

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO
Involving Certain Employes of
VILLAGE OF NECEDAH

Case 1
No. 52107 ME-747
Decision No. 28192-B

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO
8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on
behalf of the Union.

Curran, Hollenbeck & Orton, S.C., Attorneys at Law, 111 Oak Street, P.O. Box 140,
Mauston, Wisconsin 53948, by Mr. Fred D. Hollenbeck, appearing on behalf
of the Village.

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

Wisconsin Council 40, AFSCME, AFL-CIO filed a petition on January 20, 1995, requesting that the Wisconsin Employment Relations Commission clarify a bargaining unit of certain employes of the Village of Necedah to include the position of Public Works Coordinator. Hearing was held in Necedah, Wisconsin on February 27, 1995 before Examiner Debra L. Wojtowski. The parties offered oral argument at that hearing and agreed not to file written briefs. A transcript of the hearing was provided to the Examiner on April 21, 1995. The Commission having considered the record evidence and the parties' arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, referred to below as the Union, is a labor organization which has its offices at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin.

No. 28192-B

2. The Village of Necedah, referred to below as the Village, is a municipal employer which has its offices located at Necedah, Wisconsin, with a mailing address of P.O. Box 371, Necedah, Wisconsin. The Village employs a total of six individuals in all departments; the Village Administrator and his secretary, a police officer and Bocerra, Needles and Ziebell in the Public Works Department.

3. In Village of Necedah, Dec. No. 28192-A (WERC, 11/94) the Commission certified the Union as the exclusive bargaining representative for a unit consisting of "all regular full-time and regular part-time employes of the Village of Necedah, excluding supervisory, managerial and confidential employes." At the time the parties stipulated to the election which led to the certification, they agreed that the Public Works Coordinator was ineligible to vote as a supervisor.

4. On January 20, 1995, the Union filed a unit clarification petition wherein it contends that the position of Public Works Coordinator, currently occupied by John Bocerra, is held by a municipal employe, and therefore should be included in the bargaining unit described in Finding of Fact 3, above. The Village disagrees arguing that Bocerra is a supervisor and a confidential employe and should continue to be excluded from the bargaining unit.

5. John Bocerra, the incumbent Public Works Coordinator, has been employed by the Village of Necedah for twelve and one-half years. He was initially hired as the Assistant Public Works Coordinator and held that position until he was promoted into his current position approximately eight years ago. As Public Works Coordinator, Mr. Bocerra is responsible for the daily functioning of the Public Works Department; i.e., water, sewer, and street maintenance. In addition to Bocerra, there are two other full-time employes in the Department, Needles and Ziebell. The job description for the Public Works Coordinator in effect until February 16, 1995, lists as the position's responsibilities:

SEC. 2-3-8 PUBLIC WORKS COORDINATOR

- (a) Term. The Public Works Coordinator shall serve at the pleasure of the Board.
- (b) Duties. The Public Works Coordinator shall have the following duties:
 - (1) He shall have general charge and supervision of all public works in the Village.
 - (2) He shall be responsible for the maintenance, repair and construction of streets, alleys, curbs and gutters, sidewalks, bridges, street signs, storm sewers, Village buildings and structures and all machinery, equipment and property used in any activity under his

control.

- (3) He shall have charge of all public services including garbage and refuse collection and disposal, snow and ice removal, street cleaning and flushing, mosquito and rodent control.
- (4) He shall perform such other activities and duties as are imposed upon him from time to time by the Village Board or by his job description and employment contract.

On February 16, 1995, following the filing of the unit clarification petition and prior to hearing, the Village Board enacted an ordinance changing the job description of the Public Works Coordinator to add the following:

...

- (5) He shall provide assistance to the Village Board in representing the interests of the Village Board and taxpayers in negotiations with any union representing the members of the Village Public Works Department. Such assistance shall include, but is not limited to, confidential information necessary to assist the Village Board in developing its negotiation and/or beginning strategy.
- (6) He shall have the authority to appoint subordinates subject to the approval by the Village Board. Such authority shall include full time and part time employees.
- (7) He shall have the authority to discipline, lay off and terminate the employment of subordinates. Such authority includes, but is not limited to, oral reprimands or warnings, written reprimands or warnings, suspensions and termination.

The effect of the Board's February 16, 1995 change to Bocerra's job description was twofold: first, it gave him authority to hire employees, subject to the Board's approval, and to independently discipline employees, up to and including termination; secondly, it gave him the responsibility to assist the Village in its labor negotiations with the Union. Bocerra previously

lacked the hiring and disciplinary authority in the first instance and his negotiation assistance was not needed until the collective bargaining unit came into existence in November of 1994, in the second. On February 17, 1995, Bocerra was informed of his new job responsibilities by the Village Administrator who supplied him with a copy of the ordinance. When Bocerra asked what his authority was, the Administrator told him it was written in the ordinance. Bocerra had no other discussion with either the Administrator or the Board concerning his new responsibilities.

6. The Village of Necedah Public Works Department has two employes besides Bocerra; Bill Needles, Assistant Public Works Coordinator and maintenance worker, and Roger Ziebell, street maintenance. Needles does the mechanic work on the vehicles and works in the Water and Sewer Departments as back-up for Bocerra. Ziebell maintains the streets and signs and helps out where needed with other departmental work. Bocerra earns \$11.75 an hour, Needles earns \$9 or \$10 an hour, and Roger Ziebell earns \$7.75 an hour. All Public Works employes have the same seven paid holidays, and all employes are eligible for the same insurance, retirement plans, paid sick leave and vacation.

7. All Public Works employes work forty hours a week, from 7:00 a.m. until 3:30 p.m., Monday through Friday. Bocerra is responsible for the coordination of work activities in the Department. Work in the Department is generally performed according to a routine procedure that was in place when Bocerra began working in the Department. This procedure includes, for example, making rounds to check trucks and vehicles. Bocerra assigns maintenance and other non-emergency work to employes on a daily basis. In addition, emergencies are brought to the attention of the Public Works Department by the Administrator or the Village residents. When available, Bocerra handles these problems himself, but frequently assigns another employe, depending on the employe's availability and the type of emergency. If Needles takes the emergency call, he may handle the matter himself. Some of the work assignments are handled cooperatively. For example, employes are contacted outside of normal work hours because of emergencies, such as a sewer main problem. At those times, whoever gets the call contacts another employee for assistance and the two handle the emergency. The employes coordinate so that someone is in town at all times. In the event of an emergency, Bocerra is usually the first person called, but if he cannot be reached, Needles is contacted. About ten to fifteen times a year, Bocerra receives emergency calls that he cannot respond to; at those times he calls another employe to attend to the problem. Individuals who work emergency hours get compensatory time, including Bocerra. Each Department employe generally works every third weekend, primarily to run tests at the waste treatment plant. Bocerra prepares the weekend schedule.

8. The Village Administrator, Dwayne Saunders, is Bocerra's direct supervisor. Saunders spends approximately two to three hours a month giving Bocerra work direction. Of that, only an hour is specific instruction about what Bocerra should do. Generally, how the work gets done is up to Bocerra. For emergencies or upon a public complaint, Saunders will call Bocerra and direct him to respond immediately. If Bocerra does not answer his radio, Saunders attempts to reach one of the other two men in the Department.

9. Employees contact either Bocerra or the Village Administrator to request sick leave. On the occasions they contact Bocerra at home, Bocerra passes along the information to the Administrator. Bocerra has no authority to deny a sick leave request.

10. There is no formal grievance procedure in the Village. If Public Works Department employees have a complaint, they would bring it to Bocerra who would direct it to the Administrator or the Board. There is no formal evaluation process for the employees in the Public Works Department.

11. Both incumbents in the Public Works Department have been hired during Bocerra's tenure. When Needles was hired seven years ago, the Village Board and Joe Hauffenberger, the previous Village Administrator established the job qualifications. Although Bocerra was shown the applications, the Board and Administrator chose the applicants to interview and conducted the interviews. Bocerra was not present at the interviews and the successful applicant was hired by the Board. Approximately one year ago the Village made its most recent hire, Ziebell. The Administrator and Village Board set the criteria for the position although Bocerra suggested the Board require a CVL license for driving the trucks and a license to run the waste treatment plant or someone with experience in public works. He did not write or place the recruitment ad. The applications went to the Village Administrator and Bocerra and the Village Administrator chose which applicants were the best qualified. Bocerra was present during the interviews along with the Village Board and the Village Administrator. The Board and Administrator formulated the questions and Bocerra described the daily work. Although Bocerra indicated who he would hire, the Board did not follow his recommendation nor did the applicant selected have the qualifications that Bocerra suggested.

12. There have been temporary and seasonal workers employed during Bocerra's tenure as Public Works Coordinator. Most of these workers have been high school students paid through a program connected to their school. When a summer seasonal employee is hired, the Administrator and Bocerra discuss some possible student employees, and agree on an applicant to recommend to the Board. Bocerra has on some occasions indicated he did not want a particular student. There has never been any disagreement on who to recommend between Bocerra and the Administrator and the Board has never rejected an applicant. The Administrator generally decides how many high school students will be needed. Because they cannot operate all the machinery, the student employees are of limited use; as a result, the Administrator sets a daily schedule for the students to keep them busy with work in line with their capabilities. In addition to the student employees, one temporary employee was hired three or four years ago primarily to catch up on back load of water meter repairs. This employee worked six months to a year and Bocerra did not take part in the hiring.

13. There has never been an occasion to lay off employees since Bocerra has held his position.

Because of the small size of the Village work force, there are essentially no opportunities for transfer or promotion.

14. No Public Works Department employe has been formally disciplined during Bocerra's employment with the Village. Bocerra's involvement in discipline has thus far been limited to occasional "arguments with the other employes about whether they are performing their job correctly."

15. Bocerra provides some budget information on departmental needs for the coming year to the Administrator; these are primarily cost estimates for replacing equipment. Wage costs are not part of the information he prepares. The Administrator prepares the formal budget and addresses the Board. Bocerra does not attend any meetings in which the budget for the Public Works Department is discussed.

16. Bocerra possesses supervisory duties and responsibilities in sufficient combination and degree to render him a supervisory employe.

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

CONCLUSION OF LAW

The position of Public Works Coordinator, currently occupied by John Bocerra, is held by a supervisor within the meaning of Sec. 111.70(1)(o), Stats., and therefore Bocerra is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT 1/

The position of Public Works Coordinator hereby continues to be excluded from the bargaining unit of Village of Necedah employes described at Finding of Fact 3, above.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner

(Footnote 1/ appears on the next page.)

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.

(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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from previous page.)

(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.

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(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.

VILLAGE OF NECEDAH

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

BACKGROUND

This proceeding was initiated by a unit clarification petition filed by the Union to include the position of Public Works Coordinator within the bargaining unit described at Finding of Fact 3.

POSITIONS OF THE PARTIES

Union

In support of its position that the Public Works Coordinator should be included the bargaining unit, the Union contends that the Public Works Coordinator has not exercised supervisory authority.

The Union points to Bocerra's limited or nonexistent role in the hiring of the Department's two other employes, both hired during his tenure. Bocerra had no input into the hiring of Needles, and during the hiring of Ziebell, his involvement was limited to culling the initial applications. The Union finds it particularly notable that Bocerra's recommendations, both as to qualifications and as to the individual to select, were disregarded by the Board.

The Union argues that the Public Works Coordinator has no authority to deny sick pay, has little or nothing to do with the granting of vacation other than to pass the requests on to the Village Administrator, and has limited authority to schedule overtime. The weekend rotation is a routine matter that involves no independent judgment or discretion. When a citizen calls Bocerra in the middle of the night, it is because it is his job and people know him in a small town. The fact that Bocerra calls Needles or Ziebell if he cannot attend to the problem does not rise to the level of supervisory authority.

The Union also contends that the Village Board's apparent grant of supervisory authority in a recently enacted job description was an attempt to prevent Bocerra from exercising his rights to organize into a collective bargaining unit. The Union suggests that the grant of authority is spurious, pointing to the Board's failure to develop specific procedures or give direction to Bocerra and to the Administrator's uncertain and indefinite testimony about the scope of Bocerra's authority.

In support of its argument that there was no intention to grant the Public Works Coordinator actual supervisory authority, the Union notes that no discussion was held with Mr. Bocerra as to what the adjustment in his authority means or how the process would operate. There has been, for example, no explanation as to him as to how he would hire employes or any detail on how the

disciplinary system would work.

The Union requests the Commission to find that Bocerra's position is not supervisory or confidential and to include him in the bargaining unit.

Village

In support of its contention that the subject position is supervisory, the Village states that Bocerra spends twenty to thirty to percent of his time supervising employes and has exclusive authority to assign the work force.

The Village and the Union are in agreement that until February 16, 1995, Bocerra lacked the authority to hire and fire Department employes. The Village points out, however, that Bocerra has exercised veto power over summer hires. He has not challenged any sick leave, but there has been no need to do so. His authority with regard to granting vacations has never been exercised because Bocerra and the employes have worked out a mutually agreeable schedule. The Village maintains that to the extent there have been grievances Bocerra has handled them, and there hasn't been any occasion to discipline. Pointing to the testimony of the Village Administrator, the Village maintains that Bocerra functions independently when running the Department.

There is no basis to doubt the Village's grant of supervisory authority. The Village concedes that the authority is new, but the Village has never has a union before. The fact that Bocerra's hiring authority is subject to the Village Board does not obviate his authority. There will be limits, constitutional and by contract, to that authority, in any event.

The Village argues in the alternative that if the disputed position is not supervisory, Bocerra should be excluded as a confidential employe. It states that even though Bocerra has not yet performed personnel work or taken part in labor negotiations, the Village will be relying on him to perform those functions now that the employes have formed a collective bargaining unit.

The Village requests the Commission to find that Bocerra's position is supervisory and confidential and to exclude him from the bargaining unit.

DISCUSSION

The first issue in this case is whether the position of Public Works Coordinator is held by a supervisor and should therefore be excluded from the unit.

The Commission considers the following factors in determining if a position is supervisory in nature:

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 persons 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 his skills or for his supervision of employees;

5. Whether the supervisor is primarily 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. 2/

If the factors appear in sufficient number and degree, the Commission will find an employe to be a supervisor. 3/ An employe who spends a majority of his/her time doing non-supervisory duties may be determined to be supervisory where sufficient responsibilities and authority are present. 4/

Applying these general principles to the instant case, we find that Bocerra is a supervisor and should be excluded from the bargaining unit.

Prior to the February 16, 1995, Village ordinance which modified his job description,

2/ Douglas County, (WERC, 12/94).

3/ Village of Stoddard, Dec. No. 27358 (WERC, 8/92)

4/ Supra, at 3.

Bocerra did not have the authority to hire or discipline employees or to effectively recommend same. The Village argues that the ordinance grants Bocerra the authority to hire, fire and otherwise discipline employees, and that Bocerra is now a supervisory employee. The Union argues that the passage of the ordinance alone did not convert Bocerra's position to a supervisory one. It points to the Board's lack of discussion at the time the ordinance was passed, the failure to adjust Bocerra's pay to reflect his expanded job responsibilities, and the lack of formal procedures or instruction regarding how Bocerra would exercise his authority as indications that the ultimate effect of the ordinance is speculative.

We find the Village's position persuasive. The ordinance on its face grants the Coordinator very substantial authority in the significant areas of discipline and hiring. While negative inferences could be drawn from the absence of an accompanying pay increase or the absence of any specific discussion with Bocerra as to how his new authority would be exercised, any such inferences are insufficient to overcome the language of the ordinance itself and the uncontested testimony that Bocerra has been advised by the Village that the ordinance now defines the scope of his authority. However, we wish to emphasize that the Commission determines supervisory status based on actual authority. Thus, if Bocerra is not allowed to exercise his authority under the ordinance, the Union is free to again seek his inclusion in the unit. However, at the present time, we are satisfied that he has significant disciplinary and hiring authority and that this authority, in conjunction with his authority to direct the work of the other two employees, is sufficient to make him a supervisor. Given our conclusion, we need not address the Village's alternative argument that Bocerra is also a confidential employee.

Given the foregoing, Bocerra shall continue to be excluded from the unit.

Dated at Madison, Wisconsin, this 25th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner