

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :
  
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WISCONSIN COUNCIL 40, AFSCME, AFL-CIO :
  
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Involving Certain Employes of :
  
: Case 94
  
MARINETTE COUNTY (PINE VIEW HEALTH : No. 46064 ME-521
  
CARE CENTER) : Decision No. 26154-B
  
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Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, WI 53719-1169, appearing on behalf of the Union.  
Mr. James E. Murphy, Corporation Counsel, Dunlap Square Building, P.O.

Box 22

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

Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission on June 6, 1991, asking that the position of Assistant Activity Director be included in a Wisconsin Council 40 bargaining unit. A hearing in the matter was held on October 31, 1991, before Examiner Karen J. Mawhinney, a member of the Commission's staff. The parties made oral arguments at the conclusion of the hearing in lieu of filing post-hearing briefs, and the transcript was received on November 22, 1991. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, herein the Union, is a labor organization with a mailing address of 5 Odana Court, Madison, WI 53719.
2. Marinette County, herein the County, is a municipal employer with a mailing address of P.O. Box 320, Marinette, WI 54143-0320. The County owns and operates a nursing home called Pine View Health Care Center, herein Pine View. At full capacity, Pine View has about 155 patients or residents. The Administrator of Pine View is Karla Brabender and the Activity Director is Lisa Hunter.
3. The Union represents all regular full-time and regular part-time employes at Pine View, excluding supervisory, managerial, confidential and professional employes. The County created the position of Assistant Activity Director in January of 1991, and the Union is petitioning to have that position included in the unit it represents. The County asserts that the position is supervisory and/or managerial.
4. The County created the new position of Assistant Activity Director to give the Activity Department more expertise and guidance and improve the therapy program. Brabender, Hunter, and the Personnel Director developed the following job description:

PURPOSE OF YOUR JOB DESCRIPTION

The primary purpose of your job description is to

assist in the planning, developing, organizing, implementing, evaluating, and directing ACTIVITY PROGRAMS in accordance with current existing federal, state, and local standards, as well as emotional, recreational, and social needs of the resident are met/maintained on an individual basis.

#### GENERAL INFORMATION

Listed below is an outline of the duties and responsibilities that you will be required to perform.

An (sic) ASSISTANT ACTIVITY DIRECTOR you are delegated the authority, responsibility and accountability to carry out your assigned duties.

Even though your job description is broad, every effort has been made to make this outline as complete as possible. However, we must emphasize that you may be required to perform other related duties and activities.

#### PERFORMANCE EVALUATION

A criteria-based performance evaluation has been made a part of this job description so that a more realistic evaluation can be made of your job performance. Ratings are based on a rating as follows: Excellent, Good, Fair, and Poor.

1. Assist in planning, developing, organizing, implementing, evaluating, and directing the Activity Programs of this facility.
2. Meet with administration, medical and nursing staff, and other related department in planning activities.
3. Assist in developing, and maintaining a good working rapport with other departments within the facility, and outside community health, welfare and social agencies, to assure that activity programs can be properly maintained to meet the needs of the residents.
4. Assist in the development, administering, and coordinating of department policies and procedures.
5. Keep abreast of current federal and state regulations, as well as professional standards, and make recommendations on changes in policies and procedures to the director.
6. Review department policies and procedures, as directed, and participate in making recommended changes.
7. Assist in the development of the department budget and monitor expenditures to stay within that budget.
8. Assist in developing and implementing policies and

procedures for identifying the spiritual, social, recreational, and emotional needs of the resident.

9. Assist in the development of and participate in regularly scheduled orientation and in-service training programs in relation to the social, emotional and recreational needs of the residents.

10. Participate in community planning to the interests of the facility and the services and needs of the resident and family.

11. Interview residents/families as directed and in a private setting.

12. Perform administrative requirements, such as completing necessary forms, charge slips, reports, etc., and submitting to the director as required.

13. Involve the resident/family in planning activities when possible.

14. Assist in arranging transportation for field trips and to other facilities when necessary.

15. Encourage residents to enhance their educational development through reading, etc.

16. Provide information to resident/families as to the activity programs available to the resident.

17. Encourage hobbies and crafts and provide materials in keeping with the resident's financial status and department budget.

18. Assist in obtaining information concerning the resident's background to better provide activities to meet their needs.

19. Assist in providing consultation to members of our staff, community agencies, etc. in efforts to solve the needs and problems of the resident through the development of activity/social service programs.

20. Attend and participate in professional activities and programs as requested.

21. Assist in the review and updating of departmental job descriptions at least annually or as directed.

22. Record and maintain activity progress notes as well as a record of resident activities.

23. Maintain an excellent working relationship with the medical profession and other health related facilities and organizations.

24. Create and maintain an atmosphere of warmth, personal interest and positive emphasis, as well as a calm environment throughout the department.

25. Assist in compiling and maintaining an activity schedule, available projects, crafts, resources, etc.
26. Meet with personnel, on a regularly scheduled basis, to assist in identifying and correcting problem areas, and/or the improvement of services.
27. Arrange for sale of articles made by residents i.e., at bazaars, in gift shop, etc., in accordance with established policies and procedures.
28. Maintain CONFIDENTIALITY of all pertinent resident care information to assure resident rights are protected.
29. Assist in coordinating programs and activities with other departments as necessary.
30. Work with the facility's consultants as necessary and implement recommended changes as required.
31. Make routine visits to residents and perform assistance with crafts, projects, etc., as necessary.
32. Review complaints and grievances and make necessary oral/written reports to the director.
33. Maintain contact with the resident's family, involving them with non-medical progress reports as directed.
34. Recommend to the director the equipment and supply needs of the department.
35. Make reports/recommendations to the director concerning the operation of the activity department developing and standardizing.
36. Assist in the methods in which work will be accomplished.
37. Assist in scheduling movies, planning parties and providing games for residents.
38. Report all incidents/accidents immediately.
39. Report all unsafe/hazardous conditions/equipment immediately.
40. Assure that established safety regulations are followed at all times.
41. Assist in providing craft supplies and material and supervising activities.
42. Assist in assuring that a current resident activity schedule is maintained for each resident.
43. Be alert for any change in the resident's condition. Report to charge nurse immediately.

44. Assist in encouraging residents to participate in religious activities through religious services, reading material, visits with chaplain, etc., to fulfill their basic religious needs.
45. Participate and assist in departmental studies and projects as assigned, or that may become necessary.
46. Assist bed residents by visiting with them, writing letters, running errands, making appointments, etc., as necessary.
47. Provide reading material in braille, tapes and records for blind residents.
48. Assist in providing library service for residents through cooperation with local library.
49. In the absence of the department director assume the authority, responsibility, and accountability of activity director.
50. Others as deemed necessary and appropriate, or as may be directed by the director.

#### WORKING CONDITIONS

1. Works in well-lighted/ventilated areas.
2. Sitting, standing, bending, lifting and moving intermittently during working hours.
3. Subject to frequent interruptions.
4. Involved with residents, family members, personnel, visitors, etc., under all conditions/circumstances.
5. Subject to hostile and emotionally upset residents, family members, etc.
6. Communicates with nursing personnel, and other department supervisors.
7. Willingness to work beyond normal working hours, and in other positions temporarily, when necessary.
8. Attend and participate in continuing educational programs as directed.
9. Subject to falls, burns from equipment, infectious diseases, substances, odors, etc., throughout the work day.
10. Be economical and careful with supplies, equipment, etc.

#### QUALIFICATIONS

1. Must possess a degree in a therapy field, i.e. art,

music recreation, or COAT.

2. Should have aptitude for and some training in arts and crafts.

Specific Requirements:

1. Must be able to read, write and speak the English language.

2. Possess the ability to make independent decisions when circumstances warrants such action.

3. Possess the ability to deal tactfully with personnel, residents, family members, visitors, and the general public.

4. Be a minimum of 18 years of age.

5. Willingness to work harmoniously with other personnel.

6. Must have patience, tact, cheerful disposition and enthusiasm, as well as be willing to handle residents based on whatever level they are currently functioning.

7. Possess the ability to seek out new methods and principles and be willing to incorporate them into existing activity programs.

8. Must have a sincere desire to work with the aged.

9. Must have some understanding of the social, psychological, and recreational needs of the aged.

Physical Requirements:

1. Must be able to move intermittently throughout the work day.

2. Must be able to speak the English language in an understandable manner.

3. Must be able to cope with the mental and emotional stress of the position.

4. Must possess sight/hearing senses, or use prosthetics that will enable these senses to function adequately so that the requirements of this position can be fully met.

5. Must function independently, have flexibility, personal integrity, and the ability to work effectively with residents, personnel, and support agencies.

6. Must be in good general health and demonstrate emotional stability.

7. Must be able to relate to and work with ill, disabled, elderly, emotionally upset, and at times hostile people within the facility.

8. May be required to lift equipment, supplies, and occasionally move furniture.

5. Tamara Francour was hired as the Assistant Activity Director and started the job on January 21, 1991. Francour reports to the Activity Director Hunter. There are four activity aides in Pine View. Francour worked 20 hours a week, usually 7:30 a.m. to 11:30 a.m. Monday through Friday. Aides have a set schedule. One aide works noon until 4:00 p.m. Another aide generally works between 7:30 or 8:00 a.m. and 2:00 or 2:30 p.m. Another aide comes in about 9:00 a.m., although one day she starts an hour earlier and one day she works only in the afternoon. One aide works on the weekends and two or three nights up to 8:00 p.m. Aides working on the weekends are not supervised by anyone and work independently. Once or twice a month, Francour works a different schedule to be able to work with the aide that works evenings, and Hunter also works some nights with this aide.

6. Francour has a degree in recreation administration. She supervises and evaluates activities and programs for residents, makes sure that those activities and programs are being carried out properly, and evaluates how residents are participating in those programs. Aides tell her when programs are not working well and she recommends changes in programs or activities such as arts and crafts. Part of Francour's responsibilities include developing activity programs that meet the needs of residents. She has developed a booklet for an aide working with a large group of residents. The booklet contains ideas for programs the aide might use with residents, and supplies that would be needed. She set up a booklet to give aides things to do with patients to keep patients' minds active and functioning. She has initiated activities, such as memory games, to stimulate patients' minds. She makes changes in activity programs.

7. Francour spends about one and a half hours each morning writing up programs for aides, coming up with new ideas for the aides to carry out with residents, such as having aides visit residents in their rooms and give them nail care at the same time. Francour spends one hour one day a week on care plans of mentally ill residents. She runs specialized programs with mentally ill residents, usually for about two hours a day. She visits new residents, writes up programs for them and informs the aide handling new residents what activities the residents are interested in. She orders snacks and food for the canteen room and makes sure the room is supplied. Aides also help keep the canteen room supplied.

8. Francour does not routinely assign duties to the aides. She has shifted responsibilities among aides as needed. For example, when aides are needed to serve coffee and juice, she has reassigned aides to different units when an aide is absent from one area. She gives direction to aides on working with groups of residents. Francour sees that the aides are following their schedules for activities. Francour would confer with Hunter before making a work schedule change if an aide asked for same. If a schedule has already been posted and Francour needed a replacement for an aide, the aide being called in would have the contractual right to refuse. Francour does not authorize overtime, except where necessary to meet federal regulations. Francour does not sign time cards. Evaluations are done on an annual basis at the facility. Francour has not evaluated employees or completed performance evaluations. Francour has no role in the grievance process, and grievances go directly to Hunter. Francour attends staff meetings which Hunter holds with the aides.

9. When an activity aide was hired, Francour and Hunter determined which applicants would be interviewed. Hunter conducted the interviews for selected applicants with Francour present and able to ask questions of applicants which she determined were appropriate. Francour did not effectively recommend that a

specific applicant was hired, but was asked by Hunter whether she concurred with Hunter's selection.

10. Francour has not had occasion to discipline an employe. She has told an aide not to leave certain residents alone when escorting others back and forth from their units, but not as a reprimand or a disciplinary action. Francour's disciplinary authority is limited to those occasions when Hunter is absent. Since January of 1991, Francour has filled in for Hunter during Hunter's two-week vacation, and approximately two to three times a month for Hunter's other absences for illness or meetings. When acting for Hunter, Francour, as an acting department head, has the authority to independently issue discipline up to and including suspension. However, as a general matter, department heads review any proposed suspension with Administrator Brabender before taking action. Any proposed discharge must be reviewed by Brabender. In Hunter's absences, Francour approves employe leave requests and may change employe work schedules.

11. Hunter makes any significant policy choices within the Activity Department. Francour is authorized to expend sums up to \$20.00 for activity supplies and was consulted by Hunter as to whether there were any large capital expenditures which the Department should seek.

12. Francour does not possess or exercise supervisory duties and responsibilities in sufficient combination and degree to render her a supervisory employe. Francour does not participate in a sufficiently significant manner in the formulation, determination and implementation of management policy or have sufficient effective authority to commit the County's resources so as to render her a managerial employe.

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

#### CONCLUSION OF LAW

The occupant of the position of Assistant Activity Director in the Pine View Health Care Center is neither a supervisory employe within the meaning of Sec. 111.70(1)(o)1, Stats., nor a managerial employe within the meaning of Sec. 111.70(1)(i), Stats. and therefore is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

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



ORDER CLARIFYING BARGAINING UNIT 1/

The bargaining unit represented by the Union is hereby clarified to include the position of the Assistant Activity Director in the Pine View Health Care Center.

Given under our hands and seal at the City of  
Madison, Wisconsin this 23rd day of March,  
1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
A. Henry Hempe, Chairperson

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Herman Torosian, Commissioner

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William K. Strycker, 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.

(footnote 1/ continued on page 11)

(footnote 1/ continued)

(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 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.

MARINETTE COUNTY

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

BACKGROUND:

The parties' dispute in this case is over the position of Assistant Activity Director in the Pine View Health Care Center. The County created a new position for a part-time Assistant Activity Director and considered it to be a supervisory/managerial position outside the bargaining unit.

THE PARTIES' POSITIONS:

The Union asserts that the Assistant Activity Director does not have a sufficient combination and degree of supervisory and/or managerial authority to be excluded from the bargaining unit. The incumbent does not prepare the budget or have the authority to reallocate funds once the budget is in place. The incumbent's typical work duties are totally devoted to client-related activities. The Union contends that it is the Activity Director and the Administrator who have supervisory responsibility and who have the authority to make effective recommendations regarding hiring, firing, suspending or promoting employes. The Assistant Activity Director does not evaluate employes, grant time off, sign time cards, and is not present during many of the hours departmental employes work. This is a part-time position in a department where only four aides work. The Administrator testified that the need to add the position was a need to improve client services, not a need for additional employe supervision in a four employe department.

The County asserts that the job description is overwhelming evidence of supervisory and/or managerial status. The incumbent was hired as a manager/supervisor, with a degree and experience. She was hired to assist the Activity Director and take the Director's place when the Director is not there. The position was advertised in the newspaper as a managerial position, and the Union did not challenge the creation of the position as managerial. The County contends that the job description's many references to assisting and planning, development, organizing, directing programs, policies and procedures demonstrate that the position has the authority of both a manager and a supervisor, and that the position should not be included in the bargaining unit.

DISCUSSION:

Managerial Status

Managerial employes are excluded from the definition of municipal employes under Sec. 111.70(1)(i), Stats. In the absence of a statutory definition of a "managerial" employe, the Commission, through case law, has developed a definition of managerial status. A managerial employe is one who participates in the formulation, determination and implementation of management policy, or who has effective authority to commit the employer's resources. 2/ To yield managerial status, the involvement with the municipal employer's policies must be "at a relatively high level of responsibility" 3/ and be "to a

2/ Kewaunee County v. WERC, 141 Wis.2d 347 (1987); Eau Claire County v. WERC, 122 Wis.2d 363 (CtApp 1984); Milwaukee v. WERC, 71 Wis.2d 709 (1976); Door County, Dec. No. 14810 (WERC, 7/76).

3/ City of Milwaukee, Dec. No. 12035-A (WERC, 2/74).

significant degree." 4/ To confer managerial status, an individual's authority to commit resources must involve allocation of resources in a manner which significantly affects the nature and direction of the employer's operations. 5/ Authority to significantly affect the nature and direction of the municipal employer's operations includes, inter alia, authority to determine the following: the kind and level of services to be provided; the kind and number of employees to be utilized in providing services; the kind and number of capital improvements to be made; and the systems by which the services will be provided, including the use of outside contractors. 6/

The record does not demonstrate that, in fulfilling her duties as the Assistant Activity Director, Francour has either participated in the formulation, determination, and implementation of management policy "at a relatively high level of responsibility" and "to a significant degree" or committed the County's resources in a significant way. The Assistant Activity Director's job description makes clear that her role is one of assisting the Activity Director to ensure that patients receive activities appropriate for their conditions. We think it apparent that within the six person department, the Activity Director exercises no significant policy authority. It is also clear that Francour has very limited authority to commit the County's resources as she has no significant budgetary responsibility and minimal authority to expend monies. Given the foregoing, we conclude Francour is not a managerial employee.

#### Supervisory Status

Section 111.70(1)(o)1, Stats., defines supervisor as ". . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, 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 has interpreted the statutory provision to set the following as relevant indicia of supervisory status:

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 other employees exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for her skill or for her supervision of employees;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;

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4/ City of Milwaukee, Dec. No. 11971 (WERC, 7/73).

5/ DePere Unified School District, Dec. No. 26572 (WERC, 8/90).

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

6. Whether the supervisor is a working supervisor or whether she spends a substantial majority of her time supervising employes; and
7. The amount of independent judgment and discretion exercised in the supervision of employes. 7/

The Commission has consistently held that not all of the above factors need to be present, but if the factors appear in sufficient number and degree, the Commission will find an employe to be a supervisor. 8/

As Activity Director, Francour serves as a technical resource for the Activity Department developing programs for residents and providing support and ideas to activity aides. When functioning exclusively as the Assistant Activity Director, Francour possesses and exercises little supervisory authority over the four activity aides. Her supervisory role is limited to general oversight of the employes as they perform their activities with the patients, a role which Hunter also shares. Although she was involved in the hiring process for an aide, her participation did not rise to the level of making an effective hiring recommendation. When Hunter is present, we are satisfied that Hunter would make all significant disciplinary decisions or recommendations. It is Hunter who approves leave requests and schedules changes, receives grievances, and evaluates employes.

However, when Hunter is not present and Francour assumes the duties of the Activity Director, we are satisfied that she also assumes some supervisory authority. However, because of the limited time each year when Francour assumes Hunter's responsibilities, we conclude that Francour is not a supervisor. 9/

Dated at Madison, Wisconsin this 23rd day of March, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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- 7/ Muskego-Norway School District, Dec. No. 10585-A (WERC, 12/91); City of Milwaukee, Dec. No. 6960 (WERC, 12/64).
  - 8/ City of Lake Geneva, Dec. No. 18507 (WERC, 3/81); Lodi Jt. School District No. 1, Dec. No. 16667 (WERC, 11/78).
  - 9/ Cases in which we have previously concluded the occasional assumption of supervisory responsibilities was insufficient to warrant a supervisory exclusion include City of New Berlin, Dec. No. 13173-B (WERC 8/83); City of LaCrosse, Dec. No. 14019 (WERC 10/75), and City of Franklin, Dec. No. 6147 (WERC, 10/62).

By \_\_\_\_\_  
A. Henry Hempe, Chairperson

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner