STATE OF WISCONSIN:	CIRCUIT COURT	:COUNTY OF MILWAUKEE
CITY OF MILWAUKEE, a municipal body corporate, Petitioner, -vs- WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.	:	Case No. 350 731
CITY OF MILWAUKEE, a municipal body corporate, Petitioner, -vs- WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.	:	Case No. 351 727

Memorandum Decision

The City of Milwaukee (City) brings this petition for judicial review of the Wisconsin Employment Relations Commission (WERC) direction for an election and its subsequent certification of the Association of Municipal Attorneys of Milwaukee (Association). The court is to review the order of the WERC directing an election as requested by the Association, and the certification of the Association as exclusive bargaining agent.

The Association on November 16, 1966, petitioned the WERC for an election pursuant to Sec. 111.70, Wisconsin Statutes. The election was to determine whether the Association could act as the collective bargaining representative for the attorneys in the office of the City Attorney of Milwaukee. The City contested the election petition and urged that these attorneys are part of the City's management, thus--are not municipal employees, and therefore, are not eligible under Sec. 111.70 of the Wisconsin Statutes.

Hearings were held on January 5, 1967, and on July 10, 1967, the Commission issued an order directing an election as requested by the Association but excluding from participation the City Attorney, Deputy City Attorney, and one Assistant City Attorney, John Kitzke, a member of the City's labor negotiation team.

The election was held August 9, 1967, and all votes cast were in favor of the Association. The WERC then certified the Association as the exclusive bargaining agent for all the attorneys except those specifically excluded.

It is the City's position that the WERC's action was in excess of its statutory authority in that the attorneys are not municipal employees within the meaning of Sec. 111.70(1)(b), Wisconsin Statutes. The City maintains that the city attorneys comprising the Association cannot be considered municipal employees.

The Association contends that the assistant city attorneys come within the definition of a public employee and are therefore entitled to the benefits of the Section 111.70 of the Wisconsin Statutes.

Section 111.70(1)(b), Statutes, defines "municipal employee" as follows:

> "Municipal employee means...any employee of a municipal employer except city and village policemen, sheriff's deputies, and county traffic officers."

Section 111.02(3), Statutes, provides in part:

> "The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the State of Wisconsin, in a non-executive or non-supervisory capacity."

Section 111.70(2), Statutes, provides:

> "Rights of Municipal Employees. Municipal employees shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employee shall have the right to refrain from any and all such activities."

It is apparent from a literal reading of the above statutes that an assistant city attorney is not an excluded employee and thus would be eligible.

The WERC found that Sec. 111.70(2), Statutes, gave to the attorneys employed by the City of Milwaukee in the office of the City Attorney, the right to organize and affiliate with a labor organization of their own choosing and the right to be represented by labor organizations of their own choice in conferences with and negotiations with the City of Milwaukee or its representatives, on questions of wages, hours and conditions of employment.

In Wisconsin Collectors Assn. v. Thorp Finance Corp., (1966) 32 Wis. (2d) 36, 43-46, the Court determined that certain matters more properly belong before the appropriate administrative agency rather than before the court. While this case involved a discussion of jurisdiction, the language used by the Supreme Court exemplifies its acceptance of the expertise of certain administrative agencies performing quasi judicial functions.

Concerning the Wisconsin Employment Relations Commission, the Supreme Court has held that it will not "independently redetermine every legal conclusion of the WERC unless the same is clearly unreasonable.

The fact that the members of the Association are called upon to give legal opinions and to advise executive and supervisory personnel does not make them executive or supervisory personnel, or the fact that they may advise executive and supervisory personnel in labor matters in other separate municipal corporate entities, does not make

them executive or supervisory personnel or make them ineligible to be members of a separate collective bargaining unit for purpose of conferences and negotiations with the employer.

And in American Motors Corp. v. Wisconsin E. R. Board (1966) 32 Wis. (2d) 237, at page 249, the Court held:

> "...the WERB is composed of three commissioners who are experts in the area of labor relations. They are well acquainted with federal labor law and its development. Hence they would be much better able to apply it uniformly than state courts."

In Tecumseh Products Co. v. Wisconsin E.R. Board (1964) 23 Wis. (2d) 118, at page 129, the Court said:

> "To resolve disputes such as these, the board must apply certain standards, either expressly stated in the agreement or derived from the board's knowledge of industrial relations, if the agreement is silent, to certain determined facts. The application of a standard to certain facts to dispose of a dispute involves a conclusion of law. Milwaukee Transformer Co. v. Industrial Comm. (decided February 4, 1964), 22 Wis. (2d) 502, 126 N.W. (2d) 6. This court, however, will not independently redetermine every legal conclusion of the board. If the board's construction of the agreement is reasonable, this court will sustain the board's view, even though an alternative view may be equally reasonable. Milwaukee Transformer Co. v. Industrial Comm., supra. The reasonableness of the board's determination will be assessed not only from the point of view of the express criteria for judgment set forth in the agreement, but, because the express standards of the agreement are often purposefully general and indeterminate, the board's determination must also be evaluated in terms of the 'common law of the shop'---general practices and principles of industrial relations which are part of the context in which every collective agreement is negotiated, although not expressed in the contract as criteria for judgment"

In Muskego-Norway C.S.J.S.D. No. 9 v. W. E. R. B. (1967, 35 Wis. (2d) 540, 562, 151 N.W. (2d) 617, the Court said:

> "...Sec. 227.20(2) Stats., requires that upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved. In short, this means the court must make some deference to the expertise of the agency."

And the United States Supreme Court in Medo Photo S. Corp. v. National Labor Relations Board (1944), 321 U.S. 678, 681, 88 L. ed. 1007, 64 S. Ct. 830, added the following as its own footnote to its decision:

> "It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight. See Franks Bros. Co. v. Labor Board, post, p. 702; Labor Board v. Southern Bell Co., 319 U.S. 50, 60, and cases cited; Labor Board v. Nevada Copper Co., 316 U.S. 105, 106-107, and cases cited; cf. Dobson v. Commissioner, 320 U.S. 489, 501, and cases cited."

The functions of the WERC with respect to determining bargaining units and representatives in municipal employment are outlined in Sec. 111.70(4)(d), Statutes, which says that proceedings shall be governed by Secs. 111.02(6) and 111.05, Statutes. Proceedings under those sections to determine bargaining representatives and units necessarily involve determination by the Commission what employees may be included in a unit and what ones are entitled to vote.

As pointed out in Ray-O-Vac Co. v. Wisconsin E. R. Board, (1946), 249 Wis. 112, the discretion of the Commission is to be respected in determining questions relating to bargaining units. Such discretion necessarily involves determination of who are employees to be included in such a unit.

Section 111.02(3), Statutes, excludes executives and supervisors from the definition of employee. This section does not mention or exclude "managerial" personnel. Management personnel are not automatically excluded merely because they might be considered to be part of the "management team", as opposed to regular line employees, and an indiscriminate use of the word "managerial" personnel in discussing who should be excluded from a collective bargaining unit under Ch. 111 should be avoided.

The City relies on the decision and order made by the WERC in Wausau City Employees, Local 1287, AFSCME, AFL-CIO, Decision No. 6276 (1963) in support of its position. In the Wausau case, the WERC expressly excluded:

> "...managerial and supervisory personnel from collective bargaining units on the basis that they are agents of the municipal employer in the performance of the 'employer" function."

The WERC in the Wausau decision notes:

> "Governmental units, including municipal employers, are managed by persons who, among their duties, may represent their municipal employer in its relationship to employees thereof who are performing services and who have no connection with any managerial function."

However, in Dairy Employees Ind. Union v. Wisconsin E. R. Board, 262 Wis. 280, (1952), the Supreme Court held:

> "We find no suggestion in any of the authorities which we have examined that the action of an administrative agency should be controlled solely by the fact that there has been a previous determination of the same issue."

The Court went on:

> "...the only matter for consideration here is whether the board's finding is 'unsupported by substantial evidence in view of the entire record as submitted.'"

Now, assuming that attorneys are part of the management team under the WERC decision in Wausau, supra, the subsequent Dairy Employees finding allows the Commission to change its ruling. Therefore, the WERC's order in this case being based on the whole record, the Wausau decision and precedent is not binding on the Commission.

The Court in Petzak v. Graves, 33 Wis. (2d) 175, (1966), distinguished executive duties from ministerial duties. It cited 67 C.J.S., Officers, pp. 105, 106, sec. 3:

"With respect to the nature of the duties pertaining thereto, public offices and officers are sometimes classified as either executive, legislative, judicial, or ministerial...

"Executive. An executive officer is one in whom resides the power to execute the laws; one whose duties are mainly to cause the laws to be executed and obeyed...

"Ministerial. A ministerial office is an office which gives the officer no power to judge of the matter to be done, and requires him to obey the mandates of a superior."

The Court went on to hold that a village assessor was not an executive officer, but rather a ministerial officer.

With these definitions in mind, the court looks to the scope of permissible judicial review set down in Sec. 227.20, Wisconsin Statutes.

"(1) The review shall be conducted by the court without a jury and shall be confined to the record...The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative finding, inferences, conclusions or decisions being:

(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or

(2) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it."

The Court in Muskego-Norway C.S.J. No. 9 v. WERB, 35 Wis (2d) 540, (1966), discussed the standard of judicial review:

"It is well established that under sec. 227.20(1)(d), Wisconsin Statutes, judicial review of the WERB findings is to determine whether or not the questioned finding is supported 'by substantial evidence in view of the entire record.'"

Citing Copland v. Department of Taxation, 16 Wis. (2d) 543, (1962), the Court noted that:

"...'substantial evidence' is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

The Court went on to say that:

"...the test of reasonableness is to be applied to the evidence as a whole, not merely to that part which finds to support the agency's findings".

The Court has said that in a judicial review, when based on the evidence as a whole, a reasonable man could conclude as the Commission did, then the decision must be upheld.

This position is clarified somewhat by Milwaukee Transformer Company v. Industrial Commission, 22 Wis. (2d) 502, (1963). Here the Court said that it has the power:

"...to determine whether the standard or policy choice used by the agency is consistent with the purpose of the statute. If upon consideration, we determine that a particular rule is consistent with legislative purpose, we must reject alternative rules regardless of whether they are 'reasonable' or gounded in administrative expertise."

This case is authority for the rule that the only criteria necessary is that the rule adopted be consistent with the legislative purpose of the statute.

The Commission in its memorandum accompanying its decision sets forth its reasoning for the decision. The Commission noted that by statute the City Attorney is required to furnish legal advice to the Milwaukee Board of School Directors, the Milwaukee Vocational School Directors, and the Milwaukee Sewerage Commission; and that these agencies and the City are separate and distinct municipal employers.

The Commission likewise found that although the various assistant city attorneys act in a confidential capacity with respect to management policies in the field of labor relations, the information available to these attorneys is not directly applicable to the relationship between the Association and the City.

In Muskego-Norway, supra, the Court held:

> "Sec. 227.20(2), Statutes, requires that upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved. In short, this means the Court must make deference to the expertise of the agency."

The Court continued:

> "The board (Commission) is the judge of the credibility of the witnesses and the reviewing court is not to substitute its judgment for the judgment of the board."

The court finds that the mere fact that the employees are professional personnel, in a higher salary range, are required to exercise legal and analytical judgment, does not take from them the rights granted by the legislature in Sec. 111.70(2) Statutes.

The decision of the Wisconsin Employment Relations Commission certifying the Association of Municipal Attorneys of Milwaukee as the exclusive bargaining agent for the assistant city attorneys should not be disturbed.

In review, the court finds that the WERC order is reasonable and in accordance with law.

The court will sign an order in conformity with this decision.

Dated at Milwaukee, Wisconsin, this 11 day of October, 1968.

BY THE COURT:

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Maurice M. Spracker
Circuit Judge