

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

In the Matter of the Petition of  
**WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

Involving Certain Employees of

**CITY OF VIROQUA**

Case No. 8  
No. 51725  
ME (u/c)-3695

**Decision No. 29644-C**

---

**Appearances:**

**Mr. Daniel Pfeifer**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

LaFollette, Godfrey & Kahn, by **Attorney Peter Albrecht**, Suite 500, One East Main Street, Madison, Wisconsin, appearing on behalf of the City of Viroqua.

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

Wisconsin Council 40, AFSCME, AFL-CIO filed a petition on February 18, 2002, with the Wisconsin Employment Relations Commission seeking to include the positions of Street Superintendent and Utility Supervisor into an existing bargaining unit of City of Viroqua employees which Wisconsin Council 40 represents. The City of Viroqua opposed the petition on the basis that both positions are held by supervisors.

Hearing in the matter was held in Viroqua, Wisconsin on August 1, 2002 before Examiner Lauri A. Millot, a member of the Commission's staff. AFSCME declined to file a brief while the City's brief was received on September 24, 2002. The hearing transcript was received on November 18, 2002.

Dec. No. 29644-C

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

### **FINDINGS OF FACT**

1. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter Union, is a labor organization with its offices located at 18990 Ibsen Road, Sparta, Wisconsin.

In CITY OF VIROQUA, DEC. NO. 29644-A (WERC, 5/99) the Wisconsin Employment Relations Commission certified Wisconsin Council 40, AFSCME, AFL-CIO as the exclusive bargaining representative of the bargaining unit defined as:

all regular full-time and part-time employes of the City of Viroqua, excluding professional, supervisory, managerial and confidential employes and employes with the power of arrest.

2. City of Viroqua, hereinafter City, is a municipal employer with its offices located at 428 South Main Street, Viroqua, Wisconsin. The City provides governmental services to the public of the City of Viroqua.

3. The incumbent in the position of Street Superintendent is Steve Clark. Clark has been employed by the City for 17 1/2 years, 15 years of which have been in his current position although the title has been changed over that time period. Clark's supervisor is Tom Henry, City Director of Public Works.

Clark's designated work hours are Monday through Friday from 7:00 a.m. to 3:30 p.m. although he usually starts work at 6:15 a.m. and his ending time varies due to work responsibilities. Clark regularly works more than 40 hours a week, does not earn overtime, but may take time off after completing his 40 hour work week provided he determines it is feasible with his work load and responsibilities. Clark earns a salary of approximately \$40,000 - which is approximately \$8,000 - \$10,000 more on an annual basis than the wages received by the employees he supervises. Clark receives the same vacation, holiday and sick leave benefits as a member of the bargaining unit with his same number of years employed in the Public Works Department, but has the additional benefit of a \$400 allowance to purchase items not covered by the City's health insurance plan which is not available to bargaining unit employees.

The Utility Superintendent replaces Clark in Clark's absence.

4. The job description for the Street Superintendent reads as follows:

**JOB TITLE:** STREET SUPERINTENDENT

**PURPOSE.** To assist the DPW with the operation of the Viroqua Streets and Sanitation Divisions of the Public Works Department.

**EDUCATION:** High school or equivalent.

**EXPERIENCE:** Must have worked five (5) years in comparable work area.

**GENERAL QUALIFICATIONS:**

Good moral character with a willingness to learn and cooperate.

Good leadership ability.

Must be in a physical condition that will allow for the satisfactory performance of tasks required with the job.

Must have a CDL license with proper endorsements needed to drive the equipment.

Must have the ability to operate any equipment used in the Public Works Department.

**RESPONSIBILITIES:**

Supervise the day to day operation of the streets and sanitation divisions.

Maintain a good line of communication with the DPW and City Clerk's office.

Supervise and work with crew.

Written evaluation of employees in your department at least once per year and discipline when necessary.

Take part in interview and hiring of employees in department.

Prepare budget, if needed, and present to Director of Public Works.

Perform other public works tasks when assigned.

Be familiar and comply with rules and regulations of the Public Works Department.

5. Clark assigns work hours and job duties daily to eight Street Division employees who perform street maintenance, sanitation, and recycling work. Clark has the independent authority to change the work hours and work responsibilities of these employees. Clark has independent authority to call-in Public Works employees. Clark approves time off, vacation, and sick leave requests submitted by these employees. Clark approves employee time cards.

Clark has participated in the hiring of Public Works employees. Clark has reviewed applications, recommended candidates for interview, prepared questions for the interview, participated at the interview and has recommended candidates for hire to the Personnel Committee. The candidates Clark recommended were offered positions with the City. Clark does not attend candidate interviews when he has another commitment.

Clark makes verbal recommendations to Henry regarding the continued employment of probationary employees.

Clark has investigated situations of potential discipline, has independent authority to counsel employees prior to the imposition of discipline and has imposed discipline in the form of a written warning. Clark has the independent authority to send an employee home from work. On one occasion Clark received a verbal complaint that would have resulted in a grievance had he not reached resolution with the employee.

Prior to 1998, Clark completed performance evaluations for the Public Works employees. Clark and his supervisor, Henry, both prepared performance evaluations for employees and then met with each employee and reviewed both prepared evaluations. The City, and therefore Clark, no longer complete performance evaluations for employees. Clark does not recommend merit raises.

6. Clark occasionally will operate dump trucks, loaders, graders and will plow snow. Clark's occasional performance of bargaining unit work occurs more during the winter than during the summer. Clark spends approximately three hours per day working with bargaining unit members.

Clark attends Personnel Committee meetings and City Council meetings on an as-needed basis. Clark is the City designated Weed Commissioner.

Clark participated on the City's side during the negotiation of the 2000-2002 collective bargaining agreement with the Union.

Clark possesses supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

7. The incumbent in the position of Utility Superintendent is Leland Anderson. Anderson began working for the City in January of 2000. Anderson's supervisor is Tom Henry, City Director of Public Works.

Anderson's designated hours are Monday through Friday from 7:00 a.m. to 3:30 p.m. although these hours vary due to job duties. Anderson earns a salary of approximately \$40,000 and does not receive overtime or compensatory time. His salary is approximately \$8,000 - \$10,000 more on an annual basis than the wages received by the employees he supervises. He receives the same holiday and sick leave benefits as Clark and three weeks vacation leave which is one less than Clark. Anderson receives the additional benefit of a \$400 allowance to purchase items not covered by the City's health insurance plan which is not available to bargaining unit employees.

The Street Superintendent replaces Anderson in Anderson's absence.

8. The job description for the Utility Superintendent reads as follows:

**JOB TITLE:** UTILITY SUPERINTENDENT

**PURPOSE:** To assist the DPW with the maintenance of the Viroqua Water and Sewer Divisions of the Public Works Department.

**EDUCATION:** High school or equivalent. Must possess the necessary license requirements of the DNR for the operation of the City Water and Sewer Utility or be able to obtain within one (1) year.

**EXPERIENCE:** Must have worked five (5) years in water and sewer or related experience.

**GENERAL QUALIFICATIONS:**

Good moral character with a willingness to learn and cooperate.

Good leadership ability.

Must be in a physical condition that will allow for the satisfactory performance of tasks required with the job.

Must have a CDL license with proper endorsements for driving necessary trucks.

Must have the ability to operate any equipment used in the Public Works Department.

**RESPONSIBILITIES:**

Supervise the day to day operation of the water and sewer utility.

Be sure required samples and tests are taken and sent to respective labs for analysis.

Maintain a good line of communication with the DPW and Utility Clerk.

Keep required records for the utilities.

Supervise and work with crew.

Written evaluation of employees in your department at least once per year and discipline when necessary.

Take part in interview and hiring of employees in department.

Prepare yearly financial proposals, if needed, and present to Director of Public Works.

Perform other public works tasks when assigned.

Be familiar and comply with rules and regulations of the Public Works Department.

9. Anderson assigns work hours, work locations and work orders to four employees who make up the Utility Division of the Public Works Department. The Utility Division is responsible for the maintenance of all lift stations, water towers, wells, manholes, wastewater mains, the wastewater treatment plant and any sewer problems. Anderson may change an employee's work assignment during the course of a day as a result of emergencies that arise, his re-prioritization of projects, or when he determines it is more efficient for project completion.

Anderson authorizes overtime and approves vacation leave and sick leave. Anderson has denied vacation leave. Anderson has independent authority to call-in both Street and Utility employees in emergency situations.

Anderson has participated in one hiring process during his employment with the City. Anderson reviewed candidate applications, participated in the candidate interviews, and offered his recommendation as to who should be hired to the City's Personnel Committee. The candidate that Anderson recommended was hired by the Personnel Committee.

Anderson has not disciplined an employee. At hire, Anderson was informed by the Personnel Committee that he had the independent authority to issue a written reprimand. Anderson has not completed any evaluations of employees. Anderson has offered a verbal

evaluation of two employees who desired to transfer from one division to the other division within the Department of Public Works. Anderson has not received any grievances from employees.

Anderson attends Personnel Committee meetings and City Council meetings on an as-needed basis.

Anderson participated on the City's side during the negotiation of the 2000-2002 collective bargaining agreement with the Union.

10. Anderson spends approximately fifty percent (50%) of his time supervising employee maintenance of the City's water and wastewater infrastructure. Anderson supervises employees at job sites. Anderson responds to questions at job sites and makes decisions when necessary.

Anderson receives complaints and sewer backup calls and responds by viewing and assessing the situation, and calling in the appropriate employee to fix the problem.

Anderson completes forms for the Department of Natural Resources. Anderson monitors water samples and either completes or reviews documentation of the samples which are submitted to the DNR. Anderson is the only employee of the Public Works Department that holds all licensures required by the DNR to operate the wastewater facility and water well system.

Anderson possesses supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

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

### **CONCLUSIONS OF LAW**

1. The incumbent in the position of Street Superintendent is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats. and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. The incumbent in the position of Utility Superintendent is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats. and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

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

**ORDER CLARIFYING BARGAINING UNIT**

The Street Superintendent and the Utility Superintendent continue to be excluded from the bargaining unit described in Finding of Fact 1.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of March, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

---

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

---

Paul A. Hahn, Commissioner



City of Viroqua

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

**POSITIONS OF THE PARTIES**

**Wisconsin Council 40**

Wisconsin Council 40 takes the position that the positions of Street Superintendent and Utility Superintendent are municipal employees and not supervisors and therefore the positions should be included in the bargaining unit.

**City**

The City argues that the Street Superintendent and Utility Superintendent are supervisors. It asserts that the evidence obtained at hearing, in addition to supporting their supervisory status based on the multifactor test the Commission utilizes when evaluating whether an employee is a supervisor, supports a "you just know it when you see it" conclusion.

In addressing the relevant factors, the City notes that the incumbents have been given the authority to effectively recommend the hiring, promotion, transfer, discipline and discharge of employees. Both schedule and approve overtime, authorize time off requests, have the authority to approve time cards and payroll, and maintain personnel files. Clark and Anderson are the first step in the grievance procedure and thus have the authority to adjust grievances. Both have the authority to direct and assign the workforce, independently assess and direct the completion of projects through employee job assignment and respond to citizen complaints and emergencies, all of which require that they use their discretion and judgment.

The City asserts that in comparing Clark and Anderson's salary to that of the bargaining unit employees, there is an approximate \$10,000 difference. The evidence is unrefuted that the additional \$10,000 is compensation for their additional duties and responsibilities as supervisors.

In response to the Union's line of questioning regarding Clark's and Anderson's performance of bargaining unit work alongside bargaining unit members, the City points out that both incumbents testified that the majority of their time is spent on non-bargaining unit work.

For the above reasons, the City asserts that the positions of Street Superintendent and Utility Superintendent should be found to be supervisors who continue to be excluded from the bargaining unit.

### DISCUSSION

Section 111.70(1)(o)1, Stats. defines a supervisor as an 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 employees, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When interpreting this statutory language, we consider the following:

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

TAYLOR COUNTY, DEC. NO. 24261-F (WERC, 5/98).

Not all of the above-quoted factors need to reflect supervisory status for us to find an individual to be a supervisor. Our task is to determine whether the factors appear in sufficient combination and degree to warrant finding an employee to be a supervisor. RICE LAKE HOUSING AUTHORITY, DEC. NO. 30066 (WERC, 2/01).

### **Street Superintendent**

Looking first to Factor 1, we find Clark effectively recommends hiring and discipline of employees. Clark has not had the opportunity to promote, transfer or discharge employees.

With regard to hiring, Clark reviews candidate applications, prepares questions and participates in candidate interviews, and has recommended candidates for hire. Clark's recommendations have been received and followed by his supervisor, the Public Works Director, and by the Personnel Committee. Although we are concerned that Clark did not participate in an interview when he had another commitment, on balance we find that Clark effectively recommends hiring.

As to discipline, the record is clear that Clark has independently imposed a written reprimand.

With regard to Factor 2, Clark assigns work to eight street department crew members. Clark determines what work will be completed daily and assigns crew members to complete the work. Clark may change these responsibilities during the course of the day. At no time is it necessary for Clark to consult with his supervisor when assigning work or hours. Clark has the authority to alter the work hours for these employees. Clark calls in employees when necessary. Clark determines and assigns overtime when necessary.

Addressing Factor 3, Clark has primary authority over eight employees. Clark has secondary authority over four water and wastewater division employees when Utility Superintendent Anderson is absent. Clark and Anderson report to Public Works Department Director Henry.

As to Factor 4, Clark is a salaried employee annually earning approximately \$8,000 to \$10,000 more than the most senior street operators. There is no evidence to indicate that this differential is based on seniority, especially since Clark's benefits are the same as the bargaining unit members with the same level of seniority. We conclude the differential reflects Clark's supervision of employees.

As to Factors 5 and 6, the majority of Clark's time is spent supervising employees rather than work activity. Although Clark may perform bargaining unit work, this occurs primarily during the Winter months when there is not sufficient manpower to respond to the weather conditions.

Concluding with Factor 7, Clark exercises independent judgment daily when determining what project will be addressed, what work will be completed during the day, and which employee will perform it. Although Clark weekly receives direction from the Public Works Director as to project priorities, it is Clark's responsibility to create a timetable for completion of each project.

Given Clark's role in hiring, discipline, and grievance adjustment; his direction of the work assignments and work days of eight employees; his compensation as a supervisor; and his exercise of discretion when exercising his supervisory authority, we find that Clark is a supervisor.

### **Utility Superintendent**

Looking at Factor 1, Anderson has been involved to a significant degree in one hiring process and although he has not disciplined an employee, he has been informed by the City that he has the authority to impose discipline up to and including a written reprimand.

With regard to Factors 2 and 3, Anderson directs the work day and work responsibilities of four employees and has the same authority in that regard as does Clark.

As to Factor 4, Anderson who has less than two years seniority with the City, earns the same salary as Street Superintendent Clark who has 17 years seniority with the City. In the context of the pay differential between Anderson and the employees he supervises, we find this to be persuasive evidence that Anderson is compensated for his supervisory responsibilities since he has substantially less seniority than Clark.

As to Factor 5, Anderson supervises both employees and work activities. The four employees under his supervision receive their work assignments and hours of work from Anderson. They must obtain his approval for vacation and sick leave. Inherent in Anderson's responsibilities is also the supervision of the City Water system. Although some of these responsibilities are performed by bargaining unit members, we note that Anderson is the only City employee with the DNR certifications necessary to complete the work. We find that Anderson's expertise, certifications and experience are substantive and enhance his authority and supervision of employees.

Regarding Factor 6, Anderson spends the majority of his time supervising employees.

Finally, as to Factor 7, Anderson exercises independent judgment when performing his supervisory duties and responsibilities.

Given the foregoing, and noting that Anderson has limited tenure with the City, we find that Anderson is a supervisor. His involvement in hiring included the authority to effectively recommend an employee for hire. Although he has not disciplined employees, he has been verbally informed he has the independent authority to do so. Anderson directs the day-to-day work of four employees, including approval of vacation and sick leave. We find Anderson's independent exercise of judgment compelling and conclude that he has supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

Dated at Madison, Wisconsin, this 25th day of March, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

---

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

---

Paul A. Hahn, Commissioner