

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OPERATING ENGINEERS, LOCAL 139, Complainant,

vs.

TOWN OF FIFIELD, Respondent.

Case 3
No. 56216
MP-3400

Decision No. 29403-A

Appearances:

Ms. Kristine Aubin, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53202, on behalf of the Union, Complainant.

Mr. Ronald Rutlin, Ruder, Ware & Michler, Suite 700, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On February 27, 1998, the Operating Engineers Local 139 (Union) filed a complaint against the Town of Fifield (Town) with the Wisconsin Employment Relations Commission, alleging that the Town had violated Sections 111.70(3)(a)1 and 4, Wis. Stats., by unilaterally transferring bargaining unit work to a newly-created "supervisory" position without prior notice to the Union or giving the Union an opportunity to bargain. In addition, the Union alleged that since January 10, 1998, the Town had insisted that any applicant for the newly-created "supervisory" position would have to resign from membership in the Union in order to be considered for that position, in violation of Sec. 111.70(3)(a)1 and 3, Wis. Stats. On July 1, 1998, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner in this case. On that same date, a Notice of Hearing issued, setting hearing for August 17, 1998 at Fifield, Wisconsin. The Town submitted its Answer on July 28, 1998 in a timely fashion. Hearing was held and concluded on August 17, 1998. A stenographic

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transcript of the proceedings was made and received by the Examiner on September 24, 1998. The parties then submitted their initial briefs by November 30, 1998, which were simultaneously exchanged by the Examiner and their reply briefs which were received by December 21, 1998, whereupon the record herein was closed. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Operating Engineers, Local 139 (Union), is a labor organization with its offices located at 2233 Birch Street, Eau Claire, Wisconsin 54703. The Union is the exclusive bargaining representative of certain employees of the Town and has been since the first collective bargaining agreement was entered into covering the period January 1, 1995 through December 31, 1997.

2. The employees that are represented by the Union can be described as follows:

“ . . . all regular full-time and regular part-time Street Department employees employed by the Town of Fifield, but excluding clerical, supervisory, managerial, confidential, temporary, casual, seasonal employees, and all other employees of the Town of Fifield.”

3. The Town of Fifield (Town) is a municipal employer within the meaning of Sec. 111.70, Wis. Stats., and its office is located at N13935 Ridge Avenue, P.O. Box 241, Fifield, Wisconsin 54524.

4. The Union and the Town entered into their initial collective bargaining agreement covering the period beginning in 1995 and ending on December 31, 1997. A part of that agreement concerned a distinction the parties agreed would be made between the then-Leadman of the Street Department, Don Ocker, and the other three Street Department employees, Jeff Spaulding, Brian Scullin and Ted Fleming. This distinction was based upon the fact that Leadman Ocker would remain covered by the Town's deferred compensation plan, and not by the Union's pension plan, while Spaulding, Fleming and Scullin would be covered by the Union's pension plan. In addition to this distinction, Spaulding, Scullin and Fleming had requested that in lieu of any retroactive pay, they should receive additional contributions to their pension plan for the period from January 1, 1995 through August 20, 1995. By a side agreement dated January 31, 1996, the parties also agreed to continue these distinctions between Ocker and Scullin, Fleming and Spaulding, whereby the latter group of three employees would have a large contribution made to their Union pension funds in lieu of a wage increase, and Ocker would receive a wage increase and payments to the Town's deferred compensation plan. Also in this 1996 addendum agreement, the following distinction was made in regard to Leadman Ocker's pay:

. . . In the event the current leadman, Don Ocker, retires, resigns or is terminated during the term of the 1995-97 collective bargaining agreement, the hourly rate for his replacement, if any, will be as follows: effective 1/1/96, \$11.68; effective 1/1/97 \$12.02. Consistent with the prior agreement of the parties, his replacement' would be covered under the central pension fund of the International Union of Operating Engineers and receive the same pension contribution as all other employees covered by the collective bargaining agreement. . .

5. It is undisputed that Leadman Ocker performed bargaining unit work during his employment with the Town. Unit work has consisted of grading roads, hauling gravel, picking rocks and garbage, cutting brush, plowing snow and sanding roads in the winter, installing culverts and running a loader. In addition to this work, Ocker also regularly attended Town meetings in order to give the Town Board reports on what the Town crew was doing. It is undisputed that in 1997-98 other employees besides Ocker attended Town meetings in Ocker's place, approximately six times. The Town Board meets two times each month throughout the year. In the years prior to January 1, 1998, Town crew employees including Ocker have performed overtime duties, removing snow and sanding roads in the winter, as well as cleaning up parks in the summer.

6. The parties met for one collective bargaining session on November 17, 1997. Present for the Town were the entire Town Board, as well as their attorney, Mr. Ronald Rutlin. Present for the Union was representative Dennis Zuleger and three unit employees, Fleming, Spaulding and Scullin. Prior to the session, the Union sent a proposal to the Town regarding changes it wished to see in the 1998-2000 agreement as follows:

. . .

ARTICLE 6 – WORK HOURS, OVERTIME AND WAGES

- A. Normal Work Week/Schedule: The normal work week shall be five (5) eight (8) hour days, forty (40) hours per week. The normal work week shall be from 7:30 a.m. to 4:00 p.m. Monday through Friday. Except from June 1 through September 30 when the normal work week shall be four (4) ten (10) hour days, forty (40) hours per week and the normal work week schedule shall be from 6:30 a.m. to 5:00 p.m., Monday through Thursday. However, employees may be required to work other work schedules. Work hours and schedules shall be established by the Employer. Employer reserves the right to establish a time clock.

. . .

ARTICLE 9 – HEALTH INSURANCE

- A. Health Insurance: The Employer will make available group health insurance coverage for full-time employees. All employees shall be covered under the same group plan. Effective 1/1/98, the Employer agrees to pay eighty (80) per cent of the health insurance premium per month. An employee's failure to contribute to health insurance premiums as required will terminate the Employer's premium obligation.

. . .

ARTICLE 11 – HOLIDAYS

- C. Weekend Holiday: If the holiday falls on a Saturday, the paid holiday shall be observed the preceding Friday; if the holiday falls on a Sunday, the paid holiday shall be observed on the following Monday.
- D. Pay Rate: Payment for holidays shall be computed based upon an employee's regular hourly rate of pay and regularly scheduled number of hours worked on a single day.

ARTICLE 12 – LEAVES OF ABSENCE

- A. Sick Leave:
1. Benefit and Accumulation: Full-time employees shall accrue sick leave at the rate of one (1) sick day per month to a maximum of twelve (12) days of sick leave each year. Sick leave benefits shall begin on the first day of absence and continue until the employee returns to work or has used all accrued sick leave. Sick leave shall be paid at the employee's regular base rate of pay. No less than one-half (1/2) day of sick leave shall be used or granted in any case. Sick leave shall accumulate to a maximum of sixty (60) days. Any unused sick leave at retirement shall be used to buy health insurance.

ARTICLE 13 – PENSION

Effective 1/1/98, the Employer will contribute an additional \$.15 per hour worked for each employee, to the Central Pension Fund of the International Union of Operating Engineers. An additional \$.15 per hour shall be contributed on 1/1/99 and on 1/1/00.

. . .

