

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

AFSCME COUNCIL 40

Involving Certain Employees of

CITY OF ANTIGO

Case 75
No. 55970
ME-3649

Decision No. 29391

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of AFSCME Council 40

Ruder, Ware & Michler, S.C., by **Attorney Jeffrey T. Jones**, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the City of Antigo.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION**

On January 5, 1998, AFSCME Council 40 filed a petition for election with the Wisconsin Employment Relations Commission seeking a representation vote in a bargaining unit described as “regular full-time employees of City Hall, excluding confidential, supervisory, professional, temporary, seasonal and part-time employees.” The City disputes the exclusion of regular part-time employees from the bargaining unit proposed by AFSCME. The City also disputes AFSCME’s contentions that the City Administrator’s Administrative Secretary is a confidential employee; that the Human Resource Assistant is not a confidential employee; that the Deputy City Clerk/ Treasurer is a supervisor; and that the Crossing Guard is a casual or temporary employee.

No. 29391

Hearing in the matter was held on March 3, 1998, in Antigo, Wisconsin, before Examiner Lionel L. Crowley, a member of the Commission's staff. Following the hearing, the parties stipulated to the following bargaining unit description with the phrase "and part-time" to be deleted if the Commission concludes that the "full-time" unit sought by the Union is appropriate:

All regular full-time (and part-time) employees of the City of Antigo excluding employees in existing collective bargaining units, elected officials, confidential, supervisory, managerial, professional, temporary, seasonal, casual and part-time employees.

The parties filed post-hearing briefs, the last of which was received on May 12, 1998, and the record was then closed.

The Commission, having reviewed the evidence and arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Direction of Election.

FINDINGS OF FACT

1. AFSCME Council 40, hereinafter referred to as the Union, is a labor organization and has its offices at 7111 Wall Street, Schofield, Wisconsin 54476.

2. City of Antigo, hereinafter referred to as the City, is a municipal employer and has its offices at City Hall, 700 Edison Street, Antigo, Wisconsin 54409. The City Administrator acts as the City's Personnel Director and, in that capacity, the Administrator (with assistance from an outside labor attorney) bargains and administers the labor contracts between the City and its three existing bargaining units.

3. The parties agree that the following employees/positions are included in the proposed bargaining unit:

<i>Name</i>	<i>Title</i>	<i>Work Location</i>	<i>Wages/hr</i>
Artz, Carol	Utility Secretary	Clerk-Treasurer Office	9.47
Beck, Marji	Accts Payable/Secretary	Clerk-Treasurer Office	10.01

Cameron, David	Assist. Bldg. Inspector	Inspector/Assessor Dept.	15.30
Cross, Susan	Secretary	Fire Department	8.93
Falk, Sandy	Secretary	Park, Rec & Cemetery Dept.	10.01
Koeppel, Tracy	Utility Secretary	Clerk-Treasurer Office	9.47
Kuhr, Linda	Secretary	Police Department	8.87
LaVoie, Heather	Secretary	Police Department	8.87
Marciniak, Julie	Secretary	Police Department	8.93
Marx, Louise	Secretary	Dept. of Public Works	10.58
Schroepfer, Lynda	Secretary	Police Department	9.72

4. The Human Resource Assistant position is presently unoccupied but was previously held by Kim Gross who left the County's employ in February, 1998. Gross was Payroll Clerk until February 1, 1997, when the position was changed and upgraded to Human Resources Assistant with additional duties of drug and alcohol testing and the Employee Assistance Program. She worked on a Worker's Compensation case with the City's labor counsel, and costed a bargaining proposal. When Gross left the position, the City again evaluated the position's duties and concluded that the Human Resource Assistant will perform the vast majority of any clerical/technical support needed by the City Administrator when he functions as the City's Personnel Director.

The Human Resource Assistant position has sufficient access to, knowledge of and involvement in confidential matters relating to labor relations to make the occupant of the position a confidential employee.

5. The Administrative Secretary, Lisa Volkman, does general secretarial work for the Mayor and the City Administrator. She does not open any mail marked "confidential". She does not administer any collective bargaining agreement. She has not attended any bargaining sessions, taken minutes of any closed meetings where labor relations matters are discussed, nor costed contract proposals. She has typed one response to a grievance for the City Administrator in her three years of employment.

Volkman does not have sufficient access to, knowledge of, or involvement in confidential matters relating to labor relations to make her a confidential employee.

6. The City Clerk/Treasurer's Office consists of the City Clerk/Treasurer, the Deputy City Clerk/ Treasurer, two Utility Secretaries, a Secretary/Accounts Payable Clerk, the Human Resource Assistant, a Green Thumb Worker and a Co-op Student.

The City Clerk/Treasurer has retained all disciplinary and hiring authority. The Deputy City Clerk/Treasurer oversees the office in the Clerk's absence, which has been infrequent. The Deputy Clerk/Treasurer participates in interviews for new hires in the office but has not hired anyone nor effectively recommended their hire. The Deputy City Clerk/Treasurer has no independent authority to discipline anyone and does not make effective recommendations as to discipline. The Deputy can approve vacation, sick leave, or other absences only when the City Clerk/Treasurer is absent. The Deputy City Clerk/Treasurer has no authority to layoff, promote, transfer, reward employees, assign work, authorize overtime, change work hours or adjust grievances.

The Deputy City Clerk/Treasurer does not possess supervisory duties and responsibilities in sufficient combination and degree to make her a supervisor.

7. The City employs three part-time employees in the Police Department: two Parking Enforcement/Crossing Guards and one Crossing Guard. The Parking Enforcement/Crossing Guards work between 5½ and 6 hours a day during the school year and four hours per day when school is not in session. Their job duties are parking enforcement and traffic control at school crossings. The Crossing Guard works two hours per day when school is in session and does not work during the summer but is expected to return each fall. The Secretaries in the Police Department work 35-40 hours per week, are supervised by the same individual who supervises the Parking Enforcement/Crossing Guards and the Crossing Guard, and are included in the proposed unit.

The Parking Enforcement/Crossing Guards are eligible to participate in the Wisconsin Retirement System but the Crossing Guard is not. Under the City's compensation plan for unrepresented employees, the part-time employees are not eligible for health insurance and those working more than 20 hours per week are entitled to a proration of benefits allotted full-time employees.

The Parking Enforcement/Crossing Guards and the Crossing Guard are regular part-time employees.

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

CONCLUSIONS OF LAW

1. The occupants of the Parking Enforcement/Crossing Guard positions and Crossing Guard position are regular part-time employees appropriately included in the proposed collective bargaining unit set forth in Conclusion of Law 6.

2. The occupant of the Deputy City Clerk/Treasurer position is not a supervisor within the meaning of Sec. 111.70(1)(o), Stats., and therefore is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., appropriately included in the proposed collective bargaining unit set forth in Conclusion of Law 6.

3. The occupant of the position of Administrative Secretary is not a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and therefore is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., appropriately included in the proposed collective bargaining unit set forth in Conclusion of Law 6.

4. The occupant of the now vacant Human Resource Assistant position will be a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and therefore is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats. and is not appropriately included in the proposed collective bargaining unit set forth in Conclusion of Law 6.

5. All regular full-time employes of the City of Antigo excluding employes in existing collective bargaining units, elected officials, supervisors, confidential, managerial, executive, professional, craft, temporary, seasonal, casual and part-time employes is not an appropriate collective bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

6. A question concerning representation exists within the following collective bargaining unit deemed appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats:

All regular full-time and regular part-time non-professional employes of the City of Antigo, excluding employes in existing collective bargaining units, elected officials, supervisors, confidential, managerial, executive, and craft employes.

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

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Direction in the voting group consisting of all regular full-time and regular part-time non-professional employes of the City of Antigo, excluding employes in existing collective bargaining units, elected officials, supervisors, confidential, managerial, executive and craft employes, who were employed on June 9, 1998 except such employes as may prior to the election quit their

employ or be discharged for cause, for the purpose of determining whether a majority of such employes voting desire to be represented by AFSCME, Council 40 for the purposes of collective bargaining with the City of Antigo, or whether such employes desire not to be so represented by said labor organization.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of June, 1998.

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 ANTIGO

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION**

POSITIONS OF THE PARTIES

The Union

The Union contends that the Human Resource Assistant is not a confidential employee. It refers to the testimony of Kim Gross, the former incumbent, and argues that the Assistant's duties are primarily related to payroll and assisting with drug and alcohol testing and the Employee Assistance Program (EAP). It points to Gross' testimony that she had no dealings with the City's three existing bargaining units in negotiations or contract administration during her four years of employment. It anticipates that the City will argue that she had some *de minimus* level of involvement in a Worker's Compensation matter, but asserts this was strictly of a clerical nature and should not be considered a basis for exclusion.

As to the Administrative Secretary, the Union states that it is not particularly adverse to her inclusion in the unit but concedes that the City needs one employee to perform confidential clerical and related duties at City Hall. Because the City Administrator is very involved in labor relations matters and the Administrative Secretary is his assistant, the Union argues that it makes sense that she be excluded as a confidential employee.

As to the Deputy City Clerk/Treasurer, the Union contends she is a supervisor.

As to the part-time employees, the Union claims they have no community of interest with the other employees because they work outdoors and have different duties and working conditions than do full-time employees. It notes that part-timers get paid less and do not have the advantages of all the fringe benefits. It further argues that the Crossing Guard is casual or temporary employe as she only works during the school year.

The Union maintains that the City's position in this litigation is based not on the duties and responsibilities of the disputed positions but on the incumbents' likely voting persuasion. The Union contends its position on inclusion/exclusion is based on relevant statutes and case law and should be favored.

The City

The City contends that the Union's position with respect to inclusion/exclusion of the disputed positions is without merit and contrary to the evidence and Commission law. It asserts that the Parking Enforcement/Crossing Guards and the Crossing Guard, although part-time, work almost as many hours as the Secretaries in the Police Department and have a community of interest with employees included in the unit. The City points out that these employees are in the same department and have the same supervision. The City observes that part-time status is not a basis for excluding employees from the unit and that to do so would be contrary to the anti-fragmentation policy in Sec. 111.70(4)(d)2.a., Stats.

The City argues that the evidence supports a conclusion that the Administrative Secretary is not a confidential employee and the Human Resource Assistant is a confidential employee. The City points out that the Administrative Secretary's job description does not list any duties relating to confidential labor relations. It notes that the incumbent, Lisa Volkman, testified that she does virtually no confidential labor relations work and this was confirmed by the testimony of the City Administrator. The City observes that Volkman typed only one response to a grievance in her three years of employment.

On the other hand, the City maintains that the Human Resource Assistant must be excluded because the position's duties are clearly confidential. The City states that the Human Resource Assistant position was upgraded from Payroll Clerk in January, 1997, at the request of Kim Gross, who advised the City Administrator that she would assist the Human Resources area for a higher wage rate. The City contends that in the summer of 1997, Gross was offered employment elsewhere and the City further upgraded her position to entice her to remain with the City. It asserts that the evidence demonstrates that she worked closely with the City's legal counsel on a claimed duty disability by a fire fighter commencing in August, 1997. In 1998, Gross resigned and the City again revised the job description for the position to perform duties assisting the City Administrator in all confidential labor relations matters.

The City takes the position that Deputy City Clerk is not supervisory. The City observes that there are only four full-time and two part-time positions in the Clerk's office; that they are supervised by the City Clerk; and that there is no need for another supervisor over these employees. The only time the Deputy Clerk would exercise supervision, according to the City, is when the Clerk is absent, which is seldom. The City insists that the Deputy Clerk does not hire, promote, transfer, discipline or discharge employees. It concludes that the evidence demonstrates quite clearly that the Deputy City Clerk is not a supervisor and that there is no basis to exclude her from the unit.

DISCUSSION

Appropriate Unit

Our role in disputes such as this is to determine whether the unit sought is appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats. which provides:

2.a. The commission shall determine the appropriate collective bargaining unit for the purpose of collective bargaining and shall whenever possible, unless otherwise required under this subchapter, avoid fragmentation by maintaining as few collective bargaining 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 municipal employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a collective bargaining unit.

When making that determination, we consider the facts presented by the parties as measured against the statutory language of Sec. 111.70(4)(d)2.a., Stats. and 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 employees in the unit sought have separate or common supervision with other employees.
5. Whether the employees in the unit sought have a common workplace with the employees in said desired unit or whether they share a workplace with other employees.

6. Whether the unit sought will result in undue fragmentation of bargaining units.
7. Bargaining history.

(ARROWHEAD UNITED TEACHERS v. WERC, 116 Wis.2d 580 (1984); BENTON SCHOOL DISTRICT, DEC. NO. 24147 (WERC, 12/86); BOYCEVILLE COMMUNITY SCHOOL DISTRICT, DEC. NO. 20598 (WERC, 4/83)).

We have used the phrase “community of interest” as it appears in Factor 1 as a means of assessing whether the employees participate in a shared purpose through their employment. We have also used the phrase “community of interest” as a means of determining whether employees share similar interests, usually – though not necessarily – limited to those interests reflected in Factors 2-5. This definitional duality is of long-standing, and has received the approval of the Wisconsin Supreme Court. ARROWHEAD UNITED TEACHERS v. WERC, *supra*.

The fragmentation criterion reflects our statutory obligation to “avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal workforce.” Section 111.70(4)(d)2.a., Stats. The bargaining history criterion involves an analysis of the way in which the workforce has bargained with the employer or, if the employees have been unrepresented, an analysis of the development and operation of the employee/employer relationship. MARINETTE SCHOOL DISTRICT, DEC. NO. 27000 (WERC, 9/91).

Based upon long-standing Commission precedent, it is well established that within the unique factual context of each case, not all criteria deserve the same weight (SHAWANO-GRESHAM SCHOOL DISTRICT, DEC. NO. 21265 (WERC, 12/83); GREEN COUNTY, DEC. NO. 21453 (WERC, 2/84); MARINETTE COUNTY, DEC. NO. 26675 (WERC, 11/90)) and thus a single criterion or a combination of criteria listed above may be determinative (Common purpose MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NOS. 20836-A and 21200 (WERC, 11/83); similar interests, MARINETTE SCHOOL DISTRICT, *SUPRA*; fragmentation, COLUMBUS SCHOOL DISTRICT, DEC. NO. 17259 (WERC, 9/79); bargaining history, LODI JOINT SCHOOL DISTRICT, DEC. NO. 16667 (WERC, 11/78)). Consequently, the Commission gives effect to the aforesaid statutory provision by employing a case-by-case analysis (APPLETON AREA SCHOOL DISTRICT, DEC. NO. 18203 (WERC, 11/80)) “to avoid the creation of more

bargaining units than is necessary to properly reflect the employe's community of interest." AREA BOARD OF VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT NO. 1, DEC. NO. 11901 (WERC, 5/73).

Here, the parties generally agree that a residual unit of currently unrepresented non-professional employes of the City of Antigo is an appropriate unit. They also correctly agree that the regular part-time employes are municipal employes entitled to be represented for the purposes of collective bargaining. HARTFORD UNION HIGH SCHOOL, DEC. NO. 15745 (WERC, 8/77); MARINETTE HOSPITAL, DEC. NO. 7569 (WERC, 4/66). They disagree as to whether the residual unit should only include full-time employes (the Union's position) or whether the unit should also include regular part-time employes (the City's position).

We conclude the "full-time only" residual unit sought by the Union is not an appropriate unit.

Residual units have historically been found appropriate by the Commission in large part because they serve the statutory interest in avoiding further fragmentation of bargaining units. CITY OF STURGEON BAY, DEC. NO. 27106 (WERC, 12/91); WAUKESHA COUNTY, DEC. NO. 26020-A (WERC, 9/89). A full-time only residual unit is at odds with the statutory directive that we avoid fragmentation of bargaining units. The exclusion of the regular part-time employes sets up the potential for another bargaining unit to be established consisting of all unrepresented part-time non-professional employes.

We have also generally held that regular part-time employes should be included in a bargaining unit with the regular full-time employes unless there are "special circumstances indicating that a group or groups of regular part-time employes do not in fact have a definite interest in wages, hours, and working conditions governing employment" JEFFERSON JOINT SCHOOL DISTRICT NO. 10, DEC. NO. 15336 (WERC, 3/77). The absence of fringe benefits is not such a "circumstance". MILWAUKEE COUNTY, DEC. NO. 17224-A (Knudson, 4/80).

There is no evidence of such a "special circumstance" here.

It is also important to note that because this is a residual unit, it inevitably consists of employes who have differing work locations, supervisors, duties, skills, wages, hours of work, etc. Thus, the distinctions in wages, fringe benefits, work location, and hours applicable to the Parking Enforcement/Crossing Guards and the Crossing Guard are of even less consequence than would usually be the case when determining whether the unit sought by the Union is an appropriate one. Further, as argued by the City, the part-time employes do have the same supervision and shared purpose/community of interest (i.e. law enforcement) as the Secretaries employed by the Police Department who the parties agree are to be included in the residual unit.

In addition, for the purposes of compensation issues the City has dealt with the unrepresented employes as a single group and thus the “bargaining history” criterion does not support a “full-time only” unit.

Given all of the foregoing, we have found the “full-time only” residual unit is not an appropriate unit within the meaning of Sec. 111.70(4)(d)2.a., Stats. However, because the Union is willing, in the alternative, to stand an election in a residual unit of all regular full-time and regular part-time unrepresented non-professional employes of the City and because such a unit is appropriate, we have directed an election in that alternative unit.

There remains the Union’s contention that the Crossing Guard is a casual or temporary employe and thus not a regular part-time employe. The record clearly establishes that the incumbent Crossing Guard has an expectation of continued employment at the commencement of each school year and thus she is not a temporary employe. MANITOWOC COUNTY, DEC. NO. 15250-B (WERC, 9/77). It is also clear that the Crossing Guard’s schedule of working two hours each day during the school year provides the requisite regularity of employment to make her a regular part-time rather than a casual employe. TOMAHAWK SCHOOL DISTRICT, DEC. NO. 22495 (WERC, 3/85). Therefore, the Crossing Guard is eligible to vote in the election and will be included in the unit if the requisite number of employes vote to be represented by the Union.

Administrative Secretary and Human Resource Assistant

The parties take opposing positions on which of these employes has or should perform the City Administrator’s confidential work. Both parties correctly assume that the City Administrator needs one confidential employe to meet his needs. TOWN OF GRAND CHUTE, DEC. NO. 22934 (WERC, 9/85); SHEBOYGAN COUNTY HANDICAPPED CHILDREN’S EDUCATION BOARD, DEC. NO. 20217 (WERC, 1/83). The Administrative Secretary, Lisa Volkman, has historically almost never performed confidential work. There is no evidence that her duties will change. The Human Resource Assistant position is vacant but the record makes it clear that the incumbent in this position will perform all of the City Administrator’s Personnel Director confidential work. Therefore, we are satisfied that the Human Resource Assistant is a confidential employe, but the Administrative Secretary is not.

Deputy City Clerk/Treasurer

The Union alleged that the Deputy is a supervisor, but made no specific arguments in its brief.

Section 111.70(1)(o), Stats., defines a “supervisor” in pertinent part as:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, 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.

When evaluating a claim of supervisory status under Sec. 111.70(1)(o), Stats., we consider the following factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised, and the number of persons exercising greater, similar or lesser authority over the same employes;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employes;
5. Whether the supervisor is supervising an activity or is primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes; and
7. The amount of independent judgment exercised in the supervision of employes.

The Commission has historically held that not all of the above-quoted factors need be present, and that if the factors appear in sufficient number and degree, the Commission will find an employe to be a supervisor. WALWORTH COUNTY, DEC. NO. 29040 (WERC, 4/97).

The record clearly establishes that the City Clerk has retained all significant supervisory authority in the City Clerk’s office. Even in the Clerk’s absence, the Deputy has no

significant supervisory responsibility. Because the Deputy City Clerk has no independent disciplinary authority and cannot effectively recommend the hire, discipline, promotion, transfer, evaluation or layoff of employes, she is not a supervisor. The position is therefore appropriately included in the bargaining unit.

Dated at the City of Madison, Wisconsin this 9th day of June, 1998.

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