

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40
Involving Certain Employes of
WALWORTH COUNTY

Case 7
No. 51241 ME-712
Decision No. 9394-E

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, on behalf of the Petitioner.

Davis & Kuelthau, S.C., Attorneys at Law, by Ms. Mary L. Hubacher and Mr. Roger E. Walsh, 111 East Kilbourn, Suite 1400, Milwaukee, Wisconsin 53202-6613, on behalf of Walworth County.

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

On June 24, 1994, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission clarify the existing bargaining unit represented by Local 1925, AFSCME, AFL-CIO, by including the position of Judicial Law Clerk. Hearing on the petition was held on November 16, 1994 in Elkhorn, Wisconsin, before Examiner Douglas V. Knudson, a member of the Commission's staff. A stenographic transcript was made of the hearing and was received on November 30, 1994. Post-hearing briefing in the matter was completed by January 24, 1995.

On or about August 18, 1995, the Commission advised the parties that it wished to supplement the record with additional evidence. The parties provided that evidence on December 14, 1995.

The Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, now makes and issues the following

No. 9394-E

FINDINGS OF FACT

1. Walworth County, hereinafter the County, is a municipal employer with its principal offices located at Elkhorn, Wisconsin 53121.

2. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization with its principal offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. Walworth County Courthouse Employees, Local 1925-B, AFSCME, AFL-CIO, hereinafter Local 1925-B, is an affiliate of the Union. The current collective bargaining agreement between the County and Local 1925-B contains the following Recognition Clause:

ARTICLE I - RECOGNITION

1.01 Recognition: The County hereby recognizes the Union as the exclusive collective bargaining representative for purposes of conferences and negotiations on all matters concerning wages, hours and other conditions of employment for all Walworth County courthouse employees, but excluding elected officials, professional employees, social services employees represented by Local 1925, supervisors, court reporters, the deputy coroner, confidential employees in the Personnel Office, and all other employees of Walworth County as certified by the Wisconsin Employment Relations Commission on February 3, 1970.

Effective July 1, 1994, the parties voluntarily agree to include all regular full-time and regular part-time clerical employees of the Walworth County Lakeland Nursing Home, excluding confidential, supervisory and casual clerical employees.

3. There are four elected Circuit Court Judges in Walworth County. The Judges are not involved in representing the County in contract negotiations between the County and the unions representing its employees or in litigation of labor relations related matters, and have no access to the County's strategies in negotiations nor input into these negotiations. In late 1992 or early 1993, the Judges received a notice from the State of Wisconsin that funding had been approved for a "judicial assistant" position, along with a position description for that position which duties were primarily clerical in nature, e.g., typing, filing, calendaring, maintaining records, answering the telephone, etc. The Judges reviewed those duties and concluded that they were already being performed by the Calendar Clerk or each judge's court reporter. The Judges decided they wanted someone to assist them in doing legal research and drafting decisions and drafted the following job description for a

"Judicial Law Clerk":

Job Description

Job Title: Judicial Law Clerk
Department: Courts
Location: Walworth Co. Courthouse
Direct Sup: Judges/Clerk of Courts

Job Summary: This position provides paralegal and clerical support to the Walworth County Circuit Court Judges working under the supervision of the Judges and Clerk of Courts.

Tasks:

1. Researches and analyzes law sources such as state statutes, recorded judicial decisions, legal articles, and legal codes as directed.
2. Prepares legal documents such as opinions, jury instructions, orders, notices, etc. as directed.
3. Prepares judicial correspondance [sic], reports, memoranda, agendas, etc.
4. Organizes and maintains judges files and records.
5. Maintains judge's law library.
6. Maintains records on each judge's continuing legal education credits and needs.
7. Manages visitors for the judges and answers their phone lines.
8. Sets up the bi-weekly judge's meetings; prepares the agenda, records minutes, prepares and distributes minutes following each meeting.