ARTICLE 18 – FAIR SHARE

A. The Town agrees that it shall deduct from the monthly earnings or yearly if desired of all full-time employees in the collective bargaining unit a dues deduction or a fair share contribution certified by the Union and pay said amount to the treasurer of the Union on or before the end of the month in which such a deduction was made. The Union agrees to certify to the Town only such fair share cost as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in the regarding (sic). Deductions shall be made at the end of the last pay period each month or if yearly by September 30.

. . .

ARTICLE 21 – DURATION

A. Term: This Agreement shall become effective as of January 1, 1998 and remain in full force and effect through December 31, 2000.

ARTICLE 22 – VACANCIES AND JOB POSTING

A. Vacancies/New Positions: The Employer shall have the sole right to determine whether job vacancies exist, whether vacancies are to be filled, and whether new positions shall be created.

B. Job Posting: When the Employer deems it necessary to fill a vacancy or create a new job position, the Employer shall post a notice of such vacancy or new position on the bulletin board for a period of five (5) working days. The posting shall contain the date the position is to be filled, title of the position, qualifications required, rate of pay and space for all interested employees to sign said posting. The most qualified employee applying for the position shall be assigned to the position. The

Employer shall be the sole judge of an employee's qualifications, skills and ability. If the Employer determines that the qualifications, skills and ability of two employees applying for a posted position are equal, the employee with the most seniority shall be awarded the position.

- C. Trial Period: An employee who is awarded a posted position shall serve a one hundred and eighty (180) calendar day trial period in the position. Within said period, if the Employer determines the employee is not qualified for the position or is performing the job unsatisfactorily, or if the employee does not desire the position, the employee shall be returned to his former job at his former rate of pay with no other loss of benefits. When such a situation occurs, the Employer shall then give the position to the next qualified employee or applicant who signed the posting as outlined in Section "A" above. This procedure shall continue until the position is filled permanently.

APPENDIX "A"

| | 1/1/98 | 1/1/99 | 1/1/00 |
|-----------------|---------|---------|---------|
| Leadman | \$12.86 | \$13.36 | \$13.86 |
| Grader/Operator | \$11.17 | \$11.62 | \$12.07 |
| Truck Driver | \$11.49 | \$11.94 | \$12.39 |

7. The Town did not submit any proposal prior to the November 17, 1997 bargaining session with the Union. During the November 17 session, attorney Rutlin stated that the Town intended to create a new supervisory position. Zuleger responded that the Union had no problem with that, as long as the position did not do any bargaining unit work.

8. The Town took the position that when Leadman Ocker retired from his position, the Town was going to hire a supervisor, because it needed a person who could represent the Town and work in the field with the workers to perform supervisory duties including discipline. Attorney Rutlin stated that the Town could not have an employee performing only supervisory work because there was not enough such work for a supervisor to be employed on a full-time basis. Zuleger then gave the Town representatives the following document from his files:

SUPERVISORY EMPLOYEES

A. Definition (Section 2(11) of the Act).

“ANY INDIVIDUAL HAVING AUTHORITY, IN THE INTEREST OF THE EMPLOYER, TO HIRE, TRANSFER, SUSPEND, LAY OFF, RECALL, PROMOTE, DISCHARGE, ASSIGN, REWARD, OR DISCIPLINE OTHER EMPLOYEES, OR RESPONSIBILITY TO DIRECT THEM, OR TO ADJUST GRIEVANCES, OR EFFECTIVELY RECOMMEND SUCH ACTION, IF NOT OF A MERELY CLERICAL NATURE, BUT REQUIRES THE USE OF INDEPENDENT JUDGMENT.”

B. Checklist.

1. Hire.

- a. Does he interview applicants?
- b. Does he reject applicants?
- c. Does he determine or agree to terms and conditions of employment?
- d. Specific instances of the above.

C. What is the supervisory hierarchy of the company?

D. For what are they responsible?

1. What are their duties?
2. Compare the duties and authority of the supervisory employees in question with those above or below the disputed ones.
3. Do men work permanently or temporarily under them?
4. Emergency.
5. How much of their time is spent in manual labor, in supervision?
6. To whom do they report?
7. Who supervises them?
8. What kind of orders do they give?
9. Do they assign work, if so, how and what is the nature of such assignments?

E. What are the powers and duties in respect to discipline, direction, hiring, discharge, and status of employees under them?

1. What powers of recommendation do they have affecting the status of other employees?
2. Do they possess effective power to make recommendations respecting promotions, transfers, layoffs, recall, rewards, etc.?
3. Have they ever exercised the authority which they have purportedly been given?

There was some discussion between the parties regarding filing of a unit clarification petition before the Wisconsin Employment Relations Commission at the November 17 meeting. In this regard, the Town made it clear that they would not object, and would in fact work with the Union through the unit clarification process. During this bargaining session, the Union never made any proposal regarding prohibiting the Town from assigning bargaining unit work to supervisory employees and the Town never made any proposal regarding supervisory employees. On November 17, 1997, the Town and the Union had a meeting of the minds regarding the Town's intention to remove bargaining unit work due to the elimination of the leadman position and the creation of a working supervisory position. At the November 17th bargaining session, the Town and the Union reached a full tentative agreement for the 1998-2000 contract, which the employees ratified that evening.

10. By his letter dated December 1, 1997, Attorney Rutlin wrote to Union representative Zuleger enclosing a draft of the 1998-2000 labor agreement tentatively agreed to by the parties on November 17, 1997, in which he highlighted the sections of the contract which were new or changed, and highlighted some changes that Rutlin indicated were "purely editorial". The letter went on to state, in relevant part, as follows:

. . .

The other item that needs clarification is the Wage Schedule. You will note that the leadman rate is less than what Don Ocker will receive up to the date he retires. This is consistent with the Memorandum of Agreement that we reached when the other employees took an extra contribution in lieu of a wage increase last year. In other words, until Mr. Ocker retires he will receive an additional \$.40 per hour over his 12/31/97 hourly rate. If anyone is promoted to a leadman position after he retires, they would get the contract rate. This will also confirm that it is understood that Mr. Ocker will continue to receive \$25.00 biweekly paid to a deferred compensation plan until the time that he retires and that he will continue to be excluded from the Operating Engineers' pension plan.

It must be understood that as we indicated during negotiations, it is the Town's intent to eliminate the leadman position and create a new position that will be excluded from the bargaining unit as a supervisory/managerial employee when Mr. Ocker retires. However, we will keep the leadman rate in the event it is needed in the future. I would suggest that once the Town Board takes formal action to create this new position, the parties agree to jointly petition the Wisconsin Employment Relations Commission to conduct a unit clarification hearing if the Union intends to dispute the Town's exclusion of that position from the bargaining unit.

After you have had an opportunity to review the enclosed contract and this letter, please contact me with any changes.

. . .

The sections which were highlighted in the draft sent by Rutlin to Zuleger on December 1, 1997 were Article 6 regarding a change in the work hours and work week on an experimental basis to include a workweek of four, ten-hour days; and changes in Article 8 – Vacancies and Job Posting, which incorporated all of the language proposed by the Union in its initial proposal. The draft also made some changes regarding dates and the current amount of health insurance premiums as well as some grammatical changes; and there was a change in vacation to reflect that vacation was to be taken in hours, rather than vacation by the week. In order to comport with the four, ten-hour day schedule included with this agreement, changes were therefore made in Article 12 – Holidays and in Section A of Leaves of Absence regarding sick leave, paragraph 1. In addition, the parties agreed to change the Fair Share article as the Union had initially proposed. However, under Article 13(A), paragraph 2, and in Article 13(B), Funeral Leave, paragraph 3, Rutlin made the following changes:

. . .

2. Advance Notice: Employees who are sick and thus are unable to perform their duties or to report to work, shall notify the ~~(leadperson)~~ lead person or supervisor of same at least one (1) hour before the start of the employee's regular work shift or assignment. Failure to provide this notice shall result in no sick leave pay for the day. The one (1) hour notice may be waived by the Employer in special circumstances or in cases of emergency.

. . .

3. Notice: Employees desiring funeral leave shall, upon knowledge of an eligible death, promptly make application to the ~~(lead person)~~ lead person or supervisor so that work schedules can be appropriately adjusted.

. . .

11. By letter dated December 15, 1997, Zuleger wrote to Rutlin that he had received Rutlin's letter dated December 1, and the draft of the tentative 1998-2000 labor agreement. Zuleger failed to comment regarding the changes Rutlin made in Article 13 (A) and (B). Zuleger's letter stated:

" . . . We would like the following change made, under Article 8 – Vacancies and Job Posting: A. Vacancy/New Positions: The Employer shall have the sole right to determine whether new positions shall be created.

This is the only change we request at this time. . . "

The language of Article 8 originally proposed by the Union and agreed to by the parties on November 17th was as follows:

A. Vacancies/New Positions: The Employer shall have the sole right to determine whether job vacancies exist, whether vacancies are to be filled, and whether new positions shall be created.

12. By letter dated December 29, 1997, Rutlin responded to Zuleger's December 15 letter as follows:

. . .

I am writing in response to your letter of December 15, 1997. In your letter you indicate there is only one change that you want in the draft of the contract I had forwarded to you on December 1, 1997. The change you requested was to modify Article 8 – Vacancies and Job Posting, Subsection A, to read as follows:

A. Vacancies/New Positions: The Employer shall have the sole right to determine whether new positions shall be created.

The language that was in the contract that was forwarded to you previously was the language that was proposed by the Union and accepted by the Town during negotiations. We do not agree to change the language.

I am enclosing three originals of the contract to you for your signature. Please sign all three originals and then forward them to the town chairman, Joe Wagner, for signature. After all signatures have been obtained, a signed original will be forwarded to you.

. . .

It should be noted that in Article 13 of the final copy of the collective bargaining agreement which Rutlin enclosed in his December 29 letter, he had excised the phrase "leadman or supervisor" and replaced it with "road superintendent" without commenting thereon.

13. Also on December 29, 1997, the Town Clerk forwarded to Union representative Zuleger the following job description for the "Road Superintendent" position:

. . .

REPORTS TO: TOWN BOARD

EMPLOYMENT CATEGORY: FULL-TIME
SUPERVISORY/MANAGERIAL

PURPOSE OF POSITION:

This is a highly responsible position providing management and supervision to the Town's road crew.

ESSENTIAL DUTIES AND RESPONSIBILITIES:

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- * Directs daily operations, and supervises road crew personnel. Prioritizes and assigns tasks and projects. Reviews daily progress.

- * Monitors the Town's budget related to the activities of the Town crew for work planning progress.
- * Researches and writes equipment specifications. Establishes equipment acquisition priorities and recommendations.
- * Approves budgeted equipment and materials purchases.
- * Reviews employee work and procedures. Evaluates employee performance.
- * Responsible for requiring employee compliance with safety rules and regulations. Monitors safety training, procedures and recommends safety procedures and policies.
- * Provides training and task instruction to employees.
- * Attends meetings of the Town Board and Town Committees, and carries out their directives.
- * Participates in the interviewing of applicants and makes recommendations to the Town Board regarding individuals to be employed on the Town crew.
- * Disciplines and suspends Town crew employees.
- * Makes recommendations to the Town Board, when appropriate, to discharge Town crew employees.
- * Makes recommendations to the Town Board regarding resolving employee grievances.
- * Directs the daily activities of Town crew.
- * Assists the Town Board in the formulation of management policies for the Town crew.
- * Carries out and requires compliance of management policies of the Town Board.

- * Makes recommendations to the Town Board regarding the kind and level of services to be provided, the kind and number of employees to be utilized in providing those services, the kind and number of capital improvements to be made, the kind and number of systems by which services will be provided, and the use of outside contractors and equipment needs of the Town crew.

ADDITIONAL TASKS AND RESPONSIBILITIES:

- * Assist the Town Board in preparing an annual budget related to the Town crew.
- * Conducts employee orientation and training to provide instructions to employees regarding their duties and responsibilities.
- * Keeps the Town crew in compliance with all applicable state and federal laws.
- * Approves vacation requests and approves and assigns overtime to Town crew employees.
- * Works with Town crew projects.
- * Performs such other duties and responsibilities as from time to time are assigned by the Town Board.

KNOWLEDGE AND ABILITIES:

- * Ability to calculate percentages, fractions, decimals, volumes, ratios and present values. Ability to interpret basic descriptive statistical reports.
- * Ability to use functional reasoning in supervising, managing, leading, teaching, directing and controlling Town personnel.
- * Ability to exercise the judgment, decisiveness and creativity required in situations involving the evaluations of information against sensory and/or judgmental criteria.

- * Ability to operate, maneuver and/or steer equipment and

machinery requiring simple but continuous adjustment, such as a motor vehicle, computer keyboard/terminal, photocopier, fax machine, two-way radio, mechanic's tools and calculator/adding machine.

- * Ability to coordinate eyes, hands, feet and limbs in performing coordinated movements when performing work activities.
- * Ability to exert moderate to heavy physical effort, typically involving some combination of climbing and balancing, stooping, kneeling, crouching, crawling, lifting, carrying, pushing and pulling.
- * Ability to recognize and identify degrees of similarities or differences between characteristics of colors, forms, sounds, odors and textures associated with job-related objects, materials and tasks.
- * Ability to work under conditions where exposure to environmental factors such as temperature variations and extremes, toxic agents, noise, machinery and/or dust, may cause some discomfort and where there is a risk of minor injury.

EXPERIENCE AND TRAINING:

- * High school diploma, vocational/technical training in work-related field, or any combination of education and experience that provides equivalent knowledge, skills and abilities. A valid Wisconsin motor vehicle operator's license and commercial driver's license.

. . .

14. On or about January 10, 1998, the Town Board began interviewing for the position of Road Superintendent. One of those interviewed was Town crew employee Ted Fleming. During the interview, the Town Board discussed with Fleming the kind of job responsibilities the position involved; that the Supervisor would have control of the Town crew and do Town crew work as well. At one point during the interview, Fleming was asked whether he thought he would be able to discipline employees on the crew as this was part of the Superintendent job and Fleming stated that he would have a problem with that. Town

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representatives explained to Fleming that the open position was a "non-union position", not in

the bargaining unit. During the first round of interviews, the Town interviewed two others besides Fleming: Bob Andrews, the current incumbent of the Superintendent position and another individual.

15. After his January 10, 1998, interview, Fleming either called the Union or the Union called him. Fleming then spoke to Union representative Zuleger and asked him about the status of his pension, told Zuleger about his interview, and that he (Fleming) did not plan on taking the Road Superintendent job. Fleming also spoke to International Union representative Jim O'Geary during this time period, who told Fleming "to try" the job for reasons that Fleming could not recall.

16. After the first round of interviews, the Town determined that it needed to ask candidate Bob Andrews further questions regarding the experience he had listed on his job application and to ask Fleming for more information, as Fleming was their first choice to fill the position. Fleming turned the job down at his second interview because he did not want to be to blame or to be in the middle between the Union and the Town, if a situation developed regarding discipline and because it was not protected by the Union.

17. By January 16, 1998, Zuleger had spoken to Fleming and knew that the Superintendent job would be assigned to perform what Leadman Ocker had previously done on a day-to-day basis. On January 16, 1998, Zuleger wrote the following letter to Attorney Rutlin:

. . .

This is in response to your letters of December 29 and December 1. Enclosed is the labor agreement with some grammatical and/or typographical changes which I have made and outlined. There are also some language changes which were not discussed in negotiations. However, with respect to the petition to the WERC for unit clarification, the Union does not intend to immediately petition the WERC for unit clarification with respect to the "supervisory" employee that you intend to hire when Mr. Ocker retires. Rather, the Union intends to wait several months while we observe what the new employee does, and then decide whether to petition the WERC. In other words, we are more comfortable petitioning the WERC with more than the position description in our hands when in fact we believe the individual will be performing essentially as Mr. Ocker does currently.

. . .

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Zuleger selected a copy of the collective bargaining agreement previously sent to him by Rutlin

which contained the references in Article 13 to “leadperson or supervisor”, and made a few typographical/grammatical/punctuation corrections in the remainder of the document (not disputed herein).

18. By his letter of January 22, 1998, Rutlin responded to Zuleger’s January 16 letter as follows:

. . .

Your letter of January 16, 1998 was received in our office on January 21, 1998. I am enclosing three originals of the contract which corrects the grammatical and/or typographical errors which you identified in the draft you returned to me with your January 16, 1998 correspondence. I also changed the references to “lead person or supervisor” in Article 13 to “road superintendent.”

It is my position that with these changes, the contract is now ready for signature. I request that you forward three copies of the signed contract to Joe Wagner, who will obtain signatures on behalf of the Village and return a signed copy to you.

. . .

19. On February 2, 1998, the Town hired Bob Andrews as Road Superintendent. As such, Andrews works approximately 90 percent of his time doing the same kind of work that bargaining unit employees do: cutting brush, plowing snow, sanding roads, hauling gravel and running the loader. During the Summer of 1998, Andrews admitted to Fleming that he had cleaned up the park on weekends approximately one to three times.

20. On February 6, 1998, Ms. Robbins wrote to Mr. Rutlin, in relevant part, as follows:

. . .

The undersigned represents International Union of Operating Engineers Local 139. I am writing to you in response to your correspondence, dated January 22, 1998, directed to Dennis Zuleger, asking that he sign the draft settlement agreement which you have forwarded to him.

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The Union does not agree with the Town’s phrasing of Article 13 nor the Town’s failure to amend Article 8.

Additionally, the Union has recently learned that management intends to unilaterally remove work from the bargaining unit by assigning non-supervisory work to a newly created superintendent position. The Union, therefore, requests the opportunity to bargain concerning this issue also. The Union further requests that the Town not transfer any unit work until they have bargained an agreement on the issue.

Until these issues are resolved, there can be no meeting of the minds on a successor collective bargaining agreement. We ask that you contact Dennis Zuleger to set up meetings so that these remaining issues may be bargained and a collective bargaining agreement can be reached.

. . .

21. On February 10, 1998, Attorney Rutlin sent a letter to Attorney Robbins containing his view of the events which had occurred previously and which enclosed relevant documentation (quoted herein). That letter read, in relevant part, as follows:

. . .

I am in receipt of your February 6, 1998 facsimile transmission. It is the Town's position that the parties reached a meeting of the minds during negotiations and the contract should be signed.

. . .

It is the Town's position that the parties reached an agreement on November 17, 1997. If the Union is not willing to agree to change the references to "lead person" to "road superintendent" the Town will not hold up executing the contract on that issue. Therefore, we hereby demand that the Union forward a signed copy of the contract to the Town with the references to "road superintendent" changed to "lead person". That change should then be initialed. The change will also be initialed by the Town and a signed contract will be sent back to the Union. If the Union refuses to sign the contract, as proposed, I will recommend that the Town file a Prohibited Practice charge against the Union. If we do not receive the signed contract one week from the date you receive this letter, the Town will also rescind any wage and fringe benefit increases that were already implemented in good faith based upon the agreements reached at the November 17, 1997 bargaining session.

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. . .

22. By her letter dated February 20, 1998, Attorney Robbins responded to the February 10th letter sent by Attorney Rutlin to her, as follows:

. . .

We have received your correspondence of February 10, 1998 in which you take the position that the parties had reached an agreement on November 17, 1997 and on that basis, that the Union is obligated to sign an agreement, excluding your later proposals to change the contract language.

Even accepting the Town's position on this issue, the Town cannot, subsequent to reaching that agreement, unilaterally remove work from the bargaining unit. We note that Article 21 of the parties' agreement specifically excludes from Entire Memorandum of Agreement unilateral changes in working conditions:

[N]othing herein shall grant the Town the right to make unilateral changes in working conditions not covered by the agreement without the recognizing the Union's statutory right to bargain on those changes.

We further note that in your correspondence of February 10, 1998, you have failed to respond to the Union's request to bargain. We must renew our request that the Town return any bargaining unit work now being performed by the newly created road superintendent position and bargain with the Union on this issue.

. . .

23. By his letter dated February 24, 1998, Mr. Rutlin responded to Ms. Robbins' letter of February 20 as follows:

. . .

The Town has received signed (sic) copies of the contract and I have recommended that they sign the same and return signed originals to Mr. Zuleger.

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With respect to the Union's request to bargain regarding the removal of work from the bargaining unit by assigning nonsupervisory work to the newly created superintendent position, please have Mr. Zuleger contact the undersigned

to set up a date to discuss this issue. However, please understand that by agreeing to bargain with the Union on this issue, the Town is not waiving any defenses it may have regarding its actions in this regard.

. . .

24. By her letter dated February 24, Ms. Robbins responded to Mr. Rutlin's letter of February 24 as follows:

. . .

Thank you for your correspondence of February 24, 1998. While your letter addresses the Union's request to bargain, it does not address the Union's first request that the Town return work performed by the Road Superintendent to the bargaining unit. We request the Town return to the status quo ante as a prerequisite to bargaining.

Like the Town, the Union also does not waive any other claims it may have concerning this matter in agreeing to bargain.

. . .

25. Sometime after February 20th, but before February 24, 1998, the Union executed the 1998-2000 contract. On February 28, 1998, the Town executed the 1998-2000 labor agreement. That contract retained the leadman classification and pay rate and deleted any references to "supervisor" and "road superintendent".

26. On March 4, 1998, Rutlin responded to Robbins' letter of February 24 as follows:

. . .

I am writing in response to your February 24, 1998 correspondence. While the Town is willing to bargain with the Union, as indicated in my letter of February 24, 1998, it is the Town's position that it has the right to assign whatever work it deems appropriate to the Road Superintendent and the Town does not intend to modify his duties as a condition precedent to bargaining on that issue.

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We stand ready to set a date to bargain on this issue. Please have Mr. Zuleger contact me at his earliest convenience.

. . .

27. On March 6, 1998, Ms. Robbins responded to Mr. Rutlin's letter of March 4 as follows:

. . .

This letter is in response to your correspondence dated March 4, 1998. On behalf of the Town of Fifield, you refuse to return work removed from the bargaining unit and further assert the right to assign such work to a position which has been treated as a position outside the bargaining unit. In this context, it is not clear what the Town of Fifield is willing to bargain.

As we have explained, the Union requests bargaining over the decision to transfer work outside the bargaining unit after the status quo ante has been reestablished by return of work to the bargaining unit.

Dennis Zuleger stands ready, willing and able to meet with representatives of the Town of Fifield at any time. However, we do not believe that the parties can engage in good faith bargaining while the Town refuses to return work unilaterally removed from the unit and continues to insist on its unilateral right to do so. As you know, the Union has filed a prohibited practice complaint to remedy the situation since the Town has been unwilling to do so.

If the Town is willing to meet with the above reservations, please provide the dates on which the Town of Fifield is available directly to Dennis Zuleger.

. . .

28. On April 1, 1998, the Town and the Union met for approximately one hour to bargain regarding the Town's removal of unit work. No agreement was reached to return unit work.

29. During the briefing schedule herein, the Union withdrew its allegations regarding Sec. 111.70(3)(a)1 and 3, Stats.

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Upon the basis of the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. By its conduct at the November 17, 1997 meeting and thereafter in its communications with the Town, the Union waived its right to bargain regarding the assignment of bargaining unit work to the new Road Superintendent position in 1998.

2. Given the fact that the Town of Fifield and the Union reached a tentative agreement which was ratified by the Union on November 17, 1997, prior to which the bargaining unit members and the Union representatives became fully aware of the Town's intention to create a working supervisory position and eliminate the leadman position, the Town did not engage in bad faith bargaining by assigning bargaining unit work to the Road Superintendent beginning in January, 1998, and thus, the Town did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats.

3. By its conduct following the Union's request to bargain concerning the impact of the assignment of bargaining unit work to the Road Superintendent, the Town did not refuse to bargain collectively with the Union, and thus, the Town did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)4, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats.

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

ORDER

It is ordered that the complaint filed herein be, and the same, hereby is, dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 22nd day of February, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

TOWN OF FIFIELD

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

POSITIONS OF THE PARTIES

Complainant's Position

The Union argued that the Town had violated its mandatory duty to bargain by unilaterally transferring bargaining unit work to a supervisory position. The Union noted that such a transfer has been considered by the Commission to be a mandatory subject of bargaining. Further, the Union observed that the statute imposes a duty to bargain in good faith over mandatory subjects except those covered by the contract, or those on which the Union has waived its right to bargain. Unilateral changes in existing terms and conditions of employment are *per se* violations of an employer's statutory duty to bargain under Commission precedent. The Union contended that if it is a violation for an employer to substitute non-unit employees for unit employees (one union for another), then the Examiner should find a violation of the statute in this case as well. In addition, the Union contended that the Town should have bargained over its decision to replace the leadman with a supervisor doing bargaining unit work, although the Union recognized that the Commission has never faced this particular issue before. The Union argued that the Commission should adopt the National Labor Relations Board's approach in this area, citing HAMPTON HOUSE, 317 NLRB 1005 (1995) and PRESBYTERIAN UNIVERSITY HOSPITAL, 325 NLRB No. 70 (1998).

In addition, the Union argued that the Town failed to bargain over the transfer of unit work and the effects of that transfer on bargaining unit members. In this regard, the Union noted that a full contract was reached on November 17, 1997 and ratified that day by the Union members. Prior to this ratification, the Town never proposed that language be inserted into the agreement which would have allowed supervisors to do bargaining unit work. Even if the Town told the Union (in February) that a supervisor would have to do bargaining unit work because the Town could not afford to hire employees to do administrative duties only, such notice would not constitute a defense to removing bargaining unit work. Therefore, in the Union's opinion, the Town breached its duty to bargain in good faith in this area as well.

The Union contended that it had not waived its right to bargain over the transfer of work or the effects of that transfer on the bargaining unit during negotiations or thereafter. In this regard, the Union noted that a waiver must be clear and unambiguous and that if a contract is silent, an employer must bargain over the decision to subcontract and the impact of that decision on the bargaining unit, citing VILLAGE OF SAUKVILLE, DEC. NO. 28032-A

(Crowley, 10/94). Furthermore, the Union urged that the Town's removal of unit work relieved the Union of its obligation to bargain until the work was returned, citing, CITY OF GREEN BAY, DEC. NO. 18731-A (Davis, 6/82) and MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 21893-B (WERC, 10/86).

In all of the circumstances of this case, the Union sought a make-whole remedy (including backpay for any unit employees who lost pay due to the removal of the bargaining unit work), an order to cease and desist, and an order that the Town bargain with the Union over the effects of creating this supervisory position.

Employer's Position

Initially, the Town noted that the recognition clause excludes "supervisory" employees from coverage by the collective bargaining agreement. In addition, by his letter of December 1, 1997, Mr. Rutlin confirmed that it was the Town's intent (as stated at negotiations) to eliminate the leadman position and create a new position to be excluded from the bargaining unit. Notably, Union representative Zuleger's letter of December 15, 1997, made no comment regarding the above statement in Mr. Rutlin's letter. On December 29th, the Town sent Zuleger a job description for the Road Superintendent position which indicated that the position would "work with Town crew projects."

The Town also contended that after bargaining unit employee Fleming's interview for the Road Superintendent position on January 10, 1998 (where Fleming was given a copy of the job description and specifically told that the successful applicant would not only supervise but also perform the same work with the crew), Fleming must have passed this information along to Union Representative Zuleger. Indeed, on January 16, 1998, Zuleger's letter to Rutlin discusses a unit clarification petition which could be filed by the Union regarding the Road Superintendent position. In the Town's view, were the duties of the Road Superintendent not in question between the parties, Zuleger would have had no reason to refer to a unit clarification petition. Thereafter, in February, the Union executed the 1998-2000 collective bargaining agreement without seeking further clarification of the Road Superintendent's duties or the Town's intent.

Given the above factual scenario, the Town argued that the Union's claims that it violated Secs. 111.70(3)(a)1 and 4, Stats., are without merit. The Town conceded that if a matter is a mandatory subject of bargaining, the parties are required to bargain regarding it unless the subject is already covered by the contract or the Union has clearly waived its right to bargain regarding the matter. But if either a waiver or coverage by the agreement exists, the Town noted, no obligation to bargain mid-term of the contract exists. Indeed, if a subject is covered by the collective bargaining agreement, it is for the Arbitrator to decide the scope of the parties' rights regarding that subject under the contract.

Thus, the Town contended, the evidence established that it had the contractual right to assign bargaining unit work to the Road Superintendent. In this regard, the Town noted that Article 2, Management Rights, expresses a broad authority vested in the Town to direct the workforce and to assign work. Thus, the Town argued that the Union should have filed a grievance or, in the alternative, it could have filed a unit clarification petition with the Wisconsin Employment Relations Commission. In any event, in the Town's view, the Union is in the wrong forum.

Furthermore, the Town argued that the Union had waived its right to bargain with respect to the performance of bargaining unit work. The Town looked to the bargaining history surrounding the 1998-2000 contract and urged that the Examiner could infer a waiver from the bargaining history – either that the Union had failed to bargain regarding the subject of removal of bargaining unit work or that it had failed to resolve the issue of assignment of bargaining unit work such that it had waived its right to bargain the matter during the contract term. In this regard, the Town noted that at the November, 17, 1997 negotiation session, the Town Board clearly stated that it would not be filling the leadman position, but would be creating a supervisory position that would not be included in the bargaining unit. In addition, the Town urged, the evidence showed that Union Representative Zuleger was told at the November 17 session that the supervisor who would be hired would have to be a working supervisor because there was not enough administrative work for the supervisor to be a full-time supervisor. Despite that fact, the Union never submitted a proposal to the Town to limit the supervisor's performance of bargaining unit work, as it could have done. Furthermore, the Town asserts that even after the Town made it clear that it would be creating a supervisory position, the bargaining unit membership ratified the terms of the settlement reached at the November 17th session, without addressing the Town's intended action regarding the removal of unit work and creation of the supervisory position.

The Town pointed to a series of letters between the parties to bolster its argument that Union Representative Zuleger knew that the new supervisory position the Town intended to create would be a working supervisory position. In this regard, the Town noted that by his letter of December 15, 1997, Zuleger proposed to change Article 8A from that originally proposed by the Union and agreed upon by the parties on November 17, to limit the Town's right to determine whether job vacancies existed and whether such vacancies should be filled. This attempt by Zuleger failed and he withdrew his suggestion that the tentative agreement ratified by the Union regarding Article 8A should be changed. In addition, Zuleger received, on or about December 29, 1997, a job description of the "Road Superintendent" position which indicated that the position would be working "with Town Crew projects". Nonetheless, between December 29, 1997 and January 10, 1998, the Union made no proposal with regard to the Road Superintendent position or its performance of bargaining unit work. In addition, the Town noted, bargaining unit employee Fleming, who was interviewed by the Town for the Road Superintendent position on January 10, 1998, was specifically advised by the Town

Board that the open position would have control of the road crew and would perform many of the same duties as leadman Ocker had previously performed. The Town contended that Fleming must have conveyed this information to Zuleger after Fleming's January 10, 1998 interview. Again, as Zuleger took no action to address the question of the Road Superintendent performing unit work on or after January 10, 1998. Rather, Zuleger indicated in his letter of January 16, 1998, that the Union would not immediately petition the Wisconsin Employment Relations Commission for a unit clarification regarding the Road Superintendent position, preferring to wait several months to observe the duties of that position. On February 2, 1998, the Town Board hired Bob Andrews to fill the Road Superintendent position, yet Zuleger executed the 1998-2000 collective bargaining agreement thereafter in mid-February, 1998 without resolving the issues in dispute herein. Thus, the Town urged that the above factual scenario demonstrates that the Union knowingly waived its right to bargain with respect to the assignment of bargaining unit work previously performed by Leadman Ocker to the newly-created Road Superintendent position, and that therefore the Town did not violate Sec. 111.70(3)(a)1 and 4, Stats.

REPLY BRIEFS

Complainant

The Union argued that the Respondent mischaracterized the evidence in its initial brief and cited inapplicable and distinguishable case authority. The Union noted, contrary to the Town's assertions, contractual waivers must be clear and unmistakable and blanket waivers are generally construed restrictively by the Commission. Thus, the management rights clause cited by the Town should not relieve the Town of its obligation to bargain over removing work from the bargaining unit, in the Union's view. Furthermore, the Union noted that the cases cited by the Town in this area each specifically concerned contracts containing provisions addressing the disputed subjects of bargaining, which is not the case here. As no contractual provision covers the bargaining unit work in this case, and the management rights clause herein is a broad, non-specific clause, the Union cannot be said to have unmistakably and clearly waived its right to bargain over the removal of bargaining unit work in this case.

The Union urged that it did not waive its right to bargain by its inaction. In this regard, the Union observed that the Town failed to give it notice of its intent to remove the work from the unit, and that the Union did not have the necessary information to determine whether a contractual proposal needed to be made regarding bargaining unit work at the time of ratification. Specifically, the Union observed that the Town had failed to give it a job description for the Road Superintendent position prior to November 17, 1997. Furthermore, the Union asserted that notice of intent to remove bargaining unit work should not be inferred from the fact that Zuleger distributed a document on November 17 regarding supervisory duties. The Union contended that the fact that Zuleger had heard "rumors" regarding the

removal of bargaining unit work prior to November 17, 1997 bargaining session should not constitute actual notice of the Town's intent to remove such work. Finally, the failure of the job description to clearly state that bargaining unit work would be performed by the Road Superintendent position requires a conclusion that the Union did not waive its right to bargain regarding the decision to remove bargaining unit work in this case. Because the Town has refused to restore the work, and because the bargaining history does not establish a waiver, the Union sought a full remedy including backpay for the removal of bargaining unit work.

Respondent

The Town asserted that the Union mischaracterized the evidence in its initial brief, making its arguments meritless. In this regard, the Town noted that the Union's claim that Town officials did not advise the Union at the November 17 bargaining session that the Road Superintendent position would be performing bargaining unit work is contrary to the evidence. The Town pointed to the testimony of Town Board Supervisor Jack Wierzbza and urged the Examiner to compare that testimony with the testimony of bargaining unit employee Ted Fleming and Union Representative Dennis Zuleger. In the Town's view, such a comparison would lead to the necessary conclusion that Fleming and Zuleger's testimony demonstrated that they did not dispute that on November 17, 1997, the Town stated that it intended to create a supervisory position, that the individual who would hold that position would be performing bargaining unit work and that the Town would not oppose the filing of a petition for unit clarification if the Union believed the supervisory position should be included in the bargaining unit. In regard to the last point, the Employer noted that there would have been no reason to refer to a unit clarification petition had the Road Superintendent job been a strictly supervisory position.

In addition, the Town's letter dated December 1, 1997 again references a unit clarification proceeding. The Town urged that by its letter of December 29, 1997, enclosing the job description for the new supervisory position, Union Representative Zuleger was placed on notice that the Road Superintendent position was one which would work "with Town Crew projects". Thus, the Union's assertion that Zuleger was unaware that the incumbent of the new supervisory position would be performing bargaining unit work until mid-January, 1998, is contrary to the evidence and places Zuleger's testimony in doubt.

The Town asserted that the evidence established that the Union had numerous opportunities to request to bargain on the issue of the Road Superintendent performing bargaining unit work prior to mid-January, 1998, and that the Union failed to do so. In this regard, the Town pointed to Zuleger's letter of January 16, 1998, in which he stated that the Union intended to wait several months while they observed what the new supervisory position was doing before they would petition the Wisconsin Employment Relations Commission as evidence that the Union failed to take advantage of bargaining opportunities regarding the issue.

The Union's first request to bargain came by letter of February 6, 1998, and as a result of this, the parties agreed to meet on April 1, 1998 to bargain regarding the Road Superintendent performing bargaining unit work. At no time did the Union refuse to execute the 1998-2000 collective bargaining agreement prior to February 6, 1998. Indeed, the Union executed the collective bargaining agreement on or about February 24, 1998, without resolving the issue concerning the Road Superintendent performing bargaining unit work. These actions, in the Town's view, constituted a waiver of the Union's right to bargain on the issue.

Finally, the Town reiterated that it had the right to assign the Road Superintendent position bargaining unit work under Article 2 of the collective bargaining agreement, so that the Town was not required to bargain with the Union on the issue in any event, Article 2 constituting a contractual waiver of the issue.

DISCUSSION

As a general matter, Section 111.70(3)(a)4, Stats. enforces a municipal employer's duty to bargain in good faith over mandatory subjects of bargaining. Each case is driven by its own facts, and the Commission considers the totality of the circumstances in reaching its conclusions. ADAMS COUNTY, DEC. NO. 11307-A (WERC, 5/73), *aff'd by operation of law*, DEC. NO. 11307-B (WERC, 5/73). Proof of a violation must be by a clear and satisfactory preponderance of the evidence. Also, it is not necessary to bargain mid-term of a contract regarding mandatory subjects, if the subject is addressed by the labor agreement, or is a matter on which the labor organization has clearly waived its right to bargain. CADOTT COMMUNITY SCHOOL DISTRICT, DEC. NO. 27775-C (WERC, 6/94); WAUPACA COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 24764-B (WERC, 1/91); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82). Absent evidence that an employer's decision represents a choice among various social, fiscal, or political goals or constraints, the decision to substitute non-unit employees for unit personnel is a mandatory subject of bargaining. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20093-B (WERC, 8/83).

In CITY OF APPLETON, DEC. NO. 14615-C (WERC, 1/78), the Commission held, in accord with a long line of cases,

. . .that a waiver of the right to bargain on mandatory subjects of bargaining must be clear and unmistakable, and that a finding of such waiver must be based on specific language in the agreement or the history of bargaining.

Accord, CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 2/86) and cases cited therein. In addition, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 15829-D (Yaeger, 3/80) essentially stands for the proposition under Commission precedent that if a union (with full knowledge of the employer's intentions) begins negotiations regarding a subject, never reaching a

satisfactory resolution of the matter and then abandons negotiations on the topic and enters into a collective bargaining agreement which does not include any provision on the abandoned topic, this is “conclusive evidence of a waiver” of the Union’s right to demand to bargain about the subject during the term of the effective agreement. *Slip. op.* at p. 14-15.

Where a Union fails to present any proposals on the impact of the Employer’s elimination of a unit position(s) and the Union does not raise the issue in bargaining, the Union’s inaction has also been held to constitute a waiver. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 25283-A (Jones, 10/88), *aff’d by operation of law*, DEC. NO. 25283-B (WERC, 5/89). In CITY OF ANTIGO, DEC. NO. 27108-A (Honeyman, 5/92), *aff’d by operation of law*, (WERC, 6/92), the Union had been aware that the Employer intended to implement a program using non-unit employees to perform unit work. Nonetheless, the Union dropped contract proposals on the subject, and thereafter failed to make additional contract proposals during open contract negotiations regarding the matter, choosing instead to file a grievance. In these circumstances, the Examiner found that the Union, by its inaction, had waived its right to bargain concerning the matter and that the filing of the grievance did not constitute a demand to bargain.

In CITY OF WISCONSIN RAPIDS, DEC. NO. 27466-A (Shaw, 5/93), *aff’d* DEC. NO. 27466-B (WERC, 8/93), the Examiner found a waiver by inaction where, with full knowledge of the City’s intent to assign training duties to certain unit employees, the Union failed to make any proposals in bargaining regarding training duties and failed to demand to bargain over the impact of such training duties during contract negotiations, later reaching and ratifying a complete agreement. See also, CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85); CITY OF KAUKAUNA (FIRE DEPARTMENT), DEC. NO. 27028-A (Nielsen, 8/92). In my view, the cases discussed above focus the inquiry in this case.

This case essentially hinges upon whether the Town made it clear to the Union on November 17, 1997, that it intended to eliminate Ocker’s leadman position and create a working supervisory position. Initially, I note that the contract does not address the assignment of unit work. The transcript herein contains the testimony of Union Representative Zuleger and unit employee Ted Fleming as well as the testimony of Town Board Member Wierzba which are instructive regarding the Union’s knowledge. In analyzing Union representative Zuleger’s testimony, I note that on cross-examination he testified as follows with regard to his specific recollections of discussions at the November 17, 1997 bargaining session concerning the lead man and supervisory positions:

- (1) Zuleger did not recall discussing whether the supervisory position the Town intended to create should be in or out of the bargaining unit, although he admitted such a discussion may have taken place (Tr. 48);

- (2) Zuleger did not recall Attorney Rutlin stating that the Town could not afford to have a pure supervisory position because there would not be enough work for a full-time supervisory position, although Zuleger did not deny that Rutlin might have made such a statement (Tr. 49);
- (3) Zuleger did not recall that he told the Town that when and if the Town created a supervisory position, Zuleger could file a unit clarification petition, although Zuleger did not deny that he might have said this (Tr. 49);
- (4) Zuleger did not recall the parties discussing the fact that the Town needed someone to work with bargaining unit employees who could also discipline employees, although Zuleger did not deny that such a discussion could have taken place (Tr. 49-50);
- (5) Zuleger did not recall, but would not deny, that he told the Town that if the supervisory position did unit work, he would challenge it (Tr. 57);
- (6) Zuleger gave no explanation why, in his December 15, 1997 letter, he proposed to change the parties' tentative agreement on Article 8(A) except that Zuleger thought the change would be beneficial (Tr. 52-53, 55).

Employee Fleming's testimony on cross-examination was as follows. Fleming did not recall the Town indicating on November 17th that it intended to create a supervisory position when Ocker retired. Fleming did not recall any discussion at the November 17th session regarding what the supervisory position might entail in terms of duties and responsibilities, but he admitted the discussion of these matters could have taken place. Fleming did not recall any discussion regarding a unit clarification on November 17th (Tr. 20-21, 23).

Fleming also stated that prior to his interview regarding the Road Superintendent position in early January, 1998, he knew that the Town was calling the position a supervisory position, but he was not completely sure of everything that was involved; that at his interview, the Town made it clear that the job which he was interviewing for would include supervisory responsibility but that the Road Superintendent would also be working with the Town crew and doing Town crew work; that during his interview, Fleming became concerned about his pension because he was told that the position he was interviewing for would not be covered by the Union pension program (Tr. 23-26).

Fleming did not take the Road Superintendent position because he “didn’t want to be to blame between the Union and the Town” (Tr. 26) and because he did not want to discipline his co-workers. (Tr. 27). Fleming also indicated that after his first interview in early January, 1998, he spoke to a Union representative about his pension rights as well as whether or not he could maintain his membership in the Union and work in a supervisory position (Tr. 26).

In contrast, Town Board member Wierzba stated the following during his examination herein:

- (1) The Town took the position that when Don Ocker retired from the lead position, the Town would hire or employ a non-union supervisor (Tr. 72);
- (2) The Town made this announcement toward the end of the bargaining session on November 17, 1997, and the Union responded that the Town could not do that (Tr. 73);
- (3) The Town responded to the Union that it needed a person to represent the Town out in the field with the workers and that when Ocker retired, the Town wanted someone to represent them in such a position (Tr. 73);
- (4) In response, Union representative Zuleger stated that he did not have a problem with the Town creating a supervisory position, but he would have a problem if the position performed bargaining unit work. The Town representative responded that there was not sufficient work for a supervisor to do such work full-time (Tr. 73-74). Union representative Zuleger then gave the Town a prepared list of supervisory duties to demonstrate why the Town could not do as it wished regarding a supervisory position (Tr. 74);
- (5) There was discussion of a unit clarification proceeding at this point on November 17th and the Town representative stated that the Town would not object to such a proceeding and would in fact work with the Union in going through that process, if the Union found it necessary (Tr. 74).

Given the testimony of these three witnesses, it must be concluded that neither Zuleger nor Fleming had a clear recollection of the events of November 17th and that Wierzba’s testimony, being clear and certain, should be credited, in light of Zuleger and Fleming’s many admissions on cross-examination that discussions regarding the leadman and supervisory positions could have occurred as the Town contends.

In addition, the documentary evidence tends to support a conclusion that Zuleger knew that the Town intended to create a working supervisor position in place of Ocker's leadman position upon Ocker's retirement. In this regard, I note that in his letter of December 1, 1997, Mr. Rutlin made reference to the Town's intention to eliminate the leadman position and create a new position which would be excluded from the bargaining unit as a supervisory/managerial position. In my opinion, there is some merit to the Town's argument that it would not have made reference to a unit clarification procedure regarding the new supervisory position in its December 1st letter had there been no question regarding the type of work the new supervisor would be performing. In any event, had there been no discussion during bargaining regarding the new Town supervisor performing unit work, or of a unit clarification, it stands to reason that Zuleger would have questioned why Rutlin raised the use of a unit clarification proceeding and why the Town wished to create a supervisory position as stated in Rutlin's December 1st letter.

However, in his responsive December 15, 1997 letter, Zuleger made no reference to a unit clarification proceeding or to the reference in Rutlin's letter to the supervisory position which the Town intended to create. Rather, Zuleger sought in his December 15th letter, to change a previously agreed-upon Union proposal, part of the tentative agreement reached on November 17th -- to omit language from the agreed-upon changes to Article 8, Section A, regarding job vacancies and job postings. Zuleger's suggestion was to eliminate the following phrase from the contract: "whether job vacancies exist, whether vacancies are to be filled . . ." so that the section would read as follows: "The Employer shall have sole right to determine whether new positions shall be created." In my view, this suggested change to the Union's original proposal indicates that Zuleger was having second thoughts regarding what occurred on November 17th concerning the working supervisory position he had been notified of on that date.

During the letter-writing campaign which occurred between Rutlin and Zuleger in December, 1997, Rutlin attempted to make changes in references in the contract, deleting the term "lead person" and substituting for it either "supervisor or lead person" or "Road Superintendent". At each point, Zuleger resisted Rutlin's attempt to change the language in the contract from "lead person", relying upon the parties' tentative agreement which had been ratified by the Union membership on November 17th. In my view, this evidence supports a conclusion that Zuleger may have been concerned that the contract should continue to refer to a "lead person," even if such a person was no longer to be employed by the Town, in case the Town's workforce expanded and another leadman was needed in the future. Thus, I do not find the above-described exchange between Rutlin and Zuleger to be particularly relevant to the dispute in this case.

On December 29, 1997, the Town Clerk forwarded Zuleger a copy of the "Road Superintendent" job description. The Town has argued that this job description put Zuleger

fully on notice that the “Road Superintendent” position would be performing bargaining unit work. I find that the language of the job description when taken as a whole and in the context of this case should have caused Zuleger to ask questions of the Town. The job description requires the incumbent to possess the ability to operate and maneuver equipment and machinery, to exert moderate to heavy physical effort and to work under conditions or exposure to environmental factors such as temperature variations and extremes, toxic agents, noise, machinery and/or dust, demonstrates that the Town intended the position of Road Superintendent to perform unit work. Thus, the references to specific abilities in the job description should have caused Zuleger to question Rutlin or the Town Board regarding the meaning of the phrase “works with Town crew projects.” Notably, Zuleger never raised any questions regarding the job description, which supports a conclusion that Zuleger had received notification of the Town’s intent on November 17th, and chose not to act.

It appears clear on this record that after his interview of January 10, 1998, Fleming must have spoken to Zuleger and detailed for Zuleger the expectations that the Town had regarding the Road Superintendent position, including the fact that the Town intended the incumbent of that position to perform supervisory as well as unit work. Yet, Zuleger did not write or call the Town or Attorney Rutlin to object to what Fleming had told him regarding the expectations the Town had of the incumbent of the Road Superintendent job. Rather, on January 16, 1998, Zuleger wrote to Attorney Rutlin and made reference to a WERC unit clarification, which Zuleger stated the Union did not intend to pursue immediately, referring to the Road Superintendent job as “supervisory” (quotation marks in original), and indicating that the Union intended to wait several months to observe what the supervisor was doing for the Town before the Union would petition the WERC. Again, this letter supports the conclusion reached above that the Union knowingly waived its right to bargain regarding the Town’s plan to remove unit work from the leadman and to give that work to the new supervisor.

The exchange of letters in February, 1998 between Attorneys Robbins and Rutlin fails to add anything of substance to the controversies between the parties. However, it is significant in my view, that despite all the events which transpired from November 17, 1997 through February, 1998, the Union executed the 1998-2000 contract on or about February 24, 1998. In regard to the Union’s argument that the Town failed to properly bargain regarding the effects of the Town’s decision to have the Road Superintendent perform bargaining unit work, I believe that the facts demonstrate clearly that the Town met its obligation to bargain (after the Union requested same) regarding the impact of the Town’s removal of unit work on April 1, 1998.

In all of the circumstances of this case, I have found that there was a meeting of the minds on November 17, 1997 and that at that time, the Union received notification that the Town intended to create a new supervisory position which would be performing some bargaining unit work. CITY OF ANTIGO, supra; CITY OF WISCONSIN RAPIDS, supra;

MILWAUKEE BOARD OF SCHOOL DIRECTORS, supra. Significantly, there is no evidence in this record to demonstrate that the Town's decision to employ a working supervisor was motivated by any hostility toward the Union or a desire to threaten employees for the exercise of rights protected by the Municipal Employment Relations Act. Rather, this record clearly shows that the Town, for legitimate management reasons, made the policy choice to employ a full-time supervisor so that it could have the representative it felt it needed in the field to deal with personnel concerns that the Town might have from time to time, and to assign that supervisor unit work, as the Town had insufficient supervisory work to otherwise justify employing a full-time supervisor. Thus, the Town's motive, as such, was not an illegal motive for purposes of Section 111.70(3)(a)3 and (1), Stats. See e.g. CITY OF MEDFORD (ELECTRIC UTILITY), DEC. NO. 28440-D (Nielsen, 5/97); CITY OF BELOIT, DEC. NO. 27779-A (McGilligan, 3/94); aff'd by the Commission in relevant part, DEC. NO. 27779-B (WERC, 9/94); CITY OF BROOKFIELD, DEC. NO. 20691-A (Bielarczyk, 5/93); aff'd in relevant part by the Commission, DEC. NO. 20691-B (WERC, 1/94). I note that the Union withdrew its allegations regarding violations of Sections 111.70(3)(a)3 and 1, Stats. during the briefing process in this case.

Here, the parties have reached agreement to essentially exclude the working supervisor (Road Superintendent) from the bargaining unit, much as they might agree to a stipulation for the exclusion of a position(s) during the pendency of an election or unit clarification petition. If the Union is unhappy with the outcome of this case, it has the option of filing a unit clarification petition with the Commission to determine whether, in fact, the Road Superintendent position and its incumbent should be excluded from the bargaining unit based upon the position's supervisory authority and/or managerial participation. In any event, that issue is not before the Examiner herein. For all the reasons stated herein, I have dismissed the complaint in its entirety.

Dated at Oshkosh, Wisconsin this 22nd day of February, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

SAG/gjc
29403-A.D

