

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:
MILWAUKEE DISTRICT COUNCIL 48,	:
AFSCME, AFL-CIO	:
Involving Certain Employes of	:
CITY OF MILWAUKEE (POLICE DEPARTMENT)	:
-----	:
	Case LXI
	No. 11991 ME-368
	Decision No. 8605

Appearances:

Mr. John F. Kitzke, Assistant City Attorney, Mr. Arnold Logan, Supervisor of Classifications, Mr. Ferdinand J. Meyer, Police Personnel Officer, and Mr. Franklin H. Millard, Building Maintenance Supervisor, for the Municipal Employer.
Mr. Thomas J. King, Staff Representative, for the Petitioning Union.

DIRECTION OF ELECTION

Milwaukee District Council 48, AFSCME, AFL-CIO, having petitioned the Wisconsin Employment Relations Commission on March 1, 1968, to conduct an election pursuant to Section 111.70 of the Wisconsin Statutes, among certain employes of the City of Milwaukee (Police Department); and a hearing on such petition having been conducted at Milwaukee, Wisconsin, on April 10, 1968, before Robert B. Moberly, Hearing Officer; and the Commission having considered the petition, the evidence and arguments of Counsel, and being satisfied that questions have arisen concerning the appropriate bargaining unit and concerning representation for certain employes of the City of Milwaukee;

NOW, THEREFORE, it is

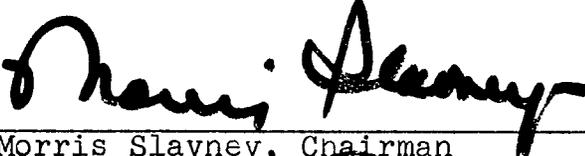
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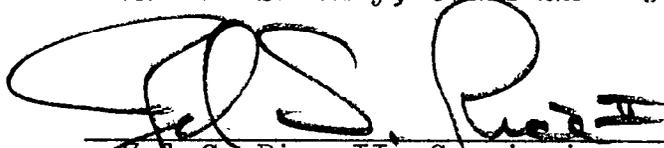
That elections by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within thirty (30) days from the date of this Direction among all employes of the Building and Grounds Division of the City of Milwaukee Police Department, excluding craft and supervisory employes, who were employed by the Employer on the date of this Direction, except such employes as may prior to the election quit their employment or be discharged for cause, for the purposes of determining

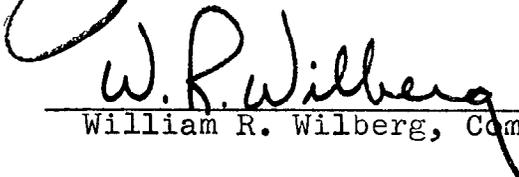
1. Whether a majority of said employes desire to constitute themselves a separate collective bargaining unit; and
2. Whether a majority of said employes desire to be represented by Milwaukee District Council 48, AFSCME, AFL-CIO, for the purposes of conferences and negotiations with the above-named Municipal Employer on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of July, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Zel S. Rice II, Commissioner


William R. Wilberg, Commissioner

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MEMORANDUM ACCOMPANYING DIRECTION OF ELECTION

The Union, in its petition as amended, requested the Commission to conduct an election among "all employes of the Building and Grounds Division of the City of Milwaukee Police Department, excluding supervisory and craft employes."

According to testimony of the individual in charge of the Police Personnel Bureau, the Police Department for payroll purposes comprises the following three separate divisions, namely, Police Services, Communications, and Building and Grounds.

The Police Services Division contains the detective bureau, the district stations, the vice squad, and the youth aid bureau. The Communications Division is concerned with the operation of the radio, telephone, telegraph and teletype systems.

The third division, Building and Grounds, contains the classifications of

1. Building Maintenance Supervisor II (admittedly supervisory)
2. Painter (admittedly craft)
3. Maintenance Mechanic
4. Mechanic Helper
5. Custodial Worker II - City Laborer
6. Elevator Operator II

As their titles suggest, Maintenance Mechanics and Mechanic Helpers perform mechanical and maintenance work; Custodial Worker II's perform the general janitorial work in both the Safety Building and the outlying district stations; and the Elevator Operator II's transport people and materials up and down elevators located in the Safety Building.

Prior to the hearing, the Municipal Employer claimed by letter to the Commission that the employes involved in the petition were included in a unit of employes presently represented by the Professional Policemen's Protective Association. The Commission then advised the Union that if this were the case, it would be required to present a showing of interest among the employes involved in the petition, in accordance with the Commission's policy with respect to showing of interest recently adopted in Wauwatosa Board of Education.^{1/} The Union responded by sending the Commission a copy of a letter to District Council 48 from the President of the Professional Policemen's Protective Association, which stated:

"(T)he Board of Trustees of the Professional Policemen's Protective Association would like to inform you that we only take employes of the Police Department into our Association that have powers of arrest.

We do not represent the custodial workers in the Safety Bldg. or those assigned in the districts, we never have represented them nor do we have an interest in representing them."

The primary issues facing the Commission are as follows:

1. Are the persons employed in the Building and Grounds Division "policemen" under Section 111.70(1)(b), Wis. Stats., and therefore denied the right accorded municipal "employes" under the Act to a representation election?
2. If said persons are entitled to a representation election, are they employed in a "division" of the Police Department under Section 111.02(6) Wis. Stats., and thereby additionally entitled to an opportunity to constitute themselves a separate bargaining unit?
3. If a representation election is directed, are the six Maintenance Mechanics employed in the division "supervisors" and thereby not entitled to vote in said election?

^{1/} Dec. No. 8300-A, 2/68.

1. Definition of "Policemen" Under Section 111.70

Under Section 111.70 only those persons who fall within the designation of "employees" of a municipal employer are entitled to an election to determine whether they desire to be represented by a labor organization.^{2/} The statute further specifically excludes policemen from the category of "municipal employe" by defining a municipal employe as "any employe of a municipal employer except city and village policemen, sheriff's deputies, and county traffic officers".^{3/} The question presented here is whether the persons employed in the Building and Grounds Division of the City of Milwaukee Police Department are "policemen" rather than "employees", and therefore not entitled to an election under the statute.

The Municipal Employer concedes that the elevator operators and custodial and maintenance employes involved here have no arrest powers. However, it contends that these employes are "parapolicemen" because "they have access to many of the matters and confidences which has made it necessary for the statute to eliminate policemen". It further states, "To allow them (employes in the Building and Grounds Division) to become employes of an international union could create a very serious conflict of interest which could jeopardize the whole security of the police and city jail system." For these reasons, the Municipal Employer contends that the individuals in the Building and Grounds Division are "policemen" under the statute and thereby excluded from the definition of municipal employes.

We cannot subscribe to the view that elevator operators and maintenance and custodial employes of a police department are "policemen" and as such denied the benefits accorded municipal employes by Section 111.70. We see no evidence that the legislature by its use of the narrow term "policemen" intended that this exception should have such a broad, encompassing meaning as to deprive all persons employed by a police department of the rights given employes under the statute. In our society the term "policemen" generally refers to individuals in a police department

^{2/} Section 111.70(4)(d) provides:

"Whenever a question arises between a municipal employer and a labor union as to whether the union represents the employes of the employer, either the union or the municipality may petition the board to conduct an election among said employes to determine whether they desire to be represented by a labor organization." (Emphasis added.)

^{3/} Section 111.70(1)(b).

having more hazardous or at least more responsible duties, and duties of an altogether different nature, than the duties normally conferred upon elevator operators and custodial and maintenance employes. Indeed, our legislature has stated by statute that individuals known as "policemen" possess certain rights, duties, powers, privileges and liabilities which generally are peculiar to that position.^{4/}

^{4/} Pertinent statutory provisions are as follows:

"62.09(13) Police. (a) . . . The chief (of police) and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables; shall arrest with or without process and with reasonable diligence take before the municipal justice or other proper court every person found in the city in a state of intoxication or engaged in any disturbance of the peace or violating any law of the state or ordinance of such city and he may command all persons present in such case to assist him therefore, and if any person, being so commanded, refuses or neglects to render such assistance he shall forfeit not exceeding \$10. They shall collect the same fees allowed to constables for similar service. . . ."

The powers of constables, referred to in Section 62.09(13)(a), are as follows:

"60.54 Constables' duties. The constable is a ministerial officer of the municipal justice, and he shall:

(1) Serve within his county any writ, process, order or notice, and execute any order, warrant or execution lawfully directed to or required to be executed by him by any court or officer.

(2) Attend upon sessions of the circuit court in his county when required by the sheriff.

(3) Inform the district attorney of all trespasses on public lands of which he has knowledge or information.

(5) Impound cattle, horses, sheep, swine and other animals at large on the highways in violation of any duly published order or by-law adopted at an annual town meeting.

(6) Cause to be prosecuted all violations of law of which he has knowledge or information.

(6m) Keep his office in the town, village or city for which he was elected or appointed. No constable who keeps his office outside the limits of such municipality shall receive fees for any service performed during the period such office is maintained.

(7) Perform all other duties required by any law."

Chief among the powers generally associated with policemen is the power of arrest. The legislature has specifically endowed policemen with this traditional power by providing that "each policeman . . . shall arrest with or without process . . . every person . . . violating any law of the state or ordinance of such city" Section 62.09(13), Wis. Stats.

We believe that by using the term "policemen" in excepting certain persons from the rights of municipal employes, the legislature meant persons who are clothed with the powers of arrest that policemen possess by statute. If the legislature intended to exclude all persons employed by a police department from the rights granted employes under Section 111.70, it could easily have said so.

In view of the above discussion, we hold that persons employed by a police department who do not possess the policemen's traditional and statutory powers of arrest are "municipal employes" rather than "policemen" under Section 111.70, and thereby may be entitled to a representation election under the statute.

2. Right to a Self-Determination Election

The Union contends that the employes of the Building and Grounds Division are engaged in a "division" of the Police Department and should therefore be given an opportunity to constitute themselves a separate bargaining unit under Section 111.02(6) of the Wisconsin Employment Peace Act.^{5/} The Municipal Employer, on the other hand, contends that the appropriate bargaining unit here should consist of the entire Police Department.

We note initially that whenever a petition for an election is filed with the Commission and the petitioner requests an election among certain employes not constituting all of the employes of the employer, the Commission has no power, except where the employes constitute a single craft, to determine what constitutes an appropriate collective bargaining unit. The Commission does, however, determine whether the group of employes set out as being an appropriate bargaining unit does in fact constitute a separate craft, division, department or plant. If the employes involved constitute

^{5/} Section 111.02(6) provides as follows:

"The term 'collective bargaining unit' shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in Section 111.05(2) to constitute such group a separate bargaining unit they shall be so considered"

a separate division, department, or plant, they are then given the opportunity to determine for themselves whether they desire to constitute a separate collective bargaining unit.^{6/}

In the opinion of the Commission, there is little, if any, community of interest among employes of the Building and Grounds Division and the remaining employes of the Police Department. There is no similarity in the type of work performed by employes in the Building and Grounds Division (e.g., custodial and maintenance) and the work of other employes in the department. There is no substantial interchange of employes between divisions. The primary supervision of these employes comes from within this division (from the Building Maintenance Supervisor II) and the employes are not generally subject to supervision from persons in other divisions.

The Professional Policemen's Protective Association has indicated in a letter quoted supra that the Association takes as members only those employes of the Police Department that have powers of arrest, and that the Association has no interest in representing the employes involved here. We consider this circumstance to be another factor indicating that there is no community of interest between the employes of the Building and Grounds Division and the remaining employes of the Police Department.

The Municipal Employer elicited testimony indicating that the employes of the Building and Grounds Division, like all employes of the Police Department, are investigated more intensively than other City employes before they are hired, that the employes are given police "call-box keys", and that they carry special identification. There was also testimony that the employes in this Division, like employes in the other divisions of the Police Department, are subject to discipline by the Chief of Police, with rights of appeal in the event of a suspension over 15 days or a discharge; that they are subject to sick leave regulations of the Chief of Police; and that some of the employes in the Division receive the benefits of a special police pension plan. We find that these factors are insufficient to overcome the considerations described above which favor a divisional status.

In May of 1963, the Municipal Employer recognized the Professional Policemen's Protective Association as the exclusive representative of employes employed in the Police Department

^{6/} City of Kenosha, Dec. No. 7424, 1/66; Appleton Water Commission, Dec. No. 6075, 8/62; County of Milwaukee, Dec. No. 7135, 5/65.

holding the position of sergeant and below in conferences and negotiations on wages, hours and conditions of employment. In December 1963, in an order appointing fact finder in a dispute between the City of Milwaukee and the Professional Policemen's Protective Association, this Commission (then Board) stated as a conclusion of law "that the Professional Policemen's Protective Association of Milwaukee, Wisconsin, is the recognized representative of the employes holding the position of sergeant or below employed in the Police Department of the City of Milwaukee within the meaning of Section 111.70(4)(j) of the Wisconsin Statutes".^{7/} The Municipal Employer implies that because of these former proceedings, the Commission should declare the appropriate unit to be the entire Police Department, and that the representation of all employes of the Police Department should be by the Professional Policemen's Protective Association.

We find this argument to be unconvincing. The statute makes no provision for denying employes in a separate division or department of their right to a self-determination election merely because they have been represented in a former fact finding proceeding by a labor organization representing a more encompassing unit. And we will not narrow the statutory right of such employes to an election by reading such a proviso into the statute.

At the time of the petition for fact finding, no question was raised as to whether these employes were engaged in a division and thereby entitled to a self-determination election. The question is raised here for the first time, and we conclude that the answer is in the affirmative. Moreover, in making this determination we believe that representation in a prior fact finding proceeding is an irrelevant consideration.

3. Alleged Supervisory Status of Maintenance Mechanics

The top level supervisor in the Buildings and Grounds Division is the Building Maintenance Mechanic. The Division functions 24 hours a day, 7 days a week. There are 43 positions in the Division to operate 3 shifts of employes, with the employes receiving rotating off days. At the present time, 2 of the employes on each shift are classified as Maintenance Mechanics, constituting a total of 6 Maintenance Mechanics in the Division. In addition to the Building Maintenance Supervisor II and the Maintenance Mechanics, there is

^{7/} City of Milwaukee (Police Department), Dec. No. 6575-D, 12/63.

currently employed in the division one Mechanic Helper, 2 Painters, 26 Custodial Worker II's and 5 Elevator Operator II's. Two of the 43 positions are unfilled.

The Municipal Employer contends that all 6 of the Maintenance Mechanics are supervisors, but puts particular emphasis on the allegedly supervisory status of the 2 Maintenance Mechanics on the day shift, Ballinger and Schwaiger. The Union's position, on the other hand, is that none of the Maintenance Mechanics are supervisors and that the only supervisor in the unit is the Building Maintenance Supervisor II.

This Commission has stated^{8/} that it will consider the following factors in determining whether an employe is a supervisor:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes.
2. The authority to direct and assign the work force.
3. The number of employes supervised, and the number of other persons exercising greater, similar or lesser authority over the same employes.
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employes.
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employes.
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes.
7. The amount of independent judgment and discretion exercised in the supervision of employes.

It is clear from the testimony that Ballinger and Schwaiger as a general rule spend 100 percent of their time in either direct supervisory duties or related office work, such as programming, laying out work, and maintaining records of equipment, repair work, and supplies. Except in emergency situations or other unusual circumstances, none of their time is spent in actual maintenance work.

Ballinger lays out work for all persons performing mechanical work on all 3 shifts, and Schwaiger lays out work for the custodial workers on all 3 shifts. Ballinger generally receives and helps to

^{8/} City of Milwaukee, Dec. No. 6960, 12/64.

resolve grievances from persons on all shifts engaged in mechanical work, and Schwaiger performs the same function for individuals performing custodial work. It appears that both Ballinger and Schwaiger have authority to effectively recommend discipline or discharge of employes under their supervision, and both have authority and in fact do direct and assign work among said employes. It further appears that both assist in arranging the vacation schedules of employes in the Division. We conclude, in view of the substantial amounts of time Ballinger and Schwaiger spend in supervisory duties, the absence of normal maintenance and mechanical tasks, the independent judgment they must exercise, and their overall responsibilities, that both men are supervisors within the meaning of the Act.

However, we reach an opposite conclusion with respect to the 4 Maintenance Mechanics employed on the early shift and late shift. It is true that the Maintenance Mechanics working on the early and late shifts are the ranking employes on those shifts. However, they spend only approximately 25 to 30 percent of their time in supervisory duties and spend the remaining 70 to 75 percent of their time in the performance of mechanical work. They have no disciplinary responsibilities, with the exception of minor tasks such as giving oral reprimands or sending home a worker who reports to the job in an inebriated state. The position calls for little exercise of independent judgment. The Maintenance Mechanics on these shifts engage in some direction and assignment of work, but even these tasks are generally performed under the direction of Ballinger and Schwaiger. All of the Maintenance Mechanics receive \$6.90 per week more than Maintenance Mechanics in other city departments, but there is no evidence to support the conclusion that this additional sum has been given for supervisory duties.

We find this situation to be similar to that in City of Wauwatosa, Dec. No. 6156, 11/62, where we made the following observations:

"Each Mechanic II is in charge of a shift and, as such, is responsible for scheduling and assigning work to the Mechanic I's and Helpers in determining the malfunction of equipment and working on same. Kolda and Ohm supervise from 3 to 5 employes in this regard, however they spend 50% of their time in performing mechanical repairs. We are satisfied, from the nature of their duties and responsibilities, that the Mechanic II's are working foremen and, therefore, are not to be excluded from the eligibles as supervisors."

As in City of Wauwatosa, we conclude that the 4 Maintenance Mechanics working on the early and late shifts are working foremen rather than supervisors. We reach this conclusion because of the limited number of supervisory duties of the 4 men, the limited number of the employes supervised, the limited amount of time spent in supervisory functions and the relatively low level of the supervisory functions and responsibilities which they carry out.

4. Miscellaneous Matters

The Municipal Employer objected to the form of the petition because there was no designation of a union local. However, nothing in the law requires that the petitioning union designate a local union on the face of the petition or at any other time in the election proceedings. Our rules require only that a petition be filed by a "labor organization acting on behalf of employes of a municipal employer",^{9/} and it is without dispute that Milwaukee District Council 48, AFSCME, AFL-CIO, is a labor organization within the meaning of the statute. It appears to the Commission that whether a labor organization designates a local in its petition for election is entirely an internal matter to be determined by said organization.

The Municipal Employer also seemed to object because the Union did not present a showing of interest under the rules set forth in Wauwatosa Board of Education. However, the Professional Policemen's Protective Association, claimed by the Municipal Employer to be the representative of the employes here, received notice of the hearing on the election petition and did not make an appearance at said hearing. Moreover, we regard the letter from the Professional Policemen's Protective Association, stating that the Association has no interest in representing the employes involved here, as being satisfactory evidence that the employes are not represented by said organization. Since the employes are not represented by any labor organization, the Commission, in accordance with its policy of not requiring a showing of interest where there is no certified or voluntarily recognized bargaining representative, will not require the petitioning union to present a showing of interest before processing the petition.

In view of the foregoing resolution of the issues, the Commission is today issuing a Direction of Election, wherein employes in the Building and Grounds Division will be given an opportunity

^{9/} ERB 11.02(1)

to determine for themselves whether they desire to constitute a collective bargaining unit separate and apart from other employes in the Police Department, and what, if any, representation said employes desire for the purposes of conferences and negotiations with the Municipal Employer. The results of the unit vote will be tabulated first. If there is no question that the required number of employes voted in favor of a separate unit, then the ballots with respect to the selection of bargaining representatives will be tallied. However, if the results of the vote on the unit determination do not establish a separate unit, the Commission's agent conducting the election will immediately impound the ballots on the question of representation and the results thereof will not be determined.

Dated at Madison, Wisconsin, this 5th day of July, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II
Zel S. Rice II, Commissioner

W. R. Wilberg
William R. Wilberg, Commissioner