

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Involving Certain Employees of

WOOD COUNTY

Case 7
No. 50548
ME(u/c)-690

Decision No. 9140-D

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 44, Stevens Point, WI 54481-0044, appearing on behalf of Wood County Courthouse, Social Services and Unified Services Employees, Local 2486, AFSCME, AFL-CIO.

Ruder, Ware & Michler, S.C., by **Attorney Dean R. Dietrich**, 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, appearing on behalf of Wood County.

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

On March 20, 2000, Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to determine whether the position of Accounting Technician should be included in the existing collective bargaining unit of Wood County employees represented by Wood County Courthouse, Social Services & Unified Services Employees, Local 2486, AFSCME, AFL-CIO. Contrary to Local 2486, Wood County maintains that the position is held by a confidential employee within the meaning of the Municipal Employment Relations Act and, therefore, that it should continue to be excluded from the unit.

Dec. No. 9140-D

A hearing was held Wisconsin Rapids, Wisconsin, on October 30, 2000, before Examiner Stephen G. Bohrer, a member of the Commission's staff. The parties filed post-hearing briefs by February 12, 2001, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

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

FINDINGS OF FACT

1. Wood County Courthouse, Social Services & Unified Service Employees, Local 2486, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization having its principal offices c/o Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 44, Stevens Point, Wisconsin 54481-0044.

2. Wood County, hereinafter the County, is a municipal employer having its principal offices at 400 Market Street, Wisconsin Rapids, Wisconsin 54495-8095.

3. The Union is the exclusive bargaining representative for a bargaining unit of County employees described in the parties' 1999-2000 collective bargaining agreement as follows:

. . .

. . . all regular full-time and regular part-time employees of the Wood County Courthouse and annexes including all regular full-time and regular part-time non-professional and clerical employees of the Department of Social Services, regular full-time and regular part-time dispatcher/matron, regular full-time and regular part-time Sheriff's Department cooks, regular full-time and regular part-time Corrections Officers, all regular full-time and regular part-time non-professional employees of Unified Services, regular full-time and regular part-time Emergency Government employees, but excluding elected officials, department heads, supervisory personnel, custodial and maintenance personnel, law enforcement personnel, and registered nurses for the purposes of conferences and negotiations on questions of wages, hours, and conditions of employment.

. . .

4. The County operates a Highway Department which is staffed with approximately 43 employees. The Department is located at 555-17th Avenue North, Wisconsin Rapids, Wisconsin, and is 3.8 miles from the Wood County Courthouse located at 400 Market Street, Wisconsin Rapids, Wisconsin.

5. The Union represents all of the Department's employees except for those employees occupying the following positions: Highway Commissioner, two Patrol Superintendents, Shop Lead Man, Engineer, Accounting Supervisor, and the position at issue, Accounting Technician. Sometime near the latter part of 1996, the Union requested to add the positions of Engineer, Administrative I (which was later renamed to Accounting Technician), and Administrative II to the existing bargaining unit. In March of 1997, the parties agreed to add the Administrative II position, but did not agree to add the positions of Engineer or Administrative I (Accounting Technician).

6. The Highway Department's office area houses the Highway Commissioner, the Accounting Supervisor, the Administrative II and the Accounting Technician. John Peckham is the incumbent Accounting Technician and has occupied the position since April of 1997. Prior to Peckham, the position was occupied by Lori Miller (December, 1996 to March, 1997), Shirley Jepsen (March, 1996 to December, 1996) and Jeanette Heilgert (December, 1984 to March, 1996). At all times, Peckham has reported to Jim Alfred, the Accounting Supervisor. Angela Porsch occupies the position of Administrative II, is represented by the Union, and has at all times also reported to the Accounting Supervisor. There have been two Highway Commissioners during Peckham's employ: Brian Mattison (February, 2000 to the time of hearing) and David Krekowski (1976 to January, 2000). At the time of hearing, Commissioner Mattison was expected to leave his post at the end of calendar year 2000.

