

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO
Involving Certain Employees of
SHEBOYGAN COUNTY

Case 8
No. 53894
ME-831

Decision No. 8256-L

Appearances:

Samuel Gieryn, Staff Representative, 187 Maple Drive, Plymouth, Wisconsin 53073, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO and Sheboygan County Supportive Services Employees Union Local 110, AFSCME, AFL-CIO.

Michael J. Collard, Human Resources Director, 508 New York Avenue, Sheboygan, Wisconsin 53081-4692, appearing on behalf of Sheboygan County.

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

On September 6, 2002, Wisconsin Council 40, AFSCME, AFL-CIO filed a petition with the Wisconsin Employment Relations Commission seeking to have the Commission clarify an existing AFSCME bargaining unit of Sheboygan County employees by inclusion therein of the Mechanic-Sheriff's Department, Assistant Mechanic - Sheriff's Department, Deputy Register of Deeds, Deputy County Clerk and Deputy Zoning Administrator. The matter was held in abeyance for an extended period while the parties sought to resolve the matter voluntarily. The parties voluntarily resolved the status of all positions except Deputy Register of Deeds, which was the subject of a hearing in Sheboygan, Wisconsin on July 11, 2007 before a Commission examiner. A stenographic transcript was prepared and made available to the parties by July 25, 2007. The parties filed written arguments and replies, the last of which was received on September 8, 2007.

No. 8256-L

On September 17, 2007, the Commission issued its decision in CITY OF WAUSAU, DEC. NO. 20916-J and the Examiner invited the parties to file supplemental briefs as to the impact of that decision, which they did by November 26, 2007.

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

FINDINGS OF FACT

1. Sheboygan County Supportive Services Employees Union Local 110, AFSCME, AFL-CIO, herein the Union, is a labor organization with offices at 187 Maple Drive, Plymouth, Wisconsin.

2. Sheboygan County, herein the County, is a municipal employer with offices at 508 New York Avenue, Sheboygan, Wisconsin.

3. At all times material hereto, the Union has been the exclusive representative for collective bargaining of a County employee bargaining unit defined in the 2005-2006 labor agreement between the County and the Union as:

...all regular full-time and part-time personnel employed by Sheboygan County in the Court House, Sheriff's Department and in auxiliary departments and buildings (but specifically excluded therefrom all elected public officials, supervisors, professional employees of the Health and Human Services Department, all sworn law enforcement officers of the Sheriff's Department with powers of arrest, supervisory employees of the Sheriff's Department, all nurses and all confidential employees,

4. The Register of Deeds is an elected County officer with responsibilities established by Sec. 59.43, Stats. Until 1998, the position immediately under the Register was the Deputy Register of Deeds. The Deputy Register of Deeds was included in the Union's bargaining unit. The job description for the Deputy Register was as follows:

I. PURPOSE AND SUMMARY

- Performs a variety of clerical tasks and substitutes for the Register of Deeds.

II. DUTIES

- Assists the Register of Deeds in the performance of his/her duties.

- Advises other clerical personnel on difficult or unusual problems encountered in registering deeds and mortgages.
- Serves as lead counter clerk advising the public on procedures for registering deeds and mortgages.
- Reviews deeds and other documents for accuracy and completion.
- Personally performs and takes the lead in tracking of the land title documents for inclusion into the permanent land record of Sheboygan County.
- Takes the lead in the performance of, and oversees, a wide variety of clerical activities.
- Receives and responds to telephone messages.
- Prepares monthly and assists the Register of Deeds in preparation of the annual report and annual budget.
- Affixes his/her signature to various legal documents in the absence of or as designated by the Register of Deeds.
- Arranges for monthly billing to governmental units.
- Performs other duties as may be assigned.

III. QUALIFICATIONS

- High school education or equivalent.
- Knowledge of state laws pertaining to recording and filing of documents in the Register of Deeds office.
- Knowledge of the systems of entering, indexing, recording, and filing deeds and other documents and county regulations pertaining to the Register of Deeds office.
- Ability to plan and supervise the work of others.
- Ability to understand and follow complex oral and written instructions.

- Considerable, progressively responsible clerical work some of which shall have been in the Register of Deeds office.

5. In 1998, the County abolished the position of Deputy Register of Deeds and created the non-bargaining unit position of Office Supervisor. The current job description for the Office Supervisor is as follows:

I. **PURPOSE SUMMARY**

Responsible for the supervision and coordination of the various activities with the Register of Deeds office. Responsible for overall collection of revenues and budgetary reports related to the Register of Deeds office. Execution of Federal, State and County regulations, laws and policies as related to Register of Deeds office.

II. **DUTIES**

- Supervises the activities within the Register of Deeds office.
- Plans, assigns, coordinates daily schedules and checks daily work output and employee performance within the defined activities.
- Recommends the hiring, promotion, disciplining and discharge of employees.
- Assists in the preparation of yearly budget. Prepares monthly, quarterly, and yearly revenue and budget reports.
- Develops new or revised office procedures to insure completion of activities in a timely and economic manner.
- Trains new employees and provides additional training for existing employees.
- Responds to inquiries from attorneys, title insurance companies, financial institutions, state and county offices and to the public for information within the Register of Deeds office.
- Acts in behalf of the Register of Deeds when the Register of Deeds is absent.
- Performs special studies and prepares monthly and yearly reports as required.

- Perform any other duties as may be assigned.

III. SUBORDINATES

- Tract Index Document Specialist
- Vital Record Specialist
- Real Estate/UCC Technician

IV. QUALIFICATIONS

- High school education and/or equivalent.
- Four or more years of demonstrated office experience with related supervisor duties. Knowledge of legal documents, real estate law, and legal descriptions. High school education or post high school credits. Knowledge of office practices and procedures. Ability to plan, organize, and complete work activities. Basic accounting knowledge a plus. Ability to become a bonded notary public. Ability to communicate with employees and public.

6. Nila Born has held the position of Office Supervisor since February, 1999. She independently directs the work of six bargaining unit employees and has authority to grant or deny employee requests to modify their existing hours of work within contractually authorized options. She does not spend a majority of her time directing said work but also does not generally perform the same type of work assigned to the bargaining unit employees.

Under the current Register of Deeds, Born has the independent disciplinary authority to issue written reprimands and would effectively recommend whether an employee was to be suspended or discharged.

Under the current Register of Deeds, if employees are hired to fill vacancies in the Register of Deeds office, Born will participate in the selection of applicants for interview, the applicant interviews themselves and will then make a recommendation as to which applicant should be hired. The Register of Deeds will give considerable weight to Born's recommendation.

When vacancies are filled by transfer from within the Union bargaining unit, the most senior qualified transfer applicant is contractually entitled to receive the position. Born has historically played no significant role as to such transfers.

Born effectively recommended the reclassification of two employees into higher paying job classifications.

The Register of Deeds evaluates whether newly hired employees have successfully completed their probationary period but consults with Born when doing so. Employees in the Register of Deeds office are not otherwise formally evaluated.

The Register of Deeds approves or denies all employee leave requests after consulting with Born.

7. The top hourly wage rate (Account Clerk III) for a Register of Deeds office employee is \$17.18. Born's salary translated into an hourly wage rate is \$21.45.

8. Office Supervisor Born possesses supervisory authority in sufficient combination and degree to be supervisor.

On the basis of the above and foregoing Findings of Fact, the Commission hereby makes and issues the following

CONCLUSION OF LAW

Office Supervisor Born is a supervisor within the meaning of Sec. 111.70(1)(o)l, Stats.

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

ORDER CLARIFYING BARGAINING UNIT

Office Supervisor Born shall continue to be excluded from the bargaining unit described in Finding of Fact 3, above.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of April, 2008.

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

SHEBOYGAN COUNTY

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

DISCUSSION

Section 111.70(1)(o)1, Stats. defines a "supervisor" in pertinent 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 evaluating a claim of supervisory status under Sec. 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. 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).

In ROYALL SCHOOL DISTRICT, DEC. NO. 27147-B, (WERC 12/03), we cited MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 17009-F (WERC, 4/01) to further explain the supervisory standard:

Section 111.70(1)(o)1, Stats., speaks in terms of the “authority” of an individual to act or effectively recommend action. The statute does not require that the actual exercise of authority to be established before an employee can qualify as a supervisor. Thus, our analysis focuses on whether an individual has the authority to take or effectively recommend action. Clearly, evidence as to the actual exercise of that authority provides conclusive support for the existence of the authority itself. Similarly, where the authority is not exercised in a relevant fact situation, the asserted existence of the authority is substantially if not critically undermined. However, where there has been no occasion to exercise the authority in question, it does not follow that the authority does not exist. Rather, in the absence of factual scenarios in which the existence of authority can definitively be tested, we evaluate the existing evidence presented as to the authority of the individuals in question and make a determination. CITY OF MILWAUKEE, DEC. NO. 17741-B (WERC, 1/91); TOWN OF MADISON, DEC. NO. 27784-B (WERC, 8/97). If a fact situation subsequently arises that calls into question whether the authority exists, the matter can be raised again by a party.

Our task here is complicated by the fact that: (1) the current Register of Deeds was relatively new to her position at the time of hearing; (2) much of testimony regarded events that occurred under the former Register of Deeds; (3) Born credibly testified that the former and current Registers have different management styles and that she anticipates playing a greater role in supervisory decisions than she did under the former Register of Deeds; and (4) the County presented credible testimony to the effect that Register of Deeds manages the office but is not the supervisor of the employees. We have considered all of these complicating factors when deciding this case and will comment more specifically on their impact where appropriate in this decision.

Factor 1 asks us to consider the critical authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.

As to hiring, some of the evidence and argument presented slurred the distinction between hiring an individual who is not currently a County employee to fill a vacant position and the transfer of a current County employee into a vacancy. Particularly where, as here, there is limited discretion for the employer to exercise as to contractually regulated transfers, an individual’s authority as to hiring is a much more significant indication of supervisory authority than is authority as to transfers. Our discussion of hiring authority considers only the evidence which we understand relates to hiring an individual who is not currently a County employee.

In this regard, the current Register credibly testified that she would involve Born in all aspects of the hiring process and would give her hiring recommendation “significant weight”. While this evidence falls short of establishing that Born would “effectively recommend” who to hire (i.e. that the Register would accept her recommendation even where the Register preferred another applicant), it does make it clear that Born would be involved in a significant way in a hiring decision. We acknowledge that there have not been any hires under the new Register but we have no basis for doubting her testimony and thus base our conclusion as to Born’s role as to hiring on same.

As to the authority to recommend “promotion”, Born did effectively recommend and lobby for the reclassification of two employees into a higher paying job classification. While not technically a “promotion”, it is functionally similar in its impact on the affected employee (ie. increase in pay).

As to transfers, Born played a very limited role under the former Register. However, even assuming that she may play a greater role under the new Register, management has little authority/discretion to exercise as to transfers given the existing contractual rights of employees. Thus, authority as to transfers plays little role in our overall analysis.

Turning to discipline, Born testified and the County Human Resources Analyst confirmed Born’s independent authority to issue a written reprimand-even if opposed by the Register of Deeds. The County Analyst further testified that as to suspension and discharge, Born is the effective decision-maker. While this testimony can be viewed as being at odds with the Register’s earlier testimony that she would be the one to impose formal discipline, we note that Register did not return to the witness stand to rebut the testimony of Born and the Analyst. We further note that under County policy, the Register would sign off on any formal discipline and thus there may well not be any conflict between the testimony of the Register and that of Born and the County Analyst. Lastly, we conclude that in a clash between the disciplinary authority of the County and the Register, it is the County’s view of Born’s disciplinary authority that would prevail. We do so because we are satisfied that once an individual becomes a County employee, it is the County-not an elected official - who has the statutory authority to end County employment. ¹ Given the foregoing, we conclude that Born does indeed have the independent authority to issue a written reprimand and that Born is the effective decision-maker as to suspensions and discharges. ²

¹ In WINNEBAGO COUNTY V. COURTHOUSE EMPLOYEES ASS’N, 196 Wis. 2D 733 (Ct. App. 1995), the Court concluded that the county’s authority prevailed over that of the elected official in the context of a dispute over whether the just cause provision in the contract bargained by the county limited the clerk of circuit court’s statutory power to terminate an employee’s employment. The relevant statutory authority of a clerk of court (Sec. 59.38, Stats.) and a register of deeds (Sec. 59.43, Stats.) is virtually the same and thus we are satisfied that the same result would be reached as to a register’s power to terminate employment in the face of a County-bargained collective bargaining agreement. Therefore, we are persuaded that in any clash between the Register and the County as to whether an employee should be disciplined or discharged, the County’s authority under the collective bargaining agreement and its rights under Chapter 59 would prevail over the Register’s.

² Our determination is supported by evidence that while serving under the prior Register of Deeds (who apparently

The authority to evaluate employees is also a factor we typically consider when assessing whether an employee is a supervisor. Here, we have the same potential clash between the testimony of the County Analyst (Born would perform any regular evaluations) and the Register (she would conduct the evaluations with input from Born). Either way, it is clear that if the County does begin to perform regular evaluations of employee performance (other than during the probationary period) Born will have a significant role to play as to such evaluations.

As to Factors 2 and 7, the evidence establishes that Born has and exercises some independent authority to direct the work of the six unit employees in the office. Although we acknowledge the truism that employees know their usual assignments and how to perform them, the record here persuades us that Born independently changes assignments on a regular basis to meet office needs. She has the authority to grant or deny requests to change hours of work within contractually authorized options. While it is the Register that grants or denies leave requests, she does so after consulting with Born. In addition, as was true for transfers, little management discretion is exercised by anyone as to the granting of leave requests.

As to Factor 3, Born directs the work of six employees. The Register is generally present in the office and thus can and occasionally does also give direction to the office employees.

As to Factor 4, Born is paid substantially more (\$4.27 on an hourly basis) than the highest paid bargaining unit employee in the Register of Deeds office. The County's internal pay structure analysis provides some evidence that this pay differential is at least partially based on Born's supervisory authority. Even without this evidence, we would conclude that this pay discrepancy is at least partially based on Born's supervisory role.

As to Factors 5 and 6, Born's testimony as to her many duties and responsibilities and time devoted thereto persuades us that she does not spend a majority of her time actually supervising the employees in the office. However, in the context of a competent and experienced work force, this is neither surprising nor particularly damaging to a determination of supervisory status. It is noteworthy to us that unlike a lead person who may well spend a substantial amount of time performing the same work as unit employees, Born does not do so. Further, given the authority we have previously discussed in the context of Factors 1 and 2, we are persuaded that Born is primarily supervising employees rather than an activity.

Considering all of the foregoing, we conclude that Born is a supervisor. While this is a close case, we are satisfied that our conclusions as to hiring and discipline, the exercise of authority when directing the work of the employees and her higher level of pay provide sufficient support for our conclusion.

had a less collaborative style than the current Register), it was Born who worked with the Human Resources Department investigating possible employee misconduct and ultimately determined that no disciplinary action need be taken.

In reaching this conclusion, we acknowledge the Union's argument that we can be viewed as creating two supervisors (the Register and Born) for six employees. We further acknowledge that as the Register gains additional experience, she may rely less on Born. However, at present, we conclude that the elected Register is the manager of the department and that Born is the supervisor. Contrary to the Union's argument, we have given credence to the County testimony that it is Born who has the preeminent authority as to discipline.

In reaching our conclusion, we have also considered the numerous prior Commission decisions which the Union cites in support of its argument that Born is not a supervisor. However, as reflected below, we are satisfied that in each instance cited by the Union, there are factual distinctions sufficient to warrant the result we reach herein. As a general matter, all of the cases cited by the Union involve employees with a lesser role in discipline and hiring than Born's.³ Because the Examiner sought and received supplemental argument as to the impact of CITY OF WAUSAU, DEC. NO. 20916-J (WERC, 9/07) some specific comment as to that decision is warranted. The employee found not to be a supervisor in WAUSAU had a hiring role comparable to Born's but did not have the effective authority to suspend or discharge. Although as previously noted it presents a close question, this distinction as to disciplinary authority is sufficient to warrant our conclusion that Born is a supervisor. In addition, we note that unlike the employee in WAUSAU, Born does not spend a majority of her time performing the same work as those she supervises.

³ In RACINE COUNTY, DEC. NO. 7911-B (WERC, 11/95), the Commission concluded that a Deputy Register of Deeds who had no significant role in discipline or hiring was not a supervisor. Here, Born's role in hiring and discipline clearly distinguishes her from the Deputy in RACINE. In OZAUKEE COUNTY, DEC. NO. 22667-F (WERC, 1/99), unlike Born, the Chief Deputy Register of Deeds found not to be a supervisor lacked the authority to impose or effectively recommend significant discipline and had an inconsistent role in hiring. In MANITOWOC COUNTY, DEC. NO. 8152-F (WERC, 6/83), unlike Born, the Administrative Assistant found not to be a supervisor had no disciplinary authority and a minimal role in hiring. In SCHOOL DISTRICT OF CORNELL, DEC. NO. 17982 (WERC, 8/80), in contrast to Born, the custodial supervisor found not to be a supervisor did not have significant disciplinary authority, had an inconsistent role in hiring and spent the majority of his time performing the same work as other employees. In ONEIDA COUNTY, DEC. NO. 24844-F (WERC, 1/99), in contrast to Born, the Deputy Register of Deeds found not to be a supervisor had no significant disciplinary authority, spent a majority of her time performing the same work as the other employees in the office and had no significant role in hiring. In GERMANTOWN SCHOOLS, DEC. NO. 14762, (WERC, 7/76), unlike Born, the Head Cooks found not to be supervisors lacked any significant disciplinary authority. The Director of Aging and Nutrition found not to be a supervisor in JUNEAU COUNTY, DEC. NO. 18728-A (WERC, 1/86) had, in contrast to Born, a limited and inconsistent role in hiring and no significant role in discipline. In DOOR COUNTY, DEC. NO. 24016-B (WERC, 8/88), unlike Born, the Administrative Assistant found not to be a supervisor did not have the authority to effectively recommend hiring or discipline and her higher pay was due to seniority and non-supervisory job responsibilities. Similarly, the Clerk IV found not to be a supervisor in MILWAUKEE COUNTY, DEC. NO. 14169-A (WERC, 10/77) did not have the authority to effectively recommend hiring or discipline and her higher pay was due to seniority and non-supervisory job responsibilities. In contrast to Born, the Program Manager found not to be a supervisor in WOOD COUNTY, DEC. NO. 26227-B (WERC, 5/92) had no significant role in hiring or discipline. Unlike Born, the Lieutenants found not to be supervisors in PORTAGE COUNTY, DEC. NO. 19798-A (WERC, 2/93) and the Sergeants found not to be supervisors in WALWORTH COUNTY, DEC. NO. 29040 (WERC, 4/97) had no authority to discipline and a limited role in hiring.

Given all of the foregoing, Born shall continue to be excluded from the bargaining unit.

Dated at Madison, Wisconsin, this 15th day of April, 2008.

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

