

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
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CITY OF KAUKAUNA (ELECTRIC AND WATER DEPARTMENT)	:	
	:	
Involving Certain Employees of	:	Case 42
	:	No. 39341 ME(u/c)-214
	:	Decision No. 25580
CITY OF KAUKAUNA (ELECTRIC AND WATER DEPARTMENT)	:	
	:	
	:	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, WI 53202, appearing on behalf of the Union.
 Boardman, Suhr, Curry & Field, Attorneys at Law, by Mr. Paul A. Hahn, One South Pinckney Street, Madison, WI 53701, appearing on behalf of the Utility.

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

The City of Kaukauna (Electric and Water Department) filed a petition with the Wisconsin Employment Relations Commission on September 23, 1987 requesting the Commission to clarify an existing bargaining unit of its employes, represented by the Kaukauna Unit, Local 2150, International Brotherhood of Electrical Workers, by excluding the positions of system operator and relief system operator. Hearing on the matter was held in Kaukauna, Wisconsin on January 12 and February 1, 1988 before Robert M. McCormick, an Examiner on the Commission's staff. A transcript of the hearing was received on March 9, 1988. The parties filed briefs by April 14, 1988. The Commission, having considered the record and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. The City of Kaukauna (Electric and Water Department), herein the Utility, is a municipal employer and has its offices at 777 Island Street, Kaukauna, WI 54130.
2. The Kaukauna Unit, Local 2150, International Brotherhood of Electric Workers, herein the Union, is a labor organization and has its offices at 6227 West Greenfield Avenue, West Allis, WI 53214.
3. The Union has been the recognized collective bargaining representative for the employes of the Utility since 1921. On September 23, 1987 the Utility filed a petition with the Commission seeking the exclusion from the bargaining unit of the positions of system operator and relief systems operator as managerial employes. The Union opposes such an exclusion. Currently there are four system operators and one relief system operator.
4. The Utility is a municipal utility providing electricity to residential, commercial and industrial customers in the City of Kaukauna, the Village of Little Chute, part of the Village of Combined Locks and rural areas surrounding those communities. From a single hydroelectric generating plant in 1912, the Utility has expanded to six hydro plants with a current generating capacity of approximately twenty-one (21) megawatts. Additionally, the Utility has diesel generating capacity of six (6) megawatts and, under ideal conditions, gas turbine generating capacity of twenty (20) megawatts. Until the early 1950's, the Utility

remained virtually independent of outside power sources. At that time the Utility began obtaining a portion of its energy needs from outside sources, primarily the Wisconsin Electric Power Company (WEPCO). In 1980 the operation of the Utility's hydro plants became centralized at a single location. Since that time all hydro plant operations have been monitored from the central location by system operators, rather than by employees at the individual hydro plants.

5. The Utility is a member of Wisconsin Public Power, Inc. (WPPI), which is an agency comprised of twenty-six (26) municipally owned utilities. WPPI's primary function is to provide a bulk power supply to each of its members through lower cost energy sources than they could obtain individually. As contract demand customers, the Utility and the City of Menasha Utility differ from the other WPPI members which are all requirement customers and do not need to make hourly power supply arrangements. WPPI is now the supplier of outside power to the Utility and obtains that power from WEPCO and other sources. The system operators are not involved in the negotiations either of the price or of the quantity of power available from other sources. WPPI has contracted with the Utility at the annual fee of \$100,000, for the Utility to do the scheduling and dispatching of power for both the Utility and Menasha. The current combined demand of the Utility and Menasha is approximately one hundred (100) megawatts. WPPI supplies fifty (50) of those megawatts through a firm contract with WEPCO. The balance of the demand is supplied by the generating capacity of Menasha and the Utility and is supplemented by non-firm suppliers. The annual savings to the Utility and Menasha resulting from WPPI's provision of energy may be as much as \$500,000 annually.

6. Several years ago, the Utility installed a System Control and Data Acquisition (SCADA) computer system, which permits a single system operator to monitor and control the entire power operation of the Utility, including actual power demand, water levels at the hydro plants and system malfunctions. Four system operators and one relief system operator 1/ work alternating eight hour shifts around the clock in the Utility's headquarters. During the normal work day of 8:00 a.m. - 5:00 p.m., Monday - Friday, the system operator reports to the system operator supervisor. At night and on weekends when no supervisor is on duty, the system operator can contact an on-call supervisor with a beeper system. The system operator can maintain either radio or telephone communications with WEPCO, maintenance and line crews and the Utility's two major customers which use approximately 66% of the energy provided by the Utility. The system operator is responsible for arranging, on an hourly basis, an adequate supply of power from the cheapest sources to meet customer needs. The SCADA system enables the system operator to monitor and control the Utility's power generation facilities, transmission and sub-transmission system, switching stations and sub-stations, and water pumping facilities. In addition, the SCADA system provides data on the actual power supply and usage levels which enables the system operator to compare what is actually happening to what was projected and arranged. The system operator can then make adjustments in the schedule to accommodate changes in the demand for power. On any given day the system operator on the day shift will prepare a schedule, often referred to as a load estimate, estimating the power required for the following day, or weekend, on an hour-by-hour basis and arranging for the sources of that power. In establishing the schedule, the system operator must consider the current and predicted weather conditions, historical data, the amount of generated power available from the Utility system and the needs of the two largest customers, as well as the availability and cost of power from non-firm outside sources. Once developed, the schedules are submitted to a supervisor for approval. The objective of the schedule is to arrange for a sufficient power supply from the cheapest available sources. The schedule includes the power from the Utility's own generating system, the firm (contracted) power available from WEPCO and the non-firm additional sources. If the power need changes from the scheduled amount, the system operator makes changes in the amount and source of purchased power. For example, if a major customer shuts down some equipment on an unplanned basis, the system operator may need to reduce the scheduled purchase of

1/ The system operators and relief system operator perform basically the same duties. Therefore, throughout the rest of the decision only the term system operator will be used.

power. In monitoring the SCADA system, the system operator tries to anticipate whether the schedule will match the needed power as the demand varies throughout the hours of the schedule and will make adjustments to the schedule two or three times a day on a routine basis. The daily schedules can have a significant economic impact on WPPI and the Utility. For example, a single hourly deviation, or inadvertent, of more than five percent with respect to energy used in comparison to the energy scheduled, could result in a demand charge penalty being assessed on all energy purchased from WEPCO for the remainder of the contract year. Such a penalty could amount to several thousand dollars a month, perhaps as much as \$25,000 or \$50,000. Rather than exceed the established demand, the system operators contact other sources from a list provided by their supervisor and purchase the lowest cost available power. As a final option, the system operator can activate the Utility's gas and oil turbines, which cost more to operate than does energy purchased from outside sources.

7. The system operators are involved in a process called peak shaving, which is the transmission of energy to another utility at a lower cost than the cost of energy said utility would otherwise use. Peak shaving is a function performed by the Utility for WPPI under a contract between WPPI and Wisconsin Public Service and provides a return to WPPI of approximately \$50,000 per month. The system operators are not involved in the negotiation of those contractual terms. The parameters of peak shaving, e.g., the range of hours, are established by the supervisory and managerial employees of the Utility. However, the system operators communicate with Wisconsin Public Service operators to determine their anticipated peak periods and then relay that information to their supervisors, who make the ultimate decision regarding peak shaving. The system operators implement the peak shaving when it has been approved. Two paper companies represent about sixty-six percent (66%) of the Utility's energy usage. If those companies start or shut down equipment, the system operator can adjust the energy purchase schedule without checking with a supervisor. The system operator also can request the two companies to curtail power use. System operators direct the switching operations, when equipment is either taken out of, or restored to, service. An error could energize the equipment and cause serious injuries to the work crew. The system operators screen trouble calls to determine whether the problem is with the Utility's or the customer's equipment. Also the system operators can call in and direct the work of repair crews for immediate hazards, e.g., house fires or storms. In conjunction with the U.S. Army Corp Engineers, the system operators monitor and regulate water levels at the Utility's hydro plants, including shutting down hydro plants during low water flow periods, to maintain navigational levels on the Fox River. System operators also prepare various reports of the hourly activities of the system. To become a system operator, an employee would require a minimum of six months to one year of on the job training, assuming the employee already had some knowledge of a power system like the Utility's system. The training period at some utilities is as long as 42 or 54 months.

8. While the duties of the system operators are performed under general guidelines and require the exercise of significant judgment and technical knowledge to avoid negative financial impact on the Utility, the system operators do not have sufficient independent control or authority over the allocations of the Utility's financial resources to be deemed managerial employees.

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

CONCLUSION OF LAW

The individuals occupying the positions of system operator and relief system operator are not managerial employees and, therefore, are municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT 2/

The positions of system operator and relief system operator shall remain in the bargaining unit.

Given under our hands and seal at the City of
Madison, Wisconsin this 19th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

- 2/ 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 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

(Footnote 2/ continued on page 5).

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.

CITY OF KAUKAUNA (ELECTRIC
AND WATER DEPARTMENT)

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

The sole issue before the Commission is the employment status of the positions of system operator and relief system operator, which perform the same duties.

POSITION OF THE UTILITY:

The Utility requests the exclusion of the system operators from the bargaining unit as managerial employees because they possess effective authority to commit the Utility's resources. The system operators exercise considerable independent judgment in the daily scheduling and purchasing of power. A single deviation from the purchase contract schedule with WEPCO could result in a penalty charge of thousands of dollars a month in additional costs. When additional power is needed, the system operators seek the lowest cost sources available through WPPI. Routinely, the system operators make two or three changes daily in the hourly energy purchase schedule. Such changes may need to be made more frequently if a major customer has equipment problems or if a major source of power is interrupted. When a load loss occurs, the system operator must act quickly to avoid service interruptions by obtaining power without incurring demand charges. The system operators also perform peak shaving for WPPI, which function can result in a potential savings to WPPI of close to \$50,000 per month. The input of the system operators is an integral part of peak shaving. System operators analyze system malfunctions and dispatch and direct repair crews when necessary. During switching procedures when equipment is either removed from, or restored to service, the system operator must avoid errors which would endanger the repair crews. The system operators regulate water levels in the hydro system. In addition, the system operators prepare various reports on the hourly activities of the system. All of these activities are performed under general guidelines and parameters rather than detailed instructions and frequently in the absence of an on-duty supervisor. When an emergency occurs, the system operator generally must act and notify the supervisor later when the situation permits.

Because of the extensive training needed for the position and the absence of other employees in the bargaining unit who could qualify for the position in a reasonable time period, the Utility believes the position should not be subject to a contractual bidding procedure. The Utility believes that a currently employed substation technician would need a minimum of six months of on-the-job training to be able to assume a position as a system operator. The Utility notes the testimony of a Union business representative that the period of training for a position, similar to the system operators at issue herein, at other utilities ranges from 42 to 54 months.

System operators at other utilities such as WEPCO, Wisconsin Power and Light, Madison Gas and Electric, and Northern States Power who perform duties similar to those performed by the positions at issue herein, are excluded from bargaining units. At those same utilities, operators who only perform dispatch functions are in bargaining units.

The Utility cites Monongahela Power Company v. NLRB, 657 F.2d 608, 108 LRRM 2352 (4th Cir.1981) as a case involving facts very similar to the facts in the instant matter. In that case the controlroom foremen were excluded from the bargaining unit as supervisors, even though they did not exercise authority to hire, discharge, transfer, promote, recall, discipline or adjust grievances of other employees. However, those foremen were in charge of the controlroom of the Utility, and therefore the entire operation of the plant, had the authority to put maintenance employees to work, and, in emergencies, took action without first notifying a supervisor. The Utility asserts that the system operators herein perform even more duties in effectuating the policies and in committing the resources of the Utility than did the controlroom foremen in Monongahela, such as the purchase of power, peak shaving and scheduling of power needs. The Utility also cites Maine Yankee Atomic Power Co. v. NLRB, 624 F. 2d 347, 104 LRRM 2902 (1st Cir.1980), where the shift operating supervisors were excluded from the

bargaining unit as supervisors based on duties very similar to those of the system operators in this case. Also relied on by the Utility was Big Rivers Electric Corp., 266 NLRB 380, 112 LRRM 1369 (1983), where system supervisors were excluded from the bargaining unit as supervisors based on duties which were almost identical to those performed by the system operators in this case.

The Utility contends that the system operators clearly meet the tests of implementing management policy and of committing the employer's resources in the daily scheduling of power, purchasing of power, transmission of power, working with the large commercial customers, handling emergencies, directing maintenance activities, and regulating the hydro electric system. Errors by the system operators could have a serious adverse effect on the financial viability of the Utility.

POSITION OF THE UNION:

The Union contends that the system operators are not managerial employees. The system operators do not participate in the formulation, determination and implementation of management policy with the type of responsibility indicative of managerial status. It is WPPI which identifies the outside sources of power for the Utility and negotiates the prices and quantities which may be obtained from those sources. Thus, an outside source formulates management policy and the system operators have little opportunity to significantly affect policy, which is similar to the register in probate in Waupaca County, Dec. No. 20854-C (WERC, 9/85). The system operators do not exercise discretion in selecting an outside source of power, but rather purchase additional power in accordance with the standard defined for them. Further, any discretionary questions concerning either implementing a policy or scheduling power from alternative sources must be approved by a supervisor. While system operators gather information and may, on the basis of technical expertise, make calculations and projections, it is the supervisor who makes decisions concerning policy implementation.

The system operators have no role in negotiating the prices at which the Utility purchases power, which negotiations are performed by WPPI. The projection of energy use based on prior use and information provided by major customers is a ministerial act based on prior experience, rather than managerial discretion. In preparing daily power schedules the system operators utilize a preestablished list of alternative power sources and prices to determine the availability of power under the preestablished conditions. Thus, the schedule is a ministerial listing of the least expensive available power from predetermined sources. Such a function is similar to that of the City Treasurer in City of Whitewater, Dec. No. 24354 (WERC, 3/87), who was found not to have managerial status.

