

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO
Involving Certain Employes of
CITY OF MANITOWOC

Case 8
No. 53972 ME-835
Decision No. 7667-D

Appearances:

Mr. Michael J. Wilson, Staff Representative, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Wisconsin Council 40, AFSCME, AFL-CIO and City of Manitowoc Employees Local 731, AFSCME, AFL-CIO.

Mr. Patrick L. Willis, City Attorney, 817 Franklin Street, P.O. Box 1597, Manitowoc, Wisconsin 54221-4418, for the City of Manitowoc.

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER CLARIFYING BARGAINING UNIT

On March 25, 1996, Wisconsin Council 40, AFSCME, AFL-CIO filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission clarify an existing bargaining unit of City of Manitowoc employes represented by City of Manitowoc Employees Local 731, AFSCME, AFL-CIO by including therein the position of Deputy City Clerk. The City opposed the petition, contending the Deputy Clerk is a supervisor and a confidential employe.

On July 31, 1996, hearing in the matter was held in Manitowoc, Wisconsin, before Examiner Debra L. Wojtowski, a member of the Commission's staff. A stenographic transcript of the hearing was available to the parties by August 15, 1996. The Union filed written arguments on August 19 and September 27, 1996; the City filed written argument on September 4, 1996, and waived its right to file a reply brief. The Commission, being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. City of Manitowoc Employees Local 731, AFSCME, AFL-CIO, herein the Union, is a labor organization with offices at 8033 Excelsior Drive, Madison, Wisconsin.

No. 7667-D

2. The City of Manitowoc, herein the City, is a municipal employer with offices at 817 Franklin Street, Manitowoc, Wisconsin. The City has 333 employees within eight separate bargaining units, and two confidential clerical positions, 3/ the secretary to the Mayor and the secretary to the City Attorney. Since 1981, the Deputy City Clerk has also been excluded as a confidential employee because she takes minutes of closed sessions of the City Council.

3. At all times material, the Union has been the certified exclusive collective bargaining representative for a unit defined in the 1996-1998 contract as:

all employees of the City of Manitowoc City Hall and associated departments, Cemetery and Parks Department and Bridges, as certified by the Wisconsin Employment Relations Commission election held on August 30, 1966, with respect to wages, hours and conditions of employment.

4. In January, 1974, in Dec. No. 12403, the Commission concluded that the position of Deputy City Clerk was not a supervisor, and was appropriately included in the bargaining unit represented by the Union. The Commission stated:

...

Deputy Clerk

In addition to the City Clerk, the Clerk's office is staffed by one full-time Deputy, two regular part-time employees and one temporary part-time employee. The duties of the Deputy Clerk include overseeing the conduct of elections, recording and typing minutes of council meetings, supervising special projects, and preparing the payroll. Although election poll workers are hired by the Clerk, the Deputy oversees approximately sixty workers during polling hours. Similar to the Deputy position discussed above, the Deputy Clerk works in the same area as other employees and thereby directly observes the staff more often than the Clerk does. The Deputy's recommendation would be given consideration in a departmental disciplinary matter. In the absence of the Clerk, the Deputy could reassign work or call in temporary help.

3/ In City of Manitowoc, Dec. No. 7667-C (WERC, 4/95), the Police Chief's secretary was found to be a confidential employee. However, Joint Exhibit 2 states that there are presently only two confidential clericals.

Mrs. Evelyn Martin, the Deputy Clerk since 1969, has neither made a recommendation nor participated in the hiring or firing of any employees. Mrs. Martin has not fully assumed all of the statutory duties of the Deputy position. Whereas, the Deputy could supervise special projects, such supervision has neither been exercised nor necessary to date. In the anticipated absence of the Clerk, instructions are usually left with the Deputy to convey to the employees.

Based on the foregoing, we are satisfied that the Deputy Clerk is not a supervisory employe within the meaning of Section 111.70, and thereby, is appropriately included in the existing collective bargaining unit.

...

However, in December, 1981, in Dec. No. 12403-B, the Commission concluded the Deputy City Clerk was a confidential employe who should be excluded from the unit. The Commission stated:

...

8. That the Council meets twenty-four times per year and that its meetings are convened at 7:00 p.m. in the City's Council Chambers; that the Deputy City Clerk attends all Council meetings and is paid overtime for such attendance; that during open meetings of the Council the City Clerk reads documents and reports presented to the Council into the record, and that the Deputy City Clerk takes, in shorthand, the minutes of the proceedings; that closed sessions of the Council are held in a conference room adjacent to the Council Chambers; that between June 2, 1980 and June 15, 1981 the Council held ten closed sessions relating to labor relations matters; that of the ten closed Council meetings, three meetings pertained to the financial authority of the City's Employee Relations Committee when negotiating wage increases, three meetings concerned disability benefits being claimed by a police patrolman, one meeting concerned promoting an employe in a bargaining unit to a new position, and determining if the position would be supervisory, one meeting concerned a disputed position in the City's Building Inspection Department, and the remaining closed meetings concerned the handling of grievances and the actions and alternatives the City could take in resolving the grievances; that during closed

sessions the City Clerk remains in the Council Chambers, having custody over documents and reports presented to the Council and to answer questions from the press concerning same while the Deputy City Clerk is in attendance at said closed meetings taking minutes thereof; that the Deputy City Clerk types the minutes of the open and closed Council meetings during normal work hours; that the minutes of open and closed Council meetings are kept in the City Clerk's personal office and are maintained by the Deputy City Clerk; and that the minutes of the Council's closed sessions are not available to the public or to general City employees.

...

In its petition the City contends that the Deputy City Clerk performs confidential duties and therefore should be excluded from the City Hall bargaining unit. The City premises the Deputy City Clerk's alleged confidential status upon her duties of taking, transcribing and maintaining the minutes of closed Council sessions concerning labor relations matters. The Deputy City Clerk attends all Council meetings and is paid overtime for her attendance. Minutes of closed Council sessions are kept in the City Clerk's office in files which are not open to the public. The Union alleges that the position should not be excluded from the unit because the confidential duties of the Deputy City Clerk constitute a de minimus portion of her work.

The Commission has consistently found that in order for an employe to be deemed "confidential" the employe must be privy to decisions of the employer with respect to personnel and labor relations matters. 1/ Here, neither of the City's two "confidential" employes have the ability to take shorthand and therefore cannot take shorthand notes of the minutes of closed Council meetings. In addition, the City Clerk has multiple sclerosis and her ability to take shorthand notes and to type has been impaired. Thus the only employe with ability to take shorthand notes of the closed Council meetings is the Deputy City Clerk. As the Commission has found that the closed Council meetings pertain to confidential labor relations matters, the Commission concludes that the position of Deputy City Clerk is confidential and therefore is excluded from the

City Hall bargaining unit.

1/ Eau Claire County Health Care Center and Mt. Washington Home, LXVII, Decision No. 17488-A, 3/81, Manitowoc County 8152-A, 5/79.

...

The position of Deputy City Clerk has been excluded from the Union bargaining unit ever since.

5. Since January, 1990, the City has employed Debra Peterson as Deputy City Clerk. Prior to July, 1996, the position had the following job description:

DEPUTY CITY CLERK

GENERAL STATEMENT OF DUTIES: Serves as Deputy City Clerk for the City of Manitowoc and assists in the overall operation of the office; does related work as required.

DISTINGUISHING FEATURES OF THE CLASS: An employee in this single position class participates in a variety of functions in the City Clerk's office. Office functions and procedures are governed by State Statutes and local ordinances and must be executed accordingly. The work involves contact with other municipal officials and the general public. The employee in this position works under the general direction of the City Clerk who is available for guidance on difficult and non-recurring problems.

EXAMPLES OF WORK: (Illustrative only)

Assists the City Clerk in preparing election notices, ballots and registering voters;
Takes and transcribes minutes of Common Council meetings;
Prepares, distributes and mails schedule for all City of Manitowoc monthly meetings;
Prepares notices and types minutes for Board of Review and Board of Public Works meetings;
Records Council documents at Register of Deeds office;
Takes and transcribes dictation of letters, memoranda, reports as well as hearing notices;

Prepares payroll for City Clerk's Office, aldermen and election officials;
Keeps a current record of insurance policies involving the City;
Answers inquiries and assists the public in preparing forms and applications;
Notorizes (sic) licenses and other official documents;
Answers incoming telephone calls;
Supervises, trains and instructs personnel within the office as required;
Issues licenses and permits in the absence of the City Clerk;
Prepares legal notices, notices for public hearing and ordinances for publication;
Keeps a record of all easements and agreements;
Operates copier and other office machines;
Acts in the absence of the City Clerk.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES:

Considerable knowledge of office terminology, procedures and equipment; good knowledge of State laws pertaining to operation of the City Clerk's office and municipal functions, including the workings of the Common Council; ability to follow complex oral and written directions; ability to get along well with others; demonstrated ability to maintain complex clerical records and prepare reports from such records; ability to make decisions in accordance with laws, regulations and established procedures; ability to plan and supervise the work of others; good judgment; tact and courtesy; good physical condition.

In July, 1996, the City revised the position's job description to read as follows:

DEPUTY CITY CLERK

GENERAL STATEMENT OF DUTIES: Serves as Deputy City Clerk for the City of Manitowoc; actively assists in the supervision and overall operation of the office; does related work as required. (Emphasis supplied).

DISTINGUISHING FEATURES OF THE CLASS: An employee in this single position class participates in a variety of functions in the City Clerk's office. Office functions and procedures are governed by State Statutes and local ordinances and must be executed accordingly. The work involves contact with other municipal

officials and the general public. The employee in this position works under the general direction of the City Clerk, but is responsible for directly supervising the staff and office operations.

EXAMPLES OF WORK: (Illustrative only)

1. Assists the City Clerk in preparing election notices, ballots, election instructions, nomination papers, campaign finance notices, etc.;
2. Interviews and recommends hiring of new employees in the City Clerk's office; represents Clerk's Office on interdepartment clerical hiring committee;
3. Trains, assigns, instructs and supervises members of the City Clerk's staff;
4. Evaluates employees in the Clerk's office;
5. Attends all Common Council meetings, including closed sessions, and takes, transcribes and is custodian of minutes;
6. Oversees preparation and posting of open meeting notices;
7. Prepares notices and types minutes for Board of Review, Board of Public Works, Committee on Public Utilities & Licensing, Committee of the Whole, Ad Hoc Paratransit Committee and attends those meetings when required;
8. Records Council documents at Register of Deeds office;
9. Prepares letters, memoranda, reports and hearing notices to carry out the actions of the Council;
10. Prepares time cards for City Clerk's Office, alderpersons and election officials;
11. Keeps a current record of insurance policies involving the City;
12. Answers inquiries and assists the public in preparing forms, applications, special assessments, voter registrations, zoning

amendment applications, etc.;

13. Prepares special assessment certification letters and computes payments;
14. Notarizes licenses and other official documents;
15. Answers incoming telephone calls supplying information on Council actions, licensing, voting, etc.
16. Keeps a record of leased parking stalls, prepares related lease agreements, invoices, vouchers and reports;
17. Issues licenses and permits in the absence of the City Clerk;
18. Prepares legal notices, notices for public hearing and ordinances for publication;
19. Keeps a record and prepares required vouchers/invoices for bonded indebtedness payments, land contracts, lease agreements, options for purchase of land in the Industrial Park, etc.
20. Keeps a record of all deeds, easements and agreements;
21. Operates computer with work processing, copier, calculator and other office machines; (Emphasis supplied)

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES:

Considerable knowledge of office terminology, procedures and equipment; good knowledge of State laws and City ordinances pertaining to operation of the City Clerk's office and municipal functions, including the workings of the Common Council; ability to follow complex oral and written directions; ability to hire, supervise and evaluate employees; ability to get along well with others; demonstrated ability to maintain complex clerical records and prepare reports from such records; ability to make decisions in accordance with laws, regulations and established procedures; ability to plan and supervise the work of others; good judgment; tact and courtesy. (Emphasis supplied).

ACCEPTABLE EXPERIENCE AND TRAINING: Progressively

responsible experience in business office functions and completion of a standard high school course or equivalent, with business school training highly desirable or any equivalent combination of experience and training which provides the required knowledge, skills and abilities.

6. The position of Deputy Clerk is a full-time position with a monthly salary of \$2,718 in 1996, which translates into an hourly wage rate more than \$3 an hour higher than the highest paid unit clerical position. In 1995 the salary was \$2,639, and was increased in 1996 prior to the amendment of the job description.

7. In the early summer 1996, City Clerk June E. Fetzer retired after approximately 40 years in office. At that time, the City Clerk's table of organization showed the City Clerk, Deputy City Clerk, Clerk Typist III, Clerk Typist II and Clerk Typist I. In the Finance Director/Treasurer's office, there was a Finance Director/Treasurer, a Deputy Finance Director/Treasurer, Account Clerk, Finance Relief Clerk, Cashier, Clerk/Accountant-Payables, and Temporary Clerks. The City Clerk, Deputy City Clerk, Finance Director/Treasurer and Deputy Finance Director/Treasurer were all unrepresented. When Deputy Finance Director/Treasurer Jennifer Hudon was also appointed City Clerk on June 4, 1996, the City revised its organizational chart to combine the positions of City Clerk and Deputy Finance Director/Treasurer. Thus, at present, three positions (Finance Director/Treasurer, City Clerk/Deputy Finance Director/Treasurer, and Deputy City Clerk) are excluded from the unit set forth in Finding 3. In all other respects, the organization of the City Clerk's office and City Treasurer's office remained the same.

8. Both the City Clerk/Deputy Treasurer and Deputy City Clerk attend all Common Council meetings. Deputy City Clerk Peterson (like all Deputy City Clerks since at least 1981) takes minutes of both the open and closed portions of the Council meetings. Her notes of meetings are detailed and at times verbatim. She is regularly asked to read back motions verbatim. Following the meetings, she types her notes into minutes. She is the custodian of Council minutes and maintains closed session minutes separately from open session minutes. When the Council goes into closed session, it leaves the Council Chambers and moves into a nearby conference room. The Deputy City Clerk moves with the Council while the City Clerk remains in the Council chambers doing paperwork.

From May, 1995 through July, 1996, the Council met in closed session eight times to discuss confidential labor relations matters.

The current City Clerk/Deputy Treasurer has shorthand skills, but has not used them for some time. The current City Attorney's secretary has shorthand skills but has not used them for some time. The Mayor's secretary has shorthand skills and uses them on a regular basis.

Neither the City Attorney's secretary nor the Mayor's secretary attend Common Council

meetings as part of their duties.

9. The City Clerk/Deputy Finance Director/Treasurer has overall responsibility over the clerical employees in the Treasurer's office and City Clerk's office. In part because the City Clerk/Deputy Finance Director/Treasurer works in both the Treasurer's and Clerk's offices, the City Clerk has delegated to Deputy City Clerk Peterson substantial responsibilities in direction and supervision of the City Clerk's office staff. Thus, Peterson reviewed applications for a clerical vacancy in the City Clerk's office and will participate on the interview committee which will recommend a candidate to the City Clerk. Peterson will function as the City Clerk's representative on the City's interdepartmental clerical hiring committee which makes effective recommendations for hire to the head of the department in which the vacancy occurs. When the City implements a comprehensive evaluation procedure, Peterson will assist City Clerk Hudon in the evaluation of clerical staff.

Peterson has independent authority to issue verbal reprimands. Any recommendation by Peterson for more severe discipline would be considered by City Clerk Hudon along with advice from the City Attorney and the results of Hudon's own investigation.

Peterson plays no approval role regarding employee leave requests.

Peterson supported the successful reclassification of a City Clerk's office clerical employee.

10. The Deputy City Clerk possesses sufficient supervisory duties and responsibilities to be deemed a supervisor.

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

CONCLUSION OF LAW

The Deputy City Clerk is a supervisor within the meaning of Sec. 111.70(1)(o)(1), Stats., and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the

Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 2/

The Deputy City Clerk shall continue to be excluded from the bargaining unit described at Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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.

(Footnote 2/ continues on the next page.)

(Footnote 2/ continues from the previous page.)

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.

CITY OF MANITOWOC

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT

BACKGROUND

AFSCME, Wisconsin Council 40 filed a petition to clarify a bargaining unit with the Wisconsin Employment Relations Commission on March 25, 1996, seeking to include the position of Deputy City Clerk, currently occupied by Debra Peterson.

This position has been the subject of two previous unit clarification petitions and its current exclusion is the result of a 1981 Commission decision wherein it was found to be confidential. City of Manitowoc, Dec. No. 12403-B (WERC, 12/81). The Commission had previously ruled the position was not supervisory. City of Manitowoc, Dec. No. 12304-A, (WERC, 1/74), aff'd Dec. No. 141-491 (Cir.Ct. Dane County, 8/74). The Union argues that materially changed circumstances warrant a reconsideration of the confidential status of the position. The City in turn has argued that a material change in circumstances exists which warrants a reconsideration of the position's supervisory status.

POSITIONS OF THE PARTIES

The City's Position

The Wisconsin Employment Relations Commission ruled in 1981 that the Deputy City Clerk qualified as a confidential employe by virtue of her duties relating to the transcription and maintenance of closed session minutes of the Common Council. Most of the factors which led to that determination are still present today. The Deputy City Clerk continues to be responsible to take minutes of all Common Council proceedings, whether in open or in closed session. Between May of 1995 and July of 1996 the Common Council met in closed session on eight occasions for labor relations purposes. This is comparable to the circumstances preceding the last unit clarification when, between June of 1980 and June of 1981, the Council met in closed session for labor-related purposes on ten occasions.

There are a total of two non-union employes who could theoretically perform the Deputy Clerk's confidential duties, the City Attorney's confidential secretary and the Mayor's confidential secretary. This is the same situation as in 1981 when the Mayor's secretary and the City Attorney's secretary were also the only other confidential employes. In 1981, the Commission dismissed the Union's suggestion that either of these secretaries could perform the confidential duties because neither incumbent at the time had the ability to take shorthand. The current City Attorney's secretary once used shorthand, but has not done so for many years. The Mayor's secretary does have shorthand ability. However, there are other factors which could create an undue burden on the

employer to force these employees to perform the confidential tasks of the Deputy City Clerk, most importantly, neither the Mayor's secretary nor the Attorney's secretary attend Common Council meetings. The City is unaware of any reported WERC decision which has held that an employee must be called in outside of normal working hours in order to perform confidential duties to save a union position. In City of Greenfield, Dec. No. 26423 (WERC, 4/90), the Commission ruled that "it would be unduly disruptive for the confidential work of the Fire Chief to be performed by the Police Chief's (confidential) secretary who is located in a separate building 200 feet away." If it is an undue disruption for an employee who is on duty to walk 200 feet, it surely is an undue disruption for an off duty employee to be forced to interrupt her evening by reporting to City Hall, so she can sit around and wait for the Council to go into closed session.

The City understands the Union's primary argument to be that the City now has an able-bodied City Clerk who could take minutes of the Common Council closed sessions, transcribe those minutes, and maintain the minutes after they have been transcribed. This argument must fail for a number of reasons. The City Clerk candidly admitted that she once had shorthand skills, but she has understandably not maintained those skills. Department heads generally are supposed to run a department, and she has a combined department of 12 employees to run. Further, the Deputy City Clerk testified that notes of portions of the closed session are taken in great detail and that she is asked to read back verbatim motions "on a regular basis". After the Common Council meetings, the Deputy Clerk must transcribe the minutes which the Deputy testified is a "very time consuming" task, even for someone typing from their own notes. The City Clerk did not do any transcription typing before she assumed the City Clerk duties and does not plan on doing any transcription typing now.

A further disruption would arise from the Deputy Clerk's continued responsibility for maintaining the records of both open and closed sessions after the meeting. The open session minutes are accessible to other members of the office staff, but the closed session minutes are considered classified, and the Deputy City Clerk keeps them in a separate file. When requests for closed session minutes are made, the requestor may not know the date on which a specific subject was discussed and the custodian may have to review "closed session minutes" to locate the specific minutes which are being requested. It is not fair to the employer to require that the City Clerk/Deputy Treasurer drop her other duties in order to make such a search. The City submits that the physical disability of the former City Clerk made it unnecessary for the Commission to analyze whether other factors supported the City's contention that the Deputy Clerk was the only available employee to perform the confidential duties of the Clerk's office, but such other factors did and still do exist. With only three confidential employees for an employment force of more than 300, it surely cannot be said that the City is "loading up" on confidential employees to reduce union membership. The confidential duties performed by the Deputy City Clerk are real and were found in 1981 to be significant enough to exclude her from the unit as a confidential employee.

Additionally, the Deputy City Clerk now exercises sufficient supervisory responsibilities to qualify as a supervisory employee. Because of the consolidation of the City Clerk and Deputy

Treasurer into one position, the job of the Deputy City Clerk was revised to include significant supervisory duties, as is reflected in her current job description. The Deputy City Clerk is now required to have the ability to "hire, supervise and evaluate employees" as well as the "ability to plan and supervise the work of others."

There is nothing pretextual about the supervisory duties which have been assigned to the Deputy City Clerk. Her supervisor, the City Clerk/Deputy Treasurer, now has to divide her time between two separate offices and two separate sets of employees. The offices themselves are physically separated by the office of the Accounts Payable Clerk. In fact, the supervisory duties now assigned to the Deputy City Clerk mirror the supervisory duties which the Finance Director/Treasurer has assigned to his Deputy. These duties were sufficient to withstand a challenge from the Union in 1995 that the Deputy Finance Director/Treasurer position was not supervisory.

While the timing of the petition filed by the Union allows a review of only two months of practice, the Deputy Clerk has already exercised her supervisory responsibilities. In fact, from some time before Jennifer Hudon assumed the City Clerk's duties on June 4, 1996, Debra Peterson was the only supervisor present in the Clerk's office. The City argues that even though the City Clerk/Deputy Treasurer is now present in both the Treasurer and City Clerk offices, there will be significant periods of time when the Deputy City Clerk is the only supervisor present in the Clerk's office.

The Deputy City Clerk has effectively recommended the reclassification of an employee in the Clerk's office. She has also recently reviewed and recommended for interview applicants for a Clerk's office vacancy and she will be participating on the interview committee which will make the final selection. She has also been appointed to represent the City Clerk's office on the Interdepartment Clerical Hiring Committee. As a member of this Committee, the Deputy City Clerk will actually participate in the selection of all clerical employees hired by the City of Manitowoc, even those not hired to fill vacancies in the Clerk's office. The City Clerk/Deputy Treasurer has instructed the Deputy Clerk that she has authority to reprimand individuals.

The compensation provided to the Deputy City Clerk is also an indication of her supervisory duties. She receives a monthly salary of \$2,718 per month which translates into an hourly rate of \$15.68 per hour. ($\$2,718 \times 12$ divided by 2,080). The Deputy City Clerk is a salaried employee who does not receive overtime compensation for work over 40 hours. Using a rate of \$15.68 per hour, she is considerably higher paid than the \$12.39 per hour earned by the highest paid secretaries in the City Hall bargaining unit. While she did not receive a separate adjustment when the new City Clerk/Deputy Treasurer position was created, she has exercised supervisory duties for some time preceding the creation of that combined position. For example, when the Clerk's office last had a vacancy in a Clerk Typist position, Debra Peterson recommended to the former City Clerk that they make the position a permanent part-time position. This recommendation was implemented and led to the creation of the current Clerk Typist II position which is shared between

the Clerk's office and the Treasurer's office.

The Deputy City Clerk will also be responsible for preparing job evaluations of staff members in the Clerk's office as part of a planned City-wide employee evaluation program. The City acknowledges that because the program has not yet begun, not as much weight can be given to this particular supervisory duty which is included in the Deputy City Clerk's new job description. However, given the role that the Deputy City Clerk has already played in the reclassification request of Deborah Neuser, it is certainly reasonable to conclude that she will be performing the job evaluation duties.

Given all of the foregoing, the City argues the Deputy City Clerk is both a confidential employe and a supervisor.

The Union's Position

The Union has filed a petition in this matter seeking the accretion of the Deputy City Clerk to the bargaining unit represented by Manitowoc City Employees, Local 731, AFSCME, AFL-CIO because the Deputy City Clerk is a municipal employe, who is neither a confidential employe nor a supervisor.

In City of Manitowoc, Dec. No. 12403-B (WERC, 12/81), the Commission excluded the Deputy City Clerk as a confidential even though she performed a de minimis amount of confidential duties. At that time, the incumbent City Clerk was impaired by multiple sclerosis and the Deputy Clerk was the only confidential City employe who had the ability to take shorthand notes of closed sessions of the City Council which pertained to confidential labor relations matters. The Commission's decision on this position's confidential status was premised on its belief that undue disruption of the employer's operations would result from the continued inclusion of the Deputy City Clerk in the unit.

The former City Clerk has now retired and the new City Clerk, Jennifer Hudon, has the ability to take shorthand notes and to type without impairment. In addition, two other confidential employes have this ability. Thus, there have been material changes in circumstances which establish the taking of minutes of closed meetings should no longer operate to exclude the Deputy from membership in the bargaining unit. The Union has therefore met its burden for reconsideration of the status of the position.

The Union argues that another individual could perform the confidential work without undue disruption. The City Clerk has the necessary ability and attends City Council meetings as a matter of law. The Clerk waits in the Council Chambers while the City Council is in closed session. During the closed session the Clerk is basically "shuffling papers". There is no reason to believe the City's operation would be unduly disrupted to have the Clerk take shorthand minutes of the closed session while the Deputy Clerk "shuffled papers" in the Council chambers. In addition

to the City Clerk, other confidential employees are now qualified to perform this work.

For whatever reason(s) the City has already determined that the City Clerk, Secretary to the Mayor and the Secretary to the City Attorney should have the ability to take shorthand minutes as indicated in their job descriptions. The City argues that these employees should not be required to attend Council meetings. However, the Union asserts an employee's desire not to do the work is of no consequence in the Commission's determination of whether or not the City's operation would experience undue disruption if a reluctant employee had to perform the work. Although call-in of another employee involves a possible inconvenience to that individual employee, it does not result in undue disruption of the City's operation.

The City has more than enough confidential exclusions and does not need the Deputy City Clerk to perform de minimis confidential duties. The City does not have an inordinate number of confidential employees and has not in the past spread confidential duties amongst its employees for the purpose of having more confidential exclusions than warranted. However, now there is no need to continue to exclude the Deputy City Clerk from the bargaining unit as a confidential employee. Where the Commission has determined that the de minimis confidential duties of one position could be reasonably assumed by another confidential employee, the former was not required to forfeit rights as a municipal employee. City of Richland Center, Dec. No. 17950-A (WERC, 2/96).

Neither is it necessary for the Deputy Clerk to perform custodial tasks with respect to the closed session minutes. Minutes of closed sessions are not integrated with the minutes of open sessions. Classified closed minutes are kept in a separate place. They are marked "classified" and not to be distributed to public or department heads without approval. It is usually the City Attorney who makes requests regarding closed session minutes. If another individual asks for minutes of closed sessions, the City Attorney is contacted as a matter of routine to determine whether or not the closed session minutes can be released. Testimony supports that it is likely that the City Attorney's Office could access the closed minutes, with appropriate computer technology and a change in the access code. The Commission has ruled that an affected employee will not automatically be excluded from a bargaining unit as confidential where an employer can limit access if it chooses, Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88). In this instance, access to the files containing hard copies of closed minutes can be limited and access to files stored in a computer can be protected by codes. Furthermore, it would not be unduly disruptive to have the City Clerk and the Secretary to the City Attorney serve as custodians of the closed minutes of sensitive labor relations matters.

Even if the Deputy City Clerk had continuous access to such minutes, in Waukesha County, Dec. No. 26020-A (9/89), the Commission found that an employee's access to confidential data requiring a de minimis amount of time did not warrant exclusion as a confidential. The confidential exclusion protects a municipal employer's right to conduct its labor relations through employees whose interests are aligned with those of management, rather than risk having confidential information handled by someone with conflicting loyalties. Manitowoc County, Dec. No. 7116-C

(WERC, 11/91). However, potential conflict is not recognized by the legislature as a basis for depriving "municipal employees" of their collective bargaining rights. An employer remains able to respond to protect its interests if it believed an employe was inappropriately disclosing confidential labor relations or other sensitive information. DePere Unified School District, Dec. No. 25712-A (WERC, 10/90).

The Union also argues that the City has not met its burden of proving there has been a material change in the degree and combination of supervisory duties of the Deputy Clerk. The City Clerk's duties were consolidated with the duties of the Deputy Finance Director/Treasurer, but the Deputy City Clerk's position was not significantly impacted by said consolidation. The Deputy City Clerk does not have the outright supervisory authority to make meaningful personnel decisions which constrain the City Clerk. Nor does the Deputy City Clerk have the ability to make "effective recommendations" which "are largely self-executing or are the exercise of judgement independent of that of the Clerk". As the City has not met its burden, the matter previously determined by the Commission should not be revisited.

Nonetheless, if the matter is considered as if there had been no prior determination of this position's supervisory status, the City's supervisory argument fails on its merits. Specifically, the City Clerk has not ceded hiring authority to her and the Interdepartment Clerical Hiring Committee does not have hiring authority or the authority to effectively recommend hiring. These decisions are left to the hiring department. In the case of the City Clerk's office, the hiring decision is made by the Clerk.

The Union disputes other contentions relied on by the City to establish supervisory status. Particularly, it maintains the testimony shows that the Deputy City Clerk did not make an "effective recommendation" to change a position from full-time to a part-time shared position. Other City officials, including department head(s), the City's Attorney, and the Personnel Committee all were involved in the decision-making process. Nor did the Deputy City Clerk "effectively recommend" the reclassification of Deborah Neuser. Both the City and the Union had other officials who actually made the decision to reclassify Neuser. The evidence regarding employe evaluations is speculative; there have been no evaluations performed and there is no indication that such evaluations would be meaningful as to pay, tenure, discipline or promotion. In addition, the Deputy City Clerk has no authority to issue the more significant employe disciplines of written reprimand, suspension and discharge or to "effectively recommend" same.

The Union asserts that even the City acknowledges that the pay level of the Deputy City Clerk does not include higher compensation for supervisory duties and responsibilities.

Given the foregoing, the Union asks that the Deputy City Clerk be clarified into the unit.

DISCUSSION

In this case, there have been two previous unit clarification decisions addressing the

supervisory and confidential status of this position, respectively. We have held that a party seeking to litigate an issue which has already been decided by the Commission must show a material change in circumstances. City of Milwaukee, Dec. No. 6960-J (WERC, 5/89).

Here, both the Union and the City have presented evidence of change which is material to the prior Commission decisions regarding the unit status of the Deputy City Clerk. The Union presented evidence of change in the skills of other supervisory/confidential City employees, a matter which played a role in the Commission's 1981 decision finding the position confidential. The City presented evidence of a reorganization and new supervisory responsibilities in a revised job description, matters which present a different context than existed when the Commission found the Deputy was not a supervisor in 1974.

Given the foregoing evidence, it is appropriate to look again at the unit status of the Deputy City Clerk.

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 foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When determining whether an individual is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., we consider the following factors:

1. The authority to recommend effectively 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. 4/

Not all of the above factors need be present for an employe to be found a supervisor. Rather, in each case, the inquiry is whether the factors are present in sufficient combination and degree to warrant the conclusion that the employe occupying the position is a supervisor. 5/

Here, as reflected in her revised job description, the Deputy City Clerk has been granted significant responsibility in the supervision of the City Clerk's office clerical employes. She will play a role in the evaluation of employes, and has been given significant authority in the hiring process. Although the Deputy has limited independent disciplinary authority and the City Clerk is present in the workplace at least part of the time, we are satisfied that the Deputy City Clerk will exercise independent judgment in the supervision of employes.

Given all of the foregoing, we are on balance persuaded the Deputy City Clerk is a supervisor. Because the exclusion of the Deputy City Clerk from the bargaining unit is mandated by her status as a supervisor, we need not resolve the question of whether the Deputy is a confidential employe.

Dated at Madison, Wisconsin this 10th day of June, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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

5/ Taylor County, Dec. No. 27360 (WERC, 8/92).

Paul A. Hahn /s/

Paul A. Hahn, Commissioner