

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :

LOCAL 1801, INTERNATIONAL ASSOCIATION :  
OF FIRE FIGHTERS, AFL-CIO :

Involving Certain Employees of :

CITY OF CUDAHY (FIRE DEPARTMENT) :  
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Case XXXII  
No. 25961 ME-1817  
Decision No. 18502

Appearances:

Mr. Ted Ryan, State Representative, International Association of Fire  
Fighters, AFL-CIO, 2685 Milwaukee Street, Madison, Wisconsin  
53704, and, on the brief, Lawton & Cates, Attorneys at Law, by  
Mr. P. Scott Hassett, 110 East Main Street, Madison, Wisconsin  
53703, for the Union.

Mulcahy & Wherry, S.C., by Mr. Robert W. Mulcahy, Suite 1600, 815  
East Mason Street, Milwaukee, Wisconsin 53202, for the  
Municipal Employer.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER CLARIFYING BARGAINING UNIT

Local 1801, International Association of Fire Fighters, AFL-CIO  
filed a petition, on April 4, 1980, requesting the Wisconsin Employ-  
ment Relations Commission to clarify an existing voluntarily recognized  
bargaining unit consisting of non-supervisory firefighter employees in  
the employ of the Fire Department of the City of Cudahy, and in parti-  
cular to determine whether the Captains in the employ of the City's  
Fire Department should be, or should not be, included within said bar-  
gaining unit. Hearing was held in the matter on May 29, 1980, before  
Stuart S. Mukamal, Hearing Officer, during the course of which both  
the Union and the City were afforded the opportunity to present evi-  
dence and argument with respect to the aforementioned issue. The  
parties filed briefs, the last of which was received on December 12,  
1980. The Commission, having reviewed the record and the briefs, and  
being fully advised in the premises, makes and issues the following  
Findings of Fact, Conclusions of Law and Order Clarifying Bargaining  
Unit.

FINDINGS OF FACT

1. That Local 1801, International Association of Fire Fighters,  
AFL-CIO, hereinafter referred to as the Union, is a labor organization  
having its offices at Cudahy, Wisconsin.

2. That the City of Cudahy, hereinafter referred to as the City,  
is a municipal employer having its offices at Cudahy, Wisconsin, where  
it operates a Fire Department providing fire protection services in  
said municipality; and that in said regard the City employs one Chief,  
two Captains, five Lieutenants, twenty-one Motor Pump Operators, and  
eleven paid on-call Firefighters.

3. That since the latter part of the 1960's, and at all times  
material thereafter, the City has voluntarily recognized the Union as  
the exclusive collective bargaining representative of all regular fire-  
fighting personnel in its employ who hold the ranks of Motor Pump Op-  
erator and Lieutenant; that on December 15, 1969, at a time when the

City operated only one fire station located at 4626 Packard Avenue, Cudahy, in a proceeding jointly initiated by the parties, the Commission issued a Declaratory Ruling wherein it determined that the two Captains then in the employ of the Department were "supervisors" within the meaning of the then existing Section 111.70, Wis. Stats., and as a result, the Captains were excluded from the bargaining unit of firefighting personnel represented by the Union; that subsequent to the issuance of said Declaratory Ruling the City opened, and presently maintains, a second fire station located at 3115 East Ramsey Avenue, Cudahy; and that further, in 1971, the Wisconsin Legislature enacted the Municipal Employment Relations Act, which contains a substantial revision of the definition of the term "supervisor" as it applies to municipal and county firefighting personnel.

4. That Raymond Spies and Robert Sklander presently occupy the rank of Captain and perform their duties respectively at the Packard Avenue station (Station No. 1) and at the Ramsey Avenue station (Station No. 2); that the Chief maintains his office at Station No. 1 and that Captain Spies, who is the highest ranking officer below the Chief at said station, is responsible for the day-to-day operation of said station; and that Captain Sklander is the highest ranking officer at Station No. 2.

5. That Captain Spies works a fifty-six hour week on the basis of one twenty-four hour shift on-duty and two twenty-four hour shifts off-duty; that Captain Sklander works a flexible forty-hour week; that the Captains assign, direct and oversee the work of all Lieutenants and Motor Pump Operators assigned to their respective stations; that Captain Spies evaluates the work of all Lieutenants assigned to Station No. 1, and Motor Pump Operators on his shift assigned to Station No. 1, while Captain Sklander evaluates the work of all Lieutenants assigned to Station No. 2 and of all paid on-call Firefighters; and that the Lieutenants in the employ of the Fire Department evaluate the work of all Motor Pump Operators assigned to shifts other than Captain Spies' shift at Station No. 1 and all Motor Pump Operators assigned to Station No. 2.

6. That Captain Spies, in addition to those duties enumerated hereinabove, has been designed the Fire Department's "Personnel Management Officer"; that in said regard Spies has been delegated the responsibility for maintenance of official records of the Department, for compiling such records in preparation for collective bargaining and for revising promotional examinations to fit the need of the Department; that Spies is the second in command of the Fire Department, assists the Fire Chief in long-range planning for the Department, drafts proposed rules and regulations for the Chief's review and approval, participates in the hiring process for new firefighters, and receives employe complaints and grievances in his role as commanding officer, discusses employe complaints and grievances with the Chief from time to time, although he is not given a role in the contractual grievance/arbitration procedure; and that Spies has the authority to report rule infractions by, and recommend discipline of, subordinates to the Chief, although Lieutenants also possess that authority, and he possesses the effective authority to impose discipline only during periods when the Chief is absent from duty.

7. That Captain Sklander, in addition to his duties as indicated above, has been designated the Fire Department's "Training Officer," and in that regard is primarily responsible for the training and continuing instruction of all regular and paid on-call firefighters, and in the recommendation of subjects of training, development of training schedules, evaluation of training sessions, development and updating of the Department training manual and maintenance of training reports records; that Sklander additionally prepares the Department's training

budget for consideration by the Chief; that Sklander is the third in command of the Fire Department and participates in the hiring process for new firefighters, receives employee complaints and grievances in his role as a commanding officer and discusses same from time to time with the Chief, although he is not given a role in the contractual grievance/arbitration procedure; and that Sklander has the authority to report rule infractions by and recommend discipline of subordinate officers to the Chief, although Lieutenants also possess that authority, and he possesses the effective authority to impose discipline only during periods when the Chief and Captain Spies are both absent from duty.

8. That Captain Spies maintains the Department's personnel files but his responsibilities in that regard are largely routine and clerical in nature; that Captains Spies and Sklander have access to personnel files and records and necessarily perform duties concerning labor relations within the Department from time to time; that however, the performance of such duties occupies a relatively minimal proportion of their working hours and is incidental to the performance of duties best characterized as supervisory rather than demonstrative of their performance of confidential duties on a regular basis.

9. That Captain Spies sat as a member of the City's bargaining team during collective bargaining negotiations with the Union and assisted in budget presentations to the City's Common Council during the year 1976, largely in an effort to aid the Fire Chief who was then new to his duties, but has not actively participated in either collective bargaining negotiations or budget presentations since that time; that Spies compiles data for use by the City in collective bargaining negotiations, but such data is not of a confidential or sensitive in nature and is largely a summarization of official Fire Department records and Fire Department operations; and that Captain Sklander has not at any time become involved in either the collective bargaining or the budget presentation process.

10. That one Captain consult with the Chief from time to time on policies and long-range planning of the Department and assist the Chief in the implementation of managerial decisions within their respective areas of responsibility, but neither possesses the effective authority to formulate or determine managerial policy for the Department; that two Captains have the authority to make budget recommendations to the Chief concerning expenditure for matters relating to their respective areas of responsibility, and to make routine purchases from accounts specified and earmarked for those areas; that, however, neither possesses the effective authority to establish an original budget or allocate funds for differing program purposes from such a budget, and thus neither possess the effective authority to commit the City's resources.

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

#### CONCLUSIONS OF LAW

1. That, pursuant to Section 111.70(4)(d)2.a. of the Municipal Employment Relations Act, the Wisconsin Employment Relations Commission has the discretion and authority to determine, in a unit clarification proceeding, whether Captains in the employ of the Fire Department of the City of Cudahy should or should not be accreted to a unit of firefighting personnel in the employ of said City, without the necessity of conducting an election among said personnel.