The system operator does not have the authority to call out a repair crew in an emergency outage. Rather, the system operator contacts a supervisor to advise him of the circumstances so the supervisor can decide whether to send out a repair crew. Similarly, peak shaving is performed within the parameters established by WPPI and with the approval of the supervisor. The system operator gathers information and applies technical expertise to administer the operation of the system under the direction of a supervisor. Such a role is primarily ministerial in nature.

Except for situations where an employe has supervisory responsibility for other employes, employes at WEPCO and other utilities who monitor and control energy systems, like the instant situation, are in the bargaining unit.

DISCUSSION:

Managerial employes are expressly excluded from the definition of municipal employe set forth in Sec. 111.70(1)(i), Stats.

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/ Effective authority to commit the employer's resources means

3/ Village of Jackson, Dec. No. 25098 (WERC, 1/88); City of Milwaukee v. WERC, 71 Wis.2d 107 (1976).

authority to take actions which significantly affect the nature and direction of the employer's operations. 4/ Examples of such authority include the ability to determine: the kind and level of services provided; the kind and number of employes to be utilized in providing the services; the kind and number of capital improvements to be made in the systems by which the services will be provided, including whether to use outside contractors. 5/

The Utility primarily premises its contention that the system operators are managerial employes on the argument that the system operators perform functions and exercise independent judgment in ways which have a significant economic impact on the Utility, rather than on the argument that the system operators significantly participate in the formulation, determination and implementation of management policy.

In the instant case, it is clear that the actions of the system operators involve a high degree of responsibility and can have a significant impact on the Utility's revenues. However, those actions are essentially routine in nature even though considerable technical expertise and accurate mathematic calculations are required to adequately perform the duties. The system operators are not involved in the negotiations of the price and quantity of power available from other sources. Rather, those arrangements are negotiated by WPPI and when it is necessary to purchase additional power, the system operators check those sources to locate the least expensive source with available power. The daily hourly schedule developed by the system operators is approved by a supervisor. The system operators do make changes in that projected schedule to adjust for variations in the actual need and/or supplies of power. Those changes require the gathering of information and the application of technical knowledge and experience to deal with the anticipated necessary changes at the lowest cost to the Utility. 6/ Although considerable judgment is needed, such does not constitute managerial authority. In essence, the system operators are implementing management policy in a sophisticated manner but are not formulating and determining same. 7/ Such a role is similar in nature to that of the City Treasurer in the City of Whitewater 8/ where the Commission found said position not to be managerial since the duties were essentially advisory and ministerial, even though the duties involved the implementation of management fiscal policy through the research of available investment options and making investment recommendations.

The fact that the system operators perform responsible work with minimal supervision and that incorrect calculations could have an adverse impact on the Utility does not establish managerial status. In Kewaunee County 9/ the Probate Registrar worked under comparable conditions but was not found to be a managerial employe.

Peak shaving is performed by the system operators for WPPI pursuant to a contractual arrangement between WPPI and Wisconsin Public Service. The system operators are not involved in the establishment of the contractual arrangement. They do communicate with Wisconsin Public Service by telephone to determine the anticipated peak periods and provide that information to their supervisors who decide when the peak shaving will occur. While the system operators perform an

4/ Ibid.

5/ Jackson County, Dec. No. 17828-B (WERC, 10/86).

6/ The Utility has argued that the employes in question should be removed from the unit so that the contractual bid selection process will not apply when any of these positions become vacant and the Utility can therefore be assured of qualified replacements. This argument is totally irrelevant to the determination of managerial status. We would note that the Utility is, of course, free to seek contractual changes which it believes will better protect its interest.

7/ City of Milwaukee, supra at p. 717.

8/ Dec. No. 24354 (WERC, 3/87).

9/ Dec. No. 13185-D (WERC, 1/86) aff'd Dec. No. 86-1800 (Ct.App.III, 1987).

integral role in the peak shaving process, the decision on whether to peak shave is not made by them. Thus, the role of the system operators is of a more advisory than a managerial nature. Many of the other functions of the system operators involve a high degree of responsibility and involve judgment, e.g., insuring the safety of other employees during switching operations. While errors by the system operators could have an economic impact on the Utility, such does not constitute a commitment of the Utility's resources in a managerial sense.

Our basic conclusion herein is analogous to that we have historically reached as to the managerial status of attorneys. While such employees possess substantial skill and exercise independent judgment when making decisions which may adversely affect the financial interests of the municipal client, their duties nonetheless fall short of the high policy level authority required of "managerial" employees. 10/

The Commission is not persuaded that its decision in this matter should be affected either by the parties' assertions regarding bargaining unit placement of similar positions with other employers, or by NLRB decisions regarding the supervisory status of such positions. Instead, the Commission has relied on the duties performed by the system operators in this case when measured against Municipal Employment Relations Act precedent in determining they are not managerial employees.

Dated at Madison, Wisconsin this 19th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

10/ City of Milwaukee, Dec. No. 12035-A (WERC, 2/74), aff'd CirCt Dane (7/74).