

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
WISCONSIN STATE EMPLOYEES	:	
UNION (WSEU), COUNCIL 24,	:	Case IX
AFSCME, AFL-CIO, and its	:	No. 15583 SE-44
affiliated LOCAL 18	:	Decision No. 11243-K
	:	
Involving Certain Employes of	:	
	:	
STATE OF WISCONSIN	:	
	:	

Appearances:

- Mr. Richard V. Graylow, Lawton & Cates, Attorneys at Law, Tenney Building, 110 East Main Street, Madison, Wisconsin 53703-3354, appearing on behalf of Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its affiliated Local 18.
- Mr. Sanford N. Cogas, Attorney at Law, Division of Collective Bargaining, Department of Employment Relations, 149 East Wilson Street, Madison, Wisconsin 53702, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER CLARIFYING BARGAINING UNIT

Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its affiliated Local 18, having, on April 1, 1982, filed a petition for unit clarification 1/ with the Wisconsin Employment Relations Commission (the Commission), in which WSEU requested the Commission to assign certain employes to a bargaining unit represented by that Union; and hearing in the matter having been conducted in Madison, Wisconsin, on September 17, 1982, by Richard McLaughlin, an Examiner on the Commission's staff; and a stenographic transcript having been prepared of that hearing; and the parties having filed briefs and a reply brief or a waiver of reply brief by January 4, 1983; and the Commission having reviewed the record, and the briefs of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Wisconsin State Employees Union (WSEU), Council 24, AFSCME, AFL-CIO, and its affiliated Local 18, hereinafter referred to as the Union, is a labor organization having its offices located at 5 Odana Court, Madison, Wisconsin 53719.
2. That the State of Wisconsin, hereinafter referred to as the State, is an employer which employs certain employes in the performance of its various functions including the operation of a correctional institution at Waupun, Wisconsin, hereinafter referred to as the Prison; that, at the Prison, the State employs certain personnel who are included in a bargaining unit represented by the Union for purposes of collective bargaining under the State Employment Labor Relations Act (SELRA); and that in performing its function as an employer, the State is represented by its Department of Employment Relations, which has its offices located at 149 East Wilson Street, Madison, Wisconsin 53702.
3. That the State employs certain classified employes at the Prison who occupy the positions of Officer 1, 2, 3 and 4; that the Union is the certified exclusive bargaining representative of various classified Prison employes in a

1/ WSEU included, with the petition, a Complaint of Unfair Labor Practices, and a Request for Declaratory Ruling. The Request for Declaratory Ruling has, on the request of the parties, not been processed. The Complaint of Unfair Labor Practices has been treated as a separate case.

bargaining unit composed of Security and Public Safety employees; and that from November 9, 1979 until December 19, 1981, the Union and the State were parties to a collective bargaining agreement which included, among its provisions, the following:

ARTICLE II

Recognition and Union Security

Section 1 Bargaining Unit

The Employer recognizes the Union as the exclusive collective bargaining agent for all employees, as listed below:

. . .

SECURITY AND PUBLIC SAFETY

<u>Classification</u>	<u>2/</u>	<u>Pay</u> <u>Range</u>
		. . .
Officer 1		7
Officer 2		8
Officer 3		9

. . .

4. That the present proceeding concerns the employees occupying the position known as Control Lieutenant; that, as of September 17, 1982, the State employed three employees, each classified as Officer 4, in the position of Control Lieutenant: Howard McLaughlin, 3/ John Howe, and Jack Nannery; that the Union, contrary to the State, contends that these employees should properly be assigned to the Security and Public Safety bargaining unit represented by the Union since these employees are not supervisory; and that the State, contrary to the Union, contends that the Commission lacks jurisdiction to determine this issue.

5. That the position of Control Lieutenant replaced a position known as Control Sergeant; that the State described this change in a letter sent to Mr. Harris VanderVelde, a Control Sergeant, on July 24, 1981; and that this letter stated:

This letter will serve as formal notice that effective August 9, 1981, the position you presently occupy "Control Sergeant", 1st Shift, "D" Group is being eliminated as it is being converted to a supervisory position. Since you will be without a position you will be allowed to select one of the present vacant Officer III positions which would otherwise have been filled by promotion. You remain eligible to compete in future transfer opportunities.

This change is necessary in order to bring this position in conformity with current institution requirements.

. . .

2/ See Department of Public Welfare and Employment Relations Division of the Bureau of Personnel of the State of Wisconsin, Decision No. (7984) 4/67; (7984-B) 6/67; (7984-C) 11/67. The Commission excluded the entire classification of Officer 4, 5 and 6, from the bargaining unit then certified on the basis of information submitted by the parties. Council 24, and its affiliated Locals, was certified as the exclusive bargaining representative of Security and Public Safety Employees under the provisions of Wis. Stats., Section 111.81(3)(c)1 on August 25, 1972. (Dec. No. 11243). A stipulation executed by the State and by Council 24 set forth the classifications composing this bargaining unit, and excluded employees occupying the classification of Officer 4, 5, 6.

3/ Not related to Commission Examiner Richard McLaughlin.

6. That the Prison is organized so that Control Lieutenants report to Line Captains, who hold the classification of Officer 6, who report to the Institution Security Director, who, in turn, reports to the Institution Superintendent; and that immediately below the Control Lieutenants are employes holding the classification of Officers 1 and 2 who perform the function of security monitors and of prisoner escort and transfer.

7. That the job description for Control Lieutenants divides the duties of the position into four components: maintenance of shift schedules after their basic preparation; operation of institution control center; direction of officer staff performing escort/transfer and transportation function; and, provision of relief to other Officer 4 and 5 positions; that shift schedules are prepared by an Administrative Captain and ultimately distributed to Control Lieutenants who ensure that the schedule is duly manned; that Control Lieutenants receive call-ins from officers unable to work; that Control Lieutenants cannot independently authorize a leave of absence, but can request a Doctor's slip and can inform employes of the procedures to obtain an authorized leave, or can inform employes of the procedures which may result from an unauthorized absence; that if employe absences result in vacancies in the shift schedule, the Control Lieutenants will contact the shift Captain to determine if the Captain wishes the vacancies to be filled; that Control Lieutenants can call officers in on overtime to fill such vacancies; that established procedures exist to determine which particular employe will be allowed to perform overtime work; that if an employe refuses overtime, the Control Lieutenant writes a report to reflect that refusal, and informs the employe of the disciplinary procedures which may be triggered by the refusal; that in operating the institution control center, Control Lieutenants operate monitoring equipment to observe inmates, operate radio and teletype equipment, answer phones, and respond to any problems detected during their observations; that Control Lieutenants direct officers performing escort/transfer and transportation functions primarily by overseeing inmate movement pursuant to escort passes issued without input from the Control Lieutenants; that in emergency situations, Control Lieutenants can direct officers in transporting inmates as necessary; that Control Lieutenants are also responsible for the tally of inmates, and can assign employes to investigate problems detected by the tally; that Control Lieutenants may assume the duties of higher ranking officers if those higher ranking officers are incapacitated; that no employes report directly to the Control Lieutenants during the course of a routine day; and that if a Control Lieutenant finds it necessary to assign employes to respond to a non-routine situation, he will assign an officer within his immediate work area.

8. That the State hires employes for the Prison by giving an examination to job applicants and then selecting the particular applicant to be hired through an interviewing process of the certified applicants; that although Control Lieutenants have the apparent authority to interview applicants, no examples have been offered of said Lieutenants having exercised this authority; that no examples have been offered of a higher ranking Officer consulting a Control Lieutenant for a recommendation on which applicant should be hired; and that Lieutenant McLaughlin played no role in the hiring of an applicant who was placed in a position subordinate to his.

9. That the State uses the examination interview procedure set forth in Finding of Fact 8 to promote employes; that Control Lieutenants have the apparent authority to participate on a committee which reviews applications for promotion, but that no examples of such participation have been offered; that Control Lieutenants and other officers may be requested to file recommendations regarding a particular promotion applicant; that these recommendations are completed on the basis of any daily contact the officer has had with the applicant, and are considered collectively by the State; and that McLaughlin, who has been a Control Lieutenant since the summer of 1981, has filled out such a recommendation, but has not participated in any other fashion in the promotion of a Prison employe.

10. That McLaughlin has not participated in the layoff, recall, or transfer, of any Prison employe; that Prison employes are periodically evaluated by their supervisors on forms prepared by the State; and that McLaughlin has not completed such a form on any employe since he became a Control Lieutenant in the summer of 1981.

11. That the Prison Superintendent makes the ultimate decision on discharging employes, and may do so on recommendation from a subordinate Officer; but that no instances have been identified of a discharge having been made on recommendation from a Control Lieutenant.

12. That the collective bargaining agreement referred to in Finding of Fact 3 contains a formal grievance procedure; that McLaughlin has neither granted nor denied a formal grievance while a Control Lieutenant, nor been asked to make a recommendation regarding the imposition of discipline in a specific case; that Control Lieutenants file reports regarding employe behavior which may result in discipline; that these reports state the relevant facts which they have become aware of in the performance of their normal duties and which may involve violations of work procedures or Health and Social Services Departmental rules; that said reports state facts which may result in discipline, and a statement of the work rule violated, but do not contain a recommendation regarding the appropriate discipline; that if a report states facts which warrant a verbal reprimand, said reprimand is issued by a Captain; that if a report states facts warranting more stringent discipline, then it is routed to a Major who reviews it, and returns it to a Captain for the conduct of a pre-disciplinary hearing; that after said hearing, the matter is sent back to the Major who reviews it, and sends the matter on to the Prison Superintendent with a recommendation of specific discipline; and that Control Lieutenants do not attend these pre-disciplinary hearings.

13. That the Control Lieutenants are classified employes who are not performing in a supervisory capacity.

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

CONCLUSIONS OF LAW

1. That the State Board of Personnel has no jurisdiction to determine whether any individual employed in the classified service of the State of Wisconsin should or should not be included in any appropriate collective bargaining unit consisting of State employes, as set forth in the provisions of the State Employment Labor Relations Act (SELRA), and that, on the contrary, said jurisdiction and authority rests with the Wisconsin Employment Relations Commission, pursuant to Sections 111.81(3)(a) and (b), and 111.81(15) of the SELRA.

2. That the bargaining unit described in Finding of Fact 3 is an appropriate bargaining unit within the meaning of Sections 111.81(3)(a), and (b) of the SELRA.

3. That the occupants of the position of Control Lieutenant are employes within the meaning of Section 111.81(15) of the SELRA, who are properly assigned to the appropriate bargaining unit described in Finding of Fact 3.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission issues the following

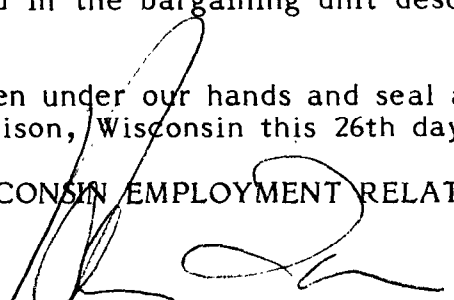
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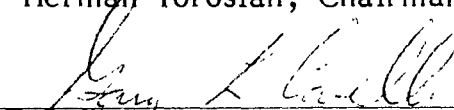
That the Officer 4 employes occupying the position of Control Lieutenant be, and the same hereby are, included in the bargaining unit described in Finding of Fact 3.

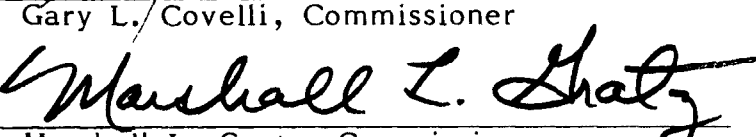
Given under our hands and seal at the City of
Madison, Wisconsin this 26th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner

4/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.
(Continued on page 5)

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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

THE PARTIES' POSITIONS

The Union asserts that the Commission's jurisdiction over the present matter was clearly decided in a prior case. 5/ Regarding the merits of this matter, the Union claims that the Control Lieutenants belong in the bargaining unit because they lack the authority to hire, fire, suspend, transfer, promote or evaluate employes, and thus, are not supervisors. The Union characterizes the Control Lieutenants as "basically clerical" employes, "working within well established guidelines." At best, according to the Union, Control Lieutenants oversee employe activities rather than supervising employes.

The State contends that the Commission "does not have the jurisdiction to rule on the bargaining unit status of the Scheduling Lieutenant position because a challenge to such a classification decision belongs before the Wisconsin Personnel Commission." The State asserts that it did not remove any employes from the bargaining unit in this case, but simply created a new position and filled it with non-represented employes. In the State's view, this makes the present matter distinguishable from Decision No. 18696. The State contends that placing Control Lieutenants in the bargaining unit is beyond the Commission's jurisdiction since "the W.E.R.C. can not reclassify the employe as an Officer III."

In the alternative, the State contends "the duties of the Scheduling Lieutenant are supervisory," and thus that "the position . . . is correctly classified as a non-bargaining unit position."

DISCUSSION

The Commission's Jurisdiction:

The Commission's jurisdiction to clarify bargaining units of State Employes rests on Section 111.81(3)(b) of the SELRA which states: "The commission 6/ shall assign eligible employes to the appropriate statutory bargaining units set forth in paragraph (a)." Paragraph (a) 4. sets forth a bargaining unit for the "Security and Public Safety" occupational group. The scope of this jurisdictional grant from the Legislature to the Commission is set forth at Section 111.81(15), which defines "Employe" thus:

"Employe" includes any state employe in the classified service of the state, as defined in s. 230.08, except limited term employes, sessional employes, project employes, employes who are performing in a supervisory capacity, management employes and individuals privy to confidential matters affecting the employer-employe relationship, as well as all employes of the commission.

The Commission's jurisdiction in this unit clarification proceeding turns, then, on the determination of "employe" status. That this jurisdictional grant is exclusively vested with the Commission is clear in the statutes set forth above, and has been emphasized by the Commission in a prior case:

5/ State of Wisconsin (18696) 5/81.

6/ See Sec. 111.81(1), Stats.

The Commission is the only State agency which has the authority and jurisdiction to determine "employee" status, for the purposes expressed in SELRA, and no other State agency, including the Personnel Board has such authority or jurisdiction. 7/

The State's jurisdictional objection rests on a misstatement of the issue before the Commission. The State asserts that the present matter turns on whether the Control Lieutenant position has been properly classified. This assertion misstates the issue by attempting to make the appropriate civil service classification relevant to a Unit Clarification proceeding under the SELRA. The scope of the jurisdictional grant of Sec. 111.81 extends to "any classified employee" with certain enumerated exceptions. The parties do not dispute that Control Lieutenants are classified employees. Thus, whether the Control Lieutenants are properly classified as Officers 3 or 4 for civil service purposes is irrelevant to the instant unit clarification proceeding. The present matter turns solely on whether the Control Lieutenants, as classified by the Division of Personnel, are "employees" within the meaning of Section 111.81(15) eligible for assignment, within the meaning of Section 111.81(3)(b), to the bargaining unit represented by the Union. Thus phrased, the issue is clearly within the Commission's jurisdiction.

The Issue of Employee Status:

The Control Lieutenants are classified personnel, and thus "employees" within the meaning of Section 111.81(15) unless they "are performing in a supervisory capacity." Section 111.81(19) defines "Supervisor" thus:

. . . any individual whose principal work is different from that of his subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or to adjust their grievances, or to authoritatively recommend such action, if his exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This definition demands an initial determination of whether the Control Lieutenants' principal work is different from their subordinates. This issue is clouded by the fact that no employees routinely report to these Lieutenants during the course of a typical day. Rather, the relationship of the Control Lieutenants to subordinate officers is diffuse, extending to any subordinate officer in the Lieutenants' work area, and to those officers who report to the Lieutenants for scheduling purposes. In any event, the Control Lieutenants' work centers on scheduling duties, and, on monitoring and overseeing inmate activity. Thus, the principal work duties of Control Lieutenants are different from subordinate officers.

The next determination required by Section 111.81(19) concerns the supervisory authority exercised by Control Lieutenants. While the State asserts that Control Lieutenants can participate in hiring employees, no instances of such participation have been offered. McLaughlin testified that he did not participate in the hiring of an employee placed in a position subordinate to his. Similarly, the Control Lieutenants' participation in the promotion of employees has been minimal. Recommendations filed by these Lieutenants are considered collectively, and no instances have been offered of Control Lieutenant participation in the committee which oversees promotions.

In addition, McLaughlin has not participated in the layoff, recall, transfer, or evaluation of Prison employees. Discharge decisions are made by the Prison Superintendent. No instances have been offered of a Control Lieutenant making a recommendation on discharge. While the Control Lieutenants file reports which may serve as a basis for discipline, the discipline actually rendered is determined and issued by a superior Officer. Further, these reports are factual in nature, and do not include any recommendation of the discipline appropriate for a given

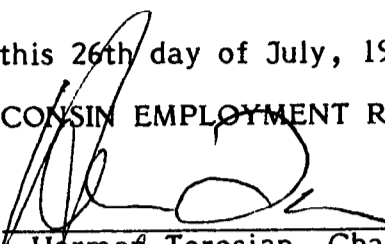
7/ Decision No. 18696 at 5.

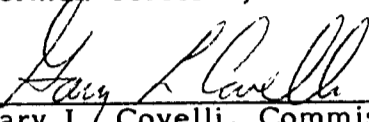
case. The Findings of Fact establish that the effective roles in the disciplinary process are played by Captains and by Majors. McLaughlin has not been asked to make any recommendations regarding the discipline appropriate to a specific case. Finally, while the Control Lieutenants do assign employees, they do so within established guidelines formulated by superior Officers.

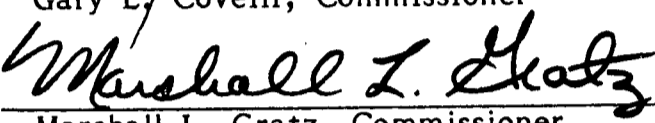
In sum, the Control Lieutenants do not have the authority necessary to establish that they perform in a supervisory capacity. Accordingly, those Lieutenants have been found to be employees eligible for assignment to the bargaining unit represented by the Union.

Dated at Madison, Wisconsin this 26th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Chairman


Gary L. Covelli, Commissioner


Marshall L. Gratz, Commissioner