

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN PROFESSIONAL POLICE ASSOCIATION
Involving Certain Employees of
VILLAGE OF PALMYRA

Case ID: 553.0000
Case Type: E_ME

DECISION NO. 37447

Appearances:

Roger W. Palek, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, appearing on behalf of the Wisconsin Professional Police Association.

James R. Macy, Attorney, von Briesen & Roper, 2905 Universal Street, Suite 2, Oshkosh, Wisconsin, appearing on behalf of the Village of Palmyra.

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

On January 29, 2018, the Wisconsin Professional Police Association filed a Petition for Election with the Wisconsin Employment Relations Commission requesting that the Commission conduct an election to determine whether certain public safety employees of the Village of Palmyra wish to be represented by the Association for the purposes of collective bargaining with the Village.

The parties subsequently agreed that the scope of the proposed bargaining unit would be all regular full-time public safety employees with the power of arrest who are not supervisors, confidential, or managerial employees. However, the parties were unable to agree on whether the Sergeant was or was not a supervisor, confidential, or managerial employee, and the hearing as to that dispute was held in Palmyra, Wisconsin, on April 23, 2018, before Hearing Examiner Peter G. Davis. The parties made oral argument at the hearing's conclusion, and the record was closed on April 26, 2018, with the receipt of the hearing transcript.

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

FINDINGS OF FACT

1. The Village of Palmyra, herein the Village, is a municipal employer.
2. The Wisconsin Professional Police Association, herein WPPA, is a labor organization.
3. The Village employs certain individuals in a Public Safety Department which includes a Police Division. The Police Division consists of the Police Chief/Director of Public Safety, a Sergeant, four full-time public safety officers, and a part-time administrative assistant who does not have the power of arrest. The WPPA seeks to represent the Sergeant and the four full-time public safety officers.
4. The Sergeant is a long-time employee of the Village who has also served in various other capacities, including administrative assistant, police officer, and *de facto* police chief. Her typical duties consist of a scheduled eight-hour patrol shift. For the majority of her shift, she is the only public safety employee on patrol in the Village. The Sergeant's role when directing the work of other employees is generally limited to reviewing reports and requesting corrections.
5. The Sergeant is paid approximately \$1.50 per hour more than the highest paid public safety officer with part of the pay differential attributable to her length of service.
6. The Sergeant's independent disciplinary authority is limited to oral reprimands. If she were to report employee misconduct to the Police Chief, the Chief would conduct an independent investigation and determine whether misconduct occurred and what level of discipline was appropriate for him to impose or effectively recommend to the Village. When two public safety employees were discharged, the Chief did not involve the Sergeant in the investigation of their conduct or the determination of what discipline was appropriate.
7. The Public Safety Department makes hiring decisions by consensus. The Sergeant's role in a hiring decision is the same as other members of an interview panel – although she may be called upon to check the references of a recommended candidate.
8. The Police Chief evaluates all employees.
9. The Sergeant does not authorize overtime or approve requests for use of sick leave or vacation. Employees calling in to report an illness may speak to the Chief, the Sergeant, or the Administrative Assistant depending on who is available.
10. Under the recently adopted Employee Handbook, an employee grievance is to be filed with the employee's supervisor and, if unresolved, the grievance moves to the Village President.
11. When the Police Chief cannot be contacted because he is out of the country or otherwise unavailable, the Sergeant will handle "police administration." If both the Chief and the

Sergeant are unavailable, the public safety officer with the most seniority would assume those responsibilities.

12. The Sergeant did not play any role in the development of the Policy & Procedure manual for the Police Division.

13. The Sergeant does not have any significant involvement in the creation of the Police Division budget and has no expenditure authority to commit the Village's resources.

14. Should WPPA become the collective bargaining representative, the extent of the Sergeant's role in collective bargaining and contract administration is unclear.

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

CONCLUSIONS OF LAW

1. The Sergeant does not have supervisory authority and responsibility in sufficient combination and degree to be a supervisor within the meaning of § 111.70(1)(o)1, Stats.

2. The Sergeant does not sufficiently participate in the formulation, determination, and implementation of management policy or possess sufficient authority to commit the Village's resources to be a managerial employee within the meaning of § 111.70(1)(i), Stats.

3. The extent of the Sergeant's potential role in the collective bargaining and contract administration is not sufficient to make her a confidential employee within the meaning of § 111.70(1)(i), Stats.

4. The Sergeant is a municipal employee within the meaning of the § 111.70(1)(i), Stats.

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

DIRECTION OF ELECTION

A secret ballot election shall be conducted by the Wisconsin Employment Relations Commission within 30 days of the date of this Direction in a collective bargaining unit consisting of all regular full-time public safety employees with the power of arrest, excluding supervisors, managerial, confidential, and executive employees employed by the Villager of Palmyra on May 18, 2018, except such employees as may prior to the election leave or be removed from the bargaining unit, for the purpose of determining whether a majority of the employees who vote

wish to be represented by the Wisconsin Professional Police Association for the purposes of collective bargaining with the Village of Palmyra.

Signed at the City of Madison, Wisconsin, this 18th day of May, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

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

Section 111.70(1)(i), Stats. defines a municipal employee as:

... any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee.

The issue to be resolved is whether the Sergeant in this small department is a supervisor or a managerial or confidential employee and thus is not a municipal employee eligible to vote in the election sought by WPPA or to be included in the bargaining unit should WPPA win the election. Having considered the record evidence and the arguments of the parties, the Commission concludes the Sergeant is a municipal employee.

Section 111.70(1)(o)1, Stats. defines a “Supervisor” as:

... 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 to recommend such action, if in connection with the forgoing 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, the Commission considers 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 workforce;
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 alleged supervisor is paid for his/her skill or for his/her supervision of employees;
5. Whether the alleged supervisor is primarily supervising an activity or primarily supervising employees;
6. Whether the alleged supervisor is a working supervisor or whether he/she spends a substantial majority of his/her time supervising employees; and

7. The amount of independent judgment exercised in the supervision of employees.

See Town of Brookfield, Dec. No. 26426 (WERC, 4/90).

Not all of the factors above need to reflect supervisory status for the Commission to find an employee to be a supervisor. Rather, the inquiry in each case is whether the factors are present in sufficient combination and degree to warrant the conclusion that the employee in the disputed position is a supervisor. *City of Green Bay*, Dec. No. 31417 (WERC, 8/05).

As to Factor 1, the record reflects that the Sergeant does not have the authority to effectively recommend any of the listed actions. Hiring is done by consensus. There are no promotional or transfer opportunities. Any significant discipline is the province of the Chief.

As to Factor 2, the evidence does not reflect any significant opportunity or authority to direct and assign the four full-time public safety officers. She patrols alone for the majority of her working hours, and shift schedules are established as a matter of routine.

As to Factor 3, the record establishes that it is the Chief who serves as the supervisor of the four full-time employees and the administrative assistant.

As to Factor 4, the Sergeant's pay is higher than that of other full-time public safety officers but some of that pay gap is attributable to her seniority.

As to Factor 5, at most the Sergeant is occasionally directing the activities of other employees.

As to Factor 6, the Sergeant spends the vast majority of her time performing the same law enforcement duties as other employees.

As to Factor 7, to the limited extent that the Sergeant directs the work of other employees, she does exercise some independent judgment.

Reviewing the foregoing, the Commission concludes the Sergeant is not a supervisor and it is the Chief who is the supervisor of the Patrol Division employees.¹

A "managerial" employee is specifically excluded from the definition of "municipal employee" found in § 111.70(1)(i), Stats. However, because there is no statutory definition of a "managerial" employee, that term has been defined by the Commission through case law. With

¹Consideration of the Village's "grievance procedure" argument does not weaken the basis for this conclusion. While the Village points to the handbook provision that it interprets as requiring that a grievance be presented to the Sergeant at Step 1 because she is the employees' "supervisor," Step 2 has an unresolved grievance proceeding to the Village President. Under the Village's view, there is no role for the Police Chief, a scenario which seems highly unlikely. Rather, if, as the Commission has concluded, the Chief is the supervisor, the grievance procedure becomes a more realistically functional process.

judicial approval, the Commission has defined a “managerial” employee by considering the extent to which the employee participates in the formulation, determination, and implementation of management policy or possesses the authority to commit the employer’s resources. *City of Milwaukee vs. WERC*, 71 Wis.2d 709 (1976); *Village of Whitefish Bay*, 103 Wis.2d 443 (Ct. App. 1981); *Kewaunee County vs. WERC*, 141 Wis.2d 347 (Ct. App. 1987); *Manitowoc County vs. Local 986A*, 170 Wis.2d 692 (Ct. App. 1992); *County of Eau Claire vs. AFSCME Local 2223*, 190 Wis.2d 298 (Ct. App. 1994). To confer managerial status, the employee’s policy role must be “at a relatively high level.” *Marinette County*, Dec. No. 26154-B (WERC, 3/92), or the employee’s authority to commit resources must involve the allocation of resources in a manner which significantly affects the nature and direction of the municipal employer’s operations. *Village of Jackson*, Dec. No. 25098 (WERC, 1/88).

Here, the Sergeant does not have any independent authority to expend the Village’s resources, and it seems clear that her role in the preparation of the recommended Patrol Division budget is very limited. Thus, her alleged managerial status turns on any policy role she may play. While the Village asserts the Sergeant will participate in the development of future Patrol Division policies, the evidence presented does not establish that this role will rise to the “relatively high level” required for managerial status. It is also noteworthy that the Sergeant played no role in the development of the existing and recently developed “Policy & Procedure” manual. Therefore, the Commission concludes the Sergeant is not a managerial employee.

The legal standard to be used in determining confidential status is as set forth by the Commission in *Mineral Point School District*, Dec. No. 22284-C (WERC, 9/00), and affirmed by the Court of Appeals in *Mineral Point Unified School District vs. WERC*, 251 Wis.2d 325, 337-338 (2002):

We have held that for an employee to be held confidential, the employee must have sufficient access to, knowledge of or participation in confidential matters relating to labor relations. For information to be confidential, it must (a) deal with the employer’s strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents. ...

While a *de minimus* exposure to confidential materials is generally insufficient grounds for exclusion of an employee from a bargaining unit, ... we have also sought to protect an employer’s right to conduct its labor relations through employees whose interests are aligned with those of management. ... Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, ... and,

similarly, where a management employee has significant labor relations responsibility, the clerical employee assigned as his or her secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employee without undue disruption to the employer's organization.

Here, because no bargaining unit currently exists within the Village generally or within the Public Safety Department specifically and because the Village has not made any concrete plan as to how it will handle confidential labor relations issues should a bargaining unit be created, the Commission has no persuasive basis for concluding that the Sergeant would have sufficient confidential responsibilities to warrant her exclusion as a confidential employee. From the evidence presented, it appears that the Administrative Assistant will likely be the employee called upon to assist the Chief and the Village Board as to confidential labor relations matters.

In summary, the Sergeant is clearly a valued employee who is being asked by the Village to expand her leadership skills within the Patrol Division. She serves the Division increasingly well as lead worker but is not a supervisor or a managerial or confidential employee. Therefore, she is eligible to vote in the election.

Signed at the City of Madison, Wisconsin, this 18th day of May, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman