

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**CEDARBURG POLICE OFFICER'S ASSOCIATION**

Involving Certain Employees of

**CITY OF CEDARBURG**

Case 49  
No. 70546  
ME-4254

**Decision No. 33342**

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**Appearances:**

**Ronald S. Stadler** and **Aaron J. Graf**, Smith Amundsen LLC, 4811 South 76<sup>th</sup> Street, Suite 306, Milwaukee, Wisconsin 53220, appearing on behalf of the City of Cedarburg.

**William R. Rettko**, Rettko Law Offices, S.C. 15460 West Capitol Drive, Suite 150, Brookfield, Wisconsin 53005, appearing on behalf of the Cedarburg Police Officer's Association.

**Ben Barth**, Labor Consultant, Labor Association of Wisconsin, Inc. N116 W16033 Main Street, Germantown, Wisconsin 53022 and **Nathan Dineen**, Vanden Heuvel Dineen, P.O. Box 550, W175 N11086 Stonewood Drive, Germantown, Wisconsin 53022, appearing on behalf of the Labor Association of Wisconsin, Inc.

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

On January 19, 2011, the Cedarburg Police Officer's Association, herein the Association, filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether certain employees of the City of Cedarburg Police Department,

No. 33342

herein the City, wished to be represented for the purposes of collective bargaining by the Association or to continue to be so represented by the Labor Association of Wisconsin, Inc., herein LAW.

The parties were unable to stipulate to the conduct of the election because the City, contrary to the Association and LAW, asserted that the Sergeants currently included in the LAW-represented bargaining unit are supervisors.

Hearing on the status of the Sergeants was held on June 7, 2011 in Cedarburg, Wisconsin by Commission Examiner Peter G. Davis. The City and the Association each filed written argument on July 15, 2011 with LAW electing not to do so.

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

#### **FINDINGS OF FACT**

1. The City of Cedarburg, herein the City, is a municipal employer that provides law enforcement services through its Police Department, herein the Department.

2. The Department consists of the Chief, a Captain, one Detective Sergeant, four Patrol Sergeants, one Detective, 11 Patrol Officers, six Dispatchers, four clerical employees and one maintenance employee. The Sergeants, the Detective and the Patrol Officers are currently represented for the purpose of collective bargaining by LAW, for and on behalf of the Cedarburg Police Officer's Association Local 223. The six Dispatchers are currently represented for the purpose of collective bargaining by the Cedarburg Professional Dispatcher's Association, Local 512, of LAW.

3. The Department provides law enforcement services 24 hours a day, seven days a week, with Department personnel staffing three eight hour shifts and the occasional overlapping "power shift." The Chief, the Captain, the Detective Sergeant, the Detective, the clerical employees, and the maintenance employee work the day shift. The Patrol Sergeants, the Patrol Officers, and the Dispatchers staff all three shifts, with a minimum of seven sworn employees with the power of arrest (Sergeants and Patrol Officers) working each day. Typically each shift will have a Patrol Sergeant, one or two Patrol Officers, and one or two Dispatchers. Shift assignments are determined by employee seniority.

4. The City Police and Fire Commission, herein the PFC, has the statutory authority to hire, promote and suspend, demote, or discharge Department employees. The PFC

does not significantly involve any Department employees when hiring new Department employees. The Chief and Captain interview applicants for promotions. Input received from Patrol Sergeants can play a role in the selection of the individual that the Chief and the Captain will recommend for promotion to the PFC. The Captain generally investigates alleged misconduct by Department employees and reports his findings to the Chief and/or the PFC. The Chief is the only Department employee with authority to issue a written reprimand.

5. The Chief directly supervises the clerical employee and the maintenance employee. The Captain performs a wide variety of administrative duties, including vacation scheduling and responding to contractual employee grievances.

6. The Sergeants spend at least 80% of their shifts directly providing law enforcement services, with the remainder of the time spent completing paperwork. Law enforcement services are provided through routine patrol and specific assignments such as enforcing speed limits and response to citizen calls. Citizen calls for service are received by a Dispatcher who then forwards the necessary information to the Patrol Sergeant. The Patrol Sergeant then decides whether to personally handle the call or to assign it to a Patrol Officer. The nature of the call, the skills/experience of the Sergeant and the Officers(s), the geographic location of the call, and the nature and number of prior calls on the shift are factors typically considered when the Sergeant makes this decision. On average, Patrol Sergeants respond to as many services calls as do Patrol Officers.

Patrol Sergeants have discretion to hold employees over at the end of a shift to ensure the proper handling of a service call. If a Patrol Officer is absent from a shift on short notice due to illness or other causes, the Patrol Sergeant determines whether another Officer needs to be called in to work, with the seven person staffing minimum generally being the determining factor in the decision.

The Detective Sergeant directs the work of the Detective.

7. The Patrol Sergeants typically evaluate the job performance of two or three Patrol Officers and two Dispatchers each year. The evaluations are signed by the Patrol Sergeant and the subject employee and then reviewed by the Captain, who can, and occasionally has, made changes to ensure consistent Department-wide evaluation standards. Evaluations may affect a Patrol Officer's promotional opportunities and extra duty assignments (which produce additional compensation) and could be used to support disciplinary action against Patrol Officers or Dispatchers. The Detective Sergeant evaluates the Detective.

8. Sergeants and the Detective have a maximum annual base compensation of \$68,900 after seven years, with Patrol Officers having a maximum of \$64,800 after five years. If overtime earnings are included, Sergeants may earn \$80,000 and Patrol Officers may earn \$70,000. The Captain has an annual salary of \$79,300 and is not eligible for overtime.

9. The Sergeants do not have supervisory duties and responsibilities in sufficient combination and degree to be supervisors.

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

### **CONCLUSIONS OF LAW**

1. The Sergeants are not supervisors within the meaning of Sec. 111.70(1)(o) 1, Stats., and thus are municipal employees within the meaning of Sec. 111.70 (1) (i), Stats. They are appropriately included in the collective bargaining unit currently represented by LAW.

2. A question concerning representation within the meaning of Sec. 111.70(4)(d) 2.a., Stats., has arisen as to whether the employees in the collective bargaining unit currently represented by LAW wish to continue to be so represented, wish to be represented by the Cedarburg Police Officers Association, or desire not to be represented for the purposes of collective bargaining.

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

### **DIRECTION OF ELECTION**

A secret ballot election shall be conducted under the direction of the Wisconsin Employment Relations Commission within thirty (30) days from the date of this Direction in the collective bargaining unit consisting of full-time employees of the City of Cedarburg Police Department employed in the classifications of Detective, Sergeant and Patrolman who were employed on August 30, 2011, 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 desire to be represented by the Cedarburg Police Officer's Association, or by the Labor Association of Wisconsin, Inc., or by neither of said organizations, for the purpose of collective bargaining with the City of Cedarburg on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of August, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

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James R. Scott, Chairman

Judith Neumann /s/

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Judith Neumann, Commissioner

Rodney G. Pasch /s/

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Rodney G. Pasch, Commissioner

**CITY OF CEDARBURG**

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

The City, contrary to LAW and the Association, contends that the Sergeants currently included in the LAW bargaining unit are supervisors within the meaning of Sec. 111.70(1)(o) 1, Stats., and thus are not eligible to vote in the election sought by the Association.

The statutory definition of a supervisor in Sec. 111.70(1)(o)1, Stats., is the following:

. . . any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When applying this statutory definition, we focus upon the following factors:

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 persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the individual is paid for his skills or for his supervision of employees;
5. Whether the individual is supervising an activity or is primarily supervising employees;
6. Whether the individual is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees.<sup>1</sup>

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<sup>1</sup> CITY OF MILWAUKEE, DEC. No. 6960-J (WERC, 5/89)

We have consistently held that not all of the above factors need to reflect supervisory status for us to find an employee to be a supervisor. Our task is to determine whether the factors are present in sufficient combination and degree to warrant finding an employee to be a supervisor.

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As to Factor 1, we acknowledge at the outset that, given the statutory authority and independence of the Police and Fire Commission (PFC), the role of any Department employee in hiring, promotion, and serious discipline may be limited. However, to the extent that Department employees can effectively recommend such action by the PFC -- which is true here for promotions -- or have independent disciplinary authority to issue written reprimands, the identity of those individuals and the extent of their authority remain important considerations. Here, the PFC retains control of the hiring process, and thus the Sergeants, like other Department employees, play no role. As to discipline, the Chief issues all written reprimands and thus the Sergeants' disciplinary authority is limited to verbal reprimands. The Captain typically investigates alleged instances of employee misconduct, and the Sergeants' role, like that of all Department employees, is generally limited to reporting alleged instances of employee misconduct. Sergeants have input as to promotions of Patrol Officers through the evaluation process and staff meetings, but it is the Chief who effectively recommends promotions to the PFC. The Sergeants' evaluation of employees can also be a factor in the Chief's decisions as to special assignments that can produce additional compensation. The Sergeants play no role in transfers.

As to Factors 2 and 7, in the context of the paramilitary structure of a law enforcement agency, employees are generally obligated to follow orders issued by employees with a higher rank without regard to whether the higher ranked employee is a statutory supervisor. Nonetheless, the extent of an employee's authority to direct the work of others remains an important consideration. Patrol Sergeants direct and assign the work of the one or two Patrol Officers who work on a shift with them. They have the authority to hold Officers over at the end of a shift as needed and, within the context of the Department's seven person staffing policy, to determine whether to replace a Patrol Officer who is absent from a shift on short notice. The Patrol Sergeants use independent judgment when exercising this authority. The Detective Sergeant generally directs the work of a Detective who is typically assigned to investigate crime by minors.

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<sup>2</sup> ONEIDA COUNTY, DEC. NO. 24844-G (WERC, 6/98)

As to Factor 3, each Patrol Sergeant generally exercises authority over three or four Department employees each shift (one or two Patrol Officers and two Dispatchers), with the Detective Sergeant exercising authority over the Detective. The Chief and Captain exercise greater authority than the Sergeants over the Patrol Officers, the Dispatchers, and the Detective.

As to Factor 4, the level of pay of the Sergeants and Patrol Officers is contractually bargained and thus does not provide the City's independent perspective on the relationship between pay and authority over other employees. In addition, the Detective receives the same bargained pay rate as the Sergeants. However, it is apparent that the Patrol Sergeants are paid more than the Patrol Officers (and Dispatchers) and that at least some of that disparity is attributable to the Patrol Sergeants' authority to direct the shift.

As to Factors 5 and 6, the Patrol Sergeants and the Detective Sergeant spend a substantial majority of their time (at least 80%) performing the same patrol or detective work as the Patrol Officers and the Detective, respectively. While the Patrol Sergeants on duty during a shift electronically monitor the performance of the Patrol Officers and Dispatchers assigned to that shift and also are in a position to observe the Patrol Officers on those occasions when a call requires the Sergeant to respond along with one or more Officers, the Sergeants devote very little time to the purpose of physically observing said employees' performance. The Detective Sergeant rarely oversees the work of the Detective.

As is often the case, the evidence presents a mixed picture as to the issue of supervisory status. Supporting a finding of supervisory status is the independent authority exercised when directing and assigning work and the evaluation of employees that can affect promotional and additional pay opportunities. Weighing against a finding of supervisory status is the lack of independent authority to issue or effectively recommend a written reprimand or more serious discipline, the limited number of employees whose work is directed by each Sergeant, and the substantial amount of time spent by the Sergeants performing the same law enforcement work as those whose work they direct. On balance, we conclude that the Sergeants do not possess supervisory duties and responsibilities in sufficient combination and degree to be supervisors. Thus, they are eligible to vote in the election sought by the Association.

When reaching this conclusion, we have considered the prior Commission decisions cited by the City but find each to be significantly distinguishable from the facts before us here. In CITY OF SUPERIOR, DEC. NO. 17018-A (WERC, 2/99), the employees found to be supervisors had the independent authority to issue written reprimands and investigated/made



culpability determinations as to performance-related complaints. In CITY OF MARSHFIELD, DEC. NO. 25700-A (WERC, 10/92), the supervisors participated in the hiring process and had the independent authority to issue written reprimands and to effectively recommend suspensions. In CITY OF ST. FRANCIS, DEC. NO. 24473 (WERC, 5/87), the supervisors participated in the hiring process, effectively recommended written reprimands, investigated performance-related complaints, and made decisions that significantly affected employee wages. Lastly, in CITY OF WISCONSIN RAPIDS, DEC. NO. 20779-B (WERC, 8/87), the employees determined to be supervisors spent significant time directly supervising employees, served as the first step in the grievance procedure, investigated performance-related complaints and were participants in management discussions as to what discipline might be appropriate. Given these significant factual distinctions, none of these prior decisions provides a persuasive analytical basis for finding the Sergeants at issue here to be supervisors.

Dated at Madison, Wisconsin, this 30<sup>th</sup> day of August, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

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James R. Scott, Chairman

Judith Neumann /s/

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Judith Neumann, Commissioner

Rodney G. Pasch /s/

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Rodney G. Pasch, Commissioner