

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	Case 9
STATE OF WISCONSIN	:	No. 15583 SE-44
	:	Decision No. 11243-L
Involving Certain Employees of	:	Case 11
STATE OF WISCONSIN	:	No. 15585 SE-46
DEPARTMENT OF EMPLOYMENT	:	Decision No. 11245-K
RELATIONS (SECURITY AND PUBLIC	:	Case 21
SAFETY) (SCIENCE) (TECHNICAL)	:	No. 15845 SE-56
	:	Decision No. 11328-J
		Case 26
		No. 16009 SE-61
		Decision No. 11329-J

Appearances:

Mr. Duane McCrary, Attorney, Department of Employment Relations, Division of Collective Bargaining, State of Wisconsin, P.O. Box 7855, Madison, WI 53707, appearing on behalf of Petitioner.

Lawton & Cates, Attorneys at Law, 110 E. Main Street, Madison, WI 53703-3354, by Mr. Richard V. Graylow, appearing on behalf of Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO.

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

State of Wisconsin, having filed a petition on May 3, 1984, requesting the Wisconsin Employment Relations Commission to clarify three existing statutory collective bargaining units as noted in Findings of Fact 2 and 4, below; and hearings thereon having been held on September 17, 18 and 19, 1984, in Madison, Wisconsin before Examiner Sharon A. Gallagher, a member of the Commission's staff; and a stenographic transcript having been prepared and forwarded to the parties on November 28, 1984; and the parties having filed briefs in the matter, the last of which having been received on March 18, 1985; and the Commission having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That the State of Wisconsin, hereafter the State, is an Employer and is represented for purposes of collective bargaining by the Department of Employment Relations which has its offices at 137 E. Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707-7855; that the State operates a Bureau of Aeronautics in its Department of Transportation (DOT), wherein it employs one pilot, Aircraft Pilot Luverne Reller; that the State also operates an Aeronautics Section, headed by Kenneth Corbett in the Bureau of Engineering, headed by Gerald Slack, in its Department of Natural Resources (DNR), and wherein it employs the following Aircraft Pilots with the following working titles in the following districts:

<u>Name</u>	<u>Working Title - District</u>
Charles Slaughter	Chief Pilot - Southern (Madison)
Terrance Schaefer	Administrative Pilot - Southern (Madison)
Joseph Weiss	District Chief Pilot - (also referred to as DCP) - Northwest (Spooner)
Jon Folven	District Chief Pilot - Lake Michigan & Southeast (Offices in Green Bay, flights from Oshkosh)
Mark Finley	District Chief Pilot - Southern (Madison)
Daniel Doberstein	District Chief Pilot - North Central (Rhinelander)
Darwin Krall	District Chief Pilot - West Central (Eau Claire)

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and wherein it also employs the following Conservation Pilots:

<u>Name</u>	<u>District</u>
Carlton Marvin	North Central (Rhineland)
Randy Michaelson	Northwest (Spooner)
Fred Kruger	Northwest (Spooner)
Jeffrey Heide	Lake Michigan (Green Bay)
Cyril Griesbach	Lake Michigan (Green Bay)

and that, usually in the Fall and Spring, the DNR employs 4-10 limited term employees who fly aircraft and perform related aircraft maintenance duties.

2. That the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, hereinafter WSEU or Union, is a labor organization and has its offices at 5 Odana Court, Madison, Wisconsin 53719; that WSEU has been the exclusive representative of the statutory unit of technical employees, hereafter the Technical Unit, since the WERC certified it as such in State of Wisconsin (Technical), Dec. No. 11245 (WERC, 8/72); and that WSEU has been the exclusive representative of the statutory unit of security and public safety employees, hereafter the Security and Public Safety Unit, since the WERC certified it as such in State of Wisconsin (Security and Public Safety), Dec. No. 11243 (WERC, 8/72).

3. That Aircraft Pilots (also referred to herein as APs) have been included in the Technical Unit since its original certification; and that Conservation Pilots (also referred to herein as CPs) have been included in the Security and Public Safety unit since its original certification.

4. That the statutory Professional Science bargaining unit (consisting of employees engaged in "the profession of science") has been represented by Wisconsin Science Professionals, AFT Local 3272 (previously named Wisconsin State Foresters Association) since WERC's certification issued in State of Wisconsin (Science), Dec. Nos. 11328-E and 11329-E (WERC, 9/73); and that said employee organization was given notice of the instant proceeding and declined to participate herein.

5. That on May 3, 1984, the State filed the instant petition requesting that the Commission issue an order clarifying the three statutory units noted above so as to exclude Slaughter and the DCPs as supervisors, exclude Reller as a confidential employee, and reallocate all remaining eligible employees in AP and CP positions to the Professional Science unit on the grounds that they are professionals; and that WSEU argues that the State's assertions are without merit in all respects such that the petition should be dismissed in its entirety.

6. That the DNR aeronautics program underwent at least two major reorganizations, the last of which occurred in 1974; that after 1970, all DNR pilots were placed in the Aeronautics Section of the Bureau of Engineering, flying services were provided through six districts, and a DCP and a District Director and other staff and field professionals were assigned to each district; that after 1974, DNR pilots not only flew under FAA visual flight rules, i.e., daylight flying in clear weather, but also flew under FAA instrument flight rules, i.e., night flying at low altitudes and/or in bad weather; that after the 1974 reorganization APs and CPs performed only minimal natural resources ground work e.g., work which previously been performed by Conservation Wardens and Forest Rangers; and that these pilots are engaged in substantially less law enforcement activities (between 5-20% of their time rather than 50-60% 10 years ago).

7. That the DNR, as a condition of hire, requires that Conservation Pilots have commercial pilot certificates and an instrument rating which, according to FAA and DNR rules and regulations, require that they have a minimum of 1,000 (trainee) or 1,200 (permanent) hours of pilot-in-command time (i.e., sole manipulation of aircraft controls), multi-engine land and single engine land ratings and a first class medical certificate; that said ratings and certificates are usually achieved through classroom courses offered at ground schools and courses and training offered at flight schools and/or the armed services; that after hire, DNR Conservation Pilots are frequently trained by DNR specialists, U.S. Forest Service and Weather personnel and other appropriate State personnel in (1) any updated areas relating to how to fly and maintain single and multi-engine aircraft and helicopters; (2) law enforcement related activities, (3) forestry (e.g., detecting diseased trees and fire control), (4) fish and wildlife activities (general knowledge of lakes, rivers and streams, fish and endangered

species), (5) aerial photography and surveillance, and (6) waste disposal; that Conservation Pilots serve one-year-probationary/trainee periods before becoming permanent employees; that the duties of Conservation Pilots include piloting various single and on occasion multi-engine DNR aircraft on both day and night flights under visual and/or instrument conditions in order to manage and protect the state's natural resources; that specifically, CPs (1) fly, observe and relay information necessary to detect and suppress forest fires and to support other law enforcement related activities, (2) conduct various aerial surveys covering fishing pressure, use of recreational facilities, wild life populations, etc., (3) take aerial photographs, often for use in permanent DNR records, (4) conduct reconnaissance flights for forest management, (5) occasionally fly DNR personnel, equipment and supplies, and (6) perform pre- and post-flight inspections and perform minor maintenance of aircraft.

8. That the DNR, as a condition of hire, requires that Aircraft Pilots have air transport pilot certificates (highest degree of proficiency rating issued by FAA and same rating as possessed by pilots of commercial airlines) which, according to FAA and DNR rules and regulations, requires that they have (1) a commercial pilot license and a first class medical certificate, and (2) a minimum of 1,500 hours of pilot-in-command time logged; that said certificates and ratings are customarily achieved at ground and flight schools and/or the armed services; that DNR Aircraft Pilots, unlike Conservation Pilots, are trained with a heavy emphasis on aircraft emergencies, e.g., what to do if aircraft system fails; that in addition to the training provided to CPs, APs are trained by DNR specialists, US Forest Service personnel and other State personnel; in (1) meteorology, (2) biotelemetry, (3) scheduling aircraft and related record-keeping activities, (4) minor and major aircraft maintenance, and (5) resource management; that to date, only Conservation Pilots have been promoted to vacant Aircraft Pilot positions; that Aircraft Pilots serve 6-month probationary periods; that APs fly multi-engine aircraft more frequently than CPs; and that DNR and DOT Aircraft Pilots perform the same duties as performed by Conservation Pilots, except as set forth below in Findings of Fact 10-12.

9. That neither Conservation Pilots nor Aircraft Pilots are engaged in work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital; that rather, they gain much of their knowledge and skills required to do the job at technical and flight schools, through on-the-job training, or by studying on their own, more akin to an apprenticeship and to training in routine mental, manual and physical processes.

10. That since 1970, Aircraft Pilot Reller's duties have included flying the Governor and other state officials and employees to various locations once or twice a week, year-round, primarily in a Piper Navaho Chieftain twin-engine aircraft; that Reller schedules flights and occasionally assigns pilots; that he conducts pre-and post-flight checks of aircraft airworthiness; that Reller is the only aircraft pilot employed by DOT; that Reller's first line supervisor is Carl Guell, Administrative Officer I, DOT; that Reller is "on call" 24 hours a day, 7 days a week; that Reller's exposure to sensitive labor relations information arises only by reason of conversations that he may have occasion to overhear, on or in the proximity of the aircraft or in occasional situations in which he shares ground transport with his passengers; that the opportunities for overhearing conversations within the aircraft are significantly reduced by the fact that the aircraft utilized by Reller has passengers separated from the cockpit by a partial wall and curtain and that Reller wears flight headphones at all times, at least over his left ear; that in the 14 years he has been employed as a DOT pilot, Reller has overheard two conversations related to labor relations matters, and has not participated in any such conversations; and that Reller has no more than de minimis access to and knowledge of sensitive labor relations information.

11. That DNR Aircraft Pilot Schaefer (1) flies executive personnel around the State and Canada about five times per week, (2) occasionally flies natural resource missions and (3) assists and receives work assignments from Slaughter.

12. That in addition to their duties as Aircraft Pilots, DCPs administer and oversee the DNR aviation program, working with District Directors coordinating the overall DNR programs at the district level; that in this capacity, DCPs (1) assign, direct and review the work of pilots; (2) prioritize and schedule flights -- rescheduling flights as necessary usually for weather and personnel

considerations, (3) grant subordinate pilots' requests for compensatory time, sick leave, overtime and vacation (although District Directors sign all time sheets and expense vouchers and Corbett has final authority to grant vacations), (4) attend law enforcement hearings and serve as expert witnesses in enforcement cases and, (5) work with District Directors, their staff and all field professionals (e.g. Fish Managers, Game Managers, Environmental Specialists and other research staff); that DCP Finley and CP Kruger are licensed flight instructors and as such assist Slaughter in pilot-training and flight checks (by administering oral and written exams); that Finley, DCP-Southern district, gives natural resources and aircraft maintenance assignments to limited term employee (LTE) Green as well as approves/disapproves Green's request for time off and changes in schedule, and has effectively recommended a pay increase for Green; that Doberstein, DCP - North Central district, has CP Marvin assigned to work with him in his district as well as two LTE pilots in the Fall and Spring; that Krall, DCP-Western district, has no permanent pilots assigned to assist in his district but from time to time has one or more LTE's working out of his district (usually Fall and Spring); that Folven, DCP-Lake Michigan and Southeast districts, effectively recommended the hire of 2 CPs currently working in his district and effectively recommended the discipline of another CP (who later resigned); that Folven hires 1-3 LTEs to work in his district, as needed, usually in Fall and Spring; that Weiss, DCP-Northwest district, has two CPs working in his district, one of whom he was consulted about before the CP was hired; that Weiss has two LTE pilots assigned to him (usually working Fall and Spring) one of whom he hired with no prior approval being required; that Weiss effectively recommended the disciplinary transfer and subsequent termination of one CP; that Weiss occasionally resolves work-site complaints; that DCPs spend about 30-40% of their time conducting natural resource and passenger flights and the remaining time scheduling flights, assigning work to other pilots, and training and working with other DNR District staff; and that the DCPs' principal work is not sufficiently different from that of their subordinates to support a conclusion that they are supervisors.

13. That nearly all current DNR and DOT pilots possess college degrees; that their degrees are in various disciplines, none of which involved a major emphasis in a natural resource specialty; that since 1974 a college degree has not been required by either the DNR, DOT or FAA as a condition of hire or continued employment for APs or CPs; that 4 of 13 CPs and APs have current law enforcement credentials with powers of arrest; and that APs are paid more than CPs (pay ranges 6-14 and 5-13, respectively).

14. That Aeronautics Section Chief Corbett is in charge of all DNR Aircraft Pilots and Conservation Pilots; that Corbett's supervisor, Bureau Chief Slack, has final authority to adjust grievances, hire, fire, discipline, promote, demote and transfer pilots; that Corbett has final authority to permanently relocate aircraft, to grant vacation time off, to assign pilots and planes, to decide where and how aircraft should be used to fly district-to-district missions and to resolve customer complaints and safety questions.

15. That Chief Pilot Slaughter has duties and responsibilities different from those of the DCP's; that Slaughter is responsible for the DNR aeronautics safety program and conducts all investigations of safety violations; that Slaughter assigns pilots to all non-district flights e.g., flights to Canada and other states; that he has effectively recommended the movement and transfer of State-owned aircraft around the State; that he is responsible for investigating all customer complaints; that Slaughter is responsible for the Section's training program and has effectively recommended training for pilots; that he is an FAA-certified flight instructor and he administers FAA-required flight checks; that he (and Kruger and Finley) also give pilots FAA required oral and written examinations; that Slaughter effectively recommended the hire of 5 permanent pilots after serving as a member on an oral interviewing board and after giving each of them flight checks; that he effectively recommended that one Conservation Pilot be promoted to Aircraft Pilot; that he effectively recommended that two pilots receive disciplinary suspensions after Slaughter conducted the only investigation of one of the incidents involved, but that the length of one of the suspensions was greater than Slaughter had recommended; that Slaughter acts as Section Chief when Corbett is not present; that he schedules Aircraft Pilot Schaefer's flights and grants him compensatory time, sick leave and, subject to Corbett's approval, vacation time; that Slaughter spends 20-30% of his work time administering the pilot training program, assigning work to Schaefer and other pilots and performing certain other supervisory functions; that he spends 15% flight checking employees; that he spends the remaining time flying, attending

seminars, meetings, etc.; that Slaughter's above-noted recommendations have generally been followed, that his actions have not generally been overridden; that Slaughter effectively recommends the hire, promotion and discipline of DNR pilots and exercises considerable discretion and independent judgment through his decisions regarding deployment of equipment and pilots and through his training and testing activities (which form the State employer's sole means of pilot performance evaluation); that there is no other person who exercises similar authority over DNR pilots, and only Section Chief Corbett and Bureau Chief Slack exercise greater authority; that based on the above, Slaughter's principal work is sufficiently different from that of Conservation Pilots and Aircraft Pilots and he exercises supervisory authority in sufficient combination and degree so that he is a supervisor under SELRA.

CONCLUSIONS OF LAW

1. That the position currently occupied by Charles Slaughter is supervisory, and that, therefore, Slaughter is not an employee within the meaning of Sec. 111.81(19), Stats.

2. That the position currently occupied by Laverne Reller is not confidential in nature, and that Reller is an employee within the meaning of Sec. 111.81(7), Stats.

3. That the Aircraft Pilot positions with the working title District Chief Pilot currently occupied by Weiss, Folven, Krall, Doberstein and Finley are not supervisory, and that those individuals are employees within the meaning of Sec. 111.81(19), Stats.

4. That none of the Aircraft Pilot and Conservation Pilot positions referred to in Finding of Fact 1, above, are professional within the meaning of Sec. 111.81(15), Stats.; and that, therefore, the employees holding said positions cannot be allocated to the statutory Professional Science Unit.

ORDER CLARIFYING BARGAINING UNIT 1/

1. That the position of Aircraft Pilot (working title Chief Pilot) currently occupied by Charles Slaughter shall be and hereby is excluded from the Technical bargaining unit.

2. That the remainder of the Aircraft Pilot positions referred to in Finding of Fact 1, above, shall continue to be included in the Technical Unit, and the employees currently holding said positions shall continue to be allocated to that unit.

1/ 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.

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.

(Footnote 1 continued on Page 6)

3. That the Conservation Pilot positions referred to in Finding of Fact 1, above, shall continue to be included in the Security and Public Safety bargaining unit, and the employees currently holding said positions shall continue to be allocated to that unit.

Given under our hands and seal at the City of
Madison, Wisconsin this 9th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

(Footnote 1 continued)

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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

...

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail,

(Footnote 1 continued on Page 7)

(Footnote 1 continued)

not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS
(SECURITY AND PUBLIC SAFETY) (SCIENCE) (TECHNICAL)

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

There are seven Aircraft Pilots and five Conservation Pilots employed by the DNR, and one Aircraft Pilot is employed by the DOT. The State's petition to clarify bargaining unit seeks the following: (1) to have all 13 DNR and DOT Aircraft Pilots and Conservation Pilots reallocated from their current placement in Technical or Security and Public Safety bargaining units, respectively, on the grounds of alleged professional status; the State contends that they more appropriately should be placed in the Professional Science unit; (2) to have 5 District Chief Pilots and Chief Pilot Slaughter excluded from any bargaining units on the grounds that they are supervisors; and (3) to have DOT Aircraft Pilot Reller excluded from any unit because he is allegedly a confidential employee. The Union disputes the State's assertion that any of the pilots at issue are professional, supervisory or confidential employees and contends that all pilots are already appropriately assigned to the Technical or Security and Public Safety bargaining units represented by the Union.

The additional relevant facts are adequately set forth in the Findings of Fact and need not be repeated here.

POSITIONS OF THE PARTIES

The State

A. Alleged Professional Status of Aircraft Pilots and Conservation Pilots

Continued inclusion of Conservation Pilots (CPs) in the Security and Public Safety bargaining unit and Aircraft Pilots (APs) in the Technical unit, both represented by the Union, is repugnant to SELRA, the State argues, because the CPs and APs are "per se" professional employees or, in the alternative, because their duties have changed since the original certification by the Commission such that they are now professional employees. With respect to changed duties of CPs and APs the State points out that since 1974, the DNR has increased the areas of responsibilities that these pilots must perform in and has given them different kinds of flying. Moreover, the type of flying has become more dangerous and varied since 1974. In this regard, the State notes that APs and CPs are specially trained in a variety of natural resources disciplines, e.g., air pollution, water quality control, and fish and game management. Moreover, in addition to flying fire control (most often in the daytime) these pilots, since 1974, fly nights for law enforcement, sometimes fly into uncontrolled airports (i.e., no air traffic controllers), fly passengers in any weather condition and fly with DNR fish and wildlife specialists conducting game surveys performing aerial telemetry and aerial photography.

The licensure and certificate requirements for Aircraft Pilots and Conservation Pilots are further evidence of the professional knowledge and skills possessed by these employees, the State argues. Aircraft Pilots must possess air transport pilot (ATP) certificates, requiring the highest degree of proficiency issued by the FAA, to function as aircraft pilots. Conservation Pilots are required to have commercial pilots licenses issued by the FAA. Both the ATP certificate and commercial pilot licensure requirements help to ensure that the DNR and the DOT employ more highly skilled pilots as needed to fly under more varied conditions and to perform expanded DNR mission requirements.

The State also submits that a finding that the pilots at issue are professional employees is consistent with Paul v. Petroleum Equipment Tools Co., 708 F.2d 168, (CA 5, 1983) exempting from overtime provisions of the Fair Labor Standards Act the airline pilot therein who possessed an ATP certificate and who, in the Court's view performed professional work.

Further, the State asserts that non-supervisory Aircraft Pilots and all Conservation Pilots share a community of interest with employees in the Professional Science unit rather than with employees in the Technical or Security and Public Safety bargaining units. In this regard, the State cites DNR employees

classified as Environmental Program Supervisor 3 and Natural Resources Supervisor 4 as examples of employees already assigned to the Professional Science unit who, in addition to Aircraft Pilots, "provide specific expertise to the district, possess budgetary, supervisory and field work responsibilities." Moreover, though their programs are separate, they continually interact in order to accomplish the district mission and all report to the District Director for program supervision. Finally, the State asserts that the wages for these employees are comparable.

As regards Conservation Pilots, the State asserts that they share a community of interest with the Natural Resource Specialist 2 position which is also assigned to the Professional Science unit.

B. Alleged Supervisory Status of DCPs and Chief Pilot Slaughter.

A District Chief Pilot is a supervisor within the meaning of Sec. 111.81(19), Stats., the State asserts, because his principal work is to be "responsible for the administration of the aviation program in his particular district" and as such is different from the work performed by his subordinates. The State concedes that DCPs also perform identical work as employees supervised, i.e., flying. However, the State argues that the DCPs also effectively recommend the hire of permanent employees, hire limited term employees, exercise independent judgment when directing the work activities of pilots, approve requests for time off (vacation, sick leave and compensatory time) and that some DCPs have effectively recommended the discipline and discharge of employees supervised. Additionally, at least one DCP recommended a pay increase for an employee. Furthermore, the State asserts, these DCPs are paid more than their subordinates and have adjusted employees' complaints about work schedules and equipment.

