STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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CITY OF MANITOWOC,

Petitioner, Case No. 141-491

vs.

MEMORANDUM DECISION

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent. Decision No. 12403-A

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BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

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This is a proceeding under ch. 227, Stats., to review an order of the respondent commission dated January 16, 1974, placing the positions of deputy city clerk, deputy city treasurer, deputy city assessor, and the information and referral service manager in the collective bargaining unit of city employees represented for collective bargaining purposes by Local 731, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO (hereafter the union).

Under date of March 12, 1973, the petitioner city and the union entered into a collective bargaining agreement for the calendar year 1973. The only employees covered by this agreement making up the collective bargaining unit are all regular full-time and part-time office personnel in various city departments. A schedule listing hourly rate of pay for various job classifications was attached to and made a part of the agreement. Specifically included in this schedule were the job classifications of deputy city clerk, deputy city treasurer, and deputy city assessor. On May 30, 1973, the city filed a petition with the commission praying for the elimination of these three offices from the collective bargaining unit on the ground that their positions were supervisory in nature. Thereafter, on June 15, 1973, the union petitioned the commission to clarify the previously certified bargaining unit to include the position of information and referral service manager.

A public hearing was held on these two petitions before a hearing officer of the commission on July 20, 1973. Although testimony was taken no stenographic reporter reported the same. Thus the record certified to this Court contains no transcript of testimony. Two exhibits offered by the city were received in evidence consisting of the aforementioned collective bargaining agreement and a letter dated April 20, 1972, from the city clerk to the city attorney seeking a legal opinion as to whether the deputy city assessor appointed by the former city assessor might carry out the responsibilities of the city assessor (there then being a vacancy in the office of city assessor). These two exhibits are included in the record certified to this court. There are attached to the city's brief a copy of the 1974 collective bargaining agreement between the city and the union but this court deems it cannot resort to that in reviewing the order before it because not part of the record before the commission certified to this court.

The commission attached to its order of January 16, 1974, a memorandum decision setting forth comprehensive detailed factual statements with respect to each of the four positions affected by its order.

The city advances these three grounds in support of its contention that the commission committed errors of law in making its decision that the four positions should be included in the bargaining unit:

(1) The positions of deputy treasurer, deputy clerk and deputy assessor are statutory offices; and they are appointed respectively by the city clerk and city treasurer and city assessor who have the right to remove them at their pleasure.

(2) The deputy treasurer, deputy clerk and deputy assessor perform the function and duties of their appointing officers in the absence or disability of these officers or a vacancy in the office of the officer whose deputy they are.

(3) The persons filling all four positions are supervisors within the meaning of the applicable statute.

The practical reason advanced by the city for not wishing the four positions included in the bargaining unit is because of the requirements in the collective bargaining agreement that the occupants of these positions may only be discharged for cause, and that vacancies in these positions must be filled through job posting and the accordance of seniority rights.

The statutes governing the appointment of deputy treasurers and clerks are as follows:

Sec. 62.09 (9) provides:

"Treasurer.

"* * *

"(f) He may in writing, filed in the office of the clerk, appoint a deputy who shall act under his direction and in his absence or disability, or in case of a vacancy shall perform his duties. The deputy shall receive such compensation as the council shall provide. The acts of such deputy shall be covered by official bond as the council shall direct."

Sec. 62.09 (11) provides:

"Clerk.

"* * *

"(i) He may in writing filed in his office appoint a deputy who shall act under his direction, and in his absence or disability or in case of a vacanty shall perform his duties, and shall have power to administer oaths and affirmations. The deputy shall receive such compensation as the council shall provide. The clerk and his sureties shall be liable on his official bond for the acts of such deputy."

However, it would appear to be proper and valid for a city common council to provide for the appointment of an assistant assessor under sec. 70.05 and give him the title of deputy assessor, and this is what apparently the petitioner city did, the city assessor being the appointing officer.

The statute which covers the removal of appointed city officers is sec. 17.12(1) which provides:

"General and special charter. Officers of cities operating under the general law or under special charter including school officers, may be removed as follows:

"* * *

"(c) Appointive. Appointive officers, by whomsoever appointed, by the common council, for cause, except officers appointed by the council who may be removed by that body, at pleasure. Officers appointed by any other officer or body without confirmation or concurrence by the council, by the officer or body that appointed them, at pleasure. . . ."

Whether a municipal employee is an officer for the purposes of a particular statute sometimes presents a problem. See Matcak v. Mathews (1953), 265 Wis. 1, 60 N.W. 2d 352, and Heffernan v. Janesville (1946), 248 Wis. 299, 21 N. W. 2d 651. The Court has no doubt but what the deputy treasurer and deputy clerk are officers for the purposes of sec. 17.12(I)(c), Stats., because of the above-quoted statutes which provide for their appointment and conferring such titles upon them. The Court reaches the same conclusion with respect to the deputy assessor inasmuch as he is an assistant assessor within the meaning of sec. 70.05(2), Stats. That statute does not speak in terms of assistants to aid the assessor but of assistant assessors, thus conferring a title of office.

The City contends that to place these three officers, i.e., the deputy treasurer, deputy clerk, and deputy assessor in the collective bargaining unit whereby the restrictive provisions of the collective bargaining agreement with respect to the appointment of persons to fill such position and their removal therefrom would violate secs. 62.09(9)(f), 62.09(11)(i), 70.05(2), and 17.12(1)(c), Stats. The fallacy of that contention is that neither the commission nor this court should resort to a collective bargaining agreement (unless possibly to look at the specified duties of the employee where spelled out in a job description made part of the agreement) to determine whether a particular person employed by a city is a supervisor for the purposes of sec. 111.70(1)(b), Stats., which provides:

> "'Municipal employe' means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential managerial or executive employe."

If the city is correct in maintaining that the Municipal Employment Relations Act (MERA), secs. 111.70 - 111.77, Stats., does not supersede and make inoperative the aforequoted provisions of secs. 62.09(9)(f), 62.09(11)(i), 70.05(2) and 17.12 (1)(c), then any provisions of an existing collective bargaining agreement which conflict with any of the provisions of such four statutes is invalid and void. The court deems it unnecessary to here determine whether any of the provisions of MERA do so conflict with and supersede the methods of appointment and removal of "deputy treasurer, deputy clerk, and deputy assessor provided in such four statutes. It is unnecessary because the city cannot prevail on this line of approach whichever way the Court decided the question. Furthermore, it should be pointed out that MERA does not require the city to agree in any contract negotiated with the union that the city treasurer, city clerk, and assessor not have the unfettered right to appoint whomever they chose as their deputies, nor the right to remove the same at their pleasure. This is because sec. 111.70(1)(d), Stats., provides:

> ". . . The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. . . ."

The Court turns now to the city's contention that in the absence or disability of the treasurer, clerk or assessor, or a vacancy in any of such offices, the deputy performs the duties and has their responsibilities. The commission answered this contention in its memorandum decision by holding the fact that the deputy fills in for his supervisor during the latter's absence does not convert the deputy into a supervisor. Poultry Enterprises, Inc. v. NLRB (5th Cir. 1954), 216 Fed. 2d 798, 801. Moreover, this conclusion by the commission is its interpretation of the word supervisor in sec. 111.70(1)(b) and (o), Stats., and the Court should not disturb the same unless it determines this to be an irrational interpretation. Wisconsin Southern Gas Co. v. Public Service Comm. (1973), 57 Wis. 2d 643, 652, 205 N.W. 2d 403. This the Court cannot do.

There remains for consideration the issue of whether the duties of all four employees are such as to make them supervisors within the meaning of sec. 111.70(1)(b) and (o), Stats. Sec. 111.70(1)(o), Stats., provides these statutory tests of what is a supervisor for purposes of sec. 111.70(1)(b):

"1. . . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. . . ."

The evidentiary criteria in determining supervisory status have evolved from commission decisions over a period of time. See City of Milwaukee (Decision No. 6960, December 1964); Wauwatosa Board of Education (Decision No. 6219-D, September 1967); and Racine County (Decision No. 8330, December 1967). They are, therefore, entitled to great weight, and the Supreme Court has approvingly used them. They are:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes.

2. The authority to direct and assign the work force.

3. The number of employes supervised, and the number of other persons exercising greater, similar or less authority over the same employes.

4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employes.

5. Whether the supervisor is primarily supervising an activity or is primarily supervising employes.

6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes.

7. The amount of independent judgment and discretion exercised in the supervision of employes.

The Attorney General's brief contends that the commission's determination that an employee is a supervisor within the meaning of sec. 111.70(1)(b), Stats., involves the drawing of an inference from evidentiary facts and so long as the inference is reasonable such determination is a finding of fact and conclusive upon a reviewing court, if the found evidentiary facts are supported by credible evidence in the record, under sec. 111.07(7), Stats.

It would be a more accurate approach in the Court's opinion if the Court would review the commission's legal conclusion from the standpoint that it constituted the commission's application of sec. 111.70(1)(b), Stats., which the Court should accept if it is equally consistent with the purpose of these statutes compared to any alternative application that might be made. See Milwaukee Transformer Co., Inc., v. Industrial Comm. (1964), 22 Wis. 2d 502, 510, 126 N.W. 2d 6; Libby, McNeill & Libby v. Wisconsin E. R. Comm. (1970), 48 Wis. 2d 272, 280, 179 N.W. 2d 803; Adams-Marquette Coop. v. Public Service Comm. (1971), 51 Wis. 2d 718, 729, 188 N.W. 2d 515. The purpose of sec. 111.70(1)(b) in excluding supervisors from the collective bargaining unit is that employees who have authority to hire, discharge or discipline other employees, or to effectively recommend the same, are performing a function of management and should owe undivided loyalty to management.

The Court will not encumber this decision by restating herein the detailed statement of facts made by the commission in its memorandum decision with respect to the duties and functions performed by each of the four employees, but will give consideration mainly to those of the found facts which conceivably might form the basis of supporting a determination of supervisor status.

In the case of the deputy treasurer, she may report obvious misconduct of staff to the city treasurer and recommend appropriate disciplinary action which the treasurer testified he "would give some weight to." The recommending of appropriate discipline is not effective recommendation within the meaning of the commission's criteria implementing sec. 111.70(1)(o), Stats., since the treasurer gives only "some weight" to the recommendations and the recommendations are not largely self-executing or the exercise of judgment independent of that of the treasurer. The

city's brief asserts the deputy treasurer supervises employees, but the commission did not so find except in separate occasions during the absence of the treasurer.

The city's brief also asserts that the deputy clerk supervises employees. In addition to the clerk and deputy the staff of the city clerk's office consists of two regular part-time employees and one temporary part-time employee. The commission made no finding that the deputy clerk supervised these other three employees. On election days the deputy clerk does oversee approximately 60 election workers during polling hours. At the most this would probably not occur on more than four days of any year. There have been no special projects for the deputy clerk to supervise. Her disciplinary recommendations are given "consideration" only.

At the time of hearing the city had no deputy assessor, and the most recent deputy assessor had been promoted to assessor. It was anticipated that a deputy assessor would be appointed shortly. Upon such appointment the department will consist of the assessor, the deputy, a clerk-typist and at least one and probably two property assessors. There is no finding that the deputy assessor exercises supervisory powers.

The position of information and referral service manager has been recently created and the lady filling that position is directly supervised by the director of the Advisory Committee on Aging. The information and referral service is located in the Service Center and its primary function is to identify and communicate community services for elderly residents of the city. It is staffed by the manager, one secretary/specialist, and community volunteers, which volunteers are not city employees. Because these community volunteers are not city employees the commission determined that the manager's direction of them did not warrant a conclusion that the manager constituted a supervisor within the meaning of sec. 111.70(1)(o), Stats. The commission also found that the manager's work relationship to the secretary/specialist was one of initial instruction as opposed to continuous supervision. The Court deems the fact that the manager's supervisor was located at the city hall some three miles away is not of much materiality.

The Court is satisfied that the commission's determination that the deputy treasurer, deputy clerk, the deputy assessor to be appointed, and the information and referral service manager are not supervisors within the meaning of the applicable statute, is consistent with the statutory purpose of that statute. This is because these employees do not have the power to hire, discharge or discipline the employees in question, or to recommend the same. Therefore, under the rule laid down in the Milwaukee Transformer Co. case previously cited herein, the Court deems it must accept this application of sec. 111.70(1)(b) and (o).

Let judgment be entered affirming the order here under review.

Dated this 30th day of August, 1974.

By the Court:

George R. Currie /s/
Reserve Circuit Judge