

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
PETER JOVANOVIC
Involving Certain Employees of
CITY OF EAGLE RIVER
(LIGHT and WATER DEPARTMENT)

Case 5
No. 39161 ME-2725
Decision No. 25218

Appearances:

Mr. Kevin Brewster, 2550 Columbus Road, Eagle River, Wisconsin, 54521, on behalf of Petitioner.
Drager, O'Brien, Anderson, Burgy & Garbowicz, by Mr. John L. O'Brien, Arbutus Court, Box 639, Eagle River, Wisconsin, 54521, on behalf of the City.
Mr. Guido Cecchini, Staff Representative, Box 676, Rhinelander, Wisconsin, 54501, and Mr. Jack Bernfeld, Staff Representative, 5 Odana Court, Madison, Wisconsin, on behalf of AFSCME.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
DIRECTION OF ELECTION

Peter Jovanovic having, on July 17, 1987, filed a petition requesting the Wisconsin Employment Relations Commission to conduct an election among all regular full-time and regular part-time employees, but excluding all supervisory, confidential and craft employees, employed by the City of Eagle River Light, Water and Waste Water Treatment Plant Commission to determine whether said employees wish to continue to be represented for collective bargaining purposes by their present collective bargaining representative, Local 474-B, AFSCME, AFL-CIO; and the efforts of the Commission's Coordinator of Elections to acquire a Stipulation for Election having been unsuccessful; and hearing having not been scheduled immediately thereafter due to the unavailability of one of the parties; and hearing in the matter having been conducted on November 18, 1987, at Eagle River, Wisconsin, before Examiner Amedeo Greco, a member of the Commission's staff; and AFSCME having been granted permission to intervene in this matter; and a transcript of the proceedings having been made; and the City and AFSCME thereafter having filed briefs by January 19, 1988; and the Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. That Peter Jovanovic is employed by the City of Eagle River Light, Water, and Waste Water Treatment Plant Commission and, as such, is a municipal employee, as are the other three (3) rank and file Commission employees.
2. That the City of Eagle River, herein the City, is a municipal employer with its principal offices at 217 East Division Street, Eagle River, WI 54521. For a number of years, it operated a Light and Water Department and a Public Works Department, both of which were directly run by the City of Eagle River's Common Council.
3. That Local 474-B, AFSCME, AFL-CIO, herein AFSCME or the Intervenor, is a labor organization whose address is 5 Odana Court, Madison, WI 53719; that it has represented in one overall collective bargaining unit certain City employees employed in both of said departments; and that the Intervenor and the City are parties to a collective bargaining agreement which expired on December 31, 1987.
4. That the City operated the Water and Light Department until 1985; that on April 9, 1985, the Eagle River City Council, pursuant to Sec. 66.068, Stats., enacted Ordinance No. 224 which provided in pertinent part:

WHEREAS the Common Council of the City of Eagle River deems it in the best interest of the City that the operation and management of the electric, water and WWTP utilities be accomplished through a commission rather than through the public works committee of the council, as provided for by Sec. 66.068, Wis. Stats.; NOW, THEREFORE,

SECTION 1. Section 13.01 of the Municipal Code of the City of Eagle River is hereby repealed.

SECTION 2. Section 13.01 of the Municipal Code of the City of Eagle River is hereby created to read as follows:

13.01 - MANAGEMENT OF UTILITIES

SECTION 1 - LIGHT, WATER AND WWTP COMMISSION CREATED. There is hereby created a light, water and WWTP commission of the City of Eagle River. The commission shall consist of three (3) members to be elected by the Common Council of the City of Eagle River. The members shall serve for terms of three (3) years each beginning on the 1st day of October, 1985, except that the terms of the commissioners first elected shall expire successively, one (1) year each, on each succeeding 1st day of October so that members will serve for staggered terms. Vacancies shall be filled by appointment by the mayor subject to confirmation by the City Council.

SECTION 2 - DUTIES. The light, water and WWTP commission shall have entire charge of the management of the city electric utility, city water utility and WWTP utility. It shall install and properly carry on the necessary accounting procedures and may employ and terminate the employment of professional engineering, accounting and legal talent necessary to carry out the business of the utilities. The commission may also employ and terminate the employment of employees and fix the compensation of the employees required for operation, maintenance, administrative and financial matters connected with the light, water and WWTP utilities of the city.

. . .

SECTION 4 - FINANCES. The commission shall audit all expenditures of the electric, water and WWTP utilities. Bills approved by the commission shall be paid by the city treasurer from the light, water and WWTP fund upon warrant signed by the president of the light, water and WWTP commission and by the city treasurer. All utility receipts shall be paid to a bonded cashier appointed by the commission, to be turned over to the city treasurer at least once per month. All such funds shall be kept in a separate fund and used to meet operation, maintenance, depreciation, labor, interest, bond retirement, sinking fund requirements, and additions and improvements or other necessary expenses and indebtedness of the electric, water and WWTP utilities.

SECTION 5 - THE EXTENSION AND IMPROVEMENTS. The

. . .

SECTION 11 - MANAGER. The light, water and WWTP commission shall hire a manager who shall have general supervision of the electric, water and WWTP utilities under the direction of the commission. He shall receive such compensation as is set by the light, water and WWTP commission. He shall be responsible for enforcement of all applicable state laws, city ordinances and rules and regulations of the light, water and WWTP commission. The superintendent shall report to the light, water and WWTP commission at least once each month.

. . .

5. That the City of Eagle River Light, Water and Waste Water Treatment Plant Commission, herein the Commission, pursuant to Ordinance No. 224 became a separate legal entity on or about October 1, 1985; that the Eagle River City Council appointed all three Commission members at that time pursuant to the Mayor's recommendation; that the Commission itself hired all of the employees who formerly worked in the Water and Light Department, including the person who became its manager; that the Eagle River City Council ever since then has not exercised any control over the Commission since the Commission adopts its own budget and hires and fires employees without any input from the City Council; that once the collective bargaining agreement between the City of Eagle River and the Intervenor has expired, the City will have no responsibility for the wages, hours, and conditions of employment for Commission employees; that the Commission directly bills the City of Eagle River for its services; that both the Commission and the Department of Public Works maintain their offices in City Hall; that while the Commission now shares another building with the Street Department where it houses its equipment and personnel, it will shortly move into its own nearly completed building which it will not share with anyone else; that the Commission authorized the construction of said building completely on its own without any input from the City of Eagle River City Council; and that the Commission is a separate municipal employer from the City of Eagle River.

6. That Commission employees are separately supervised from Street Department employees; that all Commission employees are licensed either in waste water or for work on high tension wires; that Street Department employees never work in either the waste water plant or on high tension wires, as they lack the required licenses to do so; that there is no permanent interchange between these two groups of employees; that Commission employees sometimes work alongside Street Department employees in emergencies, at which time they share common supervision; that Commission and Street Department employees have the same work schedules, work the same hours, and participate in the same health insurance and worker compensation plans; and that employees of the Commission and the Department of Public Works were covered under the same collective bargaining agreement which expired on December 31, 1987.

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

CONCLUSIONS OF LAW

1. That the City of Eagle River Light, Water and Waste Water Treatment Plant Commission is a municipal employer within the meaning of Section 111.70(1)(u) of the Municipal Employment Relations Act (MERA) and, as such, is a separate municipal employer from the City of Eagle River.

2. That all regular full-time and part-time employees of the City of Eagle River Light, Water and Waste Water Treatment Plant Commission, but excluding supervisory, managerial, confidential and craft employees, constitute an appropriate bargaining unit under Section 111.70(4)(d)2.a. of MERA.

3. That a question of representation within the meaning of Section 111.70(4)(d)(3) of MERA presently exists as to the employees in the bargaining unit set forth in Conclusion of Law 2.

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

DIRECTION OF ELECTION

That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this directive in a collective bargaining unit consisting of all regular full-time and regular part-time employees of the Eagle River Light, Water and Waste Water Treatment Plant Commission, but excluding managerial, supervisory, craft and confidential employees who were employed by the Commission on March 1, 1988, except such employees who may prior to election quit their employment or be discharged for cause, for the purpose of determining whether a majority of said employees voting desire to continue to be represented by Local 474-B, AFSCME, AFL-CIO, for the purpose of collective bargaining with the Commission over wages, hours, and conditions of employment, or to not be represented.

Given under our hands and seal at the City of
Madison, Wisconsin this 1st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Mempe
A. Henry Mempe, Commissioner

CITY OF EAGLE RIVER (LIGHT & WATER DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DIRECTION OF ELECTION

POSITION OF THE PARTIES

Petitioner Peter Jovanovic through his representative at the hearing asserts that the City of Eagle River Light, Water, and Waste Water Treatment Plant Commission is a separate municipal employer from the City of Eagle River; that the employees therein constitute a separate bargaining unit; and that said employees are entitled to a representation election to determine whether they wish to continue to be represented by the Intervenor. The City of Eagle River supports this position, asserting that Ordinance No. 224 created the Commission as a separate legal entity pursuant to Sec. 66.068, Stats., and that under Schroeder et. al. vs. City of Clintonville, 90 Wis. 2d. 457, (1979), it is the Commission, not the City Council, which establishes the wages, hours and conditions of employment for Commission employees. Going on, it thus states that "the record of testimony taken at the time of the hearing reveals very clearly that the two groups, Street Department employees and Light, Water, and Water Water Treatment Plant employees constitute separate units," pointing in the process to various facts in the record supporting said position. The Intervenor, on the other hand, opposes the petition, claiming that it was procedurally defective because it was not accompanied by any showing of interest and because it was not filed by a bona fide labor organization. On the substantive merits, Intervenor asserts that the Commission is not a separate employer; that the existing bargaining unit consisting of Commission and Department of Public Works employees is the only appropriate unit; and that both groups of employees share the same community of interest, hence obviating any need for any separate election. However, Intervenor goes on to say that if an election is to be held, that it wants to be listed on the ballot.

DISCUSSION

Addressing Intervenor's procedural claims first, it is true that the instant petition was not accompanied by any written showing of interest indicating that other Commission employees want a representation election to determine whether they wish to continue to be represented by the Intervenor. However, where, as here, (1) the Commission made an initial administrative determination that no showing of interest was required because Petitioner was asserting that the identity of his employer had changed rendering the existing unit inappropriate; (2) Petitioner was not advised of any possible showing of interest requirement because of the Commission's initial administrative determination; and (3) the record at hearing credibly establishes that all four Light and Water employees support the petition, we do not find the absence of a showing of interest to be a valid basis upon which to dismiss the instant petition. As to Intervenor's assertion that the petition must be dismissed because it was not filed by a labor organization; again, while the Commission imposes such a requirement in certain other situations such as unit clarification proceedings, it does not do so when, as here, the employees are simply seeking to decertify the Intervenor.

Turning now to the substantive issues at hand, Intervenor correctly notes that the City of Eagle River Common Council appointed the Commission members; that the Commission is headquartered in the Eagle River City Hall; that the Commission's employees were formerly employed by the Eagle River Light and Water Department; that Commission and other Eagle River employees have worked out of the same building; and that employees from both entities occasionally work together in emergencies, sharing the same work schedule and same employment benefits.

This situation therefore is similar to that found in Schroeder, supra. where the Wisconsin Supreme Court ruled that a utility created under Sec. 66.068, Stats., is responsible for fixing the wages, hours, and conditions of employment for their employees. Accordingly, and in accord with our prior decisions, 1/ it follows that the Commission is a separate legal entity and that it is a different municipal employer from the City of Eagle River. The Commission employees herein therefore constitute a separate bargaining unit and, as such, are entitled to a representation election to determine whether they wish to continue to be represented by the Intervenor, or by no labor organization.

Dated at Madison, Wisconsin this 1st day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

1/ See, for example, Village of Footville, Dec. No. 21322 (WERC, 1/84).