

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**KEWAUNEE CITY POLICE DEPARTMENT EMPLOYEES  
UNIT LOCAL 1778, AFSCME, AFL-CIO**

and

**CITY OF KEWAUNEE**

Case 15  
No. 55209  
MA-9928

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Appearances:

**Mr. Gerald D. Ugland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Mr. William J. Wolske**, City Attorney, appearing on behalf of the City of Kewaunee.

**ARBITRATION AWARD**

Kewaunee City Police Department Employees Unit Local 1778, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Kewaunee, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Kewaunee, Wisconsin on August 19, 1997. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on November 17, 1997.

**BACKGROUND**

On October 11, 1996, the Assistant Chief position became vacant when the incumbent, Dan Kruse, was selected to be Chief of Police. The parties stipulated that Peter Doperalski was the most senior qualified applicant for the position. James Kleiman was the next most senior qualified applicant and Frank Salentine was the next most senior qualified applicant. The Chief arranged for four police department administrators from neighboring communities to conduct an oral interview of the three candidates. Salentine scored highest and the Chief recommended to the Police and Fire Commission that his selection of Salentine be approved. On January 18, 1997, the Police and Fire Commission approved Salentine's selection and Officer Doperalski filed the instant grievance which is the subject of this arbitration.

## ISSUE

The parties stipulated to the following:

1. Did the Employer violate the collective bargaining agreement by not awarding the Assistant Chief position to the senior qualified applicant?
2. If so, what is the appropriate remedy?

## PERTINENT CONTRACTUAL PROVISIONS

### Article II - Recognition

A. Bargaining Unit: The Employer recognizes the Union as the sole and exclusive bargaining agent for all regular employees of the Kewaunee City Police Department, but excluding the Chief of Police, supervisory, managerial, and confidential employees.

### Article V - Seniority

A. Filling Vacancies: In filling vacancies or in making promotions other than in a supervisory capacity, preference shall be given to the employees who are oldest in point of service, provided such employees can qualify for the position to be filled.

## POSITIONS OF THE PARTIES

### Union's Position

The Union contends that the Assistant Chief position has been and still is included in the bargaining unit and under Article V, Section B, the most senior qualified employe must be given the job. It submits that as Mr. Doperalski is the most senior qualified applicant, he must be given the job. Contrary to the City, the Union insists the position is not supervisory.

The Union refers to the job description which sets out the extent to which the Assistant Chief performs as a supervisor. It notes that the "Summary Description" states that in the Chief's absence the Assistant Chief assumes the Chief's duties and responsibilities. It argues that merely substituting for a supervisor does not make a person a supervisor. As to the shift, the Union notes that when the present Chief was the Assistant, he and the Chief worked the same shift and the Assistant would act in the Chief's absence. With regard to hiring, it observes that the Assistant Chief has not participated in hiring and the Police and Fire Commission perform this task. The Union points out that the Assistant Chief can only discipline in the Chief's absence and yet in ten years, the Assistant Chief only recommended the discipline of three casual employes and actually disciplined only one after consulting with the Chief. It terms this

disciplinary authority de minimis. The Union states that there are only four officers besides the Chief and a number of casual employes. It surmises that the Assistant Chief may or may not work with other officers but it stresses that many times two officers work the same shift and the most senior officer on duty is in charge and all officers must report any performance inconsistent with policy. It admits that the Assistant Chief does scheduling but there have been no layoffs, only one promotion in ten years and few grievances, none received by the Assistant. It concludes that on this record the Assistant Chief is not supervisory. It argues that the only supervisor is the Chief.

The Union claims that the selection process was flawed and the selection was based on test scores rather than on seniority. It asks that the grievance be upheld and the position offered to Doperalski, and if he does not accept, then to Kleiman and then to Salentine with the affected employe to be made whole.

### **City's Position**

The City contends that it did not violate the collective bargaining agreement in not selecting the most senior qualified applicant. It refers to Article V, Section B, which states that preference is given to the most senior qualified employe when filling vacancies or making promotions "other than in a supervisor capacity" and insists this language must have some meaning and it must be given effect. It alleges that this cannot refer to the Chief as the Chief is appointed by statute and not the contract. It insists that this language must apply to the Assistant Chief because there is no other supervisory position in the bargaining unit. It argues that the language is clear and unambiguous and must be given effect. It notes that the present Chief, who was the Assistant Chief for ten years, understood the position was supervisory. It claims that as it is supervisory, it need not be filled by strict seniority.