7. On March 17, 1998, Peckham completed a Comprehensive Position Questionnaire at the direction of the County. It states: "The essential purpose of my position is to collect, code, and enter into a computer the daily labor and machinery reports of the Highway Department. I also assist the Highway Commissioner and members of his staff in preparing various reports, forms and documents as needed in the function of their duties." The questionnaire defines an "essential task" as one that cannot easily be delegated to someone else. The questionnaire lists specific essential position tasks and allocates an approximate percentage of time spent in completing each task over the course of a year as follows:

Code and enter into computer – Daily Labor
and Machinery Reports.....18%

Prepare Final Payroll Reports and
send them, via modem, to Courthouse 3%

Prepare Distribution Report – charge Labor
and Machinery to proper accounts 10%

Gather information from Distribution Reports and Requisitions to use in preparation of invoices.....	10 %
Create State Requisition for time spent on State projects	5 %
Collect data from various sources and prepare summary of fuel and vehicle maintenance product usage for Highway machinery, as well as for other County Depts	14 %
Maintain fuel inventory records for Highway Dept. shops	2 %
Calculate monthly price to charge for fuel and gasoline	1 %
Prepare a summary report for all fuels used and then prepare State Fuel Tax Refund report	2 %
Design and create form for use by Patrol Superintendent in new County Trunk Highway Road Maintenance Inventory Program. Using Program, calculate “what-if” scenarios for budgeting and planning purposes	3 %
Using various computer programs, design and create more efficient forms and report formats for Highway Commissioner, Accounting Supervisor, and County Engineer. Input information on forms as needed	5 %
Type forms and requirements for bids and quotes. Distributes results.....	3 %
Undertake typing for Highway Commissioner- Agendas, Committee Minutes, Certified Survey letters, etc	5 %
Using information from Highway Commissioner, type and assemble the Annual Budget	1 %
Undertake typing for County Engineer- Property Descriptions as needed on deeds and right-of-ways	1 %
Close Month-End on computer	1 %
Update files on computer- employee files, state projects, and construction projects.....	1 %

Complete year-end rollover procedures	2 %
Transcribe memos, using dictaphone tapes, from Highway Commissioner....	1 %
Using computer, import updated personnel files biweekly.....	1 %
Various year-end summary reports for use by Highway Commissioner	1 %

The above list of essential tasks, when added together, is 90% out of 100% of the position's duties. The questionnaire also lists the following Marginal Position Tasks, that is, "although usually necessary to be the work of the [incumbent], can easily be done by others..." as follows:

Type correspondence and purchase orders for Highway staff.....	2 %
Perform daily and monthly computer back-up	2 %
Verify that server backup is functioning properly	1 %
Answer telephone and greet and help public as needed	2 %
Sort and file various reports	2 %
Obtain price quotes for diesel fuel and gasoline by contacting various companies. Order from lowest bidder	1 %

Peckham signed the Comprehensive Position Questionnaire on March 17, 1998.

8. Peckham's Position Description, dated April, 1998, states, *inter alia*, the following:

Purpose of Position

The purpose of this position is to code, enter and prepare departmental payroll; maintain records for construction projects, machinery and fuel use; and perform confidential duties for Highway management personnel. The work is performed under the supervision of Accounting Supervisor.

Essential Duties and Responsibilities

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Enters patrol personnel daily labor and machinery use time in computer. Calculates and distributes labor and machinery use to appropriate classification and charges to proper account.
- Maintains fuel inventory records. Prepares cards for fuel use. Tracks oil, anti-freeze and other fluids use.
- Prepares requisition for work performed on state roads.
- Calculates and prepares department payroll for courthouse computer.
- Types billing statements for work performed by department and submits to appropriate municipality or responsible party.
- Types and distributes bid and price quote forms, procedures and requirements. Orders fuel. Obtains fuel price quotes.
- Prepares fuel use and state fuel tax refund reports.
- Types confidential correspondence, meeting agenda, memoranda, advertisements, purchase orders, budget, personnel records, property descriptions, right-of-way documents and other material and documents from written and oral instructions.
- Calculates fuel price for fuel used in other county departments.
- Closes computer fiscal records on computer. Creates back-up computer files. Completes year-end roll-over on computer. Prints year-end report and submits to County Finance Director.
- Enters information regarding road maintenance into the County Trunk Highway Road Inventory computer program.

. . .

Peckham's predecessors' Position Description for Administrative Assistant I, dated November, 1995, states, *inter alia*, the following:

General Function

To code and perform data entry for the Wood County Highway Department's daily labor and machinery time, and to maintain a variety of payroll, fuel, and other highway construction records. Also provides varied secretarial duties.

. . .

Responsibilities

A. Essential Functions

1. Code, according to account, all daily and labor and machinery time and enter data into computer using the Wisconsin County Highway Costing System.
2. Maintain fuel inventory at bulk plants and all shops; includes preparing fuel cards for fuel used in each piece of equipment.
3. From computer reports, prepare payroll sheets at the end of each payroll period. Using information obtained, prepare recap of payroll distribution to accounts.
4. As needed, miscellaneous office duties, which include but not [sic] limited to, typing correspondence, committee minutes and various reports.

. . .

9. Peckham generally did all of former Highway Commissioner Krekowski's typing. Although the Accounting Supervisor and the Administrative Assistant II did some typing for Krekowski, Peckham was primarily responsible. If Peckham was sick or absent, Krekowski would typically wait for Peckham to return to do the typing.

During his ten month tenure prior to this hearing, Highway Commissioner Mattison has not had any typing performed.

10. Peckham does not attend administrative meetings where potential or ongoing litigation is discussed. Peckham also does not attend meetings where there is a discussion of potential employee discipline. Further, Peckham does not investigate employees' job behavior nor does he type investigative reports.

However, Peckham has typed dictation for the Highway Commissioner which relates to employee discipline. Such typing was transcribed from a dictaphone carried by Commissioner Krekowski while traveling throughout the County, including observations of employees who fail to follow work rules. For example, Krekowski dictated, and Peckham later typed, Krekowski's observations of an employee who failed to wear a safety vest while working which observations eventually resulted in a verbal warning to that employee. Peckham typed similar observations that led to discipline approximately 2-3 times for each construction season of April through November for 1997, 1998 and 1999. Peckham has not typed any such field dictation for Commissioner Mattison for the 2000 construction season because Mattison has not used dictation.

In addition, Peckham has printed out employee disciplinary memos issued by Commissioner Mattison.

11. The Accounting Technician has been responsible for typing the Highway Commissioner's responses to grievances. For example, on March 28, 1989, June 12, 1989, October 11, 1995, and April 29, 1996, Commissioner Krekowski sent letters to the Union denying grievances. These letters were typed by Peckham's predecessors Heilgert and Jepsen. A similar letter, dated May 1, 1998, was typed by Peckham.

12. The Highway Commissioner represents the County in the Department's collective bargaining with the Union. In the past, the Accounting Technician has typed Commissioner Krekowski's handwritten notes taken during bargaining sessions. Krekowski would then compare these typed notes with bargaining notes taken by the Human Resources Director in preparation for final stages of contract negotiations. Peckham has not typed any such notes for Krekowski. However, Peckham was hired after the beginning of the 1997-99 contract period and bargaining for the successor agreement occurred primarily in 2000 after Krekowski retired. Commissioner Mattison has not had anyone type his handwritten notes, if any, during bargaining for the successor agreement. Peckham does not attend any meetings where bargaining proposals are discussed. Peckham does not do any costing of bargaining proposals made by either the Union or by the County.

13. On October 2, 1996, Peckham's predecessor Jepsen typed a memorandum for Commissioner Krekowski to Personnel Director Pat Costello outlining the County's position regarding the Union's request to add three positions into the bargaining unit, one of which was the incumbent position. That exchange eventually resulted in the Administrative II position being added to the unit and the incumbent position remaining unrepresented. This occurred in 1997 and prior to Peckham's hire. One of the reasons noted in that memorandum for excluding the incumbent position was because of its confidential nature. The October 2, 1996, memorandum was not shared with the Union.

14. With regard to the Department's budget, Peckham does not collect or assemble any budgetary data. Rather, Peckham is given figures from the Commissioner and from the Accounting Supervisor for things such as future machinery purchases or construction project costs. Peckham then types the figures onto predetermined forms. Peckham does not establish or create hypothetical scenarios for budget planning purposes and has no involvement in deciding how the Department budget is formed or what levels of funding will be requested.

15. The Accounting Technician does certain confidential clerical labor relations work for the Highway Commissioner who has significant labor relations responsibilities. The County has assigned these confidential duties to the Account Technician in good faith. Although the amount of time spent performing confidential duties is *de minimus*, there are no other non-bargaining unit employees to whom these duties can be assigned without causing undue disruption.

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

CONCLUSION OF LAW

The Accounting Technician is a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., and is therefore 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

The Accounting Technician shall continue to be excluded from the bargaining unit described above in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of September, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Wood County

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

POSITIONS OF THE PARTIES

The Union

The Union contends that the Accounting Technician should be in the existing Courthouse bargaining unit because he is not a confidential employee. The Union makes four basic arguments.

First, the incumbent, John Peckham, does not have responsibility for information which is considered confidential. The Commission should give primary emphasis to the actual duties of the position as opposed to those duties listed in the Accounting Technician's job description. Peckham is not involved in the County's strategy in collective bargaining, he is not involved with labor relations litigation affecting the County, and his input in the budgetary process is limited to inserting figures on a form. With regard to employee discipline, Peckham does not attend disciplinary meetings and does not have contact with employee performance evaluations or other confidential files. Although he does type responses to grievances, this work is not confidential because the Union has received those responses. With regard to the field dictation, Peckham did not characterize this work as confidential. Even if it is, such typing cannot be deemed confidential where the employee already knows that he is getting a verbal reprimand. With regard to the October 2, 1996 memorandum, Commissioner Krekowski was only able to identify that the person in the Accounting Technician position typed it, and not the actual person.

Second, any amount of information which may be found to be confidential is *de minimus*. The County is not entitled to deprive an employee of the right of representation due to a minimal amount of confidential duties which it has assigned to a position.

Third, confidential work performed by the Accounting Technician could be performed by the Accounting Supervisor. The Accounting Supervisor is an unrepresented position located within the Highway Department and the assignment of confidential duties would not unduly disrupt the organization of the County. The Accounting Supervisor uses the same word processing program as the other office personnel and does some typing. The Accounting Supervisor, otherwise known as the Office Manager, could easily absorb any alleged confidential duties. In addition, another represented clerical position in the Highway Department, the Administrative Assistant II, has a community of interest with the Accounting Technician which is similarly clerical in nature.

Fourth, any agreement between the Union and the County in 1997 regarding the exclusion of the Accounting Technician was not put into evidence. Further, any evidence indicating to the contrary does not preclude the Union from requesting the addition of the Accounting Technician position at a later date.

The County

The County maintains that the Accounting Technician is a confidential employee and, therefore, should be excluded from the unit. The County makes three basic arguments.

First, the position has historically performed and currently performs confidential clerical typing for the Highway Commissioner. Examples of confidential work include the four Commissioner's letters denying Union grievances, the Commissioner's October 2, 1996, memorandum to the Personnel Director regarding bargaining positions, and the Commissioner's notes from bargaining sessions in preparation for negotiations. Further, the incumbent Accounting Technician continues to handle confidential material such as making copies of employee evaluations, typing the Commissioner's field dictation, typing employee evaluations and typing investigations for employee misconduct, if needed. This includes printing out employee disciplinary memos issued by current Commissioner Mattison. Moreover, Peckham works with the Accounting Supervisor in putting together the Highway Department budget.

In addition, it is likely that Peckham will be involved in the future in typing confidential notes regarding contract negotiations. Peckham was not involved in typing such notes with regard to the negotiations of the 1997-1999 collective bargaining agreement because he did not start employment until April of 1997 when the 1997-1999 agreement had already been signed. Since the negotiations for the 2000-2002 successor agreement did not start until shortly before Commissioner Krekowski retired on January 4, 2000, and since then newly hired Commissioner Mattison may not have been actively involved in negotiating that successor agreement, Peckham did not have the opportunity to type confidential notes for the new Commissioner and for that round of negotiations. However, the new Commissioner will establish his own practices and procedures which may provide for additional confidential duties to be performed by the Accounting Technician, including the typing of confidential notes regarding contract negotiations.

Second, even if the amount of exposure to confidential matters is determined to be *de minimus*, it is the only position available to perform the Highway Commissioner's confidential clerical duties and it would be unduly disruptive of the County's organization to assign these duties elsewhere. Specifically, it would be unreasonable to assign those duties to the Accounting Supervisor because that position already supervises staff and manages the Highway Department's finances. The only other position in that office area is the Administrative II position which is already represented by this Union. Further, it would be inefficient and ineffective to assign the Highway Commissioner's confidential clerical duties to someone located in the Courthouse building 3.8 miles from the Highway Department offices.

Third, since the County is currently without a Highway Commissioner, it is unreasonable to expect that the future Commissioner will type all of his own confidential matters.

DISCUSSION

In order for an employee to be held confidential, that employee must have access to, knowledge of, or participation in, confidential matters relating to labor relations. Confidential information is that which is not available to the bargaining representative or its agents, and which deals with the employer's strategy or position in collective bargaining, contract administration, litigation or similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer. WHITEHALL SCHOOL DISTRICT, DEC. NO. 29491 (WERC, 11/98); VILLAGE OF SAUKVILLE, DEC. NO. 26170 (WERC, 9/89). In making a determination as to confidential status, the Commission is mindful of the need to balance the statutory right of employees to engage in concerted activity with the right of employers to conduct labor relations through employees whose interests are aligned with management. WHITEHALL SCHOOL DISTRICT, SUPRA; CITY OF SEYMOUR, DEC. NO. 28112 (WERC, 7/94). In striking this balance, the Commission looks to, among other things, the amount of confidential work performed, the number of employees available to perform the work, and the degree of disruption that would be caused to the employer's operation if confidential work is reassigned. CITY OF SEYMOUR, SUPRA. Ordinarily, performance of a *de minimus* amount of confidential work does not warrant finding an individual to be a confidential employee. BROWN COUNTY, DEC. NO. 22379-A (WERC, 8/88).

However, 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, unless that work can be assigned elsewhere without undue disruption to the employer's organization. VILLAGE OF SAUKVILLE, SUPRA.

In this case, most of the duties performed by the position of Accounting Technician are not confidential matters relating to labor relations. As stated in the 1998 Comprehensive Position Questionnaire, "[t]he essential purpose of the position is to collect, code, and enter into a computer the daily labor and machinery reports of the Highway Department." However, the Highway Commissioner has historically had significant labor relations responsibilities and the Accounting Technician's duties include serving as secretary to the Highway Commissioner. Thus, the Accounting Technician historically has been responsible for all of the Highway Commissioners clerical confidential work including typing the Highway Commissioner's grievance responses, 1/ typing field dictation, typing the Commissioner's hand written notes made during bargaining sessions, and typing at least one internal memorandum for the Commissioner in 1996 to the County's Personnel Director regarding the County's position on the Union's request to accrete various unrepresented positions.

1/ With regard to the Union assertion that grievance responses are not confidential because they are ultimately sent to the Union, early or corrected drafts of grievance responses are not available to the Union. Thus, the work is confidential.

Given the foregoing, we conclude the Accounting Technician does perform the clerical confidential labor relations work for a County management employee with significant labor relations responsibilities. The Union does not claim these duties have been assigned in bad faith and the historical nature of the assignment evidences the County's good faith. However, because the amount of time spent performing these duties is *de minimus*, the question becomes one of determining whether these duties can be reassigned to the Accounting Supervisor or to confidential clericals located in the Courthouse without undue disruption.

Although the Accounting Supervisor has been known to do some typing, the frequency of this occurrence is, according to the incumbent, rare. Moreover, it is unrebutted that if the Accounting Technician is not available to do typing for the Highway Commissioner, then the typing usually waits until he returns and is available. Finally, we note that the confidential clericals in the County Courthouse, are located 3.8 miles from the Highway Department's offices.

Under these circumstances, we conclude that the confidential work of the Accounting Technician cannot be assigned to another non-unit employee without undue disruption of the County's organization.

Given the foregoing, we conclude the Accounting Technician shall continue to be excluded from the bargaining unit as a confidential employee. However, should the new incumbent Highway Commissioner elect to do his own confidential typing or to have the Accounting Supervisor or confidential Courthouse clericals perform the confidential typing, the Union is free to again seek the Technician's inclusion in the unit.

Dated at Madison, Wisconsin, this 13th day of September, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner