

JAN 20 1982

DRIVERS, SALESMEN, WAREHOUSEMEN,
MILK PROCESSORS, CANNERY, DAIRY
EMPLOYEES AND HELPERS LOCAL 695,

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

Petitioner,

v.

DECISION
and

DIRECTIONS FOR JUDGMENT

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Case No. 80-CV-4806

Respondent.

Decision No. 14776-D

The court affirms the decision and order of the Wisconsin Employment Relations Commission.

The question at issue is whether or not the position of Police Sergeant, created as a new position in the City of Verona Police Department in April, 1979, is or is not a supervisory position within the calls of Section 111.70(1)(o)1 of the Wisconsin Municipal Employment Relations Act in force and effect on June 14, 1979, when Petitioner Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local 695 of the Teamsters Union requested that Respondent Wisconsin Employment Relations Commission determine that question with respect to the status of Police Sergeant Lynn Marquardt who had been promoted to that position.

Following a hearing held August 21, 1979, Examiner Timothy Hawks issued Proposed Findings of Fact, Conclusions of Law and Order, supported by his Memoranda, that the rank of sergeant in the City of Verona Police Department remain within the Union's collective bargaining unit under its agreement with the City of Verona. The Respondent Wisconsin Employment Relations Commission rejected the Examiner's proposed decision, and issued Findings of Fact, Conclusions of Law and Order, supported by the Commission's Memoranda, that "The bargaining unit of law enforcement personnel employed by the City of Verona properly excludes the position of sergeant..." The Union's petition for rehearing was dismissed by the Commission on August 19, 1980, and petitioner immediately filed for judicial review under Chapter 227, Wisconsin Statutes.

The controlling statute, Sec. 111.70(1)(o)1, Wisconsin Statutes, in force and effect at all times relevant hereto, provides:

(o) "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. (underlining supplied)

In addressing the question of whether or not a given position is that of a "supervisor" under the foregoing statute the Commission, as recognized by the

Wisconsin Supreme Court in City Fire Fighters Union vs. Madison (1970) 48 Wi 2d 262, has established the following criteria, not all of which need be present to conclude that an individual is a supervisor:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employee;
2. whether the supervisor is primarily supervising an activity or is primarily supervising employees;
3. the level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees;
4. whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees;
5. the number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;
6. the amount of independent judgment and discretion exercised in the supervision of employees;
7. and the authority to direct and assign the work force.

The Union contends that in the case at bar the Commission did not follow the above criteria as it should have done, and that the Commission's Findings of Fact are not supported by substantial evidence as required under Sec. 227.20(6) Wis. Stats.

"Substantial evidence" is "that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion" and does not need to be a "preponderance of the evidence." Robertson Transport Co. vs. Public Service Commission (1967) 39 Wi 2d 653, 658. The Commission's findings are conclusive if made on a rational basis and supported by "substantial evidence." Stated another way, judicial review under Chapter 227 is limited to whether the evidence was such that the Commission might reasonably make the finding that it did. Boynnton Cab Co. vs. ILHR Dept. (1980) 96 Wi 2d 396, 404, 405; Sanitary Transfer & Landfill Inc. vs. DNR (1978) 85 Wi 2d 1, 14; Hamilton vs. ILHR Dept. (1980) 94 Wi 2d 611; Chicago & NW RR vs. Labor & Ind. Rev. Comm. (1980) 98 Wi 2d 593, 607; Bucyrus-Erie Co. vs. ILHR Dept. (1979) 90 Wi 2d 408, 418.

Where different inferences reasonably may be drawn from essentially undisputed facts, such inferences are for the administrative tribunal to determine and the court should not substitute its view of the evidence for that of the tribunal. St. Francis Hospital vs. Wisconsin Employment Relations Board (1959) 8 Wi 2d 308, 318; Pabst vs. Department of Taxation (1963) 19 Wi 2d 313, 322; St. Joseph's Hospital vs. Wisconsin Employment Relations Board (1953) 264 Wi, 396, 402. Sec. 227.20(6) Wis. Stats.

Upon judicial review under Sec. 227.20(10) "due weight shall be awarded the experience, technical competence and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Muskego-Norway C.S.J. SD No. 9 vs. WERB (1967) 35 Wi 2d 540, 562; Milwaukee vs. Wisconsin Employment Relations

Although it is evident from reading the Wisconsin Employment Relations Commission's decisions, cited by counsel for all parties appearing upon this judicial review, that the Commission has reached varying determinations based upon the facts of each particular case, it is also evident that the Commission has used its "criteria" as guidelines, has utilized its experience, technical competence and specialized knowledge, and that it has not been arbitrary, capricious or unreasoning in reaching its decisions. These decisions have been consistent with the purpose of the statute and the court respects them as proper and appropriate administrative applications of the controlling legislative provisions. Milwaukee vs. WERC (1975) 71 Wi 709, 717. Where inconsistencies are made to appear, the court must recognize that a ruling made by an administrative agency relates only to the facts and conditions presented on the pending proceeding and the agency is not bound by its prior determinations. Robertson Transport Co. vs. Public Service Commission (supra) 661; Dairy Employees Ind. Union vs. Wisconsin Employment Relations Board (1952) 262 Wi 280, 283; Chicago M St. P & P R Co. vs. Public Service Commission (1954) 267 Wi 402, 422; Nick vs. State Highway Commission (1963) 21 Wi 2d 489, 495; Anheuser Busch Inc. vs. Ind. Comm. (1965) 29 Wi 2d 685, 693.

The Commission made the following Findings of Fact:

5. That, although Marquardt spends a substantial portion of his time performing patrol duties and other duties similar to the duties performed by the patrolmen in the department who work on the 2:30 p.m. to 10:30 p.m. and 10:30 p.m. to 6:30 a.m. shifts, he is expected to and does perform duties of a supervisory nature, to wit:

(a) The preparation of written evaluations concerning the performance of the three full-time employees who work overlapping shifts, i.e., Ottman, Meuer and Bemis which evaluations may have a significant impact on their employment.

(b) The evaluation of the performance of probationary employees and the making of effective recommendations concerning the termination or continuation of their employment.

(c) The evaluation of the performance of three of the five part-time employees who substitute for full-time patrolmen when they are absent, including the authority to make effective recommendations concerning changes in their employment status.

(d) The investigation of alleged misconduct and the administration of discipline including verbal reprimands to employees under his supervision.

(e) The assignment of overtime and the scheduling of part-time employees to cover for patrolmen who seek compensatory time off.

(f) Participation with the Chief in discussions concerning the proper operations of the department including the handling of personnel problems such as temporary shift assignments and the selection of personnel to attend training programs.

(g) The authority to act in the Chief's absence with regard to the proper operation of the department.

Neither the Union nor the City of Verona question the Commission's Findings of Fact under items 1,2,3 and 4, set forth above. The dispute is with respect to item 5 above which is at odds with the Hearing Examiner's proposed Findings of Fact 6,7 and 8, as follows:

6. Marquardt spends only one hour at the beginning of the shift and a shorter period of time at 10:30 p.m. in the Department offices. The remainder of his time is spent patrolling

in a manner not distinguishable from that of the other officers. Most of the time spent in the office by Marquardt involves performing a routine review and recording of the daily reports filed during the day by the patrolmen. Marquardt returns to the station to pass on information regarding ongoing police activities at 10:30 p.m. The Sergeant is at most a working supervisor who spends virtually all of his time performing non-supervisory duties.

7. As a Police Sergeant, Marquardt is engaged in limited supervisory decision making. In particular he has (1) recommended making full-time a part-time patrolman; (2) orally reprimanded an employee; (3) assigned overtime and allowed the taking of compensatory time; (4) written evaluations of those officers he has contact with during working hours; and (5) assumed the authority of the Chief of Police during the Chief's vacation.

8. The Sergeant may not issue discipline more severe than a three day suspension and has not implemented discipline more serious than an oral reprimand, which reprimand had been approved by the Chief. The sergeant's ability to effectively recommend the hiring or promotion of an employee is not established by reference to the same in Finding of Fact No. 7 above since there was only one applicant for the opening and the amount of reliance placed upon Marquardt's recommendation by the Chief cannot be discerned.

From the court's analysis of the record it is evident that there is "substantial evidence" to support the hearing examiner's proposed Findings of Fact and that there is "substantial evidence" to support the Commission's Findings of Fact. The difference between the two boils down to the inferences drawn by the Commission to reach its ultimate findings and conclusions as against the inferences drawn by the hearing examiner to reach his ultimate findings and conclusions.

Under Secs. 111.07(3) and 111.70(4)(a) Wis. Stats., the burden was on the Union, which invoked the proceedings, to sustain such burden before the Commission, acting as a legislatively established administrative tribunal, by a clear and satisfactory preponderance of the evidence. Layton School of Art & Design vs. WERC (1977) 82 W1 2d 324, 361. But that is not the test upon judicial review where the "substantial evidence" test is applied and where the findings under court review are those of the Commission, not the hearing examiner, as in Anheuser Busch, Inc. vs. Industrial Commission (1965) 29 W1 2d 685, 692. See: Century Building Co. vs. Wisconsin Employment Relations Board (1940) 235 W1 376, 383. See also: Reinke vs. Personnel Board (1971) 53 W1 2d 123, 134.

Utilizing the meticulous briefs of counsel and studying the record, the court concludes that the Commission's Findings of Fact are supported by substantial evidence in the record and are sufficient to support the Commission's conclusion.

Items 5(a) and 5(b) of the Commission's Findings of Fact are supported by the testimony of Chief Moffet and Sergeant Marquardt who had supervision of the officers involved (Tr 10, 11, 41, 53).

Item 5(c) is supported by Chief Moffet's testimony that he sought Sergeant Marquardt's recommendation before Patrolman Meuer was hired in a full-time position. The Sergeant's recommendation was a substantial factor in Meuer's selection (Tr 6, 7, 24). The Commission did not err in concluding that it made no difference that Sergeant Marquardt's recommendation was founded in large part upon his experience with Meuer while the Sergeant was still a Patrolman.

Item 5(d) with respect to investigation of alleged misconduct and the administration of discipline including verbal reprimands to employees under his supervision is supported by Sergeant Marquardt's actual exercise of such supervisory authority in a case where he concluded that a verbal reprimand was sufficient (Tr 12, 13, 25, 26, 68, 69).

Item 5(e) with respect to the Sergeant's supervisory responsibilities in the assignment of overtime and the scheduling of part-time employees to cover for patrolmen who seek compensatory time off is supported by the testimony of Chief Moffet and Sergeant Marquardt (Tr 13, 14, 20, 28, 32, 62, 64, 65, 66).

✓ Item 5(f) that Sergeant Marquardt participated with the Chief in discussions concerning the proper operation of the department including the handling of personnel problems such as temporary shift assignments and the selection of personnel to attend training programs is supported by the testimony of Chief Moffet and Sergeant Marquardt (Tr. 19, 20, 26, 27, 28, 32, 36, 52, 53, 65).

Item 5(g) that Sergeant Marquardt has the authority to act in the Chief's absence with regard to the proper operation of the department (Tr. 32, 33). This is consistent with Sergeant Marquardt's job description (Exh. 2) and the fact that he was given a raise in pay (Tr. 21).

The specific findings set forth above show that Sergeant Marquardt's position was one in which he exercised and had the power to exercise supervisory authority requiring the exercise of independent judgment and that it was reasonable for the Commission to determine that his exercise of such authority was not merely routine or clerical in nature. It was reasonable for the Commission to determine, with their experience, technical competence and specialized knowledge, that Sergeant Marquardt was not just a "working supervisor" or "lead worker", and that his raise in pay upon promotion was to set his compensation at a level commensurate with supervisor responsibilities. He was second in command of the Verona Police Department, which, though small, had important law enforcement obligations. The fact that individual patrolmen have important responsibilities which require considerable skill does not minimize the importance of effective supervision by a superior officer in charge even though he may spend the majority of his time on patrol. The Commission was entitled to determine, as it did, that notwithstanding Sergeant Marquardt spent a very "considerable portion of his time performing duties similar to those performed by patrolmen, his supervisory duties, particularly those involving consultations with the Chief and the evaluation of the other employees, are sufficient to require such a conclusion"; that is that the "position of sergeant currently occupied by Lynn Marquardt is a supervisory position within the meaning of Section 111.70(1)(0)1. of the Municipal Employment Relations Act".

Finally the court concludes that the Commission has, in its "Memoranda accompanying Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit and amending Certification" made satisfactory explanation of the basis upon which its decision is at variance from the decision of the hearing examiner, all within the applicable provisions of Sec. 227.09 and established procedures before the Commission and as prescribed in Appleton vs. ILHR Department (1974) 67W1 2nd 162, 171. Since there was no question of creditability involved there was no requirement that the Commission review the testimony of Chief Moffet and Sergeant Marquardt with the hearing examiner.

The Commission's memoranda accompanying its decision recites the hearing examiner's discussion of the issues, the positions taken thereon by the City of Verona and the Union respectively, and concludes with its discussion of the reasons for its decision vis-a-vis the hearing examiner's decision, as follows:

DISCUSSION

In the Commission's view the evidence presented, contrary to the discussion and conclusion reached by the Examiner in the above quoted portion of his memorandum, supports a finding that Marquardt's position contains sufficient duties of a supervisory nature to cause the position in question to be deemed supervisory. While it is true that Marquardt spends a considerable portion of his time performing duties similar to those performed by patrolmen, his supervisory duties, particularly those involving consultations with the Chief and the evaluation of other employees, are sufficient to require such a conclusion.

The fact that the Chief may have reserved the right to amend the written evaluations prepared by Marquardt does not render them ineffective, and there is no basis in the record here to conclude that his written evaluations will not be accepted. On the other hand, there is evidence to support the inference that the Chief has in the past and will probably continue to rely on Marquardt's evaluations, both written and oral, particularly in the case of employees whose shifts do not coincide with that of the Chief. One example, supporting that inference, is the recommendation that James Meuer, a part-time patrolman, be hired as a full-time patrolman. 2. The fact that he acquired his knowledge of Meuer's performance while he was still a patrolman is immaterial.

Without discussing the evidence in detail we would also note our disagreement with at least two other points in the Examiner's evaluation of the evidence. While it is possible to conclude that Marquardt understood that the Chief did not expect him to administer any discipline in excess of a verbal reprimand in the one disciplinary matter discussed in the Examiner's memo, the Chief did not place any express limitation on the action Marquardt should take. It is more reasonable to infer from the record evidence that Marquardt retained the authority to effectively recommend greater discipline if he believed that the situation called for such action.

Secondly, the inference that the additional \$100 per month received by Marquardt is to compensate him for his additional non-supervisory duties is not compelling. A more compelling inference is that the additional compensation reflects compensation for his supervisory duties rather than less responsible activities such as the filing of reports. (Underlining supplied.)

For the above and foregoing reasons we have modified the Examiner's proposed Findings of Fact, Conclusion of Law and Order to reflect our view that Marquardt's position is supervisory and properly excluded from the bargaining unit.

Again, on rehearing the Commission further explains the difference between its rationale and that of the hearing examiner:

MEMORANDUM ACCOMPANYING ORDER DENYING PETITION FOR REHEARING

The petition for rehearing repeats many of the same arguments that were raised before the examiner which were considered by the Commission in issuing its findings. In our view it is not necessary to address those arguments in considering the petition herein. However, several arguments merit some comment because they relate specifically to the Commission's decision as rendered.

As the City correctly points out in its brief in opposition to the petition, the Commission's decision is not contrary to the provisions of MERA or past Commission precedents. The Commission does not base its decisions as to supervisory status on the titles of positions. Thus we have in some instances found sergeants to be supervisory employees and in other instances, we have found that they were not, depending on all the facts and circumstances in a given case.

With regard to the Union's claim that the Commission did not consider the fact that the sergeant here spends a large portion of his time performing the same work as patrolmen, we would point out that our Findings of Fact No. 5 acknowledges such fact, which is essentially undisputed. The numerous evidentiary findings of the examiner which support this ultimate finding, and were contained in his proposed decision, were not repeated in our Finding of Fact No. 5 since, in our opinion, they are not dispositive of the question of whether Marquardt performs supervisory duties in sufficient combination and degree to be found to be a supervisor.

In support of our view that Marquardt does perform duties of a supervisory nature in sufficient combination and degree to deem his position supervisory, our Finding of Fact No. 5 describes those duties. As noted in our original memorandum, the inferences that we draw from the evidence differ substantially from those of the Examiner and those differences are reflected in our description of Marquardt's duties. (Underlining Supplied.)

Counsel for the respondent Wisconsin Employment Relations Commission can prepare a formal judgment in accordance herewith and submit the same to opposing counsel for approval as to form and to the court for signature.

Dated January 19, 1982

BY THE COURT



Edwin M. Wilkie, Circuit Judge