Regarding Chief Pilot Slaughter, the State notes that he is the safety officer of the DNR aeronautics section and conducts flight checks every six months "consisting of written and practical examinations to ensure that all pilots continue to meet the standards of proficiency, safety and judgment required of them." As safety officer, Slaughter investigates accidents and passenger complaints, adjusting them where appropriate. Slaughter administers the State's pilot training program and in the absence of the Aeronautics Section Chief, Slaughter is in charge. The State asserts that Slaughter has authority to recommend the hire, promotion, transfer and discipline of employees and has approved sick leave, vacation and compensatory time off requests made by Aircraft Pilot Schaefer. Thus, the State concludes, since Slaughter's principal work "is radically different" from duties performed by APs and CPs and because he exercises independent judgment and discretion, he possesses sufficient indicia of supervisory status to warrant a finding that he is a supervisor and properly excluded from any collective bargaining unit.

C. Aircraft Pilot Reller's Alleged Confidential Status.

The State asserts that Aircraft Pilot Reller is a confidential employee because he flies the Governor and other state officials around the state (a responsibility he has maintained since 1970) and therefore is "exposed to conversation concerning labor relations before, during and after flights." Moreover, the State argues, the potential access to information relating to collective bargaining issues, pay and benefit proposals and contract administration before the Union is made privy to such information warrants the exclusion of Reller as a confidential employee. The State notes that the Commission excluded two state troopers who were assigned to drive the Governor and other state officials around the State because it held they had similar access to confidential information.

The Union

A. Alleged Professional Status of Aircraft Pilots and Conservation Pilots.

The Union contends that neither Aircraft Pilots nor Conservation Pilots are professional employees within the meaning of Sec. 111.81(15), Stats., for the following reasons. First the primary duty of both APs and CPs is "to provide safe and efficient air services to the State." Such duties, while requiring a high degree of skill, do not involve predominately intellectual work. In fact, the work is routine mental, manual or mechanical in nature and has been standardized

over time, as witnessed by the abundance of FAA rules and regulations governing a pilot's activity from take off to descent.

Second, the Union asserts that Aircraft Pilots and Conservation Pilots are generalists who do not perform the DNR specialists' work. Rather, they merely utilize their aircraft to amass data and assist the specialists in completing DNR projects.

Third, not only are these pilots required to file pre-flight plans which are approved by the FAA, these pilots must also remain in constant communication with air traffic controllers who monitor and regulate all movement for the entire duration of flights. Thus, they do not consistently exercise a high degree of discretion and independent judgment as contemplated for professional employees.

Finally and most importantly, the Union argues, the pilots' work does not involve knowledge of an advanced type that is customarily acquired by a prolonged course of specialized instruction in an institution of higher learning. In this regard, the Union asserts that by definition, "an institution of higher learning is a place offering an education higher than that found in a high school, vocational or technical school. Higher education is a college or university education. . . ." The Union contends that National Labor Relations Board cases Hawthorne School of Aeronautics (Transport Workers Union of America), 29 LRRM, 1475, 1476, 1477 (1952) and Express-News Corp. (San Antonio Typographical Union), 91 LRRM 1489, 1491 (1976) are applicable because the definition of "professional employee" under the National Labor Relations Act and that under SELRA are identical. The Union states that in Hawthorne the NLRB held flight instructors were not professional employees because no college degree was required and in Express-News, journalists were not professionals because, although many possess a general college degree, no specialized college degree is required. The pilots herein generally pursue their course of instruction either through on-the-job training or at vocational flying schools and are not required to have any college degrees. In fact, the FAA does not require that pilots have college degrees. Moreover, the Union maintains, while the pilots are trained in such principles of physics, meteorology, forestry, photography and telemetry, such training and instruction relates to aircraft flight and maintenance and does not confer professional status on these pilots. Further, the Union argues that APs and CPs generally obtain the above course work after being hired, not as a condition for hire.

The Union disputes the State's contention that these pilots share a community of interest with DNR employees assigned to the Professional Science bargaining unit. It argues, contrary to the State, that any community of interest shared prior to 1974 has decreased because after 1974, Conservation Pilots no longer engage in natural resources ground work. Rather, these pilots have more of a community of interest with employees assigned to the Technical or Security and Public Safety bargaining units because of their law enforcement responsibilities and because they are paid by the hour and receive some weekend pay.

B. Alleged Supervisory Status of DCPs and Chief Pilot Slaughter

Neither the DCPs nor Chief Pilot Slaughter are supervisors within the meaning of Sec. 111.81(19), Stats., the Union argues, primarily because none of these pilots' principal work is different from their subordinates. Slaughter as well as most of the DCPs who testified at hearing stated that they spend a large portion of their work time performing the same work as their subordinates, either providing flying services or attending seminars and law enforcement meetings. Since none of these pilots' principal work is different from their subordinates, as is necessary under SELRA to conclude they are supervisors, the Union asserts they are not supervisors.

As further evidence of the instant pilots' non-supervisory status, the Union asserts that while some can recommend, none of them possess the authority to hire, transfer, suspend, layoff, recall, promote, discharge reward or discipline employees. Only Bureau Chief Slack and Section Chief Corbett possess the authority to appoint or remove employees. Further, the Union contends that none of them can adjust grievances; only the Deputy Secretary of DNR and other delegates not involved herein can adjust grievances. The Union also contends that at best these pilots supervise activities, not employees. As to employees being supervised, the Union argues that since Sec. 111.81(7), Stats., expressly excludes limited term

employees from the definition of "employee", there is only a small number of employees under the DCPs' and Slaughter's purview. At best, the Union concludes, DCPs and Slaughter are lead workers.

Finally, the Union contends that any difference in pay between aircraft and conservation pilots is attributable to differences in skill and duties, not to any supervisory authority possessed by any of them.

C. Aircraft Pilot Reller's Alleged Confidential Status.

The Union disputes the State's contention that Reller is a confidential employee and argues that the State's reliance on two conversations Reller overheard to establish confidential status is unwarranted. Citing testimony at hearing, the Union notes that Pilot Reller could only vaguely recall the nature of the conversations (one between then Acting Governor Schreiber and an aide and the other between Governor Earl and a state trooper). Furthermore, Reller testified that he never participated in any confidential labor relations discussions, that he wears a radio head set nearly 100% of the time while flying and that his primary duty is to fly passengers in a safe and efficient manner. The Union concludes that Reller's exposure to confidential information is de minimus and, therefore, he should not be excluded from the unit.

DISCUSSION

A. Alleged Professional Status of Aircraft Pilots and Conservation Pilots

Section 111.81(15) defines "Professional" employee as follows:

- (a) Any employee engaged in work:
 - 1. Predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
 - 2. Involving the consistent exercise of discretion and judgment in its performance;
 - 3. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
 - 4. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or
- b. Any employee who:
 - 1. Has completed the courses of specialized intellectual instruction described in para. (a); and
 - 2. Is performing related work under supervision of a professional employee as defined in par. (a).

If the evidence shows that the positions in dispute 2/ are professional employees within the above definition, the instant unit clarification proceeding is an appropriate means to achieve their exclusion from non-professional units. However, we conclude that neither the Conservation Pilots nor the Aircraft Pilots are professional employees within the meaning of SELRA.

We start with the well established proposition that to be a professional employee under the above-quoted statutory definition, the record must establish that the employee meets all of the criteria under (a) or all of the criteria listed under (b). E.g., Milwaukee County, Dec. No. 14786-B (WERC, 4/80) (under virtually identical language of the Municipal Employment Relations Act, in what is now Sec. 111.70(1)(L), Stats.)

Beyond that, however, the case authorities cited by the parties are neither controlling nor of significant persuasive value in determining whether the work of the pilots in this case meet the above-noted SELRA requirements. The Gateway Technical Institute, Dec. No. 14381 (WERC, 3/76) case cited by the State did involve employees with FAA instructor's licenses and was adjudicated under an

identical statutory definition of professional employee contained in the Municipal Employment Relations Act, but we do not view Gateway as a broadly applicable holding that pilots are professionals. Rather, the outcome in that case appears to us to have been substantially influenced by the fact that the work of the Aviation Teaching Assistants at issue involved working with teachers and students in support of the educational process. Non-WERC precedents of the sort noted in the summaries of the parties' positions above do not bind the Commission, though they can be of persuasive value in our interpretation of the statutes which we administer. The particular cases relied upon by the parties, however, reached conflicting results as to the applicability of statutory or regulatory language similar to that contained in Sec. 111.81(15), Stats., above. At best the cited cases represent two different tribunals--federal courts interpreting the FLSA and the NLRB interpreting the NLRA--reaching different results on whether certain pilots are professional employees. While these cases confirm our perception that this is a complex and difficult area of statutory interpretation, none of those cases provides a satisfactory and persuasive basis for us to closely follow in applying the relevant portion of SELRA to the particular facts we have before us herein. Accordingly, we proceed below with an effort at applying the language of the statute to the facts before us.

As noted, we start with the premise that all of Sec. 111.81(15), (a) or all of (b) must be established for professional status to exist. In our view, the aviation-related and other knowledge required by the work engaged in by the Conservation Pilots and Aircraft Pilots at issue herein is not of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital as distinguished from an apprenticeship or from training in the performance of routine mental, manual or physical process. The aviation-related knowledge required of these employees appears, instead, to be of a type customarily acquired from flight schools and in-flight training, which appear to be more like trade schools than institutions of higher learning or a hospital; and the other knowledge required (such as natural resources background information and data collection skills) is acquired through post-hire in-service training on a wide variety of subjects provided by the State. While several of the incumbent employees have college degrees, their major areas were in no case in natural resources specialties. Moreover, while some of those employees may have faced a degree requirement when they were hired, there is no longer a college degree required for the positions in question. While it would unquestionably take a substantial length of time to gain all of the knowledge and skills required to perform the disputed positions at the objective level, we are satisfied that the nature and manner of acquiring same is more akin to an apprenticeship than to "a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital." Moreover, acquisition of knowledge through training in routine mental, manual and physical processes also appears to more aptly describe the customary means by which a significant portion of the required knowledge for these positions is acquired, rather than through a prolonged course of specialized intellectual instruction in an institution of higher learning or a hospital. While skills and knowledge training in certain non-routine processes is also involved, our overall conclusion concerning the predominant nature of the knowledge required to perform the work in question remains as noted above.

For the foregoing reasons, we conclude that the Aircraft Pilots and Conservation Pilots at issue do not meet criterion 4 of (a) or 1 of (b), and hence that they are not professional employees within the meaning of Sec. 111.81(15),

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- 2/ The Union objected on several grounds to Petitioner's offer of exhibits 3A - 3M (updated position descriptions for various Aircraft Pilot and Conservation Pilot positions). The Examiner admitted those documents, but in doing so she expressly left it to the Commission to determine the merits of the parties' dispute as to whether these documents should be considered or given any weight herein. We have considered all of the position descriptions in evidence including 3A-3M, together with the evidence concerning their respective reliability. Wherever possible, however, we have relied upon the ample record testimony concerning the nature of the duties and responsibilities of the positions involved, rather than the written position descriptions.

Stats. We need not and do not express an opinion as to whether the other elements of Sec. 111.81(15)(a) or (b) have been established herein.

B. Alleged Supervisory Status of DCPs and Chief Pilot Slaughter

Section 111.81(19) Stats., defines "supervisor" as follows:

. . . 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.

The Commission has recognized the distinction between the above definition and that contained in Sec. 111.70(1)(o), Stats., i.e., SELRA requires a finding that the disputed employee's principal work is different from that of his/her subordinates and that the requisite supervisory authority be possessed. See, State of Wisconsin (Security and Public Safety), Dec. No. 11243-K (WERC, 7/83). The Commission has also given weight to the following factors in determining supervisory status under SELRA:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
2. The authority to direct and assign the workforce.
3. The number of employees supervised, and the number of other 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 skill or for supervision of employees.
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees.
6. Whether the supervisor is a working supervisor or whether (s)he spends substantial majority of his/her time supervising employees.
7. The amount of independent judgment and discretion exercised in the supervision of employees. 3/

The State has argued that Chief Pilot Slaughter and all District Chief Pilots are supervisors under SELRA and therefore should be excluded from the Technical bargaining unit where they are currently assigned. A necessary inquiry under SELRA must be whether Slaughter and/or the DCPs' principal work is different from that of subordinate Aircraft Pilots and Conservation Pilots.

The common definition of "principal" is: "first or highest in rank, character, authority, value or importance; most important; leading; chief." Funk & Wagnall's New Standard Dictionary of the English Language, Unabridged version. We view that definition as helpful in determining the proper interpretation of the use of that term in SELRA. In view of that definition, it appears to us that it is appropriate to determine principal work considering both evidence as to which aspect of an employee's work the employee spends the greatest amount of his/her work time on (i.e., a quantitative view), as well as which aspect of the employee's work is most essential or important to the fulfillment of the State Employer's or the work group's mission (i.e., a qualitative view). In some cases the

quantitative evidence will be more clearly indicative of what the employee's principal work is, whereas in others reliance on a qualitative analysis will reveal the most important function of the disputed position.

Turning first to Slaughter, we note that he testified that he spends 20-30% of his work time administering the pilot training program, assigning work to Schaefer and other pilots and performing certain other supervisory work; 15% flight checking employees, and the remaining time flying, and attending seminars and meetings. In qualitative terms, we note that among Slaughter's duties are being chiefly responsible for the DNR Aeronautics Section's safety program, conducting all investigations of safety violations and other customer complaints, and taking charge of the entire Section when Section Chief Corbett is absent. Based primarily on the qualitative considerations, we conclude that Slaughter's administrative and supervisory responsibilities--which are substantially different from the work performed by subordinate pilots--constitute Slaughter's most important function and hence his principal work.

Turning then to whether Slaughter possesses supervisory authority in sufficient combination and degree to warrant supervisory status, we note that Slaughter testified that he assigns pilots to all non-district flights, e.g., to other States and Canada; along with Kruger and Finley, administers tests to pilots both orally and in writing as required by the FAA, thereby participating in employee evaluation; effectively recommended the hire of 5 permanent pilots; and effectively recommended that a Conservation Pilot be promoted to Aircraft Pilot and that two pilots receive disciplinary suspension (with respect to the latter, he conducted the only investigation of one of the incidents involved). In addition, Slaughter is Schaefer's immediate supervisor, scheduling Schaefer's flights and granting his requests for compensatory and vacation time and sick leave. The record further satisfies us that Slaughter exercises considerable discretion and independent judgment in connection with his exercise of supervisory authority. Hence, we conclude that Slaughter exercises supervisory authority in sufficient combination and degree to warrant the conclusion that he is a supervisor within the meaning of SELRA. Having met both of the necessary elements of the SELRA definition of supervisor, we conclude that Slaughter is a supervisor.

The alleged supervisory status of the five District Chief Pilots is a much closer question in our view. For, the record in this case does not definitively reveal how much of their work time is spent on flying nor does it reveal how much time is spent specifically performing other assigned duties. Some DCPs testified that they spend 30-40% of their work time flying aircraft, either for natural resource missions or to transport passengers. They stated that their remaining work time is spent directing subordinate pilots and coordinating their activities, attending meetings and training seminars, and generally working with other DNR district staff. With the exception of directing and coordinating subordinate pilots and their activities, the work performed by DCPs is the same as that performed by all Aircraft Pilots and Conservation Pilots. Put another way, DCPs spend more of their work time on a combination of flying and attending meetings and training seminars than they do on any other function, and the same is true of the subordinate pilots. The only responsibility which is different is that they direct and coordinate pilots and related activities at the district level, a responsibility that is shared to some extent with the District Directors.

It could be concluded from the foregoing that the DCPs, like their subordinate pilots, spend more of their time on actual flying of natural resource and passenger transport missions and the meetings, training seminars and ground preparations related thereto than they do on any other aspect of their work. However, even if that is not true quantitatively, in our judgment the most important work performed by the DCPs as regards fulfillment of the employer's mission is also their actual flying of natural resource and passenger transport missions and their attendance at the meetings, training seminars and ground preparations related thereto. We therefore have found that to be the DCP's

3/ University of Wisconsin and Department of Administration, State of Wisconsin and Resident Halls Student Labor Organization, Dec. No. 10320-B (WERC, 6/72).

"principal work" and conclude that it is not different from that of their subordinates.

Since the DCP's principal work is therefore not different from that of their subordinates, the first necessary element for supervisory status under SELRA has not been met and the DCPs cannot be supervisors within the meaning of SELRA. Accordingly, we need not and do not address the question of whether DCPs meet the second element necessary for supervisory status under the SELRA definition.

C. Aircraft Pilot Reller's Alleged Confidential Status

Section 111.81(7), Stats., defines "employee" as follows:

. . . any state employee in the classified service of the state, as defined in s. 230.08, except limited term employees, sessional employees, project employees, employees who are performing in a supervisory capacity, management employees and individuals privy to confidential matters affecting the employer-employee relationship. . . .

The Commission has long held that to be found confidential, an employee must have access to, have knowledge of or participate in confidential matters relating to labor relations.^{4/} In order for the information to be considered "confidential" it must deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters relating to labor relations between the bargaining representative and the employer and the information must not be available to the bargaining representative or its agent.^{5/} However, if an employee's exposure to such confidential matters is de minimus, the employee will not be excluded as a confidential.^{6/}

In the instant case the evidence shows that DOT Pilot Reller has transported the Governor and other State officials and employees approximately once or twice per week since 1970. The State asserts that he is a confidential employee because in the course of his duties he overheard two arguably confidential conversations and because he has the "potential" for access to confidential labor relations information as a result of flying the Governor and other State officials around the State. In that regard, the State relies heavily upon State of Wisconsin (Security and Public Safety, Dec. No. 18696 (WERC, 5/81)), wherein the Commission found that two state patrol troopers who regularly drove the Governor and his staff about the State should be excluded from the Security and Public Safety bargaining unit as confidentials.

That case is factually distinguishable from the instant case, however, primarily because of the difference in duties performed by Reller as compared to state troopers assigned by the Governor. The two state troopers were permanently assigned to the Governor's office daily to drive the Governor and his staff as well as to act as security officers for the Governor. The proximity of passenger to driver in a car is a lot closer than exists between pilot and passenger. More importantly, the evidence in the above case revealed that, troopers assigned to the Governor had "been increasingly privy to meetings and conversations between the Governor and his staff, members of his cabinet, and other State officials, including management personnel, relating to confidential labor relations matters. . . ."

4/ E.g. Milwaukee County, Dec. No. 7135-S (WERC, 2/85); City of Cudahy, Dec. No. 21887 (WERC, 8/84); State of Wisconsin (Clerical Related), Dec. No. 14143-B (WERC, 10/77); State of Wisconsin (Professional Education), Dec. No. 11885-M (WERC, 11/82).

5/ Walworth County, Dec. No. 18846 (WERC, 7/81); Cooperative Education Service Agency No. 4, Dec. No. 14177-A (WERC, 7/80).

6/ State of Wisconsin, (Professional Education), supra; State of Wisconsin (Clerical Related), supra; City of Cudahy, supra.

Here, the evidence shows that in the past 14 years Reller has overheard just two conversations regarding labor relations matters; one was in 1976 between acting Governor Schreiber and his aides regarding the possibility of an alleged strike by State employees. The other occurred in 1984 between Governor Earl and a state trooper (who was driving Reller and the Governor to a meeting site) regarding an employment complaint that the trooper had. It does not appear entirely clear that by overhearing even the two actual conversations involved that Reller became privy to any significant State strategies or positions in collective bargaining, contract administration, litigation, etc. as required by our precedent. Furthermore, it is noteworthy that Reller did not participate in either of these conversations; that they occurred during incidental contacts on the ground rather than during flight; and that by reason of their incidental nature and locations, the Governor involved could easily have avoided allowing Reller to overhear such conversation had he preferred to do so. Regarding the potential for overhearing sensitive in-flight labor relations conversations, Reller testified that during flight he wears headphones for air/ground communication, which cover at least his left ear and that he does not generally listen to passenger conversations unless they make requests of him (i.e., regarding their comfort) or ask him questions (i.e., about the flight). The evidence also showed that there is a partial wall and a distance of one foot between the cockpit and the passenger area of the aircraft.

Upon consideration of all of the foregoing, we are satisfied that Reller's exposure to confidential labor relations information is incidental and de minimus, and that he is therefore not a confidential employee within the meaning of SELRA.

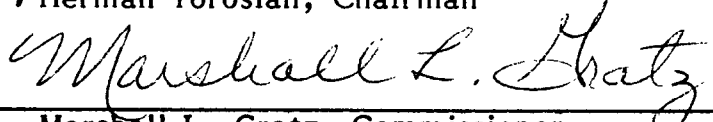
In sum, for all the foregoing reasons we conclude neither Aircraft Pilots nor Conservation Pilots are professional employees, District Chief Pilots are not supervisors and Aircraft Pilot Reller is not a confidential employee. Therefore, their positions shall remain allocated to their respective bargaining units. Chief Pilot Slaughter, on the other hand, is a supervisor under SELRA and shall be excluded from any bargaining unit.

Dated at Madison, Wisconsin this 9th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner