

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHANNON OSWALD, Complainant,

vs.

**CITY OF FOND DU LAC AND
FOND DU LAC CITY FIRE SUPERVISORY ASSOCIATION**, Respondents.

Case 209
No. 70112
MP-4610

Decision No. 33189-A

Appearances:

Atty. Michael J. Kuborn, Curtis Law Office, 491 South Washburn Street, Oshkosh, Wisconsin 54904, for Complainant Shannon Oswald

Atty. Matthew L. Granitz, Piper & Schmidt, 733 North Van Buren Street, Milwaukee, Wisconsin 53202 for Respondent City of Fond du Lac.

Captain Larry Wunsch, for Respondent Fond du Lac City Fire Supervisory Association.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On August 23, 2010, Shannon Oswald filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Fond du Lac and the Fond du Lac City Fire Supervisory Association had committed prohibited practices in violation of Secs. 111.70(3)(a)(1), 111.70(3)(a)(4) and 111.70(3)(a)(5), Stats., and Secs. 111.70(3)(b)(2), 111.70(3)(b)(3) and 111.70(3)(b)(4), Stats., respectively. On December 14, 2010, pursuant to Secs. 111.70(4)(a) and 111.07, Stats., the Commission appointed Atty. Stuart D. Levitan of its staff to serve as hearing examiner, with authority to make and issue Findings of Fact, Conclusions of Law and Order. Hearing in the matter was held in Fond du Lac, Wisconsin, on January 14, 2011. A transcript was made available to the parties on March 11, 2011. The parties filed written arguments, the last of which was received on May 16, 2011. The

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examiner subsequently supplemented the record by asking the parties to stipulate to certain additional facts, which they did. Being fully advised in the premises, the Examiner hereby makes and issues the following

FINDINGS OF FACT

1. Respondent City of Fond du Lac (“the city”) is a municipality on the southern shore of Lake Winnebago in eastern Wisconsin. Among its several offices and agencies, the City maintains and operates a Fire Department. At all times material hereto, Peter O’Leary has been Chief of the Fire Department.

2. The city has recognized Respondent Fond du Lac City Fire Supervisory Association as “the exclusive bargaining agent of the Fond du Lac Fire Department, excluding the Fire Chief and the Assistant Chiefs, Training/Safety Officer, Fire Fighters, Paramedics, Lieutenants and Inspectors, in accordance with Wisconsin Statutes.” At all times material hereto, Battalion Chief (now Captain) Larry Wunsch was President of the Association.¹

3. On February 4, 2009, the city offered Complainant Shannon Oswald employment as a Fire Captain. Oswald began work as a Fire Captain with the City on February 23, 2009, subject to a probationary period of six months. At the time Oswald began his employment, and throughout his tenure, the city maintained three fire stations, with the command structure at Station One consisting of a Battalion Chief and a Captain on each shift, and Stations Two and Three having a Lieutenant as the ranking officer on each shift.

4. On August 18, 2009, Wunsch wrote a memorandum O’Leary to recommend that Oswald’s probationary status be extended for another six months. On August 23, the six month anniversary of Oswald’s starting date, Wunsch sent O’Leary an email informing him that he had “had a conversation with Shannon about probationary extension,” and that Wunsch felt Oswald was “comfortable with that and understands the reasons.”

5. At a meeting on August 25, 2009, O’Leary formally notified Oswald that his probationary period was being extended. On August 26, O’Leary wrote to Rodney Pasch, Director of Human Relations, informing him of that meeting, and relating that “(a)lthough disappointed, Captain Oswald accepted the six month extension to his probation.” O’Leary further related that Wunsch was “confident that Shannon’s progress will continue to improve over the next six months and will successfully complete probation.”²

6. The three battalion chiefs were paid an hourly wage with significant overtime assignments. In the fall of 2009, O’Leary proposed a reorganization of the department to eliminate the battalion chief position and create in their stead three assistant chief

¹ Although the recognition clause refers to “Assistant Chiefs,” the salary schedule appendix refers to “Battalion Chiefs.” The discrepancy does not affect the legal issues which this complaint presents.

² On May 23, 2011, Mr. Pasch became a Commissioner of the Wisconsin Employment Relations Commission. I have not discussed any aspect of this case with him.

positions, paid a salary without overtime opportunities. In late November, 2009, the Fond du Lac Police and Fire Commission approved the reorganization, effective January 1, 2010. Other than replacing hourly Battalion Chiefs with salaried Assistant Chiefs, the distribution of command staff at each station house remained the same, with Station One having Assistant Chiefs and Captains, and Stations Two and Three having Lieutenants as the ranking officer on each shift.

7. Several battalion chiefs were offered employment as assistant chiefs, but two declined, preferring to revert to the position of captain. One captain at the time of the reorganization retained his captaincy. Counting Oswald, this left four captains to fill three permanent positions.

8. On December 4, 2009, O'Leary wrote Oswald to inform him that due to the department having four captains for three positions due to the reorganization, Oswald's probationary status, and his skill set, he would be "dismissed from your employment," effective December 31, 2009.

9. On or about December 11, 2009, Oswald requested a hearing under the city's personnel policies, alleging an "unjust application or violation of a personnel policy or departmental regulation." Hearing was held before City Manager Tom Herre on January 15, 2010. On February 12, 2010, Herre issued a 15-page, single-spaced Findings of Fact and Conclusions which denied and dismissed Oswald's complaint.

10. On August 23, 2010, Oswald filed a complaint with the Wisconsin Employment Relations Commission, alleging that the city and association separately violated his rights under several subsections of Secs. 111.70(3)(a) and 111.70(3)(b), Stats., respectively.

On the basis of the above and foregoing Findings of Fact, I hereby make and issue the following

CONCLUSIONS OF LAW

1. The City of Fond du Lac is a municipal employer as defined by Sec. 111.70(1)(j), Stats.

2. The Fond du Lac City Fire Supervisory Association is a supervisory unit as referenced in Sec. 111.70(8)(b), Stats.

3. At all times that he was employed by the City of Fond du Lac, Shannon Oswald was a supervisor as defined by 111.70(1)(o), Stats., and thus was not a municipal employee as defined by 111.70(1)(i), Stats.

On the basis of the above and foregoing Conclusions of Law, I hereby make and issue the following

ORDER

That the complaint herein be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 6th day of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

CITY OF FOND DU LAC

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

This case poses several interesting questions, including what action is necessary for an employer to extend an employee's probation, and the effect of incorporating Sec. 62.13(5m), Stats., into a supervisory association's working agreement with the city. However, due to fundamental jurisdictional issues, I cannot address and answer those questions.

Complainant Shannon Oswald alleges that the City of Fond du Lac and the Fond du Lac City Fire Supervisory Association have committed a number of prohibited practices, in violation of Secs. 111.70(3)(a)1, 4 and 5 and Sec. 111.70(3)(b)2, 3 and 4, Stats., respectively.

Section 111.70(2), Stats., protects the rights of municipal employees to engage, or refrain from engaging, in certain collective activities in the workplace. Sec. 111.70(3)(a)1., Stats., prohibits municipal employers from interfering, restraining or coercing municipal employees in the exercise of those rights.

Sec. 111.70(3)(a)(4), Stats., makes it a prohibited practice for a municipal employer to refuse to bargain collectively "with a representative of a majority of its employees in an appropriate collective bargaining unit." Sec. 111.70(1)(b), Stats., defines "collective bargaining unit," as:

...a unit consisting of municipal employees who are school district professional employees or of municipal employees who are not school district professional employees that is determined by the commission to be appropriate for the purpose of collective bargaining.

Sec. 111.70(3)(a)5., Stats., makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees"

Sec. 111.70(3)(b)2., Stats., makes it a prohibited practice for a municipal employee, individually or acting collectively, to coerce, intimidate or induce an agent of a municipal employer to interfere with any of its employees in the enjoyment of their legal rights, including those guaranteed in subsection 2. Sec. 111.70(3)(b)3., Stats., makes it a prohibited practice for any municipal employee, individually or collectively, to refuse to bargain collectively with the duly authorized agent of the municipal employer. Sec. 111.70(3)(b)4., Stats., makes it a prohibited practice for a municipal employee, individually or collectively, to violate any collective bargaining agreement between the parties.

Thus, the starting point for evaluating complaints alleging a violation of Sec. 111.70(3)(a) is that the complainant be a municipal employee. The starting point for

evaluating complaints alleging a violation of Sec. 111.70(3)(b) is that the respondent be a municipal employee.

Sec. 111.70(1)(i), Stats., defines “municipal employee” as, “any individual employed by a municipal employer other than as an independent contractor, supervisor, or confidential, managerial, or executive employee.”

Sec. 111.70(1)(o)2., Stats., provides:

As to fire fighters employed by municipalities with more than one fire station, 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.

Both before and after the reorganization, the city of Fond du Lac maintained three fire stations. Battalion Chiefs and Captains (later, Assistant Chiefs and Captains) were assigned only to Station One. A lieutenant was the highest ranking officer at Stations Two and Three, or the “highest ranking officer at each single station.” Pursuant to the statutory definition, all officers above the rank of lieutenant – first battalion chiefs and captains, later assistant chiefs and captains – are supervisors.

Supervisors are not municipal employees, and are not protected under Secs. 111.70(2) or (3), Stats. As a supervisor, the complainant has no recourse under those statutes. Further, as respondent association was comprised entirely of Battalion Chiefs (later Assistant Chiefs) and Captains, it could not, by definition, have committed a violation of Sec. 111.70(3)(b), Stats. Accordingly, although the respondents did not raise this jurisdictional matter in their answer or written arguments, I am constrained to dismiss the complaint in its entirety.

Dated at Madison, Wisconsin this 6th day of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner