

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**WATERFORD SANITARY DISTRICT NO. 1**  
Involving Certain Employees of  
**WATERFORD SANITARY DISTRICT NO. 1**

Case 2  
No. 59402  
ME(u/c)-1023

**Decision No. 30214-B**

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**Appearances:**

Previant, Goldberg, Uelman, Gratz, Miller, Levy & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, 1555 North Rivercenter Drive, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Union Local No. 43.

Weber & Cafferty, S.C., by **Attorney Robert K. Weber**, 2932 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Waterford Sanitary District No. 1.

**ORDER GRANTING MOTION TO DISMISS**

On September 19, 2001, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit with Accompanying Memorandum concluding that the Operations Superintendent of the Town of Waterford Sanitary District No. 1 was a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., who therefore should be excluded from the collective bargaining unit represented by Teamsters Union Local No. 43. Teamsters then filed a petition seeking judicial review of the Commission's decision which was subsequently dismissed upon stipulation of the parties on January 30, 2002.

On April 18, 2002, Teamsters Union Local No. 43 filed a petition to clarify bargaining unit with the Wisconsin Employment Relations Commission seeking inclusion of the Operations Superintendent in the Teamsters' Sanitary District bargaining unit.

On May 2, 2002, the Town of Waterford Sanitary District No. 1 filed a motion to dismiss the Teamsters' unit clarification petition arguing that the claim asserted is "res judicata" and "frivolous" and that there has been no change in circumstances affecting the

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supervisory status of the Operations Superintendent. On May 15, 2002, Teamsters filed a response to the motion to dismiss asserting that the motion should be denied because there have been changes in circumstances as to the Operations Superintendent's supervisory authority since the Commission's September 19, 2001 decision.

We have considered the matter and conclude the motion to dismiss should be granted. The parties' arguments in support of and in opposition to the motion correctly focus on the question of whether circumstances as to the Operations Superintendent's supervisory duties and responsibilities have changed in some material way. CITY OF MANITOWOC, DEC. NO. 7667-D (WERC, 6/97); CITY OF MILWAUKEE, DEC. NO. 6960-J (WERC, 5/89). The parties and the Commission have recently devoted substantial resources deciding the issue the Teamsters now wish to revisit. The Commission finds it is appropriate as a matter of initial pleading to require that the party asserting material change at the very least provide a sworn affidavit detailing the alleged change before we will proceed to hearing. No such affidavit accompanied the petition or was filed in response to the District's motion to dismiss. Therefore, we have granted the motion to dismiss without prejudice.

NOW, THEREFORE, it is

**ORDERED**

The motion to dismiss is granted.

Given under our hands and seal at the City of Madison, Wisconsin, this 13th day of June, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

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Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

I dissent

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

**DISSENTING OPINION OF COMMISSIONER PAUL A. HAHN**

I believe the decision of the majority to dismiss the Teamsters' petition is contrary to the Commission's rules, and applicable statutory and case law and therefore I dissent. I do not believe the majority's argument that one of the considerations for deciding the merits of a motion to dismiss is previous expenditure of resources by the parties and Commission on the same issue is relevant. What I believe is relevant is whether the petition for unit clarification is filed in good faith and with enough particularity in the petitioner's supporting papers to warrant an evidentiary hearing.

The majority's order cites the relevant facts resulting in the exclusion of the Operations Superintendent as a supervisor except one, that the factual hearing in this matter was conducted by the Commission's hearing examiner on March 19, 2001, more than a year previous to the Teamsters' current petition. This is a long enough period of time for the circumstances of the Operations Superintendent's job duties to change as presented and argued by the Teamsters.

In its motion to dismiss and attached affidavit, Waterford presents no facts to respond to the Teamsters' change of circumstances argument except to say there has been no change in circumstances. The Teamsters responded to the motion to dismiss in a letter from Teamsters' counsel which states that the Operations Superintendent has had his supervisory authority limited, particularly as to his hiring authority, a key element considered by the Commission in discerning supervisory status.

The majority decides that the Teamsters should have supported its unit clarification petition with an affidavit. It is primarily at this point that I part ways with my colleagues. I would find that Teamsters' counsel's letter is all that is required by ERC 10.11 to answer Waterford's motion to dismiss and require the evidentiary hearing. ERC 10.11 only requires that any statement opposing a motion shall ". . . set forth with particularly the grounds therefore."

The language of ERC 10.11 is similar to Sec. 802.01(2)(a) and (b), Stats., "Motions," which speaks to "supporting papers" and the opportunity of opposing counsel to the party making the motion to submit them. Affidavits are not required; "other papers" are specifically allowed. 1/

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*(2) Motions. (a) How made. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. Unless specifically authorized by statute, orders to show cause shall not be used.*

*(b) Supporting papers. Copies of all records and papers upon which a motion is founded, except those which have been previously filed or served in the same action or proceeding, shall be served with the notice of motion and shall be plainly referred to therein. Papers already filed or served shall be referred to as papers theretofore filed or served in the action. The moving party may be allowed to present upon the hearing, records, affidavits or other papers, but only upon condition that opposing counsel be given reasonable time in which to meet such additional proofs should request therefore be made.*

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I submit that Teamsters' counsel's letter of May 18, 2002 meets the "particularly" requirement of ERC 10.11 in response to Waterford's affidavit (which states only generally that circumstances have not changed) and satisfies the definition of "other papers" in opposition to Waterford's motion set forth in Sec. 802.01(2)(b), Stats. This, I believe is particularly true in light of Sec. 802.05(1)(a), Stats., which provides that:

The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact . . . ; and that the pleading, motion or other paper is not used for any improper purpose. . . .

I find that Teamsters' counsel's letter meets that standard and should have been accepted by the majority. I believe the majority has with the decision in this case adopted a standard as an administrative decision maker higher than have the civil courts. *JANDRT V. JEROME FOODS, INC.* (1999) 227 WIS.2D 531, 549-551, paragraphs 32 and 33.

Although the motion to dismiss has been granted without prejudice, it seems that administrative efficiency and resources are not honored if the Teamsters are required to go through the exercise of filing another unit clarification petition and supporting affidavits.

I dissent.

Dated at Madison, Wisconsin, this 13th day of June, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

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