

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :
LAKE GENEVA POLICEMEN'S PROTECTIVE : Case XXIII
ASSOCIATION : No. 26289 ME-1849
Involving Certain Employees of : Decision No. 18507
CITY OF LAKE GENEVA (POLICE DEPARTMENT) :

Appearances:

Braden & Olson, Attorneys at Law, by Mr. John O. Olson,
716 Wisconsin Street, P.O. Box 512, Lake Geneva,
Wisconsin 53147, for the Petitioner.
Lindner, Honzik, Marsack, Hayman & Walsh, S.C., Attorneys
at Law, by Mr. James S. Clay, 700 North Water Street,
Milwaukee, Wisconsin 53202, for the Municipal Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION

Lake Geneva Policemen's Protective Association having filed a petition on May 30, 1980, requesting the Wisconsin Employment Relations Commission to conduct an election, pursuant to Section 111.70(4)(d) of the Municipal Employment Relations Act, among all full-time professional police officers employed by the City of Lake Geneva Police Department, possessing the power of arrest including patrolmen, sergeants, detectives and lieutenants, to determine whether said employees desire to be represented by said Association for purposes of collective bargaining; and hearing on said petition having been held at Lake Geneva, Wisconsin, on August 5, 1980, before Stuart S. Mukamal, Examiner; and the Commission, being satisfied that a question of representation has arisen concerning said employees, and having considered the evidence and arguments of the parties, issues the following Findings of Fact, Conclusions of Law and Direction of Election.

FINDINGS OF FACT

1. That Lake Geneva Policemen's Protective Association, hereinafter referred to as the Association, is a labor organization having its offices at Lake Geneva, Wisconsin.
2. That the City of Lake Geneva, hereinafter referred to as the City, is a municipal employer having its offices at the City Hall, Lake Geneva, Wisconsin; that the City operates a Police Department which employs a Chief of Police, a Captain, a Lieutenant, three Sergeants, six Patrolmen, two Detectives and four Dispatchers.
3. That for the past number of years the City has voluntarily recognized the Association as the collective bargaining representative of "full-time employees" of the Police Department "classified as Patrolmen, Sergeant, Detective and Civilian Dispatchers" in a single collective bargaining unit; and that on May 30, 1980, the Association filed two separate petitions with the Wisconsin Employment Relations

Commission, requesting the Commission to conduct two separate elections in two separate bargaining units for the purpose of determining whether the employees in said units desired to be represented for the purposes of collective bargaining by the Association; and that the two units sought by the Association consist of (a) all full-time sworn law enforcement personnel having the power of arrest, excluding managerial, supervisory and confidential employees, and (b) all full-time dispatchers.

4. That, during the course of the hearings on the petitions involved, Counsel for the parties executed a stipulation with respect to the election involving the dispatchers.

5. That during the course of the hearing herein the parties agreed that all full-time professional police officers employed by the City, possessing the power of arrest and classified as Patrolmen, Sergeants and Detectives should be included in the unit of sworn police officers; that the parties could not agree as to whether the position of Lieutenant should or should not be included in said unit; that the City, contrary to the Association, contends that the Lieutenant occupies a supervisory and/or managerial position; and that, however, the parties agreed that the officers holding the positions of Chief and Captain should be excluded from the unit on the basis of their managerial and/or supervisory status.

6. That the Lieutenant in the employ of the Police Department of the City, presently occupied by Thomas Nelson, does not exercise sufficient supervisory and/or managerial duties and responsibilities so as to constitute a basis for his exclusion from a bargaining unit consisting of non-supervisory police officers in the employ of the City.

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

CONCLUSIONS OF LAW

1. That the individual occupying the position of Lieutenant in the employ of the Police Department of the City of Lake Geneva, namely, Thomas Nelson, is an employee within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act, and, therefore, such position may be included in a bargaining unit consisting of non-supervisory law enforcement personnel having the power of arrest.

2. That all full-time professional police officers employed in the Police Department of the City of Lake Geneva, possessing the power of arrest, including Patrolmen, Sergeants, Detectives and Lieutenants, excluding the Chief of Police, the Captain, managerial, supervisory, confidential and all other employees, constitutes an appropriate collective bargaining unit within the meaning of Section 111.70(4)(d)2.a. 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

DIRECTION OF ELECTION

That an election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within thirty (30) days from the date of this Directive in the collective

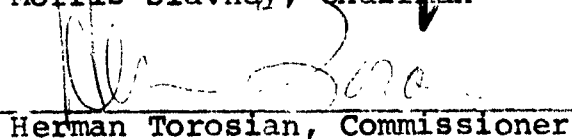
bargaining unit consisting of all full-time professional police officers employed in the Police Department of the City of Lake Geneva, possessing the power of arrest, including Patrolmen, Sergeants, Detectives and Lieutenants, excluding the Chief of Police, the Captain, managerial, supervisory, confidential and all other employees, who were employed on March 13, 1981 , except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of such employees voting desired to be represented by the Lake Geneva Police-men's Protective Association for the purpose of collective bargaining with the City of Lake Geneva with respect to wages, hours and conditions of employment.

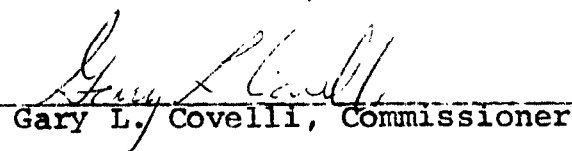
Given under our hands and seal at the City of Madison, Wisconsin this 13th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DIRECTION OF ELECTION

The Association filed two petitions with the Commission requesting separate elections in units consisting of (a) law enforcement personnel having the power of arrest, and (b) civilian dispatchers in the employ of the Police Department.

During the course of the hearing the parties stipulated to the description of the dispatcher unit, as well as to the employees included therein. The Commission has today issued a separate Direction of Election involving the dispatcher unit. 1/

The only issue arising with respect to the law enforcement unit involves a determination as to whether the Lieutenant position should or should not be included in the unit of all full-time professional police officers having the power of arrest. The parties agreed that the Patrolmen, Sergeants, and Detectives are properly included in the unit, and that the Chief of Police and Captain are excluded as managerial, supervisory and/or confidential. Contrary to the Association, the City contends that the Lieutenant should be excluded as a supervisory and/or managerial employee.

In determining whether a particular position enjoys supervisory status, the Commission has set forth the following factors as determinative:

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

1/ Case XXII, Decision No. 18490.

2/ Eau Claire County, (17488) 12/79.

When considering the attributes of a particular position, it is not necessary that all of the above facts considered be present in order to find an employee to be a supervisor. Rather, it is necessary that those facts should appear in sufficient combination to clearly establish that the employee is a supervisor. 3/

Similarly, in determining whether a particular position is managerial, the Commission has considered the degree to which the incumbent of that position participates in the formulation, determination and implementation of management policy and possesses the authority to commit the employer's resources. 4/

The Police Department is composed of a Chief, a Captain, a Lieutenant, three Sergeants, eight Patrolmen and four civilian dispatchers (not a part of the unit involved in this proceeding). The Lieutenant is thus third in command, and has been regarded as part of the Department's command structure. He has not been included as a member of the Association's bargaining unit which has, for a number of years prior to this time, been voluntarily recognized by the City.

Lieutenant Nelson presently works the night shift (from 10:00 p.m. until 6:00 a.m.) as the shift commander, and has done so since January 1, 1980. Prior to that time, he worked the afternoon (2:00 p.m. through 10:00 p.m.) shift. He was switched to the night shift in order that a command officer be present during the night hours. The City has since determined that such was not workable and, therefore Lieutenant Nelson will in the near future work a 3:00 p.m. to 11:00 p.m. split shift, which will necessitate the designation of a sergeant as acting commander from 11:00 p.m. until 6:00 a.m.

Although Lieutenant Nelson acts as the ranking officer on duty during most of his working hours and is given a measure of discretion as to how he may structure his working day, he spends over 90% of his time on patrol, performing many of the same functions as those officers below him in rank. The City's claim that Lieutenant Nelson is supervisory is based largely upon a number of departmental activities assigned to him.

Lieutenant Nelson oversees the scheduling of departmental personnel and the official reports and recordkeeping of the Department. Although occasionally Lieutenant Nelson might exercise a small measure of discretion in performing the scheduling function (for example, in determining whether vacations or compensatory times are scheduled in accordance with the police officers' collective bargaining agreement), it is clear that his scheduling authority is severely circumscribed by contractual, seniority and shift assignment requirements. Similarly, while Lieutenant Nelson administers the department's recordkeeping functions, the work is mostly routine in nature, is generally performed by the civilian dispatcher, and occupies a minimal amount of Lieutenant Nelson's time (according to the City's Police Chief, approximately two hours per month). In

3/ Eau Claire County (Health Center), supra, n.1, Village of Butler (Police Department), supra, n.1, Wood County, (10345-A).

4/ Milwaukee Area V.T.A.E. Board, (8736-B, 16507-A) 6/79, Tomahawk School Dist., (16524) 8/78; City of Milwaukee (Library), (16483) 8/78.

the only recent instance of a major departmental decision involving scheduling and/or recordkeeping - the decision to institute shifts that rotated every three months - Lieutenant Nelson's opposition to rotating shifts was overruled by the Police Chief and the Captain. Clearly, Lieutenant Nelson's scheduling and recordkeeping responsibilities are not evidence of supervisory status. 5/

Lieutenant Nelson does possess some measure of supervisory authority over the department's regular police officers, but such authority is quite limited. He has the authority to call in additional help when needed, whereas the Sergeants only have the authority to call in replacement help, except with the concurrence of a superior officer. Both a Lieutenant and a Sergeant may authorize and verify overtime. Furthermore, as the shift commander and the ranking officer on duty, Lieutenant Nelson exercises command authority over all officers of lesser rank. However, Sergeants exercise the same authority over Patrolmen and there are frequent and regular occasions when a Sergeant would act as shift commander (i.e. during Lieutenant Nelson's off days or vacations, whenever one of the three "command officers" is not on duty, and from 11:00 p.m. until 6:00 a.m. once his split shift is instituted). Although service as shift commander may constitute evidence of supervisory authority, 6/ it is not determinative, particularly where officers occupying a clearly non-supervisory rank perform in the same capacity on a frequent and regular basis.

Lieutenant Nelson's authority to hire, fire and discipline officers of lesser rank is extremely limited. Hiring of all of the Department's regular police officers is performed under the aegis of the City's Fire and Police Commission and decisions are made by that Commission, with the advice and concurrence of the Police Chief, on the basis of an eligibility list derived from the names of the highest-ranking candidates in examinations administered by the Fire and Police Commission. Although at times in the past, Lieutenant Nelson has participated in discussions concerning the makeup of the final eligibility list or the selection of successful candidates from that list, such does not amount to authority to effectively hire police officers or to recommend their hiring or to veto the hiring of any particular candidate. The record indicates that the effective hiring decisions are made by the Police and Fire Commission from an eligibility list derived from examination scores in conjunction with advice from the command staff (particularly from the Police Chief). The role of Lieutenant Nelson in this process is relatively minor and of an advisory nature only. Since November of 1979, Lieutenant Nelson has not participated in the hiring process to this limited extent.

5/ Cf. Village of Hales Corners (Police Department), (15589) 6/77.

6/ See e.g. City of Superior (Police Department), (17018) 5/79. Note, however, that in that instance, the duties of the Lieutenants differed markedly when they served as shift commanders from their duties at other times and that the Lieutenants received the pay of Captains when they served as shift commanders. Neither factor is apparently present in this case. See also City of Merrill, (14707) 6/76.

Lieutenant Nelson does not have the authority to discharge employees or to effectively recommend their discharge. His authority in the disciplinary area extends only to the power to suspend subordinate police officers from duty pending formal charges until such charges can be reported to the Police Chief. 7/ In practical terms, this permits Lieutenant Nelson to send a subordinate officer home from duty, but for a maximum period of only 24 hours - until the Police Chief could be notified of the suspension. 8/ Furthermore, this suspension could be countermanded by the Police Chief. The power to suspend as outlined above has never been exercised, and it amounts to little more than the authority that any shift commander (including a Sergeant) possesses to relieve an officer from duty. The only difference is that Lieutenant Nelson can send a subordinate home while a Sergeant acting as shift commander could detain a subordinate until one of the command officers could be reached. The record does not indicate that Lieutenant Nelson possesses the authority to impose any other sort of disciplinary sanction upon subordinate officers.

There is no evidence to indicate that Lieutenant Nelson plays any significant role in the evaluation of the performance of subordinate officers. The Captain of the Police Department supervises officer training, and no evidence was adduced as to the nature of the Department's evaluation process, or as to the role that the Lieutenant might play within that process.

Finally, the Lieutenant is, under the terms of the applicable collective bargaining agreement, one of the designated representatives of management at the first step of the contractual grievance procedure. 9/ While such may indicate that the City has viewed the Lieutenant until this time as part of the Department's management "team", it is not in and of itself an indication of supervisory status. There is no evidence that any grievances have ever been resolved by Lieutenant Nelson at Step 1, and given that Step 1 merely provides for oral presentation of grievances, his actual authority to adjust grievances at this step is rather limited.

Lieutenant Nelson does play a very significant role in the hiring, training, evaluation and discipline of the Department's reserve officers. The Department's reserve officers numbering approximately ten, act as auxiliaries to the regular force and while they are hourly-paid employees of the Police Department, they are used only on an as-needed basis, and thus must be considered to be casual employees. 10/ We do not accept the Association's apparent contention that supervisory status must rest upon a finding that a particular

7/ See "General Rules and Regulations of the Division of Police, Lake Geneva, Wisconsin", Association Exhibit 11, page 3.

8/ Transcript of August 5, 1980 hearing (hereinafter "Tr.") at p. 83.

9/ See Article XVIII, Section 18.02 Step 1 of the 1977 and subsequent collective bargaining agreements between the parties hereto.

10/ Madison Metropolitan School District, (13735-B, 14814-C) 8/78; Tomah Area School District, (8209-D) 5/78; Florence County Jt. School District No. 1, (6677) 3/64.

position occupies such status vis-a-vis bargaining unit employees. In fact, a finding that a position is supervisory may be based upon the incumbent's exercise of such authority over part-time, temporary or even casual employees outside of the bargaining unit within which the position is sought to be included. 11/ However, the appropriate circumstances for such a finding do not exist here. Only a minimal amount of Lieutenant Nelson's time is devoted to hiring, training, supervision or discipline of the reserve officers. Furthermore, while Lieutenant Nelson apparently has been delegated the day-to-day supervisory responsibility over these officers, major decisions concerning their status (such as the discharge of a reserve officer) would be reached only by a consensus of the entire command staff (including the Police Chief and the Captain). While Lieutenant Nelson may therefore possess some supervisory authority over the Department's reserve officers, such is not sufficient to establish his position as supervisory for purposes of the Municipal Employment Relations Act.

The Lieutenant's pay has to date been determined by City ordinance, in accordance with the pay of all of the City's other non-represented employees. As such, the base pay rate for the Lieutenant is considerably higher than the base pay rate for the Department's Sergeants (who occupy the next lowest rank). However, the gap between the actual pay of the two ranks is narrowed considerably by the fact that Sergeants receive premium pay for holidays and overtime while the Lieutenant does not. 12/ The remaining gap is likely to be further narrowed, or even eliminated by virtue of a new cost-of-living allowance that applies to all members of the bargaining unit represented by the Association, but not to the Department's command staff and that was first negotiated into the parties' 1980 collective bargaining agreement. 13/ Furthermore, there is no evidence to indicate that the level of the Lieutenant's pay or benefits or the method by which they were calculated derived from that position's alleged supervisory status. The

11 Cf. Madison Metropolitan School District, (13735-D) 8/79, where Program Leaders and Senior Program Leaders who supervised large numbers of part-time employees and volunteers were found to be supervisory. However, that decision was based largely upon the fact that virtually the entire working week of these persons was spent in hiring, scheduling or overseeing this work force or arranging the programs within which they worked. Furthermore, the Program Leaders and Senior Program Leaders did no work similar to that performed by any non-supervisory employees of the District. The distinctions between that situation and the situation involved in the matter at hand are readily apparent.

12/ Thus, while the 1980 base rate gap between Lieutenant Nelson and Sergeant Fritz (the most highly-paid of the Department's Sergeants) was over \$250.00 per month (\$1,657.11/mo. as opposed to \$1,405.30/mo.), the 1979 gap in pay actually received between the two totalled only \$660.81 (\$18,369.78 as opposed to \$17,708.97 for the year). The command staff (the Police Chief, Captain and Lieutenant) have received hour-to-hour compensatory time for holiday or overtime work in lieu of premium pay. See City Exhibits 4 and 5.

13/ See the parties' 1980 collective bargaining agreement, City Exhibit 3, Sections 22.01 - 22.05, pp. 3-4.

Lieutenant's pay and benefit levels were most likely determined as a function of the rank involved, and the method by which they have been heretofore determined has been consistent with the method applied to all unrepresented City employees.

The rank of the position at issue is not determinative of the existence or non-existence of supervisory status. In a number of cases, we have found Sergeants to occupy supervisory positions and have excluded them from police bargaining units on that basis. 14/ In other cases, we have found Assistant Chiefs, Captains and Lieutenants to hold non-supervisory status and have thus included them in police bargaining units. 15/ The determination of the status of a particular position must be based on the facts applicable to that position only and is made on a case-by-case basis.

The record indicates that while the Lieutenant does possess a limited degree of supervisory authority, such largely extends to certain activities engaged in by the Department, rather than to supervision over employees of the Department and that virtually all of the Lieutenant's time is spent performing police work normally performed by members of the bargaining unit. This contrasts sharply with the situation of the Department's Police Chief and Captain, both of whom spend a considerable amount of their time on administrative duties. Furthermore, the record establishes that the Lieutenant's authority to hire, promote, evaluate, transfer, discipline or discharge subordinate police officers or to direct their work on a day-to-day basis is either non-existent or very limited and that the amount of time that the Lieutenant devotes to supervision of the reserve officers is quite small. Thus, the factors upon which we have determined supervisory status are not present in sufficient combination or degree to clearly establish that the Lieutenant is a "supervisor" within the meaning of the Municipal Employment Relations Act.

Although at the hearing the City contended that the Lieutenant occupied managerial status, this argument was not pursued further. Although he has been consulted occasionally by the Police Chief and the Captain for his views, and although he has in the past attended meetings of the City's Fire and Police Commission, there is no evidence in the record to indicate that Lieutenant Nelson regularly participates in the formulation, determination and implementation of management policy, or that he has been given authority and discretion to commit City resources to a sufficient degree to warrant the conclusion that his position is managerial.

We have on the basis of the foregoing concluded that the Lieutenant in the employ of the City of Lake Geneva Police Department is neither a supervisory nor a managerial employee. Therefore,

14/ See e.g. City of Franklin, (17179) 8/79; Village of Fox Point (Police Department), (9959-A, 16831) 2/71, 2/79; Village of Butler (Police Department), fn. 1 *supra*.

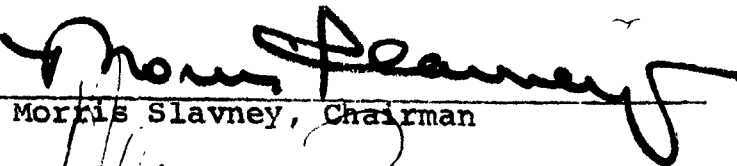
15/ See e.g. Village of Fontana (Police Department), (16895) 3/79; City of Medford, (13609) 5/75; City of Kiel, (11368) 10/72.


we have included the Lieutenant in the description of the appropriate collective bargaining unit and hereby deem the Lieutenant to be eligible to vote in the forthcoming representation election involving said bargaining unit.

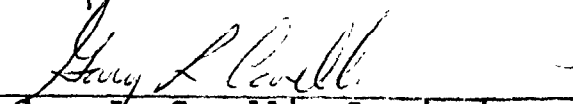
Dated at Madison, Wisconsin this 13th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

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