The City maintains the position is supervisory and lists the factors that the Wisconsin Employment Relations Commission considers to determine supervisory status, as follows:

- 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 other persons exercising greater, similar or lesser authority over the same employees;
- 4.The level of pay, including an evaluation of whether the supervisor is paid for his or her skills or for his or her supervision of employees;
- 5.Whether the supervisor is primarily supervising an activity or is primarily supervising employees;

6. Whether the supervisor is a working supervisor or whether he or she spends a substantial majority of his or her time supervising employees; and

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

The City observes that not all factors need be present, that the actual duties are more important than the job description, that the supervised employees may be part-time or casual and a majority of time can be on non-supervisory duties. The City lists the supervisory responsibilities of the position based on the Chief's ten years of performing them. It asserts that the Assistant Chief reports directly to the Chief and need not obtain authorization to exercise his authority, although only some duties are exercised when the Chief is absent. It maintains that the Assistant Chief is the only person authorized to exercise these functions and all the witnesses agreed that he was in charge in the absence of the Chief regardless of the seniority of patrol officers on duty at the time. The City describes its force as the Chief, the Assistant Chief, four full-time patrol officers and four part-time patrol officers who work four different shifts with the Chief working Monday through Friday and all the rest, a 6 - 3 rotating schedule. The City asserts that the Assistant Police Chief has authority to issue oral and written reprimands and has done so on four occasions. It admits that some duties of the Assistant Chief are ministerial in nature but others involve independent decision making and discretion. It states that the Assistant Chief is paid additional compensation in recognition of the supervisory duties he performs.

It argues that the Chief of Police is undisputedly a supervisor and not a member of the bargaining unit. It claims that it is just as clear that the Assistant Chief, who has all the duties and responsibilities and authority of the Chief, especially in his absence, is also a supervisor. It insists that merely because no action has been taken to have the position removed from the bargaining unit does not mean the position is not supervisory. It asserts that if the position is not supervisory, there is no reason to continue such position with its additional compensation.

The City contends that it did not abuse its discretion in selecting a less senior applicant because this is authorized by the contract. The City argues that the Union is attempting to redefine the contract and to remove the exception for filling supervisory positions and limiting it to the Chief of Police. It submits the Union wants to do this by grievance arbitration and not by collective bargaining.

It concludes that the Assistant Chief is a supervisory position which may be filled at the City's discretion, so there is no contract violation and it asks that the grievance be denied with costs to be paid by the Union.

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### **Union's Reply**

In response to the City's reference of Sec. 62.13(4)(a), Stats., the Union contends that the City in the collective bargaining agreement agreed to select the senior qualified applicant and this must be given effect. The Union rejects the City's argument that the

posting procedure does not apply to the Assistant Chief because the only promotion under the contract is to Assistant Chief and there would be no point of having a posting procedure because there are no other positions into which employees could bid. The Union insists that Dan Druse was promoted to Assistant Chief by seniority so the City's explanation does fit the testimony.

The Union disputes the City's argument that the language which mentions "supervisory" positions does not refer to the Chief because that position is not in the unit and if the Assistant Chief is also supervisory, it too would be excluded from the unit. It points out that the recognition clause excludes supervisory positions, yet the Assistant Chief has been in the unit since its inception. The Union asserts that the criteria set forth in Sec. 111.70(1)(o)1, Stats., is not met because the supervisory duties of the Assistant Chief are at most de minimis. It argues that the dominant role of Assistant Chief is due to his seniority. The Union objects to what it describes as a sinister threat by the City to abolish the position of Assistant Chief, should it be determined that the position is not supervisory. It claims the City is being vindictive and acting in spite or attempting to persuade the Union to drop its litigation. The Union maintains that it is stretching the facts beyond credulity to suggest that four patrol officers need two full-time supervisors. It submits that the senior applicant be awarded the position.

### **City's Reply**

The City contends that the law, applied to the facts of this case, can only lead to the determination that the position of Assistant Chief is supervisory.

### **DISCUSSION**

The City has referred to Sec. 62.13(4)(a), Stats., which provides that the Chief of Police will appoint subordinates with the approval of the Police and Fire Commission. In GLENDALÉ PROFESSIONAL POLICEMEN'S ASSOCIATION VS. GLENDALÉ, 83 Wis.2D 90, 264 N.W.2D 594 (1978), the Wisconsin Supreme Court held that the Chief's authority to appoint subordinates could be limited by the parties' collective bargaining agreement. There, as here, the agreement provided that a vacancy shall be filled by the most senior qualified applicant. Here, it was stipulated that the most senior applicant was qualified, thus the most senior applicant's appointment would not violate Sec. 62.13(4)(a), Stats.

The City argues that it did not violate the agreement because the position of Assistant Chief is supervisory. The Recognition clause, Article II, A. excludes supervisory employees and Article V, B. excludes supervisory positions from the seniority requirement. Generally, the determination of whether a position is supervisory or not is a

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statutory determination made by the Wisconsin Employment Relations Commission in a unit clarification proceeding. The undersigned must determine if the position is supervisory to determine whether the City violated the parties' agreement, so the determination of supervisory status is contractual and not statutory. The parties are free to have the Commission make a statutory determination.

The City has listed the factors that the Commission traditionally uses in determining whether a position meets the statutory definition set forth in Sec. 111.70(1)(o), Stats. It must be noted that the Assistant Chief has been included in the unit since it was formed and is still in the unit. It would appear that, as supervisory positions are excluded, the position is not supervisory. There was no evidence of a change in duties such that the position is now supervisory. This however is not sufficient to conclude the position is not supervisory and the undersigned will review the seven factors set out in the City's brief in determining the position's status.

In determining the supervisory status of certain employees, the quasi-military organization of police departments presents unique problems. 1/ Generally, officers of higher rank will have the authority to issue orders to subordinates, regardless of a determination of supervisory status. The Commission has based its determinations on the authority held and exercised and have found officers to be supervisors where they have demonstrated a high level of supervisory responsibility. The Commission has found sergeants to be non-supervisory where they had no role in the hiring decisions or transfer decisions, could not recommend promotions, conducted evaluations which were only preliminary, and shared many work features with those whom they oversaw. 2/ A lieutenant who had the authority to call in replacements, change work schedules, and approve days off, but who performed the same duties as patrol officers, had no role in grievance adjustments, did not conduct written evaluations, and was often the only officer on duty was not a supervisor. 3/ Another lieutenant whose disciplinary role was limited to preparing reports of wrongdoing by lower ranking officers, who made only routine assignments as shift commander and directed deputies and sergeants at accident scenes was not a supervisor. 4/ It even found a chief deputy in command of a department on a regular basis to be nonsupervisory because he did not make any notable supervisory decisions. 5/

Here, the Assistant Chief does not participate in the hiring process and has never fired anyone nor effectively recommended same. There appears to be no transfers and only one promotion which is the position in issue here. As far as discipline, it appears that the Assistant Chief in ten years gave one written reprimand to a part-time officer and gave three verbal reprimands.

As far as directing and assigning the work force, it appears that this would occur when the Chief is absent and nothing suggests that these would be other than routine assignments. The number of employees supervised on a regular basis would be one or more. Occasionally, in the absence of the Chief, it would be more. The ratio of supervisors to staff favors the Union. The level of pay is established by the contract

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which certainly would not be for supervisory status but may be due to a number of bargaining factors which are traditionally part of the negotiation process including additional responsibilities in directing patrol officers which is more supervising an activity than supervising employees in a labor relations sense. The Assistant Chief has prepared the work schedules for the last ten years. The Assistant Chief works the same schedule as patrol officers and performs the same work as patrol officers a majority of his time. It would appear that the work of the Assistant Chief is like that of a lead worker. The record establishes the amount of independent judgment exercised in supervising employees is very

small. The Assistant Chief has not yet been assigned to perform any meaningful evaluation of patrol officers.

Not all seven factors need be present for a position to be found supervisory but the factors must be present in sufficient combination and degree to warrant such a finding. An evaluation of the evidence in this case fails to establish that the Assistant Chief possesses a sufficient combination of the seven factors or sufficient meaningful authority to be deemed supervisory. It is concluded that the Assistant Chief is a lead worker and not a supervisor.

Having concluded that the Assistant Chief position is not supervisory, the City violated Article V, Section B by its failure to offer the position to the most senior qualified applicant. The appropriate remedy is to immediately offer the position to the senior applicant, Peter Doperalski, and if he declines it, then to James Klieman, and if he declines it, then to Frank Salentine. If Doperalski or Klieman take the position, he shall be made whole by granting him the difference in pay between the Assistant Chief rate and Patrol Officer rate retroactive to February 1, 1997.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

### **AWARD**

The City violated the collective bargaining agreement by not awarding the Assistant Chief position to the most senior qualified applicant. The City is directed to immediately take action in accordance with the discussion set out above to remedy its violation of the agreement. The undersigned will retain jurisdiction for a period of thirty (30) days from the date hereof solely for the purpose of resolving any dispute with respect to the remedy herein.

Dated at Madison, Wisconsin this 11th day of December, 1997.

Lionel L. Crowley /s/

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Lionel L. Crowley, Arbitrator

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### **ENDNOTES**

1/ CITY OF MADISON, DEC. NO. 11087-A (WERC, 12/72).

2/ MILWAUKEE COUNTY, DEC. NO. 74855 (WERC, 10/87).

3/ CITY OF KIEL, DEC. NO. 11370-A (WERC, 3/85).

4/ PORTAGE COUNTY, DEC. NO. 19798-A (WERC, 2/93).

5/ MENOMINEE COUNTY, DEC. NOS. 23353 - 23355 (WERC, 3/86).

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