

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
**TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 43,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

Involving Certain Employees of

TOWN OF LINN

Case 6
No. 58609
ME-3758

Decision No. 29989

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Bruggeman, by **Attorney Jonathan M. Conti**, 1555 North Rivercenter Drive, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 43.

Davison, Mulligan & Schiltz, Ltd., by **Attorney David W. Schiltz**, 803 West Main Street, Lake Geneva, Wisconsin 53147, appearing on behalf of the Town of Linn.

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

On March 1, 2000, Teamsters Union Local 43 filed a petition with the Wisconsin Employment Relations Commission seeking an election among certain employees of the Town of Linn to determine whether they wish to be represented by Teamsters for the purposes of collective bargaining.

In the petition, Teamsters described the claimed appropriate bargaining unit as “all regular full-time and regular part-time employees and Hwy. Superintendent in the Street &

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Road Department of the Town of Linn, excluding supervisory, confidential, managerial, professional employees and law enforcement employees with the power of arrest.” The Town objected to the inclusion of the Highway Superintendent in the claimed appropriate bargaining unit, asserting the Superintendent is a supervisor.

Hearing in the matter was held in Zenda, Wisconsin, on May 17, 2000, before Hearing Examiner Stuart Levitan, a member of the Commission’s staff. A stenographic transcript was made available to the parties by July 24, 2000. Teamsters and the Town filed written argument on August 22 and 29, 2000, respectively, and waived their right to file reply briefs.

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

FINDINGS OF FACT

1. Teamsters, Chauffeurs & Helpers Local Union No. 43, Affiliated with the International Brotherhood of Teamsters, herein Teamsters, is a labor organization with offices at 1624 Yout Street, Racine, Wisconsin.

2. The Town of Linn, herein the Town, is a municipal employer with offices at W3728 Franklin Walsh Street, Zenda, Wisconsin. The Town has a Highway Department.

3. Ernie Osborne is the incumbent Highway Superintendent for the Town Highway Department. Town Chair David Ballweg is his immediate supervisor, with further oversight being provided by the Highway Committee and Town Board. When he was hired on July 31, 1993, Osborne and the then-Town Chair agreed to a handwritten position description, as follows:

1. Health Insurance Paid. Employee pays 1st \$100
Town pays rest
Looking into a Dental Plan
Probably will have \$10,000 Life Insurance
2. No Sick Leave
3. Salary based on a 45 hr week, about \$560/week
4. Monthly pay check
5. 11.3% State Pension
6. Paid Holidays (10?)

Duties:

- Some budget recommendations
- Organize work schedules
- Over-see Town work projects
- Keep equipment up
- Keep roads in good repair
- Other as required by Town Board

On July 8, 1995, Town Clerk Sue Polyock wrote Osborne as follows:

Ernie –

At the special meeting on Friday, July 7, 1995, the Board made the Highway Superintendent an hourly wage instead of salary. To arrive at the hourly amount I was instructed to take your salary and divide it by 2080 hours which equals \$14.42/hour. All overtime must have prior approval of the Hwy. Committee Chairman or the Town Board except for emergencies (summer storms, snowplowing, etc.). If it is OK with you, it would be easier for me to make this retroactive to the beginning of the pay period – July 3, 1995.

The Town of Linn Ordinances, Sec. 2.09, provide as follows:

2.09 HIGHWAY SUPERINTENDENT

- (a) Highway Superintendent. There is hereby created the office of highway superintendent for the Town of Linn, Walworth County, Wisconsin.
- (b) Salary, Term and Appointment.
 - 1. The salary for said highway superintendent shall be determined by the Town Board from time to time at its discretion.
 - 2. The term shall be for three (3) years.
 - 3. The highway superintendent shall be appointed by the Town Board for each term that the highway superintendent serves.

(c) Duties.

1. The highway superintendent shall have the authority to supervise, under the direction of the Town Board, the construction and repair of Town highways and bridges and such other duties as the Town Board deems necessary.
2. The highway superintendent shall advise and make recommendations to the Town with regard to any matters regarding Town roads and bridges.

The only other permanent Highway Department employee is Leo Linhart, who had been with the Department for about 11 years at the time of hearing. In 2000, Osborne and Linhart earned \$17.00 and \$14.50 per hour respectively, reflecting a fifty cent raise for Osborne and a \$1.00 increase for Linhart from the year before. In 1998, their hourly wages were \$16.00 and \$12.50, respectively.

4. Osborne determines the work which he and Linhart will perform each day based on his own general assessment of what needs to be accomplished and specific service requests received from citizens, local law enforcement, and the Town Chair/Town Board. Osborne and Linhart often work together and because Linhart is an experienced employee, he does not need or receive much specific direction from Osborne. Linhart submits requests for use of sick leave or vacation to Osborne. Osborne also reviews and approves Linhart's time cards.

5. In addition to Osborne and Linhart, the Town Highway Department employs 7-10 seasonal employees in the winter to plow snow and employed one seasonal summer employee to cut grass during the summer of 2000.

The seasonal snowplow employees are called to work by Osborne or local law enforcement-depending on the circumstances. The drivers each have a specific route which they plow. Any necessary training is conducted by either Osborne or Linhart.

Each year, Osborne submits a list of recommended seasonal snowplow employees to the Town Board – most of whom have plowed snow for the Town for several years. The Board has always hired all of the employees on Osborne's list.

As to the hiring of the summer seasonal employee, Osborne will play a significant role in the selection of the employee.

In 1997, Osborne approached the Town Board Chair and recommended that two incumbent seasonal snow plow employees be terminated – one due to Osborne’s concerns about the employee’s ability to safely drive and the other due to Osborne’s concerns about the employee’s negative attitude. The Town Board Chair accepted Osborne’s recommendation and directed Osborne to pursue the matter with the Town Attorney. Following consultation with the Town Attorney, Osborne then sent the two employees a letter terminating their employment.

6. Highway Superintendent Osborne has supervisory 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 Highway Superintendent is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats. and thus is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. A question concerning representation within the meaning of Sec. 111.70(4)(d)3, Stats. exists within the following collective bargaining unit deemed appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats.:

All regular full-time and regular part-time employees of the Town of Linn Highway Department, excluding supervisory, managerial, confidential and clerical employees.

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

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days of the date of this Directive in the collective bargaining unit consisting of all regular full-time and regular part-time employees of the Town of Linn Highway Department, excluding supervisory, managerial, confidential and clerical employees who are employed by the Town of Linn on October 6, 2000, except such employees as may, prior to the election, quit their employment, or be discharged for cause, for

the purpose of determining whether a majority of said employees voting desire to be represented by Teamsters Local Union No. 43 for the purpose of collective bargaining with the Town of Linn on wages, hours and conditions of employment or not to be so represented.

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

TOWN OF LINN

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

POSITIONS OF THE PARTIES

Teamsters

In support of its position that the Highway Superintendent properly belongs in the claimed bargaining unit as a municipal employee, Teamsters assert that the Highway Superintendent does not have the authority to effectively recommend hiring, promotion, transfer, discipline or discharge of employees. Such authority rests with the Town Chair and Town Board.

The Superintendent does not have the authority to hire an employee without the Board's approval. When the Superintendent presented a proposal to hire another full-time employee, the Highway Committee approved the request, but the Town Board denied it, and suggested instead a seasonal part-time employee. Prior to the hearing, Osborne had been unaware of the Town's desire to instill in him the authority to hire for the alleged summer position. The Superintendent's involvement in the hiring process therefore has been extremely minimal. Indeed, there are three decision-makers above Osborne, namely the Highway Committee, Town Chair and Town Board.

Osborne possesses no authority to discipline. He has never fired, disciplined or even recommended discipline of an employee. The two so-called termination letters which he signed to former snow plow drivers cannot form the basis of determining Osborne to be supervisory, in that the Town Chair was the final decision-maker in these two "discharges." The fact that Osborne signed the letters is immaterial because he was directed to do so by the Town's attorney.

The summary of his duties and conditions of employment which the Town provided when Osborne was hired makes no mention of any authority to hire, fire, discipline, promote or evaluate employees. Nor does the Town ordinance creating the position reflect such duties.

Osborne's responsibilities and duties make him, at most, a working foreman and not a supervisor. He and Linhart always work together, but Linhart knows what needs to be done and Osborne spends basically no time directing Linhart on what to do or how to do it. They work as partners and as equals. Any overtime that either works, apart from emergencies, must be approved by the Town Chair. The phone calls that Linhart made to Osborne while Osborne was on vacation were merely inquiries on where to have vehicles repaired, not for work

instructions. Osborne's supervisory duties involve, at most, supervising activities and not employees. Because Linhart knows how to do the work and what needs to be done, even this supervision requires little independent judgment. Osborne is thus a working foreman, consistent with determinations the Commission has made in a number of other cases.

Osborne's slightly higher hourly wage is based upon his skills and experience, and not on any supervisory duties. Osborne and Linhart receive the same fringe benefits, while Linhart actually receives more vacation time based on his greater length of service.

Because Osborne has no authority to effectively discipline, hire, promote or transfer employees, and because he does not possess supervisory responsibilities and duties, the Commission should find the position of Highway Superintendent to be a municipal employee properly included in the claimed appropriate bargaining unit.

Town

In support of its position that the Highway Superintendent is a supervisor, the Town contends the record evidence clearly establishes the incumbent's authority to discharge Highway Department personnel, particularly the snowplow drivers. Without requesting approval of the Town Board or Chairman, the Superintendent clearly felt he had the unilateral authority to terminate two men's services as drivers. Indeed, the Superintendent testified that the Chair had told him he could get rid of the two men. It is very clear that not only did the Superintendent have the authority to discharge Town Highway Department employees, but that, in fact, he exercised that authority.

The hearing also established the Osborne has the authority to hire at least part-time highway employees. Only Osborne can put names on the list of snow plowers, and whoever Osborne puts on the list for submission will be hired. Osborne also has the authority to hire other part-time Highway Department employees.

The Town's Employee Handbook establishes that supervisors can respond to a grievance. The Handbook therefore gives Osborne the right to respond, and, implicitly, the right to adjust or effectively recommend action on a grievance. As the Town Chairman testified, Osborne runs the Department. Given that Osborne can hire and fire employees and, in the eyes of the Chairman, runs the Department, it stands to reason he has the authority to discipline employees.

Testimony also established that Osborne has the authority to assign work as well, such as setting the snow plow routes and directing employees where to take vehicles needing repair. He does not need Town Board approval to assign overtime or approve vacation days. Finally,

his statutory authority clearly includes the authority to assign workers or subcontractors the work necessary to construct and maintain the Town's highways.

Accordingly, by virtue of his authority to hire and fire, adjust grievances, and assign work, there can be no other conclusion but that the Highway Superintendent is a supervisor and thus properly 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, layoff, recall, promote, 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 evaluating claims of supervisory status under Sec. 111.70(1)(o)1, Stats., 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 workforce;
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his skills or for his supervision of employees;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees, and
7. The amount of independent judgment exercised in the supervision of employees. WATERTOWN SCHOOL DISTRICT (FOOD SERVICE), DEC. NO. 29694 (WERC, 8/99)

We have consistently held that not all of the above factors need to reflect supervisory status for us to find an individual to be a supervisor. Our task is to determine whether the factors support supervisory status in sufficient combination and degree to warrant finding an individual to be a supervisor. ONEIDA COUNTY, DEC. NO. 24844-F (WERC, 1/99).

Only two witnesses provided testimony in this matter: Town of Linn Chair David Ballweg and Town Highway Superintendent Ernie Osborne.

Chair Ballweg is quite firm in his opinion that Osborne is a supervisor while Superintendent Osborne is equally sure that he is not. Our reading of the record persuades us that Osborne is a supervisor and thus ineligible for inclusion in the bargaining unit.

Looking first at the Highway Superintendent's authority to effectively recommend the hiring of employees, we conclude that through the annual submission of the list of acceptable snow plow drivers to the Town, Osborne effectively recommends the hiring of employees. At no time since Osborne began working for the Town has the Town Board altered the list of persons he recommends for part-time employment. While we acknowledge that the record contains somewhat conflicting evidence as to the extent of Osborne's role in hiring a part-time summer seasonal employee, we are persuaded for the record as a whole that Osborne will play a significant role in that hiring decision.

Given the size of the workforce, there are no transfers or promotions.

Turning to Osborne's authority to effectively recommend the discipline or discharge of employees, the record as a whole establishes that Osborne approached the Town Chair with concerns about the job performance of two snow plow drivers and with a recommendation that the employees be terminated. The Town Chair accepted Osborne's recommendation and directed Osborne to the Town Attorney to for the drafting of the discharge letters. From this evidence, we are persuaded that Osborne effectively recommended the discharge of the two employees and thus has significant disciplinary authority. While Osborne denies that he engages in any formal evaluation of Highway Department employees, it seems reasonably clear that his termination recommendations to Chair Ballweg regarding the two part-time employees were based on *informal* observations and evaluations.

As to the authority to direct and assign the workforce, Osborne determines the work which he and Linhart will perform each day based on his own general assessment of what needs to be accomplished and specific service requests from citizens, local law enforcement, and the Town Chair/Town Board. Because Linhart is an experienced employee, he does not need or receive much specific direction from Osborne. Linhart makes sick leave and vacation requests to Osborne who also reviews and approves Linhart's time cards.

Linhart is the only regular employee supervised by Osborne. As evidenced by his hiring and disciplinary authority over the snow plow drivers, Osborne supervises the approximately 7-10 such employees in the winter. The record also satisfies us that Osborne will supervise the one summer seasonal employee employed by the Town. Osborne is the only individual with direct supervisory authority over all of these Highway Department employees.

Osborne is paid \$2.50 an hour more than the more senior Linhart. This translates into a rate of pay for Osborne that is \$20 per day and \$100 per week more than Linhart. While we are satisfied that his pay rate at least partially reflects his skills, we conclude his higher pay rate is consistent with his supervisory responsibilities.

Because Osborne and Linhart often work together performing the same duties, we are persuaded that Osborne is a working supervisor who supervises both an activity and an employee.

Given his role in the hiring and firing of employees and in the overall determination as to what projects will be performed each day, we are satisfied that Osborne's exercise of authority is, in the words of Sec. 111.70(1)(o)1, Stats. " . . .not of a merely clerical or routine nature, but requires the use of independent judgement." Osborne's testimony seems to denigrate his decisions as to work assignments as being a matter of "common sense". In our view, however, Osborne's consistent exercise of that attribute is an indication of supervisory judgment.

Considering all of the foregoing, we are satisfied that Osborne is a supervisor. Teamsters correctly argue that the small number of employees supervised and Osborne's performance of the same work as Linhart both are typical of a leadperson rather than a supervisor. However, because Osborne possesses the authority to effectively recommend hiring and firing 1/ receives a rate of pay that reflects at least in part his supervisory

1/ We deem this authority as critical in determining Osborne's status and distinguishes him from the individuals not found to be supervisors in the CITY OF SHELL LAKE, VILLAGE OF PEWAUKEE, DANE COUNTY, VILLAGE OF DICKEYVILLE and TOWN OF CONOVER cases cited by Teamsters.

responsibilities, and exercises independent judgment in making work assignments and hiring

and firing recommendations, we are satisfied that the indicia of supervisory status are present in sufficient combination and degree to make Osborne a supervisor. Thus, Osborne is not eligible to be included in the bargaining unit Teamsters seek to represent.

Dated at Madison, Wisconsin this 6th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

