

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
LANGLADE COUNTY COURTHOUSE AND PROFESSIONAL EMPLOYEES UNION

Involving Certain Employees of

LANGLADE COUNTY

Case 116
No. 71586
ME(u/c)-1324

Decision No. 34660

Appearances:

John Spiegelhoff, Staff Representative, AFSCME Wisconsin Council 40, AFL-CIO, 1105 E. 9th Street, Merrill, Wisconsin, appearing on behalf of the Langlade County Courthouse and Professional Employees Union.

Patrick C. Henneger, Phillips Borowski, S.C., 10140 N. Port Washington Road, Mequon, Wisconsin, appearing on behalf of Langlade County.

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

By its unit clarification petition filed on April 11, 2012, and amended on June 26, 2012 and July 25, 2012, Langlade County Courthouse and Professional Employees Union asks the Wisconsin Employment Relations Commission to add: (1) the Land Conservationist and Shoreland Protection Specialist to its Langlade County non-professional employee bargaining unit; and (2) the County Surveyor / Land Records Coordinator to its Langlade County professional employee bargaining unit.

Langlade County opposes the Union's request arguing that the Land Conservationist and County Surveyor / Land Records Coordinator are supervisors and managerial employees and that the Shoreland Protection Specialist is a temporary employee.

Hearing on the petition was held in Antigo, Wisconsin, on August 1, 2012 and September 12, 2012 before Commission Examiner Lauri Millot. Transcripts were prepared and received by the Examiner on October 30, 2012. The parties did not submit post-hearing argument but did supplement the record as to the Shoreland Protection Specialist. The record was closed July 29, 2013.

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

FINDINGS OF FACT

1. Langlade County (herein the County) is a municipal employer.
2. Langlade County Courthouse and Professional Employees Union (herein the Union) serves as the collective bargaining representative of County employees in professional and non-professional employee bargaining units.
3. The disputed employees are all part of the Land Records and Regulation Department / Land Conservation Department. The Departments consist of Director Becky Frisch, the disputed County Conservationist, the disputed County Surveyor, the Code Administrator, the Assistant Code Administrator, the Land Records Technician, the disputed Shoreland Protection Specialist, and two Deputies. The two Deputies, the Land Records Technician and the Assistant Code Administrator are in the Union's non-professional employee bargaining unit. All other Department employees are currently excluded from either of the Union-represented bargaining units. The Department organizational chart includes a Land Conservation Technician but the incumbent is employed by Lincoln County.
4. The Land Conservationist is the only County employee in the Land Conservation Department. The Department is administratively attached to the Land Records and Regulations Department. The incumbent Land Conservationist is Marie Graupner who has held this position for twenty-one (21) years and receives a yearly salary of approximately \$36,000.
5. Graupner does not significantly participate in the formulation and determination of County policy or have significant authority to allocate County resources.
6. Graupner does not have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline other employees, adjust their grievances or effectively recommend same.
7. The incumbent County Surveyor / Land Records Coordinator is David Tlusty who has held the position for twenty-one (21) years and receives a yearly salary of

approximately \$66,000. Tlusty's immediate supervisor is Land Records and Regulation Department Director Becky Frisch.

8. Tlusty does not significantly participate in the formulation and determination of County policy or have significant authority to allocate County resources.

9. Tlusty does not have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline other employees, adjust their grievances or effectively recommend same except to a limited degree as to discipline.

10. The Shoreland Protection Specialist is a part-time employee funded by a grant administered by the Wisconsin Department of Natural Resources. The current grant provided sufficient funds for work during the summer of 2013 and again in the summer of 2014. Future existence of the position is dependent on receipt of a new grant. There has been substantial turnover in the position.

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

CONCLUSIONS OF LAW

1. The Land Conservationist and County Surveyor / Land Records Coordinator are not supervisors within the meaning of § 111.70(1)(o) 1, Stats., or managerial employees within the meaning of § 111.70(1)(i), Stats., and therefore are municipal employees within the meaning of § 111.70 (1)(i), Stats.

2. The Shoreland Protection Specialist is a temporary employee and not a regular part-time employee.

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

ORDER

1. The Land Conservationist is hereby included in the non-professional employee bargaining unit represented by Langlade County Courthouse and Professional Employees Union.

2. The County Surveyor / Land Records Coordinator is hereby included in the professional employee bargaining unit represented by Langlade County Courthouse and Professional Employees Union.

3. The Shoreland Protection Specialist shall continue to be excluded from the non-professional employee bargaining unit represented by Langlade County Courthouse and Professional Employees Union.

Given under our hands and seal at the City of Madison, Wisconsin, this _____ day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

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

I. Alleged Managerial Status of the Land Conservationist and County Surveyor / Land Records Coordinator

Section 111.70(1)(i) of the Municipal Employment Relations Act (MERA) specifically excludes a “managerial employee” from the definition of “municipal employee.” Thus, if the County is correct that the Land Conservationist and the County Surveyor / Land Records Coordinator are managerial employees, the Union’s request that they be added to a “municipal employee” bargaining unit must be rejected.

MERA does not provide a definition of a “managerial employee” and thus this statutory term has been defined by the Commission and the courts. In Milwaukee v. WERC, 71 Wis.2d 709 at 716 (1976), the Wisconsin Supreme Court summarized and 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.

To qualify as a managerial employee based on participation in management policy, an employee’s participation must be "at a relatively high level of responsibility." Taylor County, Dec. No. 24261-E (WERC, 7/97).

To attain managerial employee status based on the effective authority to commit the employer’s resources, the Court in Kewaunee County v WERC, 141 Wis.2d 347 at 355-356 (1987), stated:

For an employee’s budgetary duties to constitute effective authority to commit an employer’s resources, the employee must possess the discretionary power to determine the type and level of services to be provided and the manner and means by which those services will be delivered.

Formulating a budget, as opposed to merely submitting a budget, 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. Consequently, to possess effective authority to commit an employer’s resources, an employee preparing a budget must possess the authority to effectively recommend the amount and

manner in which funds will be expended in support of each of the services provided.

Managerial status based on effective authority to commit the employer's resources can also be established by an employee's authority to allocate funds for differing program purposes within the confines of a budget. Eau Claire County v. WERC, 122 Wis.2d 363 (1984).

II. Land Conservationist

Land Conservationist Graupner is a one-person department and does important work as to the County Land and Water Resource Management Plan and the Farmland Preservation Tax Credit program, Clean Sweep program, Soil, Water and Resource Management program, Nutrient Management program, and Wildlife Damage Abatement program, among others. However, the policy content of those matters is established by state and federal law. Therefore, while Graupner implements policy, she does not formulate it and thus does not qualify as a managerial employee under the "policy" test established by the Court in Milwaukee.

Graupner prepares a proposed annual Land Conservation Department budget which for 2012 was \$230,881. The proposed budget expenditures are funded by a combination of tax levy dollars and grant monies. Graupner submits her proposed budget directly to the Land Conservation Committee which has historically left her proposals unchanged. However, from our review of the budget components, we conclude that the budget consists of salary, fringe benefits, and program costs that do not reflect discretionary power to determine the type and level of services to be provided and the manner and means by which those services will be delivered. In addition, the record establishes that Graupner lacks any significant authority to allocate funds for differing program purposes within an established budget. Therefore, Graupner also does not qualify as a managerial employee under the "resource" test established by the Court in Milwaukee.

III. County Surveyor / Land Records Coordinator

As reflected by the following, the County Surveyor / Land Records Coordinator performs important work but does not formulate management policy or commit the County's resources in a significant way.

Trusty performs surveying work for parcel mapping projects and corner maintenance consistent with state statute. Trusty conducts field and record investigations to verify and / or correct section and quarter section corners. He does surveying work and other land-related projects for various County departments including Forestry, Highway, County Clerk, Maintenance, and Corporation Counsel. The majority of Trusty's work is performed in the field. None of these responsibilities reflect the formulation of policy and therefore Trusty does not qualify as a managerial employee under the "policy" test established by the Court in Milwaukee.

As to Tlusty's "resource" related responsibilities, he prepares project specifications and lets projects out for bid, negotiates contracts within the confines of bids and / or County committee authority, and monitors performance and recommends payment of contractor billing. Tlusty authored the 1999 and 2010 County Land Records Modernization Plan with input from the Land Records Technical Advisory Committee. Tlusty independently created a numeric record indexing system which resulted in all land records being renumbered.

Tlusty prepares the Land Information Grant portion of the Land Records and Regulation Department's overall budget and submits it to Director Frisch. Tlusty does not attend any County meetings where the Land Records and Regulation Department budget is discussed, approved or modified.

Tlusty investigates and recommends to Director Frisch equipment to be purchased for use in the performance of his duties. If approved and prioritized by Frisch, the request is submitted to the County Capital Improvements Committee for consideration and prioritization.

While the foregoing duties are important, they do not reflect discretionary power to determine the type and level of services to be provided or the manner and means by which those services will be delivered. In addition, the record establishes that Tlusty lacks any significant authority to allocate funds for differing program purposes within an established budget. Therefore, Tlusty also does not qualify as a managerial employee under the "resource" test established by the Court in Milwaukee.

IV. Alleged Supervisory Status of the Land Conservationist and the County Surveyor / Land Records Coordinator

Section 111.70(1)(o)1, Stats., defines a "supervisor" in relevant part as:

... 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 applying this statutory definition, the following factors are considered:

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 alleged supervisor is paid for his / her skill or for his / her supervision of employees;

5. Whether the alleged supervisor is primarily supervising an activity or is primarily supervising employees;

6. Whether the alleged supervisor is a working supervisor or whether he / she spends a substantial majority of his / her time supervising employees; and

7. The amount of independent judgment exercised in the supervision of employees.

Town of Brookfield, Dec. No. 26426 (WERC, 4/90).

To be found a supervisory employee, it is not necessary to find that the employee meets all of the above factors. Rather, our review focuses on whether the factors are present in sufficient combination and degree to warrant the conclusion that the employee occupying the position is a supervisor. City of Green Bay, Dec. No. 31417 (WERC, 8/05).

V. Land Conservationist

The only evidence of current supervisory authority for the Land Conservationist as to County employees is her ability to assign work to several administrative employees in the Land Records and Regulation Department. Therefore, it is clear that she is not a supervisor.

VI. County Surveyor / Land Records Coordinator

As to the hiring portion of Factor 1, the evidence establishes that Tlusty has participated in the hiring process for multiple Land Record Technicians during his employment with the County. Tlusty prepared the interview questions for at least one of the hires and was typically part of an interview panel (including Director Frisch) which would seek to arrive at a consensus regarding who to hire. However, had there been disagreement between Tlusty and Frisch as to who to hire, Director Frisch would overrule Tlusty's recommendation. Given the foregoing, Tlusty does not have the authority to effectively recommend hiring.

Concerning the discipline portion of Factor 1, Tlusty does not have any independent disciplinary authority. As to Tlusty's authority to effectively recommend discipline, Director Frisch testified that she would "give weight" to a disciplinary recommendation from Tlusty –

particularly where the alleged misconduct involved the technical aspects of the Technician's job. Thus, at least to this limited degree, we conclude that Tlusty does effectively recommend discipline.

Tlusty does not have the authority to promote, recall, or transfer employees or adjust grievances.

As to Factor 2, Tlusty does assign work to the Technician.

Addressing Factor 3, Tlusty only directs the work of one employee – the Technician. Director Frisch exercises greater authority over the employee than Tlusty. She approves the Technician's timecards, approves leave requests and receives his calls if he will be absent due to illness or other reason.

As to Factors 4-7, Tlusty is paid for his professional skills and spends little time directing the work of the Technician. However, when he does so, he exercises independent judgment. To the extent that the County evaluates employees, the evaluation is performed by Frisch.

Given the foregoing, we conclude that Director Frisch is the Technician's supervisor and that Tlusty is not. He only directs the work of one employee, does not evaluate that employee, spends most of his time independently performing his own work, and has no role in the approval of work time or leave. In that context, his role in the hiring process and limited ability to effectively recommend discipline are insufficient to qualify him as a supervisor.

VII. Shoreland Protection Specialist

The County contends that the Shoreland Protection Specialist is a temporary employee who therefore cannot appropriately be included in a bargaining unit consisting of regular full-time and part-time employees. MERA does not provide a definition of a temporary employee. However, through its decisions, the Commission has developed a temporary employee definition as an employee lacking a reasonable expectation of continued employment. Forest County, Dec. No. 29159-B (WERC, 5/02).

As the post-hearing supplement of the record reflects, there has been some ebb and flow as to the status of the Shoreland Protection Specialist. At present, there is funding for employment next summer but funding beyond that is contingent on receipt of additional grant monies. The record also reflects a fair amount of turnover in terms of who has filled the position in prior years. Given that turnover and the uncertainty as to future funding, we are satisfied that the Shoreland Protection Specialist is a temporary rather than a regular part-time employee.

VIII. Summary

The parties have agreed that if the Land Conservationist and the County Surveyor / Land Records Coordinator are not managerial employees or supervisors, they should be added to the existing non-professional and professional units, respectively. Given our conclusions as to those employees, we have done so. The Shoreland Protection Specialist shall continue to be excluded from the non-professional employee unit.

Given under our hands and seal at the City of Madison, Wisconsin, this _____ day of November 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner