STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
CIVIL DIVISION

CITY OF WEST ALLIS,

Petitioner,

v. Case No. 414-088

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, MEMORANDUM DECISION

Respondent. Decision No. 12020-C

The City of West Allis (petitioner) has moved to stay the decision of the Wisconsin Employment Relations Commission of January 4, 1974, which certifies that the city's police officers, up through and including the rank of detective sergeant, may bargain collectively as a unit. The Commission (respondent) argues that the determination of the appropriate bargaining unit for purpose of collective bargaining was properly made pursuant to Wis. Stats., section 111.70(4)(d) and that its determination was supported by substantial evidence in view of the entire record.

The West Allis Professional Policemen's Protective Association (association) has represented West Allis policemen below the rank of sergeant in collective bargaining matters since 1967. On September 14, 1972, the association filed with respondent a petition for election and asked that sergeants, detective sergeants, lieutenants and captains be included in the bargaining unit for purposes of the election.

Respondent conducted hearings with regard to this petition on October 24 and December 11, 1972. On July 18, 1973, respondent directed that an election be held and determined that the bargaining unit should include all police officers with ranks of detective sergeant or below. Specifically excluded from the bargaining unit were lieutenants, captains, inspector, and chief of police.

The petitioner on October 29, 1973, asked this court for an order staying the election and respondent simultaneously moved to dismiss the petition on the ground that the direction for an election was not reviewable. Both motions were denied.

An election was subsequently held and the association was chosen as bargaining agent by a substantial majority of the police officers eligible to vote.

The reviewing court may reverse or modify an order if, as contended here, the petitioner's substantial rights have been prejudiced because the administrative findings are (a) in excess of statutory authority, (b) arbitrary and capricious, or (c) unsupported by substantial evidence in view of the entire record as submitted.[1]

The first allegation, that respondent acted in excess of its statutory authority, appears to be unsupported in the instant case. Respondent has been empowered by sec. 111.70(4)(d)2a to determine the appropriate bargaining unit for purposes of collective bargaining but "avoid fragmentation by maintaining as few units as practicable in keeping with the size of the total municipal labor force." The policy of the Municipal Employment Relations Act, Ch. 111.70, is to encourage voluntary settlement of public service labor disputes through the collective bargaining process. To effectuate this policy, the legislature has deemed it in the public interest to permit municipal employees to bargain collectively through labor organizations of their own choosing.[2]

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1. Wis. Stats. s. 227.20(1)(b), (d) and (e).

2. Wis. Stats. s. 111.70(6).

From the record it is clear that respondent considered the evidence submitted and fashioned an order within the letter and spirit of the Act.

Petitioner's second contention is that respondent acted arbitrarily and capriciously by making an order for election not supported by respondent's prior decisions in similar cases. As the Wisconsin Supreme Court said in Robertson Transport Co. v. Public Service Commission:[3]

> Consistency, of course, is a virtue both in administrative and in judicial determinations but inconsistencies in determinations arising by comparison are not proof of arbitrariness or capriciousness. /Citations omitted/ We have said that an agency does not act in an arbitrary or capricious manner if it acts on a rational basis. /Citations omitted/ Arbitrary action is the result of unconsidered, wilful or irrational choice, and not the result of the "sifting and winnowing" process. /Citations omitted/.

In ruling on facts in issue in a particular case, the administrative agency is not necessarily bound by prior proceedings,[4] and may excerise discretion in applying the law to the issues of fact with which it is confronted.[5]

Petitioner claims also that respondent's finding that sergeants are employees rather than supervisors and, therefore, are includable in the collective bargaining unit is unsupported by substantial evidence in view of the entire record as submitted.[6]

Substantial evidence has been defined as "that quantity of evidence which a reasonable man could accept as adequate to support a conclusion."[7] The test, then, is whether, upon an examination of the entire record, the evidence and the inferences drawn therefrom, it can be found that a reasonable man, acting reasonably, might have reached the decision."[8] It should be noted that the drawing of inferences from the facts presented is a function of the administrative agency. The court, on review, examines only the reasonableness of those inferences."[9]

The language of Wis. Stats., sec. 227.20(1)(d), "in veiw of the entire record as submitted," suggests that the abovementioned test of reasonableness should be applied to all the evidence, and not merely to that part which tends to support the agency's findings and conclusions.[10]

One final tenet with regard to review of administrative hearings is that great weight must be given to an agency's interpretation and application of its own rules, unless such application or interpretation is clearly erroneous or inconsistent with the rules so interpreted."[11]

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3. 39 Wis.2d 653, at 661 (1968).

4. Dairy Employees Industrial Union v. W.E.R.B., 262 Wis. 280 (1952).

5. Appleton Chair Corp. v. United Brotherhood of Carpenters & Joiners, 239 Wis. 337 (1941).

6. Wis. Stats. s. 227.20(1)(d).

7. Robertson Transport Co. v. Public Serv. Comm., note 3 supra at 658.

8. Kenosha Teachers Union v. W.E.R.C., 39 Wis.2d 196, at 204(1968).

9. St. Francis Hospital v. W.E.R.B., 8 Wis.2d 308 (1959).

10. Kenosha Teachers Union v. W.E.R.C., note 8 supra, at 205.

11. Josam Mfg. Co. v. State Bd of Health, 26 Wis.2d 587 (1965).

In its practical application, that tenet incorporates Wisconsin Stats., sec. 227.20(2), and it has been held that,

> . . . in fields in which an agency has particular competence or expertise, the courts should not substitute their judgment for the agency's application of a particular statute to the found facts if a rational basis exists in the law for the agency's interpretation and it does not conflict with the statute's legislative history, prior decisions of this court, or constitutional prohibitions.[12]

Petitioner's last contention, that the findings by respondent that police sergeants were not supervisors of employees is unsupported by substantial evidence in the record, must be viewed in light of seven elements enunciated in City Firefighters Union v. City of Madison.[13]

First, do officers in the ranks of sergeant and detective sergeant have authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of police officers at or below the rank of detective?

According to the testimony before the hearing examiner, promotion results after a combination of evaluation forms have been reviewed and oral and written exams have been administered to the candidates. It appears that the sergeants' input in the process is limited only to the evaluation form. A second performance evaluation is made by the candidate's respective shift commander, and the oral exam board is composed of captains and the police inspector. From the record with regard to this point, respondent, acting as a reasonable man might reasonably reach the conclusion that sergeants' recommendations do not constitute a substantial factor in promotions.

The testimony in the record indicates that decisions as to hiring or discharge of police officers is made by the West Allis Police and Fire Commission. As concerns discipline, the sergeant cannot effectively remove the offending patrolman from service pending final action by the Chief of Police.[14] His disciplinary authority is, according to the testimony, limited to verbal reprimands and to initiation of formal discipline proceedings by the filing of a routine report. There is substantial evidence to support a finding that West Allis police sergeants exercise minimal or no independent judgment regarding discipline.[15]

Second, do sergeants and detective sergeants have authority to direct or assign work? This involves a question of fact and it is necessary, therefore, to identify actual rather than theoretical duties and powers of control.[16]

According to the testimony, shift commanders, who are usually either lieutenants, captains or the inspector of police, make decisions regarding assignment at the beginning of each shift and also assign patrolmen to calls received by the dispatcher. Sergeants may occasionally serve as shift commanders, but ultimate responsibility for command decisions falls upon the shoulders of an officer above the rank of sergeant.

It is indicated in the record that sergeants, like patrolmen, spend the bulk of their duty-time in patrol cars. When called upon to respond to serious emergencies, the sergeants may be required to direct on-the-scene activities. It is clear from the record, however, that such situations are rare, that all of the sergeants' orders or requests are cleared through the shift commander, and that respondent was justified in reasonably inferring that these occasional responsibilities were entrusted to sergeants as a result of their superior skill and experience in police work.

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12. City of Milwaukee v. W.E.R.C., 43 Wis.2d 596 (1969).

13. 48 Wis.2d 262, at 270-71 (1970). See also Wis.Stats. s. 111.70(1)(o)1.

14. Eastern Greyhound Lines v. N.L.R.B., 337 F.2d 84 (6th Cir. 1964).

15. N.L.R.B. v. Merchants Police, Inc. 313 F.2d 310 (7th Cir. 1963).

16. Dubin-Haskell Lining Corp. v. N.L.R.B., 375 F.2d 568 (4th Cir. 1967).

Performance of isolated or infrequent tasks of a supervisory nature does not transform an employee into a supervisor.[17] It should be noted also that "the gradations of authority responsibly to direct the work of others . . . are so infinite and subtle that of necessity a large measure of informed discretion" must be vested in respondent to determine those persons who fall within the statutory definition of "supervisor."[18] Respondent's conclusions and inferences as to the sergeants' authority to direct and assign work, in view of the facts, meet the substantial evidence standard.

Third, the sergeants' positions in the hierarchy of the West Allis Police Department must be examined. While it is true that there are 108 police officers below the ranks of sergeant and detective sergeant, there are also eleven officers in positions of responsibility above the ranks of sergeant and detective sergeant. It would be reasonable to assume, therefore, that there is sufficient upper-echelon personnel above the rank of sergeant to adequately handle supervisory matters for the police department.

A fourth critical element with regard to determining supervisory status is the sergeants' level of pay and an examination of whether they are paid primarily for their skill and experience as police officers or for their supervision of other employees.

There is, as indicated by the record, a three percent difference in pay between the rank of detective and sergeant. This difference is minimal, however, in light of the fact that sergeants receive no additional compensation for their first 60 hours of overtime. Although pay increases, however slightly, with rank because promotion is based upon skill, experience and performance, respondent could properly infer that the pay level is determined by these factors rather than by the amount of supervisory work performed.

Based upon substantial evidence in the record, respondent could reasonably conclude as a fifth factor that any supervision in which a sergeant is involved is directed primarily at the activities inherent in police work rather than at specific employees. For example, in occasional emergency situations, the sergeant on the scene has the responsibility of directing activity to meet the emergency. The direction of personnel under this limited circumstance is incidental and secondary to the performance of this function.

The testimony clearly indicates that the sergeants spend at least 75 percent of their time on routine patrol duty, and time spent in direct supervision of personnel is minimal by comparison. This is a sixth factor to be considered in determining supervisory status.

Finally, do the sergeants exercise sufficient independent judgment and discretion in performing their duties to constitute them supervisors within the meaning of section 111.70(1)(o)?

The Court of Appeals for the Seventh Circuit, in Illinois State Journal Register, Inc. v. N.L.R.B.,[19] said the question is,

> ". . . whether an employee is so closely related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer on the one hand and his fellow workers on the other."

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17. Plastic Workers Union Local No. 18 v. N.L.R.B., 369 F.2d 226, at 230 (7th Cir. 1966).

18. N.L.R.B. v. Swift & Co., 292 F.2d 561, at 563 (1st Cir. 1961).

19. 412 F.2d 37, at 41 (7th Cir. 1969).

To answer this question, the Court said, it must first be determined "whether the employee is formulating, determining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties."[20] In the latter instance, he must be excluded from the bargaining unit.

Although the cases interpreting 29 U.S.C.A. section 152(11) which is similar to Wis. Stats. section 111.70(1)(o), hold that the statutory elements of supervisory status are to be read in the disjunctive and the existence of any one of them makes a person a supervisor,[21] the analysis made in this case indicates there was substantial evidence to support respondent's finding that none of the statutory elements were present, either qualitatively or quantitatively. Therefore, there is little evidence to indicate that sergeants exercised that degree of independent judgment necessary to create a potential conflict of interest between themselves and their superiors and between themselves and police officers of lesser rank.

Respondent's decision determining that detective sergeants and sergeants of the West Allis Police Department are to be included in the bargaining unit is affirmed. The attorney for the respondent may prepare an order and judgment in accordance with them memorandum decision.

Dated at Milwaukee, Wisconsin, November 19, 1974.

By the Court,

John A. Decker /s/
Judge

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20. Id.

21. Ohio Power Co. v. N.L.R.B., 176 F.2d 385 (6th Cir. 1949); Arizona Public Serv. Co. v. N.L.R.B., 453 F.2d 228 (9th Cir. 1971).