STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of LOCAL 407, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS Involving Certain Employes of CITY OF WAUKESHA (FIRE DEPARTMENT)	Case XIV No. 15295 ME-749 Decision No.11342-B

Appearances:

Michael, Best & Friedrich, S.C., Attorneys at Law, by Ms. Toni L. Bonney, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, on behalf of the City.

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, WI 53703, on behalf of the Union.

ORDER DENYING PETITION FOR REHEARING

On December 15, 1982, the City of Waukesha filed a petition requesting the Wisconsin Employment Relations Commission to clarify the existing bargaining unit consisting of all firefighters, lieutenants, captains and inspection personnel in the employ of the City of Waukesha (Fire Department) by determining whether the positions with a rank of captain should be included or excluded from said unit. Hearing in the matter was held in Waukesha, Wisconsin on March 10, 1983 before Examiner Dennis P. McGilligan. Examiner McGilligan subsequently left the Commission's staff prior to the issuance of the Commission's Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit on August 16, 1983. In its decision, the Commission found that lieutenants function as station commanders in the Waukesha Fire Department and that captains functions above the level of the lieutenants. Based upon that finding, the Commission concluded that the captains are "supervisors" within the meaning of Sec. 111.70(1)(o)2, Stats. and therefore clarified the bargaining unit in question by excluding the captains therefrom. On September 2, 1983, Local 407 timely filed a petition for rehearing. The City of Waukesha responded thereto with written argument received by the Commission on September 12, 1983. Having considered the petition and the City's response thereto and reviewed the record, the Commission concludes that the petition for rehearing should be denied.

NOW, THEREFORE, it is

ORDERED 1/

That the petition for rehearing is hereby denied.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of September, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

Footnote One appears on Page Two

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties 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.

227.16 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.

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); 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.

MEMORANDUM ACCOMPANYING ORDER DENYING PETITION FOR REHEARING

In its petition for rehearing, the Union initially argues that the Commission failed to consult with Examiner McGilligan regarding witness credibility and demeanor and that this failure deprived the Union of its statutory and constitutional right to hearing. The Union cites Appleton v. ILHR Dept. 67 Wis. 2d 162 (1974) as authority for its statutory argument and Falke v. Industrial Commission 17 Wis. 2d 289 (1962), Shawley v. Industrial Comm. 16 Wis 2d 535 (1962) and Appleton, supra as authority for its constitutional claim. Our review of these cited cases and current statutory provisions persuades us that there was no duty to consult in this case.

Appleton, supra sets forth the Court's discussion of the requirement then contained in Sec. 227.12, Stats. (now in Sec. 227.09(2), Stats.) that the agency inform the parties as to why it is rejecting the findings and conclusions of a hearing examiner even if witness credibility is not a substantial element of the case. To the extent that the Union here relies upon this explicit statutory duty, said reliance is misplaced because: (1) the unit clarification proceeding is a Class 1 proceeding under Sec. 227.01(2)(a), Stats.; (2) under Sec. 227.09(2), Stats., the Commission need not cause its examiner to issue a proposed decision in a Class 1 proceeding; (3) no proposed decision was issued by Examiner McGilligan; and (4) the Commission's duty under Sec. 227.09(2), Stats., was not operative as there are no variations on which to comment and thus no need or obligation to consult with the Examiner over impressions as to witness credibility.

Appleton, supra also expresses the notion that due process, meaningful judicial review, and motions of fundamental fairness entitle the parties to know the basis for agency rejection of examiner findings particularly where credibility of witnesses is involved. Implicit in this right to know is the duty of the agency to consult with the examiner as to his or her impressions of the witnesses so that the agency can benefit from same when determining whether examiner findings based upon credibility resolution should be set aside. Here, again, as the Commission did not set aside any examiner findings inasmuch as the examiner was not obligated to and did not make same, Appleton, supra is not directly applicable. However, we recognize that even where, as here, no intervening examiner decision is being reviewed by the agency, due process may require consultation. Falke, supra, at page 169, and Shawley, supra do set forth a constitutional right, ". . . in cases involving the credibilty of a witness as a substantial element to have the benefit of the demeanor evidence which is lost when the agency decides the controversy without the participation of the hearing examiner who heard the testimony" (emphasis added). However, these cases, as well as Wright v. Industrial Comm. 10 Wis 2d 653 (1959) upon which Falke and Shawley are premised, hold that this due process obligation only arises where the credibility of a witness is a substantial element or a determining factor in the agency decision. As witness credibility did not play a substantial role in our decision, no due process obligation to consult with the examiner existed.

The Union's apparent belief that witness credibility played a substantial role in our decision is simply not supported by the record. Fire Chief Baumgart, the City's only witness, testified for 62 of the 64 pages of transcript testimony. Although Baumgart was cross-examined and subsequently called as on adverse witness, the Union did not call any witnesses to impeach the Chief's testimony. The Union's assertion that the City's failure to have the captains testify reflects the City's fear that their testimony would impeach the Chief, need be answered only be pointing out that the Union itself had every right and opportunity to call the captains for that or any other relevant purpose. The Union's choice to call Baumgart adversely and to call its only other witness for the purpose of authenticating an organizational chart does not reflect upon the Chief's credibility.

To the extent that the Union believes that written exhibits from the record somehow raise a credibility issue, we do not agree. None of the exhibits conflict with Chief's testimony which establishes that lieutenants function as station commanders at all of the City's stations and that the captains have department-wide responsibilities which differentiate them from the station command function

and from the lieutenants. These critical findings (see Findings of Fact 6 - 9) when viewed in light of Sec. 111.70(1)(o)2, Stats., dictate the result herein.

The Union also argues that the Commission somehow improperly expanded the scope of the decision beyond the supervisory status of captains to include a managerial issue or, in the alternative, improperly used evidence of managerial status to buttress a supervisory finding. Again we do not agree. No managerial issue was or is present and no managerial findings were made. Instead the Commission simply and properly included the duties of the captain (see Findings of Fact 7) in its decision. Obviously, such a recitation is essential to a determination regarding the level at which the captains function and as to what rank serves as station commander.

The Union also seems to overlook the fact that the legislature has seen fit to define supervisory firefighters in a manner which differs from the supervisory definition applicable to other employes (compare Sec. 111.70(1)(o)1 with Sec. 111.70(1)(o)2, Stats.). We must thus again reject the Union's claim that the presence or absence of evidence of supervisory responsibility under Sec. 111.70(1)(0)1, Stats. is somehow determinative under Sec. 111.70(1)(o)2, Stats. Rather, the crucial determination in deciding supervisory issues under Sec. 111.70(1)(o)2, Stats., is a determination of what rank serves in the capacity of station commander. 2/

Lastly, the Union submits that our findings are not supported by credible evidence and that we have ignored our prior decisions. We reject both claims and believe that the content of the record as well as our decision based thereupon both demonstrate the contrary.

Finding no basis for granting the Union's petition, we reject same.

Dated at Madison, Wisconsin this 30th day of September, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

2/ City of Janesville, (12460-A) 5/74; City of Beloit (12606-B) 11/74; and City of Eau Claire, (19666) 8/82.