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CITY OF OAK CREEK,

Petitioner,

Case No. 150-265

vs.

JUDGMENTWISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,

Respondent.

Decision No. 14254

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

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The above entitled matter having been heard by the Court on the 27th day of June, 1977, at the City-County Building in the City of Madison; and petitioner having appeared by City Attorney George A. Schmus and by Attorneys Robert D. Sundby and Jean G. Setterholm of the law firm of DeWitt, McAndrews & Porter; and the respondent Commission having appeared by Assistant Attorney General John D. Niemisto; and the Court having had the benefit of the argument and briefs of counsel, and having filed its Memorandum Decision wherein Judgment is directed to be entered as herein provided;

It is Ordered and Adjudged that the Order of respondent Wisconsin Employment Relations Commission dated January 15, 1976, entered In the Matter of the Petition of Oak Creek Professional Fire Fighters Association Local 1848 Involving Certain Employees of City of Oak Creek, be, and the same hereby is, affirmed.

Dated this 22nd day of July, 1977.

By the Court:

George R. Currie /s/  
Reserve Circuit Judge

CITY OF OAK CREEK,

Case No. 150-265

Petitioner,

vs.

MEMORANDUM DECISIONWISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,

Respondent.

Decision No. 14254

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

This is a proceeding under ch. 227 Stats., to review an order of respondent Wisconsin Employment Relations Commission (hereafter WERC) dated January 15, 1976. This order determined that the appropriate collective bargaining unit of firefighting personnel in the employ of the Fire Department of the City of Oak Creek consisted "of all regular fire fighting personnel employed by the City of Oak Creek, including probationary, Lieutenants, and Captains, excluding supervisory, managerial, and confidential employees."

In its Memorandum accompanying its order WERC set forth the following basis for its decision:

"The Municipal Employer has two fire stations. The Chief and Assistant Chief are located at one of the stations. Captains perform the functions of shift commander at each station. We conclude that the Captains are not 'supervisors' within the meaning of Section 111.70(1)(o)(2). of the Municipal Employment Relations Act and have today clarified the existing unit to include the captains therein."

STATEMENT OF FACTS

On February 10, 1975, the City of Oak Creek entered into a labor agreement with Local 1848 of the International Association of Firefighters-AFL-CIO, a copy of which agreement is included in the record as Exhibit #1.

Under Article II of such agreement the City recognized Local 1848 as the sole and exclusive bargaining agent of all employees in the bargaining unit. "Employee" for the purpose of the agreement was defined in Article VI as a "probationer, fire fighter or Lieutenant."

The agreement was effective until December 31, 1975, or a signing of a successive contract whichever occurred later.

On September 15, 1975, Local 1848 petitioned the WERC for an election in the bargaining unit claimed to consist of 32 employees including firefighters, fire lieutenants, fire inspectors and fire captains but excluding the chief and assistant chief.

WERC thereupon issued a Notice of Hearing dated September 25, 1975, noticing a public hearing on Local 1848's petition to be held at the State Office Building in the City of Milwaukee on October 28, 1975. Among other things, this notice stated that the "municipal employees" and any person or labor organization representing or claiming to represent any of its employees in the collective bargaining unit might appear in person or by representative and give testimony "in support of its claims."

No testimony was offered at the hearing of October 28, 1975, but instead an informal conference took place. The City was represented on that occasion by Attorney Frederick A. Miller and Local 1848 by Edward Durkin and Wayne Lepak. A "Waiver" was executed dated October 28, 1975, signed by Durkin and Miller which was captioned with the title of the proceeding, and read:

"The undersigned hereby waive a transcript of the record made at any hearing in the above captioned matter, as well as compliance with Section 227.12, Wisconsin Statutes, with respect to the above-captioned matter. A copy of said section is reproduced below and has been read by each of the undersigned."

The hearing was adjourned and reconvened on December 23, 1975. In the meantime Attorney Miller had withdrawn as counsel for the City and had been replaced by the law firm of Mulcahy and Wherry. Attorney Michael Boshar of that firm represented the City at this adjourned hearing. Durkin again appeared as representative of Local 1848. When at the hearing before this Court the fact was brought out that the proceedings of the December 23, 1975, hearing had been taped, the Court on its own motion entered an order dated June 27, 1977, directing WERC to prepare a supplemental return to the court containing a typewritten transcript of the hearing of December 23, 1977. WERC made such supplemental return on June 29, 1977.

The hearing of December 23, 1975, was conducted before Stanley H. Michelstetter; a WERC hearing officer. The material portion of the transcript of such hearing reads:

"MR. MICHELSTETTER: In an off-the-record discussion, the parties have agreed to the following and waives the transcript in this proceeding and has executed the appropriate waiver form. They have also waived the opening of the -- the reading of the opening statement.

It is stipulated that the City of Oak Creek has two fire stations -- three Captains. The City has three Captains who serve at both stations. There are 34 Fire Fighters including a Chief and an Assistant Chief. There are three Captains and four Lieutenants who are in the unit. One of the three Captains is at the Fire Prevention Bureau. At Station 1 there is one Commander and, I guess one Captain who performs the pre-planning and one who -- ah, one checking and planning fire services at local industries and commercial establishments.

At Station 2 there is a Captain who also acts as Shift Commander and is responsible for the water supply, keeping maps and fire plug locations. He also performs flow tests on the meters.

The parties admitted to the -- stipulated to the admission of Joint Exhibit No. 3 which is a list of employees. Off the record.

(Discussion off-the-record was had.)

MR. MICHELSTETTER: Joint Exhibit No. 3 has been initialed and put into the record. The parties have also stipulated that the Captains -- the three Captains are not supervisors within the meaning of the Statute, 111.70(1)(o)(2).

The Union has requested that an election be conducted and that effective January 1, 1976 the unit be amended to include the Captains. The Employer takes -- that the election be conducted and certification be issued prior to January 1, 1976.

The Employer takes the position that should the Commission direct an election in the requested unit, the Employer will recognize the Petitioner as the majority representative. Off the record.

(Discussion off-the-record was had.)

MR. MICHELSTETTER: The parties have also stipulated to the admission of Joint Exhibit No. 1 which is the current collective bargaining agreement between the Employer and the Union. Joint Exhibit No. 2 is an organizational chart of the City Fire Department. Is there anything else for this record? This hearing is closed."

The organizational chart of the City's Fire Department (Ex. 2) discloses that there are three Captains: Salzwedel, Wagner and Getzin. Wagner is commander of Station No. 1 and is in charge of "Pre-Planning" Getzin is commander of Station No. 2 and is in charge of "Water Supply"; and Salzwedel is in charge of "Inspection-Fire Prevention Bureau".

The stipulation made at the December 23, 1975, hearing elaborates on the additional duties of Captains Wagner and Getzin besides acting as station commanders.

#### THE ISSUES

The City's original brief raised certain issues with respect to WERC failing to comply with the provisions of sec. 227.12, Stats. Because the City in the stipulation of October 28, 1975, waived compliance by WERC of sec. 227.12, the Court is of the opinion that it is unnecessary to consider any issues grounded on this statute.

In oral argument counsel for petitioner raised a constitutional issue. However, no claim of unconstitutionality was raised in petitioner's petition for review.

The remaining issues necessary to be resolved are:

(1) Did WERC properly interpret sec. 111.70(1)(o) 1. and 2., Stats., by including the three Captains in the bargaining unit?

(2) Should the Court order a remand for the presentation of testimony with respect to the duties of the three captains?

#### STATUTES INVOLVED

Section 111.70(1)(b) provides:

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

Section 111.70(1)(o) provides:

"'Supervisor' means:

"1. As to other than municipal and county firefighters, 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 employees, 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.

"2. As to firefighters employed by municipalities with more than one fire station, the term 'supervisor' shall include all officers above the rank of the highest ranking officer at each single station. In municipalities where there is but one fire station, the term 'supervisor' shall include only the chief and the officer in rank immediately below the chief. No other firefighter shall be included under the term 'supervisor' for the purposes of this subchapter." (Emphasis supplied.)

#### THE COURT'S DECISION

##### A. Statutory Interpretation Issue

The Court is of the opinion that the City has waived this issue with respect to WERC having included the three Captains in the bargaining unit because of the stipulation made at the December 23, 1975, hearing which stated "the three Captains are not supervisors within the meaning of the Statute, 111.70(1)(o)2." However, because there may be an appeal to the Supreme Court in this matter, the Court deems it advisable to decide the statutory interpretation issue.

There is no question but that who is a "supervisor" in a fire department within the meaning of sec. 111.70(1)(b), Stats., is controlled by the specific provision of

sec. 111.70(1)(o)2., Stats. While "highest ranking officer at each single station" is ambiguous with respect to a situation where a Captain, Chief and Assistant Chief are quartered at one of two or more stations, WERC has interpreted this phrase as meaning the Captain. The Court deems this accords with common sense and is in accord with the purpose of sec. 111.70(1)(o)2. This interpretation is entitled to "due weight." Beloit Education Asso. v. WERC, 73 Wis. 2d 43, 68, 242 N.W. 2d 231 (1976). The Court approves such interpretation.

Sec. 111.70(1)(b) uses the words "other than an independent contractor, supervisor, or confidential, managerial or executive employee". When the legislature defined "supervisor" in sec. 111.70(1)(o)2., Stats., so as not to include Captains in command of a fire station it must be assumed such Captain was also excluded from being a managerial or executive employee. This is in keeping with the common understanding that ordinarily managerial and executive employees outrank supervisors. Furthermore, it would make no sense to exclude such a Captain as a supervisor if it was intended to include him as a managerial or executive employee.

The City contends that because Captains Wagner and Getzin had other duties to perform besides commanding their respective stations, such duties may have been of a confidential, managerial or executive nature within the meaning of sec. 111.70(1)(b), Stats. The record, including the stipulation made at the December 23, 1975, hearing, does not disclose that these duties were of that character. The City had its opportunity to present testimony on such issue at the hearing of December 23, 1975, if it chose to do so. Instead of presenting testimony it elected to rest on the stipulation of facts.

B. Remand to Present Further Evidence

The request in the City's reply brief for a remand to present additional evidence comes too late. It was not made prior to the time this review proceeding was set for hearing as required by sec. 227.19(1), Stats. No error has been demonstrated in the handling of the matter by WERC which would require a reversal and remand for further proceedings.

Let judgment be entered affirming WERC's order here under review.

Dated this 22nd day of July, 1977.

By the Court:

George R. Currie /s/  
Reserve Circuit Judge