

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
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WISCONSIN COUNCIL 40,	:	Case 2
AFSCME, AFL-CIO	:	No. 40931 ME-278
	:	Decision No. 11317-B
Involving Certain Employees of	:	
	:	
PRICE COUNTY	:	
	:	

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council #40, AFSCME, AFL-CIO, N-419 Birch Lane, Hatley, Wisconsin 54440, on behalf of the Union.

Slaby, Deda & Marshall, Attorneys at Law, P. O. Box 7, Phillips, Wisconsin, by Mr. David B. Deda, on behalf of the County.

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

On September 1, 1988, Wisconsin Council 40, AFSCME, AFL-CIO, hereafter the Union, filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing collective bargaining unit of certain employees of Price County by determining whether certain positions should be included within said unit. The parties requested that the petition be held in abeyance while they attempted to resolve the matter. Such efforts were successful in resolving the status of several positions, but dispute remained about the positions of Judicial Assistant and Legal Assistant. Hearing in the matter was held in Phillips, Wisconsin, on March 23, 1989 before Examiner Stuart Levitan, a member of the Commission's staff. A stenographic transcript was prepared by April 11, 1989. Written arguments were submitted by June 5, 1989, at which time the record was closed. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, hereafter the Union, is a labor organization with offices at N419 Birch Lane, Hatley, Wisconsin.
2. Price County, hereafter the County, is a municipal employer with offices at 126 Cherry Street, Phillips, Wisconsin.
3. Pursuant to the collective bargaining agreement effective from January 1, 1987 to December 31, 1988, the Union is the exclusive bargaining representative for:

all regular full-time and regular part-time employees working an average of more than 20 hours per week during any calendar year at the Price County Courthouse as certified by the WERC and as listed by job classification in Appendix 'A'. Employees excluded from the Union's representation include elected officials, supervisors, social workers, confidential and managerial employees, and part-time employees who do not work an average of 20 hours per week during the calendar year.

4. Pat Michek is the judicial assistant to Circuit Court Judge Douglas Fox, who also supervises the Court Reporter (a state employe) and the Register

in Probate (a bargaining unit member). Michek spends about 60 percent of her time on duties related to keeping the court calendar and proceedings, about 20 percent of her time on usual secretarial duties, and the remainder on the judge's personal correspondence and other miscellaneous matters. Due to concerns about the performance of the Register in Probate, Fox has assigned Michek to certain oversight tasks, including monitoring the Register's telephone and office practices, and reviewing bills and accounts. During the past five years, Michek has made about 10-12 reports to Fox based on her on-going monitoring of the Register's performance. As Michek is the only person available to monitor certain aspects of the Register's work and given that Fox is away from the Courthouse about 20 percent of the time, and is on the bench much of the time he is in Phillips, Fox relies almost exclusively on Michek for on-going observation and evaluation of the Register's performance. Over the past five years (his tenure in office, and Michek's tenure as his assistant), Fox has issued to the Register one written reprimand and two verbal reprimands; Michek was not the source of the information on which the most recent verbal reprimand was based, but was the prime source for the information on which the previous verbal reprimand was given. Prior to the most recent verbal reprimand, Fox discussed the various disciplinary options with Michek. Fox and Michek have also discussed whether the Register's position should be full-time or part-time, whether it should feature added duties, and have jointly discussed various rule changes which Fox has instituted for the Register's office. Fox has played no role in developing County positions in collective bargaining, either for the unit as a whole or on matters affecting only the Register. Michek has not participated in the development of any bargaining proposals, in bargaining, in grievances, or in labor relations litigation. Michek maintains the personnel files for the Register and Court Reporter. Michek has no authority to effectively recommend the hiring, transfer, or promotion of employes, nor the authority to direct and assign the work force. Michek has no authority to commit the County's resources.

5. Jackie Popko is the legal assistant to the District Attorney Paul Barnett. They share an office divided by a partition. Her duties include the preparation of criminal complaints, warrants, juvenile delinquency petitions, motions, various court documents and responses to demands for delivery. Prior to August, 1984, the District Attorney's Office handled the County's Corporation Counsel duties as well, including grievances and arbitration, but not collective bargaining negotiations, which were handled by the Wausau office of Mulcahy & Wherry, S.C. In August, 1994, upon the recommendation of the then District Attorney, Mary Lietdke, the Corporation Counsel duties were contracted out to the Phillips firm of Slaby, Deda & Marshall. Since then, with the exception of one instance in November, 1984, in which a possible conflict of representation arose, the District Attorney's office has not had any involvement in labor relations matters. Due to financial considerations, the County Personnel Committee has begun discussing whether to return personnel matters to the salaried District Attorney, which development Barnett supported in his recent campaign, but no decision has been made. When she held a different position, Popko participated in various labor relations activities on behalf of the Union. In her current position, she has neither participated in collective bargaining or contract administration on behalf of the County. Prior to the contracting out of the County's personnel functions, Popko did assist the District Attorney in the disciplining of a co-worker whose position was also then excluded from the unit but which has recently been voluntarily accreted thereto.

6. Neither Michek nor Popko have sufficient access to or involvement in confidential matters relating to labor relations so as to render them confidential employes.

7. Michek does not possess and exercise supervisory authority in sufficient combination and degree to be deemed a supervisory employe, nor does

she possess and exercise managerial authority in sufficient combination and degree to be deemed a managerial employe.

CONCLUSION OF LAW

1. The position of Judicial Assistant is not occupied by a supervisory employe within the meaning of Sec. 111.70(1)(o), Stats., nor by a confidential or managerial employe. Therefore, the position is occupied by a "municipal employe" within the meaning of Sec. 111.70(1)(i), Wis., Stats.

2. The position of Legal Assistant is not occupied by a confidential employe and therefore the position is occupied by a "municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

ORDER CLARIFYING BARGAINING UNIT 1/

The positions of Judicial Assistant and Legal Assistant shall be included in the collective bargaining unit described in Findings of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker
William K. Strycker, 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.

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1/ Continued

(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.

PRICE COUNTY

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

POSITIONS OF THE PARTIES:

The Union:

In support of its position, the Union avers and asserts as follows:

The incumbent judicial secretary, Pat Michek, spends about 60% of her work time on such tasks as maintaining the court calendar and communicating with parties before the court; about 20% on routine secretarial duties; and about 20% dealing with the judge's personal and private correspondence. Any duties related to written and verbal reprimands, or other personnel matters, took up only a small fraction of her time. Her supervisor, Judge Fox, agreed with this assessment, estimating that the secretary spends no more than 40 hours per year on confidential duties related to labor relations. Clearly, this constitutes a de minimus involvement or an occasional assignment, thus failing to satisfy the tests for confidential employe as set forth in statute and interpreted by the Commission. Cases cited include Shawano County, Dec. No. 12310 (WERC 12/73); Columbia County, Dec. No. 12218 (WERC, 10/73); Rusk County, Dec. No. 11768 (WERC, 6/73); Calumet County, Dec. No. 11158 (WERC, 7/72), and Green County, Dec. No. 16270 (WERC, 3/78).

The incumbent legal assistant to the District Attorney performs no confidential labor relations work at all, inasmuch as all labor relations/personnel matters are handled by contract with either Mulcahy & Wherry or Slaby, Deda & Marshall. That certain County officials contend that labor relations work may be returned to the D.A.'s office does not provide a basis for exclusion now. The incumbent works about 75% of her time at such tasks as preparing criminal complaints, warrants, motions, and court actions, and the remainder on such matters as discovery motions, compiling criminal records and general correspondence. She performs no duties which would justify exclusion under MERA.

The County:

In support of its position, the County avers and asserts as follows:

The Price County District Attorney, the only attorney on the County payroll, has at times handled personnel matters. Because the legal assistant would be the only person available to provide typing and other support services, this position should be considered confidential.

The judicial assistant is the only non-unit person available to supervise the unit-member Register in Probate, making this position supervisory. Because the judicial assistant also types and files confidential personnel matters for the Circuit Judge, this position is also confidential.

The incumbent judicial assistant, Pat Michek, testified that the Judge, who has authority over the Court Reporter, the Register in Probate and the judicial assistant, is frequently scheduled outside the county, leaving the assistant behind. There have been at least ten occasions when the Judge has discussed the Register's job performance with the assistant, who also maintains files of performance reviews. The assistant monitors the Register's job performance, which reports are related to the Judge and relied on by him in doing his evaluations. Such monitoring includes review of phone calls, expense logs, telephone bills, and vouchers. No one else is available for such duty, which the assistant conducts on a regular, daily basis. The assistant was the

prime source of information leading to a recent verbal reprimand; the assistant considers that she helped in a significant way the decision to issue such discipline.

The Circuit Court Judge, Hon. Douglas T. Fox, testified that he almost relies on the assistant to monitor the Register's performance and to keep him posted on how she is performing and what success the changed work rules have met with as far as correcting disciplinary problems. The new work rules were the product of joint discussions with the assistant, on whose advice the judge relied. Each instance of reprimand has involved the assistant either providing the initial information or investigating and providing added information. No other employe is available to perform these duties. They have also discussed whether the position should be full-time, and whether the Register should be assigned other duties. The assistant's observations provide the basis for the evaluations which the Judge issues for the Register, which evaluations could impact on her wages and continuance of employment.

The District Attorney, Paul L. Barnett, testified that if he were handling confidential personnel matters, arrangements could certainly be made to have the legal assistant type and file such material. The District Attorney and the assistant share an office with a dividing partition.

The District Attorney who served from 1978 to 1987, Mary M. Liedtke, testified that she handled personnel matters on a fairly regular basis during her tenure, making use of the legal assistant in the discharge of her duties. In addition to normal secretarial duties, on at least one occasion, the legal assistant reviewed phone bills in preparing for the termination of a unit employe.

The County Board's Personnel Committee Chairperson, Wilbert Blomberg, testified that it is up to the Personnel Committee to determine whether to refer a particular matter to the District Attorney or to outside counsel. There is always the possibility of the county referring personnel matters to the District Attorney directly; there has been a lot of discussion about that as a way to cut costs. During the previous election campaign, the D.A. promised to find the time to do such work.

The legal assistant, Jackie Popko, testified that she had on one occasion made a recommendation for discipline of a non-bargaining unit member, whose position is now within the unit. When personnel matters were within the D.A.'s office, her involvement therewith was occasional, and included maintaining a set of labor relations files separate and apart from the normal file cabinet.

The case law is quite clear that the secretary to a management employe will be found confidential even where the amount of confidential work is not significant unless the confidential work can be assigned to another confidential employe without undue disruption of the employer's organization. Cases cited include Howard-Suamico School District, Dec. No. 22731-B (WERC, 11/88); Lacrosse School District, Dec. No. 15710-A (WERC, 4/79), and City of Greenfield, Dec. No. 25646 (WERC, 12/86).

The case law is also clear that, in determining whether a position is supervisory, not all facts set forth in statute need be present in any given case. Cases cited include Somerset School District, Dec. No. 24968-A (WERC, 3/88) and School District of Glenwood City, Dec. No. 20949-A (WERC, 6/88).

The Union declined to file a reply brief. In its reply brief, the County further posits as follows:

While the WERC usually likes to slot employes into one of the single-focus categories (i.e., confidential, supervisory or managerial), there have been instances where the Commission has combined all these categories,

rather than insist on the artificial separation. City of Mauston, Dec. No. 21424-B (WERC, 10/86). The case of the judicial assistant should be considered in such context, with all the position's duties considered both separately and in combination.

The Commission has stated that a managerial employe is one whose relationship to management imbues them with interest significantly at variance with those of other employes; such status does not require possession of either confidential information or supervisory authority. Cases cited include City of Oak Creek, Dec. No. 17633 (WERC, 3/80) and Jackson County, Dec. No. 17828-B (WERC, 10/86).

Here, supervision and discipline of the Register in Probate (a unit-member) is based primarily (indeed, practically exclusively) on the observations of the judicial assistant, who is also actively involved in the formulation of appropriate job duties and implementation of management policy. This relationship clearly imbues the assistant with interest significantly at variance with the unionized Register in Probate. Moreover, the Union made no showing that there is any other non-Union employe available to do the supervisory, confidential or managerial duties of the assistant.

As to the legal assistant, there is a very strong potential that personnel matters may be returned to the District Attorney, the only salaried County attorney. The case of Sanitary District No. 1, Town of Grand Chute and Sanitary District No. 2, Grand Chute, Dec. No. 22934 (WERC, 9785) stands for the proposition that the WERC will consider the future potential for an employe assuming confidential duties, especially when the subject position would be the only one available to perform such duties.

DISCUSSION

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. 2/

While a de minimus exposure to confidential materials is insufficient grounds for exclusion of an employe from a bargaining unit 3/, we have also sought to protect an employer's right to conduct its labor relations through employes whose interests are aligned with those of management. 4/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employe may be found to be confidential where the person in question is the only one available to perform legitimate confidential work 5/; similarly, where a management employe has significant labor relations responsibility, the clerical employe assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, unless the confidential work can be assigned to another employe without undue disruption of the employer's

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- 2/ Dane County, Dec. No. 22976-C (WERC, 9/88); Wisconsin Heights School District, Dec. No. 17182 (WERC, 8/79).
- 3/ Boulder Junction Joint School District, Dec. No. 24992 (WERC, 11/87)
- 4/ Cooperative Educational Service Agency No. 9, Dec. No. 23863-A (WERC, 12/96)
- 5/ Town of Grand Chute, Dec. No. 22934 (WERC, 9/85)

organization. 6/

Applying these principles to the facts at hand, we have no hesitancy about finding the legal assistant in the District Attorney's office to be a municipal employe. Even when viewed in the light most favorable to the County, the evidence simply fails to establish that this position currently has any confidential duties at all. While it may be true that this position did formerly have some confidential aspects, such is no longer the case. And, while we accept as sincere the County's testimony suggesting that such duties may in the future be restored, we base our decisions on the facts as they are, not on campaign promises or future possibilities. The contrary conclusion which the County draws from the Grand Chute case is not on point, we believe, because that case dealt with the apparent employer need to have at least one confidential employe to handle labor relations matters where the employer handles labor relations "in-house". Finally, we reject the County's contention that we are improperly restraining its discretion to return personnel matters to its salaried District Attorney; in the event such action is taken, the County is of course free to seek the appropriate clarification of bargaining unit it deems necessary.

Regarding the judicial assistant, the County has argued that separately or in accumulation there are sufficient confidential, supervisory and managerial characteristics to justify exclusion. We disagree.

At the outset, we consider and reject the County's contention that Michek is a managerial employe, an argument it raises for the first time in its reply brief. We have previously explained that managerial employes are those persons whose relationship to management "imbues them with interests significantly at variance with those of other employes." Such a divergence of interests has been found where the subject employe participates in the "forumulation, determination and implementation" of management policy, provided that such involvement "must be at a relatively high level of responsibility and to a significant degree." 7/ The record does not establish that Michek plays any significant policy role for the County. A position may also be deemed managerial if it has the effective authority to commit the employer's resources. 8/ The record fails to establish that Michek's position has any such authority.

Regarding confidential and/or supervisory status, the County argues that Michek's role monitoring certain aspects of the Register's performance and her subsequent involvement in disciplinary decisions are sufficient to warrant her continued exclusion from the unit.

When evaluating a claim of supervisory status, we consider the following factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised, and the

6/ Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88)

7/ Jackson County, Dec. No. 17828-B (WERC, 10/86)

8/ City of Sparta (Police Department), Dec. No. 18799-A (WERC, 12/86)

number of other persons exercising greater, similar or lesser authority over the same employes;

4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employes;
5. Whether the supervisor is supervising an activity or is primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes; and
7. The amount of independent judgement exercised in the supervision of employes. 9/

The County rests its case here primarily on what it contends is Michek's authority to effectively recommend discipline of employes; the direct testimony of Judge Fox, however, substantially belies that claim. Moreover, the County stipulated at hearing that Michek has neither the authority to effectively recommend the hiring, promotion or transfer of employes, nor the authority to direct and assign the work force. To the extent that Michek does any supervision, the record indicates that this does not constitute a substantial portion of her work. The record is inconclusive on whether Michek's level of pay is premised on her skills or her purported supervision. While all factors need not be present to establish supervisory status, having two supervisory positions for one municipal employe would require extraordinary circumstances. The foregoing facts are clearly not sufficient to warrant a finding of supervisory status under the foregoing criteria.

We likewise fail to find support for confidential status. The purpose of the confidential exclusion is to protect the employer's right to conduct its labor relations through employes whose interests are aligned with those of management, rather than risk having confidential information handled by persons with conflicting loyalties who may be subjected to pressure from fellow bargaining unit members. Neither Fox nor Michek have any involvement in collective bargaining. The County's basic argument is that Judge Fox's need to monitor the Register in Probate justifies exclusion of his assistant from the unit.

We have held that "where the duties of an employe are closely related to an activity which could lead to disciplinary action, such duties are confidential", and may lead to exclusion of the employe from the unit. 10/ However, where the investigative or monitoring role does not constitute a major portion of the employes duties and primarily involves fact-finding as opposed to decision-making, a finding of confidential status is not warranted. 11/ Michek is the only individual available to monitor the Register and has been involved by the Judge in decision-making in at least one of the three disciplinary actions taken against the Register. On the other hand, the monitoring function is a very small portion of Michek's overall work and essentially is a fact-finding as opposed to decision-making role. On balance, we are not persuaded that the assistance which Michek provides the Judge when he is functioning as the Register's supervisor is sufficient to render her a confidential employe.

9/ City of Milwaukee, Dec. No. 6960-J (WERC, 5/89)

10/ Milwaukee County, Dec. No. 22519 (WERC, 4/85)

11/ Compare Milwaukee County with the City of Manitowoc, Dec. No. 20696 (WERC, 5/83).

Having concluded that Michek essentially has no managerial responsibilities and that her role vis-a-vis the Register is not sufficient to warrant a finding that she is a supervisory or confidential employe, we have included her position in the unit.

Dated at Madison, Wisconsin this 25th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker
William K. Strycker, Commissioner