STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of	
WISCONSIN STATE ATTORNEYS ASSOCIATION	Case 33
and	No. 16403 SE-65
STATE OF WISCONSIN	Decision No. 11640-C
Involving the Unit of Attorneys in the Employ of	
STATE OF WISCONSIN	

Appearances:

Shneidman, Myers, Dowling, Blumenfield & Albert, Attorneys at Law, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, by Mr. Timothy E. Hawks, appearing on behalf of the Union.

Mr. David R. Riehle, Employment Relations Specialist, Division of Collective Bargaining, 137 E. Wilson Street, Madison, Wisconsin 53707-7855, appearing on behalf of the State.

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

Wisconsin State Attorneys Association, having on June 13, 1984, petitioned the Wisconsin Employment Relations Commission to clarify the State-wide Legal bargaining unit to include the positions of two (2) Attorney 14's in the Office of the Commissioner of Securities, an Attorney 15 in the Office of the State Investment Board, an Attorney 13 in the Office of the Board of Vocational, Technical and Adult Education; an Attorney 11 in the Office of the Educational Approval Board, and four (4) Attorney 13's and an Attorney 14 in the Department of Transportation; and hearing in the matter having been scheduled for September 5 and 6, 1984, but having been postponed by the mutual agreement of the parties; and on December 18, 1984, the Association having amended its original petition by withdrawing its request to include the positions of two (2) Attorney 14's in the Office of the Commissioner of Securities, an Attorney 15 in the office of the State Investment Board and an Attorney 13 in the office of the Board of Vocational, Technical and Adult Education; and on December 19, 1984, the State having petitioned the Commission to clarify the same bargaining unit by excluding the position of an Attorney 13 in the Office of the Commissioner of Insurance; and both petitions having been consolidated for purposes of hearing; and hearing in the matter having been held on February 13 and 14, March 13 and 29, 1985, in Madison, Wisconsin, before Raleigh Jones, a member of the Commission's staff; and a transcript of the proceeding having been distributed on April 17, 1985; and the parties having submitted briefs by June 5, 1985, and the State having filed a reply brief on June 19, 1985, and the Union having filed a waiver of reply on July 3, 1985; and the Commission being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Wisconsin State Attorneys Association, hereinafter referred to as the Union, is a labor organization maintaining its principal offices at 2021 Atwood Avenue, Madison, Wisconsin; and that in State of Wisconsin (Professional - Legal), Dec. No. 11640 (WERC, 3/73) the Commission certified the Union as the exclusive bargaining representative of a bargaining unit described as all Attorneys 11 through 15 and Law Clerk employed in the classified service of the State of Wisconsin, excluding limited term employes, confidential employes, supervisory employes, managerial employes and all other employes.

2. That the State of Wisconsin, hereinafter referred to as the State, employs certain attorneys in the performance of its various governmental functions; and that the State is represented in labor relations matters by its Department of Employment Relations (DER), which has its offices located at 137 East Wilson Street, Madison, Wisconsin.

3. That the Union, contrary to the State, asserts that the following positions, currently excluded, should be included in the unit:

	Position		Incumbent
1.	Attorney 14	(Department of Transportation)	Philip Peterson
2.	Attorney 13	(Department of Transportation)	Jerry Hancock
3.	Attorney 13	(Department of Transportation)	Joe Maassen
4.	Attorney 13	(Department of Transportation)	Barbara Bird
5.	Attorney 13	(Department of Transportation)	Vacant
6.	Attorney 11	(Educational Approval Board)	Claudia Berry Miran

4. That the State, contrary to the Union, asserts that the position of Attorney 13, Office of the Commissioner of Insurance (now filled by Fred Nepple) and currently included, should be excluded from the unit.

5. That the Wisconsin Department of Transportation (DOT) is an agency headed by a Secretary and consists of 3800 employe positions; that the DOT has seven operating divisions each headed by an administrator; that four of these divisions have three separate bureaus headed by directors while three of the divisions have four separate bureaus headed by directors; that one of these bureaus is the Bureau of Personnel Management which administers labor contract grievance procedures covering two-thirds of DOT employes included in bargaining units; that in addition to the seven divisions, there are three offices reporting directly to the Secretary; that the office of General Counsel is one of the three offices; that the Secretary is ultimately responsible for the policies of DOT; that the Secretary delegates authority to, and can remove it from, division administrators, and that the Secretary can accept or reject their decisions; that these division administrators formulate and implement management policy, but not independent from the Secretary; that deputy division administrators and bureau directors also implement management policy, but that attorneys in the office of the General Counsel do not; that there are at least 40 DOT employes responsible for implementing departmental policy; that the Secretary, division administrators, bureau directors, and other high level management officials with supervisory authority have created management teams which make suggestions and recommendations to the Secretary concerning policy issues which the Secretary can either accept or reject; that these management teams generally consist of a half dozen members, and in theory, each member has equal status; that these management teams utilize group participation and attempt to develop a group consensus; that attorneys from the office of the General Counsel can be, and have been, assigned to management teams by the Secretary, General Counsel James Thiel, or Deputy General Counsel Phillip Peterson; that the attorneys participate in these management teams as legal counsel and also to propose policy and legislative initiatives; that the attorneys offer their advice to the management teams which can accept or reject that advice; that the attorneys did not initiate the creation of any of these teams; that attorneys in the office of the General Counsel include General Counsel Thiel, Deputy General Counsel Peterson (who is classified as an Attorney 14), and three employes classified as Attorney 13 (Jerry Hancock, Joe Maassen and Barbara Bird); that as of the time of the hearing there was an additional unfilled Attorney 13 position which was to be filled shortly thereafter; that there are no other

attorneys employed in the office of the General Counsel; that the Attorney 13's report to Peterson; that other employes of the office include an Administrative Officer 2 who holds the position of Chief-Regulatory Intervention Section (currently filled by James Smith), a vacant Administrative Assistant 3 position, a Legal Assistant 2 position (currently filled by Connie Keaton), and a vacant Legal Assistant 1 position; that these positions all report directly to the General Counsel; that Thiel, as General Counsel, is responsible for the direction of the office, all legal matters and litigation which the Department becomes involved in, coordination of the legislative programs of DOT, the fiscal estimate program, the administrative rule making process and legal representation of the Department; and that the Attorney 13's under Deputy General Counsel Peterson have no line authority and cannot direct, require or compel any administrator, bureau director or any other employe to perform a particular act, but they may advise, make recommendations and suggestions.

6. That the State contends, contrary to the Union, that Philip Peterson is a supervisory, managerial and/or confidential employe; that Peterson is Thiel's Deputy in the office of the General Counsel and acts in Thiel's place on all matters affecting the office during Thiel's frequent absences; that he supervises the Office of the General Counsel and its legal activities in Thiel's absence or as delegated; that Peterson was promoted to this position in June, 1982, after his predecessor left and created a vacancy in the position; that since that time, he has participated along with Thiel in interviewing candidates to fill the only two attorney vacancies which have occurred; that the Attorney 13's did not participate in the interviews but later offered their comments regarding the qualities of the candidates interviewed; that after the interviews, Thiel and Peterson agreed on whom to hire; that Peterson then called and informed the applicant chosen of the decision, and, along with Thiel, signed the hiring letter; that Peterson could not answer whether he had the authority to hire on his own; that he does not have the authority to discharge and has never been involved in the dismissal of an employe; that he has never issued a written reprimand to an employe, but believes he has the authority to issue such a written reprimand; that no formal discipline has been administered in the Office of General Counsel in recent years because no discipline was needed; that he has given oral admonishments to tardy employes and directives to be more timely with regard to work output; that he does not have the authority alone to promote; that Peterson trained the only new employe who was hired after Peterson assumed his present position, (i.e., Jerry Hancock) and prepared his probationary performance and retention evaluation form; that Peterson is designated as the first step in the grievance process and acted in that capacity several years ago in the only grievance which has been filed; that Peterson is the person primarily responsible for coordinating the legal work of the four Attorney 13's in the office; that he assigns 350 to 500 formal requests for legal services each year, although Thiel and the Secretary also assign some work to the Attorney 13's; that these requests for services range from general legal services to requests for participation in policy formulation; that prior to making an assignment, Peterson has considerable information on the issue so that he can decide if he can quickly handle the matter himself; that he then either assigns the case to himself, determines which attorney can best handle the case or whether the request for services should be denied; that he also decides who will answer general correspondence; that Peterson reviews the written materials of the Attorney 13's; that since the time Peterson assumed his current position, there have been two formal performance evaluations of the four attorneys: the first in 1982 and the second in 1984; that Thiel primarily prepared these evaluations; that on the first evaluation, Peterson prepared a portion of the evaluation and participated with Thiel in discussing the evaluation with each employe; that on the second evaluation he met with each employe to discuss the evaluations and signed the evaluations as their immediate supervisor; that Thiel prepared the evaluations for the office, clerical and administrative staff which Peterson signed; that Peterson also signed the revised position descriptions of the Attorney 13's as their first line supervisor; that Thiel is responsible for signing office leave slips but Peterson does it in his absence; that where merit pay raises have been available for the Attorney 13's, Peterson has been consulted by Thiel on the distribution of such raises and agreed to the decisions made by Thiel; that Peterson receives the supervisory pay add-on under the attorney pay plan and has had supervisory training; that Peterson has participated in management teams which have determined DOT policy on outdoor advertising signs, defined when a bank becomes a motor vehicle dealer, developed a cooperative agreement between DOT and the Department of Natural Resources (DNR), drafted Chapter 504 of the Administrative Code dealing with debarment of DOT contractors,

administered contracts with short line railroads, developed rule drafts relating to the rail program, recovered money from a township over a bridge issue, and resolved policy issues on harbor rules and on the placement of newspaper dispensers on a highway right of way; that Peterson has never represented the DOT in a case against it by another DOT attorney, nor appeared in state or federal court on a labor relations issue for DOT, nor appeared before the Workers Compensation Division or the Equal Rights Division for the DOT; that he handled two or three unemployment compensation cases for DOT in 1984; that he has not appeared in any arbitration cases for DOT although he once interviewed witnesses for a discharge arbitration involving a State Patrol employe; that he appears before the Personnel Commission an average of five times a year primarily on reclassification or reallocation matters; and that Peterson's position description was redrafted in December, 1984; that said position description indicates that he spends 10 percent of his time on supervisory matters, 20 to 30 percent of his time on policy issues and 20 to 25 percent of this time on matters affecting employment relations; and that said position description also indicates that 70 percent of his work is non-supervisory work that is not different from that of his subordinates, 20 percent of his work is on non-supervisory work that is different from that of his subordinates, and 10 percent of his work is supervisory in nature.

7. That the State contends, contrary to the Union, that Jerry Hancock is a managerial and/or confidential employe; that Hancock is an Attorney 13 employed in the office of General Counsel in DOT; that Hancock serves as a member of several management teams which formulate and determine departmental policy, but he does not implement these policies; that Hancock serves as legal counsel to these management teams/committees and also expresses his views on policy matters; that Hancock serves on the following management teams/committees: minority business, operating while intoxicated (OWI), land use and property management, inspection/maintenance, and State Patrol law enforcement; that the minority business committee is involved in the certification review process of minority businesses who have contracted with the Department; that as a member of this committee, Hancock assists in investigating minority businesses acting as fronts, reviews contractor applications for certification, takes action to decertify contractors, and is developing a new certification process; that the OWI committee addresses the range of issues presented by drunk driving; that as a member of this committee, Hancock was the sole author of the legislative report for administrative (license) revocation for drunk drivers; that this report was developed at the Secretary's direction without an opinion from the Secretary as to the conclusions to be reached, was approved by the Secretary, and was submitted to the legislature for action; that the land use and property management committee coordinates DOT's approach to property and land use, including the acquisition, management and disposal of rail property abandoned by rail carriers; that as part of the inspection/maintenance committee, Hancock evaluated three bidders for an Inspection Maintenance Program, served as a member of a four-person negotiating team that negotiated a $45 million contract with Hamilton Test Systems, and maintains weekly contacts in administering this contract; that a November, 1982 proposed evaluation report for the Motor Vehicle Inspection Maintenance Program identifies Hancock and another individual as assistants to the seven-member committee; that the State Patrol law enforcement committee addresses drunk driving, evidence policy and State Patrol personnel actions; that as a member of this committee, Hancock advises the administrator of the Division of State Patrol on personnel matters; that Hancock once advised the State Patrol on the compensatory time implications of the OWI enforcement program the Department was undertaking; that Hancock serves in a group which reviews disciplinary matters for members of the State Patrol before such discipline is imposed; that Hancock organizes State Patrol discipline arbitration cases before they are presented to the Department of Employment Relations (DER), and that in two cases, he represented the DOT in discharge arbitration proceedings involving the Wisconsin State Employees Union (WSEU); that in the first arbitration, he assisted DER Attorney Sanford Cogas in the presentation of DOT's case; that in the second arbitration, he presented DOT's case due to Cogas' death; that Hancock averages one hearing a month in representing DOT before the State Personnel Commission, the Workers Compensation Division or the Equal Rights Division; that in these cases, the complainants are sometimes represented by union staff representatives and on other occasions by private attorneys; that he has never represented the DOT in any administrative matter or court case wherein a union was a named party; that Hancock does not have access to the state's strategy in matters involving the Wisconsin State Attorneys Association; that Hancock has never been present in

negotiating sessions between the State and unions representing state employes, nor has he ever been present at the State's negotiating caucuses or preparatory meetings; and that Hancock revised his position description in September, 1984, at the direction of Thiel and DOT Personnel Director Victor Thompson, and it indicates that he spends 50 percent of his time on policy related activities and 35 percent on personnel and labor management matters.

8. That the State contends, contrary to the Union, that Joe Maassen is a managerial and/or confidential employe; that Maassen is an Attorney 13 employed in the office of the General Counsel in DOT; that Maassen serves as a member of several management teams which formulate and determine departmental policy, but he does not implement these policies; that Maassen serves as legal counsel to these management teams/committees and also expresses his views on policy matters; that Maassen serves on the following management teams/committees: airport runways (which considers how to preserve runways without the need for resurfacing), aircraft registration, land use affecting airports, paperless title (which considers the feasibility of electronically recording all motor vehicle title information), and odometer tampering task force; that Maassen participated on a task force which developed land use zoning guidelines for airports; that he participated in the committee which drafted the paperless title procedure; that Maassen had lead involvement in developing DOT's odometer fraud practices and that these practices were detailed in a memo he wrote; that Maassen participated in the development of a bill relating to railroads and abandoned rail property; that Maassen participated in a group which evaluated the Motor Vehicle Unit's investigative arm, and recommended program and organizational changes; that he is DOT's contact person on child safety restraint and handicapped parking and has made suggestions as to how the State Patrol should implement the child restraint law; that Maassen serves as a member of a contract negotiating team that makes acquisitions for DOT, and that one of the contracts he helped negotiate had a value of $4 million; that Maassen coordinates DOT legislative activities and participated in developing DOT initiatives for the latest Governor's budget bill; that Maassen appears before the State Personnel Commission approximately four times a year, mostly for reclassification matters; that Maassen had not appeared before the Equal Rights Division or Unemployment Compensation Division, although he had a case pending before the Equal Rights Division at the time of the hearing; that he has never appeared before a grievance arbitrator on behalf of DOT; that he had two or three cases pending before the Equal Employment Opportunities Commission (EEOC) as of the time of the hearing; that he has never represented the DOT in any action in any forum involving a fellow attorney from the office of General Counsel; that he has no access to or knowledge of the State's position as regards collective bargaining; and that Maassen revised his position description in September, 1984, and it indicates he spends 35 percent of his time on management teams (although an undated and unsigned addendum to the position description indicates that the figure is 50 percent) and 15 percent on personnel and labor relations matters.

9. That the State contends, contrary to the Union, that Barbara Bird is a managerial and/or confidential employe; that Bird is an Attorney 13 employed in the office of the General Counsel in DOT; that Bird serves as a member of several management teams which formulate and determine departmental policy, but she does not implement these policies; that Bird serves as legal counsel to these management teams/committees and also expresses her views on policy matters; that Bird serves on the following management teams/committees: land use and property management, land use affecting airports, outdoor advertising sign control and State Partol off-duty conduct; that Bird prepared a draft of proposed legislation to increase the involvement of public airport owners in zoning issues which affect land users in the vicinity of airports, and that this draft was approved by the Secretary; that Bird participated in the development of changes regarding outdoor advertising signs which were supported by the Secretary and later passed by the legislature; that Bird participated in the development of guidelines for use by supervisors in determining disciplinary action with regard to off-duty conduct of State Patrol Troopers, as well as a policy for light duty due to injuries; that for several years Bird has been involved in a major compensatory time case which is currently pending before the Wisconsin Supreme Court; that Bird has appeared on behalf of the DOT in actions before the State Personnel Commission, the Equal Rights Division, the Unemployment Compensation Division and the EEOC; that generally these cases involve unrepresented employes and do not involve a union as an opposing party; that she has never appeared before a grievance arbitrator on behalf of DOT; that she has no access to, knowledge of or participation in matters relating to labor relations or collective bargaining strategy as it relates to the

State and the Wisconsin State Attorneys Association; that Bird used to do more personnel work than she does now; that starting about two years ago, she began to reduce the amount of personnel work she was doing and this work was assumed by other Attorney 13's in the office; and that Bird's position description was redrafted in September, 1984, and it indicates she spends 12 percent of her time on management teams (although an unsigned and undated addendum to the position description indicates that the figure is 15-20 percent) and 27 percent on personnel and labor management matters.

10. That the State contends, contrary to the Union, that the occupant of a vacant Attorney 13 position in the office of the General Counsel in DOT will be managerial and/or confidential; that this vacancy was created by the resignation of Mary Rinkel in September, 1984; that it is anticipated that the employe who fills this vacant position will also serve as a member of several management teams which will formulate and determine department policy but he/she will not implement these policies; that this employe will serve as legal counsel to these management teams/committee and also will express his/her views on policy matters; that it is anticipated that the employe will serve on the following management teams/committees: Motor Carrier Safety Act of 1984, truck weight law bill and the international registration plan (which committee currently does not exist); that the prior incumbent of the vacant position drafted legislation at the request of the Secretary of DOT, but she did not implement it; that the prior incumbent of this position handled matters involving DOT before the State Personnel Commission, the Equal Rights Division and the Unemployment Compensation Division; that there is nothing in the record bearing on confidential labor relations status for this position; that Thiel revised the position description for this position in November, 1984, and it indicates that the incumbent will spend 40 percent of his/her time on management teams and 15 percent on personnel and labor management matters.

11. That the State contends, contrary to the Union, that Claudia Berry Miran is a managerial employe; that Miran, an Attorney 11, is legal counsel to the seven-member Educational Approval Board (EAB) and also serves as deputy executive director in the absence of the executive director; that the mission of the EAB is to ensure that quality programs exist in proprietary "for-profit" schools; that the EAB has six employes, and Miran is the sole attorney in the agency; that as legal counsel, she investigates school compliance with applicable statutes, complaints regarding supervised schools, and claims against private school surety bonds for licensing; that she also reviews applications for approval of school and counsel, and participates in litigation, rulemaking and administrative hearings; that when the EAB has a hearing, the hearing is conducted by the Board and Miran writes the decision for the Board; that Miran makes recommendations to the Board on policy decisions arising out of investigation of schools for compliance with statutes such as recommending modifications to rules and possible disciplinary action against schools; that she handles applications for approval of schools from beginning to end; that Miran set up the procedures for handling claims against bonds and has handled all such claims; that she has prepared rules for banning discriminatory practices on the basis of handicap which were adopted by the Board with minor modifications; that Miran proposed rule changes with regard to teaching locations which were later adopted with some changes; that the EAB staff (including Miran) makes recommendations to the seven-member EAB Board which can accept or reject them; that Miran testified her recommendations are accepted by the Board 90 to 95 percent of the time; that the Board formulates and determines policy after receiving recommendations from staff, and the staff (including Miran) implements the policy; and that Miran's position description indicates that she spends 25 percent of her time participating in litigation, rulemaking, administrative hearings and agency management.

12. That the State contends, contrary to the Union, that the Attorney 13 in the Office of the Commissioner of Insurance (OCI) has undergone substantial changes in duties and should be designated a managerial employe; that Frederick Nepple, the incumbent, is legal counsel and hearing examiner to OCI which regulates the insurance industry in the State of Wisconsin; that Nepple, who began employment with OCI in September 1984, functions as chief legal counsel for the Commissioner and staff on a wide variety of legal matters; that he provides assistance and guidance on policy/administrative matters, conducts administrative hearings on matters for OCI, and prepares proposed findings of fact, conclusions of law and opinion; that there are two attorneys in OCI: Nepple and an Attorney 12; that Nepple reports to the Commissioner while the Attorney 12 reports to the Administrator of the Division of Regulation and Enforcement; that both

positions are currently included in the attorneys' bargaining unit; that Nepple has no line authority in OCI and shares a paralegal who works in the office with the Attorney 12; that Nepple sits on four committees/working groups which address various regulatory and legislative issues: 1) the executive committee 2) problem companies 3) regulatory issues and 4) legislative policy; that all four of these committees meet weekly and attempt to reach decisions on a consensus basis; that Nepple offers his recommendations to these committees and the latter may accept or reject that advice; that the executive committee (which is composed of the Commissioner, Deputy Commissioner, Administrators of the Divisions of Administrative Services and Regulation and Enforcement, and Nepple) jointly formulates the position the office will take on various issues and implements those positions; that the Commissioner can overrule the decision of the executive committee, but only rarely has the Commissioner taken a position different from the executive committee; that the executive committee assigns work to staff in the Divisions in addition to assignments made by Division Administrators; that the Commissioner created the executive committee approximately two years ago, but Nepple's predecessor did not serve on the executive committee; that Nepple has been delegated the responsibility of developing policy in the area of integrated financial services (insurance/banking), and is chair of an OCI group assigned to implement policy in this area; that in most cases, liquidation of insurance companies is handled by outside legal counsel on contract to OCI, although Nepple was delegated responsibility for liquidating a New York insurer and chairs an internal work group implementing that liquidation; that the Commissioner assigned Nepple the task of approving checks for outside legal counsel and consultants; that Nepple has served as an alternate for the Commissioner at national and statewide association meetings; that Nepple's position description which was redrafted in January 1985, indicates that he spends 30 percent of his time participating in management of OCI; that Nepple testified he spends 40 percent of his time on management related matters; and that the Commissioner estimated that 50 percent of Nepple's time is spent on policy matters with the figure expected to increase to 60 percent when a backlog of hearing cases is caught up.

13. That none of the positions in issue are engaged predominately in managerial functions.

14. That Attorney 14 Peterson and Attorney 13's Maassen, Bird and the vacant Attorney 13 position do not have sufficient access to, knowledge of, and participation in confidential matters relating to labor relations to be considered confidential employes.

15. That Attorney 13 Hancock has sufficient access to, knowledge of, and participation in confidential matters related to labor relations to be a confidential employe.

16. That Attorney 14 Peterson's principal work is not different from that of his subordinates.

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

CONCLUSIONS OF LAW

1. That the occupants of the positions of Attorney 13 and 14 in the Department of Transportation (DOT), Attorney 11 in the Educational Approval Board (EAB) and Attorney 13 in the Office of the Commissioner of Insurance (OCI) are not managerial employes within the meaning of Sec. 111.81(13), Stats.

2. That the occupants of three Attorney 13 positions (Maassen, Bird and vacant) and the Attorney 14 position (Peterson) in DOT are not confidential employes, but rather are employes within the meaning of Sec. 111.81(7), Stats.

3. That the occupant of one Attorney 13 position in DOT, currently held by Jerry Hancock, is a confidential employe, and therefore is not an employe within the meaning of Sec. 111.81(7), Stats.

4. That because Attorney Peterson's principal work is not different than that of his subordinates, his position in DOT is not that of a supervisor within the meaning of Sec. 111.81(19), Stats., but rather is that of an employe within the meaning of Sec. 111.81(7), Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

That the positions of three Attorney 13's in DOT, the Attorney 11 in EAB and Attorney 13 in OCI, presently occupied by Maassen, Bird, vacancy, Miran and Nepple respectively, and the Attorney 14 position occupied by Peterson, are included in the State-wide Legal bargaining unit described in Finding of Fact 1 and that the position of an Attorney 13 in DOT, presently occupied by Hancock is excluded from the State-wide Legal bargaining unit described in Finding of Fact 1.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Danae Davis Gordon, Commissioner

I dissent as to Peterson

_____
Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order

(Footnote 1 continued on Page 9)

(Footnote 1 continued from Page 8)

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. 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. 227.20 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.

DEPARTMENT OF ADMINISTRATION (PROFESSIONAL-LEGAL)

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

BACKGROUND

The Union's original petition alleged that the following 10 attorney positions currently excluded from the bargaining unit should be included in the unit:

- two Attorney 14's in the Office of the Commissioner of Securities
- one Attorney 15 in the office of the State Investment Board
- one Attorney 13 in the office of the Board of Vocational, Technical & Adult Education
- one Attorney 11 in the office of the Educational Approval Board
- four Attorney 13's and one Attorney 14 in the Department of Transportation

Before the hearing, the Union withdrew its request to include:

- two Attorney 14's in the office of the Commissioner of Securities
- one Attorney 15 in the office of the State Investment Board
- one Attorney 13 in the office of the Board of Vocational, Technical & Adult Education

The State later petitioned to exclude the position of one Attorney 13 in the Office of the Commissioner of Insurance that is currently included in the bargaining unit. Therefore, the positions in issue herein are:

- one Attorney 13 in the Office of the Commissioner of Insurance
- one Attorney 11 in the office of the Educational Approval Board
- four Attorney 13's and one Attorney 14 in the Department of Transportation

POSITIONS OF THE PARTIES

The Union contends that none of the positions involved are supervisory, managerial or confidential and therefore each should be included in the bargaining unit. Addressing the issue of managerial status, the Union argues that none of the attorneys herein are engaged predominantly in managerial functions and that none of the DOT attorneys implement management policy or have a relationship with management which imbues them with interest significantly at variance with those of other attorneys represented by the Union. With regard to the issue of alleged confidential status, the Union argues that none of the attorneys involved herein are privy to confidential matters between the State and the Wisconsin State Attorneys Association. Furthermore, the Union submits that the DOT may not exclude all of its attorneys from the bargaining unit by the piecemeal assignment of duties arguably involving confidential information. Finally, addressing the issue of the supervisory status of the occupant of the DOT Attorney 14 position, the Union argues that his principal work does not differ from that of his subordinates and that he does not exercise supervisory functions in sufficient combination and degree so as to be excluded as a supervisor from this bargaining unit.

The State argues that all seven attorney positions should be excluded from the bargaining unit. The State submits that all positions are managerial because the occupant of each position participates in the formulation, determination and implementation of management policy which gives them a relationship to management at a relatively high level of responsibility which imbues them with interests significantly at variance with those of employes in the bargaining unit. In the alternative, the State submits that the five DOT positions are confidential because the occupants of these positions are privy to confidential matters affecting the employer-employe relationship. 2/ Also, in the alternative, it argues that the DOT Attorney 14 position is supervisory.

DISCUSSION

Managerial Status

The State contends all seven positions at issue are managerial employes. Section 111.81(7), Stats., excludes from the definition of "employes" those who are "management employes". Section 111.81(13) more specifically states:

> "Management" includes those personnel engaged predominantly in executive and managerial functions, including such officials as division administrators, bureau director, institutional heads and employees exercising similar functions and responsibilities as determined by the commission.

This definition specifically lists certain positions which, by virtue of their placement in the organizational structure, are per se management positions. This listing however is not all inclusive. 3/ In previous cases, the Commission has given further meaning to the term "managerial" as that word appears in both SELRA 4/ and MERA. 5/ Those cases have held that "managerial" functions must be demonstrated by a showing that the occupant of the position in question participates in a significant manner in the formulation, determination and implementation of management policy or that the occupant of such a position has the effective authority to commit the municipal employer's resources. 6/

Although the job titles of the positions at issue vary from attorney to legal counsel/hearing examiner, all are staff attorneys who were hired to provide legal services to their respective agencies or department. In addition to the performance of their normal legal responsibilities, these attorneys have been assigned to management teams/committees in their respective agencies by their superiors and are expected, as part of their normal job duties, to participate in these committees which are involved in the determination and formulation of policy questions. The attorneys serve as legal counsel to these management teams/committees and can make recommendations and offer advice to the management teams/committees which can be accepted or rejected. None of the attorneys has the authority to compel any other members of their management team/committee to abide by their recommendations. Moreover, it is apparent that the attorneys cannot formulate and implement policy individually or without review, comment or consensus by other members of the management team/committee or their superiors. There is no question however that all the attorneys at issue have, on occasion,

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2/ At hearing the State contended all seven positions at issue were confidential. In its brief, however, the State did not argue that the Attorney 11 at the EAB and the Attorney 12 at the OCI were confidential. Therefore, no determination is made as to their confidential status.

3/ State of Wisconsin (Professional-Education), Dec. No. 15108 (WERC, 12/76), wherein the position of State Extension Coordinator was determined to be managerial.

4/ State of Wisconsin (Professional-Education), Dec. No. 11885-M (WERC, 11/82).

5/ Oneida County, Dec. No. 9134-D (WERC, 7/83); Brown County, Dec. No. 7954-C (WERC, 11/84).

6/ The second part of this standard (i.e. the authority to commit the employer's resources) is not involved in this case.

participated in the formulation and determination of policy as a result of their participation on management teams/committees. Although we have previously found participation on a management team can be indicative of a managerial function under MERA, 7/ the threshold question under the SELRA definition quoted above is whether the attorneys herein are "engaged predominantly in executive or management functions" by virtue of their inclusion on management teams/committees and/or because of their high position within the agency. We conclude that they are not so engaged.

While all the attorneys spend some time participating in the making of various policy decisions, we are not persuaded that this is the function in which they are "engaged predominantly" within the meaning of Sec. 111.81(13), Stats. Instead, their predominant functions and responsibilities as indicated by their position descriptions and their testimony are to provide legal services and legal advice to their client. While we recognize that legal advice can at times involve recommendations regarding the policy issues and among policy choices that are confronted, it is legal advice rather than policy making that constitutes the functions in which the occupants of the disputed positions are predominantly engaged. 8/ In our view the attorneys at issue are not "employes exercising similar functions and responsibilities" to those of "division administrators, bureau directors, and institutional heads" as expressly referred to in the Statute. As a result, we have concluded that none of the attorneys herein are managerial employes under SELRA. 9/

CONFIDENTIAL STATUS

That State contends all five DOT positions are also confidential. Section 111.81(7) of SELRA excludes from the definition of "employe" those "individuals privy to confidential matters affecting the employer-employe relationship." The Commission has held that for an employe to be considered a confidential employe, and thus excluded from the bargaining unit, the employe must have access to, knowledge of, or participate in confidential matters relating to labor relations. 10/ The Commission has further held that in order for the information to be considered "confidential", it must deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters relating to labor relations between the bargaining representative and the employer, and must not be available to the bargaining representative or its agent. 11/

7/ In Madison Metropolitan School District, Dec. Nos. 20836-A and 21200 (WERC, 11/83) the Commission held that two nurse practitioners who participated on a four person Health Services Management Team charged with planning, developing, implementing and evaluating health services within the District were managerial employes. It was concluded that "performance of these functions would significantly enmesh the members of the Management Team in the formulation, determination and implementation of policy. Moreover, the nurse practitioners would constitute 50 percent of the regular membership on the Team."

8/ See generally, City of Milwaukee, Dec. No. 12035-A (WERC, 2/74) aff'd, City of Milwaukee v. WERC, 71 Wis.2d 709 (1976).

9/ Although the NLRB found full-time physicians and dentists who served on policy committees to be managerial in FHP Inc. v. Union of American Physicians and Dentists, 274 NLRB 168 (1985), we do not consider this determination controlling herein since the SELRA definition of managerial employes differs from that applied by the National Labor Relations Board in interpreting the NLRA. For in NLRB v. Bell Aerospace Co., 85 LRRM 2945 (1974) the U.S. Supreme Court approved the Board's non-statutory definition of managerial employes as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy."

10/ State of Wisconsin (Clerical-Related), Dec. No. 14143-B (WERC, 10/77).

11/ Walworth County, Dec. No. 18846 (WERC, 7/81).

The Union argues that since none of the DOT attorneys are involved in labor relations matters involving the Wisconsin State Attorneys Association and the State, they fall outside of the central purpose embodied by the exclusion of "confidential employes". Our reading of Sec. 111.81(7), Stats., however, does not limit the exclusion of confidential employes to just those employes having confidential contact with their own bargaining unit. Instead, we believe the phrase "privy to confidential matters affecting the employer-employe relationship" is sufficiently broad to encompass traditional labor relations matters involving represented employes in bargaining units other than just the bargaining unit of the affected employe. 12/

Turning to the question of whether any of the DOT attorneys 13 and 14 ought to be excluded from a bargaining unit because of confidential status we find that, with the exception of Jerry Hancock, none of these attorneys perform work which makes them "privy to confidential matters affecting the employer-employe relationship" to any significant degree. The record reveals that Joe Maassen has no access to or knowledge of the State employer's strategy or position in collective bargaining, nor is he involved in any way with grievance administration or related litigation. While Maassen appears before the State Personnel Commission about four times a year, and has handled one Equal Rights Division case and two or three EEOC matters, we are convinced that on balance he spends very little of his work time on traditional confidential labor relations matters as described above.

Similarly, the evidence of confidential status for Barbara Bird is also minimal. Attorney Bird once participated in the development of guidelines for use by supervisors in determining disciplinary action with regard to off-duty conduct of State Troopers. Additionally, she has occasionally represented the DOT on personnel matters before the State Personnel Commission, Equal Rights Division, Unemployment Compensation Division and the EEOC; all such cases involving unrepresented employes. However, Bird testified that the amount of personnel related duties has diminished over the years. Most importantly, Bird has never represented the DOT in grievance administration or related litigation, and she does not have access to, knowledge of or participate in collective bargaining strategy as relates to the State and the Union. Therefore, we conclude, on balance, that Bird is not a confidential employe in a labor relations sense.

The State asserts that the person to be hired to fill the vacant Attorney 13 position in DOT also should be excluded as a confidential employe. The State notes in support of its position that the prior incumbent handled cases before the State Personnel Commission, the Equal Rights Division and the Unemployment Compensation Division. We find the record devoid of any evidence that the vacancy will be filled by someone significantly involved in, with access to or knowledge of confidential labor relations information. Thus, we reject the State's contention and conclude that this position is not confidential.

In reaching our conclusions above regarding Maassen, Bird and the vacant position, we have considered the fact that the position descriptions involved state that these employes spend from 15-27 percent of their time on "personnel and labor management matters." We have found, however, upon consideration of the record as a whole that most of that time does not encompass traditional confidential labor relations matters involving represented employes in this or any other bargaining unit within the meaning of SELRA.

With respect to Jerry Hancock, we find ample evidence in the record demonstrating his access to, knowledge of and participation in confidential labor relations matters. Hancock (1) advises the Administrator of the Division of the State Patrol on personnel matters, (2) serves on a group which reviews disciplinary matters before discipline is imposed by the DOT, (3) organizes State Patrol discipline arbitration cases before they are presented to the Department of

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12/ We have essentially so held in interpreting the term "confidential employe" under the Municipal Employment Relations Act. Town of Madison, Dec. No. 16340-A (WERC, 2/79) and Portage County, Dec. No. 14946 (WERC, 9/76) (the confidential status of a position is determined by the incumbent's relationship to the employer, not to various bargaining units.)

Employment Relations, and (4) represented the DOT in two discharge arbitration cases involving employes represented by the Wisconsin State Employees Union. In addition, Hancock regularly represents DOT in numerous Personnel Commission matters at least some of which also involve him in confidential labor relations matters. For the foregoing reasons, we conclude that Hancock is "privy to confidential matters affecting the employer-employe relationship" and that he is a confidential employe who should be excluded from the bargaining unit.

SUPERVISORY STATUS

The State also contends that Peterson's position in DOT is supervisory. Section 111.81(7), Stats., excludes from the definition of "employes" those who "are performing in a supervisory capacity." Section 111.81(19), Stats., defines "Supervisor" thus:

> . . . any individual whose principal work is different from that of his subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employes, or to adjust their grievances, or to authoritatively recommend such action, if his exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Commission has recognized the distinction between the above definition and that contained in Sec. 111.70(1)(o) of MERA, i.e., SELRA requires a finding that the disputed employe's principal work is different from that of his/her subordinates and that the requisite supervisory authority be possessed. 13/ In appropriate cases under SELRA, 14/ the Commission has also given weight to the following factors in determining whether the requisite supervisory authority is possessed:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes.

2. The authority to direct and assign the workforce.

3. The number of employes supervised, and the 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 skill or for supervision of employes.

5. Whether the supervisor is primarily supervising an activity or is primarily supervising employes.

6. Whether the supervisor is a working supervisor or whether (s)he spends substantial majority of his/her time supervising employes.

7. The amount of independent judgment and discretion exercised in the supervision of employes. 15/

As noted, the statutory definition above requires that Peterson's principal work be different from that of his subordinates for him to be deemed a supervisor. We therefore need to determine the nature of Peterson's principal work and to compare it with that of his subordinates.

13/ See, State of Wisconsin, Dec. No. 11243-L, (WERC, 12/85) citing State of Wisconsin (Security and Public Safety), Dec. No. 11243-K (WERC, 7/83).

14/ Compare, State of Wisconsin, Dec. No. 11243-L at 13-15 (WERC, 12/85) (Chief Pilot Slaughter held supervisor) with id. (District Chief Pilots held not supervisors).

15/ University of Wisconsin and Department of Administration, State of Wisconsin and Resident Halls Student Labor Organization, Dec. No. 10320-B (WERC, 6/72).

As we noted recently in State of Wisconsin, supra,

> The common definition of "principal" is: "first or highest in rank, character, authority, value or importance; most important; leading; chief." Funk & Wagnall's New Standard Dictionary of the English Language, unabridged version. We view that definition as helpful in determining the proper interpretation of the use of that term in SELRA. In view of that definition, it appears to us that it is appropriate to determine principal work considering both evidence as to which aspect of an employe's work the employe spends the greatest amount of his/her work time on (i.e., a quantitative view), as well as which aspect of the employe's work is most essential or important to the fulfillment of the State Employer's or the work group's mission (i.e. a qualitative view). In some cases the quantitative evidence will be more clearly indicative of what the employe's principal work is, whereas in others reliance on a qualitative analysis will reveal the most important function of the disputed position.

Peterson's latest position description, as supported by the balance of the record, indicates that he spends only 10 percent of his time on supervisory duties, 20 percent of his time on non-supervisory work that is different from that of his subordinates, and the remaining 70 percent of his time on non-supervisory work that is the same as that which the four Attorneys 13 subordinate to him perform. Thus, the substantial majority of Peterson's work is not different from that of his subordinates. Hence, in quantitative terms at least, there is no question that Peterson's principal work does not differ from that of his subordinates.

However, we have also considered whether Peterson's supervisory activities might qualitatively be the most important part of his job and on that basis constitute his principal duties. In that regard, we note that Thiel is the head of the office and exercises ultimate supervisory discretion over the same four attorneys that the State seeks to attribute to Peterson. Thus, Peterson's roles in interviewing candidates, making hiring decisions, allocating merit monies and discussing evaluations with Attorneys 13 are all performed in common with and in direct communication with Thiel, reducing the extent of Peterson's exercise of independent judgment in such matters. While Peterson's exercise of independent judgment comes into play more when Thiel is away from the office, and while Peterson's initial preparation of evaluations of the Attorneys 13 remains significant, given Peterson's day-to-day assignment, coordination and review of their work, we are nonetheless persuaded that the work he spends the substantial majority (70%) of his time on is his principal work rather than his supervisory activities and/or his non-supervisory duties that differ from the work of his subordinates.

Since that 70 percent of his time is spent on work similar to that of his subordinates, we have concluded that Peterson's principal work does not differ from that of his subordinates.

Since Peterson's principal work is therefore not different from that of his subordinates, the first necessary element for supervisory status under SELRA has not been met and Peterson cannot be a supervisor within the meaning of SELRA. Accordingly, we need not and do not address the question of whether Peterson meets the second element necessary for supervisory status under the SELRA definition.

SEPARATE OPINION OF COMMISSIONER GRATZ

I agree with my colleagues' foregoing analysis in all respects except I dissent as to Peterson and would have continued to exclude him from the unit as a supervisor.

I agree that because Peterson spends a majority of his time (70%) on duties similar to those of his subordinates, his principal duties in quantitative terms do not differ from those of his subordinates.

However, the record also satisifies me that, qualitatively, Peterson's most important and influential duties consist of the role he plays in the supervision of the subordinate Attorneys 13 in the DOT Office of the General Counsel. While there are only four Attorneys 13 under both Thiel and Peterson, there are also office clerical and administrative personnel in the Office for whom Thiel is responsible. While Peterson shares some supervisory functions with Thiel (conducting hiring interviews, making hiring decisions, deciding merit pay allocations, dicussion of evaluations with Attorney 13s), Peterson also has numerous supervisory responsibilities independent of Thiel, and Peterson is responsible for overall supervision of the office in Thiel's absence. Peterson is principally responsible for preparing performance evaluations of the subordinate attorneys in the office; Peterson serves as a separate step recipient of grievances, though this function has not been an active one in this office; Peterson assigns or disposes of the bulk of the various requests for attorney services received by the Office; Peterson reviews the written work produced by the subordinates; and Peterson issues directives correcting problems with the Attorney 13s' day-to-day job performance.

In choosing between the conflicting outcomes indicated by the quantitative and qualitative considerations noted above, I would have concluded that the qualitative considerations predominate in this case. I am influenced in that regard by the fact that the importance of Peterson's supervisory duties has been recognized by a supervisory add-on to his pay and by the fact that Thiel's absences from the office are "frequent". Accordingly, since Peterson's supervisory duties and the additional 20 percent of his time spent on non-supervisory duties differ from the duties of his subordinates, I would conclude that his "principal duties" differ from those of his subordinates.

For that reason, and because his responsibilities in hiring, evaluation, merit pay allocation, grievance adjustment, and particularly in work assignment and performance correction require a substantial exercise of independent judgment rather than merely routine clerical inputs, I would have concluded that Peterson is a supervisor within the meaning of SELRA and would have ordered that his position remain excluded from the unit.

Dated at Madison, Wisconsin this 31st day of January, 1986.

By: Marshall L. Gratz
Marshall L. Gratz, Commissioner