

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
**FIRE FIGHTERS LOCAL 311,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS**

Involving Certain Employees of the
CITY OF FITCHBURG

Case 41
No. 65836
ME-4075

Decision No. 32088

Joe Conway, Jr., District Vice-President, International Association of Fire Fighters, 821 Williamson Street, Madison, Wisconsin, 53703, appearing on behalf of Fire Fighters Local 311, International Association of Fire Fighters.

Leslie Sammon, Axley Brynelson LLP, Manchester Place, 2 East Mifflin Street, Suite 200, P.O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the City of Fitchburg.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION**

On April 28, 2006, Fire Fighters Local 311, International Association of Fire Fighters filed a petition with the Wisconsin Employment Relations Commission, seeking an election to determine whether certain firefighters employed by the City of Fitchburg Fire Department wish to be represented by Local 311 for the purposes of collective bargaining.

The parties thereafter engaged in extended but ultimately unsuccessful efforts to resolve a dispute as to whether Captain-Fire Prevention, Inspection and Investigation Chad Grossen is a supervisor, as defined by Sec. 111.70(1)(o)2, Stats., and, therefore, excluded from the proposed bargaining unit

A hearing on that dispute was held in Fitchburg, Wisconsin, on December 19, 2006, before Commission Examiner Danielle Carne. The parties filed post-hearing briefs, the last of which was received on February 13, 2007.

No. 32088

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Firefighters Local 311, International Association of Firefighters, herein the Union, is a labor organization having its principal offices at 821 Williamson Street, Madison, Wisconsin 53703.

2. The City of Fitchburg, herein the City, is a municipal employer having its principal offices at 5520 Lacy Road, Fitchburg, Wisconsin.

3. The Fitchburg Fire Department, herein the Department, was created in 1972, when Fitchburg was a township. When the City of Fitchburg was incorporated in April of 1983, it established a Fire Department and a Police and Fire Commission, pursuant to Sec. 62.13, Stats.

4. The Department operates two fire stations within the City. Station 1 is located at 5791 West Lacy Road, and Station 2 is located at 5415 King James Way. The Department headquarters is also located at 5791 West Lacy Road, but in a separate building. Station 1 houses a primary on-duty engine, a reserve engine, a ladder truck, a tanker, a utility truck, a brush truck and an all-terrain vehicle. Station 2 houses a primary on-duty engine, a reserve engine, a heavy-rescue squad vehicle, and a tanker.

5. The Department is a “combination” Fire Department, meaning that it employs full-time firefighters, on-call firefighters, limited-term firefighters, as well as student-intern firefighters. Full-time firefighters are permanent employees of the City, who are scheduled to fill a predetermined number of “on-duty”¹ shifts per pay period. Although the Department’s full-time firefighters do not carry pagers, they also are allowed to respond to emergency calls, during “off-duty” hours, if they are available to do so. On-call firefighters are allowed to sign up for available on-duty shifts; they also carry pagers and are expected to respond to emergency calls when available to do so. On-call firefighters are paid only for those shifts they actually work. Limited-term firefighters are allowed to fill shifts and work off-duty hours in the same manner as on-call firefighters; they are distinguishable from the Department’s on-call firefighters, however, in that they do not live in the City of Fitchburg and for that reason do not carry pagers and are not expected to routinely respond to emergency calls. Student-intern firefighters are students enrolled in the Madison Area Technical College fire science degree program, who serve a two-year internship with the Department.

¹ The pre-established shifts that are known, in advance, to require coverage at the Department stations, regardless of the occurrence of an emergency call, are referred to as “on-duty” shifts. “Off-duty” shifts are those worked by Department firefighters as a result of an emergency call in.

6. Currently, the Department employs eleven career firefighters, forty-eight on-call firefighters, nine limited term firefighters, and six student intern firefighters.

7. The appointed officer positions within the Department are Chief, Deputy Chief, Captain, and Lieutenant.

8. The Fitchburg Fire Chief, Randall Pickering, is employed on an on-call basis. Chief Pickering served as interim Chief from April, 2002, through January 1, 2007. He was appointed Chief effective January 1, 2007.

9. The Department organizational chart provides for two, on-call Deputy Chief positions, both of which report directly to Chief Pickering. One of the Deputy Chief positions has been vacant, but was budgeted to be filled in 2007. The Deputy Chief-Safety and Personnel position is filled by Richard Roth.

10. The Department has three Captain positions, all of which report directly to Chief Pickering.² Each of the three Department Captain positions has oversight responsibility for one of three Department programs areas or “bureaus”³, identified as the Bureau of Support Services, the Bureau of Training, and the Bureau of Fire Prevention, Inspection and Investigation.

The incumbent in the Captain of Support Services position is Gary Heberling, an on-call employee of the Department. The Bureau of Support Services has responsibility for the Department’s physical assets, including its buildings, trucks, and other equipment. Thus, in his capacity as Captain of Support Services, Captain Heberling oversees maintenance and preventive maintenance activities associated with all apparatus and equipment located at Station 1, Station 2, and the Department headquarters building.

The incumbent in the Captain of Training position is Lance Langer, also an on-call employee of the Department. The Bureau of Training is responsible for identifying training needs in the Department, devising a Department training curriculum, and planning the small-group weekly and Department-wide monthly training sessions.

The incumbent in the Captain of Fire Prevention, Inspection and Investigation is Chad Grossen, a full-time Department firefighter. The Bureau of Fire Prevention, Inspection and Investigation oversees educational and training programs intended to prevent fires; oversees the review of new construction plans, as well as the inspection of existing properties, for fire code compliance; and complies with state mandates requiring the investigation into the cause and origin of fires that occur within the City.

² In 2007, a fourth on-call Captain position will be added to the Department. It is anticipated that this position will be responsible for a newly created Bureau, overseeing the Department’s grant funding activities, which currently are overseen by Captain Heberling.

³ The program area of Safety and Personnel, for which Deputy Chief Richard Roth has oversight, is not considered a bureau, because no Department employees are assigned to assist Deputy Chief Roth in carrying out the duties associated with that program area.

Department employees are assigned to assist each of the three Captains in carrying out their bureau responsibilities, and the work each of the Captains perform with respect to their bureau responsibilities is primarily oversight-oriented. For example, although Captain Langer has some direct involvement with certain training functions throughout the year, firefighters assigned to assist Captain Langer with his bureau responsibilities will generally schedule and lead training sessions. Similarly, although Captain Grossen conducts plan reviews, he assigns to other qualified Department firefighters the 1,700 annual inspections and he also generally oversees the teams that perform the fire investigations.

The Captains' bureau responsibilities are their primary job responsibilities in the Department. The Captains, like all of the appointed officers in the Department, have office space in the Department headquarters building. On average, Captain Grossen spends ninety to ninety-five percent of his time performing his bureau responsibilities. Because these duties locate him primarily at the headquarters building or in the field, Captain Grossen spends, at most, five percent of his time physically at Station 1 and Station 2.⁴ This break-down is typical for the Captains in the Department.

None of the Captains' bureau responsibilities are specifically associated with either of the Department stations. Further, the Captains do not have day-to-day responsibilities associated with either of the Department stations. For example, although the Captains do respond to emergency calls when needed, none of them are assigned to fill on-duty shifts at either station.

11. The Department Captains also have personnel management responsibilities. To a certain extent, the Captains' personnel management assignments correlate with the training assignment of Department firefighters. Specifically, each Department firefighter is assigned to either Station 1 or Station 2 for training purposes and is generally expected to receive training at that station.⁵ The Lieutenants and paid-on-call firefighters that are assigned to Station 1 for training purposes are overseen, for personnel management, by Captain Heberling. The Lieutenants and on-call firefighters that are assigned to Station 2 are overseen, for personnel management, by Captain Langer. Captain Langer also oversees the student-intern firefighters, for the same purpose. Captain Grossen, however, has personnel management oversight over all of the full-time Department firefighters, regardless of the Station to which those firefighters have been assigned for training purposes.

⁴ The limited time Captain Grossen spends at either Station 1 or Station 2 is primarily spent receiving training, joining a company on an off-duty, emergency call basis, or speaking to a Department employee involved in a fire investigation.

⁵ The Department makes an effort to assign a firefighter, for training purposes, to the station closest to that firefighter's residence. The training assignments also generally dictate where firefighters choose to store their gear and, therefore, to which of the Department stations they respond to gear-up for emergency calls. The exceptions to this rule are firefighters who commonly perform non-emergency duties in the field and, therefore, choose to carry their gear with them in their vehicles, as well as the full-time firefighters who work shifts at both stations and, therefore, may keep gear at both stations. There is no effort in the Department to assign firefighters, for their on-duty shifts, to the station at which they train. In fact, the full-time firefighters rotate shifts between both stations, on a six-month basis.

If a disciplinary issue arises with a Department employee, that issue would be documented and referred to the managing Captain. If the issue is not able to be resolved by the Captain, the issue is then referred up the chain of command to the Deputy Chief and then, if necessary, Chief Pickering.

12. Currently, each of the Department's Captains also has general oversight responsibility for one of the three training sessions that occur on a weekly basis at the Department stations. Although they are not required to lead the training sessions, they are required to be present at the sessions, keep track of the participants, and ensure that the training occurs. When the Department hires an additional, on-call Captain, Captain Grossen will no longer have training oversight responsibilities. Instead, the training oversight responsibilities will be distributed among the on-call Captains.

13. There are six Lieutenant positions in the Department, all of which are paid on-call positions. Three of the Department Lieutenants report to Captain Heberling and three of the Lieutenants report to Captain Langer. Another six Lieutenant positions are budgeted for 2007, three of which will report to Captain Grossen and three of which will report to the new Department Captain.

14. The Department provides around-the-clock coverage from both Station 1 and Station 2. The Department divides coverage time, at each station, into two on-duty shifts – a morning shift from 7:00 a.m. until 5:00 p.m. and a night shift from 5:00 p.m. until 7:00 a.m. Each station requires the presence of a full “company” during each of these shifts. A company is comprised of a mixture of four Department employees who, together, are able to perform a defined set of duties that are necessary for being able to respond to a call on an emergency vehicle. Specifically, each company must have two firefighters, one driver, and one Company Officer or Acting Company Officer.⁶

Emergency situations requiring the response of more than the two, pre-assembled, on-duty companies will result in additional companies being formed on a call-in basis. Off-duty firefighters responding to an emergency on a call-in basis will generally report to the station where their gear is stored. Once enough firefighters have arrived at the station to assemble a new company, complete with its own Company Officer, that company travels together on an emergency vehicle to the emergency scene.

The highest ranking officer in a company is generally the employee who assumes the role of the Company Officer. Thus, the Company Officer is typically the highest ranking Department employee present at a station during an on-duty shift. The Company Officer is responsible for all the emergency and non-emergency activities of his or her company. In the event that a company member, for example, does not report for a scheduled, on-duty shift, the Company Officer is required to take steps to ensure that a Company is fully staffed.

⁶ An appointed Department employee serving in the company officer role is referred to as a “Company Officer”. A non-appointed Department employee serving in that role is referred to as an “Acting Company Officer”.

Generally, a company functions as a cohesive unit, and the Company Officer is responsible for deciding when it is appropriate or necessary for a company member to split from the company. The Company Officer is also required to see that each on-duty shift participates in a training activity, completes certain station duties (such as cleaning, maintenance, equipment checks), is allowed to take meal breaks, and has time for physical fitness activities. The Company Officer is also responsible for directing the activities of his or her company at the scene of an emergency.

Although Department Captains are responsible for disciplinary matters, Company Officers are responsible for handling any conflicts that may arise during the course of a shift. The assistance of Department employees, outside the company and higher in the chain of command, is sought only if the Company Officer is unable to resolve the conflict.

The Company Officer at Station 1 is responsible for only the company and activities at Station 1, and the Company Officer at Station 2 is responsible for only the company and activities at Station 2. The Company Officers at the two stations communicate with one another to the extent it is necessary to keep one another apprised of company availability to provide emergency response.

Because the Company Officer position is assumed by the highest ranking officer in a company, appointed officers in the Department, who respond to emergency calls on a call-in basis, have assumed the Company Officer role when responding on a call-in basis to emergency calls. Of the 1,460 Company Officer shifts in the Department between December 1, 2005 and December 1, 2006, only nine were filled by a Department Captain. Three of those nine were filled by Captain Grossen. This ratio is representative of past years in the Department.

15. The Department as a whole is overseen, around-the-clock, by a single Officer-in-Charge (OIC). The OIC is the highest ranking officer on duty in the Department at any given time and is responsible for the operation of the entire Department during that period of time. The OIC is responsible for making Department-wide staffing decisions, such as the decision to “fold-down” or combine the two on-duty companies, in the event that there are not enough firefighters on duty to form two separate companies. Moreover, if a conflict within a company cannot be resolved by a Company Officer, the issue is referred to the OIC on duty.

If an emergency call requires only a single-engine response, the OIC generally does not participate in the response, unless requested to do so by the Company Officer responding to the call. In the event that a multiple engine response is required, however, the OIC also responds to the emergency. In that case, the OIC will generally travel to the scene of the emergency, alone, in a separate Department vehicle. Although the Company Officers oversee the activities of their respective companies at an emergency scene, the OIC will assume the role of Incident Commander, overseeing and coordinating the activities of all responding companies. The OIC/ Incident Commander is also responsible for determining whether to enlist the assistance

of additional responders at an emergency scene. The OIC also ensures that protection is provided to the City, in the event that the on-duty companies are otherwise occupied.⁷

Although the bureau responsibilities assigned to the Department captains are their primary duties, when a Captain is serving as an OIC, the Captain is expected to elevate any OIC duty that arises – because it is generally in the context of an emergency – to the highest priority.

The OIC duties are not generally associated with either of the Department stations.

From 8:00 a.m. until 5:00 p.m., Monday through Friday, the OIC position is filled by Captain Grossen. From 5:00 p.m. until 8:00 a.m., Monday through Thursday, the OIC position is filled by Chief Pickering. During the course of the weekend, from 5:00 p.m. Friday until 8:00 a.m. Monday, the OIC position is filled on a rotating basis by the other on-call, appointed officers in the Department.

Between December 1, 2005 and December 1, 2006, there were a total of 730 OIC shifts. The Department Captains filled 348 of those OIC shifts. Captain Grossen filled 189 of them.

16. The bureau responsibilities and the OIC duties that are currently associated with Captain Grossen's position are properly associated with that position, regardless of any inconsistent assertion to the contrary in the position description(s) associated with that position. Indications otherwise in the position description(s) represent inaccuracies therein.

17. Captain-Fire Prevention, Inspection and Investigation Chad Grossen is an officer above the rank of the highest ranking officer at each single fire station in the City.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Captain – Fire Prevention, Inspection and Investigation Chad Grossen is a supervisor within the meaning of Sec. 111.70(1)(o)2, Stats., and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. A question concerning representation exists in the following collective bargaining unit found to be appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats.:

⁷ This would occur, for example, if both companies were outside the City of Fitchburg, offering mutual aid to a neighboring community in need of emergency relief.

All regular full-time and regular part-time paid firefighters employed by the City of Fitchburg Fire Department, excluding supervisors and confidential, managerial and executive employees.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days of the date of this Direction among all regular full-time and regular part-time fire fighters employed by the Fitchburg Fire Department, excluding supervisors and confidential, managerial and executive employees who were employed on May 7, 2007, 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 the employees voting desire to be represented by Fire Fighters Local 311, International Association of Fire Fighters, for the purposes of collective bargaining with the City of Fitchburg as to wages, hours, and conditions of employment or desire not to be so represented.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

CITY OF FITCHBURG

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

The dispute as to the alleged supervisory status of Captain Grossen is properly resolved through interpretation of Sec. 111.70(1)(o)2, Stats., which provides:

2. **As to fire fighters 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 fire fighter shall be included under the term “supervisor” for the purposes of this subchapter.** [Emphasis added.]

We consistently have concluded that the supervisory definition in Sec. 111.70(1)(o)2, Stats., is to be applied based on its plain meaning and, thus, without regard to whether the individual in question actually has supervisory authority. VERONA FIRE DISTRICT, DEC. NO. 31777 (WERC, 8/06); CITY OF RICE LAKE, DEC. NO. 16413-B (WERC, 1/99); CITY OF ST. FRANCIS, DEC. NO. 17437-A (WERC, 9/82); TOWN OF MADISON, DEC. NO. 17667-A (WERC, 6/80); VILLAGE OF SHOREWOOD, DEC. NO. 15094 (WERC, 12/76). Thus, while the measure of Captain Grossen’s supervisory authority is irrelevant in this case as well, it is necessary to examine the scope of the responsibility of his position, as well as other positions in the Department, to determine the “rank of the highest ranking officer at each single station” of the Department. After doing so, we have concluded that Captain Grossen’s position is above the rank of the highest ranking officer at each of the single stations of the Department and, therefore, that he is a supervisor properly excluded from the proposed bargaining unit.

Our determination that Captain Grossen is above the highest ranking officer at each single station turns, in large part, on the fact that the vast majority of Captain Grossen’s duties – his bureau responsibilities, his OIC duties, and his supervisory duties – are not associated with either of the Department stations. Rather, they are Department-wide duties, which require most of Captain Grossen’s attention, as well as his presence at either the Department headquarters building or in the field for ninety to ninety-five percent of his time.

In addition to Captain Grossen’s lack of association with either of the Department stations, the presence of Company Officers at the two stations also persuades us that Captain Grossen is above the highest ranking officer at each single station. As a general rule, each station is occupied, on an around-the-clock basis, by an on-duty company of firefighters. The on-duty company typically constitutes the only Department personnel present at each station. Each company is supervised and led by a Company Officer. Thus, the Company Officers – not the Captains – represent the highest ranking officers at the Department stations.

The fact that Captain Grossen is periodically in a position to serve as a Company Officer does not persuade us otherwise. The occasions upon which a Department Captain has served as a Company Officer are rare – from December 1, 2005 through December 1, 2006, only nine Company Officer shifts were filled by Captains and only three by Captain Grossen. Further, the parties agree that any Department officer – including appointed officers such as the Chief – can occupy the Company Officer position in a company formed in an emergency, call-in situation. That being the case, linking the statutory designation of the highest ranking officer in each station with the role of a call-in Company Officer would result in the inability to identify even the Chief as a supervisor, under the test set forth in Sec. 111.70(1)(o)2, Stats.

We do not disagree with the Union's contention that Captain Grossen's position should be analyzed in conjunction with the on-call Captain positions in the Department. We also believe, however, that those Captains' bureau duties, their OIC duties, and their personnel management responsibilities – and the resulting, limited association with either of the Department stations – places these individuals in a rank above the highest rank at each individual Department station. In this regard, we disagree with the Union's assertions that the supervisory duties assigned to the on-call Captains – wherein the Lieutenants and paid-on-call firefighters assigned to Station 1 for training purposes are overseen by Captain Heberling and those assigned to Station 2 are overseen by Captain Langer – should be viewed as duties that make these Captains the highest ranking officers at each of the stations. First, it seems to us that these assignments are an administratively simple way to make personnel management assignments. They are not station assignments, and they do not have the effect of bestowing station-specific oversight to the Captains. The lack of connection between the Captains and one station or another is underscored by the fact that Captain Langer also has management authority over all of the student interns and Captain Grossen has management authority over all of the full-time firefighters, regardless of the training-based station assignments that have been given to those individuals. Further, we believe the minimal importance of the station assignments for training purposes is suggested by the fact that those assignments have no influence whatsoever over the scheduling of Department firefighters, between one station or another for on-duty hours.

We also are not persuaded by the Union's reference to other cases, involving fire departments with multiple stations, in which the Commission has determined that officers with the rank of "captain" are not supervisors. As stated above, the definition set forth in Sec. 111.70(1)(o)2, Stats., is to be applied based on its plain meaning, and the language of that statute simply does not defer to the mere titles given to officers.

Finally, we are not persuaded by the Union's arguments that Captain Grossen is only performing some bureau and OIC duties due to the absence of the Deputy Chief in charge of Fire Prevention and of a full-time Chief. We have based our decision on the evidence regarding the Captain's responsibilities in the present and the foreseeable future. Should those responsibilities change in some material way, the Union is free to ask us to revisit this issue should it become the collective bargaining representative.

Given all of the foregoing, it is apparent that the Captain of Fire Prevention, Inspection and Investigation is an officer that is above the rank of the highest ranking officer at each of the single stations of the Department and, therefore, that Captain Grossen is properly excluded from the proposed bargaining unit as a supervisor.

Dated at Madison, Wisconsin, this 7th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

