

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

CITY OF OSHKOSH

Involving Certain Employees of

CITY OF OSHKOSH (COURTHOUSE)

Case 203
No. 56628
ME-955

Decision No. 27663-B

Appearances:

Mr. Richard Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin 54913, appearing on behalf of Oshkosh Clerical-Paraprofessional Union Local 796-B, AFSCME, AFL-CIO.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the City of Oshkosh.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER CLARIFYING BARGAINING UNIT**

On July 3, 1998, the City of Oshkosh filed a petition with the Wisconsin Employment Relations Commission to clarify an existing bargaining unit represented by Oshkosh Clerical-Paraprofessional Union, Local 796, AFSCME, AFL-CIO by excluding three Accountant positions. The City filed the instant petition based upon unsolicited letters the City received from the three incumbent Accountants requesting exclusion from the bargaining unit. The City argues herein that the three Accountants are supervisors, while the Union opposes their exclusion from the unit asserting that they are, at most, leadpersons.

No. 27663-B

On November 2, 1998, hearing on the petition was conducted at Oshkosh, Wisconsin before Sharon A. Gallagher, a member of the Commission's staff. The hearing was transcribed and a copy of the transcript was received on November 20, 1998. The parties filed initial briefs on December 23, 1998 and reply briefs were received by January 19, 1999.

The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Oshkosh Clerical-Paraprofessional Union, Local 796, AFSCME, AFL-CIO, herein the Union, is a labor organization with its principal offices in Appleton, Wisconsin.

2. City of Oshkosh, herein the City, is a municipal employer with its principal offices in Oshkosh, Wisconsin.

3. The Union is the certified collective bargaining representative of "all regular full-time and regular part-time clerical and paraprofessional employees of the City of Oshkosh, excluding supervisory, managerial, and confidential employees." Dec. No. 26673-A (WERC, 6/93). The unit has always included the position of Accountant.

4. The City Finance Department is headed by Ed Nokes. The Deputy Director of the Finance Department is Greg Henke.

The Finance Department is divided into three sections: Accounting and Collections; Assessor; and Parking Utility. In the Accounting and Collections section, the City employs the three Accountants in dispute herein (Rothe, Marquardt and Neumann), as well as two Account Clerk II's, five Account Clerk I's, and one Data Entry Clerk.

5. The undated position description for the Accountant position reads, in relevant part, as follows:

NATURE OF WORK

This is responsible accounting work in coordinating and maintaining accounting and fiscal operations.

Work involves responsibility for performing varied and specialized accounting tasks at the professional level, incumbents of this class frequently develop, revise, and install accounting procedures and forms, and train and supervise subordinate personnel in carrying out fiscal policies and procedures. Successful completion of the work of this class requires an employee to exercise independent, responsible judgment in solving problems which arise in his work

area. Work is performed under the general supervision of the Director of Finance or the Comptroller, who is generally available for assistance on the more complex accounting problems encountered. Work is reviewed through conferences and by analysis of reports and records.

EXAMPLES OF WORK

Supervises the billing and accounting work of the utility and accounting and collection sessions; balances meter books; computes consumption; balances daily cash deposits and other cash transactions; prepares delinquent account lists; prepares monthly recapitulation of merchandise and final billings; maintains general and subsidiary ledgers and journals; coordinates accounting and clerical activities; prepares trial balances, monthly statements of funds received and disbursed; records bonds and bond transactions in bond register; prepares monthly bank reconciliation; prepares various financial reports; prepares journal vouchers to retire property; makes recapitulations of all receivables; sets up utility receivables; predicts cash flow and recommends the proper cash balance; distributes interest from investments; processes papers for collection of delinquent accounts; writes miscellaneous and trust account checks; disburses payments due on indebtedness; audits receipts and disbursements and billing distributions; completes reports to state or federal agencies; assists outside auditors who audit the City; supervises subprofessional or clerical workers.

DESIRABLE KNOWLEDGES, ABILITIES, AND SKILLS

Thorough knowledge of municipal accounting and collection methods and procedures.

Knowledge of ordinances, laws, and regulations governing city financial administration.

Ability to develop and maintain effective public relations.

Supervisory ability.

REQUIRED EDUCATION AND EXPERIENCE

High school graduation and completion of a standard business course.

Three years' experience in accounting, cashiering, and general clerical work.

. . .

None of the Accountants has a separate office. Their desks are in the same open area as the employees with whom they work. Nokes and Henke have separate offices in an area removed from the work area of the Accountants.

All three of the Accountants have the authority to grant overtime, change work schedules and approve sick leave and vacation requests, although the leave forms are ultimately signed by either Nokes or Henke.

None of the Accountants substitute for Nokes or Henke when they are absent.

Nokes and Henke hold meetings which the three Accountants attend on an "as-needed" basis. At these meetings, Nokes and Henke give the Accountants information which they are expected to pass on to the other full-time employees in their areas.

When an employee is hired in the Accounting and Collections section of the Finance Department, the Accountant who will direct the work of the new employee reviews the applications and determines who will be interviewed. The interviews are then conducted by Deputy Director Henke, a representative from the City Personnel Department, and the Accountant in question. The interview team reaches a consensus on who to hire.

The Accountants receive wages and benefits pursuant to the collective bargaining agreement. If they need to work overtime, they do not need to get approval.

6. Cathleen Rothe is the Accountant who directs the Collections Unit. Rothe is responsible specifically for the following activities: opening all mail; receipting; adding taxpayers to the tax rolls; auditing receipts and disbursements as well as billing distributions; completing reports to governmental agencies; preparing monthly recapitalization of merchandise and final bills; maintaining a unit computer system and training employees in the use of that computer system; writing miscellaneous and trust account checks; reimbursing special payments on indebtedness; dispersing special payments; performing daily auditing of receipts; disbursements and billings; balancing daily cash deposits and other cash transactions; preparing monthly bank reconciliations; and daily tax roll balancing during the tax roll season.

There are two full-time employees and one part-time employee who work with Rothe: Jill Vaughn, a full-time Account Clerk I with the City since December, 1997; Deb Mugerauer, a full-time Account Clerk I with the City since 1993; and part-time employee Karen Bier. One

of these full-time employees handles all dog and cat licenses, and the other full-time employee handles all parking receipts and manages the City's parking areas. In addition, Vaughn and Mugerauer serve all members of the public who appear in person to pay the City for various items.

Rothe distributes work to these two full-time employees after she opens the mail. Rothe is authorized to request a regular part-time employee to assist in her section when there is a heavy workload. During the tax roll season (beginning in December through the end of March each year), there are one or two seasonal employees as well as one part-time employee who assist in handling tax roll receipting.

Vaughn and Mugerauer do not need to have their work checked, as they are aware of and experienced in performing with the general tasks they must complete each day. There is no formal evaluation system in the Finance Department.

Rothe has never issued a written warning nor has she laid off, suspended, or discharged any employees. In 1993, shortly after Rothe was hired, Rothe witnessed an employee who was rude and recommended to Nokes that the employee be transferred out of her position or that the position be eliminated by the City. Henke and Nokes made the decision to transfer this employee. The employee transferred out of the position but remained a City employee. Rothe has counseled employees in circumstances where an employee has placed money in the wrong account, where the employee has not completed receipts in a timely fashion or the employee has made some other small mistake. Rothe has never documented any of this counseling, and these instances have not resulted in any discipline. Employees who work with Rothe come to her with complaints regarding other employees but no employee has filed a grievance with Rothe.

7. Lynn Marquardt is the Accountant in the Finance Department who is responsible for accounts receivable/payable and general ledger and reporting functions of the City. As such, Marquardt prepares various financial reports; disburses payments due on indebtedness; completes state and federal reports; assists outside auditors who audit the City; prepares delinquent account lists, maintains general and subsidiary ledgers and journals; coordinates accounting and clerical activities; prepares trial balances and monthly statements of funds received and disbursed; prepares and disburses payments on indebtedness; and audits receipts and disbursements as well as billing distributions. Marquardt also assists in training employees in the Finance Department, analyzing departmental procedures for efficiency and effectiveness, and helping customers at the counter.

Marquardt assigns work to two full-time employees and utilizes one part-time worker on an as-needed basis during the busy season in her area. The full-time employees who work with Marquardt are Laurie Burns, Account Clerk II (responsible for accounts payable paperwork),

and Sue Stahl, Data Entry Clerk, (assists Burns with accounts payable paperwork and enters data on accounts payable into the computer).

Marquardt has never formally disciplined any employee, although she has orally counseled employees regarding their work performance.

8. Beverly Neumann is the Accountant for the City's Water and Sewer Utility. In her position, she oversees the billing and accounting work of the Utility; balances meter books; computes consumption for the Utility; balances daily cash deposits; prepares delinquent account lists, a monthly recap of merchandise and final billings; prepares journal ledgers; coordinates accounting and clerical activities of the employees she works with; prepares trial balances; prepares monthly statements of the money received and disbursed by the Utility; sets up Utility receivables; and works with auditors of City accounts at the end of the year.

Neumann works with three full-time employees, and normally has one part-time employee assigned to her during the summer months. Neumann distributes work in her area, trains employees and checks their work while she is performing her own work of overseeing the billing process for the Utility. One full-time employee who works with Neumann, an Account Clerk I, handles billing, daily receipting, and other recordkeeping and answers the telephone. A second full-time Account Clerk I has the primary responsibilities of answering the telephone, performing property searches and meter charge outs and contacting customers for information as requested by Neumann. The third full-time employee, an Account Clerk II, sets up all new accounts, bills for merchandise sold by the Utility and is the back-up on answering telephones.

During her tenure as an Accountant, Neumann has arranged for Job Service workers to work in her area. Job Service workers are not paid or employed by the City. Neumann terminated a Job Service worker after advising Nokes that the person was not working out in the position. Neumann then called the Job Service worker's contact at Job Service and indicated that the City did not want the worker back. The City has not used Job Service workers in the Finance Department since the incident.

On four occasions, Neumann has verbally counseled employees and has, on her own motion, kept notes of these counseling sessions for her own files. Neumann's notes were not placed in any employee's personnel file. Two of these memos to her own files were made in the spring of 1996, and two others were made March and August, 1998, respectively. These memos concerned one complaint that had been brought to Neumann by employees against a co-worker, another dealt with an employee who was taking work out of the office, and a third and fourth concerned an employee who was not timely performing her duties. None of these memos resulted in any of the employees receiving formal discipline and no employees filed grievances regarding any of these verbal counseling sessions/memos of Neumann's.

In 1997, Neumann terminated a part-time employee for job performance issues after consulting with Nokes and Henke. Neumann advised the employee that she was to be terminated.

9. Neumann possesses supervisory authority and responsibility in sufficient combination and degree to be deemed a supervisor.

10. Rothe and Marquardt do not possess supervisory authority and responsibility in sufficient combination and degree to be deemed supervisors.

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

CONCLUSIONS OF LAW

1. Accountant Neumann is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. Accountants Rothe and Marquardt are not supervisors within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore are municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER

1. Accountant Neumann is hereby excluded from the bargaining unit referenced in Finding of Fact 3.

2. Accountants Rothe and Marquardt shall continue to be included in the bargaining unit referenced in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of April, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

CITY OF OSHKOSH (COURTHOUSE)

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

POSITIONS OF THE PARTIES

City

The City argued that the three Accountants are supervisors and should be excluded from the unit because they have the authority to effectively recommend hiring, promotion, transfer, discipline and discharge of employees. The City noted that the job description for the Accountant position states that the position “supervises sub-professionals or clerical workers”, and lists as desirable both the ability to supervise and to train and supervise subordinate personnel. The City noted that Rothe was involved in the interviewing and hiring of both regular employees and seasonals. Accountant Marquardt had also been involved in interviewing employees and one employee had been hired on her recommendation over the apparent objection of Administrative Services Director Svatos. Accountant Neumann was similarly involved in interviewing and hiring and she had both hired and terminated a Job Service worker.

In regard to discipline, the City noted that no formal discipline has been necessary in Marquardt’s area but that Neumann has issued verbal reprimands in the past and has participated in the discharge of a part-time employee. In 1993, Rothe effectively recommended the transfer of an employee.

The City contended that the three Accountants evaluate the performance of their employees on a daily basis, although no formal evaluation mechanism is in place in the Department; that the three Accountants handle the overtime, sick leave, vacation and work schedule changes for their employees; and that they continually monitor employee work output. In addition, the City noted that the Accountants have the authority and do in fact direct and assign the employees who are working under them. In this regard, the City noted that Marquardt assigns new tasks to employees, trains employees on new software and that Neumann and Rothe have assigned and reassigned tasks to the employees in their areas and that they have both trained employees. Therefore, the City urged that it has proven the first two factors of the Commission’s seven-factor supervisory test.

In regard to the number of employees supervised and the number of other persons who exercise greater, similar or lesser authority over the same employees, the City noted that Rothe, Marquardt and Neumann each supervise at least two and up to three full-time employees as well as some part-time and seasonal employees. The fact that the Commission’s ruling in favor of the City here would create one supervisor for every approximately three employees is not a

factor which the Commission has relied upon to determine whether supervisors are in fact substantially performing supervisory duties. The City noted that the three Accountants are in separate divisions and that each has separate and autonomous responsibility for the fiscal operations in her division, such that the City needs all three of the Accountants to be supervisors of the employees with whom they work.

In regard to the level of pay, the City urged that on a bi-weekly basis the salaries of the Accountants are from 15 to 42 percent higher than the employees they supervise when the Accountant rate is compared with the Data Entry Clerk rate (the lowest-paid employee) and the Account Clerk II (the highest-paid employee). Given the fact that the Accountants as well as Deputy Director Henke stated that the Accountants are paid both for their skills and for their supervisory responsibilities, the City argued that the level of pay factor supports a conclusion that the Accountants should be removed from the bargaining unit.

In regard to the factor of whether the supervisor is a working supervisor or spending a substantial amount of time supervising employees, the City noted that Rothe, Marquardt and Neumann testified they spend between 50 and 90 percent of their time performing supervisory duties. Therefore, the City argues it would not be appropriate to conclude that they are lead workers. The City also urged that the Accountants are primarily supervising the employees under them, rather than supervising an activity.

In regard to whether the Accountants evidenced independent judgment and discretion in exercising their supervisory authority over employees, the City noted that the Accountant's recommendations regarding hiring have been counted as "key" and "critical" by Deputy Director Henke. Henke does not supervise the employees under the Accountants on a day-to-day basis. The City also noted that the Accountants sign and check the work of their employees; that the Accountants evaluate their employees on a daily basis; that they approve leaves for their employees; and that they decide on staffing levels - all essentially without the input of either the Director or Deputy Director of the department. Finally, the City pointed out that the Accountants attend management staff meetings and pass on information to their employees; that they have effectively disciplined employees; and that they can grant overtime and direct employees without their supervisors' approval.

For all of these reasons, the City urged that the three Accountants are supervisors who should be removed from the existing collective bargaining unit.

Union

The Union argued that the three Accountants do not meet the seven-factor test utilized by the Commission in determining whether an employee is a supervisor within the meaning of the Municipal Employment Relations Act. Rather, the Union contended that the three Accountants are working foreman or lead persons.

In this regard, the Union noted that the Accountants cannot effectively recommend hiring, promotion, transfer, discipline or discharge. The Union asserted that although the Accountants play a role in hiring, they do not have the authority to hire on their own; that the Accountants have never formally evaluated their employees; and that they have never formally disciplined any employees, although they may have coached or counseled employees, which actions have not resulted in the filing of any grievances. Although one of the Accountants was apparently involved in an employee's transfer, the Union noted that: (1) this occurred in 1993; (2) it was not clear if the action was initiated by the Accountant or the Deputy Director; and (3) it was unclear whether the transfer was a voluntary one or in lieu of discipline. Furthermore, the Union pointed out that no bargaining unit member has ever been discharged or recommended therefor by an Accountant.

In regard to whether the Accountants direct and assign work to the employees, the Union noted that each Accountant only works with two or three employees plus perhaps a seasonal worker during tax season. The Union pointed out that the job description requires the technical skills of an accountant and emphasizes these skills over the supervisory duties allegedly required for the position.

The Union urged that the small number of employees supervised tends to favor a finding that the Accountants are not supervisors. Furthermore, the Union noted that the Accountants have work that they must perform while they are directing the activities of the employees and thus that they are more likely to be working foreman or lead persons.

In regard to Accountants' pay, the Union noted that the Accountants are only paid approximately \$200 to \$300 more per month than the Account Clerk II's, and that the Accountant job description emphasizes a thorough knowledge of county and municipal ordinances and the ability to maintain public relations – both of which would tend to show that the Accountants are paid more for their technical skill than for their supervisory duties.

In the Union's view, the Accountants supervise activities, not employees or groups of employees. In this regard, the Union noted that Deputy Director Henke stated that the Accountants are "responsible for those areas". Contrary to the Accountants' testimony that they spend 50 to 90 percent of their time supervising, the Union indicated that the Accountants could not spend a majority of their time supervising, and that a detailed analysis of the job description demonstrates that the Union's assertions in this area are correct.

In regard to the factor of whether Accountants exercise the independent judgment and discretion of supervisors, the Union noted that although each Accountant stated she has the authority to formally discipline employees, none has actually disciplined bargaining unit employees. Although each Accountant has stated that they set policy, it is the Deputy Finance Director who actually sets departmental policy. Although the Accountants stated that they

assign and direct the work of their employees, the Accountants actually only divide assignments and check the work of employees on a routine basis while they are performing their own bargaining unit work.

The Union urged the Commission to utilize a three-factor test to determine whether an employee is a working foreman or a supervisor, citing CITY OF SHEBOYGAN, DEC. NO. 14359 (WERC, 2/76). The Union listed the three factors the Commission used to find an employee a supervisor not a lead person in the SHEBOYGAN case, as follows:

- (1) the employee must spend a substantial amount of time supervising employees;
- (2) the employee must have authority to rate employees for promotion; and
- (3) the employee must have the ability to initiate disciplinary warnings.

In regard to the first factor, the Union noted that the Accountants only supervise employees while performing their own work and that their workload is so substantial that they could not possibly supervise employees for a substantial amount of time. The Union also noted that the Accountants have never evaluated employees. Finally, the Accountants have never formally disciplined any bargaining unit employees. The Union urged that the termination of a non-unit employee who is working through Job Service is not the same as participation in the discipline and termination of a bargaining unit employee; that the personal notes kept by Accountant Neumann did not result in any disciplinary action or grievances being filed and should not be raised to the level of disciplinary warnings; and that in 11 years of employment in her position, Accountant Marquardt has never disciplined an employee.

The Union argued that the City failed to prove that Accountant Rothe participated in the management meetings that resulted in a 1993 decision to transfer or offer of a transfer to a bargaining unit employee. Further, the Union noted that its President testified that grievances would be filed with the Deputy Director - not to the Accountants. The Union also contends that because the Deputy Director and Director's offices are approximately 50 to 100 feet from the areas in which the Accountants work with other employees, the actual supervisors of the departmental employees are readily available. Finally, the Union asks how many supervisors a department of 21 actually needs and answers that question by stating that if the City prevails, the supervisor to employee ratio would rise from an acceptable level of one to seven to an unacceptably high level of one to three.

The Union therefore sought continued inclusion of the Accountants in the bargaining unit.

DISCUSSION

Section 111.70(1)(o)1, Stats., defines a supervisor as:

. . .any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively to 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 factors the Commission focuses upon in evaluating claims of supervisory status under Sec. 111.70(1)(o)1, Stats., are as follows:

- (1) The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
- (2) The authority to direct and assign the workforce;
- (3) The number of employees supervised and the number of persons exercising greater, similar or less authority over the same employees;
- (4) The level of pay, including an evaluation of whether the supervisor is paid for his/her skill or his/her supervision of employees;
- (5) Whether the supervisor is supervising an activity or is primarily supervising employees;
- (6) Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
- (7) The amount of independent judgment exercised in the supervision of employees. CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97).

Not all of the above factors need to reflect supervisory status for us to find an employee to be a supervisor. Our task is to determine whether the factors are present in sufficient combination and degree to warrant a finding that an employee is a supervisor. ONEIDA COUNTY, DEC. NO. 24844-G (WERC, 6/98).

The supervisory status of the three Accountants presents a close question.

All three Accountants spend a substantial amount of time directing the work of other employees and exercise independent judgment when doing so. They have independent responsibility for altering work schedules, granting or denying sick leave and authorizing employees to work overtime.

We are further satisfied that although the Accountants' pay level is established by the collective bargaining process, their compensation is partially reflective of their responsibilities directing the work of other employees.

All three Accountants play a significant role in the consensus hiring process used by the City.

However, we are troubled by the reality that the three Accountants direct the work of a total of eight employees – all of whom work in the same general area in City Hall. In addition, while Accountant Neumann clearly exercised significant disciplinary authority when discharging a part-time employee, we have some doubt as to the extent of the disciplinary authority possessed by Rothe and Marquardt.

Given all of the foregoing, we conclude that the record does not support a determination that all three Accountants are supervisors. However, Accountant Neumann's exercise of disciplinary authority distinguishes her from her Accountant colleagues. Her obvious disciplinary authority, when viewed in conjunction with her other attributes of supervisory status, satisfy us that Accountant Neumann does possess supervisory authority in sufficient combination and degree to warrant her exclusion from the unit.

Dated at the City of Madison, Wisconsin this 23rd day of April, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

gjc
27663-B.D

