

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Case XXXI
No. 23482 DR(M)-89
Decision No. 17633

DeWitt, McAndrews & Porter, S.C., Attorneys at Law, by Ms. Jean G. Setterholm, and Schmus & Panosian, Attorneys at Law, by Mr. George A. Schmus, appearing on behalf of the Petitioner. Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Respondent.

City of Oak Creek (Fire Department) having, on September 5, 1978, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to issue a Declaratory Ruling, pursuant to Section 227.06, Wis. Stats., for the purpose of determining whether captains in the employ of the City's Fire Department are municipal employees within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act, and the matter having been heard on March 26, April 24, and May 14, 1979, before James D. Lynch, a member of the Commission's staff; and the parties having filed final briefs in the matter on August 29, 1979; and the Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following

1. That the City of Oak Creek, hereinafter referred to as the City, operates a fire department in order to provide fire protection services to its inhabitants; that the City employs thirty-four fire fighting personnel which includes the chief, an assistant chief, three captains, four lieutenants, a clerk-dispatcher and twenty-four fire fighters; that the captains positions were created in June 1971; and that the individuals occupying the captains positions since June 1971 are Donald Salzwedel, Raymond M. Wagner and Robert N. Getzin.

2. That the Oak Creek Professional Fire Fighter's Association, Local 1848, IAFF, AFL-CIO, hereinafter referred to as the Union, is a labor organization and is the sole and exclusive collective bargaining representative of all regular fire fighting personnel in the employ of the City, including probationary, lieutenants, and captains, excluding supervisory, managerial and confidential employees.

3. That, in a previous proceeding initiated by the Union, the Wisconsin Employment Relations Commission, on January 15, 1976, issued an Order Clarifying Bargaining Unit, wherein it determined that captains in the employ of the City's fire department were not supervisors within the meaning of Sec. 111.70(1)(o) of the Municipal Employment Relations Act, and that therefore said captains were properly included in the bargaining unit consisting of non-supervisory firefighter personnel in the employ of the City; that, pursuant to an Order of the Dane County Circuit Court, the Commission, on September 9, 1977, issued Findings of Fact and Conclusion of Law in support of said Order; that, following an appeal by the City, the Dane County Circuit Court, on September 22, 1977, affirmed the Commission's determination in the matter; and that on February 3, 1978 the Wisconsin Supreme Court granted a motion for summary affirmance of the decision of the Dane County Circuit Court; and that, while said matter was pending before the Wisconsin Supreme Court, the City filed a petition with the Commission instituting the instant proceeding, wherein it requested the Commission to determine that captains in the employ of the fire department of the City were, in the alternative or in the conjunctive, managerial, executive and/or confidential employees, and thereby should be excluded from the definition of municipal employees as set forth in Sec. 111.70(1)(b) of the Municipal Employment Relations Act.

4. That Captain Salzwedel, who works out of Station No. 1, is the sole inspector in the Fire Prevention Bureau, that Salzwedel works a straight forty-hour week; that Captains Wagner and Getzin perform shift commander duties at Stations Nos. 1 and 2; that said Captains, as well as lieutenants, the assistant chief and the chief, attend monthly fire department staff meetings, which last from one to one and one-half hours in length, for the purpose of discussion of the day-to-day operation of the department, such as the scheduling of routine maintenance duties and the acquisition of equipment and the use thereof; and that personnel matters are rarely discussed at said meetings.

5. That the designated officer in charge of shift may be occupied at various times at either station by captains, lieutenants or fire fighters, any one of whom may be designated as an "acting officer" in charge of a particular shift; that in said capacity the individual so designated receives; pursuant to the collective bargaining agreement existing between the City and the Union, oral grievances in the first step of the contractual grievance procedure; that captain Salzwedel and captain Getzin have not received any oral grievances; that, however, captain Wagner has received oral grievances on two occasions, wherein Wagner has routinely denied said grievances, and thereupon forwarded same to the chief for his consideration at Step 2 of the contractual grievance procedure; and that none of the captains perform any role on behalf of the City in its collective bargaining relationship with the Union, except for possible participation in the oral grievance step.

6. That none of the captains have access, save through their input to the chief, to the budget-making process; that, while the captains have authority to make expenditures from within budget line items, any purchase expenditure other than an emergency nature must be approved by the chief; and that none of the captains has ever made capital expenditure in excess of \$200 without the express permission and approval of the chief.

7. That the chief is the only individual in the Fire Department who has the overall responsibility and authority over the management of the Fire Department.

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

CONCLUSION OF LAW

That the captains in the employ of the Fire Department of the City of Oak Creek are municipal employees within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

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

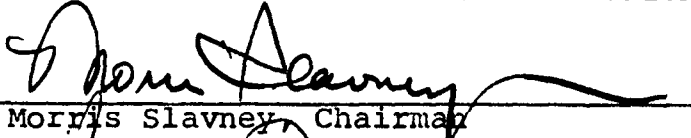
DECLARATORY RULING

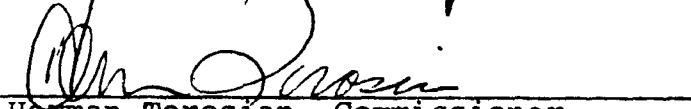
That the captains in the employ of the Fire Department of the City of Oak Creek are appropriately included in the collective bargaining unit consisting of all regular fire fighting personnel in the employ of the City of Oak Creek, including probationary, lieutenants and captains, but excluding supervisory, managerial, executive, and confidential employees.

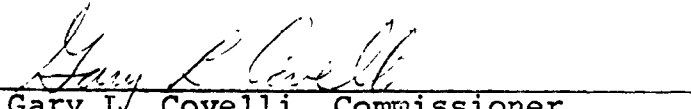
Given under our hands and seal at the
City of Madison, Wisconsin this 14th
day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

POSITIONS OF THE PARTIES:

The City advances numerous arguments in support of its claim that the captains in its fire department must be excluded from the bargaining unit. The City predicates many of the arguments on the basis of alleged expert testimony proffered by George James utilizing a definition of public manager commonly accepted in the field of public personnel administration. James testified that he performed, on the City's behalf, a position analysis of the captain's duties. He relied upon interviews which he had with the captains, the fire chief and the City's budget and personnel director as well as upon job descriptions which the captains filled out for him. On the basis of his review of these materials and utilizing commonly accepted definitions from within the field of public personnel administration, and in view of the captains' involvement in planning, organizing, staffing, directing, coordinating, reporting and budgeting, he testified it was his opinion that the captains were confidential, managerial and executive employees.

The City's argument, simply stated, is that an individual should be considered to be a manager or an executive when the nature of the individual's interest are more closely aligned with the interest of the employer than with the interests of the members of the bargaining unit. In support of this contention, the City argues that the supervisory authority possessed by the fire captains is of itself one of the attributes of a managerial employee and that the captain's responsibility for the maintenance of fire houses and equipment and in formulating and executing management policies requires this conclusion. The City also contends that the captains are confidential employees because of their participation in monthly departmental staff meetings and their receipt of oral grievances at the first step of the grievance procedure. Lastly, the City argues that the Commission's prior determination that captains were not to be excluded from the unit as supervisors did not resolve the questions raised herein and, thus, does not act to collaterally estop the City from bringing this instant proceeding.

The Union contends that on the basis of the duties actually performed by the fire captains they are not confidential, managerial or executive employees as those terms are defined by the Municipal Employment Relations Act. In support of these contentions, it argues (1) that the captains do not have access to nor knowledge of confidential labor relations material; (2) that the captains do not participate in the formulation of management policy nor do they have effective authority to commit the City's resources; and (3) that captains are not executives in that they do not have the ultimate responsibility for the governance of the municipality.

Next, the Union argues that James testimony must be disregarded by the Commission as it is both incredible and of no probative value insofar as James admitted that he had no knowledge of nor had he considered the definitions of the terms confidential, managerial and executive contained in and developed under the terms of the Municipal Employment Relations Act when he formed his opinions regarding the captains' status. Finally, the Union argues that insofar as these parties had previously litigated the question of the captains' supervisory status, at which time the City raised no issue with respect to

any alleged confidential, managerial or executive status, the City should be estopped from raising those issues in this proceeding. 1/

BACKGROUND:

Initially, we must make note of two preliminary items which are necessary to our determinations herein. First, we note that in an earlier case involving these same parties, the Wisconsin Supreme Court affirmed our decision that captains in the Oak Creek Fire Department were not supervisors within the meaning of Section 111.70(1)(o)2 of the Municipal Employment Relations Act. 2/ Thus, even though such employees may perform duties normally associated with supervisory status, identified in Section 111.70(1)(o)1 of the Act, they are not, as a matter of law, supervisors within the meaning of the Act. Further, since the Commission has never been called upon to resolve the question of the alleged confidential, managerial, or executive status of such employees, the City should not be deemed collaterally estopped from raising these issues at this time.

Second, we note that during the course of hearing, the City sought to introduce as evidence, over the objection of counsel for the Union, the opinion testimony of an alleged expert, to the effect that the captains perform work which is confidential, managerial and executive within the meaning commonly accorded to those terms in the field of public personnel administration.

It should be noted that James' testimony fails to take cognizance of the relevant legal principles enunciated by the legislature, the Commission and courts, which define confidential, managerial and executive employees.

DISCUSSION:

In order for an employee to be considered a confidential employee, and thereby excluded from the bargaining unit, we have held that such an employee must have access to or knowledge of, or participate in confidential matters relating to labor relations. The use of an employee for confidential work when other confidential employees are available, access to personnel and payroll records, the occasional assignment of confidential duties, or a de minimus amount of time spent on confidential matters are not grounds for concluding that employees involved therein should be excluded from the unit as confidentials. 3/

Facts material to the determination as to whether the captains occupy a confidential status are set forth in paragraphs 4 and 5 of the Findings of Fact. The attendance at staff meetings and the role of the captains at the first step of the grievance procedure, assuming that these tasks can be said to be confidential rather than supervisory in nature, are de minimis, and accordingly does not warrant a conclusion that the captains occupy a confidential position.

We must evaluate the City's claim that captains are managerial employees in light of our accepted definition:

Managerial employees . . . have been excluded from MERA coverage on the basis that their relationship to management imbues them with interest significantly at variance with those of other employees. In that managerial employees participate in the formulation, determination and implementation of management policy, they are unique from their co-workers In addition managerial status may be related to a position's effective authority to commit the Employer's resources. Managerial employees do not necessarily possess confidential information relating to labor relations or supervisory authority over subordinate employees. 4/

In view of the matter discussed therein, and the day-to-day operations of the department, we deem the captains' participation in the monthly staff meetings to be insufficient to establish that they play a significant role in the formulation, determination, and implementation of management policy. Thus, we must turn to the question of whether the captains have the effective authority to commit the employer's resources. in Shawano County Sheriff's Department, we concluded that:

The power to commit the Employer's resources involves the authority to establish an original budget or to allocate funds for differing program purposes from such an original budget. By comparison, the authority to make expenditures from certain accounts to achieve those program purposes is ministerial, even though some judgment and discretion are required in determining when such expenditures should be made. Thus, the authority to spend money from a certain account for a specified purpose is not managerial power, even though managerial employees also have that authority.....5/

As is noted in the Findings of Fact, it is apparent that the captains have only a limited role in the budgetary process of the department, and they do not have sufficient authority to commit the City's resources in a manner sufficient to warrant the conclusion that they are managerial employees.

Finally, we turn to the City's contention that captains are executive employees who must, therefore, be excluded from the collective bargaining unit. Section 111.70(1)(b) provides:

'Municipal employee' means any individual employed by a Municipal Employer other than an

4/ City of New London, No. 12170 (9/73). This definition has been approved by the Wisconsin Supreme Court in City of Milwaukee v. W.E.R.C. 71 Wis. 2d 709, 716-717, 239 N.W. 2d 63 (1976).

5/ Shawano County (Sheriff's Dept.), No. 15257 (3/77).

independent contractor, supervisor, or confidential managerial, or executive employee.


We have not previously had the occasion to determine the meaning of the term "executive", and we are unaware of any legislative prescribed statutory definition, we must assume that the Legislature meant to use this term as it is commonly understood. 6/

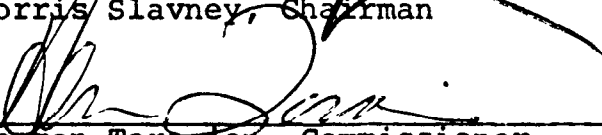
In our view the commonly understood meaning of the term "executive", if it is to be distinguished from the term "managerial" as it is in Section 111.70(1)(b), refers to an individual possessing managerial authority who has the overall responsibility for the management of an agency or major department of the employer. Thus an executive employe also has managerial and/or supervisory responsibilities, 7/ but is distinguishable by reason of his or her possession of the overall responsibility and authority for an agency or major department. Since the record establishes that the chief possesses overall responsibility and authority over the management of the fire department, it follows that the captains are not executive employes within the meaning of Section 111.70(1)(b).

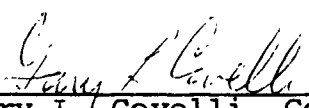
On the basis of the above and foregoing, we find that captains are municipal employes within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act and are hereby appropriately included within the collective bargaining unit.

Dated at Madison, Wisconsin this 14th day of March, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

6/ See opinion of Hon. George R. Currie in City of Oak Creek vs. W.E.R.C. Case 150-265 Dane County Circuit Court, slip op dated July 22, 1977, at p. 7.

7/ We note that several available definitions, such as those contained in Blacks Law Dictionary (4th Edition) and 33 C.J.S. 848, make reference to managerial and supervisory authority possessed by executives.