

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
CITY OF MILWAUKEE	:	
	:	Case CXXIX
Requesting a Declaratory Ruling	:	No. 16756 DR(M)-45
Pursuant to Section 111.70(4)(b),	:	Decision No. 12035-A
Wisconsin Statutes, Involving a	:	
Dispute Between Said Petitioner and	:	
	:	
ASSOCIATION OF MUNICIPAL ATTORNEYS	:	
OF MILWAUKEE	:	
	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECLARATORY RULING

The City of Milwaukee, having filed a petition on May 2, 1973, pursuant to Section 227.06, Wisconsin Statutes, requesting the Wisconsin Employment Relations Commission to issue a declaratory ruling to the effect that each attorney in the employ of the Office of the City Attorney of Milwaukee is a managerial employe or a managerial trainee, and therefore not an employe within the meaning of the Municipal Employment Relations Act; and said Petitioner and the Association of Municipal Attorneys of Milwaukee having stipulated to the record and having waived hearing herein; and the Commission having considered the evidence and briefs of parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Declaratory Ruling.

FINDINGS OF FACT

1. That the City of Milwaukee, hereinafter referred to as the Municipal Employer, has its offices at the City Hall, Milwaukee, Wisconsin.

2. That the Association of Municipal Attorneys of Milwaukee, hereinafter referred to as the Association, is a labor organization representing attorneys in the employ of the Office of the City Attorney of said Municipal Employer; and that said Association has its mailing address at the City Hall, Milwaukee, Wisconsin.

3. That on July 12, 1967, the Wisconsin Employment Relations Commission, following a hearing conducted by it, determined that all of the attorneys employed by the City of Milwaukee in the Office of the City Attorney, excluding those holding confidential and supervisory positions, were employes under the then existing Section 111.70, Wisconsin Statutes, and the Commission on said date directed an election ^{1/} among said employes to determine whether they desired to be represented for the purposes of collective bargaining by the Association; and that following such election, the Commission on August 24, 1967, issued a Certification of Representatives in which it certified that the employes in said bargaining unit had selected the Association as their collective bargaining representative.

^{1/} Decision No. 8100.

4. That, following the effective date of the Municipal Employment Relations Act, (November 11, 1971), hereinafter referred to as MERA, a dispute arose between the Municipal Employer and the Association as to whether attorneys in the employ of the Office of the City Attorney of the Municipal Employer were "employees" within the meaning of Section 111.70(1)(b) of MERA, the Municipal Employer contending that said attorneys are managerial personnel or managerial trainee personnel, and, therefore, have no rights under MERA; that in said regard, the Municipal Employer on May 2, 1973, filed the instant petition with the Commission requesting the Commission to issue a Declaratory Ruling to the effect that said attorneys are not employees for any purposes of the MERA, and further, the Municipal Employer requested, in said instant petition, that the Certification of Representatives previously issued on August 24, 1967, be declared null and void; and that, thereafter, and on July 2, 1973, representatives of the parties filed stipulations with the Commission wherein they agreed to waive hearing in the matter and further agreed that the record developed in the hearing held prior to the conduct of the election noted in paragraph three, supra, constitutes the record in the instant proceeding.

5. That the City Attorney is elected to office for a term of four years; that the Assistant City Attorneys are hired and retain their positions pursuant to Civil Service rules and regulations; that the Assistant City Attorneys are licensed attorneys-at-law admitted to practice before the Supreme Court of the State of Wisconsin; that in the course of their duties the Assistant City Attorneys grant legal advice to members of, and the heads of, several departments, boards and commissions of Municipal Employer, its Common Council, and the Mayor; that two Assistant City Attorneys administer the self-insured Workmen's Compensation and claims program of the Municipal Employer and in that regard make recommendations for payment of said claims to the City Attorney, who in turn forwards his advice and recommendations to the appropriate committee of the Municipal Employer; that the primary responsibility of at least one Assistant City Attorney is to review all bills filed in the State Legislature to ascertain their possible impact upon the Municipal Employer and to prepare various memoranda, and appear before the several committees of the Legislature to present the Municipal Employer's position upon proposed legislation, and to lobby on its behalf; that four Assistant City Attorneys in the branch office of the City Attorney, located in the Public Safety Building, prosecute violations of municipal ordinances and traffic offenses, and as part of that prosecution responsibility, interview members of the public and police officers; that a number of Assistant City Attorneys participate in real estate closings and condemnation proceedings on behalf of the Municipal Employer; that a majority of the Assistant City Attorneys appear in the various courts of the State and in the Federal Court for the Eastern District of Wisconsin and the federal appellate courts on behalf of the Municipal Employer; and that the foregoing findings are descriptive of typical and characteristic functions and responsibilities of the position of Assistant City Attorney although they do not comprise an exhaustive listing of all of the functions and responsibilities ever attributable to said position.

6. That the non-supervisory and non-confidential Assistant City Attorneys do not function as agents of the Municipal Employer with regard to the employe-employer relationship; that said Assistant City Attorneys do not possess effective authority to commit the Municipal Employer's resources, since such authority lies with elected and appointed officials and department heads, boards and commissions, and that such Assistant City Attorneys furnish professional expertise to those agents of the Municipal Employer who participate in the formulation, determination and implementation of managerial policies.

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

CONCLUSIONS OF LAW

1. That the decision of the Wisconsin Employment Relations Commission issued on July 12, 1967, wherein it determined that Assistant City Attorneys in the employ of the Office of the City Attorney of the City of Milwaukee, were employees within the meaning of Section 111.70, Wisconsin Statutes, is not deemed as rendering res adjudicata the issue involved in the instant proceeding.

2. That the Assistant City Attorneys employed in the Office of the City Attorney of the City of Milwaukee having civil service status are not "managerial" employees within the meaning of that term as it appears in Section 111.70(1)(b) of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Commission issues the following

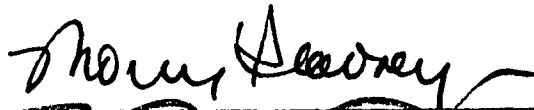
DECLARATORY RULING

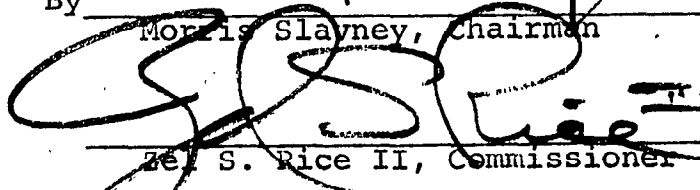
That the Assistant City Attorneys employed in the Office of the City Attorney of the City of Milwaukee, having civil service status, except those engaged in supervisory or confidential positions, are municipal employees as defined in Section 111.70(1)(b) of the Municipal Employment Relations Act, and they are entitled to the full enjoyment of the benefits and protection of the Municipal Employment Relations Act. 2/

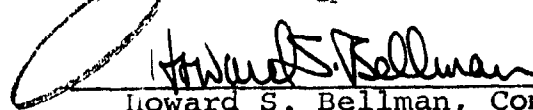
Given under our hands and seal at the City of Madison, Wisconsin this 21st day of February, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slayney, Chairman


S. Rice II, Commissioner


Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECLARATORY RULING

POSITION OF THE CITY:

The City maintains that all employes in the employ of the City Attorney's Office are managerial employes and, therefore, are not "municipal employes" within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act (MERA). A similar contention was ruled upon by the Commission in its decision involving the parties rendered in July, 1967 (Decision No. 8100) wherein the Commission determined that the Assistant City Attorneys were not managerial employes. The Commission's determination in that regard was upheld by the Supreme Court of Wisconsin. ^{3/} It should be noted that at the time of the Commission's original decision "managerial employes" were not specifically excluded from the definition of the term municipal employes nor were supervisors, however, as a matter of policy, in administering Section 111.70, prior to the adoption of MERA, the Commission excluded supervisors and confidential employes as well as managerial employes, from the coverage of the then existing 111.70, on the basis that supervisors, confidential and managerial employes were deemed to be agents of the Municipal Employer with respect to employment relations and not appropriately included in bargaining units. ^{4/}

The City now contends that as a result of the fact that MERA, which became effective in November, 1971, specifically excludes "managerial employes" from the definition of the term municipal employe, as set forth in Section 111.70(1)(b), said attorneys are not municipal employes. The City contends that the effect of specifically excluding "managerial employes" from the term municipal employe, expands the considerations to be made by the Commission in determining whether an employe performs managerial functions. The City would have the Commission adopt the test of managerial employe status employed by the National Labor Relations Board, i.e., as whether an individual is "in position to formulate, determine, and effectuate management policies." ^{5/} The City argues that the Commission, in effect, adopted the definition of the NLRB in Spooner Community Memorial Hospital and Nursing Home, Decision No. 11098 (6/72), a case which arose under the Wisconsin Employment Peace Act, and in which the Commission excluded an employe who did not have authority to hire, fire, or transfer employes, but who purchased goods for the hospital and utilized his independent judgment in dealing with suppliers and in the purchase of these goods. In the City of Manitowoc, Decision No. 11069 (7/72) the Commission excluded a housing manager, whose responsibilities included management of the project and relationships with tenants, although no mention is made in the decision of the manager's authority to supervise employes. The City argues that in the City of Manitowoc case, the Commission, in effect, adopted the definition of the National Labor Relations Board applying to managerial employes under MERA.

POSITION OF THE ASSOCIATION:

The thrust of the Association's position is that the Commission should reaffirm Decision No. 8100. The legislative history of the

^{3/} City of Milwaukee vs. WERC 43 Wis. 2d 5691, 1969.

^{4/} City of Milwaukee (8100) 7/67.

^{5/} Ford Motor Company, 66 NLRB, 1317, 1322 (1946).

1971 amendments to the Municipal Employment Relations Act indicates that the legislature rejected any definition of "managerial employe". Therefore, the Association argues, the 1971 amendment was a codification of the Commission's definition. 6/ In addition, the Association raises a procedural issue. The parties, the facts, and the issues in this Declaratory Ruling case are the same as those decided in Decision No. 8100. The Association argues the proceeding in 1967 rendered the issues in the instant matter res adjudicata.

DISCUSSION:

With respect to the procedural issue raised by the Association to the effect that the previous determination by the Commission involving the same issue in Decision No. 8100 renders the matter res adjudicata, the Commission deems that the amendments to Section 111.70, as reflected in MERA, warrant a re-examination of the Commission's 1967 determination and, therefore, we reject the Association's contention in this regard.

In determining whether a municipal employe is a managerial employe and, therefore, excluded from the definition of the term, "municipal employe", the Commission has stated as follows in City of New London: 7/

"Managerial employes, as well as supervisors, have been excluded from MERA coverage on the basis that their relationship to management imbues them with interests significantly at variance with those of other employes. In that managerial employes participate in the formulation, determination and implementation of management policy, they are unique from their co-workers . . . In addition, managerial status may be related to a position's effective authority to commit the Employer's resources. Managerial employes do not necessarily possess confidential information relating to labor relations or supervisory authority over subordinate employes."

Our considerations in this regard may or may not coincide with those of the National Labor Relations Board.

It should be noted that the definition of the term "employe" set forth in the State Employment Labor Relations Act (SELRA) excludes "management employes", and further that the term "management" is defined in Section 111.81(20) as including personnel "engaged predominately in executive and managerial functions, including such officials as division administrators, bureau directors, institutional heads and employes exercising similar functions and responsibilities as determined by the commission". Furthermore, SELRA, in Section 111.81(3), specifically establishes appropriate collective bargaining units, including Civil Service employes of the State engaged in the legal profession.

In fact, the Commission, after an election, has certified an organization representing such attorneys in the employ of the State,

6/ The Commission considers the Legislature's determination not to define managerial status not as a codification of its earlier decision but as a continuation of the Commission's responsibility for formulating said definition.

7/ City of New London (12170) 9/73. See also St. Croix County (11930-A) 6/73 and City of Milwaukee (11971) 7/73.

the majority of whom are employed in the Office of the Attorney General who perform duties that are similar, and, in some situations, identical to the duties performed by the Assistant City Attorneys involved herein.

The Legislature's provision for collective bargaining/attorneys employed by the State very strongly implies acknowledgement that the functions of an attorney are not per se managerial.

The operation of the City is highly complex and technical in nature in many respects. It legislates through ordinances and resolutions. It sues and is sued. It adopts budgets and expends funds. No elected official, board or commission, or appointed department head or supervisor has all the expertise necessary to prepare for the establishment and formulation of these functions, nor to represent the City in the implementation thereof. They must rely on professional personnel and other employes for advice and counsel in such regard. The professional personnel not only includes attorneys, but also budget analysts, engineers and members of other professions. Such advice and counsel should be, and no doubt is, loyal to the City and favorable to its functions. However, the performance of professional responsibilities loyal and favorable to the management of the City does not constitute grounds for the conclusion that said professionals are managerial employes.

We do not consider that the work product and activity of the non-supervisory and non-confidential Assistant City Attorneys in the employ of the Office of the City Attorney constitute sufficiently determinative participation in the formulation, determination and implementation of the management policy of the City, to require the conclusion that said Assistant City Attorneys are "employes" within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

Finally, the Commission recognizes that in some of its past decisions on managerial status, under both MERA and the preceding Act, there have been statements and implications to the effect that a finding of such status requires some involvement by the personnel involved in the employment relations of the employer. It is our holding herein that managerial status, unlike supervisory and confidential status, does not reflect a role in employment relations. Rather, managers are those persons who are involved with the employer's policies at a relatively high level of responsibility and, therefore, do not share the employes' community of interests so much as they are integrated with supervisory personnel. Indeed, many managers are also supervisors; but certainly the Legislature in excluding managers recognized them as other than supervisors or confidentials. Therefore, by this decision, we explicitly modify all of our past implications and statements to the effect that a role in employment relations is an element of managerial status.

Dated at Madison, Wisconsin this *21st* day of February, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slawney
Morris Slawney, Chairman

Zel S. Rice II
Zel S. Rice II, Commissioner

Howard S. Bellman
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