2. That the Captains in the employ of the Fire Department of the City of Cudahy are not "supervisors" within the meaning of Section 111.70(1)(o)2. of the Municipal Employment Relations Act.

3. That the Captains in the employ of the Fire Department of the City of Cudahy perform duties insufficient in quantity and degree so as to constitute them confidential and/or managerial employes, and therefore said Captains are "municipal employes" 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 Conclusions of Law, the Commission makes and issues the following

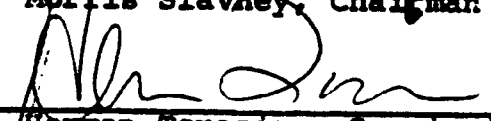
ORDER CLARIFYING COLLECTIVE BARGAINING UNIT

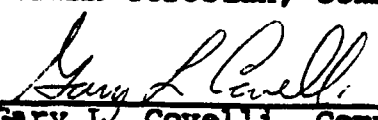
That Captains are appropriately included within the collective bargaining unit consisting of all regular firefighter personnel in the employ of the Fire Department of the City of Cudahy, including Motor Pump Operators, Lieutenants, and Captains, but excluding the Chief and all other employes, which unit is presently represented for the purposes of collective bargaining by Local 1801, International Association of Fire Fighters, AFL-CIO.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER CLARIFYING BARGAINING UNIT

In its petition initiating the instant proceeding the Union seeks a determination by the Commission to the effect that the Captains in the employ of the Fire Department of the City properly may be accreted, without an election in the entire unit, to the existing unit of fire-fighter personnel. The City had voluntarily recognized the Union as the exclusive collective bargaining representative for a unit of fire-fighters consisting of Motor Pump Operators and Lieutenants, to the exclusion of the Captains.

The City contends that the Commission should not accrete the positions in issue to the existing unit and further, in any event, it contends that the two Captains involved should not be included in the unit because of their supervisory, managerial and/or confidential duties. The Union argues that its petition is the proper procedure seeking to include the positions involved, and further, that, pursuant to the provisions of MERA, as well as the duties performed by the Captains, they properly should be included in the bargaining unit.

The Procedural Issue

In support of its argument that the Commission's unit clarification procedures may not be utilized by the Union in seeking the accretion of the Captains, the City contends that the well-established Commission policy, as set forth in a previous decision involving the City, 1/ forbids same. The Commission barred the use of such a procedure for expanding a voluntarily recognized unit without conducting an election in the entire unit deemed appropriate. In this connection, the City argues that the bargaining unit involved herein has been voluntarily recognized in its present form for more than ten years, and further, in said regard, the rank of Captain has been agreed upon as being excluded from said unit. The Union argues that circumstances have changed since the parties had agreed upon the description of the bargaining unit, and therefore, it may properly utilize the procedure of a unit clarification petition to obtain a determination as to whether the Captains should or should not be included in the bargaining unit represented by the Union.

In the previous case involving the City, the Commission announced the policy of limiting the availability of the resort to unit clarification procedures to accrete positions to an existing voluntarily recognized bargaining unit, where the positions in issue were previously specifically excluded from the unit, and where a party to the agreement opposes the proposed expansion thereof. The Commission subsequently further refined this policy as follows:

The Commission will not expand a voluntarily recognized collective bargaining unit without an election in the unit deemed appropriate where certain classifications of employees have been implicitly or explicitly excluded from the unit; a party involved in the recognition agreement opposes the proposed expansion; the original exclusion was not based on statutory grounds, the unit is not repugnant to the provisions of the

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1/ Decision No. 12997, 9/74.

Municipal Employment Relations Act and there has not been any intervening events which would materially affect the status of the affected employees. 2/

Here the voluntarily agreed upon collective bargaining unit specifically excluded the Captains therefrom. However, after the parties had voluntarily agreed to the description of the unit, two events occurred which have an impact on the issue involved herein. Such events included the adoption of the Municipal Employment Relations Act by the Wisconsin Legislature in 1971 which includes, among its provisions, Section 111.70(1)(o)2., defining the term "supervisor" involving municipal and county firefighters. The second event involves the expansion of the Fire Department from a one station operation to a two station operation. These two events constitute a valid basis for departing from the strict policy set forth above, and therefore, we determine that the petition for unit clarification is the proper procedure for determining the substantive issues involved herein.

#### The Facts

The facts material to the determination as to whether the Captains should or should not be included in the bargaining unit, including those facts relating to the duties and responsibilities of the individuals occupying such rank, are succinctly set forth in the Findings and require no repetition in this Memorandum.

#### Supervisory Issue

Section 111.70(1)(o)2. of MERA defines a "supervisor" employed in a municipal or county Fire Department as follows:

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.

The Union contends that the Captains are specifically excluded from the definition of the term "supervisor" on the basis of the above cited statutory provision, even if the Captains are found to perform duties normally associated with supervisory status, since they do not enjoy that status as a matter of law.

On the other hand, the City claims that the above statutory provision is ambiguous and that at times produces absurd results if literally applied to the factual situation herein, and thus should not be literally followed. In this regard the City notes that the strict application of the provision would result in a conclusion that the

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2/ Germantown School District (17494), 12/79; Jackson County (14129-B), 8/79; City of Rice Lake (Fire Department) (16414), 6/78; Milwaukee Board of School Directors (13134-A), 1/76; Fox Valley Technical Institute (13204), 12/74.

Chief is the only supervisor in a bargaining unit consisting of twenty-nine employees, which it alleges is an unreasonable ratio of supervisors to employees. It also notes that the applicable statutory definition of the term would lead to the exclusion of the Captains in a department consisting of one station, and it is therefore absurd to reach the opposite conclusion in a two-station department where the need for supervision would be, if anything, greater. The City finally notes that the Captains have, in a previous proceeding involving the City, were found to be supervisory, that the nature of their duties have not changed, and that, therefore, the Captains continue to be supervisors.

The original decision wherein the Captains were found to be supervisory involved a declaratory ruling, 3/ which was issued prior to the amendments to Section 111.70, and at a time when the employees in the Department were located at one station only. In view of the applicability of the standards set forth in Section 111.70(1)(o)2. of MERA, the standard applicable to non-firefighting municipal employees, and the nature and the extent of the "supervisory" duties actually performed by the Captains on a day-to-day basis, are irrelevant to the issues raised in this proceeding. The fact that the City might operate only one rather than two stations does not, in any way, indicate that the applicable statutory standards are ambiguous and/or that its application to the situation represented herein would lead to absurd results. Therefore, we conclude that the Captains are not "supervisors" within the meaning of Section 111.70(1)(o)2. of MERA.

#### Confidential and/or Managerial Issue

Contrary to the Union, the City contends that the Captains perform confidential and managerial duties, and therefore should be excluded from the bargaining unit on the basis of either or both of said types of duties. The City notes that Captain Spies plays a role in compiling the Department's promotional examination, and that Captain Sklander develops the Department's training examination, and that both participate in compiling data for collective bargaining, and also evaluate subordinates and play a consultation role with the Chief concerning the Department's day-to-day labor relations matters. With respect to its contention that the Captains are also managerial employees, the City argues that the Captains are directly accountable to management, that their interests are closely aligned with management, and their interests are significantly at variance with those of firefighting personnel included in the bargaining unit.

Although the Captains perform certain functions which may be considered to be confidential in nature on an occasional basis, the record conclusively establishes that their participation in such matters is insufficient to support the conclusion that they should be excluded from the bargaining unit as being confidential employees. The Commission has set forth the following standards for determining an employee's confidential status:

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

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3/ City of Cudahy (9381), 12/69.

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. 4/

Although the Captains have access to personnel files, and although their duties necessarily involve them in training and other personnel matters, neither such access nor such duties meet the criteria for confidential status. While the Captains consult, from time to time with the Chief, on matters relating to labor/management relations and may make recommendations with respect thereto, their authority in that regard does appear to be qualitatively different from that of the Lieutenant in the Department. Captain Spies' responsibilities in maintaining Department records are largely clerical and routine in nature, and cannot be characterized as confidential because of the paucity of personnel transactions within the Department over the years. Captain Sklander's responsibilities as the chief training officer do not relate in any manner to confidential or labor relations. Neither Captain has played any role in the contractual grievance/arbitration procedure, nor do they presently participate as a member of the City's collective bargaining team. Further, they do not formulate or participate in the formulation of strategy for the City's position in collective bargaining. 5/

Although the Captains might engage in confidential duties from time to time, such duties are fairly characterized as incidental to their other duties and responsibilities, and above that only a minimal proportion of their working hours is spent on such duties. Therefore, we cannot conclude that the Captains are confidential employees.

