STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

CITY OF MILWAUKEE, * 142-170

Plaintiff, *

v. *

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, *

Defendant. * Decision No. 12035-A

*

Before: Hon. W. L. Jackman, Judge

Hearing on Judicial Review: July 2, 1974
Appearances: Plaintiff by Herbert Wiedeman, Richard D. Hicks
Defendant by Charles D. Hoornstra, Michael McCabe.

The issue in this case is whether the conclusion of the respondent that the petitioner's employees employed as Assistant City Attorneys under civil service are municipal employees under Sec. 111.70(1)(b) and are not "managerial" employees. Petitioner contends that by reason of their duties and the fact that they are attorneys who exercise broad discretion in the performance of their duties and, as attorneys, occupy positions of trust and confidence toward their employer.

Respondent apparently has taken the position that, while professional employees do exercise discretion in performance of their duties and responsibilities as professional employees, this does not of necessity make them "managerial" employees. Like many relationships the matter of degree is of importance. Professional people employed by anyone owe a loyalty to their employer while acting in relation to persons outside the master-servant relationship. This loyalty and duty to act for the best interest of the employer does not necessarily mean that the professional employee should not be in a position to assert himself for his own interest in his economic relations with his employer. Of course, there is recognized in the statute that certain employees, particularly of municipal corporations (who act through officers and employees) who are so situated in positions of responsibility for policy making or dealing with other employees that the municipality should not be required to assume a position hostile to them or they to the municipality under any circumstances with respect to the conditions of their employment. Usually these employees are those in the higher paid brackets whose conditions of employment are less likely to be the subject of grievances than the employees in lower paid classes. It is easy to see that supervisors of other employees should not engage in controversy with the employer.

An attorney, either as an independent contractor or as an employee, exercises control and discretion within the field of his professional skill with respect to the progress of litigation and the choice of methods to achieve the result his employer wishes. But the matter of what result shall be sought or achieved in each case is the prerogative of the client or employer. Management implies an identity with the employer corporation that includes the determination of policy and with it the right to determine that policy by reason of the position held. There is, of course, a shady area where the duties and responsibilities of the municipal employee have some of the attributes of the manager, yet the position is not one which has all the positive powers one usually associates with management. The Assistant City Attorneys fall into the shady area. The judgment whether they are managerial employees is one of balancing whether the relations of the Assistant City Attorneys to the municipal employer are weighted more heavily in the area of management than in the area of service. It would appear to us from the record that it is a matter of judgment to determine where the balance weighs most heavily. Whether it is said to be a matter of law or fact does not really make much difference. The real question is whether the state agency which is the trier of fact has made a choice between the two contending viewpoints which can be said to be reasonable as having a basis in the evidence before it.

In the case at bar, there are a substantial number of attorneys employed by the City in the legal department which is headed by the City Attorney. The assistants (excepting those having immediate supervision over the others) do represent the City in the preparation of legal documents and in controversial situations, such as court proceedings, involving the City and other persons. In a sense each manages his own performances, but in the sense that we usually associate with management in respect to employee relations he does not manage, he merely performs the tasks assigned to him. We do not think it unreasonable for the Commission to say that he is not a manager because he does not have the policy determining authority that is the attribute of management.

We think that on the merits of the case the Commission must be affirmed. We see no need to be involved in the procedural aspects as to whether there is here involved only an interlocutory decision. We are holding that the Commission had the power and authority to determine that the Assistant City Attorneys involved in the controversy before the Commission are not managerial employees of the City.

It is therefore ADJUDGED: That the findings of fact, conclusions of law and declaratory ruling of Wisconsin Employment Relations Commission (Decision No. 12035-A) are hereby affirmed.

Dated July 15, 1974.

BY THE COURT

W. L. Jackman /s/
Judge