9. Collects and compiles statistics as directed.
10. Performs other related duties as assigned.

Work aides, tools, machines, etc: Copier, computer, Lexis/Lotus and Word Perfect software, printers, electronic typewriter, files, dictaphone, legal folders, and law books/periodicals, etc.

Position Qualifications: High School Diploma or GED with a Paralegal Degree or an equivalent combination of education and work experience that would provide the following knowledge, skills and abilities:

1. Considerable knowledge and experience in conducting legal research.
2. Considerable experience in the preparation of a broad spectrum of legal documents such as opinions, jury instructions, orders, notices, etc.
3. Ability to maintain a high level of discretion and integrity, exercising sound judgement and diplomacy.
4. Demonstrated ability to communicate clearly, concisely and tactfully, both orally and in writing.
5. Ability to develop and maintain positive working relationships with judges, attorneys, court personnel, other county departments, and the general public.
6. Demonstrated proficiency in the use of Word Perfect.
7. Knowledge in the use of law research software programs, preferably Lexis.
8. Ability to take and transcribe dictation.
9. Knowledge of modern office practices, procedures and equipment.

In May of 1994, the Judicial Law Clerk position was posted, which stated, in relevant part, as follows:

POSITION: JUDICIAL LAW CLERK REGULAR FULL-TIME

POSITION#: 12047

PLACE: CLERK OF COURTS

DAYS: MONDAY THROUGH FRIDAY

HOURS/SHIFT: 8

SHIFT: 1ST

SHIFTS/WEEK: 5

1994 WAGE: MIN MAX
10.53 - 13.40 PAYMENT IS BI-WEEKLY

EDUCATION REQ: HIGH SCHOOL DIPLOMA OR GED EQUIVALENT WITH PARALEGAL DEGREE OR AN EQUIVALENT COMBINATION OF EDUCATION AND WORK EXPERIENCE THAT WOULD PROVIDE ALL THE KNOWLEDGE, SKILLS, AND ABILITIES LISTED HEREIN.

EXPERIENCE REQ: EXTENSIVE EXPERIENCE IN CONDUCTING LEGAL RESEARCH. EXTENSIVE EXPERIENCE IN PREPARATION OF A BROAD SPECTRUM OF LEGAL DOCUMENTS SUCH AS OPINIONS, JURY INSTRUCTIONS, ORDERS, NOTICES, ETC. DEMONSTRATED PROFICIENCY IN THE USE OF WORD PERFECT SOFTWARE.

SKILLS REQ: ABILITY TO MAINTAIN A HIGH LEVEL OF DISCRETION AND INTEGRITY, EXERCISING SOUND JUDGMENT AND DIPLOMACY. ABILITY TO COMMUNICATE CLEARLY, CONCISELY, AND TACTFULLY, BOTH ORALLY AND IN WRITING. KNOWLEDGE IN THE USE OF LAW RESEARCH SOFTWARE PROGRAMS, PREFERABLY LEXIS. ABILITY TO TAKE AND TRANSCRIBE DICTATION. KNOWLEDGE OF MODERN OFFICE PRACTICES/PROCEDURES/EQUIPMENT.

SPECIAL REQ: ABILITY TO DEVELOP AND MAINTAIN POSITIVE WORKING RELATIONSHIPS WITH JUDGES, ATTORNEYS, COURT PERSONNEL, OTHER COUNTY DEPARTMENTS, AND THE GENERAL PUBLIC.

THE HOURLY RANGE LISTED HEREIN IS AN ESTIMATE AND IS SUBJECT TO MODIFICATION BASED ON THE JOB CONTENT EVALUATION.

JOB SUMMARY: THIS POSITION PROVIDES PARALEGAL AND CLERICAL SUPPORT TO THE WALWORTH COUNTY CIRCUIT COURT JUDGES WORKING UNDER THE SUPERVISION OF THE JUDGES AND CLERK OF COURTS. JOB DUTIES INCLUDE THE FOLLOWING: RESEARCHES AND ANALYZES LAW SOURCES SUCH AS STATE STATUTES, RECORDED JUDICIAL DECISIONS, LEGAL ARTICLES, AND LEGAL CODES AS DIRECTED; PREPARES LEGAL DOCUMENTS SUCH AS OPINIONS, JURY INSTRUCTIONS, ORDERS, NOTICES, ETC. AS DIRECTED; PREPARES JUDICIAL CORRESPONDENCE, REPORTS, MEMORANDA, AGENDAS, ETC.; ORGANIZES AND MAINTAINS JUDGES' FILES AND RECORDS; MAINTAIN JUDGE'S LAW LIBRARY; MAINTAINS RECORDS ON EACH JUDGE'S CONTINUING LEGAL EDUCATION CREDITS AND NEEDS; MANAGES VISITORS FOR THE JUDGES AND ANSWERS THEIR PHONE LINES; SETS UP THE BI-WEEKLY JUDGES' MEETINGS; PREPARES THE AGENDA, RECORDS MINUTES, PREPARES AND DISTRIBUTES MINUTES FOLLOWING EACH MEETING; COLLECTS AND COMPILES STATISTICS AS DIRECTED; PERFORMS OTHER RELATED DUTIES AS ASSIGNED.

IF INTERESTED,
APPLY AT:

WALWORTH COUNTY PERSONNEL DEPARTMENT
ANNEX WEST COUNTY HWY NN ELKHORN, WI,
53121 (414) 741-2590

POSTED: 5/02/1994

DEADLINE: 5/23/94

A WRITTEN EXAMINATION WITH A PASSING SCORE OF 70 MAY BE REQUIRED.

The Judges narrowed the field of applicants to four based upon qualifications and required the finalists to complete a test consisting of two hypothetical legal problems which required the applicants to do legal research. The four finalists were a legal secretary, a legal secretary who was also a court reporter, an attorney, and a paralegal. Judge Gibbs, along with Judge Carlson, recommended that the paralegal, Jennifer Buenzli, be hired, and Buenzli started in the position on July 1, 1994. Buenzli has a B.A. degree in General Studies and certification as a paralegal from the American Institute for Paralegal Studies, and had prior experience as a legal assistant and as a judicial assistant. A four-year college degree is not required to obtain certification as a paralegal.

4. In the position of Judicial Law Clerk (JLC), Buenzli is supervised by all four Judges in Walworth County. She receives assignments from all four Judges and reports to all four Judges. Buenzli spends approximately 90% of her time doing legal research and reporting the results of such research to the Judges that have given her the assignments. The reports may be oral, or in the form of written legal memoranda, or a draft of a decision or opinion. Research assignments might not have a set deadline for completion and the time spent on each assignment varies. Buenzli does the research without direct supervision or direction and makes recommendations with regard to the legal issues based upon her research of applicable statutory law and case law. Buenzli also reviews the files and records in pending cases to determine the facts upon which the Judge can base his/her decision. In reviewing the files, Buenzli has access to the Judge's personal notes in the case. The Judges rely on Buenzli's recommendations in making decisions in cases pending before them and at times do so without independently reviewing the record. Cases brought before the Judges have included criminal cases involving a member of this bargaining unit and employees in other County bargaining units, civil cases involving challenges to discipline imposed upon employees in another bargaining unit (one having occurred since July of 1994), and a request for a temporary injunction against the County filed by a labor organization representing the County's sworn law enforcement employees.

Buenzli spends approximately 3% of her work time drafting legal documents for the Judges, which she submits for the assigning Judge's review. Buenzli spends approximately 1% of her time preparing judicial correspondence which has included letters of evaluation or recommendation, one of which was for a represented employe, and letters regarding investigations of attorneys and of a judge. Buenzli spends 2-3% of her time maintaining the Judges' law library, and 1% of her time preparing the agenda for the Judges' bi-weekly meeting and taking the minutes of those meetings. At one of those meetings, a personnel matter involving an employe who performed work for the Judges and was in the bargaining unit represented by Local 1925-B, was discussed by the judges and the Clerk of Courts with regard to whether discipline would be appropriate, and if so, what level of discipline would be appropriate.

5. The Judicial Law Clerk does not have sufficient access to or involvement in confidential matters relating to labor relations to be a confidential employe.

6. The work of the Judicial Law Clerk does require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education.

Upon the basis of the above Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. The occupant of the position of Judicial Law Clerk is not a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and, therefore, is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

2. The occupant of the position of Judicial Law Clerk is a professional employe within the meaning of Sec. 111.70(1)(L), Stats.

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

ORDER 2/

The Judicial Law Clerk shall continue to be excluded from the bargaining unit described in Findings of Fact 2, above.

Given under our hands and seal at the City of Madison, Wisconsin,
this 23rd day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

2/ See footnote on pages 9 and 10.

I concur:

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

1/ 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.

(footnote continued on page 10)

1/ (footnote continued from page 9)

(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.

WALWORTH COUNTY

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

The Union seeks an order from the Commission clarifying the bargaining unit to include the position of Judicial Law Clerk. The County has objected to the inclusion of that position in the bargaining unit on the bases that it is both confidential and professional in nature.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the new position of Judicial Law Clerk (JLC) shares a community of interest with the employees in the bargaining unit represented by the Union and is neither confidential nor professional. The Union notes that under MERA, for a position to be considered confidential, it must have access to sensitive labor relations matters. The incumbent in the JLC works for the four Circuit Court Judges in the County, none of whom are representatives of the County for the purposes of collective bargaining, contract administration, or litigation between the County and its various bargaining units. The type of confidentiality expected by the Judges is the same as is expected of hundreds of Clerk of Courts employees throughout the state, and is not of the same nature of confidentiality as that term is used under MERA. Employees who violate the confidence required by the Judges can expect to be disciplined. There is no conflict between that expectation of confidentiality and bargaining unit status because the confidential duties are not related to the County's exercise of its functions involving collective bargaining, contract administration, etc.

In Marathon County, Dec. No. 9130-E (WERC, 2/88), the Commission states the test for finding an employee to be confidential within the meaning of MERA, as "employees are excluded as confidential by reason of their participation in the Employer's labor relations, and their access to sensitive labor relations information which would not normally be available to the Union." Merely having access to confidential materials, in and of itself, is not sufficient to exclude an employee as confidential. In City of Madison, Dec. No. 23183 (WERC, 1/86), the Commission held that having a portion of one's work time spent defending the employer in labor-related litigation, where that litigation does not directly involve the employee in collective bargaining or contract administration between the employer and the union's represented employees, is not per se confidential work. The Commission distinguished between that type of litigation activity and involvement in pre-disciplinary investigations, grievance disposition issues, and arbitration which directly involve the

employer's labor relations activities and strategies. Finally, in Marathon County, Dec. No. 19130-G (WERC, 2/92), the Commission concluded that where the individual does not handle a substantial quantity of confidential material, i.e., only a de minimis amount related to labor relations, the position will not be found to be confidential. In this case, the position does not have a de minimis amount of confidential duties, it has no confidential duties. While the Judges can expect to hear all types of cases, some of which may involve bargaining unit members involved in various types of disputes, such cases are not of the type the Commission considers with regard to determining confidential status. The Union has no role in most of those cases and most of them do not involve the labor-management relationship.

The Union concedes that the JLC position is very responsible, however, it disputes that it is a "professional" position. Many of the employees represented by unions work without direct supervision, exercise a great deal of discretion within their job, and are skilled, trained people. The focus under Sec. 111.70(1)(b), Stats., is whether the position "requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized, intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes." This position does not meet that standard. As evidenced by the job description for the position and the incumbent's background, the work requires knowledge which is acquired through experience, or a combination of experience and technical training. Thus, the position does not qualify as "professional."

County

The County asserts that the position of Judicial Law Clerk (JLC) is not appropriately included in the bargaining unit represented by the Union as it is both a confidential and a professional position. With regard to the confidential nature of the position, the job activities of the JLC are closely related to discipline of bargaining unit employees and other issues raised by the unions that represent the County's employees. In Walworth County, Dec. No. 18846 (WERC, 4/79), the Commission concluded that the Fraud Investigator was confidential because he submitted reports on the actions of other employees that might possibly lead to disciplinary action being taken against the employee. Similarly, although she has only been in the position a few months, the JLC, Buenzli, has already worked on a case involving a represented employee's appeal of disciplinary action taken against him by the County. Buenzli conducted the only review of the extensive case file to identify the evidence that supported the disciplinary action taken by the County. The Judge in that case relied on her work, and did not conduct an independent review of the file in making his determination. Thus, the work of the JLC directly impacts on disciplinary action taken against bargaining unit employees. If the JLC position was placed in the bargaining unit, the Judge would not be able to place as much reliance on her work, as she would be subject to pressure from fellow unit members. Because of that potential divided loyalty, it is possible the JLC could not be assigned to such cases. Since there are no other confidential employees to whom the work could be

assigned, the Judges would not have available the very assistance Buenzli was hired to provide.

The County also notes that there have been other matters involving the appeal of disciplinary actions taken against an employe by the County that have arisen before the Judges, and there have also been cases where a union representing County employes has sought a temporary injunction against the County. Again, the JLC would be in a position to impact the final outcome of such cases and the potential for a conflict of interest would be present. Such a conflict could also arise in cases where a union, although not a party to the action, has a vested interest in the outcome of the case. The County cites as an example a case involving a criminal action against an employe who had embezzled funds from one of the unions and the union and other employes took a strong position regarding the appropriate sentence for that individual. In that case, the JLC would have had access to the Judge's personal notes, and would have been asked to research and recommend the appropriate sentence to the presiding Judge.

A finding that the amount of confidential work performed by the JLC is de minimis should not preclude a finding that she is confidential, since there is no other employe available to perform the confidential work. Citing, Town of Grand Chute, Dec. No. 22934 (WERC, 9/85); Manitowoc County, Dec. No. 7116-C (WERC, 11/91). Thus, in those cases where the JLC is in a position to influence the Court's decision in cases involving bargaining unit employes, or other matters raised by or impacting on a union, it is imperative that the individual's interests are independent from the interests of the Union.

The County also asserts that the JLC position is professional in nature, and that even if the position is not concluded to be confidential, it still should not be included in this bargaining unit. The County cites the statutory definition of a "professional employe" under MERA, and asserts that whether the position meets those requirements is determined by considering the actual work demands of the job and whether the knowledge required of the job is customarily acquired through an advanced degree from a school of higher learning. With regard to the work, the JLC spends ninety percent of her time researching the law in various legal issues. In doing so, she determines the strategy for researching the issue, applies the relevant law to the facts of the particular case, and makes a recommendation to the Judge regarding how the issue should be decided. She performs all of those duties independently, with only limited supervision. Her work also includes developing procedures and guidelines for the Court in various areas. Thus, the work of the JLC is intellectual and varied and requires the exercise of independent judgment and discretion.

The JLC's duties also require the skills and knowledge customarily obtained through advanced education. While an incumbent's actual credentials and the hiring requirements are relevant in determining whether a position is professional, such factors are not dispositive and ultimately the decision depends upon the nature of the actual work done by the incumbent and the means by which the knowledge required to perform that work is customarily obtained. Citing, Outagamie County, Dec. No. 21143-A (WERC, 10/86); City of Sun Prairie, Dec. No. 20841-B (WERC, 10/86). In those cases, a degree was not required by the employers for the positions in

issue, however, the Commission still found the positions to be professional based upon the actual work performed and the knowledge required to perform the work. In this case, the preponderance of the actual duties of the JLC, i.e., legal research and analysis, are comparable to those of a junior lawyer. To perform those duties, the individual must have extensive knowledge of legal research and analysis, knowledge of the type customarily acquired through a prolonged course of specialized study, e.g., the study of law. While a law degree was not required for the JLC position, the record establishes that it was considered "desirable", as it would provide the person with the necessary knowledge to perform the job. Finally, the amount of time required to complete the work assigned to the JLC varies with the complexity of the assignment, and there is no standardized amount of work that may be performed in a set period of time. Thus, the work cannot be standardized in relation to a particular period of time. Therefore, the JLC position satisfies the statutory criteria for a "professional" set forth in Sec. 111.70(1)(l), Stats.

DISCUSSION

Addressing first the County's claims of confidential status for the Judicial Law Clerk (JLC) position, it is well-settled that for an employe to be held confidential, such employe must have access to, knowledge of, or participation in confidential matters relating to labor relations. For information to be confidential, it must: (a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents. 3/

The Circuit Court Judges for whom the JLC, Buenzli, works have no role or function as representatives of the County for the purposes of labor relations beyond that of supervising certain employes, including Buenzli.

Given the foregoing, it is clear that application of our traditional tests for measuring confidential status would produce a determination that Buenzli is not a confidential employe.

The County in effect asks us to expand our existing test for confidential status based upon Buenzli's participation in the judicial decision-making process in the occasional cases involving represented employes which came before the Court. The County asserts that if Buenzli is included in a bargaining unit, the Judges' implicit trust in Buenzli will be compromised. We do not find the County's contentions to be persuasive for several reasons.

First, the suggestion that Buenzli may be influenced by her inclusion in a bargaining unit (presumably to favor the employe/union interest in a lawsuit before the Court) is no more

2/ City of Mauston, Dec. No. 21424-E (WERC, 11/93); City of Greenfield, Dec. No. 18304-G (WERC, 10/93); Dane County, Dec. No. 22796-C (WERC, 9/88).

persuasive than a suggestion that Buenzli's exclusion from a bargaining unit would cause her to favor the County's interests. Thus, in our view, inclusion is no more likely to harm the interests in "implicit trust" than exclusion. Second, there is no basis in this record for concluding that there is any danger that Buenzli would let her unit status affect her job performance. If such a concern nonetheless exists, that concern can be met by not having Buenzli involved in the very small number of lawsuits could which involve represented employees. Third, the confidential exclusion exists to protect the employer's strategic interests and decision-making process in collective bargaining and contract administration. The Judges simply do not play any significant part in the employer's collective bargaining/contract administration decisions. As to the supervisory role judges do play, it would again be easy to simply exclude Buenzli from information related to that role.

Given all of the foregoing, we conclude there is no persuasive basis for excluding Buenzli from the unit as a confidential employee.

Turning to the issue of Buenzli's alleged status as a professional employee, Sec. 111.70(1)(L)1., Stats., defines a "professional employe" as follows:

- 1.** Any employe engaged in work:
 - a.** Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
 - b.** Involving the consistent exercise of discretion and judgment in its performance;
 - c.** Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
 - d.** Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or . . .

The record establishes and the Union concedes that the work of the Judicial Law Clerk meets statutory criteria 1. a, b and c. Thus, the question becomes whether the work in question requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education . . ." as required by Sec. 111.70(1)(L)1.d., Stats.

As set forth in Finding of Fact 4, the Judicial Law Clerk spends the vast majority of her

work day towards analyzing legal issues for the Judges. The record further establishes the extraordinary independence and discretion given the Clerk by the Judges when she is performing

her legal work and the Judges' reliance on her work product. The record establishes that the Judges rely on her recommendations in making decisions in cases pending before them and, at times, do so without independently reviewing the record.

As set forth in Finding of Fact 4, the Judicial Law Clerk spends the vast majority of her work day analyzing legal issues for the Judges. The record further establishes the extraordinary independence and discretion given the Clerk by the Judges when she is performing her legal work and the Judges' reliance on her work product. The record establishes that on occasion the Judges rely on her recommendations in making decisions in cases pending before them. Based on this record, we are persuaded that the knowledge needed to perform the Clerk's work is customarily acquired by attendance at a law school. While there is no evidence that Buenzli has ever attended a law school, we note her graduation from an accredited "paralegal" school coupled with her experience have apparently provided her with a sufficient amount of the knowledge she needs to perform her duties in a satisfactory manner. Therefore, we conclude that the 1.d. criterion has been met and thus that the Judicial Law Clerk is a "professional employe" within the meaning of Sec. 111.70(1)(L)1., Stats.

Because the bargaining unit represented by the Union excludes professional employes, we have denied the Union's request that the Judicial Law Clerk be included in this bargaining unit.

Dated at Madison, Wisconsin, this 23rd day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

CONCURRENCE OF COMMISSIONER HEMPE

I concur with the result reached by the majority. Unquestionably, the Judicial Law Clerk (JLC) position, as presently constituted, is a professional one.

The majority bases its conclusion on its belief that the knowledge exercised by the JLC incumbent in discharging her responsibilities is knowledge customarily acquired by attendance at a law school.

I do not quarrel greatly with that finding. Neither do I embrace it.

For though it is true that a great -- even extraordinary -- amount of discretion has been invested in the JLC position incumbent, I am not prepared to assert with any confidence that the duties and responsibilities of the position necessarily constitute "lawyers' work."

Certainly the writing skills required of the JLC position match, to some extent, the writing skills routinely exercised by many practicing attorneys (and sitting judges). Undeniably, moreover, a rudimentary knowledge of legal principles and the judicial system is as essential to the JLC as is a more advanced or sophisticated knowledge of the same areas for many practicing attorneys (and sitting judges).

But to concede this no more connotes that the JLC is a de facto lawyer or exercising the knowledge and skills customarily acquired in law school any more than the recognition that registered nurses may be essential, well-trained components of patient care leads to the conclusion that they are de facto doctors, or exercising the knowledge and skills customarily acquired in medical school.

Thus, in my view it is unnecessary to elevate the requisite skills of the JLC position to those of an attorney customarily acquired in law school to conclude that the position is that of a professional. That the present incumbent may be functioning at a higher level than required by the position parameters seems to me to be irrelevant.

I am more secure with the alternate notion that while the knowledge necessary for the JLC to perform her position responsibilities could be included as a beginning component of a law school

curriculum, it is customarily acquired by attendance at a qualified, recognized paralegal program. 4/

This is not to suggest that every position designated as "paralegal" or filled by a paralegal graduate should qualify as "professional," as opposed to, say, "secretarial." Those determinations will continue to be made by this agency on a case-by-case basis, influenced in no small part -- as here -- not by job title, but by what the job actually entails.

Dated at Madison, Wisconsin, this 23rd day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

4/ As with any emerging profession, qualifications for paralegal certifications appear to vary greatly, depending on the particular program and school offering it. For instance, an associate degree as a paralegal can be obtained from Milwaukee Area Technical College in only four semesters; a four year bachelor's degree with a major in Paralegal is offered at Concordia University. Yet, even well-established professions have programs leading to licensure which greatly vary. For example, according to Wisconsin Department of Regulation and Licensing authorities, persons wishing to become registered nurses can complete licensure requirements by enrollment in a 2 year program at some of Wisconsin's vocational and adult education colleges, a 3 year program at some schools of nursing, or a 4 year program which leads to a bachelor's degree with a major in nursing in some major universities.