

STATE OF WISCONSIN : CIRCUIT COURT : KEWAUNEE COUNTY

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KEWAUNEE COUNTY,

NOV 28 1986

Petitioner,

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

vs.

FILE NO. 86-CV-34

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 11096-C

Respondent.

D E C I S I O N

WEDNESDAY

NOVEMBER 12, 1986

KEWAUNEE COUNTY COURTHOUSE

HONORABLE N. PATRICK CROOKS
PRESIDING

A P P E A R A N C E S

MR. JOHN M. SPINDLER, Attorney at Law,
of NASH, SPINDLER, DEAN & GRIMSTAD, 201
East Waldo Blvd., Manitowoc, WI 54220,
appearing for and on behalf of the
Petitioner.

MR. BRUCE F. EHLKE, Attorney at Law, of
LAWTON & CATES, S.C., 214 West Mifflin
Street, Madison, WI 53703-2594, appearing
for and on behalf of the Respondent.

CONNIE L. DES JARDINS
OFFICIAL COURT REPORTER
CIRCUIT COURT BRANCH VI
BROWN COUNTY COURTHOUSE

1 oral argument is helpful to the Court in arriving
2 at a Decision.

3 The issue that the Court faces, of course,
4 is an issue of whether or not the Wisconsin Employment
5 Relations Commission Decision in regard to Assistant
6 Chief LaCrosse and Sergeant Brusky was correct when
7 the Commission found that neither LaCrosse or Brusky
8 fit within the definition of supervisor or managerial
9 employees, and rather that those two gentlemen were
10 municipal employees within the meaning of Wisconsin
11 Statutes.

12 I think the appropriate place to start
13 any Decision in this matter is to go to the Statute
14 in regard to the scope of review, and specifically
15 to Section 227.57 of the Wisconsin Statutes.

16 I understand there's been some renumbering
17 in Chapter 227, and the Statute that I have in front
18 of me is numbered Section 227.20 and is entitled
19 "Scope of Review"; but I understand that that's basically
20 the same Statute as 227.57, that the only thing that's
21 taken place is the renumbering.

22 I think in that regard that several of
23 the sections under 227.20 are appropriate to read
24 into the record. Paragraph(2)reads as follows:

25 "Unless the court finds a ground for

1 setting aside, modifying, remanding or ordering agency
2 action or ancillary relief under a specified provision
3 of this section, it shall affirm the agency's action."

4 Paragraph (6) reads as follows: "If
5 the agency's action depends on any fact found by
6 the agency in a contested case proceeding, the court
7 shall not substitute its judgment for that of the
8 agency as to the weight of the evidence on any
9 disputed finding of fact. The court shall, however,
10 set aside agency action or remand the case to the
11 agency if it finds that the agency's action depends
12 on any finding of fact that is not supported by
13 substantial evidence in the record."

14 Paragraph (8) of 227.20, or 227.57, as
15 it's now known, reads as follows: "The court shall
16 reverse or remand the case to the agency if it finds
17 that the agency's exercise of discretion is outside
18 the range of discretion delegated to the agency by
19 law; is inconsistent with an agency rule, an officially
20 stated agency policy or a prior agency practice,
21 if deviation therefrom is not explained to the
22 satisfaction of the court by the agency; or is otherwise
23 in violation of a constitutional or statutory provision;
24 but the court shall not substitute its judgment for
25 that of the agency on an issue of discretion."

1 Paragraph (10) of 227.57 reads as follows:
2 "Upon such review due weight shall be accorded the
3 experience, technical competence, and specialized
4 knowledge of the agency involved, as well as dis-
5 cretionary authority conferred upon it. The right
6 of the appellant to challenge the constitutionality
7 of any act or of its application to the appellant
8 shall not be foreclosed or impaired by the fact that
9 the appellant has applied for or holds a license,
10 permit or privilege under such act."

11 The Court does feel that it's helpful
12 in organizing a Decision to go to the Statutory
13 provisions in regard to scope of review. The Court
14 would also note that the cases seem to be quite
15 consistent with the language of the Statute itself
16 in regard to the scope of review.

17 As an example, the court understands
18 that Findings of Fact of an administrative agency
19 should not be set aside if supported by substantial
20 evidence; and of course that is consistent with paragraph
21 (6) of 227.57 that was just read into the record.

22 The case of Guthrie v. WERC at 107 Wis.
23 2d 306, specifically at page 315, would stand for
24 that proposition, as would the case of Village of
25 Whitefish Bay v. WERC at 103 Wis. 2d 443, specifically

1 at page 448.

2 The Guthrie case, by the way, for the
3 record, was affirmed by the Supreme Court at
4 111 Wis. 2d 447.

5 The Court further understands that
6 substantial evidence does not mean a preponderance
7 of the evidence, but rather whether a reasonable
8 mind could reach the same conclusion reached by the
9 agency.

10 The case that would set forth that
11 proposition, a recent case, would be the case of
12 Samens, S-a-m-e-n-s, v. LIRC, at 117 Wis. 2d 646,
13 specifically at page 659; it's a 1984 Decision of
14 the Wisconsin Appellate Court.

15 The Court is satisfied that in regard
16 to the scope of review on questions of law, that
17 certainly the Court can always make its own deter-
18 minations on legal questions, but that deference
19 is indeed required when dealing with an agency such
20 as the WERC under circumstances such as we have in
21 this particular case.

22 In that regard, the Court would go to
23 the case of Berns, and that's capital B-e-r-n-s,
24 v. WERC, at 99 Wis. 2d 252, and specifically to page
25 261 of that Decision. I had the opportunity to review

1 that Decision this morning before coming here, and
2 I don't have the same access to that case at this
3 time; but I'm well aware of the discussion by the
4 Court in that case, and specifically at page 261.

5 The Court took the position in the Berns
6 case that although the WERC's construction of statutory
7 terms and application of those terms to particular
8 facts are questions of law that do not bind the trial
9 court, that deference is appropriate because in dealing
10 with an Act such as the Municipal Employment Relations
11 Act, Section 111.70, there is the need for the Wisconsin
12 Employment Relations Commission's expertise and
13 consistency. And the Court is further aware of the
14 fact that the Berns case made it clear that if the
15 interpretation reflects a practice or position long
16 continued, substantially uniform and without challenge
17 by governmental authorities and courts, it is to
18 be accorded weight and sustained by the trial court
19 if it is a rational interpretation of the Municipal
20 Employment Relations Act.

21 Now, in this particular situation, I'd
22 like to discuss first of all the situation involving
23 the traffic sergeant, Daniel Brusky. And I'm satisfied
24 that the summary that's set forth in Mr. Rice's brief,
25 specifically at pages 6 and 7 of that brief,

1 is an accurate summary of what is reflected in the
2 record, and I'm going to read into the record at
3 this time specifically from his brief, starting
4 at page 6, near the top of the page.

5 "On April 1, 1985, the Personnel Committee
6 appointed Daniel Brusky to the position of traffic
7 sergeant." There's then a citation to page 40 of
8 the record and to Joint Exhibit 4.

9 "When Brusky was appointed, the traffic
10 chief informed the patrol officers that Brusky was
11 to be considered the supervisor of the shift."
12 A citation to page 25 of the record.

13 "Patrol officer Mark Groessl considers
14 Brusky to be his supervisor." Cited 16 to 18 of
15 the record.

16 "Brusky spends most of his time performing
17 the same duties as the patrol officers." 12, 19
18 to 20, and 42 of the record are cited.

19 "He spends," quote, "'very little'"
20 unquote, parenthesis, "(ten percent or less)", closed
21 parenthesis, "of his time supervising the patrol
22 officers." Cite is to 45, 54 and 57 of the record.

23 "He normally works with only one or
24 two patrol officers." Citing 48 and 49 and 53 and
25 54 of the record.

1 "Although he is authorized to assign
2 patrol officers to calls or areas, and although
3 he responds to calls in order to assist or guide
4 the patrol officer at the scene, the patrol officers
5 generally function independently and Brusky provides,"
6 quote, "'only loose supervision,'" unquote. Citing
7 to pages 37, 42 to 46, 49, 54 and 57 of the record.

8 "Brusky does not have the authority
9 to hire, transfer, lay off, recall, promote, discharge
10 or reward employes or adjust grievances." Citation
11 is then made to pages 13, 21, 45 to 47 and Joint
12 Exhibit 1.

13 "Only the personnel committee has such
14 authority." Citing 36, 51 and 88 of the record.

15 "Although Brusky believes that he has
16 authority to recommend discipline, he has never
17 done so." Citing 47, 48, 51 and 56 of the record.

18 "Brusky has input in the budget process,
19 but the traffic chief and the Sheriff-Traffic
20 Committee make the final decision on the budget
21 which will be presented to the Finance Committee."
22 Citing pages 94 to 98 to the record.

23 "Brusky is paid 25 cents per hour more
24 than the highest paid patrol officer." Citation
25 for that is 41 and 87 of the record and Joint

1 Exhibit 4.

2 The Court recognizes that in making
3 a decision in regard to this matter, that we have
4 to look at the definition of supervisor, and that
5 definition is set forth in Section 111.70(1)(o)(1)
6 of the Wisconsin Statutes as follows:

7 "Supervisor means: As to other than
8 municipal and county fire fighters, any individual
9 who has authority, in the interest of the municipal
10 employer, to hire, transfer, suspend, lay off, recall,
11 promote, discharge, assign, reward or discipline
12 other employes, or to adjust their grievances or
13 effectively to recommend such action, if in connection
14 with the foregoing the exercise of such authority
15 is not of a merely routine or clerical nature, but
16 requires the use of independent judgment."

17 The Court would also note that municipal
18 employe is defined in Section 111.70(1)(i) of the
19 Statutes as follows:

20 "Municipal employe means any individual
21 employed by a municipal employer other than an independent
22 contractor, supervisor, or confidential, managerial
23 or executive employe."

24 So, clearly, either Sergeant Brusky
25 is a municipal employe or he falls within the

1 definition of supervisor or he falls within the
2 Court determination of managerial employee.

3 The idea of managerial employee is set
4 forth in the case of City of Milwaukee v. WERC at
5 71 Wis. 2d 709, especially the discussion by the
6 Supreme Court at pages 715 to 717 of that Decision.
7 At page 715 the Court defined managerial employee
8 as follows:

9 "Employees who participate in the
10 formulation, determination and implementation of
11 management policy or possess effective authority
12 to commit the employer's resources." That would
13 be the definition of managerial employee.

14 Now, looking at the scope of review
15 in regard to Daniel Brusky, looking at the fact
16 that if there is substantial evidence the Court
17 is to accept the Findings of Fact of the agency,
18 realizing that the Court is to, under these circum-
19 stances, give great weight to the legal conclusions,
20 the legal determinations of the agency, as long
21 as they're rational in nature, and having reviewed
22 the facts set forth in the record, having reviewed
23 the definitions of municipal employee, of supervisor,
24 and of managerial employee, the Court would find
25 in regard to Traffic Sergeant Daniel Brusky that

1 there is substantial credible evidence in the record
2 to sustain the determination of the Wisconsin Employment
3 Relations Commission. The Court is satisfied that
4 deference must be given to the legal conclusions
5 of the agency and that under these circumstances
6 great weight must be accorded to those determinations.
7 I am satisfied that those determinations are rational
8 under the circumstances. So, the Court is going
9 to affirm that the determination by the Wisconsin
10 Employment Relations Commission that Sergeant Brusky
11 is not a supervisory employe, he is not a managerial
12 employe, but that he is a municipal employe within
13 the meaning of Section 111.70(1)(i) of the Wisconsin
14 Statutes.

15 In regard to Dale LaCrosse, the assistant
16 chief, again I'm going to go to the brief of Assistant
17 Attorney General David C. Rice for the factual under-
18 pinnings. I'm satisfied that his recitation at
19 pages 4 and 5 and the very top of page 6 are accurate
20 summarization of what the record reflects in regard
21 to Dale LaCrosse, and so I would quote as follows:

22 "On April 1, 1985, the County Board's
23 Personnel Committee appointed Dale LaCrosse to the
24 position of assistant traffic chief." Citation
25 is then given to 58 and 72 of the record and Joint

1 Exhibit 4.

2 "LaCrosse spends most of his time per-
3 forming the same duties as the patrol officers,
4 and he spends," quote, "'very minimal,'" unquote,
5 "time supervising them." 28, 59 and 65 of the record
6 are cited.

7 "He usually works with only one other
8 patrol officer, and that officer patrols in a separate
9 car." Citation is made to 59 and 70 of the record.

10 "Although LaCrosse occasionally assigns
11 officers to handle specific assignments, the officers
12 generally know what to do, and only minimal supervision
13 is required." Citation is made to 11 and 12, 28,
14 37, 59, 65 and 74 of the record.

15 "LaCrosse is not authorized to hire,
16 transfer, suspend, lay off, recall, promote, discharge
17 or reward employes or adjust grievances." Citing
18 to 13, 31, 32, 66 of the record, and Joint Exhibit 1.

19 "Only the Personnel Committee has such
20 authority." Citing 36, 51 and 88 of the record.

21 "Although his position description states
22 that he is authorized to recommend hiring and firing
23 personnel, he has never actually made such a
24 recommendation." 72, 79, and Joint Exhibit 6 of
25 the record are cited.

1 "The position description also authorizes
2 LaCrosse to take an active part in discipline,
3 and while LaCrosse believes that he has authority
4 to issue a formal disciplinary letter, he has never
5 done so." 66, 67, and Joint Exhibit 6 are cited.

6 "LaCrosse further believes that the
7 traffic chief and the Personnel Committee would
8 first have to determine whether a disciplinary
9 letter was warranted." 67 and 68 of the record
10 are cited.

11 "LaCrosse helped draft the policy manual
12 for the traffic department, but the traffic chief
13 made the decision to adopt the policy," 82 of
14 the record is cited, "although his position
15 description states that he assists in policy making."
16 Joint Exhibit 6 is then cited.

17 "LaCrosse has input in the budget process,
18 but the traffic chief and the County Board's
19 Sheriff-Traffic Committee make the final decision
20 on the budget which will be presented to the County
21 Board's Finance Committee." 61, 64, 77, 78, 94
22 to 98 are cited.

23 "LaCrosse has authority to expend funds
24 which have previously been appropriated by the
25 Finance Committee, but he does not have authority

1 to transfer funds from one budget account to another."
2 63 and 76 of the record are cited.

3 "LaCrosse is paid approximately \$300.00
4 more per month than patrol officers are paid."
5 39, 40 and 70 are cited.

6 "His position description states that
7 he acts as the traffic chief when the traffic chief
8 is absent." Citing Joint Exhibit 6.

9 "Patrol Officer Donald Delebreaux considers
10 LaCrosse to be his supervisor when the traffic
11 chief is absent." Citing 34 to 35 and 38 of the
12 record.

13 As I indicated, I'm satisfied that
14 the portions of the brief that I've read are an
15 accurate summary of what the record itself reflected,
16 and, therefore, appropriately set forth.

17 The Court again, in regard to Dale
18 LaCrosse, has gone to the definition of "supervisor"
19 as found in Section 111.70 (1)(o)1 of the Statutes.
20 I've also reviewed the definition of "municipal
21 employe" in Section 111.70(1)(i), and the definition
22 of "managerial employe" as set forth in the Berns
23 case that I quoted from earlier. I think I'm wrong
24 in that regard. It's set forth in the City of
25 Milwaukee vs. WERC case, that I quoted from earlier,

1 at page 75 of that decision.

2 The Court feels that the issue in regard
3 to assistant traffic chief, Dale LaCrosse, on the
4 question of whether or not he is a supervisor is
5 a closer question than it is in regard to Daniel
6 Brusky, the traffic sergeant; but I am satisfied
7 that there is substantial credible evidence in
8 the record that supports the Findings of Fact made
9 by the agency.

10 Again the Court recognizes that under
11 the circumstances great weight is to be accorded
12 to the agency's legal conclusions, as long as those
13 legal conclusions are rational; and the Court is
14 satisfied that they are rational in nature. I'm
15 satisfied, therefore, that I must give deference
16 to the agency's legal conclusions.

17 The Court, therefore, would affirm
18 the finding by the agency concerning Dale LaCrosse
19 that he is not a supervisory employe, that he is
20 not a managerial employe, but that he is, therefore,
21 a municipal employe within the meaning of Section
22 111.70(1)(i) of the Wisconsin Statutes.

23 The Court recognizes that the determination,
24 as counsel indicated in answer to the Court's
25 questions, must be made on the basis of the record

1 that was before the Wisconsin Employment Relations
2 Commission, the record that is before this Court
3 today, and not in terms of what might indeed be
4 the case if we were to hold a hearing this morning
5 or this afternoon. The record is what must be
6 reviewed by the Court; and I'm satisfied, as I've
7 indicated earlier, that the record is sufficient
8 to justify this Court in affirming the agency
9 determinations in regard to both Daniel Brusky
10 and Dale LaCrosse.

11 So, the Court finds that both Sergeant
12 Brusky and Assistant Chief LaCrosse are municipal
13 employees, not supervisory or managerial employees,
14 in accord with section 111.70(1)(i) of the Wisconsin
15 Statutes.

16 Having found that, the Court affirms
17 the Wisconsin Employment Relations Commission'
18 Decision, and, therefore, grants judgment to the
19 defendant in this case.

20 Mr. Ehlke, I'm going to ask if you
21 will draft the necessary Findings, Conclusions
22 and Judgment affirming the Decision by the Wisconsin
23 Employment Relations Commission. I think those
24 can be relatively short and direct. Certainly
25 they don't have to be anywhere near as long as

1 the Court's Decision from the Bench. And I'm going
2 to ask if you would get those to the Court, and
3 simultaneously to Mr. Spindler, within two weeks
4 from today. And, Mr. Spindler and Mr. Ehlke, what
5 I'll then do is hold those until the beginning
6 of the following week. If I hear no objections
7 from Mr. Spindler to the form of those documents,
8 I'll proceed to sign them. If I do hear objection
9 to the form of the documents, then of course before
10 signing those documents, I'll take those objections
11 into consideration.

12 Mr. Ehlke, is there anything further
13 that you feel the Court should address in regard
14 to this case this morning?

15 MR. EHLKE: No, Sir.

16 THE COURT: Mr. Spindler, anything
17 further, Sir?

18 MR. SPINDLER: No, Sir.

19 THE COURT: All right, these proceedings,
20 then, are concluded.

21 (Whereupon the above proceedings concluded
22 at 11:45 a.m.)

23
24
25 (Certificate following.)

1 STATE OF WISCONSIN)

2 COUNTY OF BROWN)

ss

CERTIFICATE

3
4 I, Connie L. Des Jardins, Official Court
5 Reporter, do hereby certify that I reported the fore-
6 going matter and that the foregoing transcript,
7 consisting of 18 pages, has been carefully compared by
8 me with my stenographic notes as taken by me in machine
9 shorthand and by me thereafter transcribed, and that
10 it is a true and correct transcript of the proceedings
11 had in said matter to the best of my knowledge.

12 Dated this 21st day of November, 1986.

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17 Connie L. Des Jardins
18 Connie L. Des Jardins
19 Official Court Reporter
20 Circuit Court Branch VI
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