A (WERC, 7/87) at 5-6.

8/ Waupaca County (Courthouse Employees), Dec. No. 20854-C (WERC, 9/85) at 8; aff'd in County of Waupaca v. WERC, AFSCME, Local 2771, No. 86-1271, (Ct. App. December 30, 1987).