

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 MARQUETTE COUNTY HIGHWAY DEPARTMENT :
 EMPLOYEES, LOCAL 1740, AFSCME, AFL-CIO : Case 1
 : No. 44250 ME-430
 Involving Certain Employees of : Decision No. 6365-A
 :
 MARQUETTE COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Guido Cecchini, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2249 College Avenue, Stevens Point, Wisconsin 54481 with Mr. Bruce M. Davey, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594 on the brief, appearing on behalf of the Union.
 Godfrey & Kahn, S.C., Attorneys at law, by Mr. James R. Macy, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the County.

FINDINGS OF FACT, CONCLUSION OF
 LAW AND ORDER DISMISSING
 PETITION TO CLARIFY BARGAINING UNIT

Marquette County Highway Department Employees, Local 1740, AFSCME, AFL-CIO having, on June 22, 1990, filed a petition with the Wisconsin Employment Relations Commission requesting the clarification of an existing bargaining unit of municipal employes of the Marquette County Highway Department to determine whether the positions of Office Manager and Account Clerk should be included in said unit; and hearing in the matter having been held on September 11, 1990 in Montello, Wisconsin before Examiner Lionel L. Crowley, a member of the Commission's staff; and a stenographic transcript having been made of the hearing and the parties having filed post-hearing briefs and reply briefs, the last of which were exchanged on December 7, 1990; and the Commission having considered the evidence and the arguments of the parties and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Marquette County Highway Department Employees, Local 1740, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization with its offices located at 2249 College Avenue, Stevens Point, Wisconsin 54481.
2. That Marquette County, hereinafter referred to as the County, is a municipal employer and has its principal offices located at the Courthouse, 77 West Park, Montello, Wisconsin, 53949; and that among its functions the County maintains and operates a Highway Department.
3. That following an election conducted by it, the Wisconsin Employment Relations Commission, on June 19, 1963, certified the Union as the exclusive collective bargaining representative of "all employes of Marquette County, Wisconsin, employed in the Marquette County Highway Department excluding the highway commissioner, patrol superintendent and confidential clerical employees." 3/
4. That at all times material thereafter the Union and County have entered into successive collective bargaining agreements covering the wages, hours and conditions of employment of the Highway Department employes represented by the Union; that the parties 1989-1990 collective bargaining agreement contains the following recognition clause:

ARTICLE 1 - RECOGNITION OF BARGAINING UNIT

The Employer recognizes the Union as the exclusive bargaining representative for all the regular full-time and regular part-time employees of the Marquette County Highway Department, specifically excluding the Highway Commissioner, Patrol Superintendent, office personnel, managerial, supervisory, confidential, part-time, seasonal and temporary employees. Lead positions as found in Appendix A shall not be considered supervisory for purposes of this Article.;

and that the record fails to establish when the parties first reached agreement on said recognition clause.

5. That on June 22, 1990, the Union filed the instant petition seeking the inclusion of two clerical positions, namely, the Office Manager and Account Clerk, in the bargaining unit set forth in Finding of Fact 4; that the two positions perform clerical and account keeping functions for the Highway Department and these duties are separate and distinct and require separate and distinct skills from the other positions in the Highway Department; that these two positions work indoors in the Highway Department offices and have separate and distinct working conditions and supervision from the other Highway Department employees; that these two positions have always been excluded from the bargaining unit set forth in Finding of Fact 4; that there have not been any material changes affecting these two positions; and that the County contends that the Account Clerk should continue to be excluded from the unit as "office personnel", and that the Office Manager should continue to be excluded as "office personnel" or in the alternative as a confidential, supervisory or managerial employe.

On the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

1. That the Account Clerk and Office Manager are "office personnel" within the meaning of the parties' existing agreement regarding the scope of their bargaining unit.

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

ORDER 2/

That the position of Account Clerk and Office Manager shall continue to be excluded from the collective bargaining unit represented by the Union and the petition to clarify the bargaining unit filed by the Union with the Commission on June 22, 1990, be, and the same hereby is, dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 1st day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

(See Footnote 2/ on Page 3).

2/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49,

petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF
LAW AND ORDER DISMISSING PETITION
TO CLARIFY BARGAINING UNIT

UNION'S POSITION

The Union contends that the Office Manager position is not a managerial, confidential or supervisory position. It submits that a managerial employe participates in the formulation, determination and implementation of management policy at a relatively high level of responsibility and to a significant degree. It notes that a managerial employe has authority to establish an original budget or allocate funds for differing program purposes from such original budget. It claims that the Office Manager performs general office and account-keeping-functions with some discretion within the limits of the Department's rules, policies and procedures and any budget involvement is routine, mechanical and ministerial rather than involving the authority to actually commit the Department's resources. It argues that no evidence supports a finding that the Office Manager is managerial.

The Union maintains that the Office Manager is not confidential. It points out that a confidential employe must have access to, have knowledge of, or participate in confidential matters relating to labor relations. It further notes that a de minimis exposure to confidential labor relations material is generally insufficient to exclude an employe as confidential. It alleges that the Office Manager is not confidential as she does not attend meetings involving the discipline of employes or grievance meetings and although she types the minutes of the Highway Commission meetings, she does not type the minutes of any closed session. It asserts that while the Office Manager sometimes types reprimands and responses to grievances, the volume of such correspondence is de minimis. The Union also points out that the Office Manager does not have access to confidential personnel files and states that it is clear from the record, that the Office Manager is not a confidential position.

The Union takes the position that the Office Manager is not a supervisory position. It claims that according to the job description, the Office Manager supervises functions, not people and has not hired, evaluated, disciplined or discharged an employe. It maintains that the Office Manager played no role in the hiring of the Account Clerk or the setting of the Account Clerk's wages and has never been told she has authority to even reprimand the Account Clerk. It concludes that the undisputed evidence establishes that the Office Manager is not a supervisor.

The Union contends that there is a sufficient community of interest between the Account Clerk and Office Manager and the other Highway Department employes such that their inclusion in the Highway Department bargaining unit is appropriate. It acknowledges that the two clerical employes perform separate and distinct work and work indoors and have different immediate supervision; however, it points out that these employes are in the same department and have the same ultimate supervision. It asserts that there is interaction between the Highway clerical employes and other Highway personnel including the partsman and janitor. It submits that the cases 4/ cited by the County are distinguishable from the instant case in that clerical employes were excluded from the certification in those cases, whereas here they are not as only confidential clerical employes have been excluded. It alleges that there is a sufficient community of interest to warrant the inclusion of the two clerical positions in the Highway Department bargaining unit.

The Union argues that the certification of the Union does not preclude the inclusion of the Office Manager and Account Clerk position in the bargaining unit. It submits that the certification excluded "confidential clerical employes" and because these two positions are not confidential, they are not excluded from the bargaining unit. The Union, referring to the recognition clause in the parties' collective bargaining agreement, notes that "office personnel" and "confidential" employes are excluded. It refers to the stipulation that office personnel including the two positions have always been excluded from the highway unit but submits that the evidence failed to establish when the two positions were created or whether they were confidential at that time. The Union submits that if the two positions were confidential at the time of their creation, then the Recognition clause and certification would have the same meaning.

The Union further argues that the parties have no authority to amend a certification so as to deprive employes of representation, so the recognition clause language should be interpreted in the same manner as the Commission certification and the opposite interpretation should be deemed unenforceable.

In summary, the Union claims the positions should be included in the unit

4/ Fond du Lac County, Dec. No. 7677-A (WERC, 3/82); City of Green Bay, Dec. No. 22881 (WERC, 9/85); City of Rhinelander, Dec. No. 24518 (WERC, 5/82).

by virtue of the certification or by accretion. The Union contends that if the Commission interprets the recognition clause to be inconsistent with the certification and if the language is not invalidated, the Commission should nonetheless include the two positions in the bargaining unit because of the special circumstances in this case. The Union states that while clarification of a voluntary defined bargaining unit is not a matter of right, it may be done by Commission Order and the circumstances of each case is determinable. The Union submits the two positions can appropriately be accreted because they share a community of interest with employees in the Highway Department unit. The Union argues that to hold otherwise would entitle the employees to be represented in a Highway Department residual unit of two employees, a result which would fly in the face of the Commission's anti-fragmentation mandate of Sec. 111.70(4)(d)2, Stats.

Given the foregoing, the Union concludes that the Commission should include the two positions of Account Clerk and Office Manager in the Highway Department bargaining unit.

COUNTY'S POSITION

The County contends that the two clerical positions are not appropriate for inclusion with the blue collar highway bargaining unit. Citing Commission decisions 5/ excluding clerical employees, it argues that secretarial/clerical employees do not share a community of interest with highway blue collar employees and it would be inappropriate to include them in the highway bargaining unit. It submits that the clerical positions have always been excluded from the highway unit, they perform separate and distinct work, have separate and distinct skills, have separate and distinct working conditions, wages, work location and supervision. The County notes that there is little interaction between those clerical employees and the general blue collar unit and all these factors establish no community of interest between the two groups requiring dismissal of the petition.

Alternatively, the County contends that the Office Manager is supervisory and managerial. It asserts that the Office Manager supervises the Account Clerk as well as supervising the general office and account keeping activities of the Highway Department. The Office Manager keeps track of all budget materials for the Department and meets with the Highway Commissioner to review the status of the budget and makes recommendations regarding the new budget as well as participating in the budget process. The County points out that the Office Manager maintains and orders all supplies and effectively recommends larger purchases for the Highway Department. It insists that in managing the office, the Office Manager determines what procedures should be followed in getting the work done and has the authority to commit the County's resources regarding supplies. It submits that the Office Manager is supervisory and managerial and should be excluded from the unit.

The County claims that both clerical positions are confidential. It submits that the two clerical positions type all correspondence for the Highway Department and no other alternative exists as these are the only clerical positions in the Department. It points out that the evidence established that the two clerical positions have typed correspondence to Labor counsel which correspondence has not been available to bargaining representatives, as well as memos concerning the County's position in negotiations, disciplining suggestions and positions on grievances. It concludes that both positions must be excluded as confidential.

The County contends that the Union's reliance on a strict reading of the past certification ignores bargaining history and a proper analysis of a community of interest. It submits that the original certification predates Commission case law that clerical positions are not appropriate for inclusion in the blue collar highway unit. The County alleges that the parties specifically bargained the recognition clause to make clear the parties recognized the exclusion of the clerical positions. It maintains that the Highway bargaining unit is not the appropriate unit for requesting a unit clarification to add the clerical positions and as such the petition must be dismissed.

DISCUSSION

As a general matter, parties are free to enter into agreements which modify the scope of the bargaining unit which the Commission originally certified. 6/ Where the parties have entered into such an agreement, the Commission will honor that agreement by not allowing a party thereto to pursue modification of same through a unit clarification proceeding over the objection of the other party unless:

- 1.The type of position(s) did not exist at the time of the

5/ Id.

6/ Mid-State VTAE, Dec. No. 14526-A (WERC, 5/85).

initial agreement and/or its most recent renewal; 7/ or

2. The position(s) were included or excluded from the unit because the parties agreed the positions were or were not supervisory, confidential, managerial or executive (the so-called "statutory exemptions"); or
3. The position(s) have been impacted by changed circumstances which materially affect their unit status; or
4. The unit to which parties have agreed is repugnant to the Municipal Employment Relations Act.

In the context of the parties' dispute herein, the first question for our determination is whether the parties' use of the phrase "office personnel" in the contractual recognition clause modifies the scope of the unit which the Commission originally certified vis-a-vis the clerical positions at issue. 8/

Our original certification defined the bargaining unit as "all employes of Marquette County, Wisconsin, employed in the Marquette County Highway Department excluding the highway commissioner, patrol superintendent and confidential clerical employees." The contractual recognition clause now defines the unit as "all regular full-time and regular part-time employees of the Marquette County Highway Department, specifically excluding the Highway Commissioner, Patrol Superintendent, office personnel, managerial, supervisory, confidential, part-time, seasonal and temporary employees."

The Union contends that the addition of the phrase "office personnel" should only be interpreted as confirmation that confidential clerical employes are excluded from the unit. We do not find the Union's interpretation to be persuasive for several reasons. First, there would have been no need for the parties to have added the phrase "office personnel" to the recognition clause if the Union is correct because the clause already excludes "confidential clerical employees." The Union's interpretation renders the added language mere surplusage and thus runs counter to the general presumption that when parties' add language to a contract, they do so for a specific purpose. Second, the parties stipulated that although the Account Clerk is not confidential, the position has never been included in the unit. Thus, the parties' practice under the language runs counter to the Union's interpretation and supports the conclusion that the phrase "office personnel" has meaning independent of "confidential clerical employees".

Given the foregoing, we conclude that the parties' exclusion of "office personnel" from the unit reflects a general agreement to exclude clerical employes from the unit even if they are not confidential. This agreement thus excludes the Office Manager and Account Clerk from the unit irrespective of the possibility that they might also be excluded now or in the future based on confidential, supervisory or managerial status. Therefore, we need not determine whether the Office Manager is confidential, supervisory or managerial because she is excluded by the "office personnel" language even if not statutorily excluded.

Having concluded that the parties have agreed to exclude white collar clerical employes from the wall-to-wall unit we originally certified, we turn to the question of whether it is appropriate to allow the Union to seek to recapture these positions through a unit clarification proceeding. Because none of the four exceptions set forth earlier herein are applicable to this dispute, we conclude that a unit clarification proceeding is not a means by which the Union can seek to alter the existing unit.

7/ Edgerton Schools, Dec. No. 18856-A (WERC, 5/90) footnote 3 at p. 13; Mid-State, Id.

8/ While the Commission does not generally pre-empt the field regarding the interpretation of a contractual recognition clause, the Commission is an available forum for resolution of disputes as to the meaning and application of voluntary agreements regarding the scope of a bargaining unit. Stoughton Schools, Dec. No. 15995 (WERC, 12/77); Milwaukee Board of School Directors, Dec. No. 25413 (WERC, 2/88); Edgerton Schools, Id.

Looking at exception 1, it is clear that the positions in question existed at the time of the parties' most recent contractual agreement to a more restrictive unit than that which we originally certified. 9/ As to exception 2, we have earlier determined that exclusion of "office personnel" was not statutorily based. Turning to exception 3, there is no evidence of a change in circumstances. Lastly, as to exception 4, while the exclusion of these positions render the unit narrower than that most desirable for anti-fragmentation purposes, 10/ the blue-collar unit the parties have created is clearly an "appropriate" unit under the Municipal Employment Relations Act.

Should the Union wish to expand the unit to its original scope, it can timely file an election petition in the overall unit we originally certified.

Dated at Madison, Wisconsin this 1st day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

9/ Mid-State VTAE, Dec. No. 14526-A (WERC, 5/85).

10/ Mid-State, Id.