

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
TEAMSTERS LOCAL UNION NO. 43
Involving Certain Employees of
TOWN OF SHARON

Case 2
No. 63578
ME-3964

Decision No. 31143

Appearances:

Patrick J. Hudec, Hudec Law Offices, S.C., 2100 Church Street, P.O. Box 167, East Troy, Wisconsin 53120-0167, appearing on behalf of the Town of Sharon.

Nathan Eisenberg, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 43.

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

On April 14, 2004, Teamsters Local Union No. 43 filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(d), Stats., seeking an election to determine whether the Town of Sharon's Road Superintendent wished to be represented for the purposes of collective bargaining by Teamsters.

The Town responded to the petition by asserting that the Road Superintendent is a supervisor and thus ineligible for representation for the purposes of collective bargaining. Teamsters and the Town were unable to resolve their dispute as to the alleged supervisory status of the Road Superintendent and on September 9, 2004, Teamsters asked that the dispute proceed to hearing.

Hearing was held by Commission Examiner Peter Davis on October 5, 2004 in the Town of Sharon, Wisconsin. The parties filed post-hearing argument by October 21, 2004.

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

Dec. No. 31143

FINDINGS OF FACT

1. Teamsters Union Local No. 43, herein Teamsters, is a labor organization with offices in Racine, Wisconsin.

2. The Town of Sharon, herein the Town, is a municipal employer providing road maintenance services to its 923 citizens. The Town has five elected officials (the Town Chairperson, two Town Supervisors, the Town Clerk and the Town Treasurer) and one full-time employee - Road Superintendent Mike Kowalkowski. Kowalkowski maintains the Town's roads with the part-time (up to 1000 total hours in 2004) help of several casual Town employees. Kowalkowski is paid \$18 per hour. The casual employees are paid \$10 per hour.

Aside from monthly meetings with the Town Board to discuss past and future work projects, Kowalkowski generally functions independently and does not have day-to-day contact with Town Board members.

Whenever he needs assistance, Kowalkowski calls in and directs the work of an employee of his choosing from a list of individuals who are interested in occasional work. Kowalkowski can call the same individual for all part-time work if he wishes to do so. If Kowalkowski is dissatisfied with the work of an employee, he does not call that employee for future assignments.

When Kowalkowski concluded that a long-time casual Town employee was no longer physically capable of performing certain duties, he advised the Town Board that he wanted to begin assigning that work to another Town resident who was not on the call list. The Town Board informally approved Kowalkowski's request and the new list member began performing work. The long-time casual employee then appeared at a Town Board meeting and protested the change. The Town Board responded by employing the long-time employee to perform certain non-road maintenance tasks, some of which had previously been performed by volunteers. When Kowalkowski is on vacation or otherwise unavailable for work, the Town Board has assigned the long-time employee to perform certain road patrol work.

If Kowalkowski wanted to add an individual to the list who the Town Board did not know, he would bring the individual to a Town Board meeting so the Town Board members could meet the individual. The individual would then be added to the list.

When a Town citizen informally expressed interest to the Town Board in being added to the employee list, the Town Board informally declined to pursue the citizen's interest without consulting with Kowalkowski.

3. The Road Superintendent does not have 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. All regular full-time and regular part-time employees of the Town of Sharon excluding supervisors and confidential, managerial and executive employees is an appropriate collective bargaining unit within the meaning of Sec. 111.70(4)(d)2.a., Stats.

2. A question concerning representation within the meaning of Sec. 111.70(4)(d)3, Stats., exists within the appropriate collective bargaining unit identified in Conclusion of Law 1.

3. The Road Superintendent is not a supervisor within the meaning of Sec. 111.70(1)(o), Stats. and therefore is 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

DIRECTION OF ELECTION

That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Directive in the collective bargaining unit consisting of all regular full-time and regular part-time employees of the Town of Sharon excluding supervisors and confidential, managerial and executive employees who were employed on November 23, 2004, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether such employees desire to be represented by Teamsters Local Union No. 43 for the purposes of collective bargaining with the Town of Sharon.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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

The statutory definition of a supervisor in Sec. 111.70(1)(o)1, Stats., is the following:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively 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 applying this statutory definition, we focus upon the following factors:

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 persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the individual is paid for his skills or for his supervision of employees;
5. Whether the individual is supervising an activity or is primarily supervising employees;
6. Whether the individual 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. 1/

1/ *CITY OF MILWAUKEE, DEC. NO. 6960-J (WERC, 5/89).*

We have consistently held that not all of the above factors need to reflect supervisory status for us to find an employee to be a supervisor. Our task is to determine whether the

factors are present in sufficient combination and degree to warrant finding an employee to be a supervisor. 2/

2/ ONEIDA COUNTY, DEC. NO. 24844-G (WERC, 6/98)

As to Factor 1, the evidence presents a mixed picture in part because of the informal manner in which the Town conducts its business as to the casual employees. As reflected in the Findings of Fact, being placed on “the list” of those eligible for work is the equivalent of being “hired” by the Town but does not guarantee any work. As also reflected in the Findings, employees are not “disciplined” or “discharged” but instead do not receive work. In this context, the extent of Kowalkowski’s authority to “hire” or “discipline” (or to effectively recommend same) is a less significant part of our overall analysis than it typically would be.

The record establishes that Kowalkowski has substantial authority as to who works and has effectively recommended that individuals be added to the list. However, as evidenced by the Town Board’s use of the long-term employee when Kowalkowski is unavailable and failure to consult him when another citizen expressed interest in being added to the list, the Town Board retains some independent role as to these matters.

Turning to Factors 2 and 7, Kowalkowski directs and assigns the work of the casual Town employees and exercises independent judgment when doing so. He determines who will work when, where and how much.

Regarding Factor 3, Kowalkowski is the only individual directing the work of one or two casual employees who are typically being assigned work.

As to Factor 4, Kowalkowski’s hourly pay rate is substantially greater than that of the casual employees (\$18 vs. \$10) and we are satisfied that at least to a limited extent his pay rate reflects his responsibility for the work of the casual employees.

Regarding Factors 5-6, Kowalkowski spends a very limited amount of time supervising employees and can fairly be characterized as primarily supervising an activity rather than employees.

Considering all of the foregoing, although it presents a close question, we conclude that the Road Superintendent is not a supervisor. Although he has substantial authority over the one or two casual employees who work up to a total of 1000 hours per year, as discussed above he does not have the authority to effectively recommend the hiring or discharge of

employees. In light of that determination, the combination of the small number of casual employees, the limited time the Superintendent actually spends directing their work, and the ongoing albeit very occasional influence of the Town Board over personnel matters persuades us that the Road Superintendent is not a supervisor.

Therefore, we have directed the election sought by the petition.

Dated at Madison, Wisconsin, this 23rd day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

