

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
AFSCME LOCAL 546 D-1, AFL-CIO
Involving Certain Employees of
CLARK COUNTY

Case 137
No. 68713
ME-1269

Decision No. 32933

Appearances:

Houston Parrish, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, appearing on behalf of AFSCME Local 546 D-1, AFL-CIO.

Victoria L. Seltun, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, Post Office Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Clark County.

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

On March 9, 2009, AFSCME Local 546 D-1, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission seeking to add the Parks Superintendent/Trails and Projects Manager to a professional employee collective bargaining unit of Clark County employees represented for purposes of collective bargaining by Local 546 D-1. Clark County opposes the petition, asserting that the Parks Superintendent/Trails and Projects Manager is a supervisor and a managerial employee and, as such, is statutorily excluded from the bargaining unit.

Hearing on the petition was held on June 10, 2009, in Neillsville, Wisconsin, before Wisconsin Employment Relations Commission Examiner Danielle L. Carne. The parties filed post-hearing argument, the last of which was received on August 10, 2009. At the Commission's request, the record was supplemented on December 10, 2009.

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

FINDINGS OF FACT

1. AFSCME Local 546 D-1, AFL-CIO, hereafter Union, is a labor organization that serves as the exclusive collective bargaining representative of employees in the bargaining unit described in the 2007-2008 collective bargaining agreement between the County and the Union as:

. . . all regular full-time and regular part-time professional employees of Clark County excluding sworn law enforcement, blue collar highway, social services, health care center, managerial, confidential and supervisory employees as well as the elected officials.

2. Clark County, hereafter County, is a municipal employer providing services to the citizens of the County through its employees.

3. The County's Forestry and Parks Department, hereafter Department, is generally responsible for the oversight and management of the County's forests and parks.

4. The Department reports to and is directed by the Forestry and Parks Committee, a five-member subcommittee of the Clark County Board of Supervisors.

5. Mark Heil is the Forestry and Parks Administrator and, as such, is the head of the Department. Heil earns an annual salary of approximately \$70,000.

Brian Duell is the disputed Parks Superintendent/Trails and Projects Manager, hereafter Trails and Projects Manager. Duell has held this position since it was created in the fall of 2005. He also reports directly to Administrator Heil. Duell earns an annual salary of \$56,971.20.

6. The following portion of the Trails and Projects Manager's position description provides a generally accurate statement of Duell's responsibilities ¹:

¹ The sole exception is related to the reference to performance evaluations contained therein. Although the position description indicates that the Trails and Projects Manager will make "final recommendations" for employee performance evaluations, the testimonial evidence on the record establishes that the Department does not conduct such evaluations. There are also some duties identified in the position description that Duell has not had time to attend to during his four-year tenure as Trails and Projects Manager. Namely, Duell has not undertaken the ADA, Consumer Product Safety Commission, and OSHA compliance work, and he has not performed duties related to the operation, maintenance, and inspection of the County's dam. Nevertheless, these duties remain part of Duell's job responsibilities, and it is anticipated that he will perform them as time permits.

Position Summary:

Under the general direction of the Forestry and Parks Administrator; Professional level position exercises considerable authority and assumes lead responsibility for development and administration of the Clark County trails program, Forestry and Parks and Highway Department safety and training activities, as well as other special projects and programs as assigned.

Duties/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.

- Performs as the County Snowmobile and ATV Trail Coordinator for the development, maintenance and funding of public snowmobile and all-terrain vehicle trails on County and private lands.
- Manages other trail development and maintenance projects and activities on County lands.
- Fosters coalition efforts to achieve program goals and objectives.
- Manages and coordinates ongoing efforts of the County Trails Advisory Committee, County Snowmobile Council, County ATV Council, and other collaborative groups.
- Prepares grant applications for local, state, federal, and other aids for development and maintenance of parks, trails and forest resources and facilities; monitors cost- shared projects, administers grant development projects, provides required reports, and formulates claims for reimbursement.
- Coordinates ordinance enforcement efforts for the county forest and parks system.
- Coordinates tourism promotion of the Forestry and Parks programs and facilities. Develops brochures, solicits quotes for production, and administers contracts.
- Plans and directs compliance for Americans with Disabilities Act for department facilities; recommends compliance policy statements and receives and evaluates interpretations of the law.

- Plans and directs the upgrade of facilities and structures to meet Consumer Product Safety Commission standards.
- Coordinates county dam operation, maintenance, and inspection activities
- Coordinates employee safety training activities and assures compliance with OSHA requirements. Drafts safety policies and procedures for Highway Department and Forestry and Parks Department equipment operations per Department of Commerce rules and regulations. Provides and/or coordinates required Department of Commerce training for the safe use of equipment.
- Performs the following on Highway Department STP Rural Projects: Application management and oversight, design using AUTOCAD or approved software, construction inspection including nuclear density testing, time and materials data collection and certification.
- Plans, organizes, and supervises the activities of crews engaged in parks, trails, bridges, buildings, and other Forestry and Parks construction projects.
- Supervises the preparation of plans and diagrams for construction design.
- Assists in the preparation of the annual budget, annual report, and short and long range development plans.
- Assists the Forestry and Parks Administrator and the Highway Commissioner in the performance of other administrative tasks.
- Advisory participation in revisions to County Ordinances, County Forest Comprehensive Land Use Plan, Outdoor Recreation Plan, and other planning documents.

Work Direction Received:

Works under general direction of the Forest and Parks Administrator, working within overall policies, goals, and budget limitations. Independently resolves problems in the areas of responsibility, with direct accountability for results.

. . .

Interaction:

There is significant interaction with other County departments, the public, local businesses, community clubs, and organizations, the State Department of Health, the Department of Industry, Labor and Human Relations, the Wisconsin Department of Transportation, Department of Agriculture, the Wisconsin Department of Natural Resources, and other federal, state and local government entities.

7. Prior to his employment as the County's Trails and Projects Manager, Duell worked for the County Highway Department. Although Duell's current position requires him to continue to perform work related to the Highway Department's STP Rural Projects, Duell only spends approximately five percent of his time on such tasks. He devotes the vast majority of his time to overseeing the County trails system and to managing special projects involving the maintenance, rehabilitation and development of the County's trails and parks.

8. There are various types of trails that run through land managed by the Department, including trails for snowmobiling, horseback riding, mountain biking, cross-country skiing, and trails for all-terrain vehicle and motorcycle use. The snowmobile and ATV trails can traverse privately owned land. Duell's responsibility for overseeing the County's trails system requires him to coordinate the opening, closing, and general use of these various trails. To carry out these responsibilities, Duell serves as the Department liaison between the Forestry and Parks Committee and the various user groups interested in the management of the County's trails, such as the County Trails Advisory Committee, the County Snowmobile Council, the County ATV Council, and others. The function of such interest groups is to provide guidance to the Forestry and Parks Committee relating to the setting of trail-related policy. Duell is responsible for taking the feedback he received from interest groups and, also relying on his own expertise, formulate policy proposals regarding trail management to be presented to the Forestry and Parks Committee. Though Heil has the authority to serve in many ways as a gatekeeper regarding what proposals and recommendations are introduced by the Department to the Forestry and Parks Committee, he would not use that authority to refuse to present to the Forestry and Parks Committee concerns or recommendations raised by an interest group.

There are no formal guidelines that dictate when a County recreation trail should be opened or closed. The decision to open or close a trail can take into account many, sometimes competing, factors. If there was a safety concern involving a County trail, Duell has the authority to independently make the decision to open or close a trail on a temporary basis. Beyond that limited circumstance, however, Duell would consult with Heil before taking such a step, particularly if it involved a fairly extensive section of trail. Heil has the ultimate authority to override Duell's recommendation regarding the opening or closing of trails.² In

² An exception relates to the opening and closing of snowmobile / ATV trails that traverse privately-owned land and are sufficiently remote to prevent Duell or any other Department representative from personally assessing their condition. From a practical standpoint, Department representatives have no option but to defer for the most

one example of a section of trail that Duell has recommended closing in an effort to avoid long-term maintenance costs, stem some user conflicts, and curb damage to town roads, Heil intends to leave the trail open to allow the issue to be studied further. Any change to the County's trails system that is significant enough to impact the level of service offered by the County, such as a decision to eliminate horseback riding trails or snowmobiling trails from the trails system, must be presented to the Forestry and Parks Committee for consideration and approval.

The user fees associated with the County trails system represents a not-insignificant portion of the Department's budget. When trail fees are revised, as they periodically are, Duell has responsibility for gathering the input of interest groups and, based on that input and his own expertise, devising a fee revision recommendation to be presented to the Forestry and Parks Committee. In the course of a recent fee revision process, Heil reviewed the proposal drafted by Duell and, believing that it needed to be adjusted in some areas, directed Duell to consult again with the concerned interest groups and to attempt to correct certain problem areas prior to presenting the proposal to the Forestry and Parks Committee. Duell did so and then presented the proposal directly to the Forestry and Parks Committee.

9. In addition to overseeing the use of County trails system, Duell manages approximately eight to ten special projects each year involving the maintenance, rehabilitation, and development of the County's trails and parks. Examples of projects Duell has managed include the construction of a culvert that would allow users of a certain County trail to cross a ravine and the construction a shower/toilet building at a County campground.

The special project work overseen by Duell is funded partially through user fees, but primarily through grants. A typical grant obtained by the Department for such a project has a value of \$20,000 to \$50,000. Duell oversees ten to twenty grant contracts per year, amounting to total revenue of approximately \$300,000 to \$500,000. Approximately half of the grants are "maintenance" grants, which are sought year after year typically for the purpose of maintaining the condition of trails. "Rehabilitation" grants, on the other hand, are typically sought for the one-time purpose of fixing an existing trail or facility. And "development" grants are those obtained for new construction, such as the building of the shower/toilet building at the County campground.

Although Duell is generally responsible for managing the grant work, the process of determining which grants should be pursued is collaborative, and the Forestry and Parks Committee makes the ultimate decisions in that area. Between grant cycles, Duell seeks input from several sources – the various interest groups, individuals employed by the Department such as park managers, and Administrator Heil – regarding what special projects should be carried out. Relying on that input and his own expertise, Duell develops a proposal to present to the Forestry and Parks Committee regarding which grants the Department should pursue.

part to the assessments of the user groups that are most acquainted with the condition of those trails as to whether they should be opened or closed.

Duell is less likely to consult with Heil regarding whether such a proposal should include a standard maintenance grant and more likely to consult with Heil regarding whether it should include a one-time rehabilitation or development grant. Although Heil has allowed Duell to present ideas to the Forestry and Parks Committee he did not believe were viable, Heil has the authority to override Duell's opinion as to whether a grant idea should be proposed to the Forestry and Parks Committee. There is typically very little discussion required before the Forestry and Parks Committee approves maintenance grants. It tends to give more scrutiny to proposed rehabilitation and development grants, sometimes requiring Duell to respond to inquiries regarding the objective, scope, and financial implications of such proposals. It is unusual for the Committee not to approve a proposed grant.

Once a grant project has been approved by the Forestry and Parks Committee, it is Duell's responsibility to oversee every aspect of the project through its completion. Duell independently secures grant funding by completing and submitting the necessary grant applications. Each grant requires a corresponding Department of Natural Resources contract, into which Duell enters on behalf of the County. Duell is also responsible for obtaining the permits necessary to carry out a grant project.

A simple project may require only the use of County equipment and the purchase of materials. If the cost for such purchases falls below an established bidding threshold, Duell will independently decide what vendor to use and make purchases, without seeking approval from Heil or anyone else. Heil often does not know about such purchases until he is asked to sign the related vouchers. More significant purchases, as well as contracts for service, require the solicitation of bids. Duell is responsible for compiling documents requesting such bids, which documents are largely comprised of template forms. Duell would not seek Heil's approval before publicly circulating a request for bids. Typically, once bids are submitted, Duell will independently open, review, compare, and summarize the bids, in preparation for their presentation to the Forestry and Parks Committee. Heil is only involved in this process in the rare event that the scope of a project is quite large, such as the construction of the shower/toilet building. Duell presents the information related to bids to the Forestry and Parks Committee, which makes the final selection. Typically this selection is purely cost-driven.

Once a bid is selected, Duell is responsible for entering into the appropriate contracts on behalf of the County. He also oversees the preparation of plans for construction projects and is responsible for monitoring and enforcing contract compliance. Duell would only unilaterally stop the work on a project, on a temporary basis, if the work was being carried out improperly. Duell would not permanently suspend work on a project without consulting with Heil and seeking the approval of the Forestry and Parks Committee.

Once a special project has been approved by the Forestry and Parks Committee, Duell generally has the authority to see that it is carried out in whatever fashion he deems appropriate. Duell's authority to make revisions to a project once it is underway depends on the significance of the change. On the grant project to create a crossing for a ravine, Duell independently made the decision that it would be more appropriate to utilize a culvert than it

would be to follow the original plan to construct a bridge. This change was significant enough to require the approval of the Department of Natural Resources, and Duell first consulted with Heil regarding the recommended change. Duell would not, however, seek Heil's approval for less significant changes, particularly those not requiring DNR approval.

Every project is expected to experience a slight cost overrun. Duell has the authority to authorize the expected cost overruns of a few hundred dollars, to "max out" the grant. He would consult with Heil, however, if the overrun exceeded that amount. Any overrun significant enough to require authorization for additional County expenditures would go through the Forestry and Parks Committee. Duell also has the authority to adjust the scope of a project to use up leftover grant funds. When grants provide overlapping funding for a single project, Duell does have the independent authority to decide how expenses will be allocated against the grant monies. Duell does not have the authority to spend any funds have not already been allocated toward a project through approval of the Forestry and Parks Committee.

10. As the Department Administrator, Heil is responsible for preparing the annual Department budget that will be recommended to the Forestry and Parks Committee. Duell's role in this process is to report to Heil the status of grant projects as it relates to the anticipated timing of grant revenues and expenditures. If there is a need to make an adjustment in the processing of a grant that will balance out revenues and expenditures in a budget, Heil will indicate as much to Duell, specifying a dollar amount, and Duell will attempt to identify a grant that would accommodate that need. Heil presents the budget to the County Finance Committee. Duell does not have a role in that process.

Duell also plays a role in the budgetary process related to the planning capital equipment expenditures. Duell assists Heil in gathering information from other Department employees regarding any equipment deficiencies, and Duell shares his own opinions with Heil on that subject as well. Together, Duell and Heil prioritize the Department's capital equipment needs. If they disagree as to how to do so, however, Heil has the ultimate authority to establish the priorities that are presented to the Forestry and Parks Committee as part of a proposed budget.

The Forestry and Parks Committee has final authority to establish the Department budget. Neither Heil nor Duell has the authority to move funds between line items in the budget.

11. Duell oversees the work of Department employees who are assigned to perform the labor on the special projects for which Duell is responsible. The Forestry Workers from the AFSCME Courthouse unit whose work Duell directs in such circumstances are paid between \$17.90 and \$19.93 per hour. Typically there are ten such project in a year and they take one to three days to complete. On a day-to-day basis as to such projects, Duell indicates to Heil the number of employees that will be required at a project site – typically the number is two or three – and what, if any, special skills the employees should possess. Taking into account these requirements, Heil assigns specific Department employees to Duell's work crew

and has them report to the project site. If Duell determined during the course of a day that he needed more workers at a site, he would contact Heil to ask him to assign additional employees to the crew. If Duell had employees working on a project and determined that he did not need them, he would contact Heil to ask where to send the employees – Duell would not make that determination himself. If Duell is overseeing more than one special project, however, he does have the authority to transfer employees between those crews. Beyond that situation, Duell does not have the authority direct Department employees away from work crews to which they had been assigned by Heil.

Duell does not work alongside employees at a project site. Once the assigned Department employees are set to work on a particular project, Duell leaves the work site and tends to other obligations in the field or at the Department office. Duell typically returns to a work site once or twice in the course of a day, for approximately an hour at a time, to evaluate the progress of the work and, if needed, to redirect the employees in their efforts. Heil rarely, if ever, visits a project site.

Beyond his responsibility for directing and overseeing the work of employees at the site of a special project, Duell does not have regular, day-to-day supervisory authority over any other Department employee.

Duell does not authorize any kind of time off for employees, including those whose work he is overseeing at a project site. If an employee wanted to take time off on a day when s/he was assigned to a special project work crew, such an arrangement would be made between the employee and Heil prior to the employee's departure for the work site. If an employee unexpectedly had to leave the worksite during the course of a day, Duell would only grant such permission if Heil was not available to address the situation. Heil approves Duell's time off, as well.

Duell would not authorize employees to work overtime unless it was less than an hour. In such a case, Duell would explain to Heil on the next day the conditions that justified the overtime.

Duell does not review the timesheets of employees who work on the projects he oversees.

12. At a project site, Duell as the authority to assign employees to specific work tasks and to monitor their progress. Any feedback Duell would give to an employee on a work site would not be disciplinary, but rather intended to redirect that employee's work. If an employee's behavior at a worksite was severe or represented a safety issue, Duell would have the authority to send that employee home, but then he would contact Heil regarding the situation. Outside of that circumstance, Duell would not take any immediate action at a project site to discipline an employee. If Duell encountered an employee who was refusing to perform a task as directed, and Duell's effort to redirect such an employee through discussion was not effective, Duell would contact Heil regarding the matter.

Although Duell will provide input to Heil regarding disciplinary matters involving employees, Heil would conduct an independent disciplinary investigation and make the determination as to whether discipline is warranted.

The only instance of discipline in which Duell has played a role involved a campground manager. As Heil was considering whether it was appropriate to terminate the individual's employment, Heil considered Duell's opinion regarding the matter, along with the recommendation of others, including campground users and other employees in the Department.

13. The Department does not conduct performance evaluations. The performance of an employee can be the subject of discussion, however, between Heil, Duell, and Dailey.

14. Duell does not have any role in the processing of grievances.

15. Duell does not have any independent or effective authority to lay off, recall, promote or transfer a Department employee.

16. In the course of Duell's tenure, the only vacancy in the Department's regular, full-time staff of Forestry Workers did not result in interviews because the position was filled through the transfer posting process set forth in the collective bargaining agreement between the County and the Union. In that case, however, Heil sought Duell's input as to whether the individual who posted for the position met the minimum qualifications.

Duell will be involved in any future hiring of full-time Department staff. Duell will assist Heil in devising interview questions, and participate with Heil during the interviews. Heil and Duell would each rate the candidates, their scores would be averaged, and the highest ranked individual would be offered the position. In the recent hiring of a campground manager, Duell would have been involved in the interviews in this manner had he not been on temporary leave from his position. In that instance, Heil's administrative assistant participated in the interview process, and Heil averaged his ratings with those given by the administrative assistant. Heil always has one other individual involved in the ranking of candidates for a significant position, because he wants to avoid the appearance of bias in the hiring process. Dailey, the Forestry Assistant (Manager), has had the same role in the hiring process in the past.

There was only one instance in which Duell was involved in the process of hiring of a seasonal worker in the Department. On that occasion, Duell was contacted directly by an individual who wanted to obtain summer work with the Department. Having heard positive feedback regarding the individual, Duell suggested to Heil that he might be a good seasonal employee for the Department. Heil directed Duell to arrange for the individual to come in for an interview; and Heil and Duell conducted the interview together. Because the position was seasonal, there was no ranking involved. Beyond this instance, Duell is not typically involved in the hiring of seasonal employees.

17. Duell would only act in Heil's absence, performing the responsibilities of the Department Administrator, in the limited circumstance where an issue required immediate attention and Heil was not available. Otherwise, Duell would defer any decision-making until he could consult with Heil.

18. Duell does not sufficiently participate in the formulation, determination and implementation of County policy or have sufficient authority to commit the County's resources to be a managerial employee.

19. Duell does not possess supervisory authority 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

CONCLUSION OF LAW

The Parks Superintendent/Trails and Projects Manager is not a supervisor within the meaning of Section 111.70(1)(o)1, Stats., or a managerial employee within the meaning of Sec. 111.70(1)(i), 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 Conclusion of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The Parks Superintendent/Trails and Projects Manager position shall be included in the bargaining unit described in Finding of Fact 1, above.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of December, 2009.

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

CLARK COUNTY

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

The County has advanced two arguments as to why the Trails and Projects Manager should continue to be excluded from the professional employee bargaining unit represented by the Union – that the incumbent in the position is a supervisor and that the incumbent is a managerial employee. We address each of these arguments in turn.

SUPERVISORY STATUS

A supervisor is defined in Section 111.70(1)(o)1, Stats., as follows:

. . . 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 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 a claim of supervisory status under Section 111.70(1)(o)1, Stats., we consider 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 supervisor is paid for his/her skills or for his/her supervision of employees;
5. Whether the supervisor is 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.

CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97). Not all of the above-quoted factors need to reflect supervisory status for us to find an individual to be a supervisor. Rather, our task is to determine whether the factors are present in sufficient combination and degree to warrant finding an employee to be a supervisor. WALWORTH COUNTY, DEC. NO. 29378 (WERC, 5/98).

We proceed to consider the record evidence regarding Duell in light of the foregoing factors.

Factor 1 considers Duell's authority to independently decide or effectively recommend the hiring, promotion, transfer, lay off, recall, discipline or discharge of employees. There is no evidence before us suggesting that promotions, layoffs or recalls have occurred in the Department or that Duell would have a role in such processes. As to transfers, Duell gave input to Heil on one occasion regarding whether a bargaining unit employee was qualified to fill a position by transfer. However, we are persuaded that Duell's role did not rise to level of an effective recommendation. We turn to the critical questions of Duell's role in hiring, discipline, and discharge.

As to hiring, it is clear that Duell will play a role in the future hiring of regular Department employees by helping Heil devise interview questions, by participating with Heil in interviews, and by making ratings that will be averaged, with Heil's, into a score that will ultimately determine which candidate is offered the available position. While such participation is clearly significant, the shared nature of this mode of decision-making falls short of establishing that Duell has the authority to effectively recommend hiring in the Department. We also note that Heil employs this scoring system as a method of satisfying himself that the hiring decision is fair – he wants to avoid the appearance of bias. With the most recent hire, Heil used his administrative assistant to provide the counter-rankings against which his own were averaged. Although Heil did not have the option of having Duell participate in that process, because Duell was on leave, the use of non-supervisory employee to fill this role is supportive of the conclusion we have reached as to the extent of Duell's hiring authority.

We acknowledge that on one occasion, Duell recommended a seasonal employee to Heil whom Heil then interviewed (along with Duell) and hired. The record is not extensive as to the role Duell played in Heil's decision-making process. However, even assuming that Duell effectively recommended the hire of this seasonal employee, the record is clear that Duell generally has no role in the hiring of the 25-30 seasonal employees the Department utilizes each year.

We also have concluded that Duell does not have the independent or effective authority to recommend discipline and discharge. While it is clear, as the County points out, that Duell is independently responsible at the worksite for directing the work of employees, it is also apparent that he lacks the authority to take disciplinary action against those employees, except in the most extreme, exigent circumstances. Duell would only remove someone from the worksite if the situation was severe, where safety concerns necessitated doing so. Otherwise,

he would call on Heil to handle a disciplinary situation. In instances where discipline appears to be warranted, Duell would refer the matter to Heil who would conduct his own investigation and arrive at an independent conclusion as to whether and what discipline is warranted. Similarly, on the one occasion when Heil was considering the discharge of a seasonal employee, he sought Duell's input, as well as that of bargaining unit Department employees, and then made his own decision.

As to Factor 2, Duell has limited authority to assign and direct Department employees. This authority is only exercised during the 20-30 days per year when Department employees are working on special projects. While Duell tells Heil how many workers he will need for a project and what skills they should possess, it is Heil who makes the day-to-day decision as to which Department employees will be assigned to each work crew. Duell's authority is limited to being able to determine what particular task each employee will perform within the confines of the project to which they already have been assigned. Further, Duell has narrow authority to move employees from one project to another – he would do so if he had two projects going on at the same time, but he would not pull an employee away from or direct an employee toward a project for which he was not directly responsible. The fact that it is Heil's authority to make Departmental assignments explains why Duell contacts Heil to fix the discrepancy in situations where there are too many or too few employees at a project site. Duell's authority to direct employees is also limited by the fact that he can only authorize short periods of overtime and he does not authorize requests for time off, even for employees who are present at the worksites he oversees.

Factor 3 focuses on the number of employees supervised and the number of persons exercising greater, similar, or less authority over the same employees. Duell directs the work of between one to three regular employees and potentially several seasonal employees during the 20-30 days per year when special projects are being completed. Heil has more supervisory authority than Duell over all of these employees.

Factor 4 focuses on Duell's relative level of pay and an evaluation of whether he is being paid for his skills or his supervision of employees. Duell is paid at least \$16,000 more than the bargaining unit members whose work he directs and approximately \$13,000 less than Administrator Heil. Considering what the record tells us about the nature of Duell's job responsibilities, we view the discrepancy between Duell's salary and that of non-professional bargaining unit members to be less a reflection of the fact that he oversees the work of a few employees from time to time than a reflection of the fact that Duell has the professional responsibility of overseeing the Department's trail systems and managing its special projects.

With respect to Factor 5, it is evident to us that Duell is primarily supervising an activity, rather than employees. Duell's supervisory obligations are limited to the obligation to direct the work of employees on eight to ten projects a year, each of which is completed in approximately one to three days. This obligation is relatively minor, in terms of time and effort, compared to Duell's obligation to attend to the many other aspects of what is required to oversee the County trails system and grant projects.

With respect to Factor 6, although the County is correct in pointing out that Duell does not perform bargaining-unit work and, therefore, cannot be considered a working foreman, this does not mean that he spends the majority of his time supervising employees. Rather, as discussed, he spends most of his time carrying out other tasks related to his management of the trails system and grant projects.

Finally, as to Factor 7, Duell exercises limited independent judgment in the supervision of employees. Although he decides on his own what task each worker will perform at a job site, he consults with or completely defers to Heil regarding nearly every other aspect of the supervision of these employees.

Considering all of these factors, we conclude that Duell does not possess supervisory authority in sufficient combination and degree to warrant a conclusion that he is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats. His direction of work is limited to the 20-30 days per year when special projects are being performed. Even then, he is only present at the work site for several hours per day. Duell has no significant disciplinary authority and his role in hiring does not rise to the level of an effective recommendation. Thus, we reject the County's argument that Duell is a supervisor who therefore cannot be included in the Union bargaining unit.

In reaching this conclusion, we have considered the County's citation of CITY OF OCONOMOWOC, DEC. NO. 7170-A (WERC, 5/85) where an individual was found to be a supervisor based, in part, on the fact that he was the only individual who provided day to day supervision of employees. However, it is important to note that the supervisor in OCONOMOWOC spent time each day directing such work whereas Duell only does so for at most 30 days per year. The supervisor in OCONOMOWOC also had significant disciplinary authority whereas Duell does not. Thus, this matter is significantly distinguishable from OCONOMOWOC.

We also considered the County's citation of CHIPPEWA COUNTY, DEC. NO. 10497-E (WERC, 6/01) and CITY OF RACINE, DEC. NO. 24840-A (WERC, 9/97). In CHIPPEWA, unlike here, the employee found to be a supervisor had significant disciplinary authority and spent at least 50% of his time directly supervising employees. In RACINE, unlike Duell, the Recreation Supervisors had the authority to independently hire and fire employees.

MANAGERIAL STATUS

The County's contention that the Trails and Projects Manager position is managerial must be evaluated under the standard set forth in MILWAUKEE V. WERC, 71 WIS. 2D 709, at 716 (1976), wherein the Wisconsin Supreme Court affirmed the Commission's definition of managerial employees as:

. . . those who participate in the formulation, determination and implementation of management policy or possess effective authority to commit the employer's resources.

The Court went on to discuss why the policy component of the Commission's managerial definition was consistent with the Municipal Employment Relations Act, stating the following:

The exclusion of management personnel, as well as certain other categories, such as supervisors and executives, indicates that not all municipal employees are to have the benefit of dispute resolution through collective bargaining. However, the ability of a certain category of employees to effectuate and implement management policy does not necessarily indicate that they should be precluded from protection by the statute. The definition that has been formulated by WERC effectively distinguishes those categories of employees whose interests are shared by persons engaged in a managerial capacity from those categories who are otherwise employed. By defining the managerial exclusion so as to encompass those who formulate and determine policy, as well as implement it, WERC formulated a definition which is consistent with the purposes of the Act and the legislatively expressed intent to exclude managerial employees.

Thus, it is clear that to be a managerial employee based on one's policy role, that employee must "formulate and determine policy, as well as implement it". For instance, applying this policy test for managerial status in *EAU CLAIRE COUNTY V. WERC*, 122 WIS. 2D 363 (1984), the Court of Appeals concluded that a register in probate was not a policy-based managerial employee because the circuit court had final approval over all of the position's activities.

Lastly, it is important to emphasize that not all policy determinations qualify an individual as a managerial employee. Consistent with the purposes of the managerial exclusion as one which serves to distinguish individuals whose interests are distinct from those employees in the bargaining unit, policy making must be at a "relatively high level" to warrant managerial status. *TAYLOR COUNTY*, DEC. NO. 24261-E (WERC, 7/97).

As noted above, the second route to managerial employee status involves the effective authority to commit the employer's resources. In *KEWAUNEE COUNTY V. WERC*, 141 WIS. 2D 347, at 355 (1987), the Court of Appeals affirmed the Commission's determination that "effective authority to commit the employer's resources" at a managerial level means possessing:

. . . the discretionary power to determine the type and level of services to be provided the manner and means by which those services will be delivered and involves: . . . determining the services required, the number of persons necessary to deliver those services, and the quantity and type of equipment and supplies required to provide those services.

To support its contention that Duell is a managerial employee, the County relies on many of his responsibilities related to overseeing the County trails system and managing its special project work. We now examine these work activities as they relate to these foregoing standards.

The County contends that Duell's role in formulating policy recommendations relating to the County's trails system qualifies him for a managerial exclusion. We recognize that, insofar as Duell is the one in the field – he is on the trails and in direct contact with the trail user interest groups – he is the County's eyes and ears as to the conditions of its trails system. To a significant degree, the Forestry and Parks Committee relies on the assessments Duell provides, based on such first-hand experience, as to what is needed to maintain and develop the trails system. Such responsibilities, however, do not make him managerial. The managerial policy decision that was made by the County is to have and maintain a trail system. Duell did not make this determination and cannot change it. His recommendations as to the development and maintenance of the trail system the County has decided to have are the implementation of a managerial policy decision but not policy making at a level that confers managerial status.

The County also argues that, because the opening and closing of trails affects the level of service offered by the County, that responsibility qualifies Duell as a managerial employee. We disagree. Even if Duell had exclusive authority as to such decisions (which he does not), opening or closing decisions do not affect the level of service provided by the County at a high enough level to convey managerial status.

The County also contends that Duell's responsibilities related to the management of grant-funded projects qualify him for the managerial exclusion. Again, we disagree. As we reiterated in IRON COUNTY, Dec. No. 30291-A (WERC, 8/08), it is the general decision to pursue grants that is an indicator of managerial status, and that decision is made in this case by the Forestry and Parks Committee. We also note that Duell consults with Heil regarding what grants the Department should pursue, and Heil has the authority to override Duell with regard to the proposal that is brought before the Forestry and Parks Committee. Further, it is the Forestry and Parks Committee that has the ultimate authority to decide which grants will be pursued.

The County also asserts that Duell's authority to independently manage the special project work is evidence of his managerial status. We acknowledge that Duell has wide discretion to determine how to carry out the special project work. However, whether Duell is securing grant funding through the completion of applications, obtaining permits, purchasing materials, soliciting bids, entering contracts, monitoring contractor compliance, or handling cost overruns and the allocation of extra resources on special projects, he is doing no more than professionally implementing the decisions of the Forestry and Parks Committee. As we have held, such implementation responsibilities do not make an employee managerial. WISCONSIN INDIANHEAD TECHNICAL COLLEGE, DEC. NO. 31947 (WERC 12/06).

The County also relies on Duell's responsibility to attend and provide input at the Forestry and Parks Committee meetings. It is true that Duell plays an active role in those meetings. However, given the authority Heil has, but does not always exercise, to override Duell as to what recommendations will be brought to the Forestry and Parks Committee, as well as the final-decision making authority retained by the Forestry and Parks Committee, Duell's role in these meetings is not evidence of managerial status.

Nor is Duell's authority to determine the number of employees for a project indicative of managerial authority. As the commission has held, deciding how many employees a department should have – which would, indeed, be indicative of managerial authority – is not the equivalent to deciding how many current Department employees should be working on a particular project. *KEWAUNEE COUNTY V. WERC*, 141 Wis. 2d 347 (1987).

Finally, it is clear from the record that the person responsible for drafting and submitting a recommended budget for the Department to the Forestry and Parks Committee is Administrator Heil. Duell has a role in the drafting of the budget, but it is limited. Duell reports to Heil regarding the revenue and expenditure projections of grant projects that already have been approved by the Committee. Further, any input Duell provides with regard to capital equipment expenditures is considered by Heil along with the input of others in the Department, and Heil has the authority to establish the priority recommendation that will ultimately be presented to the Forestry and Parks Committee. Thus, none of the input Duell provides in the budget process justifies Duell's exclusion from the bargaining unit as a managerial employee.

Given all of the foregoing, we conclude that Duell does not sufficiently participate in the formulation, determination and implementation of County policy or have sufficient authority to commit the County's resources to be a managerial employee.

In reaching this conclusion, we have considered the County's citation of *MONROE COUNTY*, DEC. NO. 30037-B (*WERC*, 11/01) where the Farm Manager was found to be a managerial employee. That individual had independent control of the entire farm operation. Duell's role as to County trails is much more circumscribed. We have also considered the County's reference to the Developmental Disabilities Coordinator found to be managerial in *VERNON COUNTY*, DEC. NO. 13805-B (*WERC*, 4/91). The combination of that individual's overall policy and resource authority exceeds that possessed by Duell to a degree sufficient to warrant the distinction in ultimate results reached.

CONCLUSION

On the basis of the foregoing, we conclude that the Trails and Projects Manager neither possesses factors in sufficient combination and degree to warrant a finding that an employee is supervisor, nor does he have sufficient policymaking or resource allocation authority to be a managerial employee. Accordingly, our order directs that the Manager is added to the bargaining unit.

Dated at Madison, Wisconsin, this 15th day of December, 2009.

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