With respect to the alleged managerial status, the Commission has established the following standard:

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. 6/

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4/ City of Oak Creek (17633) 3/80.

5/ Back in 1976, on a one time basis, Captain Spies did participate in negotiation sessions in an effort to assist the Chief who was then new to his position. Since then Spies has not participated in such activities.

6/ City of Oak Creek, supra n. 14; City of New London (12170), 9/73; approved by the Wisconsin Supreme Court in City of Milwaukee v. Wisconsin Employment Relations Commission 71 Wis. 2d. 709, 239 N.W. 2d. 63 (1976). See also Milwaukee Area Board of Vocational Technical & Adult Education No. 9 (8736-B, 16507-A), 6/79, Tomahawk School District (16525), 8/78.



It is not sufficient merely to assert that the incumbent of a position possesses certain interests at variance with those of other employees in order to involve the position with managerial status. Rather, such status must be demonstrated by a showing that the holder of the position in question participates in the formulation, determination and implementation of management policy "at a relatively high level of responsibility" and "to a significant degree" 7/ and/or that the holder of such position has the effective authority to commit the municipal employer's resources.

Captain Spies and Sklander clearly do not fit the above definition and standard "managerial employees". Although they consult from time to time with the Fire Chief concerning Departmental policy and needs, and draft proposed regulations for the Chief's review and approval, they function primarily in accordance with established Departmental policies and procedures. They have little or no authority to establish such policies and/or procedures on their own. The nature and extent of their participation in the formulation, determination and implementation of management policy thus does not qualitatively differ from that of the Department's Lieutenants. The record clearly indicates that in most matters, the Chief possessed the sole authority to make managerial decisions affecting the Department. The Captains thus cannot be considered to be managerial employees on this basis.

The record further indicates that the Captains do not possess effective authority to commit the City's resources. The applicable standard is as follows:

"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 judgement 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 . . . ." 8/

Captains Spies and Sklander possess the authority only to make routine, minor purchases and their role in the City's budgetary process is limited to that of advising the Chief of Departmental needs in specific areas within their responsibility such as training, fire station maintenance and repair of equipment. Such does not constitute authority to commit the City's resources in a manner sufficient to warrant the conclusion that the Captains are managerial employees.

Although there may be an arguable basis for contending that Captains Spies and Sklander do possess certain interests at variance from those of the Department's subordinate employees, they do not evidence either of the indicia established by the Commission for determining managerial status, as set forth by the Municipal Employment Relations Act. Therefore, they cannot be excluded from the bargaining unit on that basis.

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7/ City of Milwaukee (12035-A), 6/73, aff'd sub nom. Dane Co. Cir. Ct. No. 142-170 (7/74); City of Milwaukee (11917), 7/73.

8/ City of Oak Creek supra n. 14, Shawano County (Sheriff's Department) (15357), 3/77.

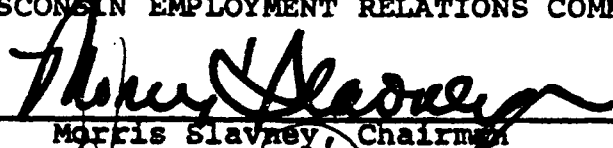
Conclusion

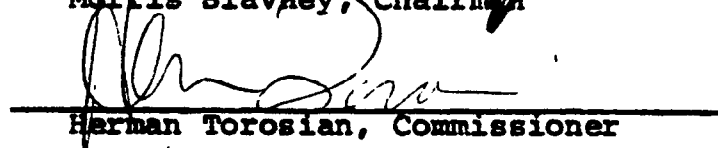
On the basis of the foregoing, we find that the Captains employed by the City of Cudahy Fire Department do not fall within any of the exceptions raised by the City to the definition of "municipal employee" set forth by Section 111.70(1)(b) of the Municipal Employment Relations Act. Thus, they are "municipal employees" within the meaning of that Act and are hereby appropriately accreted to the existing collective bargaining unit of fire fighter personnel.

Dated at Madison, Wisconsin this 12th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner