

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
	:	
WISCONSIN PROFESSIONAL POLICE	:	
ASSOCIATION/LEER DIVISION	:	Case 53
	:	No. 38770 ME-184
Involving Certain Employees of	:	Decision No. 20779-B
	:	
CITY OF WISCONSIN RAPIDS	:	
(POLICE DEPARTMENT)	:	
	:	

Appearances:

Cullen, Weston, Pines & Bach, by Mr. Steven Dettinger, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the Association.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, 408 Third Street, Wausau, Wisconsin, 54401, appearing on behalf of the City.

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

On July 8, 1986, Wisconsin Professional Police Association/LEER Division, hereafter referred to as the Association, having filed a petition with the Wisconsin Employment Relations Commission, requesting the Commission to determine whether the position of Lieutenant should be included in the existing collective bargaining unit represented by the Association; and during the hearing on the matter on September 17, 1986, the parties having entered into a stipulation on the record, whereby the Lieutenants would constitute a separate bargaining unit, and the Petitioner agreed to withdraw its petition; and on October 24, 1986, the Commission having issued an Order of Dismissal in the matter; and a dispute between the parties regarding the matter subsequently having arisen and the parties having jointly requested, on May 8, 1987, that the original unit clarification petition be processed; and hearing in the matter, which was transcribed, having been conducted on July 1, 1987 in Wisconsin Rapids, before Examiner Carol L. Rubin, a member of the Commission's staff; and post-hearing briefs having been filed, the last of which was received on July 16, 1987; and the Commission having considered the evidence and the arguments of the parties and being fully advised in the premises, and makes and issues the following

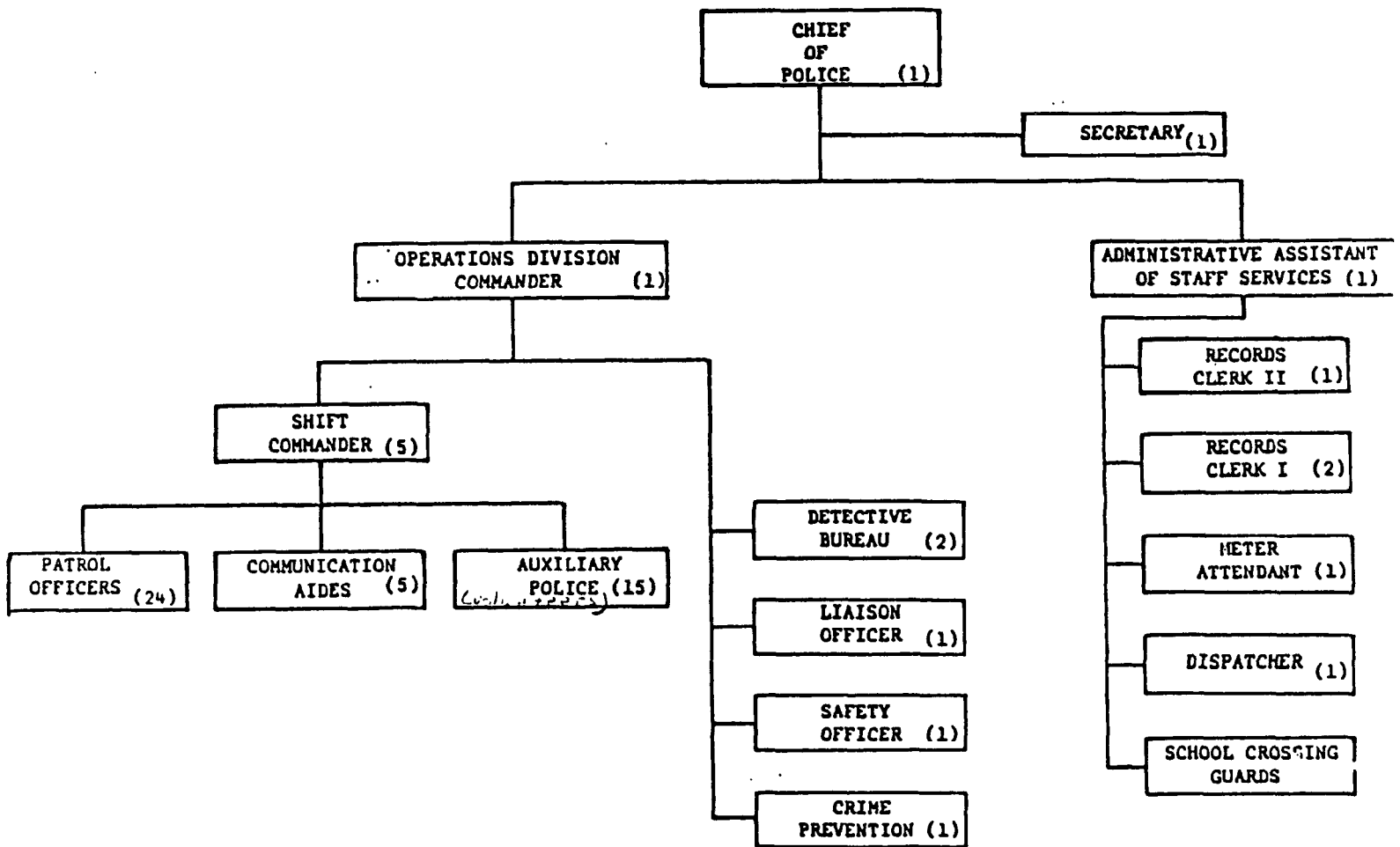
FINDINGS OF FACT

1. That Wisconsin Professional Police Association/LEER Division, herein referred to as WPPA, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its offices located at 7 North Pinckney Street, No. 325, Madison, Wisconsin 53703.
2. That the City of Wisconsin Rapids, herein referred to as the Employer, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices at 444 West Grand Avenue, Wisconsin Rapids, Wisconsin 54494.
3. That WPPA and the Employer are parties to a collective bargaining agreement effective January 1, 1986 through December 31, 1987, covering wages, hours and conditions of employment of employees of the City in the following collective bargaining unit:

All regular full-time and regular part-time law enforcement employees with the power of arrest employed by the City of Wisconsin Rapids, excluding supervisory, managerial and confidential employees.
4. That a unit clarification petition was originally filed by the Association on July 8, 1986, requesting the Commission to determine whether the

position of Lieutenant should be included in the existing collective bargaining unit or excluded as a supervisory position; that the parties subsequently entered into a stipulation whereby the Lieutenants would constitute a separate bargaining unit; and that a further dispute arose and, on May 8, 1987, the parties jointly requested that the original unit clarification petition be processed to determine whether or not the position of Lieutenant is a supervisory position.

5. That the Employer's police department is organized according to the following organizational chart:



6. That the rank of Lieutenant, currently occupied by five employes, functions as the Shift Commander noted in the above chart, and is the position in dispute in the instant matter; that until approximately 1 1/2 years ago the current police Lieutenants all had the rank of police Sergeants; that there are five Lieutenants, twenty-four patrolmen, and five dispatchers in the Operations Division, along with an Operations Division Commander and five non-patrol officers; that the auxiliary police are volunteers who are partially supervised by the Shift Commander; that a Lieutenant is assigned to each shift beginning with the first shift (6:15 a.m. - 2:30 p.m.), the second shift (2:15 p.m. - 10:30 p.m.) and the third shift (10:15 p.m. - 6:30 a.m.); that an additional Lieutenant is assigned to cover on a rotating schedule between the first and second shifts and a fifth Lieutenant is assigned to cover for the third shift as well as rotate amongst all three shifts when necessary to fill a Lieutenant vacancy due to vacation, sick leave, etc.; that Lieutenants are responsible for at least four patrolmen and a dispatcher on each shift; that the department also has two "power shifts" where an additional person reports for duty for a 10:00 a.m. - 6:00 p.m. shift and an 8:00 p.m. - 4:00 a.m. shift so that additional men are placed on patrol; that Lieutenants are required to brief additional patrolmen on the events of the shift and their job assignments; that on the second and third shift the Lieutenants are the highest ranking officer present; that according to a contractual pay plan, a Lieutenant earns approximately \$1,350 more than a senior patrol officer (who must serve a minimum of 15 years), and approximately \$1,700 more than a patrol officer with five years of experience; and that Lieutenants are also paid more than the detectives, school liaison officer, safety officer, or crime prevention officer.

7. That the job duties of the Lieutenant/Shift Commander, as outlined in the department's manual of rules and the written job description, include the following: Coordinate the functions and activities of the various units of their respective commands; investigate complaints made by citizens relative to the conduct of subordinates; be responsible for scheduling days off for members of the shift in accordance with departmental policy and procedure; be responsible for conducting roll call and other forms of inservice training; closely supervise the activities of subordinates, making corrections where necessary and commending good work where appropriate, including observing contacts made with the public by their subordinates and being available for assistance or instructions as may be required; conduct inspections of officers on duty to ascertain whether their duties are being properly performed; summon members of the detective bureau to scenes of crimes where appropriate; counsel subordinate officers in the performance of their duties and take suitable action in the case of misconduct, incompetence, inefficiency or neglect of duty; assist and instruct officers under their supervision in the proper discharge of duties and be responsible for the efficiency, discipline, good conduct, appearance and strict attention to duty over the patrolmen under this supervision; assign meal periods to patrolmen; with the direction of the Chief of Police, observe probationary officers assigned to their command and provide detailed written reports concerning qualifications of probationary officers to secure permanent status and give opinions as to the desirability of continued employment; and coordinate and assign details for parades, public events, dances and other special public events which require the presence of officers.

8. That a Lieutenant's normal workday includes a 15 minute briefing at the beginning of the shift, followed by two to three hours or more of office work during which time the Lieutenant reviews assignments, consults with the Operations Division Commander and then makes assignments to personnel; that after the completion of these duties the Lieutenant goes out on the street with no set beat; that while on the street, a Lieutenant's primary duty is to supervise the patrol officers on his shift, not to patrol; that according to the monthly activity reports for all officers, Lieutenants register significantly less patrol activities than the other patrol officers; that the majority of the activities registered by the Lieutenants are in the category of assisting other officers; that on a day-to-day basis, Lieutenants handle scheduling, calling officers to substitute for other officers on sick leave, and assigning overtime assignments as needed; and that according to the collective bargaining agreement, Lieutenants are the first step in the grievance procedure.

9. That the Lieutenants complete annual performance evaluations of both the patrol officers on their shift and the dispatchers on their shift; that these performance evaluations include the establishment of agreed upon goals, plans of action, and standards of performance developed by the Lieutenant in consultation with the patrol officer; that these evaluation reports are used in consideration of promotion and are not shared or reviewed by the Lieutenant with the Chief or Inspector until after the evaluation process has been completed; and that the Lieutenants are also responsible for preparing weekly progress reports on probationary employes, which are used by the department in determining whether a probationary officer will become a permanent employe.

10. That when there are problems with a patrol officer's performance, a Lieutenant may either give him informal counseling or fill out a Special Incident Report in which they reference deficiencies in performance; that a Lieutenant is generally called to sit in during a disciplinary interview along with the Operations Division Commander and the Chief of Police and possible discipline is discussed between those individuals, although the Lieutenant involved does not generally give a formal recommendation for discipline; that there have been relatively few incidents of discipline in the department in recent years; that an officer can be discharged only by the Police and Fire Commission, although the Chief may make a recommendation about such discharge; that other than their evaluations of probationary employes, the Lieutenants do not actively participate in the hiring process; that however, the record establishes that no member of the police department, other than the Chief, participates in the hiring process because all interviews are conducted by the Police and Fire Commission which then sends three names to the Chief of Police from which he may select a new employe; that the record does not establish that Lieutenants have a formal role to play in the promotion process; that however, in considering promotion, the department

considers the written performance evaluations filled out by the Lieutenants which sometimes contain recommendations for promotion; and that there have been occasions in which Lieutenants were asked to give their opinion about a particular individual as to a promotion.

11. That it is the position of the Association that the Lieutenants/Shift Commanders do not exercise sufficient supervisory responsibilities to qualify for exclusion from the nonsupervisory law enforcement bargaining unit; and that it is the position of the Employer that the Lieutenants/Shift Commanders are supervisory employes and must be excluded from the collective bargaining unit.

12. That the Lieutenants/Shift Commanders possess supervisory duties and responsibilities in sufficient combination and degree to render them supervisory employes.

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

CONCLUSION OF LAW

That the occupants of the position of Lieutenant/Shift Commander are supervisory employes and therefore are not municipal employes within the meaning of Sec. 111.70(1)(i), Stats., and may not be included in the non-supervisory collective bargaining unit.

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

ORDER CLARIFYING BARGAINING UNIT 1/

That the position of Lieutenant/Shift Commander is hereby excluded from the bargaining unit described above in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 26th day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(Footnote One Continued On Page 5).

(1/ Continued)

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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

BACKGROUND

Up until approximately 1 1/2 years ago, the five police Lieutenants held the rank of Sergeant. They have been members of the law enforcement bargaining unit represented by WPPA for a number of years.

Position of the Parties

The Association contends that the Lieutenants do not exercise sufficient supervisory responsibilities to qualify for exclusion from the law enforcement bargaining unit. In the view of the Association, these Lieutenants function more as experienced lead workers than as supervisors. With regard to discipline of employes, the Association contends that the Lieutenants' role in discipline is simply to relay information about potentially serious infractions to the Operations Division Commander, Inspector Gardner, or to the Chief for a decision by them. Lieutenants have no significant discretionary role in the hiring and firing or discipline of employes.

The Association also argues that although Lieutenants do have authority to assign work, a relatively small portion of their time is spent doing so, while for the majority of their time, the Lieutenants work in the field in uniform performing general foot patrol duties. The Association relies on a prior decision of the Commission 2/ in which the WERC found that six Sergeants who lacked direct involvement in hiring, transferring, promoting, disciplining or discharging of patrol officers were in fact experienced lead persons and not supervisors. The Association also calls the Commission's attention to Kewaunee County 3/ in which the WERC found that a traffic Sergeant whose job description made reference to supervisory responsibilities, who performed informal counseling of employes, who had authority to assign calls to officers, and who earned a higher hourly wage than other patrol officers, was not a supervisor under MERA. The Commission reached this conclusion despite the fact that this would leave as many as two shifts with minimal supervision.

The Employer contends that under Commission criteria, the police Lieutenant employes perform sufficient duties of a supervisory nature to warrant removal from the bargaining unit. The Employer notes that each Lieutenant is considered a Shift Commander for each of the shifts maintained by the department. A review of the Employer's manual of rules establishes that the responsibilities include clear supervisory duties. The Employer emphasizes that Joint Exhibit 6, the monthly activity reports of all of the officers, establish that the Lieutenants do not perform the same day to day law enforcement activities performed by those officers under a Lieutenant's command.

The Employer also contends that the police Lieutenants participate in the disciplinary process and evaluation process for patrol officers under their command. Each Lieutenant completes an annual performance evaluation report, which is used in consideration of promotion for patrolmen to higher paying positions. The Employer notes that in a recent decision, 4/ the Commission acknowledged that the primary responsibility of the Sergeants in that case for evaluating officers persuaded the Commission that the Sergeant position was supervisory in nature. The Employer contends that the exact factors which influenced the Commission in that prior case are all in existence here as well. The Employer notes that the Lieutenants issue Special Incident Reports in which they refer deficiencies in performance by officers and recommend disciplinary action in conjunction with the Chief. With regard to hiring, the Employer notes that the record shows that no member of the Police Department other than the Chief participates in the hiring

2/ City of Manitowoc (Police Department), Dec. No. 20696 (WERC, 5/83).

3/ Dec. No. 11096-C (WERC, 2/86))

4/ City of St. Francis (Police Department), Dec. No. 24473 (WERC, 5/87).

process since all interviews are conducted by the Police and Fire Commission which subsequently refers three names to the Chief of Police for his selection.

The Employer contends that with regard to authority to direct and assign the work force, police Lieutenants are primarily responsible for the assignment of duties and responsibilities to the patrolmen of their shift. While the Lieutenants meet with the Operations Division Commander, Inspector Gardner, and receive assignments from the Inspector which are then conveyed to the appropriate patrolman, the Lieutenants assume absolute responsibility for the duties to patrolmen. Neither Inspector Gardner nor the Chief exercise any responsibility in this area, nor do the Detectives participate in the assignment of duties to patrolmen.

With regard to the number of employes supervised and the number of the employes exercising supervisory authority, the Employer notes that the Lieutenants are responsible for at least four patrolmen on each shift along with the Dispatcher. In addition, two shifts have an additional "power shift" patrolman. When the power shift officer reports for duty, the Lieutenant is required to come into the station and brief the patrol officer regarding the events of the shift and his work assignment for that shift. It is clear the Lieutenants are the only supervisors exercising supervisory authority over the patrol officers. On the second and third shifts, the Lieutenant is the only command officer present since the Operations Division Commander and the Chief work during the daytime. According to the Employer, neither of these two supervisors participate in the assignment of duties to patrolmen during the dayshift but only convey information to the Lieutenant. The Employer also notes that the level of pay for the Lieutenant is significantly above that of any of the other officers, including the senior patrol officer. In addition, the Lieutenant participates in the first step of the grievance procedure and exercises responsibility for assigning overtime and reviewing vacation requests under the contract language. The Employer notes that the monthly activity reports clearly demonstrate that the Lieutenants do not perform the regular duties and responsibilities of the patrol officer, but rather spend a substantial majority of their time supervising employes.

With regard to the degree of independent judgment exercised by the Lieutenants, the Employer contends that the Lieutenants perform their day to day supervision of employes without specific direction or control from the higher command officers. Lieutenants do not review their evaluations of patrol officers with the Chief or the Inspector prior to conducting the evaluation conference and establishing goals with the patrol officers. The Employer contends that the Lieutenants spend three to four hours each day in their office and then, when out of the office, spend another fifteen to twenty-five percent of their patrol time directing the work force or evaluating how officers perform their duties. The Lieutenant exercises independent judgment as to whether a performance deficiency is considered so critical that it is to be reported or whether he should exercise his own authority to correct the performance deficiency.

DISCUSSION

In determining whether a position is supervisory in nature, the Commission has consistently considered the following factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised and the number of other persons exercising greater, similar or lesser authority over the same employes;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employes;
5. Whether the supervisor is supervising an activity or is primarily supervising employes;

6. Whether the supervisor is a working supervisor or whether he/she spends a substantial majority of his/her time supervising employes;
7. The amount of independent judgement exercised in the supervision of employes. 5/

The Commission has also held that not all of the above factors need to be present, but if a sufficient number of those factors appear in any given case, they will find an employe to be a supervisor. 6/

The record establishes that under the above criteria, the Lieutenants functioning as Shift Commanders perform sufficient duties of a supervisory nature to exclude them from the non-supervisory bargaining unit.

Acting as Shift Commanders, the Lieutenants spend a significant percentage of their time in a supervisory role. They spend 2-3 hours per day in their offices doing work related to the direction and assignment of the patrol officers. When the Lieutenants are out on the street, they do not patrol a particular area of the City as the patrol officers do, but spend a significant portion of their time supervising the patrol officers. The Monthly Activities Reports for the Lieutenants and the patrol officers, from December, 1986 through May, 1987 show that the Lieutenants consistently log significantly fewer enforcement activities than do the patrol officers; the vast majority of the activities they do log are in the category of assisting other officers, which is consistent with their supervisory role. Despite the low level of law enforcement activities, the Lieutenants are paid \$1350 per year more than the senior patrol officer (who must have at least 15 years experience with the Department), and \$1,700 per year more than the next highest level of patrol officer. The Lieutenants are also the first step of the contractual grievance procedure.

The record with regard to the Lieutenants' authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes is less clear. Because the Police and Fire Commission handle the initial application procedure, test scoring and interview process, the department's only involvement at the end of the process when the Chief is given three names from which to select a new hire. It is not clear whether the Lieutenants participate in any further interviews of those individuals. With regard to promotions, although much of the assessment of abilities is done through an assessment center at the local vocational/technical school district, Lieutenants are consulted about their opinions of the candidates. With regard to discipline, there has apparently been very little formal discipline in the last few years. In response to unacceptable behavior or performance, Lieutenants apparently can choose whether to give informal counseling or to write a "Special Incident Report" which is forwarded to the Chief and/or Operations Division Commander. That report does not contain a formal recommendation of discipline from the Lieutenants, and the statement of "Disciplinary Action Taken" is signed by the Division Commander or the Chief of Police. However, the Lieutenants sit in on disciplinary interviews and participate in discussions about appropriate penalties. Lieutenants also receive and investigate citizen complaints against officers. With regard to discharges, although the Chief of Police may recommend a discharge, only the Police and Fire Commission has the authority to do so.

Of considerable importance is the fact that Lieutenants now complete annual evaluations of each of the patrol officers on their shifts. These performance reports are reviewed on an annual basis by the Lieutenant with the patrol officers, including the establishment of agreed upon goals, plans of action, and standards of performance developed by the Lieutenant in consultation with the patrol officer. These evaluation reports are used in consideration of promotion for patrol officers to higher paying positions. They are not shared or reviewed by the Chief or Inspector until after the evaluation process has been completed.

5/ Door County (Sheriff's Department), Dec. No. 20020 (WERC, 10/82); Laona School District, Dec. No. 22825, (WERC, 8/85).

6/ Dodge County, Dec. No. 18076-A (WERC, 3/83).

The Lieutenants also prepare a performance report for the dispatchers on their shift. Further, the Lieutenant is primarily responsible for preparing weekly Progress Reports on probationary employes, which are used by the department in determining whether a probationary officer will successfully complete probation and become a permanent employe. The Lieutenant is also consulted by the Chief in the final decision to determine permanent status of a probationary employe.

Finally, we note that the number of employes in the department and the number of other Supervisors support the Employer's position. If the Lieutenants are found not to be functioning as Supervisors, that means that Inspector Gardner, the Operations Division Commander, is directly supervising 39 employes, including the 5 Shift Commanders, 24 patrol officers, 5 Communication Aides, and 5 other non-patrol officers.

In light of the above, we conclude that the position of police Lieutenant functioning as Shift Commander is a supervisory one.

Dated at Madison, Wisconsin this 26th day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner