

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 In the Matter of the Petition of :
 :
 OPERATING ENGINEERS Local 139 : Case 62
 : No. 44108 ME-3009
 Involving Certain Employes of : Decision No. 27093
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 ADAMS COUNTY :
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 In the Matter of the Petition of :
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 WISCONSIN Council 40, AFSCME, AFL-CIO : Case 63
 : No. 44198 ME-427
 Involving Certain Employes of : Decision No. 27094
 :
 ADAMS COUNTY (HIGHWAY DEPARTMENT) :
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law,
 by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, P.O.
 Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of
 Operating Engineers Local 139.

Mr. Bryan J. Fischer, Corporation Counsel, Adams County, P.O. Box 278, Friendship, W

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME,

Friendship, W
 AFL-CIO, 5 O

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Operating Engineers Local 139 having filed a petition with the Wisconsin Employment Relations Commission on May 31, 1990, requesting the Commission to conduct an election in a bargaining unit of all regular full-time and part-time employes of the Adams County Solid Waste operation including but not limited to all operators, mechanics and other employes performing excavations, back filling, compacting, leaching, dumpster collection, recycling, composting, source separation and all other non-supervisory employes of Adams County not represented by any other labor organization; and Wisconsin Council 40, AFSCME, AFL-CIO having filed a petition with the Commission on June 27, 1990, requesting the Commission to clarify a bargaining unit of all regular full-time and regular part-time employes of the Adams County Highway Department by including all employes of the Adams County Solid Waste operation, including clerical employes; and both petitions having been consolidated for hearing which was held on September 19, 1990, in Friendship, Wisconsin, before Examiner James W. Engmann, a member of the Commission's staff; and the parties having submitted briefs, the last of which was received on December 7, 1990; and the parties, after consultation with each other, having waived the filing of reply briefs on February 8, 1991; and the Commission, having considered the evidence and arguments of the parties, makes and issues the following

FINDINGS OF FACT

1. That Operating Engineers Local 139, hereinafter Local 139, is a labor organization; and that Local 139 has its primary office at 1602 South Park Street, Madison, Wisconsin 53715.

2. That Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter Council 40,

is a labor organization; and that Council 40 has its primary office at 5 Odana Court, Madison, Wisconsin 53719.

3. That Adams County, hereinafter County, is a municipal employer; that the County operates a Highway Department and a Solid Waste operation; and that the County has its primary office at the Adams County Courthouse, 402 Main Street, Friendship, Wisconsin 53934.

4. That on May 31, 1990, Local 139 filed a petition, hereinafter Case 62, with the Wisconsin Employment Relations Commission, hereinafter Commission, requesting the Commission to conduct an election in a bargaining unit claimed as appropriate and described as follows:

All regular full-time and part-time employees of the Adams County solid waste--landfill operations including but not limited to all operators, mechanics and other employees performing excavations, back filling, compacting, leaching, dumpster collection, recycling, composting, source separation and all other non-supervisory employees of Adams County not represented by any other labor organization.

that Council 40 and the County dispute that the bargaining unit described above is appropriate and allege that such a unit violates the statutory anti-fragmentation policy; that in its brief Local 139 seeks as a first preference a unit of all craft employees of the Solid Waste operation; that Council 40 and the County contend that none of the employees are craft employees; that, in the alternative, Local 139 seeks a departmental unit of all Solid Waste operation employees, including the office secretary; that, in the second alternative, Local 139 seeks a residual unit of the Solid Waste operation employees, including the office secretary, and all other unrepresented employees, including three full-time seasonal park employees, three house managers, one relief house manager, and one library assistant; and that Council 40 and the County oppose said alternatives asserting that the only appropriate outcome is placement of the Solid Waste employees in the Highway Department unit.

5. That on June 27, 1990, Council 40 filed a petition, hereinafter Case 63, with the Commission requesting the Commission to clarify a Council 40 bargaining unit described therein as "all regular full-time and regular part-time employees of the Adams County Highway Department" by including in said bargaining unit all employees of the Adams County Solid Waste operation, including clerical employees; that the office secretary at the Solid Waste operation is currently included in the Council 40 Courthouse bargaining unit; that the clerical employees in the Highway Department are included in the Highway Department bargaining unit; that Local 139 opposes the inclusion of the Solid Waste operation employees in the Highway Department unit and alleges that the Solid Waste operation employees do not share a community of interest with the Highway Department employees; and that the County concurs with Council 40's petition.

6. That the Solid Waste operation was created in 1984 or 1985; that the employees of the Solid Waste operation, other than the office secretary, have not been represented by a collective bargaining representative during that time; that the Solid Waste operation employs ten employees in four job classifications: one solid waste administrator, one office secretary, one Solid Waste operation equipment operator foreman, and seven Solid Waste operation

equipment operators; and that the parties agree that the Solid Waste administrator is excluded as a supervisor and that the heavy equipment operator foreman is a municipal employe.

7. That a journeyman operating engineer has to have a number of years of work experience with equipment and its maintenance; that a journeyman with less than a year of experience serves a three year apprenticeship; that the apprentice is indentured to certain contractors; that the apprentice will fulfill the obligations of the apprenticeship by going to school; that the Operating Engineers have a school at Coloma, Wisconsin with a two year and a three year apprenticeship program, depending on what the performance task is; that the apprentice program at Coloma provides a combination of experience with equipment and classroom instruction; that the apprentice learns the fundamentals of repairing the equipment; that two Solid Waste operation employes were previously journeyman operating engineers on construction work; that the two employes are foreman Strohmeier and equipment operator Rasier; that the functions of a journeyman operating engineer on new construction include visualizing and reading blueprints, reading grade lines and slopes, setting transits up along with shoot elevations and visualizing rough grade to clear; that Local 139 represents employes in landfill projects in La Crosse County, Eau Claire and Trempealeau County for the purposes of collective bargaining; that these landfills are being built by private sector employers; that these projects are a duplicate system to Adams County; that journeyman operating engineers are the primary source of labor on those projects; and that apprentices work in some of the landfills.

8. That the County began building a landfill for solid waste in 1984 or 1985; that when completed the landfill will consist of five cells; that prior to building the landfill, the site of the potential landfill was woods and low ground; that the Solid Waste operation equipment operators cleared timber from approximately 3,000 feet of right of way; that they then built a road into the site; that they then cleared the timber from the land to start building the landfill itself; that in 1987, three equipment operators began to mine clay at the site; that in 1988, several more employes were hired as scraper and bulldozer operators to help mine the clay; that the equipment operators then began to haul in clay in eight-inch lifts and to compact it to six inches; that the equipment operators continued this process to form the five feet of clay for the total cell depth; that during this time they compacted and laid leachate collection tubes; that these tubes channel the runoff water that goes through the garbage into a tank; that the equipment operators then put down six inches of rock and clay where the leachate collection tubes went; that the clay acts as a channel so the runoff does not leak into the groundwater; that then the equipment operators put in six-inch perforated pipe; that the perforated pipe collects the runoff water; that they put gravel stone on top of that; and that a portion of the landfill was open for use in December 1989.

9. That equipment at the landfill site includes four bulldozers, three loaders, seven scrapers, one smooth drum, one vibrating drum, one backhoe digger and some compacting equipment; that the biggest bulldozer at the landfill site weighs approximately 72,000 pounds; that the backhoe digger at the landfill site weighs approximately 99,000 pounds; that with the exception of the backhoe digger, all the Solid Waste operation equipment operators are able to operate all the equipment at the landfill site; that only the foreman and two equipment operators can operate the backhoe digger; that each of the equipment operators has to maintain and be able to repair the various machines at the landfill site; that the foreman and equipment operators have to read blueprints; that the foreman and equipment operators work with the engineer's

blueprints to determine amount of grading to be done and the density and type of clay to be used; that the equipment operators use a transit to determine how much fill or cut must be done in an area; that the equipment operators work as part of a crew; that equipment operators receive their instructions from the foreman or the engineer; and that an engineering firm hired by the County is at the site to monitor the grading.

10. That the Solid Waste operation equipment operator foreman is Henry C. Strohmeyer; that he has been the foreman since 1987; that the foreman is paid \$11.05 per hour; that before he became employed by the County, the foreman served full-time as a technician in the National Guard for eight years; that during that time he attended automotive school for six months to learn about automotive equipment; that he then learned how to operate, maintain and repair the Clark family of multi-purpose engineered construction equipment, hereinafter FAMECE; that the FAMECE is a power unit that has eight or nine different working sections with it; that it can be used as a scraper, bulldozer, loader, compactor or water tanker, among other things; that he continued to have on-the-job training in the Guard; that he has background and experience in welding and in mechanics on gas and diesel equipment; that he has experience in mechanics on gas and diesel equipment; and that the job description for the foreman states as follows:

General Description: Keep all solid waste equipment in serviceable shape by repairing, rebuilding or fabricating items of necessity. Act as leadman on heavy equipment operations.

Typical Job Duties:

1. Plan and layout work for equipment operators and other landfill employes.
2. Repair or rebuild construction and other equipment.
 3. Requisition repair parts.
3. (sic) Maintain an inventory of oils, grease, antifreeze, fuel, batteries and supplies of equipment parts.
4. Maintain records, prepare reports and meet with Solid Waste Committee as necessary.

Qualifications and Experience Required:

1. High school diploma.
2. Training and experience in welding.
3. Training and experience as mechanic on gas and diesel equipment.
4. Must be familiar with Clark F.A.M.E.C.E. Equipment (Family of multi-purpose engineered construction equipment).

Tools and Equipment Used:

1. Welder.
2. All mechanic (sic) tools - regular and metric.
3. Lathe.
4. All heavy equipment testing apparatus.
5. All F.A.M.E.C.E. equipment.
6. Scraper.

7. Grader.
8. Bulldozer.
9. End Loader.
10. All truck
11. Compactors.
12. Fork Lift.

11. That the seven Solid Waste operation equipment operators are Henry W. Strohmeier, Alan Giessel, Edwin Olson, Joseph Baumel, John Marlowe, Robert Rasier and George Woodruff; that the position of equipment operator is paid \$9.22 per hour; and that the job description for the equipment operator reads as follows:

General Duties: Keep all solid waste equipment in serviceable shape by repairing items of necessity.

Typical Job Duties:

1. Do preventive maintenance on all equipment.
2. Repair construction and other equipment.
3. Be able to operate all listed equipment.
4. Read rough draft prints and set rough grade

Qualifications and Experience Required:

1. High School Diploma.
2. Training and experience in welding.
3. Training and experience as mechanic on gas and diesel equipment.
4. Must be familiar with Clark F.A.M.E.C.E. Equipment (Family of Multi-Purpose Engineering Construction Equipment).

Tool and Equipment Used:

1. Welder
2. All mechanic tools - regular and metric
3. All heavy equipment testing apparatus.
4. All F.A.M.E.C.E. equipment
5. Scraper
6. Grader
7. Bulldozer
8. End Loader
9. All trucks
10. Compactors
11. Fork Lift

12. That the Solid Waste operation and landfill site is located six miles north of Friendship; that only Solid Waste operation employes are at the landfill site; that the administrator of the Solid Waste operation and the supervisor of its employes is Don Rogers; that Rogers reports to the Solid Waste Committee of the County Board; that the Solid Waste operation has its own budget; that in only one instance have Highway Department employes worked at the landfill site; that the one instance occurred when a Highway Department cruiser operator used a Highway Department machine to set some manholes at the

landfill site; that Solid Waste operation employes have not worked on Highway Department projects; that no employe of either department has been employed by the other department; that one time the foreman talked to the Solid Waste administrator concerning the wage rates for Solid Waste operation employes which are lower than the Highway Department rates; and that a wage study was conducted in 1989 which did not include the Highway Department.

13. That the Highway Department employs 22 employes; that the positions of highway commissioner, highway superintendent and engineer are excluded from the Highway Department bargaining unit; that the Highway Department bargaining unit consists of 19 employes in six job classifications as follows: one shop foreman-leadman, nine heavy equipment operators, four truck drivers, three mechanic-welder-machinists, one office manager, and one clerk; that said employes are compensated based on the following wage classifications:

Class I - \$11.09 per hour - Shop Foreman, Leadman

Class II - \$10.97 per hour - Mechanic, Partsman, Dozer, Shoulder Maintainer, Grader Operator, End Loader, Seaman, Backhoe, Travel Plant, Patrolman, Scraper, Roller, Tandem Truck

Class III - \$10.87 per hour - Pulvi-Mixer, Oil Distributor, Air Compressor, Patrolman's Helper, Truck Driver, Common Laborer

Class IV - \$10.00 per hour - Office Manager
\$ 9.43 per hour - Highway Clerk

and that Council 40 has represented the Highway Department bargaining unit since 1953.

14. That the Highway Department reconstructs three miles of federal highway each year; that the reconstruction involves taking the old material off the road, rebuilding the base and putting a new top on the road; that the Department does 20 to 25 miles of highway seal coating each year and four or five miles of resurface paving; that the Department handles snow removal in the winter; that the Department includes three mechanics who do general maintenance, including motor overhaul, transmissions and clutches; that the Department does contract out some repair work; that the mechanics do welding, such as building new harnesses for the trucks; that the Highway Department equipment operators do basic maintenance, such as checking and adjusting oil levels and water and tire pressure; that Highway Department equipment operators operate bulldozers, graders, end loader, backhoes, scrapers, rollers, and tandem trucks; that most of the equipment operators can operate all of the equipment; that the largest bulldozer used by the Highway Department weighs approximately 42,000 pounds; that the Highway Department digger weighs between 25,000 and 30,000 pounds; that the Highway Department has some employes who do laborer work at times; that laborer work includes work such as shoveling and raking; that truck drivers drive a six yard truck to patrol a section of state roads; that the truck driver is assisted by the patrolman's helper; that the duties of patrol include removing brush, fixing potholes and tarring; that a tandem truck is larger than a six-yard truck; and that a tandem truck driver would drive a tandem truck or larger.

15. That Myrna Riegle has been the secretary at the Solid Waste operation for three years; that her duties include acting as recording

secretary at committee meetings and hearings, preparing financial reports, keeping financial books, answering the telephone, responding to citizens questions, weighing trucks in, calculating tippage tickets and assisting the director in budget preparations; that she is currently represented by Council 40 in the Courthouse unit; that her supervisor is the Solid Waste administrator; that her office is at the Solid Waste site, the same office to which the other Solid Waste employes report; that there are no other clerical employes at the Solid Waste operation; that she performs all the clerical duties that are required by the Solid Waste operation; that she also orders parts and supplies for the equipment as the foreman given them to her to order; and that she drives the pickup truck when the operators are going to pick up another large piece of equipment and drive that back.

16. That the parties stipulated that the following positions are non-supervisory and non-professional and are currently unrepresented: three full-time seasonal positions in the Parks Department, three house managers, one release house manager for the drug and alcohol rehabilitation halfway house, and one library assistant.

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

CONCLUSIONS OF LAW

1. That the Solid Waste operation equipment operators are not craft employes within the meaning of Sec. 111.70(1)(d), Stats.

2. That a bargaining unit consisting of all regular full-time and regular part-time blue collar employes of the Adams County Solid Waste operation excluding supervisory, managerial, executive and confidential employes is an appropriate bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

3. That it is inappropriate under the circumstances to accrete the unrepresented employes of the Adams County Solid Waste operation into the Highway Department bargaining unit represented by Wisconsin Council 40, AFSCME, AFL-CIO.

4. That a question of representation within the meaning of Sec. 111.70(4)(d)3, Stats., presently exists among employes of Adams County in the appropriate bargaining unit set forth in Conclusion of Law 2.

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

ORDER

1. That an election be 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 among all regular full-time and regular part-time blue collar employes of Adams County Solid Waste operation, excluding supervisory, managerial, executive and confidential employes, who are employed on November 27, 1991 except such employes as may prior to the election quit or be discharged for cause, for the purposes of determining whether a majority of the employes voting desire to be represented by Operating Engineers Local 139 (or by Wisconsin Council 40, AFSCME, AFL-CIO, if Council 40 so advises us within 10 days of this Direction that they wish to be included on

the ballot) for the purposes of collective bargaining with Adams County on questions of wages, hours and conditions of employment, or not to be so represented.

2. The unit clarification petition filed by Wisconsin Council 40 is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

William K. Strycker, Commissioner

I Dissent

A. Henry Hempe, Chairperson

ADAMS COUNTY &
ADAMS COUNTY
(HIGHWAY DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The petition for election filed by Operating Engineers Local 139, as refined in its post-hearing brief, seeks an election in a bargaining unit consisting of all craft employes of the Adams County Solid Waste operation. In the alternative, Local 139 seeks an election in a departmental bargaining unit consisting of all employes of the Adams County Solid Waste operation or, in the second alternative, Local 139 seeks an election in a residual bargaining unit consisting of all unrepresented employes of Adams County. The petition for unit clarification filed by Wisconsin Council 40, AFSCME, AFL-CIO, seeks to accrete without a vote all employes of the Adams County Solid Waste operation into the predominantly blue collar Highway Department unit presently represented by Wisconsin Council 40.

POSITIONS OF THE PARTIES

Local 139

Local 139 argues that Sec. 111.70(4)(d), Stats., mandates that craft employes have the opportunity to vote on whether they will be included in a bargaining unit which includes non-craft employes; that the Solid Waste equipment operators and foreman are craft employes within the meaning of Sec. 111.70(1)(d), Stats.; that said employes are expected to meet the standards of the journeyman equipment operator who has completed an apprenticeship; that the job descriptions for the equipment operators and foreman indicate that the jobs require journeyman-level proficiency; that, unlike the employes in the Highway Department, the Solid Waste equipment operators are expected to be proficient in the operation of the full range of heavy equipment; that they are expected to read blueprints and set rough grades; that they must have experience with welding and as a mechanic on gas and diesel equipment; that, in sum, they must possess the breadth and depth of knowledge and experience which distinguish journeyman operating engineers who have gone through an apprenticeship or other comparable background; and that, indeed, some of the Solid Waste equipment operators were journeymen members of Local 139 before they were hired by the County and that others would no doubt also qualify.

Local 139 also argues that the fact that the job description does not explicitly state that applicants are to be journeymen operating engineers is not determinative where, as here, the level of work performed in training and experience amount to the same thing, citing Dane County, Dec. No. 26057 (WERC, 6/89); that the fact that the Solid Waste operators are underpaid does not alter their craft status, citing Dane County, supra.; that similarity of some equipment operator duties with those of other non-craft employes is not dispositive where a substantial portion of their time is spent performing the higher level duties which distinguish journeymen, citing City of Cornell, Dec. No. 24029 (WERC, 10/86); and given that Solid Waste equipment operators and the foreman are required to have the level of training and experience of a journeyman equipment operator who has completed an apprenticeship or the equivalent,

these positions must be considered craft and, therefore, the employes are entitled to a self-determination election.

In addition, Local 139 argues that if the Solid Waste blue collar employes are not considered craft employes, they are still not properly accreted to the existing Highway Department unit; that, rather, they constitute a proper unit in and of themselves or together with other residual, unrepresented employes; that the Solid Waste operation has separate supervision and works in a separate area from the Highway Department; that the Solid Waste employes do not have the same wage rate or contractual benefits; that, in fact, the Solid Waste employes wage rates were the subject of a study which did not include the Highway Department; that Council 40 has made no attempt to represent the Solid Waste employes in the five years of the operation's existence; that Solid Waste employes have met with their supervisor as a group entirely separate from the Highway Department; that although some employes in the Highway Department operate some equipment, many included within the unit are manual laborers or drive a simple six yard truck; that even those who operate equipment do not perform the range of skill required for new construction; that there is no reading of blueprints, no setting of grades and no using of a transit; that, therefore, the skills and duties of the employes in the two departments are different; and that, in sum, there is no shared community of interest between the Highway Department and the Solid Waste equipment employes.

Council 40

Council 40 argues that the record in this matter cannot support a finding that the Solid Waste operation employes are craft employes; that the only evidence on the craft status of these employes came in the testimony of the Business Representative of Local 139; that the Solid Waste equipment operators are not indentured to any contractor; that learning the fundamentals of oil level and minor equipment repair hardly justifies the designation of craft employe; that it is clear that the Highway Department employes are operating essentially the same kinds of equipment and performing the same kinds of functions with that equipment; that all that can be said is that the Solid Waste operation employes use larger equipment; that the Solid Waste operation employes do not fall within the "direct line of progression" within any craft, as required by Sec. 111.70(1)(d), Stats.; that there is no substantial period of apprenticeship for these employes; that they are performing essentially the same duties as many of the Highway Department employes, except that they are working at a landfill site, not on a highway; and that, in sum, there is little evidence that any of the Solid Waste operation employes fall under the definition of a craft employe.

Council 40 also argues that the unit proposed by Local 139 is not an appropriate unit while the unit sought by Council 40 is appropriate; that, first, the Solid Waste operation employes themselves identify their interests to be in common with the Highway Department employes; that, second, the duties and skills of the Solid Waste operation employes are almost a perfect match with those of the Highway Department employes; that, third, the wages, hours and working conditions of employes in the Solid Waste operation are similar to those of the Highway Department employes; that while the wages of the Highway Department employes are uniformly higher than similar positions in the Solid Waste operation, the wages are not so different as to represent a difference in community of interest; that, unlike other County employes, the Highway Department and solid waste operation employes work 40 hour weeks; that the

Solid Waste operation and Highway Department employees are essentially the only blue collar County employees; that while they do not work in the exact same location, they are the only County employees who work almost exclusively out-of-doors; that, fourth, only the unit sought by Council 40 will avoid undue fragmentation of bargaining units; that the County already has five bargaining units; that given the small size of the County, it is obvious that creating a new bargaining unit consisting of some eight or nine employees would hardly be in keeping with the legislative mandate to avoid fragmentation; that the Solid Waste operation employees share such a strong community of interest with the Highway Department employees that it would be contrary to the policy of unnecessary fragmentation to place them in a separate bargaining unit; that, fifth, bargaining history indicates that the Highway Department unit has included all blue-collar employees in the County until the time the landfill was created; and therefore that application of the factors used by the Commission in determining the appropriateness of bargaining units militates strongly against the creation of a new bargaining unit of eight Solid Waste operation employees and strongly favors the inclusion of these employees in a unit with the Highway Department employees.

In addition, Council 40 argues that the unilateral accretion of the Solid Waste operation employees into the Highway Department unit should be ordered; that the Commission must balance the interest of employees being afforded an opportunity of selecting a representative of their own choosing with the equally compelling interest of avoiding undue fragmentation of bargaining units; that placement in an existing unit can be warranted if the record demonstrates a compelling community of interest between the employees sought to be accreted and those employees in the existing bargaining unit, citing West Allis - West Milwaukee School District, Dec. No. 16405-A (WERC, 9/89), and Dane County, Dec. No. 15696-A (WERC, 12/88); that under these rulings, it is clear that unilateral accretion of the Solid Waste operation employees into the Highway Department bargaining unit is appropriate; that the commonality of interest between the two groups of employees is exceedingly strong; and that the eight or nine employees in the Solid Waste operation would not call into question the majority status of Council 40 in the Highway Department unit.

County

The County argues that this case is controlled by the statutory policy that the Commission shall avoid fragmentation by maintaining as few units as practical in keeping with the size of the total municipal work force; that by using the word "shall," the statute requires that the Commission must consider the anti-fragmentation policy as virtually conclusive; that the statute only states that the Commission "may" consider a craft as a separate unit; that the position of Local 139 that the Solid Waste operation employees constitute a craft is of secondary significance; and that the Commission does not have to and should not even address the craft argument since the issue of fragmentation is implicated here.

As to the question of whether the Solid Waste operation and Highway Department employees should be grouped within the same bargaining unit, the County argues that these employees share a community of interest; that, by combining these individuals within a single bargaining unit, collective bargaining will not be undermined because of restlessness arising from widely dissimilar interests, citing Arrowhead United Teachers v. WERC, 116 Wis.2d 580, (1984); that widely dissimilar interests between the two groups of employees have not been shown to exist here; that the Solid Waste operation employees

operate and repair various pieces of equipment out-of-doors, as do the Highway Department employees; that the facts that certain pieces of equipment weigh more than others or that the projects are not the same do not create widely dissimilar interests; that this is no less a hybrid mixture of positions than which may exist in voluntarily recognized general units, citing Madison Water Utilities Employees Association, Dec. No. 19584 (WERC, 5/82); that both the Solid Waste operation and Highway Department have interests that can fairly be described as economic and long-term; that as to duties and skills, the blue collar employees in both departments operate their own departmental equipment interchangeably; that none of the discrepancies that exist in wages and hours are substantial enough to determine the outcome of the Commission's decision; that the terms and conditions of employment for both groups are vastly similar; and that combining the Solid Waste operation employees into the Highway Department unit will not materially alter any existing rights or interests of the Solid Waste operation employees.

In conclusion, the County argues that the anti-fragmentation policy is to be effectuated by the Commission whenever possible; and that where, as here, there has been shown a commonality of interest between the Solid Waste operation and Highway Department employees and a related lack of a showing that the Solid Waste operation employees have unique interests that would be jeopardized by enforcement of the anti-fragmentation policy, the Commission should deny the Local 139's request for a separate bargaining unit.

DISCUSSION

Section 111.70(4)(d)2.a., Stats. provides in pertinent part:

The commission shall determine the appropriate bargaining unit for the purposes of collective bargaining and shall whenever possible avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. . . .

When exercising our statutory discretion to determine whether a proposed bargaining unit is appropriate, we consistently consider the following factors:

1. Whether the employees in the unit sought share a "community of interest" distinct from that of other employees.
2. The duties and skills of employees in the unit sought as compared with the duties and skills of other employees.
3. The similarity of wages, hours and working conditions of employees in the unit sought as compared to wages, hours and working conditions of other employees.

4. Whether the employes in the unit sought share separate or common supervision with all other employes.
5. Whether the employes in the unit sought have a common workplace with the employes in said desired unit or whether they share a workplace with other employes.
6. Whether the unit sought will result in undue fragmentation of bargaining units.
7. Bargaining history. 1/

Here, Local 139 seeks as a first preference a bargaining unit which would consist of all of the blue collar employes of the County's Solid Waste operation. 2/ When evaluating whether this proposed bargaining unit is appropriate under the foregoing factors, we find:

1. The shared purpose of the proper functioning of the landfill gives these employes a "community of interest" distinct from that of other blue collar employes. 3/
2. The duties and skills of the Solid Waste employes are distinct from those of blue collar Highway Department employes to the extent said duties involve the use of transits and blueprints. The Solid Waste employes' heavy equipment operation duties and skills are similar to those of certain Highway Department employes.
3. The wages and fringe benefits of the Solid Waste employes are distinct from those of the Highway employes while the hours and working conditions are similar.
4. The Solid Waste employes have separate supervision.
5. The Solid Waste employes have a common work site which is separate from that of the Highway Department employes.
6. A separate blue collar Solid Waste unit would create an additional unit which includes blue collar County employes.

1/ Arrowhead United Teachers v. WERC, 116 Wis.2d 580 (1984).

2/ The Department's clerical employe is presently included in the Courthouse unit.

3/ See Arrowhead, supra at 592.

7. The blue collar Solid Waste employes have not previously been included in a bargaining unit, and, prior to this proceeding, the record does not establish any effort by Council 40 to represent these employes.

The combination of the factors of community of interest, somewhat distinctive duties and skills, separate supervision, separate work site, and distinctive wages supports a conclusion that the unit sought by Local 139 is an appropriate one. However, both the County and Council 40 argue that because a primarily blue collar unit already exists in the Highway Department and because we are obligated to avoid fragmentation, we should conclude that the Solid Waste employes can only appropriately be represented by Council 40 within the confines of that existing unit.

We acknowledge the obvious reality that the creation of an exclusive blue collar unit further fragments the County's workforce. However, contrary to the County's argument herein, the Court made clear in Arrowhead, supra, that fragmentation is only one of the factors to be considered when we exercise our statutory discretion to determine whether an additional unit of employes is appropriate. When we balance and consider all relevant factors, we find the fragmentation factor is not sufficient for us to reject an otherwise appropriate unit sought by Local 139. Thus, we have directed an election. As noted in the Direction, should Council 40 wish to be on the ballot it must so advise us within 10 days of this decision. 4/

Additionally, we note that if we were to accrete the Solid Waste employes as argued by Council 40 and the County, we would be expanding the scope of the existing unit by including eight Solid Waste employes into a voluntarily recognized Highway unit of 19 employes. While Council 40 argues that its proposed new unit is the only appropriate one, it has not previously sought to include said employes (whose positions have now been in existence for approximately six years) through an election or unit clarification petition or through voluntary agreement with the County. Further, Council 40 has not sought to have its status as exclusive bargaining representative in the claimed appropriate unit tested in this proceeding through either an election in the entire unit or even among the Solid Waste employes. Its sole position is that the eight Solid Waste employes in issue should be added to the Highway unit by expanding the scope of that unit without any vote at all. 5/ With or without an accretion vote, this result is undesirable because it substantially restricts the blue collar Solid Waste employes' choice as to representation. The only choice the employes would have would be whether to be represented by Council 40. Local 139 could not appear on the ballot in the accretion election and, if the employes voted against accretion to the Highway unit, Solid Waste employes would be foreclosed from seeking future representation in a different unit from a different labor organization. We have previously found this

4/ Should Council 40 choose to be on the ballot and win the election, the County and Council 40 could agree to combine the Solid Waste and Highway units for the purposes of collective bargaining.

5/ Even our dissenting colleague would require an accretion vote.

restriction on the employes' exercise of their statutory right to select or reject union representation of their own choosing to be a basis for rejecting the accretion of employes to existing units. City of Clintonville, Dec. No. 19858 (WERC, 8/82); City of Watertown, Dec. No. 24798 (WERC, 8/87). For the foregoing reasons, we reject accretion herein as well.

Our discussion of this issue is sufficiently extensive to respond to the arguments raised by the parties. The dissent reveals no more than our colleague's disagreement with how we have exercised the Commission's discretion in this case. Thus, our comment regarding the dissent will be appropriately brief.

First, our dissenting colleague acknowledges that although he disagrees with our conclusion, our reliance on the combination of community of interest, somewhat distinctive duties and skills, separate supervision, separate work site and distinctive wages as support for a separate unit is not "unreasonable." However, he then proceeds to interpret our analysis and outcome as being dependent upon the right of employes to choose their bargaining representative and the unwillingness of Council 40 to stand a vote. Our decision speaks for itself as to why we find the separate blue collar unit appropriate. While we discussed and relied upon the two concepts cited by our colleague when we discussed why accretion is inappropriate, said concepts were not the overriding considerations as to how this case should be resolved. 6/

Second, we wonder how our colleague's heavy reliance on anti-fragmentation allows him to leave unresolved the status of the eight blue collar and white collar employes who remain unrepresented (see Finding of Fact 16). If we had not found a separate unit of Solid Waste equipment operators appropriate in this case and instead concluded as our colleague did, we would feel obligated to resolve the status of all remaining unrepresented positions. To do so, we would reopen the hearing and take additional evidence, if needed. This approach, rather than the piece-meal approach of our colleague, would allow us to best address the anti-fragmentation mandate.

Ultimately, what our colleague does not recognize is that notwithstanding the statutory mandate that we "whenever possible avoid fragmentation" and notwithstanding our resultant reluctance to fragment the workforce, the statute does allow for creation of additional bargaining units. As the Court held in Arrowhead at page 595:

The statute provides that the commission shall determine the appropriate bargaining unit. In determining the appropriate unit, the statute states the commission **may** decide whether employes in 'the same or several . . . professions or other occupational groupings constitute a unit.' The statute does not mandate that employes with similar duties must be grouped within a single unit. (emphasis supplied in original)

Obviously, we are satisfied that this is a case where an additional blue collar unit is appropriate.

6/ Consideration of the "right to choose" has also been part of our rationale in cases where we establish residual units. See, Waukesha County, Dec. No. 26020-A (WERC, 9/89).

We now turn from comment on the dissent to the issue of the craft status of Solid Waste employes. Local 139 sought to buttress their argument for the unit in question by asserting that the employes are craft employes who are thus entitled under any circumstance to a unit determination vote pursuant to Sec. 111.70(4)(d)2.a., Stats. 7/ We have not found it necessary to resolve the craft issue raised by Local 139 for the purpose of resolving the unit question. However, because craft status remains relevant to whether there are Solid Waste employes entitled to a self determination vote, the craft issue must be decided in that context.

Section 111.70(1)(d), Stats., defines a craft employe as follows:

(d) "Craft employe" means a skilled journeyman craftsman, including his apprentices and helpers, but shall not include employes not in direct line of progression in the craft."

To constitute a "craft" employe within the meaning of Sec. 111.70(1)(d), Stats., the individual must have a substantial period of apprenticeship or comparable training. Employes will be considered to be engaged in a single craft when they are a distinct and homogeneous group of skilled journeyman craftsmen working as such together with their apprentices and/or helpers. Winnebago County Hospital, Dec. No. 6042 (WERC, 7/62), and Dane County (Exposition Center-Coliseum), Dec. No. 16946 (WERC, 4/79). The Commission will also recognize an experience equivalent where it is clearly demonstrated to exist. Green Bay School District, Dec. No. 23263-A (WERC, 8/86). Heavy equipment operators have been found not to be craft employes because of their lack of apprenticeship or equivalent training and because their wages did not reflect pay for alleged craft skills when compared to rates of other employes. Lincoln County, Dec. No. 6200 (WERC, 1/63).

The record shows that two of the employes in the Solid Waste operation have had journeyman status as operating engineers on construction work in the past. The record is also clear that none of the other employes are journeyman operating engineers nor are they in an apprentice program to become journeyman operating engineers. According to the record, an apprentice operating engineer goes to school for two or three years, during which time the apprentice is indentured to certain contractors. This is not occurring at the landfill site. It has not been clearly demonstrated that work experience at the Adams County Solid Waste operation is equivalent to the substantial period of apprenticeship needed for craft status, nor does the County provide training comparable to an apprentice program. The County does not require that an employe be a journeyman or apprentice operating engineer, nor is it even recommended or suggested. The wage rates paid to these employes does not reflect journeyman status. For these reasons, we do not find that the employes involved herein are craft employes within the meaning of Sec. 111.70(1)(d), Stats. Thus, no

7/ Section 111.70(4)(d)2.a., Stats. provides in pertinent part:

The commission shall not decide that any unit is appropriate if the unit includes both craft and noncraft employes unless a majority of the craft employes vote for inclusion in the unit.

self determination vote is needed.

Dated at Madison, Wisconsin this 27th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

William K. Strycker, Commissioner

DISSENT

Over the years there have been three separate standards erected against which proposed bargaining units are measured. The first is statutory and establishes the general right of municipal employes ". . . to bargain collectively through representatives of their own choosing" 8/ The second, though not statutory, is, nonetheless, ". . . an accepted concept of labor law . . . often utilized in the area of collective bargaining," 9/ and requires that there be a shared "community of interest" among the members of the proposed bargaining unit. 10/ The third, like the first, has a statutory basis, and compels the Commission to ". . . whenever possible avoid fragmentation by maintaining as few units as practicable" 11/

The majority correctly recites seven factors the Commission has considered when determining whether a proposed bargaining unit is appropriate. 12/ Although this "7 Factor" test is a helpful tool, it also has its limitations. For instance, five of the seven (factors 2, 3, 4, 5 and, when germane, 7) appear to be no more than derivative subparts of the first, but by no means constitute an exhaustive listing of "community of interest" criteria. 13/ Factor 6 is a somewhat diluted restatement of the fragmentation avoidance

8/ Sec. 111.70(2), Stats. This is a fundamental or "first principle" standard and normally represents a logical point of beginning.

9/ Arrowhead United Teachers v. WERC, 116 Wis.2d 580, 590-1, 342 N.W.2d 909 (1984).

10/ "The commission has never articulated precisely what constitutes a shared community of interest among employes. However, when reviewing the commission's decisions, it appears that the concept involves similar interests among employes who also participate in a shared purpose through their employment. Arrowhead United Teachers v. WERC, *supra* at 592. This appears no less true today than in January, 1984, when Arrowhead was decided.

11/ Section 111.70(4)(d)2.a.

12/ 1. Whether the employes in the unit share a community of interest distinct from that of other employes.
2. The duties and skills of employes in the unit sought as compared with the duties and skills of other employes.
3. The similarity of wages, hours, and working conditions of employes in the unit sought as compared to the wages, hours, and working conditions of other employes.
4. Whether the employes in the unit sought have separate or common supervision with all other employes.
5. Whether the employes in the unit sought have a common work place with the employes in said desired unit or whether they share a work place with other employes.
6. Whether the unit sought will result in undue fragmentation of bargaining units.
7. Bargaining history.

13/ Earlier Commission cases bolster this view, for the considerations I perceive to be merely "subparts" were included as parts of discussion criteria (though not enumerated by number) as to whether or not a definable "community of interest" existed within the factual purview of

standard mandated by Sec. 111.70(4)(d)2.a. None of the seven address the right of municipal employes to bargain collectively through representatives of their own choosing.

The majority begins by examining the first five factors of its "7 Factor" test. It finds "(t)he combination of the factors of community of interest, somewhat distinctive duties and skills, separate supervision, common work site, and distinctive wages all support a conclusion that the unit sought by Local 139 is an appropriate one." 14/ This is not an unreasonable conclusion if only those factors are considered. Reliance on only those factors, however, does not necessarily provide a reliable basis for such conclusion.

It is, moreover, a conclusion which these factors by no means compel.

For there is also an community of interest between the heavy equipment operators who are already part of the highway department bargaining unit and the heavy equipment operators who are employed at the landfill. It is a community of interest which is both obvious 15/ and sufficient to justify

those cases. Kenosha Unified School District, Dec. No. 13431 (WERC, 3/75); Madison Jt. School District No. 8, Dec. No. 14814-A (WERC, 12/76); Hartford Union High School, Dec. No 15745 (WERC, 8/77. The "7 Factor" test appears to have first emerged in 1978 only with the explanation that those seven factors had been previously considered by the Commission. Lodi Jt. School District, Dec. No. 16667 (WERC, 1978). Since then, the "7 Factor" test has been ritualistically invoked and applied by the Commission as deemed appropriate, and has survived without change to the present.

14/ Again, it is helpful to understand that these are not five independent, equal factors. As noted above, the last four factors cited in the majority's one sentence synopsis are no more than derivative subparts of the first, and should by no means be deemed an exhaustive listing of "community of interest" criteria. However, assuming arguendo that "community of interest" is a co-factor, only equal, but not superior, to the four which immediately follow, the majority neither defines it nor gives any reason for including it in the sentence. Listing it in this fashion begs the question.

As to the merits of the majority's summary, its conclusion as to "somewhat distinctive duties and skills. . ." (emphasis supplied) logically and correctly suggests that these duties and skills are also somewhat similar to those performed by members of the highway unit. It is the same kind of distinctiveness/similarity as exists between, say, the duties and skills of employes in the Clerk of Courts office and those of employes of the County Treasurer. Moreover, it seems to me that unless the majority is suggesting that the heavy equipment operations performed by the unrepresented landfill equipment operators are not as difficult or important as the heavy equipment operations performed by the represented members of the highway department unit, its finding as to "distinctive wages" contains more than a blush of disingenuousness.

15/ Each group is blue collar, works outdoors, has similar hours and working conditions, includes members who operate heavy equipment, who are able to operate heavy equipment interchangeably, and are responsible (in varying degrees) for equipment maintenance.

merger of the landfill employes with the highway unit.

But the majority expresses two additional concerns, both of which it appears to find compelling. First, it notes that although the positions of the landfill employes whom Council 40 now seeks to represent have been in existence for approximately six years, Council 40 has not sought to represent such employes ". . . through an election or unit clarification petition." Second, it interjects that ". . . Council 40 has not sought to have its status as exclusive bargaining representative in the claimed appropriate unit tested in this proceeding through an election in the entire unit."

As to the first concern, if offered by the majority under the rubric of "bargaining history," absent speculation, the point seems more illustrative of an absence of bargaining history than the converse. 16/ As to the second, I am unaware of any existing standard which suggests Council 40 should be viewed in a less favorable light because of what the majority appears convinced is a deficiency. In both cases, the focus of the majority's concern seems to be what it perceives to be an absence of electoral initiative or courage shown by Council 40 -- though neither absence constitutes a proper standard against which to measure a proposed bargaining unit. Under this circumstance, both concerns are reduced to mere unverified notions of equity held by the majority.

The majority does not demonstrate similar enthusiasm for the fragmentation avoidance standard. It opines: "(o)n balance, we find the fragmentation factor is not sufficient for us to reject an otherwise appropriate unit sought by Local 139." The majority goes on to argue that "(w)ith or without an accretion vote, this result (accretion) is undesirable because it substantially restricts the blue collar Solid Waste (landfill) employes' choice as to representation."

The majority concedes ". . . the obvious reality that the creation of an exclusive blue collar unit fragments the County's workforce." It then proceeds to fragment. Instead of merging the eight blue collar employes at the landfill with their blue collar counterparts in the highway unit, it insists on creating a separate blue collar departmental bargaining unit of those eight persons.

The majority accomplishes this by elevating the general right of municipal employes to choose their own collective bargaining representatives to

16/ It is, of course, also possible that by highlighting Council 40's past inaction, the majority seeks to establish a new, independent standard of equity (e.g., the failure of a potential collective bargaining representative to seek to represent a group of employes over a six year period shall cause a forfeiture of any accretion it might otherwise claim, as a matter of fairness). Actually, the majority doesn't share the reason it finds the record of Council 40's apparent past inaction with respect to the landfill employes of sufficient pertinence to be worth reciting. If, however, it is asserting "equity," putting aside the question of whether equity is achieved, the majority clearly plows new ground in this area.

a primary and controlling position vis-a-vis the more specific fragmentation avoidance standard. Intent as it is on achieving an undeniably laudable purpose of expanding the representation election options for this small group of landfill employes, the majority seems to view the employes' general statutory right to bargain collectively through representatives of their own choosing as a terminal station instead of the starting point I believe it more properly constitutes in the process of determining appropriate bargaining units.

There is no question that the general statutory right of municipal employes to choose their own collective bargaining representatives is an important standard. But, it is neither an unqualified right 17/ nor the most important standard. Through the years it has been shaped and tailored by the additional standards of "community of interest" and "fragmentation avoidance." Just as the fragmentation avoidance standard ". . . does not mandate inclusion of employes within a single unit in all circumstances . . .", 18/ so it is that the general right of municipal employes to choose their own collective bargaining representative must also be appropriately balanced.

Appropriate balance, however, is not obtained by arbitrarily assigning a primacy status to this general right. Such action violates an accepted rule of statutory construction, 19/ reverses established Commission priorities, 20/ and strips future Commission bargaining unit determinations of any responsible predictability. Notwithstanding the salutary nature of the majority's wish to maximize the landfill employes' choices in selecting their collective bargaining representative, under the circumstances of this case I do not believe it is an option legally available to us. 21/

17/ For instance, the Commission does not provide any relief for employes who desire a change in their collective bargaining representation unless they meet certain standards as to showing of interest and the timing of their petition, even if they are in the majority.

18/ Arrowhead United Teachers v. WERC, supra at 602.

19/ Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. Footnotes omitted; emphasis added (by the court)." State v. Amato, 126 Wis.2d 212, 217, 375 N.W.2d 75 (1985), citing 2A Sutherland, Statutory Construction, s. 51.05 (4th ed. 1973).

20/ "The overriding determinative factor is to 'whenever possible avoid fragmentation by maintaining a few units as practical in keeping with the size of the total municipal work force.'" (Emphasis supplied) Appleton Area School District, Dec. No 18203 (WERC,11/80), citing Milwaukee County, Dane County Circuit Court (George R. Currie, Reserve Judge) 6/76 (aff'ing Commission Dec. No. 12571, 3/74).

21/ The majority wonders ". . . how our colleague's heavy reliance on anti-fragmentation allows him to leave unresolved the status of the other eight blue collar and white collar employes who remain unrepresented . . ." More accurately, the majority's rhetorical wonderment seems to go to

This is not to say there should be no election. But given the parameters of the law surrounding the facts of this case, the election should be limited to whether the landfill equipment operators wish to be accreted to the highway department bargaining unit or remain unrepresented. Whether we believe a possible consequence of such election to be unfortunate in the short run is immaterial; our task is to administer the law, not to protect municipal employes from the immediate consequences of a choice some may deem ill-considered. The employes, after all, are in a better position than we to make an informed judgment as to where their best interests lie.

Dated at Madison, Wisconsin this 27th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairperson

the undisturbed, not unresolved, status of the eight remaining employes. In any event, appropriate deference to the mandate of the statutory fragmentation avoidance standard does not require unit placement determinations for all remaining unrepresented employes where, as here: 1) the record is inadequate for us to make an informed decision as to appropriate unit placements for them; 2) to ". . . reopen the hearing and take additional evidence . . ." would unnecessarily postpone a case result already too long delayed (the original petition was filed on May 31, 1990); and 3) there is a less than compelling basis to do so. Under these circumstances, leaving undisturbed the present status of the remaining eight cannot be fairly characterized as a "piece-meal approach."