

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
**SHEBOYGAN COUNTY SUPPORTIVE SERVICES,
LOCAL 110, AFSCME, AFL-CIO**

Involving Certain Employees of
SHEBOYGAN COUNTY

Case 389
No. 67397
ME(u/c)-1230

Decision No. 8256-M

Appearances:

Michael J. Collard, Human Resources Director, 508 New York Avenue, Room 336, Sheboygan, Wisconsin 53081, appearing on behalf of Sheboygan County

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

Andrew D. Schauer, Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of the Sheboygan County Law Enforcement Supervisors Association.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On November 1, 2007, Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO filed a unit clarification petition with the Wisconsin Employment Relations Commission seeking to include the Jail Rehabilitation Corporal position into a bargaining unit of Sheboygan County employees that Local 110 represents for the purposes of collective bargaining. The County and the Sheboygan County Law Enforcement Supervisors Association oppose the petition, asserting that the incumbent cannot be included in the Local 110 bargaining unit because he is a supervisor and because, in any event, Local 110 has agreed to exclude this position from the Local 110 bargaining unit.

No. 8256-M

A hearing in the matter was held in Sheboygan, Wisconsin on May 23, 2008 before Commissioner Susan J.M. Bauman serving as Hearing Examiner. A transcript of the proceedings was filed with the Commission on June 11, 2008. The parties filed written arguments on July 21, 2008 and reply briefs on August 15, 2008.

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

FINDINGS OF FACT

1. Sheboygan County, hereinafter the County or the Employer, is a municipal employer providing a variety of governmental services, which maintains its principal offices at 508 New York Avenue, Sheboygan, Wisconsin.

2. Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO, hereinafter Local 110, is a labor organization that serves as the exclusive bargaining representative for certain employees of the County described in the 2008-2010 collective bargaining agreement between Local 110 and the County 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 excluding 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, with regard to negotiations with the Employer on questions of wages, hours, and conditions of employment) [sic].

3. Sheboygan County Law Enforcement Supervisors Association, hereinafter the Association, serves as the representative of certain employees of the County's Sheriff's Department described in the 2007-2008 collective bargaining agreement between the Association and the County as:

... Lieutenants, Sergeants, Corporals, Shift Commanders-corrections (sic), Correctional Supervisors.

4. The incumbent Jail Rehabilitation Corporal, Roy Kluss, served as the Huber Law Officer for the County Sheriff's Department and was included in the Local 110 unit until January 1, 2008, when he became the Jail Rehabilitation Corporal.

5. The Position Description for the Jail Rehabilitation Corporal states in relevant part:

The Jail Rehabilitation Corporal is the certified Corrections Officer (non-sworn) assigned to the Corrections Division and is supervised by the Dayshift lieutenant and sergeants.

. . .

The Rehabilitation Corporal has specific responsibilities, duties and objectives, which are herein described as follows:

SPECIFIC JOB RESPONSIBILITY: - Inmate Employment

The Rehabilitation Corporal is responsible for the supervision and administration of the inmate work release program.

. . .

SPECIFIC JOB RESPONSIBILITY: - Liaison

The Rehabilitation Corporal shall attempt to procure employment for unemployed inmates . . .

SPECIFIC JOB RESPONSIBILITY: - Electronic Monitoring Officer

The Rehabilitation Corporal will supervise the Electronic Monitoring Officer in carrying out the Electronic Monitoring Program and Huber objectives.

SPECIFIC JOB RESPONSIBILITY: - Classification Officer

The Rehabilitation Corporal will supervise the Classification Officer in carrying out Huber program objectives.

SPECIFIC JOB RESPONSIBILITY: - Correctional Officers

The Rehabilitation Corporal will supervise the corrections officers in the application of the Huber Law program and objectives.

SPECIFIC JOB RESPONSIBILITY: - Evaluations

The Rehabilitation Corporal will be responsible for the yearly evaluations of the Electronic Monitoring and Classification officers.

SPECIFIC JOB RESPONSIBILITY: - Discipline

The Rehabilitation Corporal will be responsible for maintaining discipline within the work group, including the investigation of possible misconduct and applying progressive discipline when warranted.

. . .

6. Kluss independently directs and evaluates the work of the Electronic Monitoring Officer and the Classification Officer. He can change their work hours on a temporary basis and authorize overtime as needed. He approves their leave requests.

In the context of his Huber program responsibilities, Kluss also assigns work to other Department employees.

Kluss does not have the power of arrest.

7. Kluss is paid \$22.96 per hour. The pay rate of the employees whose work he directs is \$21.43 per hour.

The pay rates for Correctional Supervisors and Corporal contained in the 2007-2008 contract between the County and the Association are \$23.91 and \$25.58 per hour, respectively.

8. When the Department hires a new employee, a three-member panel drawn from among the Department's approximately thirty Corporals, Sergeants and Lieutenants conducts oral interviews. Panelists take turns reading questions to job applicants that have been prepared at the department level and award points to the applicant based on how well his or her answer conforms to a model answer. An applicant's oral interview score consists of the total number of points awarded by the interview panel. From time to time, Kluss will serve on an oral interview panel.

Applicants are also subjected to a background check and a written examination. The results of the background checks and the scores from the oral interviews and written examinations are submitted to the Sheriff and the top three managers in the Department (the Jail Administrator, Director of Operations and Director of Patrol) who then make the hiring decision.

9. Kluss does not have the authority to promote or transfer Department employees or to effectively recommend same.

10. Kluss does not have the authority to impose or effectively recommend discipline of other Sheriff's Department employees beyond a verbal warning. If he observes misconduct, Kluss will report that conduct to his supervisors who will determine how any

investigation will be conducted. The decision on what, if any, discipline will be imposed is made by consensus among top Department managers.

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

CONCLUSIONS OF LAW

1. Jail Rehabilitation Corporal Kluss is not a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats.
2. The contractual recognition clause in Finding of Fact 2 is not an agreement that excludes Jail Rehabilitation Corporal Kluss from the bargaining unit represented by Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO.

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

ORDER CLARIFYING BARGAINING UNIT

The Jail Rehabilitation Corporal shall be included in the bargaining unit represented by Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of December, 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,
CONCLUSIONS OF LAW AND ORDER**

The Jail Rehabilitation Corporal is a regular full-time position within the Sheboygan County Sheriff's Department. The County and Association, contrary to Local 110, argue that the position should continue to be excluded from the Local 110 bargaining unit because the incumbent is a supervisor and because Local 110 has, in any event, agreed to exclude this position from the Local 110 bargaining unit.

A supervisor is defined in Sec. 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 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).

As to Factor 1, the Jail Rehabilitation Corporal does not effectively recommend any candidates for hire. Kluss will occasionally participate in three person interview panels on which he and his co-panelists each grade a pre-determined oral examination. However, the record in this case clearly establishes that once the oral and written examinations and the background checks have been completed, the three highest ranking employees of the department meet with the Sheriff to make the hiring decision. While the score Kluss gives an applicant during an the oral examination (on those occasions when he is on the three person panel) is part of the information considered by those making the hiring decision, it falls far short of being an effective hiring recommendation.

Jail Rehabilitation Corporal Kluss does not have the authority to impose or effectively recommend discipline beyond a verbal warning. Contrary to the content of the Job Description and the January 17, 2008 outline of County disciplinary procedures, the testimony of Captain and Jail Administrator Salata and Director of Operations Bruckbauer as to the Department's actual disciplinary practices makes it clear that to ensure consistency, all disciplinary decisions are effectively made by the Director of Operations, other top Department managers and the Sheriff. Kluss' real world role is limited to reporting misconduct and, if requested, conducting further investigation.

The Jail Rehabilitation Corporal does not promote or transfer Sheriff's Department employees or effectively recommend same.

As to Factor 2, Kluss regularly and independently directs the work of the Classification Officer and Electronic Monitoring Officer and also makes assignments to other Department employees as needed in the context of his Huber program responsibilities. He will play the primary role in the evaluation of the two Officers whose work he directs. He is also responsible for administering their work schedule and leave requests and can authorize overtime.

As to Factor 3, Kluss regularly directs the work of two employees and, as needed, other Department employees. In the context of the Department's para-military structure, Sergeants, Lieutenants, Captains, the Director of Operations and the Sheriff also have authority over these employees.

As to Factor 4, Jail Rehabilitation Coordinator Kluss is paid \$1.53 more per hour than those whose work he directs. He is paid \$.95 per hour and \$2.62 per hour less than Correctional Supervisors and other Corporals, respectively. Kluss' pay rate reflects his responsibility to direct the work of the Electronic Monitoring Officer and the Classification Officer but not Kluss' supervisory status.

As to Factors 5 and 6, the record establishes that Kluss spends the vast majority of his time performing his Huber program duties. While he regularly directs the work of the Electronic Monitoring Officer and the Classification Officer, the absence of disciplinary authority over these and other Department employees warrants the conclusion that he is primarily directing their activities as a leadworker or working foreman rather than supervising them as employees.

Regarding Factor 7, as noted above, Kluss exercises independent judgment when directing the work of other Department employees. While the County argues that the Jail Rehabilitation Corporal exercises a high degree of independent judgment and discretion regarding inmate transfers and acceptance into the electronic monitoring program, the County's argument on this point only establishes that his position is an important one, even a vital one, to the mission of progressive rehabilitation. But the presence of this type of discretion and independent judgment is not relevant to the issue of supervisory status.

Considering all of the foregoing, we conclude that Kluss is not a supervisor within the meaning of Sec. 111.70(1)(o) 1, Stats. While he has independent authority to direct the work of Department employees and has been given a primary role in evaluating the performance of two employees, he does not have any substantial authority in the critical areas of hiring and disciplining employees and spends most of his time performing his Huber program responsibilities. His pay rate is higher than the employees whose work he directs but lower than that of the Department's lowest level supervisors. Thus, on balance, we are satisfied that he is a leadworker but not a supervisor.

Remaining is the County's argument that even if Kluss is not a statutory supervisor, the exclusionary phrase "supervisory employees of the Sheriff's Department" in the Local 110 recognition clause is an agreement to exclude Kluss from the Local 110 unit. The County argues that this phrase must have some independent meaning because there is also a generic exclusion of "supervisors" elsewhere in the Local 110 recognition clause and because the phrase was added to the Local 110 contract at the time the Association unit was established. While this is a plausible argument on its face, it is not persuasive for several reasons.

First, we note that, as a matter of law, the agreement asserted by the County (to the extent it would yield inclusion in the Association unit) would be unenforceable because it would result in mixing employees who are not statutory supervisors with employees (such as those represented by the Association) who have that status. Supervisory law enforcement units are limited in their composition to statutory law enforcement supervisors. See Sec. 111.70(8), Stats. Second, agreements or "deals" such as the one the County asserts is present here must be "clear" for us to enforce them. DEPERE SCHOOL DISTRICT, DEC. NO. 25712-A (WERC, 10/90); WISCONSIN DELLS SCHOOLS, DEC. NO. 24604-C (WERC, 10/92); MATC, DEC. NO. 10882-B (WERC, 11/06). Here, such clarity is not present. There is no supportive bargaining history or other evidence that Local 110 shared the County's understanding regarding the intent behind the addition of this language to the contract and we note the language itself can certainly be viewed as no more than a contemporaneous acknowledgment of

the Association unit's existence rather than creating a new non-statutory "supervisory" exclusion. Further, Kluss' new position did not exist at the time the new language was added to the Local 110 contract.

Having concluded that Kluss is not a statutory supervisor and that there is no enforceable agreement between the County and Local 110 to exclude him from the Local 110 unit, we have ordered his inclusion in the Local 110 unit.

Dated at Madison, Wisconsin, this 12th day of December, 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

