
VILLAGE OF WHITEFISH BAY,

Petitioner,

No. 491-489

-vs-

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 16928-A

Respondent.

DECISION

Review is sought under Chapter 227 Stats. by the Village of Whitefish Bay from a decision of the Wisconsin Employment Relations Commission (WERC) which permitted Lieutenants as well as Sergeants on the Village's police force to organize as a supervisory collective bargaining unit.

The Village has a population of 16,000 and is a north shore suburb of Milwaukee which maintains a 24 hour police protection with personnel of 70 persons including 23 with arrest powers. Among the latter are one Chief, three Lieutenants and three Sergeants.

Since most personnel, including the Chief, work a schedule of five days on then two off, then four on and two off, the Lieutenants are acting heads of the department for a considerable time during the 13 day cycle even without considering vacations, sick days and holidays off for the Chief.

At a hearing held February 1, 1979 Chief Alex H. Boeder testified his authority emanates from a Village Ordinance (Exh. #2), that he prepared the budget, that his predecessor Chief promulgated rules and regulations for the department (Exh. #3) to which Boeder adheres, that he receives monthly communications from his three Sergeants, that he discusses with shift commanders (normally Lieutenants) the day's or night's events both upon the Chief's arrival and departure from his shift, that the Chief reports directly to the Village Manager and ultimately the Village Board and that he supplies the orders to the Lieutenants who in turn direct the Sergeants.

Those police officers below the rank of Sergeant are represented for collective bargaining purposes by the Policemen's Protective and Benevolent Association of the Village. While Sergeants and Lieutenants belong to same, including the Chief as an honorary member, only those represented pay any dues or can be officers of same.

Lieutenant Donald E. Reader, representing the Whitefish Bay Police Supervisors Association, related Sergeants and Lieutenants are not allowed to participate in strategy and negotiating sessions of the benevolent association. He also testified his group did not feel they were part of the management team since they weren't consulted on management decisions and that the last meeting with the Chief on the same was over a year prior to the hearing.

On April 24, 1979 a certification election was conducted and by a 5-1 majority the Lieutenants and Sergeants voted to have the Police Supervisors Association represent the six men. On May 3, 1979 said Association was certified by the WERC as the designated bargaining unit for police supervisory personnel.

Previously on March 26, 1979 the WERC filed its Findings of Fact, Conclusions of Law, Direction of Election and a memorandum supporting its conclusions.

The Findings include No. 5: "That the Lieutenants neither participate, to a significant degree, in the formulation, determination and implementation of management policy, nor do they possess effective authority to commit the Village's resources."

The WERC concluded the three Lieutenants as well as the three Sergeants are not managerial but supervisors and allowed to be in a collective bargaining unit under Sec. 111.70 (8) Stats.

It was also concluded the supervisors association is a separate entity from the benevolent association and thus not disqualified under the same statute.

No challenge was made as to the three Sergeants and they along with the three Lieutenants are technically not 'municipal employees' as defined in Sec. 111.70 (1) (b) under the Municipal Employment Relations Act. This is so because the definition excludes "(s)upervisor, or confidential, managerial or executive employee." Id.

However, the act permits law enforcement 'supervisors' to organize in a unit separate from other units for negotiating purposes with their municipal employers. Sec. 111.70 (8). The petitioner Village is such an employer. Sec. 111.70 (1) (a).

""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." Sec. 111.70 (1) (o).

In 1969, while expressing concern about broadly interpreting then Sec. 111.70 (1) (b), the Wisconsin Supreme Court upheld a WERC certification of a bargaining unit composed of Assistant City Attorneys in Milwaukee except those involved in labor negotiations for the City. Milwaukee v. WERC 43 Wis. 2d 596, 168 N.W. 2d 809 (1969). (Milw. I.)

At the time the definition of 'municipal employer' included everyone but policemen, deputies and county traffic officers. Sec. 111.70 (1) (b) 1967 Stats.

Subchapter 111.70 underwent wholesale changes by virtue of Chapter 124 of the Laws of 1971 effective November 10, 1971. Included therein was the current definition of a 'municipal employee'. Sec. 1.

Sec. 2 of the act defined 'supervisor' and Sec. 4 enacted then Sec. 111.70 (3) (d) which authorized law enforcement supervisors to organize into collective bargaining units.

Sec. 111.70 (3) (d) was amended and renumbered as Sec. 111.70 (8) by Sec. 1 of Chapter 442 of the Laws of 1977 effective June 7, 1978.

Following the 1971 amendments the City of Milwaukee again challenged its Assistant City Attorney bargaining unit rights. The parties stipulated the duties were the same as in Milw. I.

The Supreme Court again upheld the WERC's determination but because the duties of those in the unit were not 'managerial' in nature. Milwaukee v. WERC 71 Wis. 2d 709, 239 N.W. 2d 63 (1976) (Milw. II.)

This ruling was necessary since the new statute (as it does today) precludes supervisors, or confidential, managerial or executive employees from the rights guaranteed other municipal employees under the act unless specifically designated.

As indicated, supra, law enforcement supervisory employees do have such right. Sec. 111.70 (1) (o) and (8). Thus these type employees can only be excluded if it is determined that their duties are confidential, managerial or executive in nature.

No attempt was made by the Village to show confidentiality in the Lieutenant positions or that they were executive in nature.

The Village's challenge is on the 'managerial' aspects. It believes because on most hours the shift commander is a Lieutenant this is sufficient to exclude those three from being part of the unit certified. Reliance thereon is misplaced.

"Thus, WERC has determined managerial personnel as those who participate in the formulation, determination and implementation of management policy or possess effective authority to commit the employer's resources. Such attributes set them apart from the community of interests shared by other employees." Milw. II, supra, p. 716.

"We conclude that the definition formulated by WERC in the series of decisions in which it has considered this issue is neither unreasonable nor inconsistent with the purposes of the statute." Id. p. 717.

"By defining the managerial exclusion so as to encompass those who formulate and determine policy, as well as implement it, WERC formulated a definition which is consistent with the purposes of the act and the legislatively expressed intent to exclude managerial employees. Such an interpretation is not unreasonable in light of the purpose and policy embodied in the statute," Id.

This definition is not contrary to or inconsistent with the agency's own rule in Wis. Adm. Code ERB 17.01.

It further comports with the evidence before the Commission wherein the Chief prepares the budget and formulates all policies in conjunction with the Village Manager and Board. No input on management decisions was prevalent in view of no meetings between the Chief and his Lieutenants for over a year.

All the Lieutenants do is implement the policies and decisions previously made by the Chief and his superiors. This is insufficient under Milw. II to classify the Lieutenants as 'managerial' in view of the conjunctive 'and' utilized in the high court's opinion.

When judicial review is sought under Sec. 227.15 by an aggrieved party from an administrative agency decision, the scope of review is limited by Sec. 227.20.

If there is substantial evidence in the record to sustain the findings and conclusions the Court must affirm the agency unless the law has been erroneously interpreted, the agency has violated one of its own rules or acted beyond the discretion accorded it by the Legislature. Sec. 227.20 (5), (6) and (8).

Further the Court may not substitute its own judgment on a fact validly found by the agency which is in the record and also must accord to the agency its experience, technical competence and specialized knowledge within the area it administers. Sec. 227.20 (6) and (10).

"The question before this court is not whether there is credible evidence in the record to support a finding the commission did not make, but whether there is any credible evidence to support the finding the commission did make." Appleton Electric Co. v. Minor 91 Wis. 2d 825, 829, 284 N.W. 2d 99 (1979).

A finding of fact made by an administrative agency "(1)s conclusive if supported by substantial evidence in view of the entire record." Chicago, M. St. P. & P. RR. Co. v. ILHR Dept. 62 Wis. 2d 392, 396 (1974).

"Substantial evidence was "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."" Stacy v. Ashland County Dept. of Public Welfare 39 Wis. 2d 595, 603 (1968).

Applying the above tests to the decision and record herein, the determination of the WERC is affirmed. Counsel for respondent will prepare an Order in conformance with this Decision.

Dated at Milwaukee, Wisconsin, this 20th day of June, 1980.

Respectfully submitted,

Michael J. Barron /s/
Michael J. Barron
Circuit Judge