

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF DELAVAN

Appearances:

No. 12185-A

issued numerous policy memoranda, instructing his shift commanders on procedures in such matters as sick leave, personal appearance, the exercise of discipline, patrol activities, enforcement of parking ordinances, and the calling of reserves. Malsch generally communicates through the chain of command, bringing concerns regarding patrol officers and dispatchers to the attention of the appropriate shift commander for resolution rather than to the attention of the subordinate employee directly. Malsch has also assumed command of major crime scenes during shifts other than his own. Malsch wrote and issued job descriptions for all personnel, and made individual shift assignments for non-bargaining unit officers, which authority he continues to possess. Prior to becoming Chief, Malsch served as lieutenant, in which capacity in 1976 he suspended a subordinate with pay, the most recent time such an action has been taken by someone other than the chief or second-in-command.

6. Subject to instances to the contrary cited below, shift commanders have the following authority: to issue verbal warnings reduced to writing, and to relieve an officer from duty with pay; to authorize overtime; to issue work assignments; to sign time sheets; and to approve complaint cards and incident reports. Subject to instances to the contrary cited below, shift commanders do not have the authority to suspend without pay; to call in supplemental personnel; to set work or vacation schedules; or to effectively recommend discipline ranging from a written warning to discharge.

7. The commander of the first shift (7:00 a.m. to 3:00 p.m.) is Lt. Ladislav Kostecky, a 20-year veteran of the force. During Kostecky's duty tour, the duty force consists of the Chief, the detective sergeant and one dispatcher. As the only officer routinely on patrol during the first shift, Kostecky devotes the overwhelming portion of his time to performing normal patrol duties identical to those performed by non-supervisory patrol officers. Kostecky is paid an annual salary approximately \$3,000 more than that paid to patrol officers. Kostecky's participation in hiring, assignment and evaluations has been sporadic and inconclusive, in that he has sat in on an indeterminate number of hiring panels and been a part of consensus hiring recommendations, he has no patrol officers serving with him on his first shift, and the use of evaluations has been held in abeyance for about a year.

8. The commander of the second shift (3:00 p.m. to 11:00 p.m.) is Captain Timothy O'Neill, a 16-year veteran of the force. During O'Neill's duty tour, the duty force consists of one other officer, another officer who reports at 9:00 p.m., and one dispatcher. O'Neill devotes approximately five to six hours per shift to normal patrol duties similar to those performed by non-supervisory patrol officers. After serving as a sergeant for about ten years, O'Neill was appointed Captain in August, 1987, in which capacity he serves as the Department's second-in-command. As such, O'Neill assumes effective command of the Department in the Chief's absence (counting all forms of leave, about three to four weeks). O'Neill's participation in the hiring process has been irregular. The Chief has invited O'Neill's participation on only three of the last five or six hiring panels. O'Neill has occasionally investigated citizen complaints about the performance of other officers. As Captain, he is in charge of department-wide training activities. As shift commander, O'Neill actively monitors the assignments of his personnel, and occasionally makes specific reassignments contrary to standardized procedure. O'Neill is paid at least \$2,000 more than patrol officers, and, while he can authorize overtime pay, is not himself eligible to receive same.

9. The commander of the third shift (11:00 p.m. to 7:00 a.m.) is Sgt. James A. Ritchie, a 19-year veteran of the force. The third shift roster consists of two patrol officers and one dispatcher; based on the Department's days and hours rotation, Ritchie regularly works in tandem with one officer, whose tour runs from 9:00 p.m. to 5:00 a.m.; when Ritchie is off duty, the junior of the two other officers reports at 9:00 p.m., and the senior officer, serving as the officer-in-charge, reports at 11:00 p.m. About four or five years ago, Ritchie and the Chief participated jointly in a consensus decision to impose a three-day suspension on an officer assigned to Ritchie's shift. Ritchie spends the overwhelming bulk of his time on patrol duties similar to those performed by patrol officers. He plays no role in developing the master schedule or duty roster; he reviews, amends if necessary, and signs the incident reports which detail the activities of patrol officers during his shift; he is paid about \$3,000 more than the top patrol officer; he has been sent to some supplemental supervisory training seminars, but not all that he requested; of the six most

recent hires (all of whom, as reserve officers, may be assigned to the third shift), he participated in the hiring process twice; and he can authorize overtime, but his use of supplemental personnel is subject to review and approval by the Chief.

10. Sgt. Craig A. Weber served as shift commander, alternating between the second and third shifts, from January 1982 to January 1987, since which time he has been assigned solely to the second shift; based on the Department's rotation of work schedules, Weber serves as de facto shift commander approximately half of his working days. As both a formal and de facto shift commander, Weber had/has the authority to authorize overtime and to sign incident reports. In neither capacity did/does Weber have the authority to set work or vacation schedules. In both capacities, Weber spent/spends the vast majority of his time at road patrol tasks, substantially similar to those performed by patrol officers. In both capacities, Weber received/receives higher pay than patrol officers. Weber did not attend any of the scheduled supervisors' meetings in the year preceding this proceeding. Weber's participation in the hiring process has been limited to conducting some background checks and preliminary ranking of applicants, but he has not participated in interview panels.

11. Det. Sgt. Roy Ostermann is the Department's principal investigator of allegations of criminal acts and violations of municipal ordinances. Prior to December, 1986, he served as the Department's second-in-command, a position he thereafter voluntarily relinquished. In such capacity, during the absence of the Chief, he on at least one occasion suspended a patrol officer, with pay, for reporting late to duty. Pursuant to a job description posted on June 1, 1979, Ostermann was explicitly assigned the responsibility for conducting internal investigations, i.e., investigations into violations of law or departmental policy allegedly committed by Department personnel. During the period 1982-1985, Ostermann conducted approximately 14 such investigations, all but two of which involved members of the bargaining unit here at issue. Pursuant to a job description published August 24, 1987, however, the explicit reference to internal investigations was deleted; Ostermann conducted no such internal investigations from 1986 to the present, and any future such investigations will be assigned by Malsch on a case-by-case basis. Ostermann has no subordinates whom he routinely oversees, and he has played no role in the evaluation, training, hiring, or disciplining of personnel since he left the post of second-in-command. As a superior officer, Ostermann can, except when outranked by another officer, direct the activities of patrol officers during an investigation or at a crime scene.

12. When the regular shift commander is off duty, the senior subordinate assumes the position of officer-in-charge; given the scheduling practice, there is an officer-in-charge, rather than the formal shift commander, on duty approximately half of the time. An officer-in-charge, like a shift commander, has the authority to review and approve complaint cards (which indicate the complaint and the response thereto), sign time sheets, approve overtime, issue work assignments, assume command at a crime scene, request supplemental personnel, receive (except for O'Neill) overtime pay. An officer-in-charge, unlike a shift commander, cannot impose formal discipline or formally approve reports. Given the distribution of personnel among the shifts, the position of officer-in-charge is sometimes held by a reserve patrol officer.

13. The Department's use of evaluations has gone through several modifications in recent years; at various times since Malsch assumed command, evaluations have been done on a quarterly, biannual and annual basis. At the time of this proceeding, however, no evaluations had been done for about a year, a decision Malsch attributed to lingering morale problems related to recent layoffs. When evaluations have been done, they have followed a fairly formal process, with the shift commander completing a ten-factor, five-grade rating grid, making a recommendation for future personnel action (ranging from dismissal to promotion), and discussing the evaluation with the affected employee. Although the collective bargaining agreement does not provide for merit or performance pay, the evaluations may have been used in other instances (e.g., deciding whether to promote a reserve officer to permanent status).

14. Capt. Timothy O'Neill does possess and exercise supervisory authority in sufficient combination and degree to be deemed a supervisory employee.

15. Lt. Ladislav Kostecky, Det. Sgt. Roy Ostermann, Sgt. James Ritchie and Sgt. Craig Weber do not possess and exercise supervisory authority in sufficient combination and degree to be deemed supervisory employees.

16. Det. Sgt. Ostermann does not have sufficient access to, knowledge of, and participation in confidential matters related to labor relations so as to be deemed a confidential employee.

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

CONCLUSIONS OF LAW

1. The positions of first shift commander, third shift commander and sergeant/swing shift commander, respectively currently occupied by Lt. Ladislav Kostelecky, Sgt. James Ritchie and Sgt. Craig Weber, are not supervisory within the meaning of Sec. 111.70(1)(o), Stats., and therefore are occupied by municipal employees within the meaning of Sec. 111.70(1)(j), Stats., and accordingly are appropriately included in the collective bargaining unit described in Finding of Fact 3 above.

2. The position of detective sergeant, currently occupied by Roy Ostermann, is neither a supervisor within the meaning of Sec. 111.70(1)(o), Stats. nor confidential and therefore is occupied by a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and accordingly is appropriately included within the collective bargaining unit described in Finding of Fact 3 above.

3. The position of captain, currently occupied by Timothy O'Neill, is supervisory within the meaning of Sec. 111.70(1)(o), Stats., and therefore is not occupied by a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., accordingly is not appropriately included within the collective bargaining unit described in Finding of Fact 3 above.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

The positions of first shift commander, third shift commander, detective sergeant and sergeant/swing shift commander are hereby included in the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 3rd day of August, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
[Signature]
Herbert Torosian, Commissioner
[Signature]
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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, 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.

CITY OF DELAVAN

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

POSITIONS OF THE PARTIES

There are five positions at issue. In general, the Association contends that the positions should be brought into the unit because they are akin to working foremen, while the City contends they should remain outside the bargaining unit because they are supervisory and/or confidential. Their specific averments are as follows:

THE ASSOCIATION'S POSITION

The shift commanders at issue do not have the authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees. While shift commanders do have the authority to suspend a subordinate with pay, the record testimony establishes that the last time this was done was in 1976. The testimony also establishes that the Chief of Police has reversed or even dismissed recommendations of discipline and discharge. Moreover, three of the incumbents believe that the most severe discipline they can issue on their own authority is an oral reprimand reduced to writing. In addition, there is no formal procedure for either staff meetings or performance evaluations.

Second, the shift commanders do not have the authority to direct and assign the work force. The master work schedule is prepared by the Chief of Police, and shift commanders can call in reserves on their own authority only as replacements for scheduled personnel who are absent, not as supplemental personnel.

Third, the positions are non-supervisory due to the limited number of personnel they oversee. With a total work force of 14 full-time personnel, including the Chief, and eight reserve or part-time personnel, the standard shift provides for one shift commander and one patrol officer. There is no evidence to support the City's desire for one supervisor for each subordinate.

Fourth, the shift commander's higher rate of pay reflects their greater skill and longer tenure, rather than any supervisory responsibilities.

Fifth, the shift commanders primarily supervise activities rather than employees. That is, during the small percentage of time in which they are performing duties other than those of a regular patrol officer, they supervise activities such as checking the accuracy of reports, making squad car assignments, and assuming command at crime scenes.

Sixth, the shift commanders do not spend a substantial majority of their time supervising employees, but are instead working supervisors. The record testimony establishes that the shift commanders spend the overwhelming bulk of their time performing patrol duties identical to the patrol duties of members of the bargaining unit. The Commission has previously established that employees who spend a similar percentage of time doing bargaining unit work are non-supervisory.

Finally, the shift commanders exercise little independent judgment and discretion while supervising employees. Even though the collective bargaining agreement designates the immediate supervisor as the first step in the grievance, the record testimony establishes that the Chief of Police has the final say, and that the shift commander's actions in this field are essentially procedural or ministerial.

As regards the detective sergeant, that position is neither supervisory nor confidential. First, the position has no subordinates to supervise, nor has the incumbent participated in any disciplinary or hiring decisions. Also, the responsibility for internal affairs investigations, which the position formerly held, was removed from the most recent position description, and the Chief of Police will assign such investigations henceforth on a case by case basis. Moreover, no such investigations were undertaken at all in 1986 or 1987.

In summary, the shift commanders are not supervisory employees, but rather operate as experienced lead persons; they should be included in the non-supervisory law enforcement bargaining unit.

THE CITY'S POSITION

This proceeding is an aspect of a concerted legal attack by the Association upon the City, undertaken in response to recent layoffs, without any consideration as to whether the incumbents at issue desire to be represented, and absent any evidence that the previous voluntary separation of the positions from the bargaining unit should now be reversed.

As a class, the shift commanders exercise sufficient supervisory responsibility on a daily basis to justify exclusion from the bargaining unit. Such supervisory responsibility is shown by their authority to authorize or deny overtime, assign cases, assign squad cars, grant or deny sick leave and shift exchanges, call in reserves, sign reports, serve as the first step in the grievance process, and take disciplinary actions. Further, the issue of the ratio of supervisors to subordinates is irrelevant; denial of the supervisory status of the second, third and swing shift commanders will deprive the City of having any management representative present of each of those shifts. Moreover, the detective sergeant is not only supervisory, but should be excluded as a confidential employee as well, based on his role in internal affairs investigations.

Individually, the application of the supervisory standards is also clear.

Capt. O'Neill's position description specifically notes he is responsible for supervising the second shift, for a range of training and technical services, and for serving as Acting Chief in Chief Malsch's absence. Capt. O'Neill has in the recent past denied and approved overtime requests, completed employee evaluations, and effectively recommended various levels of discipline and actions concerning hiring and retention. Capt. O'Neill spends about three hours per shift on non-patrol supervisory duties.

Sgt. Ritchie performs many of the same supervisory duties as Capt. O'Neill, other than serving as permanent second in command. He has taken several specific steps in employee evaluation, training, discipline and assignment. As commander on a shift on which there are two patrol officers regularly scheduled, Sgt. Ritchie's supervisory status is not challenged by the issue of supervisor-subordinate ratio. And as the commander of the third shift, during which the most troubles occur, Sgt. Ritchie plays a crucial and vital role in the administration of the Delavan Police Department.

Sgt. Weber, when serving as shift commander due to the absence of Sgt. Ritchie or Capt. O'Neill, has the same authority as other shift commanders. Thus, he too can recommend the hiring, promotion and discipline of bargaining unit members; authorize or deny overtime; complete employee evaluations; assign work; and exercise all the other shift commander powers. Moreover, more than any other shift commander, Sgt. Weber has compiled an extensive record of involvement in policy development impacting on important labor relations matters. While Sgt. Weber is not acting as a shift commander every day, on those days when he does serve as a shift commander, his authority and responsibility are the same as any other.

Lt. Kosteletzky, by working the first shift, may have fewer subordinates to oversee, and may be able to delegate certain supervisory duties to the Chief, and may have compiled less extensive a record of taking supervisory actions. Nevertheless, he has the residual power of a shift commander, and he has a rank and a pay scale higher than the other shift commanders, so he too must be a supervisory shift commander.

Det. Sgt. Ostermann, as the officer in charge of the Investigations Division, is uniquely situated to handle investigations of an internal as well as external nature. Between 1982 and 1985, he conducted 13 separate investigations involving allegations against bargaining unit members, investigations which involved fact-finding, consideration of contractual provisions, assessment of possible litigation, and grievances; his inclusion into the unit would hopelessly compromise his ability to carry out these functions. Moreover, Ostermann retains certain supervisory authority attendant on his rank, such as giving input into hiring, discipline and promotion decisions, and making assignments. Thus, although he has no specific subordinates, he routinely orders employees from other shifts to perform certain duties, under the explicit understanding that he has the authority to effectively recommend discipline for any employee who improperly carries out his directives.

In summary, the Association has not met its burden of establishing a compelling reason to disturb the status quo regarding these positions. Moreover, the record establishes that the Chief of Police relies heavily on each shift commander and the Det. Sgt. to help run the department, and that the sufficient indicia of supervisory status exists both in theory and in practice. The Association's petition should be dismissed in its entirety.

DISCUSSION

1. Supervisory Status

The City has raised as a threshold issue the matter of the relevant bargaining history, which, it contends, shows that the positions at issue were formerly within the unit, but were subsequently removed at the specific behest of the Union. The City also asserts that none of the individuals involved desires to become attached to this bargaining unit, and asks that we respond accordingly.

Our role in this case is limited to determining whether the current duties and responsibilities of the occupants of the disputed positions continue to warrant exclusion from the bargaining unit because they are supervisory or confidential employees. Occupants of supervisory or confidential positions cannot properly be included in a unit because they lack "municipal employee" status. On the other hand, if the occupants of the disputed positions are not supervisory or confidential employees, the Association is entitled to represent them as part of the certified bargaining unit. The wishes of the individuals involved or the bargaining history, if any, surrounding the unit status of the position are irrelevant to our determination of the employee's duties and responsibilities. 2/ Thus, the City's argument to the contrary is necessarily overcome.

Historically, we consider the following factors in determining if a position is supervisory in nature:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
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 his skills or for his 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 he spends a substantial majority of his time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. 3/

We have previously commented that the quasi-military organization of police departments "presents a somewhat unique problem" in making determinations with regard to alleged supervisory status. 4/ Accordingly, we have considered the present case in light of our past decisions affecting law enforcement departments.

2/ Jackson County, Dec. No. 14129-B (WERC, 8/79).

3/ City of Rice Lake, Dec. No. 20791 (WERC, 6/83).

4/ City of Madison, Dec. No. 11087-A (WERC, 12/72).

When we have found officers, either Sergeants or Lieutenants, to be supervisors, it has been because the record demonstrates a high level of involvement in major labor relations decisions. For example, the Sergeants we have found to be supervisors had the authority: to independently issue verbal and written reprimands and to effectively recommend more severe forms of discipline; to consistently participate in hiring decisions, and to conduct meaningful performance evaluations and to call-in additional employees; 5/ to issue oral or written reprimands, or impose a day's suspension, pursuant to written policies; 6/ to consistently participate in hiring decisions, to effectively recommend written reprimands, to designate shift commanders, and to conduct meaningful performance evaluations; 7/ and, to independently change work schedules, to consistently participate in hiring decisions, to independently take oral and/or written disciplinary action and to effectively recommend more severe discipline, to conduct performance evaluations, and to do work substantially distinct from patrol officers. 8/

Those officers whom we have found to be non-supervisory have displayed few, if any, of these factors. For example, we recently found Sergeants to be non-supervisory because they had little or no role in the hiring or transfer decisions, could not effectively recommend discipline above a written warning, could not recommend promotions, conducted evaluations which were only preliminary, and shared many work features with those whom they oversaw. 9/ A Lieutenant, who had the routine authority to call in replacements, change work schedules, and approve days off, who performed the same duties as patrol officers, had no role in grievance adjustments, did not conduct written evaluations, lacked the authority to impose or effectively recommend discipline, and was often the sole officer on duty, was found to be non-supervisory. 10/ We have even found a Chief Deputy, in command of the department on a regularly recurring basis, to be non-supervisory because the record was void of his making any major labor relations decisions. 11/

The extent of disciplinary authority possessed by a shift commander is somewhat difficult to assess. It is clear that the shift commanders have the independent authority to verbally reprimand and to reduce such a reprimand to written form, where appropriate. As to more severe forms of discipline, the position description suggests that shift commanders also have the authority to independently issue written reprimands. However, our review of the testimony of the Chief and the various shift commanders persuades us that a written reprimand will generally be issued only after consultation with the Chief. Furthermore, our review of the record as a whole satisfies us that as to disciplinary actions ranging from written reprimands to discharge, the Chief's involvement, especially in the context of a small department, is likely to include his making an independent assessment and determination of what discipline to impose in addition to receiving the input of the shift commander. Thus, we do not believe the record supports a finding that shift commanders can effectively recommend discipline at levels in excess of that which they can independently impose.

As to the Detective Sergeant's disciplinary authority, we do believe that his authority is certainly no greater than the shift commander's and is only likely to be exercised when he takes charge of a crime scene.

As to the matter of effectively recommending hiring, as the record evidence shows the incumbents' involvement in the hiring process to be informal and irregular. Applicants first submit to a background check, after which the City's Police and Fire Commission interviews. After applicants have been certified by

5/ Sauk County, Dec. No. 17201-A (WERC, 6/87).

6/ Dane County, Dec. No. 21406 (WERC, 2/84).

7/ City of St. Francis, Dec. No. 24473 (WERC, 4/87).

8/ La Crosse County, Dec. No. 19539 (WERC, 4/82).

9/ Milwaukee County, Dec. No. 74855 (WERC, 10/87).

10/ City of Kiel, Dec. No. 11370-A (WERC, 3/85).

11/ Menominee County, Dec. No's. 23352-23355 (WERC, 3/86).

the Commission to be eligible for hire, the Chief invites the command staff to participate in a further interview panel; however, their recommendations reflect a consensus after a group discussion, rather than individual recommendations. Moreover, individual participation is irregular and varies from individual to individual. For example, O'Neill was invited to sit in on only three of the most recent five or six panels, Ritchie was not involved in four of the most recent six panels, Weber's involvement has been limited to making a preliminary ranking on the basis of education and experience, and Ostermann has not participated in the hiring process at all.

In assessing the authority to direct and assign the work force, we cannot overlook the importance of the chain of command in a para-military force such as a police department. That is, an officer of higher rank will generally have the authority to issue orders to subordinates, regardless of our determination as to supervisory status. We also note that most assignments (e.g., who should respond to a call, and in what manner) are routine. Moreover, the record indicates that only one officer, O'Neill, regularly issues directives and assignments requiring officers to respond in a manner different than the standard operation procedure would call for. The record before us indicates that Chief Malsch takes an especially active and involved role in setting precise policies. By official memoranda, he has instructed his shift commanders 1) to call out reserves in a particular manner; 2) to give added attention to the care and maintenance of department equipment and vehicles; 3) to devise new methods of patrolling to reduce the use of gas and oil; 4) to increase traffic enforcement and the issuance of parking tickets; 5) to be more vigilant in enforcing policies regarding personal appearances; 6) to use a specific policy regarding sick leave; 7) to use a specific policy in checking open doors and windows while on patrol; 8) to have their personnel spend less time in the office, conduct more foot patrols, and obey traffic laws more vigilantly.

While the Chief officially works the first shift, the record shows that he takes an active role in directing the work force of the other shifts, including scheduling supplemental personnel to handle major events and even taking direct command at the scene of a major crime during the third shift.

The City places great weight on the authority of the shift commanders in such areas as granting sick leave, approving shift exchanges, setting work priorities, supplementing the regular work force, and assigning patrol cars. We find these considerations less persuasive. First, we read the record as establishing that only Capt. O'Neill (whom we find to have more significant supervisory responsibilities than the other shift commanders) has the authority to supplement the regular work force without the Chief's approval. Next, we note that certain of these responsibilities (e.g., granting sick leave, assigning patrol cars) are also borne by non-shift commanders serving as officer-in-charge. Finally, there are the numerous and detailed memoranda issued by the Chief (specifically focusing on such matters as sick leave, shift exchanges and work priorities), which serve to routinize the exercise of independent judgment in these areas so as to make action practically ministerial.

Based on this record of active and extensive involvement by the Chief, we find that the positions in question exercise only a modest, and sometimes even minimal, amount of independent judgment in the supervision of their subordinates.

Regarding the issue of the number of employees supervised, apart from the Chief and the five positions here at issue, the Delavan Police Department consists of five patrol officers, six reservists, two dispatchers, one civilian dispatcher, and two reserve civilian dispatchers, for a total of 16 positions. According supervisory status to the five positions at issue would result in a ratio of a little more than 1:3 for the entire force, a little less than 1:2 for the sworn force, and 3/4:1 for the full time force. Further, we note that two of the incumbents, Lt. Kostecky and Det. Sgt. Ostermann, regularly work the same schedule as does the Chief, and that the one patrol officer who works on Sgt. Ritchie's third shift spends two hours per shift under the command of Capt. O'Neill. Clearly, this factor is not supportive of a finding of supervisory status.

The five incumbents have an average tenure of 16 years with the Department, greater by three years than the average for patrol officers. The testimony indicates that they are paid somewhere between \$2,000 and \$3,500 more, annually. But, since Det. Sgt. Ostermann has no direct subordinates, we conclude that he is

paid this higher wage primarily for his investigative skills, rather than for any supervision. Similarly, since Sgt. Weber occupies a command position only half of his time on duty, yet apparently receives the same wage as Sgt. Ritchie, it must be that this higher wage is higher for something other than employee supervision. The same conclusion emerges when we note that Lt. Kostelecky's wage is equal to or higher than Sgt. Ritchie's, even though his supervisory duties are less. We have no doubt that the higher pay range reflects, in part, a consideration that these officers bear greater responsibility than do the patrol officers; but responsibility does not necessarily equate with supervisory status, as we herein use that term.

The question of whether supervision is primarily of an activity or of employees is often difficult to assess. Here, because the superiors are frequently not in direct physical proximity with their subordinates, and because one of their few independent authorities concerns the review and approval of incident reports, it appears that their supervision is primarily of activities rather than employees. 12/

The matter of how the superiors spend a majority of their time is easier to evaluate. In conjunction with the foregoing it would seem to be a decisive factor in this case. With the exception of Capt. O'Neill, who himself spends about five hours per shift doing patrol duties, and Det. Sgt. Ostermann, whose investigative duties are unique to him, the incumbents of the positions at issue all spend the overwhelming majority of their time performing the same sort of patrol duties as do their subordinates.

Because we consider these matters on a case-by-case basis, it is instructive to compare the instant case with other similar situations. In Wisconsin Rapids, the shift commander lieutenants we found to be supervisors had as their primary duty the supervision of a four-member detail, rather than patrol duty, and they prepared formal, standardized evaluations, a factor we found to be "of considerable importance." In Delavan, Lt. Kostelecky, Sgt. Ritchie and Sgt. Weber have patrol responsibilities as their primary duty, their ancillary supervisory duties cover only one or two other persons at any time, and formal evaluations have been held in abeyance for a substantial period of time.

In Sauk County, the ratio of patrol officers to the patrol sergeants we found to be supervisors was again 4:1 or better; moreover, the Sauk supervisors spent about half their time on purely administrative duties, routinely granted vacation requests, and performed biannual employee evaluations, factors not present in Delavan.

In LaCrosse County, the sergeants we found to be supervisors were mainly assigned to supervising a shift of three patrol officers, had the authority to arrange vacation schedules, and prepared an annual Employee Development Review for each employee; again, these are factors not found in Delavan.

Finally, even in City of St. Francis, upon which the City relies heavily, significant differences emerge. In St. Francis, the sergeants whom we found to be supervisors routinely performed internal investigations, prepared detailed, standardized monthly and quarterly performance evaluations, selected subordinates for extra training opportunities, attended monthly staff meetings, and had the authority to designate the officer to serve as acting shift commander in their absence, a designation which carried with it supplemental salary at the sergeant's schedule. Again, none of these factors are found in the operations of the Delavan Department.

Thus, in four recent cases (three of which were decided within the past

assumes control of the Department in the Chief's absence and he exercises greater authority in the assignment and direction of the work force than do the other positions in dispute.

2. Confidential Status

During a prior period in Det. Sgt. Ostermann's tenure, his position was voluntarily excluded from the bargaining unit. The Association now contends that changed circumstances -- the alteration in the official job description, and Ostermann's yielding of the position as second-in-command -- justify his inclusion in the bargaining unit, while the City maintains that Ostermann's investigatory duties still carry with them sufficient indicia of supervisory and confidential status to warrant continued exclusion. We believe the Association's analysis has greater merit.

Clearly, Ostermann's position within the Department has undergone two material modifications. Under the previous position description, he was previously formally assigned the responsibility of conducting internal affairs investigations; accordingly, he conducted approximately 14 such investigations during the period 1982-1985, all but two or three of which involved bargaining unit members. When Chief Malsch published a new position description in August, 1987, however, that explicit assignment was not continued. Also, it is undeniable that Ostermann was formerly the Department's second-in-command, a position of significant status and responsibility, which he voluntarily relinquished for personal reasons.

The Commission has consistently held that an employee is excluded from a bargaining unit as a confidential employee if said employee has access to, has knowledge of, or participates in confidential matters related to labor relations. In order for information to be considered confidential, it must be of the type that deals with the employer's strategy or position in collective bargaining, contract administration, litigation, grievance handling or similar matters, and the information must be unavailable to the bargaining representative or its agent. The Commission has further held that "where the duties of an employee are closely related to activity which could lead to disciplinary action, such duties are confidential and, as such, an employee shall be excluded from a bargaining unit because of confidential status." 13/

The Commission has on several occasions considered the employment status of law enforcement personnel with responsibility for internal affairs. In Milwaukee County (Sheriff's Department), Dec. No. 22519 (WERC, 4/85) we held as confidential a position specifically designated Internal Affairs Officer, whose job consisted primarily, if not exclusively, of investigating his fellow employees in the Sheriff's Department. In addition to this quantitative nature of his investigative duties, the officer had the qualitative responsibility to act in a quasi-prosecutorial mode when he made an independent judgment that a rule had been violated. Neither of those defining characteristics is now present in the case of Det. Sgt. Ostermann.

Rather, the situation in Delavan is much more akin to that found in the City of Manitowoc, where the detectives at issue had only occasional responsibility for internal affairs, and where they served as fact gatherers and not decision-makers following such investigations. We held such positions to be municipal, and not confidential, employees. 14/

Ostermann's role in internal affairs investigations has gone through three phases. Initially, he enjoyed considerable discretion to initiate internal investigations as he determined whether they were required; later, but still during the period he was second-in-command, he was instructed to clear such investigations through Chief Malsch; finally, under the personal and job description changes noted above, his responsibility for internal affairs investigations is now triggered only by an express order by the Chief. Thus, as

13/ Walworth County, Dec. No. 18846 (WERC, 7/81).

14/ City of Manitowoc (Police Department), Dec. No. 20696 (WERC, 5/83).

in Manitowoc, Ostermann is now primarily an investigator of criminal activity by the general public; only on an individual, case-by-case basis, does he have the responsibility for investigating matters related to internal affairs. Given the foregoing, we therefore concluded that he is not a confidential employee.

Dated at Madison, Wisconsin this 3rd day of August, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Henpe
A. Henry Henpe, Commissioner