

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

WISCONSIN STATE ATTORNEYS ASSOCIATION

Involving Certain Employes of

STATE OF WISCONSIN (DEPARTMENT OF
EMPLOYMENT RELATIONS)

Case 33

No. 47040 SE-9

Decision No. 11640-E

Appearances:

Schneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, 700 West Michigan Street, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, by Mr. Timothy E. Hawks, on behalf of the Petitioner, Wisconsin State Attorneys Association.

Mr. David J. Vergeront, Legal Counsel, Office of the Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the Department of Employment Relations, State of Wisconsin.

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

On February 4, 1992, the Wisconsin State Attorneys Association filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission clarify the bargaining unit represented by the Association to include certain positions identified in the petition. A pre-hearing conference was held on May 18, 1992, in Madison, Wisconsin. Thereafter, the parties entered into settlement discussions and were able to reach agreement as to the status of some of the positions in issue, but were unable to reach agreement on the status of the positions addressed herein. Hearings on the petition were held on September 1, 3 and 28, 1992, May 11-13, 1993 and May 17 and 18, 1993, in Madison, Wisconsin before Examiner Thomas L. Yaeger of the Commission's staff. A stenographic transcript was made of the hearings, the last of which was received on November 24, 1993. The parties submitted post-hearing briefs and reply briefs by December 21, 1994. The Commission, having considered the evidence and the arguments of the parties and being fully advised in the premises, makes and issues the following

No. 11640-E

FINDINGS OF FACT

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

2. The State of Wisconsin, hereinafter referred to as the State, employs certain attorneys in the performance of its various governmental functions. 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. The Petitioner, contrary to the State, asserts that the following currently excluded positions should be included in the bargaining unit it represents:

	Position		Incumbent
1.	Attorney 15	(General Counsel-DILHR)	Howard Bernstein
2.	Attorney 14	(Assistant General Counsel-DILHR) 3/	Kristiane Randal
3.	Attorney 14	(Chief Counsel, Gas, Water & Federal Intervention Division, Public Service Commission)	Robert Mussallem
4.	Attorney 14	(Chief Counsel, Electric Division, Public Service Commission)	Barbara James
5.	Attorney 13	(Administrator, Examining Division,	Ann Pfeifer

1/ By letter of November 26, 1996, the parties agreed to withdraw this position from consideration in these proceedings due to changes in the position resulting from the reorganization of state agencies.

		Public Service Commission)	
6.	Attorney 15	(Chief Counsel, Public Service Commission)	Steven Schur
7.	Attorney 14	(Chief Division Counsel, Telecommunications Division, Public Service Commission)	Natalie Smith-Crosetto
8.	Attorney 14	(Chief Counsel, Employee Trust Funds)	Robert Weber
9.	Attorney 14	(Executive Counsel, Office of Commissioner of Securities)	Patricia Struck
10.	Attorney 14	(General Counsel, Office of Commissioner of Securities)	Randall Schumann
11.	Attorney 14	(Chief Assistant Legal Counsel, Department of Health & Social Services) 4/	John Brown
12.	Attorney 13	(Department of Administration, Division of Hearings & Appeals, Milwaukee Office Supervisor)	Wayne Wiedenhoef

2/ By letter of July 1, 1994, the Petitioner withdrew its petition as to the position held by Brown.

13.	Attorney 14	(Legal Counsel, Ethics Board)	Jonathan Becker
14.	Attorney 14	(Legal Counsel, Office of the Commissioner of Banking) 5/	Leon Swerin
15.	Attorney 14	(General Counsel, Department of Development)	Dennis Fay
16.	Attorney 14	(Deputy Legal Counsel, Department of Administration)	Mark Saunders
17.	Attorney 14	(General Counsel, Wisconsin Board of Vocational, Technical and Adult Education)	Patricia Collins

The State asserts the following with respect to the individuals in the positions set forth above:

Howard Bernstein	Confidential, supervisor & management
Robert Mussallem	Management
Barbara James	Management
Ann Pfeifer	Confidential, supervisor & management
Steven Schur	Confidential, management
Natalie Smith-Crosetto	Supervisor, management
Robert Weber	Confidential, management
Patricia Struck	Confidential, management
Randall Schumann	Confidential, management
Wayne Wiedenhoef	Confidential, supervisor
Jonathan Becker	Confidential, management

3/ Withdrawn. See footnote 1/.

Dennis Fay	Confidential, management
Mark Saunders	Confidential, management
Patricia Collins	Confidential, management

4. The Department of Industry, Labor and Human Relations (DILHR) is a State agency consisting of approximately 2,000 employes, and headed by the Secretary of that Department, and is responsible for the administration and enforcement of the State's fair employment laws, safety and building codes, worker's compensation laws, employment and training programs, and unemployment compensation laws. Directly under the Secretary are the Deputy Secretary and the Executive Assistant, in that order. There are six divisions in the Department, each headed by an administrator who reports to the Secretary, Deputy Secretary and Executive Assistant. There are also three offices in the Department: Affirmative Action, Legal Counsel, and Strategic Services, which are not part of the divisions, but which also report to the Secretary, Deputy Secretary and Executive Assistant.

The incumbent in the DILHR General Counsel position is Howard Bernstein, who has held that position since May of 1982. Bernstein reports to the Secretary, and in his/her absence, to the Deputy Secretary or Executive Assistant. In 1989, a limited-term employe (LTE), John O'Connell, was employed as an attorney in DILHR's Legal Counsel office to assist Bernstein. O'Connell was in that position until sometime in 1990. Subsequently, the permanent position of Assistant General Counsel was created in 1991, and that position was held by Neil Gebhart for several months. The incumbent in the DILHR Assistant General Counsel position at the time of hearing was Kristiane Randal, who held that position since mid-June of 1992.

Bernstein is classified as an Attorney 15 - Management, and he receives a supervisory addition in addition to his base pay. The Assistant General Counsel reports to Bernstein who is responsible for doing performance evaluations and assigning and reviewing the work of the person in that position. Bernstein was involved in the hiring of Gebhart and subsequently, the hiring of Randal. In that regard, Bernstein received and reviewed the background information on the applicants for the Assistant General Counsel position and did the initial interviews of the applicants with some assistance from others. Bernstein's Supervisory Analysis Form attached to his position description indicates that five percent of Bernstein's time is allocated to supervisory functions, another five percent is allocated to related responsibilities such as reviewing work, counseling subordinates about performance and technological orientation; 20 percent of his time is allocated to performing duties different from those performed by the employe he supervises and 70 percent of his time is allocated to performing duties that are similar to those performed by that employe. That "Supervisory Analysis Form" also indicates that Bernstein's position "participates in employment interviews and effectively recommends hiring, effectively recommends formal discipline (up to and including discharge) to a level in the chain of command where such an action can be authorized, prepares formal performance evaluations, serves as first-line supervisor, and discusses evaluations

with employes." That form also indicates that he has the authority to settle work-related complaints of the employe under his supervision and that he is identified as a formal step in the employe's grievance procedure.

DILHR's Bureau of Personnel oversees the personnel functions of the Department and has branches dealing with the hiring process - administering examinations where that has been delegated from DER and conducting or arranging interviews - and with handling reclassification requests where that has been delegated from DER.

As the General Counsel for DILHR, Bernstein represents the Department in cases before the State Personnel Commission involving personnel appeals and discrimination charges against the Department by its employes and before the United States Equal Employment Opportunity Commission (EEOC) involving discrimination charges against the Department by its employes. Bernstein also represents the other divisions of DILHR in cases before its Equal Rights Division. Bernstein's appearances in such cases are limited to appearing before administrative agencies. An Assistant Attorney General from the State's Department of Justice represents DILHR in court proceedings. The Department is represented by attorneys from the Bureau of Legal Affairs in its Unemployment Compensation Division in cases before the Labor and Industry Review Commission. Bernstein is involved in consultations regarding employe discipline matters. In that regard, Bernstein meets with the employe's supervisor, that division's administrator or bureau director, and someone from the Department's Bureau of Personnel to discuss what action should be taken. Bernstein is involved in making the recommendation to discharge an employe, but only the Secretary and Deputy Secretary have the authority to make the final decision on a discharge of a Department employe. Bernstein is involved in all of the consultations where discharge is being considered, and in most cases where suspension or other serious discipline is being considered. The number of discharges of DILHR employes has varied from one to five per year with a similar number of suspensions of DILHR employes per year. Bernstein consults with the Department of Employment Relations (DER) telephonically in approximately one-third to one-half of such cases, usually in those cases where there is a new issue or there is a question of whether DER is going to take a general position on the issue. While DER is available for consultation regarding personnel matters, the Secretary of DILHR and the division heads in that Department generally consult with Bernstein or his assistant regarding personnel matters involving DILHR employes. The general practice in the Department is for a division administrator to contact either Bernstein or the Department's Bureau of Personnel to consult regarding employe discipline or other personnel matters. In 1989, the limited-term employe in the Assistant Legal Counsel position, O'Connell, represented the Department in two grievance arbitrations involving DILHR employes. In 1990, Bernstein represented the Department in two discharge cases before grievance arbitrators. Bernstein's representation of DILHR in those cases was pursuant to a written agreement with DER, which delegated to him authority to represent DER in the arbitrations. That written delegation of authority was signed in 1989 and stated that it ended after one year, but was subject to renewal. The agreement has not been renewed in writing, and Bernstein has not represented DER since the discharge arbitrations in 1990.

Generally, Bernstein's representation of the Department is limited to the discrimination aspects of the case involving a Department employe, rather than the grievance arbitration aspect. Bernstein was involved in the consultation regarding the discharge of an employe of the Department in the Petitioner's bargaining unit. After the decision to discharge the employe was made, Bernstein prepared the case relating to the discrimination charges and worked in conjunction with DER's Division of Collective Bargaining which was handling the arbitration aspect of the discharge. All aspects of that case were settled prior to hearing. Bernstein represents the Department in cases involving represented employes, including those represented by Petitioner, and also non-represented employes. Bernstein has not been directly involved in collective bargaining on behalf of the Department. The Department is represented in collective bargaining by Lee Isaacson, an Employment Relations Specialist in the Department's Bureau of Personnel, and by a supervisor from the Safety and Buildings Division with regard to negotiations with the State Engineers Association. At time of hearing, Bernstein had approximately 30 cases pending before the EEOC or the Personnel Commission involving Department employes. Bernstein spent approximately half of his work time working on personnel-related matters during the time that the Assistant General Counsel position was vacant, and now spends approximately one-third of his time on such matters.

Bernstein's position description dated July 30, 1991 allocates 30 percent of his work time under Goal A to representing the department in legal actions including proceedings before the Personnel Commission, EEOC, Equal Rights Division and in unemployment compensation hearings; 30 percent of his work time under Goal B to providing legal advice on policy and administrative issues, including drafting formal and informal legal opinions to the Secretary and administrators in all areas of administrative activity including personnel, equal rights, labor standards, etc., assisting in developing, formulating and implementing department policies and procedures in areas involving significant legal issues, e.g., personnel management, legislative proposals, and doing the necessary research; 20 percent to coordinating and acting as liaison between DILHR and DOJ and district attorneys for litigation on administrative issues where DILHR is being represented by those entities, including coordinating approval of settlement agreements and assisting and advising those agencies; 10 percent to acting as a hearing examiner in contested cases involving divisions of DILHR without hearing examiners and acting as a factfinder for the Secretary in the investigation and disposition of complaints under DILHR's affirmative action grievance system; and 10 percent to supervising the legal staff of the Office of the Secretary, including conducting performance evaluations, responding to grievances, establishing operating procedures, reviewing the work and providing counseling and training in relation to the Assistant General Counsel.

As General Counsel, Bernstein is a member of the Secretary's management team which assists in the development, formulation and implementation of Department policy and procedures. Bernstein is involved in discussions on statutory language changes that are part of the budget discussions, but he is not involved in formulating a budget in the Department. Bernstein is

involved in the discussion of policy issues involving personnel matters, including consultations regarding suspensions or discharge of Department employees, and some involving work issues such as flexible leave time, and in those matters makes recommendations as to what he feels the policy should be.

5. The Wisconsin Public Service Commission (PSC) is an agency of the State with three appointed commissioners, headed by the Chair, who are responsible for deciding cases arising under Chapter 194 and Chapter 196 of the Wisconsin Statutes regarding the issuance of securities by public service corporations and the regulation of public utilities in Wisconsin, respectively. Directly beneath the Chair and Commissioners, and reporting to them, is the Executive Assistant. Beneath the Executive Assistant is the Commission Secretary, the Senior Policy Advisor, the Examining Division and the Office of the Chief Counsel. In addition, there are also five separate divisions in the PSC: Electric; Gas, Water & Federal Intervention; Telecommunications; Utility Operations Review; and Administrative Services. Each of those divisions is administratively headed by a division administrator who reports to the Executive Assistant. The Examining Division consists of three attorneys who act as hearing examiners, one of whom, Ann Pfeifer, is the Administrator of that division. The Chief Counsel is Steven Schur, who is the attorney for the Commission. In addition, the Electric Division has a Division Chief Counsel, Barbara James; the Gas, Water & Federal Intervention Division has a Division Chief Counsel, Robert Mussallem; and the Telecommunications Division has a Division Chief Counsel, Natalie Smith-Crosetto. Other than the Examining Division and the Administrative Services Division, the divisions also have Assistant Administrators for Policy and Assistant Administrators for Process who report to the Division Administrator. There is a three-person Bureau of Personnel within the Administrative Services Division. In May of 1993, there were approximately 183 employees at the PSC. The PSC's funding is through program revenues from the industries it regulates, rather than general purpose revenues.

In mid-1990, the PSC restructured organizationally. Prior to the reorganization, there were six attorneys in the Office of Chief Counsel of the PSC, including the Chief Counsel, Schur. Schur was excluded from the bargaining unit and the remaining attorneys were included. Following the reorganization, three of the attorneys were excluded as Division Chief Counsel. In addition to the six attorneys who were in the Office of Chief Counsel, there are also Attorney/Hearing Examiners in the Examining Division. The Examining Division did not get reorganized along with the rest of the agency. With the creation of an additional Attorney position shortly before the reorganization, there are now six attorneys in the PSC, in addition to the Chief Counsel and the attorneys in the Examining Division. The Division Chief Counsel were selected through competition. Prior to the reorganization, all of the attorneys in the PSC, other than the Examiners, were assigned to the Office of Chief Counsel, and reported directly to Schur. As part of the reorganization, the attorneys in the Office of Chief Counsel were assigned to the various divisions. Prior to the reorganization, the divisions within the agency were organized by professional expertise. Following the reorganization, the divisions are organized by the industry being regulated. As part of the reorganization, the bureau director positions were eliminated; however, division administrator

positions remained.

As part of the administrative structure of the PSC, there is an Administrative Council made up of the Chair of the PSC, the Executive Assistant, the Commission Secretary, the Senior Policy Advisor, the Chief Counsel for the PSC and the Division Administrators. Part of the reorganization included the creation of Division Core Management Teams (CMT) consisting of the Division Administrator, the Assistant Administrators, Division Chief Counsel and the Lead Program Assistant in the division. In addition, there is an Administrative Council Plus, which consists of the members of the Administrative Council, the Assistant Division Administrators, Division Chief Counsels, the Bureau Directors in the Administrative Services Division and Engineering Supervisors in a number of divisions who have a management role. The Administrative Council Plus at time of hearing (May, 1993), had not met since the fall of 1992.

With the exception of the statutory managerial responsibilities of the Chair and the Commissioners, most management functions within the PSC have been delegated to the Administrative Council and the Division CMT's. There are also approximately 110 work groups or working committees which have been assigned to address specific issues, and some of those work groups include represented employees. The Administrative Council meets on Tuesdays and Thursdays of each week, with meetings usually lasting an hour to an hour and a half in the mornings and in the afternoons on those days. The meetings are chaired by the PSC Chair, and are led by the facilitator for the particular meeting, with the role of facilitator being rotated amongst the members of the Administrative Council.

The Administrative Council normally makes decisions on a consensus basis, but voting takes place when consensus cannot be achieved. There are three levels of delegation of decision-making authority to the Administrative Council: Type one, where the Administrative Council is informed of the decision by the Chair or the Commission for information purposes; type two, where the Chair or Commission asks for advice or input from the Administrative Council into the decision; and type three, where the Administrative Council makes the final decision. An example of a type one decision was the decision of the Commission to rotate division administrators within the agency. An example of a type two delegation would be where the Executive Assistant asks for input from the Administrative Council as to subject matters for discussions at a general staff meeting of the agency. Examples of type three delegation are the setting of the Agency's budget and the selection of staff to attend a conference on quality management. The Chair of the PSC determines whether the delegation to the Administrative Council as to a particular matter will be at a type one, type two or type three level.

The Administrative Council is responsible for developing the strategic plan for the agency which includes defining the agency's mission, setting goals, and developing plans of action to meet those goals and designing specific projects to carry out those strategies or actions. The Administrative Council is also responsible for setting the budgets for the PSC. The individual divisions prepare estimates for both the annual and biennial budget requests, and also prepare an annual material operating budget. Those budgets are then submitted to the Administrative Council

for its review and approval. The authority to make the final decision on the budget has been delegated to the Administrative Council by the Chair of the PSC. The Administrative Council adopted the 1992 budget after having spent somewhere between 10 and 30 hours discussing and reviewing the budget between May and June of 1992. The Administrative Council develops the agenda for its meetings, allocates resources, and decides on the policy and guidelines to be followed regarding merit and exceptional performance awards. In some cases, those awards are monetary, and in some cases are not, e.g., the attorneys represented by Petitioner. The Administrative Council decides whether vacancies will be filled and, if so, whether they will be filled within a division or moved elsewhere, allocates otherwise unallocated funds for salary increases, and decides on large equipment purchases. The Administrative Council is informed as to the status of negotiations with all the applicable labor unions and, in turn, advises the State's bargaining representatives as to issues it would have them pursue in bargaining. The Administrative Council is not generally involved in discipline matters. The Administrative Council also develops personnel policies in addition to the work rules set by the PSC Chair (including work rules regarding outside employment), has revised the Code of Ethics for the agency, and has revised the employe appraisal system. The Administrative Council was also responsible for managing the reorganization of the PSC. The Administrative Council makes management decisions affecting the PSC as a whole, whereas the Core Management Teams deal primarily with decisions affecting the running of that particular division.

In mid-1990, the Administrative Council decided to attempt to adopt and apply the principles of Total Quality Management (TQM) and the "Demming principles". The Administrative Council also created a Management Oversight Committee consisting of the PSC Chair, the Senior Policy Advisor and the Assistant Administrator for Process in the Gas & Water Division. The members of the Management Oversight Committee were selected by the Administrative Council. The Administrative Council and the Administrative Council Plus developed an overall strategic plan for the PSC, and within that, certain goals were identified and strategies developed to meet those goals. In the process, comments and suggestions from employes, including represented employes, were considered, and in many cases, resulted in changes.

With regard to the Division CMT's, the Division Administrator generally determines which matters will be delegated to the CMT and retains the authority to accept or reject the CMT's decisions. In dealing with substantive policy at the division level, the CMT's decisions are not subject to review by the Administrative Council, rather, the Commission and individuals such as the Division Administrator and the PSC Chief Counsel would have input into such decisions. While the Administrative Council would make the decision as to whether a vacant position in a division would be filled or transferred to another division, once that decision is made the CMT for that division would make the personnel decision in filling the position. The CMT's review the employes who are eligible for exceptional performance awards under the pay plan (non-represented employes) and divide the available monies among those employes they determine should receive such awards. The CMT's also allocate available training monies within their respective divisions.

The CMT's are kept informed as to the status of negotiations with the various representatives of the applicable bargaining units, but are not directly involved or consulted regarding those negotiations. Requests for reclassifications are brought before the CMT. The goals and objectives for the division's individual employees are discussed by the CMT, including whether an employee would require or would receive specialized training in a particular area, and whether an employee will be moved into new areas. The CMT's also develop strategies for dealing with individual employee performance problems, formulate management policies related to running the division, and make hiring decisions once filling a position has been approved by the Administrative Council.

6. The Administrator of the Examining Division of the PSC is Ann Pfeifer who has held that position since August of 1986. Prior to that, Pfeifer was a Hearing Examiner in the Division and in the bargaining unit represented by Petitioner. Pfeifer's predecessor in the Administrator position was also not in the unit. The Examining Division is responsible for issuing the notices for hearings and pre-hearings, providing court reporters, ruling on pre-trial motions and discovery disputes, presiding at hearings, and preparing a summary memorandum as to the contents of the record for the Commission which accompanies the transmittal of the entire record. In addition to Pfeifer and the two Hearing Examiners, there are two Stenographers and one Program Assistant in the Examining Division.

Pfeifer is classified as an Attorney 13 - Management and receives a supervisory add-on to her base pay. Pfeifer is the only individual in the Examining Division that receives a supervisory add-on. The Examiners, the Stenographer and the Program Assistant in the Examining Division report directly to Pfeifer. Pfeifer reports to the PSC Chair. The Examiners are in the bargaining unit represented by Petitioner. The "Supervisory Analysis Form" attached to Pfeifer's job description states that 10 percent of her total work time is allocated to supervisory duties, 20 percent is allocated to activities related to her supervisory responsibilities, 40 percent is allocated to performing work similar to that of her subordinates and 30 percent is allocated to non-supervisory activities different from those of her subordinates. Pfeifer has spent less than the allocated amount of her time on supervisory and related duties in the year prior to hearing. Pfeifer's "Supervisory Analysis Form" indicates that she independently interviews applicants and effectively recommends hiring; effectively recommends discipline (up to and including discharge) to a level in the chain of command where such action can be authorized; prepares performance evaluations which she signs as first-line supervisor and discusses with the employee; settles work-related complaints of the employees she supervises and is a formal step in the grievance procedure for those employees.

Pfeifer's position description dated March of 1986, allocated 30 percent of her work time under Goal A to the administration, direction and supervision of the work of the Examining Division and its legal activities which included allocating staff resources of the Division so as to comply with the applicable statutes and regulations regarding hearings, supervising, assigning and directing staff in that regard, developing the Division's biennial budget in conformance with the instructions of the PSC Chair and in close cooperation with the Division of Administrative Services, conducting performance evaluations of Division staff, recommending discretionary pay

adjustments for Division staff to the Chair, reviewing Division decisions before issuance, coordinating recruitment and selection of professional and paraprofessional staff for the Division in close cooperation with the Personnel Department, planning and developing a systematic training program for Division staff, actively supporting and implementing EEO guidelines and PSC Affirmative Action program, policies and goals and complying with the provisions of the collective bargaining agreements for represented Division staff. That position description also allocated 30 percent of Pfeifer's time to conducting hearings, 20 percent to preparing proposed decisions or recommendations, 10 percent to research and 10 percent to disseminating information regarding PSC procedures, practices and jurisdiction.

A new position description for Pfeifer's position was signed by Pfeifer and the PSC Chair on March 5, 1992. That position description also allocates 30 percent of Pfeifer's time to Goal A, the administration, direction and supervision of the work and staff of the Division, and adds to the activities under that goal participation as a member of the Administrative Council to help plan and execute business goals as part of the PSC's "management team". The more recent position description also allocates 30 percent of Pfeifer's time to conducting hearings, 20 percent to preparing decisions and recommendations, but allocates 10 percent of her time to developing or assisting in the development of rules and 10 percent to ruling on requests for confidentiality and open records. Starting in 1991, Pfeifer spent much less than half of her work time performing hearing-related duties.

Pfeifer does not represent the PSC in any grievance arbitration proceedings, or proceedings before the State Personnel Commission and has not represented the PSC at the negotiating table in collective bargaining. As the Administrator of the Examining Division, Pfeifer is a member of the Administrative Council and attends the meetings of that body and participates in consensus decision-making, including adoption of the PSC's budgets, allocation of agency resources, equipment purchases for the agency, and the development of the strategic plan for the PSC which identifies the goals of the agency and how the goals can be attained.

With regard to budgetary duties, Pfeifer is responsible for developing the biennial budget for the Examining Division in conformance with the instructions of the PSC Chair, and in cooperation with the Division of Administrative Services in the PSC. However, a large share of the budget is done by the Administrative Council, and Pfeifer has only to include items for her Division for equipment, furniture and positions. As a member of the Administrative Council, Pfeifer also is involved in the overall budget for the PSC. In the case of the 1993-94 budget, the Administrative Council approved that budget with minimal discussion. Pfeifer is responsible for deciding whether to use the in-house court reporters (stenographers) or to use outside reporting firms with which the Division has a primary contract or a backup contract. Pfeifer bases her decision on whether to use outside reporters or Commission reporters on the turnaround time needed for the transcript and the ability of the entity appearing in the hearing to pay for an expedited transcript.

The Administrative Council also has in excess of 110 subgroups of working committees to

address specific issues from time to time. At the time of hearing, Pfeifer had served on, or was serving on, approximately 17 subgroups of the Administrative Council. Approximately 35 percent of Pfeifer's time is taken up with the Administrative Council or its subgroups. One of Pfeifer's work groups, the Teleanswering Committee, is also a Quality Improvement (QI) team, whose goal it is to improve the quality and timing of the PSC's telephone answering. That group had been meeting on a weekly basis, but at the time of hearing, meetings were suspended while they awaited further instruction from the Management Oversight team. Pfeifer was also on the "Rate Case Process - Old" working group that met for the purposes of developing a process that would enable the PSC to fulfill its statutory responsibilities, without actually having rate case hearings for cases of a certain size. That group was replaced by the "Rate-Case Process - New" working group, which included both bargaining unit members and non-bargaining unit members. That latter working group made a recommendation to the Administrative Council, which at time of hearing had not yet acted on that recommendation. The working groups include people not on the Council and both bargaining unit and non-bargaining unit personnel, and deal with such matters as redoing routing sheets, redoing forms and revising procedures. Some of the working groups are also limited to employees in certain professional disciplines, e.g., engineers, accountants, attorneys, and deal with issues that pertain to that group.

Pfeifer assigns the work to the Hearing Examiners, and in doing so, attempts to take into account the particular examiner's preferences for the types of cases, but otherwise assigns cases on the basis of availability and experience. Pfeifer also assigns the Examiners to various work groups. Pfeifer spends approximately five hours per week making assignments to the Examiners, which time includes explaining the background to the case or matter being assigned. As Administrator of the Examining Division, Pfeifer has not had occasion to recommend the discipline of any of the Examiners in the Division, and has not issued a written reprimand, suspension, or termination regarding those attorneys. Pfeifer did extend the probationary period of an Examiner by one month because she was unsure about that individual's fitness for the position. With regard to a recommendation for a termination, Pfeifer would make that recommendation in writing to the PSC Chair with a copy to the Bureau of Personnel, and the Administrative Council would not be involved in such a decision. Pfeifer has never recommended or had occasion to recommend, the discharge of an employe while holding her current position. In cases where resolving a work-related complaint would require spending State monies, Pfeifer would be required to go to the Administrative Council for those funds, since it was not budgeted and it would have to be determined where to obtain the money. Pfeifer prepares the annual evaluations of the Examining Division personnel, reviews them with the individual employes, and then sends them to the PSC's Bureau of Personnel. In evaluating the Examiners, Pfeifer attends hearings conducted by the two Examiners, and at time of hearing, was sitting in on the newer Examiner's hearings approximately once a month, for a half hour or less each time, while visiting the more experienced Examiner's hearings approximately twice a year. The purpose of visiting those hearings is to view the Examiner's work and also to review the procedure. Pfeifer spends two to four hours per year evaluating each of the other employes.

In terms of exceptional performance awards (EPAs), the Administrative Council establishes guidelines for making such awards, e.g., the individual should have performed some type of limited-term project above and beyond their regular duties or come up with new innovations. In 1992, Pfeifer recommended an EPA for the Program Assistant in her division, making such recommendation to the Administrative Council. Each division submits candidates for such awards and Pfeifer has also made recommendations for EPA's for that employe in the past. In this past instance, the individual received somewhat less of an increase than Pfeifer had originally recommended. Pfeifer has also written a non-monetary EPA for one of her Examiners.

Since becoming the Administrator of the Examining Division in 1986, Pfeifer has been involved in hiring four Examiners, including the incumbents in the two Examiner positions in the Division. In filling the most recent vacancy in an Examiner position, candidates from a certified list were interviewed by Pfeifer and two other individuals, one being the other Examiner from within the Division and the other an individual from outside the Division, whom Pfeifer had invited to sit in with her. Pfeifer interviewed the two transfer candidates for the position by herself. At the end of the interview process, Pfeifer and the two other interviewers discussed the top three candidates each had chosen until they had a list of three, which was then included with a memorandum and a recommendation from Pfeifer which she submitted to the PSC Chair, after review by the Affirmative Action Officer. The Chair then made the final decision, approving the individual Pfeifer had recommended. Pfeifer's recommendations in the three previous hirings in which she has been involved were also ultimately approved by the PSC Chair.

Pfeifer also handles employe concerns regarding the nature of work assignments, interaction with other employes, etc. Pfeifer deals with complaints from persons outside of her division regarding the performance of one of her staff and/or questions regarding the manner in which they performed. When Pfeifer deems it necessary, she will talk to the individual employe in question regarding the matter. There have not been any formal grievances filed in the Examining Division that Pfeifer is aware of since becoming the Administrator. Pfeifer is listed on the job descriptions of the two Examiners in the Examining Division as their first-line supervisor. Pfeifer approves leave requests from the two Examiners and, in her absence, they would seek approval from the Executive Assistant or the Commission Secretary.

7. Steven Schur has held the position of Chief Counsel for the PSC since July of 1974 and is classified as an Attorney 15 - Management. Prior to the reorganization of the PSC in 1990, Schur was responsible for supervising a number of attorneys in the Office of Chief Counsel. After the reorganization, there is no longer an Office of the Chief Counsel as a separate division or department and Schur does not directly supervise any other attorneys. Schur has not represented the PSC in collective bargaining between the State and any of the unions representing its employes. Schur has not appeared as counsel of record on behalf of the PSC in any grievance arbitration between the State and any of the unions representing its employes, at least from the date of January of 1991 to present. Schur is not a representative of the PSC in the steps of the grievance process for any of the represented employes, but would be involved at the second or third steps to advise

management. There has not been any occasion since January of 1991 to date of hearing for Schur to be involved in a grievance.

As Chief Counsel, Schur is also the lawyer for the PSC's Division of Administrative Services, which includes the Bureau of Personnel. Prior to the reorganization of the agency, personnel-related cases came to the Office of Chief Counsel and the work was assigned on a rotating basis amongst all the lawyers. After the reorganization, Schur is responsible for doing all of that type of work. That work includes advice with respect to disciplinary actions, advice at Step 3 in the grievance procedure, advice as to personnel improvement plans, advice as to complaints about harassment, and Schur has conducted investigations in that regard along with personnel from the Bureau of Personnel. In the year prior to the hearing, Schur was involved in five or six personnel-related matters. Several of the matters involved advice at pre-discipline levels. One case involved an investigation of a harassment complaint made by represented employees.

Schur drafted his own current job description for Chief Counsel, dated March 6, 1992 which was reviewed by the Director of Personnel, the Chair of the PSC, and the Executive Assistant before it was finalized. Schur also drafted the position description for Pfeifer's position of Administrator of the Examining Division and participated in the preparation of the position descriptions for all of the Chief Division Counsel positions at the time they were being developed in 1990 as part of the reorganization of the PSC.

From January, 1990 to the date of hearing, Schur had represented the PSC in state court in one case, and had not represented the PSC in litigation during that time in federal court or before other state or federal agencies. Schur's position description allocates 20 percent of his work time to representing the PSC in litigation, 50 percent of his time to providing legal advice to the PSC and its staff, including as relates to personnel matters and participating as a "senior policy advisor" in discussion of important cases and issues, 25 percent of his time to management and supervision, and five percent to other types of legal services.

As a member of the Administrative Council and the Administrative Council Plus, Schur is involved in the formulation and implementation of the strategic plans for the PSC and has been involved in the formulation, determination and implementation of the PSC's policies. As part of his duties as Chief Counsel, Schur is also responsible for reviewing potential policies, including regulatory policies, for any legal concerns. Schur's review may be sought by a division at the early stage in developing policy or at the later stage when the division submits the policy to the PSC for final approval.

Schur spends from two to four hours per week in meetings for the Administrative Council, two to three hours per week in preparation for those meetings, and approximately an additional 20 hours, up to a maximum of 40 hours, per month in related activities which range from meetings, developing flow charts on various processes, etc. Schur is also a member of the Administrative Council Plus, which convenes when there is an issue that requires broader input. Schur is also on

the legislative committee which tracks legislative activities relating to the PSC and utility issues, a member of the employe appraisal group that developed alternative methods of employe appraisal, the legal group consisting of the attorneys in the agency, the work group that coordinates federal intervention activities, the steering committee for a the project looking at improving ways of getting customer information for the agency, and the case planning team in the Gas, Water and Federal Intervention Division, which tracks cases and assigns resources to them. Some of those groups include represented employes. When it existed, Schur was at one time the chair of the steering committee for quality management.

8. Robert Mussallem is the Division Chief Counsel of the Gas, Water & Federal Intervention (GWFI) Division, and he has held that position since the PSC was reorganized in 1990. Prior to that time, he was an Assistant Chief Counsel in the Office of the Chief Counsel. As an Assistant Chief Counsel in the Office of Chief Counsel, Mussallem was classified as an Attorney 14 and had been in the bargaining unit represented by Petitioner. After the reorganization, Mussallem was classified as an Attorney 14 - Management. Mussallem reports to the Administrator of the GWFI Division, Robert Cullen. In the GWFI Division there are also assistant administrators for gas policy, water policy, and for process, an attorney, auditors, engineers, planning analysts, program assistants, rate analysts and word processors.

Prior to the reorganization of the PSC in October of 1990, Mussallem had represented the Commission in State court for the purpose of judicial review of cases under Chapter 227, Stats. Since the reorganization, another attorney, Steve Levine, has represented the Commission in State court. Since the reorganization and at time of hearing, Mussallem had represented the Commission before a State Court of Appeals in one case and in federal court. Since reorganization, Mussallem has also represented the Commission before federal agencies in approximately a dozen cases, with his level of involvement varying depending on the particular case. In representing the Commission before federal agencies, Mussallem is responsible for filing pleadings and comments, representing the Commission at the hearing, writing briefs and analyzing the results for appeal purposes. Mussallem spends approximately 35 percent of his work time since the reorganization representing the Commission before federal agencies, a very small percentage of his time representing the Commission on judicial review in State court and approximately five percent of his time representing the Commission in appeal cases in federal court. On numerous occasions since the reorganization, Mussallem has represented the staff in proceedings before the Commission. In those cases, Mussallem represents the staff's position or recommendation on a matter that is being opposed by others and on which the Commission has not determined whether or not to adopt the staff's recommendation. Since the reorganization, Mussallem has been, or is, involved in approximately a dozen such cases. Mussallem is responsible for such cases in the gas area, and Levine is assigned as the attorney in such cases in the water area, although in a small number of cases, Levine may appear in the gas area and Mussallem may appear in the water area. Mussallem spends 35 percent of his time representing the staff in such cases before the Commission. Taken together, Mussallem's spends approximately 70 percent of his time representing the Commission before federal regulatory agencies and representing the staff in contested case hearings before the

Commission. Since the reorganization, Mussallem is involved less in handling court matters and is doing more Commission work. Whereas previously he would handle cases in a variety of areas, e.g., electric, telephone, personnel, after the reorganization his work is for the most part limited to the areas within the GWFI Division. Due to a reassignment of certain duties, Mussallem is doing approximately the same amount of legal work after the reorganization as he was performing prior to it.

The job description for the position of Division Chief Counsel of the GWFI Division dated August 31, 1990, allocates 30 percent of the incumbent's time to administration, management and supervisory functions in the Division, 50 percent to representing the PSC in litigation before State and federal courts and State and federal agencies in areas related to the GWFI Division and representing staff in Commission proceedings, 19 percent to providing legal advice to the PSC, individual commissioners and staff on the application of regulatory statutes and rules to Commission policies, powers, duties and procedures and legal matters outside of litigation, and one percent to maintaining proficiency in his professional area and regulatory areas and to continuing to develop an understanding of quality management principles and techniques.

Levine reports to the Division Administrator, Cullen, and is not supervised by Mussallem. Work assignments are generally worked out between Mussallem, Levine and Cullen. Mussallem does not receive a supervisory add-on. Prior to the reorganization, Mussallem had represented the PSC in two cases before the Personnel Commission, one being a reclassification case and the other involving discrimination based on nationality. He also represented the PSC in an employment termination case. Such representation is now performed by Schur. Mussallem has not represented the PSC in grievance arbitration and he is not included in the steps of the grievance procedure. Mussallem's opinion on what management's position should be in bargaining has not been solicited by DER.

After the reorganization, there was an instance where a represented employe was denied a reclassification based on the employe's job performance, and that matter is being appealed to the Personnel Commission. Mussallem was involved in the discussions with the Division Administrator and Assistant Administrator regarding whether to implement a comprehensive improvement plan for the employe. Disciplinary matters are discussed between the Division Administrator, the Assistant Administrator, and Mussallem as the Division Chief Counsel. Mussallem provides input as to personnel law, the appropriate discipline, and any applicable collective bargaining agreement. Mussallem had such involvement in personnel matters prior to the reorganization as well. Approximately five percent of the 70 percent of Mussallem's time spent on legal work involves giving legal advice as to such personnel matters.

Mussallem is a member of the GWFI Division's CMT, which consists of the Division Administrator, the Assistant Administrators in the Division, the Division Chief Counsel, and the Lead Program Assistant. The CMT meets weekly for approximately an hour and a half to address the operation of the Division. In addition, it will meet to discuss such matters as developing a

strategic plan for the Division, consistent with the strategic plan for the Commission. In its regular meetings, the CMT addresses such issues as allocation of training resources, allocating computers based on priorities, developing the division budget, and determining staffing levels. As part of the reorganization, the Bureau Director positions in the Division were eliminated and their duties and responsibilities were assumed by the CMT.

The CMT is delegated responsibility for managing the Division and its resources and formulates, determines and implements the regulatory policy for its Division, consistent with overall agency policy. The CMT operates on a consensus basis, although the GWFI Division Administrator has the authority to override the Team's decision, but as of the date of the hearing, had not done so.

With regard to budget considerations, the CMT develops the travel budget and the regulatory budget based on the regulatory activities of the GWFI Division. With respect to policy decisions, Mussallem's input with regard to policy was limited to legal advice prior to the reorganization, whereas, after the reorganization, as a member of the CMT, Mussallem also expresses his opinion on the policy itself, and participates in the consensus decision-making.

Other than Mussallem, the members of the CMT in the GWFI Division have employees under them who report directly to them. The CMT for the Division sets priorities on work assignments of employees in the Division to various work activities, develops priorities for the Division for consideration by the Commission, and allocates resources among Division employees. Prior to the reorganization, Mussallem would work on case teams with engineers, accountants, rate analysts and financial specialists in planning and presenting the evidence in contested cases before the Commission. As the attorney, Mussallem coordinated their activities, but did not have authority to supervise or direct the employees. Subsequent to the reorganization, as a member of the CMT, Mussallem has the authority to assign work to an individual and direct them to do it on behalf of Division management.

The CMT discusses the work of various employees and where they can be more effectively utilized if they are not working well in their current position. The CMT does not discuss disciplinary matters, but on a number of occasions members of the CMT have discussed problems that were occurring with a particular employee to make sure that employee understood what the assignments were and whose responsibility it was to carry out those assignments within a particular time frame. Mussallem was part of those discussions and such a meeting would not take place in his absence. Mussallem's input in such discussions is more of a practical nature, than giving legal advice. In the one instance, the CMT members who discussed the employee problem were the Division Administrator, the employee's supervisor and Mussallem. Mussallem does not evaluate other employees on a formal basis, and on rare occasions has been asked to review evaluations where there is a problem with the employee. Mussallem does not possess the authority to impose discipline on his own. However, if an employee were insubordinate to Mussallem as a member of the CMT, the result would be disciplinary action for that employee. Prior to the reorganization, if

another employe on the team working on a case did not perform their work, or were insubordinate, Mussallem's only recourse was to go to that employe's supervisor and ask that person to direct the employe to do his/her work. There have not been any written reprimands, suspensions or terminations of GWFI Division employes since the reorganization. Mussallem is not involved in developing agency work rules; however, on a division level, the GWFI Division CMT has dealt with such issues as how a snow day would be handled.

9. Barbara James is the Division Chief Counsel for the Electric Division in the PSC and has held that position since the reorganization of the PSC in 1990. Prior to being the Division Chief Counsel, James was an Assistant Chief Counsel, classified as an Attorney 14, for the PSC for approximately 14 years. Prior to the reorganization of the PSC, James reported to Schur and was in the bargaining unit represented by the Petitioner. After the reorganization, James is classified as an Attorney 14-Management and reports to the Division Administrator of the Electric Division. James does not directly supervise any employes in the Division and does not receive a supervisory add-on.

Prior to the reorganization, James spent all of her work time representing the PSC in court and before administrative agencies, advising the PSC on litigation strategies, doing the necessary research and preparatory work for litigation and coordinating such activities, as well as providing legal advice to the Commission and staff regarding the application of regulatory statutes and rules and otherwise doing legal research and providing legal advice. James now has approximately half the caseload involving representing the PSC before State courts and federal agencies and representing the staff before the Commission that she did prior to the reorganization. Prior to the reorganization, James did all of the major rate cases for the PSC and now only does two out of the six. Prior to the reorganization, James did all of the electric construction cases, and at time of hearing had only one such case open. James spends 10-12 percent of her total work time representing the PSC before State courts and State and federal agencies. The other attorney in the Electric Division, Ludwig, now works only in the Electric Division and has picked up many of the court cases in that area and Levine also does some of the court litigation for the Division. Ludwig is a member of the bargaining unit represented by the Petitioner. Ludwig's duties and responsibilities are for the most part limited to representing the PSC in litigation of electric utility matters and providing legal advice to the PSC and its staff.

Following the reorganization, James' assigned duties have included her participation on the Electric Division's CMT. James is also responsible for coordinating the representation of the Commission in court or administrative agency proceedings involving the electric industry, and also works with members of other division management teams and the PSC General Counsel. The amount of time spent on coordinating cases has decreased due to the reorganization with interdisciplinary teams assigned along industry lines. An additional duty after the reorganization is James' role in the quality management style of managing the Division. James spends 60 percent of her total work time, as opposed to the 30 percent allocated in the 1990 position description for Electric Division Chief Counsel, on such duties as part of the Electric Division's CMT and on

duties related to total quality management in the Division. James spends approximately one-third of that time participating in the formulation of management policies related to the running of the Division, and two-thirds of that time participating in formulating electric industry regulatory policy.

James is also involved with the Wisconsin Advanced Plan, a requirement under Sec. 196.49(1), Stats., that all the electric utilities in the state plan their generation and transmission additions for the next 20 years, which also involves the PSC determining major policy directions. James is involved both as a member of the CMT for the Electric Division, which developed the policy the Division presented to the PSC, and as the lawyer in the case as well. James and Ludwig appeared as attorneys of record in the case, James being the lead attorney. Since it was filed in March of 1991, James has spent approximately 50 percent of her total work time on the Advanced Plan, which includes both her legal work as an attorney and her involvement as a member of the CMT, with more of her time being spent in the area of developing policy and allocating personnel resources of the Division toward that end than on the legal aspects of that matter.

The Electric Division CMT consists of the Division Administrator, the Assistant Administrator for Policy, the Assistant Administrator for Process and the Division Chief Counsel. Decisions are made by consensus, and there are times when the decision of the CMT differs from the Division Administrator's initial point of view. The Division Administrator, Sprenger, retains the authority to decide whether a matter is to be decided by herself or by the Division's CMT, however, since the reorganization and up to the time of hearing, Sprenger had only exercised that authority on one occasion. The CMT meets approximately two hours per week on a regular basis and on an informal basis may meet as often as twice a day. The duration of the daily meetings varies based on the matter that needs to be addressed. Prior to the reorganization, James' input into policy decision was limited to her ability to persuade administrators to her point of view. James now has an equal voice in policy development with the other members of the CMT, other than the Division Administrator.

Public policy issues with which the Electric Division's CMT has dealt, or will deal, are whether electricity that will be generated in Wisconsin will be by equipment owned by utilities or equipment owned by third-party non-utilities, whether the Wisconsin Transmission System will be available for third-party transmission or for transmission across the state by out-of-state utilities, the appropriate balance between the electric needs of the public and maintaining a quality environment, whether utilities in Wisconsin are going to depend more or less on efficiency measures rather than production. Other policy issues in which the CMT, including James, is involved are setting the rates for consumers' electrical utilities in the state of Wisconsin and related policy issues such as whether all of the power generated in Wisconsin by new plants is to be done by utility-owned plants or whether it will include plants owned by third parties, such as major corporations in the state. The CMT for the Electric Division will decide upon the policy recommendations it makes to the Commission, which then has the final decision-making authority.

In personnel matters, the CMT for the Electric Division has dealt with problems of

workload distribution and in one instance, with an individual employe who was not doing his/her share of the work. In that latter situation, the CMT developed a strategy for dealing with the problem and the Assistant Administrator, who was the direct supervisor of that employe, then implemented that strategy. The CMT also deals with reclassifications, EPA's, the evaluation process of Division employes and hiring within the division. The CMT allocates work and determines priorities and has discussed the goals and objectives for individual employes in the Division, which included whether an individual employe would require or would receive specialized training in a particular area, or whether the individual would be moved into a new area. The evaluations of employes are done on a pass/fail basis, with the assumption that all employes are passing, and if there is a question as to whether an employe might be failing, that matter is brought to the CMT so that a strategy for dealing with the problem can be developed. It is the responsibility of an employe's supervisor to make sure that the employe is working towards the designated goal or objective for that individual. With regard to reclassifications, there have been at least three instances where requests for reclassification have been brought before the CMT in the Electric Division. James participated in all three of those discussions, and in one instance was the individual who initiated the request to reclassify an individual employe. In that instance, the CMT agreed with James and the employe was ultimately reclassified. With regard to EPA's, the CMT reviewed the employes who were eligible for such awards under the pay plan; that is, non-bargaining unit employes. James participated in all of those discussions and the review. There were approximately ten such employes reviewed and the CMT evaluated the different contributions of the various employes, and divided the available monies amongst those they determined would receive such performance awards. The CMT also allocates the training monies available to the Division, and James participates in those discussions and decisions. As a member of the CMT, James receives status reports on the negotiations between the State and the unions representing the various bargaining units involving agency employes, but is not directly involved, nor consulted regarding those negotiations. Members of the CMT are assigned to various work groups based on their personal expertise and experience as it relates to the functions of those work groups.

James is also a member of the Administrative Council Plus, but such meetings of that body have taken up a minimal amount of her work time. James does not directly supervise any individual employes in the Division, although as Division Chief Counsel, she does allocate the legal workload in the Division between herself and Ludwig. On a number of occasions, James has been placed in charge of the Electric Division by the Division Administrator when the latter was going to be absent.

10. Natalie Smith-Crosetto is the Division Chief Counsel for the Telecommunications Division of the PSC and is classified as an Attorney 14 - Management. She reports directly to the Division Administrator. Crosetto receives a supervisory add-on to her base salary, and has one Division Attorney (Varda) and one Rate Analyst (Klaila) who report to her. Crosetto has been with the PSC since 1984 and since that time has worked exclusively in the telecommunications area. Prior to the reorganization of the PSC in October of 1990, Crosetto was an Assistant Chief Counsel in the Office of Chief Counsel and classified as an Attorney 14 and was in the bargaining unit

represented by the Petitioner.

By memorandum of October 23, 1992, to the staff of the Telecommunications Division, the Division CMT advised the employees of changes in the supervisory assignments, and indicated that as of January 1, 1993, Crosetto (then Smith) would be responsible for supervising Mike Varda and Dennis Klaila. The memorandum also noted that the supervisor will be responsible for signing their employees' time sheets and drafting their performance appraisals as well as coordinating other personnel actions, such as job description revisions, reclassifications, etc. Prior to January, 1993, Crosetto was not assigned to directly supervise any employees. Crosetto's position description was redrafted by then-Division Administrator Susan Stratton, and reviewed and signed by Crosetto on January 29, 1993. Said position description included the "supervisory analysis form" and added the supervisory responsibilities to her former position description. Before making the change in Crosetto's duties, the recommendation of the Division's CMT was taken to the Administrative Council for approval, which approval was received.

Crosetto's supervisory analysis form allocates five percent of her work time to supervisory functions, such as hiring, termination, disciplining and evaluating employees and settling grievances; 30 percent of her work time to activities relating to her supervisory responsibilities, such as establishing operating procedures, reviewing the work of subordinates, counseling subordinates on performance, training and related administrative duties; 40 percent of her work time to work activities similar to those of the employees she supervises; and 25 percent of her work time to performing non-supervisory work activities that are different from those of the employees supervised. That form also indicates that Crosetto possesses and regularly exercises the authority to change the work assignments of the employees she supervises, that Crosetto independently interviews applicants and effectively recommends hiring, effectively recommends formal discipline, up to and including discharge, to the next higher level in the chain of command, prepares formal performance evaluations and signs as the first-line supervisor and discusses evaluations with employees, has the authority to settle informal complaints and is a formal step in the employee grievance procedure.

Crosetto's January 1993 position description allocates 30 percent of her work time to duties related to the coordination and management of overall Division programs and operation of telecommunications utility regulation, (not indicated in the 1990 post-reorganization position description) which includes some of her participation on the Division's CMT; 25 percent of her work time to participation on the Division's CMT in developing and implementing strategic plans for the Division's activities on both a short term and long-term basis (as opposed to the 30 percent in the prior position description); 25 percent of her work time on representing the PSC in litigation of telecommunications utility matters before State and federal courts and agencies and the representation of staff in Commission proceedings (as opposed to the 50 percent allocated in the prior position description); five percent of her work time on the supervision of staff (not indicated in the prior description); 10 percent of her work time providing legal advice to the Commission and staff (as opposed to 19 percent in the prior description); and five percent of her work time on

maintaining professional and regulatory proficiency and developing an understanding of quality management principles and techniques (as opposed to the one percent in the prior description).

Prior to the reorganization of the PSC, Crosetto had been involved in interviewing applicants for vacancies in the Examining Division and the then-Engineering Division, along with a representative from the respective division. There have been at least two vacancies filled in the Telecommunications Division during the two two-and-one-half years prior to hearing, and Crosetto had not been involved in interviewing the applicants. However, as a member of the Division's CMT, Crosetto did discuss the results of the interviews and participated in the CMT's consensus decision on who to hire. At the time of hearing (May, 1993), Crosetto was in the process of arranging interviews for a summer intern position with the agency. Crosetto will be conducting the interview along with a Rate Analyst who is a member of a represented bargaining unit. Crosetto and the Rate Analyst will discuss the applicants and attempt to come to agreement on who should be hired. If there is a disagreement in that regard, Crosetto will make the decision as to who should be recommended for hiring. The CMT for the Telecommunications Division will then make the hiring decision for that summer intern position. Crosetto has not counseled any employees regarding unsatisfactory performance or behavior, has not had occasion to discuss discipline problems with higher-level supervisory management personnel, and has neither recommended nor independently given verbal or written reprimands or recommended any formal discipline of employees. Subsequent to January of 1993, Crosetto has prepared one formal performance evaluation as a supervisor, and has counseled employees regarding daily work performance. Crosetto was training Varda at the time of the hearing and met with him weekly to discuss his performance. There had been no instances of discipline in the Telecommunications Division since the reorganization. At the time of hearing, Crosetto had not had occasion to serve as a first step in the grievance procedure, but she has been advised that would be her role.

The Division's CMT meets once a week for approximately two hours as a team, while individual members of the team may meet informally for approximately one hour on a daily basis. Crosetto also meets with various employees in her Division to render advice or aid them in drafting a document, and is assigned to a number of work groups, such as the Intervenor Compensation Committee. That committee meets twice a month for an hour at a time and is chaired by a Hearing Examiner who is a member of the bargaining unit represented by Petitioner. Other members of that committee are also represented employees. Crosetto is also on the Strategic Planning Team, which at one point was meeting once every two weeks, but at the time of hearing had not met for approximately seven months. Crosetto is also on a Files Work Team that meets approximately once a month for about an hour at a time and includes support staff, an accountant, a rate analyst and an assistant administrator. Crosetto is on the Legal Staff Team which meets once a month for an hour and a half. Crosetto is also on the Administrative Council Plus.

Since January of 1992, Crosetto had been the attorney of record for the Division in two hearings, the Intra-LATA Competition, and the Access Charges case before the PSC. Crosetto was at the time of hearing beginning preparations for the Wisconsin Bell case as the attorney of record.

Crosetto will identify individual staff who will be responsible for particular kinds of issues and will analyze which issues are to be raised and in what order. Varda will be responsible for a portion of the case as well. Crosetto has delegated the responsibility for many of the hearings in other cases to Varda as she now has less time available for those functions.

11. The Department of Employee Trust Funds of the state of Wisconsin is responsible for administering that portion of the Wisconsin Retirement System that pertains to fringe benefits for State employees, as well as employees of participating local governments in the State, and has approximately 160 employees. The Chief Counsel for the Department of Employee Trust Funds (ETF) is Robert Weber, who has held that position since January of 1990 and is classified as an Attorney 14 - Management. Weber's predecessor in the position had been classified as an Attorney 13. Weber does not receive a supervisory add-on. The position of Chief Counsel is part of the Office of the Secretary and Weber reports directly to the Secretary and the Deputy Secretary. Weber is evaluated by the Deputy Secretary and the evaluation is reviewed by the Secretary.

In addition to the Office of the Secretary, within ETF there are three divisions and two offices: Division of Benefit Plan Operations, Division of Information Technology, and Division of Program Development and Evaluation, and the offices of Staff Services and Internal Audit, which answer directly to the Secretary of ETF. The three divisions are each headed by a Division Administrator. Within those divisions are separate bureaus which are each headed by a Bureau Chief or a Director. At the time of hearing (May of 1993), in addition to Weber there was another attorney employed in the Office of Chief Counsel at ETF, Jacqueline Eisenbrandt, a project employee whose position was proposed to be made permanent in the Governor's then-proposed budget, which at that time had not yet been approved. Eisenbrandt had held that position for approximately one year at the time of hearing and reports to Weber. Weber assigns Eisenbrandt work, supervises her performance, writes her evaluations, approves training requests, leave requests and expenses for that employee. The other employee in the office, Jane Richards, the Appeal Coordinator, is part of the Administrative Services Division and is not under Weber's direct supervision, however, he has some input in that individual's performance evaluation.

Weber is responsible for preparing budgetary information having to do with the legal services aspects of the budget, which includes Weber's position, capital expenditures and new requests, advice on additional monies to be requested for outside legal counsel and DOJ representation, the request to make the project Assistant Legal Counsel position into a permanent full-time position, a request for two support staff, a legal secretary and a clerical position, and an explanation of what their duties would be and the workload that justified the requests. Weber made those explanations to the Deputy Secretary of ETF and to the then-Administrator of the Division of Program Development and Evaluation, who then prepared an overall budget.

As Chief Counsel, Weber provides legal counsel to the Department, to the Secretary of the Department, the staff of the Department and the attached boards. The latter group includes the Employee Trust Fund Board, the Group Insurance Board (which includes the Secretary of DER and

the Executive Director of the Wisconsin State Employees Union), the Wisconsin Retirement Board, the Teacher Retirement Board and the Deferred Compensation Board. In addition to providing legal counsel, Weber also serves as an advocate for the Department in proceedings before the attached boards defending against appeals of Department decisions or direct appeals of employer decisions as to who are participants in the Retirement System. Weber also serves as a liaison between the Department or attached boards and outside counsel. In proceedings before the courts, the Department is represented by the Attorney General's Office. In addition to Weber, Eisenbrandt also provides legal representation of the Department before administrative agencies. In litigation in court relating to the Retirement System, the Department generally utilizes the services of an Assistant Attorney General who is familiar with the Retirement System and who is a member of the bargaining unit represented by Petitioner. When ETF makes a request to the Department of Justice for assistance in a case, it makes a written request to the supervisor of the civil program, explaining the nature of the case and asking that an attorney be provided. At the time of hearing, there were approximately six to eight cases pending in litigation before a court. In those cases where the ETF or one of the attached boards is directly a party, none of the attorneys at the DOJ represent ETF, as they indicated that they felt there was a conflict of interest and were unable to provide representation. In approximately three cases where ETF has an indirect interest, it is being represented by attorneys from the DOJ. At the time of hearing, there were approximately 160 individual cases pending before administrative agencies in which either Weber or Eisenbrandt were representing ETF.

At the time of hearing, the ETF board, as well as the Secretary of ETF, were defendants in two major lawsuits, one case being a consolidated case involving the State Engineers Association joined with a case involving the Wisconsin Retired Teachers Association, et. al., in which the Wisconsin Education Association Council intervened as a party plaintiff in both cases, and another case involving the Wisconsin Education Association Council and three named plaintiffs and the ETF board and the Secretary as party defendants. In both instances, the attorneys from the DOJ indicated that they had a conflict of interest on the basis that they were members of a bargaining unit and stood to be either benefitted or damaged by remedies that may be issued in that case. Membership or non-membership in a bargaining unit does not affect one's entitlement to benefits under the Wisconsin Retirement System. In both instances, special outside counsel has been retained and Weber acts as the liaison between the Department and outside counsel, providing information, responding to interrogatories from plaintiffs, and helping outside counsel keep the ETF Board and Secretary apprised of what is happening in the cases. Weber is officially designated as "of counsel" on behalf of defendants in those cases. In cases that may involve a conflict of interest for Weber in his current role, in that he is also a recipient of benefits under the WRS, he either would disqualify himself if the conflict was so severe, or would request that the parties involved be willing to waive the conflict of interest.

With regard to the Section 40.65, Stats., Duty Disability Program, Weber was the primary author of Chapter ETF 11, of the Wisconsin Administrative Code, which was approved, for the most part as written, by the Secretary of the Department and the five various boards affected by

those rules. Chapter ETF 11 pertains to the conduct of appeals, including appeals of protective occupation determinations by DER. The rules allow for the direct appeal of DER's determination by a state employe with regards to whether or not the employe's position is deemed a protective occupation for purposes of retirement and disability benefits. Weber has had discussions with DER regarding attempting to write administrative rules that would further define what constitutes a protective occupation participant. In addition to such determinations and appeals, there have been attempts by employe groups to have legislation passed making certain occupations "protective", as well as attempts by labor organizations representing employes to negotiate protective occupation status for those employes. With a recent change in the laws, appeals of determinations made by a local employer or by DER may now be made directly to the Employee Trust Fund Board. Weber serves as counsel to that Board hearing such appeals. The Department also has the authority to appeal any local employer's decision as to employe's protective status to the Employee Trust Funds Board. As counsel to the ETF, Weber also provides advice to non-State employers, as well as their employes, as to eligibility determinations under the ETF. With regard to a claim for protective occupation status, a local government employe who is dissatisfied with the employer's determination of the employment category would simply write a letter to the Department, which would refer it to the ETF Board, or directly to the Board indicating such dissatisfaction. Such a letter would be treated as a direct appeal to the Board and handled in that manner. With regard to State employes, the first step is for DER to make a determination as to protective occupation status. Once DER has made such a determination, and the employe is dissatisfied with that determination, it may be appealed directly to the ETF Board. The correspondence between the employe appealing his/her employe category and the Department of Employee Trust Funds is considered confidential.

During 1990 and 1991, Weber was spending approximately 50 to 60 percent of his work time, rather than the 25 percent allocated in his 1990 position description, representing the Department in administrative appeals. He spent approximately 15 to somewhat less than 20 percent of his work time in the 12 months prior to the hearing providing legal advice to the Secretary and the boards regarding the drafting, negotiation, interpretation and implementation of contracts and agreements with other agencies and private contractors and insurers, as opposed to the 20 percent allocated in his position description. During the six months prior to hearing, that percentage was somewhat higher. Weber spends approximately 25 percent of his time providing legal consultation to the Secretary and the Boards regarding the interpretation of statutory and case law, federal codes and administrative rules. Weber's position description includes in this category advising the Secretary and Boards in areas where statutory law and collective bargaining agreements conflict. At time of hearing, the time Weber spends providing legal representation for the Department in administrative hearings and supervising the Department's appeals processes to assure timely handling of appeals and providing necessary information to appellants was decreasing towards 25 percent, but in 1990 and 1991 it had consumed from 50 to 100 percent of his time. During budget time, Weber spends 10 to 12 percent of his work time developing legislation, administrative rules and proposed changes in the law. In non-budget years, that percentage varies from two to five percent of his work time. Weber spends 15 to 20 percent of his work time, as opposed to the 10 percent allocated in his position description, working on the administration of Sec. 40.65, Stats.,

Duty Disability Program. Weber spends approximately 10 percent of his time providing general legal consultation and liaison with other units of government on administrative procedures, personnel matters, and interpretations of law. Weber's time spent in the latter area is dependent upon outside factors, e.g., changes in the law, and may vary considerably. Weber's position description includes in this category advising the Secretary and Director of Staff Services on personnel matters and investigating complaints and appeals of Department personnel actions and representing the Department in litigation in that regard, and reviewing investigations of employee misconduct and recommending discipline.

In his role as General Counsel, Weber provides advice or information to parties who may represent either management or labor organizations regarding the propriety or impact of a bargaining proposal, as it relates to benefits provided through the ETF. Weber does not represent either side in giving such advice and has never been a member of a negotiating team for either management or labor in his capacity as General Counsel. With regard to inquiries from DER regarding possible proposals in negotiations or the impact of such proposals, Weber's advice would be limited to giving technical advice on the particular program, and how different proposals might affect adverse selection under the health care system, or lead to other costs in a different area. If a representative of one of the labor organizations made a similar inquiry, Weber's response would be essentially the same.

Weber's office provides representation for the Department in administrative hearings before the Worker's Compensation Division of DILHR, the Personnel Commission, and the Unemployment Compensation Division of DILHR. In addition to representing the Department directly in cases involving employees of the Department, Weber also represents the Department in those cases where State employees make allegations related to their fringe benefits, e.g., an allegation before the Personnel Commission that a benefit is discriminatory.

ETF has files on each of its participants, approximately 360,000 individuals, who are either active employees of one of the participating employers, annuitants of the retirement system, or who were formerly active participants of one of the active employers, and who still have rights to receive benefits from the Retirement System. There is an administrative rule interpreting Sec. 40.07(1), Stats., that sets forth the grounds for releasing information in a participant's file. The rule allows release of such information only in the following situations: upon written authorization of the participant, in response to a court order issued after finding that the information sought is relevant to the action pending before that court, as is necessary for the administration of the Department or upon request of a public official for use in the official duties of that person. Only the Secretary and the Secretary's designees are permitted to release information under circumstances that do not meet the letter of that rule. Other than the Secretary, the designees are the senior administrators, the heads of the five divisions and offices in the Department and Weber.

Weber has been involved in disciplinary matters, and is consulted both as to the appropriate disciplinary action to be taken and also performs investigations in cases where there are doubts

about the facts involved. Such involvement has required something less than five percent of Weber's work time in the three years he has been in the position. Sometime prior to the hearing, a representation election was held among certain State employes, including approximately 20 to 30 employes of the ETF, and the vote was for representation by the Wisconsin Professional Employees Council (WPEC), which is a labor organization affiliated with the Wisconsin Federation of Teachers. Petitioner is also affiliated with the Wisconsin Federation of Teachers. Weber expects to be involved in the disciplinary procedure and the grievance procedures involving those employes as well. Weber attends weekly meetings of the administrators each Monday. The meetings typically last an hour or more. In attendance at those meetings is the Secretary, the Deputy Secretary, the Administrators of the divisions, including the Director of Internal Audit and the Director of Staff Services, the Executive Assistant, who at the time was also serving as the Board Coordinator, and Weber.

12. The Office of the Commissioner of Securities is headed by the Commissioner, followed by the Deputy Commissioner, the Executive Counsel and the General Counsel and the Administrators of the Division of Administration Policy and Budget, Division of Legal Services, Division of Licensing and Regulation, and the Division of Securities and Franchise Investment Registration. There are thirty-one employes in the Office, including three staff attorneys in the Division of Legal Services who are in the bargaining unit represented by the Petitioner and the Chief Attorney and Administrator in that Division. Since 1988, Patricia Struck has held the position of Executive Counsel in the Office of Commissioner of Securities, and is classified as an Attorney 14 - Management. Struck reports directly to the Commissioner and Deputy Commissioner.

When the Commissioner is absent, the Deputy Commissioner is the first individual designated to act in his absence, and in the absence of the Deputy Commissioner, the Executive Counsel, Struck, is the next individual to be designated Acting Commissioner. On those days when both the Commissioner and Deputy Commissioner are out of the office, the Commissioner officially delegates the authority to perform any and all powers and functions exercisable by the Commissioner of Securities and at times that designee has been Struck or the General Counsel, Randall Schumann, or the Administrator of the Division of Administration, Policy and Budget, Stephanie Thorn. When so designated, that individual performs such functions as answering questions from the press, dealing with personnel concerns, dealing with other agencies that have concerns regarding the Office, disciplinary matters, signing enforcement orders, signing subpoenas, signing orders of refraction, and orders of revocation. At least since 1991, no one other than Struck, Schumann, and Thorn has been designated as Acting Commissioner. Struck had been so designated once each in 1991 and 1992 and three times in 1993 as of May 11, 1993. In 1989, Struck was designated by the then-Commissioner, to serve as the Acting Deputy Commissioner when his deputy resigned. Struck served in that capacity for several months. Struck is frequently approached by employes, either as a representative of the Commissioner or where an employe is not comfortable taking the matter to the Commissioner, with questions regarding workplace behavior, sexual harassment, harassment on the basis of sexual orientation, and other problems between

employees, with the expectation that she will either resolve the concern herself or take the matter to the Commissioner or Deputy Commissioner for resolution.

Struck attends the weekly staff meeting of all of the executive staff of the Office, which includes the Commissioner, Deputy Commissioner, General Counsel, Executive Counsel, and the Division Administrators from the four divisions, and the head of the Investment Education Support Function. Those meetings last from 15 minutes to one hour and a half, each Monday. Matters discussed at those meetings may include personnel matters such as hiring and discipline, policy issues and calendars. Discussions regarding policy include the direction the Office ought to be moving toward or away from, and the desired goals to be achieved. Struck's responsibilities include advising the Commissioner and Deputy Commissioner and other members of the Executive Section on those issues and providing input as sought. Struck is also on the team that makes recommendations as to the annual revision of the rules administered by the Office. That team includes the Commissioner, Deputy Commissioner, General Counsel, and the Executive Counsel, as well as the individual division administrator of the division that is seeking or recommending a new rule or change in the rules in that area.

Struck spends 35 percent of her time with functions involving litigation which may affect the regulatory functioning of the agency and which includes acting as a Hearing Officer; five percent of her time advising the Commissioner and Deputy Commissioner on all aspects of Chapter 552, Corporate Takeover Law, rather than the 25 percent allocated in her position description dated September, 1989; 20 percent of her work time on Chapter 553, Franchise Investment Law; 25 percent of her time assisting the General Counsel and staff attorneys in the Division of Legal Services; 10 to 15 percent of her work time, rather than the 5 percent allocated, in other duties such as assisting with special projects, assisting with enforcement-related matters, signing correspondence controls, responding to legislative and industry inquiries and providing legal guidance to staff; and 10 percent of her work time serving as the agency representative and liaison to public and private sector organizations involved in the securities industry. With regard to one of those organizations, the National Association of Securities Administrators, the Commissioner is on the board of directors of that organization and Struck acts as the central repository and analyst for documents that come in from that organization, which is made up of securities administrators from the 50 states and other applicable jurisdictions. Struck reviews the materials, which may be drafts of projects, proposed legislation, enforcements, etc. in the securities arena nationally and internationally. Struck notes those items of significance for the Commissioner's attention and also suggests a position to be taken on those issues. Some of those documents are confidential in nature in that they are not appropriately divulged to the public or press. Struck also provides verbal and written opinions relating to the Commissioner's, the Deputy Commissioner's and other staff members' relationships with the regulated industry and non-regulated industry, lobbyists, legislators and matters of outside employment. Such opinions are given only to the person asking for them and are not otherwise disseminated.

As part of her job duties, Struck is also a registered lobbyist for the Office of Commissioner

of Securities. In that capacity, she oversees the contacts with legislators to make sure that such contacts are made appropriately and that legislators are kept informed as to matters concerning their constituents or their committees. In addition to Struck, the Deputy Commissioner and the General Counsel are also registered lobbyists for the Office.

Struck also serves as the liaison to the Wisconsin Small Business Initiatives Committee and acts as a liaison between the agency staff and the Committee. Struck is also a member of the Committee of the North American Securities Administration's Franchise and Business Opportunities Committee which, at the time, was formulating a national policy related to disclosure of matters in the franchise area and enforcement areas of the states that regulate franchises.

13. Since 1972, Randall Schumann, has held the position of General Counsel in the Office of Commissioner of Securities. Schumann is classified as an Attorney 14 - Management and reports directly to the Commissioner and the Deputy Commissioner. Schumann spends approximately 40 percent of his work time serving as General Counsel to the Office, i.e., the Commissioner, Deputy Commissioner and other management staff; 30 percent of his time ensuring that statutes and administrative rules administered by the agency are sufficient and clear to meet the needs and goals of the Agency, making recommendations for changes and preparing drafts of changes; 25 percent of his time ensuring that all aspects of the Agency's positions on key financial market issues are coordinated and properly presented, including assessing the need for formulation of policy issues, determining which issues are of primary importance, and developing and recommending positions to the Commissioner for his/her review and making sure the policy is implemented; and approximately five percent of his work time doing other duties related to his office, including serving as Acting Commissioner as delegated.

Schumann is in charge of the Office's annual rule revision process, which involves developing amendments and revisions from each division of the Office, and also includes revisions coming from the regulated industry, attorneys and practitioners, and other securities registrants or licensees. Schumann acts as a clearinghouse and organizes the meetings at which the decisions will be made as to whether or not to proceed with a revision. The process usually involves several meetings over the course of two weeks in June each year, with the Commissioner, the Deputy Commissioner, the General Counsel and Executive Counsel meeting with the different administrators and discussing the proposed changes. During and following those meetings, decisions are made as to whether it is in the best interest of the Office and the investing public to make those revisions. The decisions made regarding rule revisions are made on a consensus basis by the Commissioner, Deputy Commissioner, General Counsel, Executive Counsel and the administrator from the division involved, although the Commissioner and Deputy Commissioner retain the authority to approve or veto any such changes.

Schumann is also a registered lobbyist, and together with the Executive Counsel, Struck, works on rule revisions, developing legislation that the Office wishes to have introduced, and meeting with the Commissioner, Deputy Commissioner and the appropriate division administrator

regarding that specific piece of legislation. Schumann and Struck draft the proposed legislation which is then given to the Legislative Reference Bureau to be used as a model to develop the legislation that will be introduced. Schumann and Struck then prepare for, and appear at, the hearings before the legislative standing committees, including preparing working papers and memoranda for each of the committee members discussing the policy and reasons behind the proposed legislation, and answering questions from other lobbyists, legislators and individuals in the industry affected. Schumann spends approximately 5 to 10 percent of his work time on lobbying efforts.

Over the approximately last 20 years, Schumann has at times been designated by the Commissioner to serve as the Acting Commissioner in the Commissioner's absence. The last time Schumann was so designated prior to hearing, was in April of 1993, and that was the only occasion since January of 1991. Since, and including 1991, the Commissioner has made that delegation eight times, with Schumann serving once, Thorn twice, and Struck five times.

In his years in the position of General Counsel, Schumann has appeared before the Personnel Commission on two occasions. One occasion involved a reclassification and the other involved issues of discrimination and retaliation under the Fair Employment Act with regard to a reallocation. Schumann was the attorney of record in one proceeding approximately three and a half years prior to hearing, and assisted a member of the Attorney General's office in another case approximately seven or eight years earlier that went before the Personnel Commission and was then appealed into circuit court. Schumann filed a brief and argued on the agency's behalf in that case. Schumann has not represented the agency before State agencies other than the Personnel Commission as relates to personnel matters. Schumann was involved in a grievance proceeding on behalf of the Office in late February or early March of 1993 that did not involve arbitration.

Schumann and the Administrator of the Division of Administration, Policy and Budget attend periodic meetings of personnel staff from the various State agencies at which new personnel decisions, policies and procedures are discussed. Such meetings are held approximately every two months.

The three staff attorneys in the Division of Legal Services are in the bargaining unit represented by Petitioner. There have been no grievances or other personnel issues that have arisen regarding those employees. The Office does not have a formalized procedure for dealing with personnel matters, and generally speaking, the Commissioner or Deputy Commissioner will discuss the matter with the General Counsel or Executive Counsel with regard to policy and legal implications and how to proceed. Schumann also attends the weekly administrative staff meetings each Monday.

14. The Department of Administration for the State of Wisconsin includes a Division of Hearings and Appeals. The Administrator of that division is David Schwarz, an Attorney 15 - Management, the Deputy Administrator is William Lundstrom, an Attorney 14 - Supervisor. The

Division has two units, i.e., the Corrections Unit, which holds hearings for the Department of Corrections and the General Government Unit which holds hearings for other departments and agencies of the State. The Corrections Unit also has an office in Milwaukee with a staff of four attorneys who function as Administrative Law Judges (ALJ's), a Legal Secretary and a Word Processor Operator II. Prior to December of 1991, the then-three attorneys in the Milwaukee office reported directly to Lundstrom and there was no supervisor immediately present at that location. In 1991, there was a reorganization which resulted in the creation of an Attorney 13 - Supervisor position for the Milwaukee office. On December 1, 1991, the position was filled by Wayne Wiedenhoef, who had been a staff attorney, classified as an Attorney 13, in that office. Wiedenhoef receives a supervisory add-on to his base compensation. The staff attorneys and support staff in the Milwaukee office report directly to Wiedenhoef, who in turn reports to Lundstrom.

Wiedenhoef spends approximately one-third of his time conducting administrative hearings and the attendant duties, approximately one-third of his time reviewing hearing testimony and preparing decisions, orders, and post-hearing documents, and approximately one-third of his time supervising the ALJ's and clerical support staff, and assisting in the coordination and management of the Division's operations in the Milwaukee office. Wiedenhoef's position description allocates 40 percent of his work time to conducting administrative hearings and related duties, 35 percent to reviewing testimony and preparing decisions, orders, etc., 20 percent to supervising the professional staff and clerical staff in the Milwaukee office, and five percent to assisting in the coordination and management of Division operations.

Of the approximately one-third of his time Wiedenhoef spends supervising the professional and support staff, and assisting in the coordination and management of the Division's operations in the Milwaukee office, Wiedenhoef spends approximately five to 10 percent of that time monitoring the decisions of the ALJ's to ensure the employment of proper procedures and application of appropriate laws. He also spends approximately 25 percent of that time answering questions or assisting the staff in resolution of complex factual or legal problems, and providing necessary guidance, and approximately five percent of that time training staff. Wiedenhoef holds staff meetings approximately two to three times per month for a half-hour to an hour at each time. In addition, there are all day staff meetings approximately once every other month in Madison. Wiedenhoef conducts the staff meetings held in Milwaukee, and conducts part of the staff meetings held in Madison.

Wiedenhoef spends approximately one hour per week assigning work to the staff attorneys in the Milwaukee office. Assignment is made to hearing locations rather than on a case basis. The Milwaukee office schedules hearings for Racine, Kenosha, Walworth, Waukesha, Ozaukee and Washington counties, while the Madison office schedules hearings in the remainder of the counties in the state. The Deputy Administrator in Madison may also assign the ALJ's in the Milwaukee office to hearing locations. Clerical staff then fill in the cases assigned to those hearing locations as the cases come in. Wiedenhoef prepares the performance evaluations for the three ALJ's and the

two support staff in the Milwaukee office. Prior to the reorganization, those performance evaluations were prepared by the Deputy Administrator.

With regard to discipline, Wiedenhoefl would make a recommendation to fire an employe where he thinks it appropriate, and would make that recommendation to the Division Administrator, who would have the final authority in the matter. In those circumstances, there would normally be an investigation made and Wiedenhoefl would be responsible for conducting a pre-disciplinary investigatory meeting which would include the employe and his/her bargaining unit representative. Wiedenhoefl has not disciplined any employes or recommended the discipline of any employes since taking the position in December of 1991, but has verbally discussed a problem regarding work rules with one of the ALJ's in the office.

In January of 1992, an additional attorney was hired as an ALJ in the Milwaukee office (Jeff Patzke). Wiedenhoefl participated in the interview of the applicants for that position, along with Margaret Beckwith, an ALJ in that office and a member of the bargaining unit represented by Petitioner, and Jane Hackbarth, a supervisor with the Department of Corrections, Probation and Parole Division, in its Milwaukee office. The three recommended two of the five candidates interviewed, and the final decision was made by the Administrator, Schwarz. The decision of the interviewers to recommend the two candidates was reached by consensus.

The two clerical employes employed in the Division's Milwaukee office are members of a bargaining unit represented by the Wisconsin State Employees Union. No grievances have arisen involving those employes since Wiedenhoefl has been in his position. Wiedenhoefl would be the first step in the grievance procedure for any grievance filed by those employes, or by the ALJ's in that office.

Wiedenhoefl spends approximately two-thirds of his time performing the duties performed by the ALJ's in his office. The principal function of Wiedenhoefl's position is to administer the Division's Milwaukee office and supervise the employes in that office.

15. The Ethics Board for the State of Wisconsin administers the lobbying law statutes and the Ethics Code for State officials as well as the Ethics Code for local government officials. The Ethics Board is responsible for the licensing, registration and reporting requirements the State's lobbying statutes impose on individuals and organizations lobbying in this State, and for administering the requirements that State officials file financial disclosure information on an annual basis and enforcing the standards of conduct imposed by those statutes, both on State officials and lobbyists and lobbying organizations. The major role of the Ethics Board with respect to enforcement of those laws is rendering opinions and advice to State officials, lobbyists and lobbying organizations as to their conduct. The Board responds to both telephonic and written requests for advice and both the requests and the responses are considered confidential by statute, and are not subject to the Open Records Law. Those formal opinions that are rendered are published on a yearly basis, after deleting identifying information, in order to serve as general

guidance and precedent. In addition, the Ethics Board investigates and prosecutes violations of the Ethics Code and State lobbying statutes. The Board has subpoena power and can bring an administrative proceeding for civil forfeiture heard by a hearing examiner, which by statute is required to be a retired judge, who then issues proposed findings of fact and conclusions, with the Board making the final decision. The Board also has the discretion to refer violations to a district attorney and only those cases where the Board believes there was an intentional violation of the law are so referred.

The Ethics Board has six board members and employs seven individuals. Immediately under the Ethics Board is the Executive Director; below the Executive Director is the Legal Counsel; the Program Operations Coordinator, who has three employes under her, and the Internal Operations Coordinator. Since mid-1990, Jonathan Becker has held the position of Legal Counsel with the Ethics Board and is classified as an Attorney 14 - Confidential.

Becker spends approximately 40 percent of his work time ensuring that all written and oral requests for advice and requests for information regarding the Ethics Code and lobbying law have been answered promptly and authoritatively. Becker spends approximately 15 percent of his time ensuring that the Board's legal interests are served and represented in connection with the Board's investigation and enforcement of standards of conduct for officials, lobbyists, and lobbying organizations. Becker spends approximately 25 percent of his time reviewing all forms, standards, and schedules to ensure that the Board's administration of its programs for financial disclosure by public officials, and licensing, registration, and reporting by lobbyists and lobbying organizations comports with statutory requirements. He spends approximately 10 percent of his work time ensuring that the Board is in compliance with State and federal rules related to the Board's operation, including personnel matters, accounting, purchasing, open records, open meetings, etc. Such duties are to include providing the Board and Executive Director confidential advice in the area of grievances, discipline appeals, evaluations, hiring, development of position descriptions, investigations into the conduct of key management officials in both State and local governments, screening resumes and applicants for employment at the Board, and making recommendations in that regard upon request of the Executive Director. Becker spends approximately five percent of his time ensuring that the Board's legal interests are served and represented in connection with the Board's and DER's promulgation and modification of administrative rules. In that regard, Becker reviews and proposes changes in the administrative rules governing the Board's operation, and the application of statutes it administers. Becker also advises the Administrator of the Division of Merit, Recruitment and Selection, DER, on the promulgation of a code of ethics for all State employes, pursuant to Sec. 19.45(11)A, Stats. He spends approximately five percent of his work time helping to develop and carry out the Board's program for educating and disseminating information to state and local officials, lobbyists and lobbying organizations regarding the requirements of the Ethics Code and lobbying law and Board programs.

With regard to requests for advice and information regarding the Ethics Code and lobbying laws, Becker reviews requests and makes a recommendation to the Executive Director as to

whether the opinion should be issued at the staff level or through a formal opinion of the Board. Approximately 90 percent of the time, Becker's recommendation is followed in that regard. Becker drafts the opinion at the staff level and also drafts the formal opinions for the Board to consider. Becker's draft is provided to the Board members ahead of time and is then discussed at the Board meeting in closed session with Becker present. Those opinions are essentially the Board's view of how the statutes and Ethics Code apply to specific situations.

In 1992, the Ethics Board received several requests for advice dealing with the application of the State lobby law's restriction on campaign contributions from organizations, including a request from a labor organization as to whether that labor organization's political action committee was subject to the lobby law restrictions when the organization itself was registered as a lobby principal, i.e., that it employed a lobbyist. The Board issued several opinions regarding the application of the lobby law to the political action committees of the lobbying organizations. The Board also issued an opinion regarding the scope of lobbyists' ability to perform volunteer functions for a campaign, and opined that the statute restricted a lobbyist's ability to render volunteer services. That opinion was the subject of a lawsuit brought by a state labor organization, the Wisconsin Education Association Council.

When the position of Legal Counsel was offered to Becker, it was with the understanding that he would resign as Chair of the Board of Directors of the Wisconsin Environmental Decade, a lobbying organization, and that he would resign any membership in a political party, and would no longer hold any political party affiliation, either in terms of party membership or activities in campaigns. The Petitioner does not employ a lobbyist; however, it is affiliated with the Wisconsin Federation of Teachers, a labor organization that is also a registered principal employing a registered lobbyist whose conduct as such is regulated by the statutes and rules administered by the Ethics Board. In instances where Becker has received a telephonic request for advice where he has known someone involved or has some connection with someone involved in the request, he has asked that the Executive Director return those phone calls. Becker has not, as of the date of the hearing, had occasion to formally recuse himself from any matter. Becker remains a member of the Wisconsin Environmental Decade, and is a County Board Supervisor in Dane County, an elected, non-partisan political office. Dane County is a registered lobbying organization, and is also affiliated with the Wisconsin Association of Counties, which is also a registered principal employing a registered lobbyist. In areas where there may be a conflict of interest, the Ethics Board would retain outside counsel. At times, Becker has formally sought the advice of Assistant Attorney Generals in the DOJ and at times the Ethics Board, through Becker, has requested a formal opinion from the Attorney General's office.

16. The Department of Development (DOD) of the State of Wisconsin is headed by the Secretary of that Department. The Department's General Counsel, Special Assistant, Deputy Secretary and Executive Assistant are located in the Office of the Secretary and report directly to the Secretary. In addition, the Department contains an Office of Finance, headed by a Director, five separate divisions, which are headed by Division Administrators, and within the divisions are

separate bureaus headed by Bureau Directors. There is a Bureau of Personnel and Employee Development within the Department's Division of Administrative Services.

The position of General Counsel is held by Dennis Fay. Fay is the first individual in that position and had held the position for approximately four years at the time of hearing (May, 1993). Fay is classified as an Attorney 14 - Management. At the time of hearing, Fay had been employed by the DOD for approximately fifteen years, and prior to holding the General Counsel position, Fay had been a Bureau Director of two different bureaus, the Section Chief of a section dealing with research in policy and legislative issues, and the Legislative Liaison for DOD.

Fay spends approximately 30 percent of his time providing legal advice on policy and administrative matters, including drafting and issuing formal and informal legal opinions to the Secretary and to the Department's administrators, assisting in the development, formulation and implementation of Department policies and procedures in areas such as statutory compliance, personnel management, and legislative proposals, conducting legal research, and providing oral legal opinions when a formal treatment is not necessary. Fay spends about one-third of his time providing overall guidance to the Department in the negotiation, preparation and administration of grant and loan contracts, development zone contracts, and procurement contracts, as opposed to the 20 percent allocated in his position description, dated January of 1990; approximately 15 percent of his time managing and coordinating Department rule-making functions, which include drafting all administrative rules, conducting public hearings on the rules, and representing the Department in the rule-making process before the Joint Committee for Review of Administrative Rules, standing legislative committees, and other interested legislators; five to 10 percent, rather than the 15 percent allocated in the position description, of his time acting as a hearing examiner in bond allocation hearings, acting as a fact finder for the Secretary in the investigation and disposition of complaints under the Department's internal employee grievance system, acting as a fact finder with regard to appeals to the Secretary by municipalities contesting decisions in the administration of the Development Zone Program and as a hearing examiner in other contested cases appealed to the Secretary; approximately five to 10 percent of his time providing assistance as the liaison with DOJ for litigation conducted on behalf of the Department, which includes reviewing requests for legal representation before forwarding them to the DOJ, consulting with DOJ attorneys as to the handling and status of Department litigation and coordinating the Department's approval of settlement agreements proposed by DOJ, assisting DOJ attorneys with regard to investigations, depositions, interrogatories, and replies, and the research and drafting of related papers; approximately five percent of his time representing the Department in legal actions and proceedings which, for the most part, is representing the Department in cases before the State Personnel Commission; and approximately 10 percent of his time assisting in the legislative, administrative, and program development activities, which includes drafting and reviewing proposed legislation affecting the Department and its clientele, advising the Secretary and administrators on the legal implications of legislative and administrative rule issues, identifying issues of concern to business as they relate to business relations with the State government, advocating with representatives of regulatory agencies to seek modification of rules, policies or actions, as appropriate to promoting economic

development in the State, and representing the Department at legislative and administrative hearings.

Fay's work in guiding the negotiation, preparation and administration of grant and loan contracts for the Department involves drafting of the loan contracts to businesses that are starting a new venture or expanding employment. The Department has approximately 200 such contracts a year. Fay has designed a model contract for use in the various loan programs, and the staff in the Department's Bureau of Finance will initially prepare the contracts and initiate negotiations with the companies and local governments or other recipients of such loans and grants, and Fay will then review the contracts and make whatever edits he deems necessary and also will negotiate with the businesses when necessary. In addition to his legal role in reviewing, editing and advising staff on the contracts, Fay also reviews the contents of the contracts to determine whether they meet program and policy goals of the Department and how well they meet the legislation that governs the program and the objectives that the Secretary's office has set down regarding how it wants to use those grant loan funds and the kind of results it wants to achieve. In regard to the latter, the size of the investments those companies are making, the kind of employment to be generated, the amount of employment to be generated, and the kinds of wages that are being paid are a part of that consideration. Fay's knowledge and familiarity with the Department's goals and its policy are due in large part to his years of experience and the previous positions he has held within the Department. Fay is given discretion in negotiating the contracts and will report back to the Secretary in those instances where he wants to make sure that he is attempting to achieve the result the Secretary desires. The tentative agreements reached in the negotiations on those contracts are submitted to the Secretary for approval, with Fay's recommendations in that regard being followed in excess of 90 percent of the time. In conducting administrative rule hearings and in drafting proposed administrative rules, Fay works with the people in the program where the rule will be administered, and advises on the substance and policy underlying the rule, as well as preparing the technical draft of the rule. Fay prepares drafts of recommended rules for the Secretary's review and his recommendations have always been approved.

The Secretary of the Department holds regular meetings of what is considered the management team, consisting of the Secretary, Deputy Secretary, Executive Assistant, the Division Administrators and the General Counsel. Those meetings are held on a monthly basis and last for approximately one to two hours. Fay meets frequently with the Secretary on an informal basis where the Secretary is seeking advice on different kinds of issues which may involve legal advice or policy and program advice from Fay.

With regard to personnel matters such as grievances or alleged discrimination, the employe's grievance or complaint typically goes to the employe's supervisor first and then to the Department's Personnel Office, or it will go directly to the Personnel Office, who then contacts Fay to discuss what procedures should be followed from there.

Most of the employes in DOD are non-represented, except for a small number of

professional employees who have become members of a bargaining unit represented by WEPEC and those employees in a bargaining unit represented by WSEU. Fay is not formally a step in the grievance procedures covering the Department's represented employees, and no such grievances have arisen while he has been in the General Counsel position.

In acting as a fact finder for the Secretary in investigating and disposing of complaints under the internal grievance system in the Department for non-represented employees, Fay advises management on how to investigate or deal with that grievance in the first instance. After such an investigation, Fay would advise management as to what type of resolution of the grievance ought to be sought and whether formal or informal action should be taken. There have been five such grievances in the four years Fay has held the General Counsel position. Fay estimates that approximately 90 percent of the time, his recommendations to the Secretary on personnel matters have been followed.

In representing the Department before the Personnel Commission, Fay has handled four cases in his four years in the General Counsel position, including handling a handicap discrimination case pending at the time of hearing. The pending case is the first such case in which Fay has appeared as the attorney of record for DOD. The other cases, two cases of alleged sex discrimination and one case of alleged age discrimination, were settled prior to going to hearing. If such cases end up in federal court, an Assistant Attorney General would represent the agency in that court litigation.

17. The Department of Administration (DOA) for the State is headed by the Secretary of that Department. Under the Secretary are the Deputy Secretary, the Executive Assistant, the Legal Counsel, and the Deputy Legal Counsel, in that rank order. Those positions are all contained within the Office of the Secretary. In addition, there are Program Assistants and Administrative Assistants within the Office. At time of hearing, there were approximately 850 employees in DOA.

At time of hearing, the Legal Counsel at DOA was Edward Main, classified as an Attorney 15 - Confidential. The individual in the position of Deputy Legal Counsel at DOA was Mark Saunders, classified as an Attorney 14 - Confidential. Saunders is the first individual in that position and has held the position since July, 1990. Main and Saunders are the only attorneys in the Office of Legal Counsel and in addition to them, there is also an Administrative Assistant and a Program Assistant employed in that office. Saunders reports directly to Main.

Saunders spends approximately 20 percent of his work time providing in-house legal counsel for the Secretary's Office and the divisions and bureaus within the Department. Those activities involve rendering legal advice and legal opinions to the Secretary and to Division Administrators or attached boards and commissions on questions arising in all areas of the Department activity, including areas of personnel, legislation, public records, state ethics code, property, purchasing, low income housing, finance, budgeting, contracts, bonding, etc., and also include advising and assisting management and the Personnel Director in connection with disciplinary actions and grievances. Saunders spends approximately 30 to 40 percent of his work

time representing the Department in hearings and proceedings including representing the Department before the Personnel Commission, the Equal Employment Opportunities Commission, DILHR and other administrative agencies, as well as negotiating and drafting settlement agreements and consulting with, and advising, DOA's Personnel Director as to collective bargaining agreements, rules and policies, employe discipline and the handling of grievances. Saunders spends approximately 20 percent of his time rendering contractual interpretations, or assisting others in that regard, as it relates to construction contracts, contracts for services, and contracts for grants. Saunders spends less than five percent of his work time drafting proposed legislation or reviewing pending legislation for the Governor's office; approximately 10 to 12 percent of his work time providing legal services relating to the issuance of state revenue bonds, and the operation of the Clean Water Revolving Loan Fund; and somewhat less than 15 percent of his work time providing legal services relating to issuance of bonds within the Clean Water Revolving Loan Fund. Saunders spends somewhat less than five percent of his work time on work related to the promulgating of administrative rules for the Department or its attached boards and commissions.

The most recent job description for the position of Deputy Legal Counsel, dated April, 1993, was initially prepared by Hable, the Administrative Assistant in the Legal Department, and Main, with input from Saunders. With regard to that section of the job description setting forth the duties of Deputy Legal Counsel which refers to advising and assisting management and district attorneys in connection with all stages of discipline in all disciplinary actions and grievances concerning assistant district attorneys, Saunders' responsibility in that area is now limited to the extent that DOA is involved. Prior to the assistant district attorneys in the State becoming organized in their own State bargaining unit, Main and Saunders advised district attorneys in the various counties as to disciplinary matters involving their assistant district attorneys. Subsequent to the assistant district attorneys organizing and becoming represented employes, DER, and not DOA, is involved in handling disciplinary matters regarding those employes and in the year prior to hearing (May, 1993) Saunders had only been consulted once in that regard.

Saunders' responsibility for representing DOA regarding personnel-related actions has increased in the two years prior to hearing, as he has taken over primary responsibility for those duties from Main. Goal "B" of Saunders' position description -- representing DOA in hearings and providing advice on personnel matters - was increased from 20 percent of his time in his prior 1990 description to 40 percent in his current (April, 1993) description, and additional personnel-related duties were added in that area as well. In the year prior to hearing, he has been consulted approximately two dozen times with regard to discipline involving work rule violations. Saunders is consulted on all discipline or potential discipline and oral reprimands. While he was more actively involved in two instances involving probationary employes, Saunders is most often consulted with regard to the manner of the investigation of work rule infractions, rather than actually conducting the investigation himself. Since being in his position, Saunders has only been consulted once with regard to the collective bargaining agreement between the State and the assistant district attorneys, and has not been consulted with regard to the collective bargaining agreement between the State and Petitioner. Saunders has advised the Director of the Personnel

Bureau for the Department on approximately six occasions with regard to the collective bargaining agreement between the State and Wisconsin State Employees Union (WSEU) within the one year prior to hearing. Approximately a year prior to hearing, Saunders had advised the Administrator of the Division of Hearing and Appeals with regard to the disciplining of a represented attorney employed in that division, which resulted in a written reprimand for that employee. Both Main and Saunders are responsible for advising Division Administrators on disciplinary matters that could lead to termination.

In the one year period prior to hearing, Saunders has been consulted by the Personnel Director and/or supervisors approximately once every two weeks regarding first and second-step grievances. Saunders will advise the Personnel Director or a Division Administrator approximately once a week on some type of personnel matter; such matters may be new or may include ongoing matters. Saunders spends approximately one hour per week in that regard. Up to the time of hearing, Saunders had not assisted the DER at an arbitration hearing, that duty having been handled by Main. In those instances where a represented employe brings an attorney to the third-step grievance procedure, either Main or Saunders will also attend that meeting, and most recently that has been Saunders. Since January of 1992, Saunders has been involved in two or three such meetings. Saunders is not a formal step in any of the grievance procedures covering DOA's represented employes.

Saunders only appears as counsel of record for the Department in litigation before administrative bodies. In those cases going to court, the Department is represented by Assistant Attorney Generals from DOJ. Saunders has appeared as attorney of record in cases brought to the EEOC, but he has not appeared for the Department at a hearing before that body. Some of the cases before the EEOC where Saunders has appeared as attorney of record include cases where he appears before the Personnel Commission and a cross-claim with the EEOC has also been filed. Saunders has represented DOA before the Personnel Commission in cases involving issues of appeals of denials of reclassification requests, discrimination complaints, retaliation, and in the case of a non-represented employe of the Department, on a disciplinary matter. Saunders first appeared as counsel of record for the Department before the Personnel Commission sometime in 1991. Saunders has been involved in representing the Department before the Personnel Commission approximately once a month on average. Some of the cases have been settled prior to hearing, and some have been dismissed in the middle of hearing, and since August of 1992 to date of hearing, Saunders had been involved in approximately 10 to 12 cases that have either gone to hearing and are pending decision, or that will go to hearing. Of the cases that are pending decision before the Personnel Commission, all but one involved appeals from reclassifications decisions of DOA's Personnel Director from within the time period when those decisions had been delegated to the Department from DER. The other pending case involved six complaints by an individual alleging discrimination and retaliation with regard to a reclassification request. In only two of the cases has the other party been represented by an attorney at the hearings. Saunders also represents the Department in unemployment compensation hearings and appeals, and is also responsible for advising the Bureau of Personnel in the Department regarding the propriety of a claim for

unemployment compensation. From January of 1992 to the date of hearing, Saunders has not represented DOA at any unemployment compensation hearings. Other attorneys in the Department normally would represent the Department in Worker's Compensation cases, but due to vacancies in those positions at the time of hearing, Main and Saunders had been representing the Department in those hearings and pre-hearing conferences until the vacancies were filled.

Saunders and Main also review requests for accommodation under the Americans With Disabilities Act (ADA), and advise Division Administrators as to the extent of accommodation that is required. Saunders gives advice to Division Administrators on a general basis in that area, and also on a case-by-case basis, and has provided advice with regard to accommodation questions arising under the ADA approximately a half-dozen times in the past year. In 1993, Saunders and the Department's Disabilities Rights Coordinator were assigned the responsibility for making certain that the Division Administrators conducted an evaluation of the programs they offer to the public as relates to accessibility and the other requirements of the ADA.

There is a weekly meeting of all of the Division Administrators with the Secretary, and either Saunders or Main appears at those meetings, depending on who is available. Those meetings last for approximately an hour, during which the Secretary is advised of the pressing issues of the week. There are also weekly status meetings with Division Administrators and the Deputy Secretary and the Executive Assistant, and both Main and Saunders also have status meetings with the Secretary to advise him of the pressing issues and how they might be resolved. Main and Saunders also often appear with the Division Administrators in those meetings if there is a project or case involving the Legal Department and that Administrator.

Main and Saunders, as well as Ruth Hable, an Administrative Assistant 4 - Confidential in the Legal Office, are designated as custodians of the records for the Department. All public record requests are routed to one of those three individuals. In the prior year, Petitioner made a number of public records requests to the Department, which Saunders was involved in reviewing.

On occasion, Main and Saunders are called upon to provide services for the Governor's Office. In that regard, Saunders has, in the past, represented the Department in the gaming negotiations with the various tribes of Native Americans in the State under the Indian Gaming Regulation Act, and was counsel to the Governor's Task Force on Gaming in late 1991.

DOA is responsible for the State's Risk Management Fund and when DOJ has an action they wish to settle, where the funds for such settlement will be taken from the Risk Management Fund and will exceed \$50,000, the attorney from DOJ will contact either the Risk Management Fund or Saunders or Main, who will review the proposed settlement and make a recommendation to the Secretary's office as to whether or not to sign off on the settlement. When State agencies are notified that they may be potentially held as responsible parties regarding hazardous waste sites, the agencies are required to notify the Legal Office, which in turn will notify DOJ. With regard to risk management, Saunders provides legal advice to the Department as to potential conflicts that may

arise where several State agencies may potentially be held responsible under State or federal environmental protection laws and with regard to identifying potential conflicts DOJ may have in representing the various agencies and possibly the Department of Natural Resources as the enforcing agency.

With regard to the 1993-1995 budget, the duties of rendering legal opinions and working with others on the annual Executive budget bill were divided between Saunders, Hable and Main, depending on who was available to answer questions and the subject involved. In the approximately nine months prior to hearing, Saunders had spent approximately 10 to 20 percent of his time on matters dealing with the budget bill. The amount of time Saunders spends on work in that area varies depending on the status of the budget bill, i.e., the work is at its peak during the time between introduction of the budget bill and when it is passed. Saunders' input varies from rendering opinions as to the constitutionality or appropriateness of language, as to conflicts with statutes, and at times, as to the potential fiscal impact.

18. The Wisconsin Board of Vocational, Technical and Adult Education is headed by the State Director (at time of hearing, Dwight York) followed by the Executive Assistant, Glenn Davison, Assistant State Directors Betty Brunelle and Edward Chin, and below them, the Bureau Directors of the various bureaus in the agency. There are approximately 90 employees in the agency, with approximately 30 to 35 of those employees being members of the Education bargaining unit. Patricia Collins has held the position of General Counsel at the agency since October of 1992 and is classified as an Attorney 14 - Confidential. Collins reports to Chin. Her position was originally attached to the Bureau of Policy Studies and Intergovernment Relations for organizational purposes. The Bureau Director in that bureau is Tom Fletemeyer. The former incumbent in what was then entitled the "Attorney" position was Edward Alschuer, who was classified as an Attorney 14 - Management. Alschuer had held the Attorney position for approximately 11 years and was reclassified from an Attorney 13 - Management to an Attorney 14 - Management, and was not in the bargaining unit represented by Petitioner.

After Alschuer left the agency, it attempted to fill the vacant position as an Attorney 14, but DER, whose approval is required, rejected the Attorney 14 classification due to the position's placement under a Bureau Director. The agency then placed the position under the Assistant State Director, Chin, and DER subsequently approved the position classification as Attorney 14 - Confidential. The duties and responsibilities listed on the job description for the Attorney 13 - Confidential position and the job description for the Attorney 14 - Confidential position are identical, with the exception that in the areas of analyzing complex policy issues, with special attention to legal issues, and representing the agency in administrative hearings and before legislative committees, those duties are as assigned by the Division Administrator under the Attorney 14 position description, as opposed to being assigned by a Bureau Director under the Attorney 13 position description.

From at least 1989 until his departure in 1992, Alschuer advised the agency's Personnel

Director, Keith Krinke, with regard to personnel matters and employment relations. Alschuer worked with Krinke in making sure that the layoff procedure in the collective bargaining agreement between the State and the Education bargaining unit was followed, and advised Krinke as to what he thought was required under the labor agreement. Alschuer also advised Krinke and worked with him in advising supervisors in two instances related to employe investigations. Alschuer was also the backup for Krinke as the agency's representative on the State's bargaining team for the Educational bargaining unit. In that capacity, Alschuer attended several negotiation sessions when Krinke was unavailable due to scheduling conflicts and at times also attended along with Krinke.

As the Personnel Director for the State's VTAE Board, Krinke is responsible for advising and assisting the State's VTAE districts in personnel and employment relations matters. Krinke works half-time for the VTAE Board and also is the State's Affirmative Action Officer and the enforcement officer for the Office of Civil Rights. Krinke is responsible for supervising and coordinating the personnel operations of the VTAE Board, including payroll, classification and compensation, collective bargaining matters and the full scope of personnel matters for that agency. Krinke is the agency's representative on the State's bargaining team in negotiations with the bargaining representative of the Education bargaining unit. That is the only State bargaining team upon which the agency has a representative. At time of hearing, Krinke had twenty-five years of service with the State, with three years in budget and the rest in the personnel or collective bargaining areas. Prior to taking the Personnel Director position with the agency in 1989, Krinke was the Director of Compensation in the Division of Classification and Compensation at DER, and previous to that, had spent twelve years in DER's Division of Collective Bargaining, during which period he had been the State's Chief Negotiator or assisted with the negotiations of collective bargaining agreements between the State and the bargaining representatives of its various bargaining units and had represented the State in approximately 50 to 75 grievance arbitrations.

Collins graduated from law school in August of 1992 and at time of hearing, Collins did not possess significant expertise or experience in collective bargaining, personnel matters or employment law.

Collins spends approximately 25 percent of her time analyzing complex policy issues, with special attention to legal issues, as assigned by either the Assistant State Director or by Bureau Directors. Collins spends approximately 10 percent of her time providing advice to the State Board, the State Director, the VTAE districts and the staff with regard to a variety of legal matters, which includes, or is to include, advising management and supervisory personnel and the Personnel Director with regard to bargaining issues, personnel transactions, and disciplinary actions, and serving as the backup for the Personnel Director in the bargaining with the Education bargaining unit's bargaining representative. Although the amount of time fluctuates, she spends on average 20 percent of her time directing the preparation of administrative rules and assisting in the preparation of proposed legislation. With regard to representing the agency in administrative hearings and appearing before legislative committees and conducting administrative hearings, an occasion had not yet arisen where Collins would represent the agency in an administrative hearing, and although

Collins attended two legislative committee hearings, she did not offer testimony, and at time of hearing, had not yet conducted any administrative hearings. At time of hearing, Collins had not yet researched legal questions affecting the Board or the VTAE system, and such work will take less than five percent of her work time. Collins has prepared written legal opinions for Bureau Directors, but has not, as of the date of hearing, prepared any written opinions for the State Board. Collins has spent approximately 15 percent of her time in the preparation of written opinions for the Bureau Directors. Those opinions have involved questions that arose in relation to the various VTAE districts. Collins had not had occasion to assist the Board in preparing the Board's position in judicial and administrative proceedings, nor had she yet had occasion to prepare pleadings or briefs, or to conduct discovery in actions involving the agency before administrative agencies. Collins has spent approximately five percent of her work time advising agency staff on the interpretation and application of federal and state law. At time of hearing, Collins had not yet had occasion to be involved in drafting complex legislative proposals, but anticipates doing so in the future. Collins had not yet had occasion to assist in the analysis of proposed legislation, nor to appear before any legislative committees concerning legislation or rules affecting the agency. Collins had not, as of date of hearing, conducted any administrative hearings on teacher certification, nor had occasion to act as agency liaison with the Attorney General's Office, other than to contact that agency to solicit advice on matters that are pending regarding the interpretation of statutes or to seek clarification.

Since beginning in her position, Collins has provided analyses of the Family Educational Rights and Privacy Act, provided legal assistance and advice regarding the Open Records Law, Open Meetings Law, and has reviewed contracts for the agency. With regard to contract review, Collins reviews the district facility construction contracts for compliance with competitive bidding requirements. Collins has provided advice regarding District board appointments, ethics law interpretations and parliamentary procedure issues.

Collins attends all of the Board's meetings to provide legal counsel to the Board at those meetings. The Board meets every other month, with the meetings running from approximately 10 a.m. until 2:30 p.m. on those days. Collins spends approximately four to five hours preparing for those meetings and may spend additional time discussing items on the agendas with Bureau Directors. At time of hearing, Collins had not attended any of the committee meetings of the State Board.

With regard to analyzing policy issues, Collins presents her analyses to the Bureau Director or Division Administrator who, in turn, makes a recommendation to the Board. The Board makes the final decision on policy issues.

At time of hearing, Collins had not been involved in any formal grievances on behalf of the agency, and Collins' involvement with regard to discipline of any employees was limited to having discussed a disciplinary action with Chin, which was resolved informally, and to having consulted with Krinke regarding oral reprimands that had been issued to employees. No formal discipline had

been issued to agency employees during that time. Since taking the position, Collins has consulted with Krinke with regard to bargaining issues or personnel transactions on approximately four occasions, each of less than 15 minutes duration, including two brief meetings to discuss her role as Krinke's backup as the agency's representative in collective bargaining with the representative of the Education bargaining unit. In that regard, Krinke has given Collins a copy of the Union's proposals to review and the 17 dates over which negotiations are scheduled to occur. Those negotiations had not yet commenced at the time of hearing.

19. Mussallem and Collins are not personnel predominately engaged in executive and managerial functions.

20. Collins does not have sufficient access to, knowledge of, and participation in confidential matters relating to labor relations to be considered a confidential employee.

21. Becker, Fay, James, Schur, Smith-Crosetto, Schumann, and Struck participate significantly in the formulation, determination and implementation of management policy and are personnel engaged predominately in executive and managerial functions.

22. Bernstein, Saunders and Weber have sufficient access to, knowledge of, and participation in confidential matters related to labor relations to be considered confidential employees.

23. Wiedenhoef's and Pfeifer's principal work is different from that of their subordinates and they possess the requisite supervisory authority to be considered a supervisor.

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

CONCLUSIONS OF LAW

1. The occupants of the positions of Division Chief Counsel (Mussallem) at the Public Service Commission and the General Counsel (Collins) to the State Vocational, Technical and Adult Education Board are employees within the meaning of Sec. 111.81(7), Stats.

2. The occupants of the positions of General Counsel (Schur), and Division Chief Counsel (James and Smith-Crosetto) at the Public Service Commission, General Counsel (Fay) at the Department of Development, Executive Counsel (Struck) and General Counsel (Schumann) to the Office of Commissioner of Securities and the Legal Counsel (Becker) to the State Ethics Board, are management employees within the meaning of Sec. 111.81(13), Stats., and therefore are not employees within the meaning of Sec. 111.81(7), Stats.

3. The occupants of the position of General Counsel (Bernstein) at the Department of

Industry, Labor and Human Relations, Deputy Legal Counsel (Saunders) at the Department of Administration and Chief Counsel (Weber) of the Department of Employee Trust Funds are confidential employees within the meaning of Sec. 111.81(7), Stats., and therefore are not employees within the meaning of Sec. 111.81(7), Stats.

4. The occupants of the positions of Attorney 13 - Supervisor, Division of Hearing and Appeals, Milwaukee Office, (Wiedenhoeft) of the Department of Administration and Administrator of the Examining Division (Pfeifer) at the Public Service Commission are supervisors within the meaning of Sec. 111.81(19), Stats., and therefore are not employees 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 4/

1. The occupants of the positions referenced in Conclusion of Law 1 are hereby included in the collective bargaining unit represented by Petitioner Wisconsin State Attorneys Association.

2. The occupants of the positions referenced in Conclusions of Law 2-4 shall continue to be excluded from the collective bargaining unit represented by Petitioner Wisconsin State Attorneys Association.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

I dissent as to Weber.

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

(Footnote 4/ appears on the next page.)

4/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing.

The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(Footnote 4/ continues on the next page.)

(Footnote 4/ continues from the previous page.)

(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.

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

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

POSITIONS OF THE PARTIES

Petitioner

With regard to the exclusion based upon confidential status, the Petitioner notes that the Commission has held an individual is considered to be "confidential" if he/she has access to, knowledge of, or participates in confidential matters related to labor relations. 6/ Information is considered "confidential" if it deals 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 such information is not available to the bargaining representative or its agent. Walworth County, Dec. No. 18846 (WERC, 7/81). According to the Petitioner, it is the individual's relationship to the employer, rather than to various collective bargaining units, which determines whether a position is confidential. City of Madison, Dec. No. 23183 (WERC, 1/86); Portage County, Dec. No. 14946 (WERC, 9/76). Occasionally advising management on collective bargaining and contract administration and with regard to personnel matters in a manner which only reveals the implications, rather than the full range of considerations bearing upon an employer's ultimate course in negotiations or grievance handling, constitutes de minimis exposure to confidential labor relations information. Such de minimis exposure will not be considered sufficient to exclude a position as confidential, particularly where other positions which have been excluded as confidential spend substantially less than full time on such matters. City of Madison, supra.; and Milwaukee County, Dec. No. 7135-S (WERC, 2/85). Mere speculation that the incumbent will have access to such information in the future is not sufficient to trigger the confidentiality exclusion. Kenosha County, Dec. No. 15371 (WERC, 3/77). There must be a showing of actual access and current confidential duties, and without such evidence, the confidential exception does not apply. Price County, Dec. No. 11317-B (WERC, 9/89). The performance of certain duties attendant to grievance processing and contract negotiations is an insufficient basis for exclusion based on confidentiality. Involvement in investigating co-employee misconduct and participating in post-investigation decision-making, access to personnel files, or the preparation of raw data to be used later in negotiation are also not, by themselves, sufficient basis for exclusion. Further, an employer cannot exclude a large number of positions by spreading confidential work amongst the incumbents or by assigning them occasional confidential tasks. Marshfield Joint School District, Dec. No. 14575-A (WERC, 7/76); City of Milwaukee (Police Department), Dec. No. 11971-D (WERC, 6/81).

6/ Citing, Wisconsin State Attorneys' Association, Dec. No. 11640-C (1/86); State of Wisconsin (Clerical - Related), Dec. No. 14143-B (WERC, 10/77).

Applying the above standards, the Commission held that an attorney employed by the State was not excluded as confidential even though the attorney appeared before the Personnel Commission approximately four times per year, and had handled one equal rights case and two or three EEOC cases for the State, since it constituted so little work time out of the year. In another instance, the Commission held that an attorney for the State was not excluded as confidential even though the attorney had developed disciplinary guidelines for non-represented employees and had represented her department before the Personnel Commission, the Equal Rights Division, the Unemployment Compensation Division, and the EEOC. Particular weight was given to the fact that the attorney had not represented the department in grievance administration or related litigation and did not have knowledge of, or participate in, collective bargaining. Wisconsin State Attorneys' Association, supra. In those instances, the Commission made those determinations even though those attorneys had devoted approximately 15 to 27 percent of their work time to personnel and labor relations matters.

In cases arising under the Municipal Employment Relations Act (MERA) involving attorneys, the Commission held that an attorney was not confidential even though she spent approximately 35 percent of her time representing the employer in discrimination, affirmative action and equal employment opportunity cases, and advised the city's labor relations director regarding the impact of certain discrimination issues on the labor agreements and promotion policies, drafted and explained the sexual harassment policy to union officials and employees, and had attempted to settle a complaint with union officials. City of Madison, supra. The Commission held that the attorney's involvement in confidential labor relations matters was de minimis, since she had not participated in collective bargaining, and had not represented the city in grievance procedures and grievance-related litigation. Since the Commission will not rely on speculation to exclude employees as confidential, it has also refused to find confidential status based upon expectations that an attorney would participate in some phases of contract administration and labor relations matters, but had not done so to date.

With regard to the "supervisory" exception in SELRA, created by Secs. 111.81(7) and 111.81(19), Stats., the Petitioner asserts the Commission has held that to be excluded as supervisory, the incumbent's principal work must differ from his/her subordinates, and the incumbent must possess the requisite supervisory authority. Wisconsin State Attorneys' Association, supra. In comparing the alleged supervisor's principal work to that of his/her subordinates, the Commission considers "quantitative evidence, i.e., evidence as to how the incumbent spends the greatest amount of his/her work time, and 'qualitative' evidence, i.e., evidence of the importance of the incumbent's work to the fulfillment of the employer's mission." State of Wisconsin, Dec. No. 11243-L. Exercising minimal supervisory authority will not be considered a basis for excluding a position. The Commission has held that even where an attorney directed the work of a secretary and had the authority to effectively recommend the secretary's hiring, discipline, and discharge, the time spent on such activities was insufficient to warrant exclusion. County of Kenosha, supra. Similarly, minor supervisory duties, such as participating in interviews and

adjusting vacation schedules, are not, by themselves, sufficient to find supervisory status. City of LaCrosse, Dec. No. 27361, 7833-C (WERC, 1/94). The Commission held that where an attorney assigned cases to other attorneys, but did not monitor or review the work, the attorney supervised the activity, rather than employees. City of Madison, supra. The Commission has also held that mere individual participation in policy determination meetings where issues such as department policies, work schedules, employee performance and problem areas are discussed, is not, by itself, sufficient basis for excluding a position as supervisory. City of Manitowoc (Police Department), Dec. No. 20696 (WERC, 5/83).

In applying those standards, the Commission refused to find supervisory status in a case involving an attorney in the employ of the State who was involved in interviewing candidates, hiring decisions, allocating merit money, and discussing evaluations, where the attorney performed those activities in conjunction with his supervisor, and exercised independent supervisory authority only in the absence of his supervisor, and devoted only 10 percent of his time to such activities, while devoting 70 percent of his time to activities similar to those of his subordinates. Wisconsin State Attorneys' Association, supra.

The Commission has held that the "management" exception created in Secs. 111.81(7), Stats., and 111.81(13), Stats., excludes not only those positions excluded by specific position designation, but also positions in which incumbents are "predominately engaged in executive and managerial functions." The latter must be demonstrated by showing that the incumbent "participates in a significant manner in the formulation, determination, and implementation of management policy or has the effective authority to commit the employer's resources." Wisconsin State Attorneys' Association, supra. The Commission has held that even though an attorney may serve on a management team or committee, and spend some time participating in the making of various policy decisions, the incumbent will not be considered "managerial" if the predominant function of the position is to perform his/her professional responsibilities, i.e., provide legal services and advice. Wisconsin State Attorneys' Association, supra.; Marathon County, Dec. No. 19130-E (WERC, 2/88) and citing, Association of Municipal Attorneys of Milwaukee, Dec. No. 12035-A (WERC, 2/74), aff'd, 71 Wis. 2d 709, 239 N.W. 2d 63 (1976). Further, isolated managerial exceptions to an employee's normal functions will not trigger the managerial exception. County of Kenosha, supra.

To be considered managerial based on the authority to commit the employer's resources, an employee must have the authority to allocate resources in a manner "which significantly affects the nature and direction of the employer's operations." Marathon County, supra. Involvement in management policy must be at a relatively high level of responsibility in order to yield managerial status. Merely advising his/her employer on purchase decisions and signing spending vouchers does not constitute the authority to commit resources in the absence of budgeting responsibility and the authority to allocate funds. Marathon County, supra. However, preparation of a budget, by itself, does not establish managerial status. City of LaCrosse, supra..

In applying those standards, the Commission has held that an attorney's assignment to management teams or committees involved in determining and formulating management policy as part of his/her normal job duties, is not "predominately engaged in 'an executive or managerial function' and therefore not subject to exclusion on that basis." Wisconsin State Attorneys' Association, *supra*. Further, an attorney whose advice or recommendations can be accepted or rejected and lacks authority to compel other team members to accept his/her decision, and thus cannot formulate and implement policy without review, comment or consensus of other members or the management team or their superiors, is not excluded from SELRA's coverage. Wisconsin State Attorneys' Association, *supra*. In applying the "resource allocation test", the Commission has held that an individual who exercised discretion in utilizing already allocated funds and who lacked authority to adjust large amounts of money from one budget line to another, did not have authority to commit funds for various program purposes, and was therefore not subject to the managerial exclusion. City of LaCrosse, *supra*.

In response to the State's arguments, the Petitioner disputes any claim that the confidential exclusion is unbounded by quantitative or qualitative limitations, and rejects as simplistic the argument that employes privy to any confidential matters affecting the employer/employee relationship are confidential. The exclusion based on confidential status only applies if the position is exposed to traditional labor relations matters involving represented employees, and there are both qualitative and quantitative limits to that status. Qualitatively, access to confidential information has been held to require that such information relate to an employer's position in collective bargaining, contract administration, litigation, or similar matters pertaining to labor relations and which is not available to the bargaining representative or its agents. Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88). Confidentiality in any other sense is irrelevant. Quantitatively, a *de minimis* exposure to confidential materials is insufficient. The Commission has held that an employer cannot be permitted to exclude an inordinately large number of employees by spreading the confidential work among such employees or giving them occasional tasks of a confidential nature. Howard-Suamico School District, *supra*. That is especially the case where there are other confidential employees available to do the work. Milwaukee County, Dec. No. 7135-S (WERC, 2/85). The State's argument that the Petitioner must show that the confidential work can be assigned to others without undue disruption improperly shifts the burden to the Petitioner. Petitioner asserts that once it demonstrates that other confidential employees are available to perform the confidential work, particularly where the confidential work is *de minimis*, the burden shifts to the State, who must then demonstrate that there would be undue disruption. Petitioner avers that while it has made its showing, the State has not offered any evidence in rebuttal.

With regard to the State's claims as to supervisory status, Petitioner asserts that the Commission has held that an attorney who spends 10 percent of his work time on supervisory duties, 20 percent on non-supervisory duties different from his subordinates and 70 percent on activities similar to his subordinates, is not excluded as a supervisor. Wisconsin State Attorneys' Association, *supra*. Further, "routine" and/or "minor" supervisory functions, such as participating in employment interviews and assigning cases, without the obligation to monitor the work, are not

sufficient to exempt an employe as supervisory.

With regard to the State's managerial claims, Petitioner asserts in response that there is no per se exception for chief legal counsel positions. Section 111.81(13), Stats., specifies those positions that are exempted as managerial employes per se, and requires that aside from those positions, employes must exercise similar functions and responsibilities as determined by the Commission in order to be found to be managerial. Application of that standard requires a case-by-case review, and disallows a per se exception.

Petitioner also asserts that the State has misplaced its reliance on the level at which incumbents in the disputed positions are supervised and the level of those to whom they provide advice as indicative of managerial status. An attorney is not "engaged predominately in executive or management functions" merely because they are supervised by, or advise, a board, administrator, or secretary. Wisconsin State Attorneys' Association, supra. Those attorneys simply advise, or recommend, rather than decide or direct.

Further, the State's claim that a position is managerial on the basis that it is privy to confidential matters affecting the employer-employe relationship ignores Commission precedent. The confidential exception is an independent basis for excluding employes. Recognition of a hybrid "confidential-management" exclusion would defeat the Commission's policy of not allowing an employer to exclude a large number of positions by dispersing confidential work.

Petitioner also takes issue with the State's reliance on a position's being a member of a management team as a basis for excluding the position as managerial. The individual in the position must be predominately engaged in executive and managerial functions, as demonstrated by his/her significant participation in the formulation, determination and implementation of management policy. In Wisconsin State Attorneys' Association, supra, the Commission concluded that participation on such management committees, where the attorneys' advice could be accepted or rejected, did not trigger the managerial exception, as such participation did not amount to exercising the same functions and responsibilities as division administrators or bureau directors. The Commission found significant the fact that the attorneys' advice could be accepted or rejected by the team and that none of the attorneys could individually formulate and implement policy without review, comment or consensus of other team members or their superiors. The position descriptions and the incumbents' testimony indicates that the predominant function of the attorneys is to provide legal services and advice. The State's argument asks the Commission to ignore its settled interpretation of "predominately engaged" in order to exclude attorneys who spend most of their time providing legal advice and only some of their time on a management team. Acceptance of the State's position would allow it to bring all of its attorneys out from under SELRA's coverage by assigning them to some kind of management team, and therefore ought to be rejected.

State

With regard to the confidential exemption, the State asserts that the Petitioner is arguing for the "very traditional and narrow concepts of the 'confidential' and 'management' exemptions." Employment law, and in particular labor relations, is dynamic, rather than static. The statutory language in question uses broad concepts permitting for growth in what is to be considered "confidential" or "management". The State urges that the full parameters of the statutory language be utilized in rendering the decisions on the various positions which it seeks to exclude as confidential and management.

The State asserts that statutory language and case law exempt positions occupied by "individuals who are privy to confidential matters affecting the employer/employee relationship." Sec. 111.81(7)(a), Stats. (Emphasis added). There are no quantitative or qualitative limitations. What someone must do to be exempt is to be "privy to" confidential matters affecting the "employer/employee relationship." That language does not require active involvement, but merely being privy to confidential matters. Black's Law Dictionary, (Revised Fourth Edition, 1968), defines "privy" as "a person in privity with another; one who is a participant or has any part, or interest in any action, matter or thing". The American Heritage Dictionary, (Second College Edition) Houghton-Mifflin Co. (1982) defines "confidential" as "done, or communicated in confidence, trust or reliance". The State asserts that recent Commission decisions reflect the expansive nature of the "confidential" exemption as well as the fact that mere access to, and even minimal involvement with, "confidential" matters can form the basis for a confidential exemption. Shawano County (Maple Lane Health Care Center), Dec. No. 7197-D (WERC, 8/94). The employer has the right to conduct its labor relations through employees whose interests are aligned with those of management, rather than risk having confidential information handled by people with conflicting loyalties, who may be subject to pressures from fellow bargaining unit members. Citing, Lincoln County (Sheriff's Department), Dec. No. 20687-F (WERC, 7/94). In that case, a clerical employe assigned to a management employe was found to be confidential even though the actual amount of confidential work was insignificant. Based on the language of the statute, one need only share a part of something which is confidential. One only has to either be in a position to be, or actually be, the recipient of confidential matters, and does not have to be the principal actor. Further, the type of matters which affect the employer/employee relationship can be endless, ranging from the obvious, such as participation in grievances, to the more subtle, such as being prepared as a backup negotiator. Quantitatively, there is no magic number required. Thus, merely being in a position to be privy to confidential matters is sufficient under Sec. 111.81(7)(a), Stats.

The State also asserts that the management exemption must be adapted to non-traditional organizational structures and management concepts. Section 111.81(13), Stats. recognizes that the definition of "management" is dynamic, and uses known management positions, such as division administrators, bureau directors, etc., as a point of reference to indicate the type of "executive and managerial functions" which can be considered in determining exempt status. The statute recognizes that things change and allows the Commission to exempt positions which exercise "similar functions" to those exercised by those specified positions. Section 15.001(3), Stats. encourages "structural reorganization". Therefore, the focus must be on what executive and

managerial functions are associated with division administrators, bureau directors and institutional heads in a dynamic sense. This requires looking at the contemporary situation, i.e., the actual versus the traditional organization structure and delegation of authority. To the extent a department or agency reorganizes in a manner that traditional duties and responsibilities of the agency head or division administrators are delegated to others, that delegated authority must be considered in determining whether a "management" exemption applies for the recipients of that delegated authority. Similarly, if bureau director positions are eliminated and their authority is delegated to individuals, that delegated authority must be considered in determining the "management status" of those individuals.

The State also asserts that Sec. 111.90, Stats., sets forth the State's "management rights", and that participation in activities and responsibilities listed in subsections 1 through 3 of that provision are clearly "management". Management functions are also listed in Sec. 111.91(2)(a)-(j), Stats. Both statutes list as a function the statutory mandate, mission and goals assigned to respective agencies. Duties performed by positions that create, modify, facilitate and promote those mandates, missions and goals are clearly indicative of management functions, as opposed to positions that simply implement already established mandates, missions and goals. Each agency has expressed mandates, goals and missions and they are generally carried out through policy, whether in the form of external statutes and administrative codes or in the internal agency- specific form of bulletins and rules. "Policy" is a broad concept and is defined as a "plan or course of action. . . designed to influence and determine decisions, actions and other matters." The American Heritage Dictionary, supra. Advice or input into a "plan or course of action" is involvement in policy, and positions which are so involved in formulating and developing policy have "management" attributes. The fact that a position which gives advice or has input is an attorney position does not mean that individual cannot be involved in policy simply because, "all lawyers give advice". The State distinguishes between advice such as whether or not to produce a document pursuant to discovery because it is "work product" or "confidential", and advice on whether a new statute or administrative code is needed or advice on the interpretation of a statute or code which forms the basis for the agency's directive or policy. There is also a difference between legal advice which contributes to establishing and developing policy and legal advice which follows, carries out, and/or implements established policy.

The State urges rejection of the "outdated concept" that attorneys in the bargaining unit give advice and that if positions under consideration give legal advice, they must also be in the unit. All legal advice is not the same, and some advice can be equated with policy indicative of "management" status. The State asserts that that is especially true of positions that are designated "Chief Legal Counsel" or "General Counsel". Those positions are counted on by management personnel for input in policy development and advice on high-level, confidential strategies. A position so integrally involved with management personnel and management functions, as are the Chief Legal Counsel/General Counsel positions, a fortiori, must be "management". The State asserts that such positions are, in fact, "per se management", and that management must know, to an absolute certainty, that positions that they deal with on high-level confidential strategies and

matters are aligned with management. The only way to assure that is to isolate such positions from other allegiances by exempting them from bargaining unit placement.

The State also asserts that it must be kept in mind that the only potentially quantitative limitation in Sec. 111.81(13), Stats., is the word "predominant". "Predominant" is a relative term, and to be predominant something must only be greater or larger (percentage) in relation to others. In the context of this case, the statute merely provides that "executive and managerial functions" such as those exercised by "division administrators, bureau directors, institutional heads and employes exercising similar functions" should be greater in relation to other functions and duties assigned to positions. The State offers as an example, if a position has four goals (a) 35 percent, (b) 30 percent, (c) 25 percent, and (d) 10 percent, it can be said that goal (a) is predominant, or that if (b) and (d) both relate to "executive and managerial" functions, those duties combined (40 percent) are predominant.

Lastly in this regard, the State urges that it be kept in mind that included within the concept of "management" is "confidential". Individuals with executive and managerial functions are, by definition, privy to confidential matters "affecting the employer/employee relationship", since such positions are the ultimate decision-maker in all types of personnel matters and are privy to matters relating to collective bargaining and associated strategies. Being "privy to confidential matters is another indicia of 'management'".

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
GENERAL COUNSEL (HOWARD BERNSTEIN)

According to Petitioner, Bernstein's position description, his supervisory analysis form, and his testimony demonstrate that 70 percent of his time is spent on activities similar to those of his subordinates and that he does not perform activities which would serve as a basis to exclude him from SELRA's coverage. Neither Bernstein's position description, nor his testimony, reference any responsibilities which would trigger the confidentiality exception. Further, Bernstein does not have access to confidential labor relations information and he testified that he is not involved in collective bargaining, and spends very little of his time dealing with SELRA. Bernstein's involvement in grievance and discipline activity should not serve as a basis for his exclusion, since to do so would allow the State to exempt a number of employes by dispersing confidential work, contrary to Commission policy. While Bernstein handles grievance and discipline matters, the record reveals that responsibility for disciplinary matters typically falls with DER and that such matters have been divided between the two attorneys in the Office of Legal Counsel, Bernstein and Kristiane Randal, and that Lee Isaacson, the Employment Relations Specialist in DILHR's Bureau of Personnel, is also involved in such matters. Given the one to five discharges per year, and a similar number of other disciplinary matters, which require Bernstein's involvement in approximately 10 meetings per year, that de minimis amount of confidential work can easily be assigned to someone else. To exclude Bernstein on the basis of that de minimis amount of confidential work is contrary to the Commission's policy. Absent evidence indicating that

Bernstein has, or must have, access to confidential labor relations information, the confidentiality exception cannot properly be applied to Bernstein's position.

Petitioner asserts that Bernstein has neither the quantitative nor the qualitative supervisory responsibilities required to warrant exclusion on the basis of supervisory status. The supervisory analysis form for Bernstein indicates he spends approximately 70 percent of his work time performing work similar to that performed by Randal. His testimony indicates that actual supervisory responsibilities consume relatively little of his time. Bernstein testified he spends approximately 100 hours per year on discharge and discipline consultations conducted via the telephone, and involving both represented and non-represented employees, thus consuming less than 10 percent of his work time. Bernstein ordinarily meets with the supervisors, rather than the employees, and his occasional involvement in investigatory or post-termination interviews are not of sufficient quantitative or qualitative nature to warrant his exclusion. The record indicates that supervisory matters in DILHR are typically handled by others within that Department. Bernstein testified that matters such as discharges are handled by the Secretary or Executive Secretary, and that the Bureau of Personnel has responsibility for the Department's personnel functions. As there are others within DILHR that can perform the discharge and discipline activities now performed by Bernstein, to exempt him as supervisory would be to allow the State to disperse supervisory duties away to a number of individuals, contrary to SELRA's intent. Although Bernstein receives a supervisory add-on, his supervisory responsibilities are de minimis, and are limited to the position occupied by Randal. While Bernstein was involved in the hiring process resulting in the hiring of Randal, there is no evidence to indicate he had the authority to effectively recommend her hiring, nor that he has the authority to promote, transfer, discipline or discharge Randal. Bernstein's "work assignment authority" is limited to Randal, and there is no evidence that Bernstein has the authority and responsibility to monitor or review her work. Consequently, Bernstein supervises an activity, rather than an employee.

With regard to Bernstein's claimed managerial status, Petitioner asserts that Bernstein is not "predominately engaged" in the kinds of functions that trigger the managerial exception. While Bernstein sometimes has a "voice" in the development of Department policies which involve significant legal issues, his participation is as a part of a group consensus process. He does not have the final authority to approve such policies, and therefore does not possess the authority to formulate and implement policy individually and without review, comment or consensus by others. His authority is subject to supervisory review. The position description for Bernstein's position and his testimony reveal that he is predominately engaged in providing legal advice, rather than making policy determinations. There is also no evidence to indicate that Bernstein has the control of resources that would trigger the managerial exception on that basis. He testified that the Executive Secretary was primarily responsible for budget matters for DILHR, and that his involvement is limited to consultation regarding statutory language changes.

The State asserts that Bernstein's position is properly excluded from the bargaining unit because a substantial part of his assigned duties, in excess of 48 percent, are "confidential" and those duties represent the largest part of Bernstein's work time, when compared to his other

assigned duties. In that regard, the State asserts that unless it is specified otherwise in the position description, the approximate time per work activity is determined by dividing the total time allocated for the goal in the position description by the number of work activities listed within that goal. Bernstein has handled numerous legal matters which traditionally are deemed "confidential", i.e., grievance arbitrations, matters before the Personnel Commission, giving legal advice on periodic personnel "flare-ups", giving legal advice before any discipline is imposed, and being involved as part of a three-way consultation on any significant personnel matters (a representative from personnel, Bernstein, and a representative from the program area involved). The evidence indicates that no DILHR employe will be discharged or suspended without consultation with Bernstein having first taken place. Further, at time of hearing, Bernstein was defending DILHR in a discrimination case commenced by one of Petitioner's members. Bernstein has also been asked by DER to handle grievance arbitrations involving employes of other agencies. The State also notes that there were three unions representing employes of DILHR at the time of hearing, and that a fourth union (WPEC), had been designated as a certified representative of certain State employes.

The State also asserts that Bernstein's position is managerial. The State reasserts that there is a very clear distinction between "legal advice" and "policy advice". Positions at high levels, from bureau level on up, are involved in issues which directly or indirectly impact on policy, including use of agency human resources, and issues related to wages, hours and conditions of employment. Policy issues can also relate more to the goals and mission of the agency. Bernstein's testimony and his position description further reflect that there is a distinction between policy and legal advice. On the front page of Bernstein's position description, two other General Counsel or Chief Counsel positions of large agencies are listed as performing "similar duties", and those positions are not in the Petitioner's bargaining unit. The position description also indicates that Bernstein's position is "under the direction of the Secretary". Direct supervision at that level reflects the management connection and distinguishes Bernstein's position from those in the bargaining unit. Bernstein is a "member of the Secretary's office 'management team'" and his duties are to "assist in the development, formulation and implementation of Department policy and procedures." Bernstein testified he and Randal are involved in policy, and his duties include drafting and reviewing legislation and administrative rules affecting DILHR and representing DILHR at legislative hearings and other public forums. Such duties are associated with, and entrusted to, management. Goal (B) of Bernstein's position description states: "Provide legal advice on policy and administrative issues", allocating 30 percent of his time to that goal. Goal (D) is also comprised of management level duties and is allocated 10 percent of his work time. Additionally, work activities (A)(1), (A)(2), (A)(4) and (A)(5) of Goal (A) (representing DILHR in legal actions) involve "confidential" matters usually associated with management-level personnel and comprise another 20 percent of his time. Activities that form a basis for a "confidential" exemption are subsumed within "management" functions. Thus, Bernstein's predominant duties, (at least 60 percent), are clearly "management".

The State also asserts that Bernstein's position is supervisory. Comparing his position description with that of his subordinate, Randal, reveals his principal duties differ from Randal's in

that he has supervisory duties (10 percent) her position does not have, and Randal's position also is not assigned work activities (A)(2), (A)(4), (A)(5), (A)(6) and (B)(1) (representing other divisions in cases before the Equal Rights Division, representing DILHR in unemployment compensation appeals and hearings, representing DILHR in disputes under CETA and JTPA programs in administrative proceedings before the Department of Labor, representing the Division of Safety and Buildings in license revocation hearings, and drafting and issuing formal and informal legal opinions to the Secretary and administrators on questions arising in all areas of administrative activity, including personnel-related areas, respectively.) Further, Randal's position is assigned duties that are not assigned to Bernstein's position. Lastly, Bernstein was involved in hiring Randal and while the Secretary, as the appointing authority, makes the final decision on who is hired and fired, Bernstein's input was an authoritative recommendation.

PUBLIC SERVICE COMMISSION

The State makes several general arguments as to the impact of the PSC's reorganization and its management structure. The State first asserts that the nature of the PSC's reorganization is a crucial consideration due to the delegated management functions that resulted from that reorganization. It cites Sec. 111.90, Stats., as setting out the State's "management rights", along with Sec. 15.02(3)4, Stats., as permitting an independent agency such as the PSC, with the Governor's approval, to "establish the internal organization. . . and allocate and reallocate duties and functions not assigned by law to an officer or any subunit. . . to promote economic and efficient administration and operation. . . The head may delegate and redelegate to any officer or employe. . . any function vested by law in the head. The Governor may delegate the authority to approve, select organizational changes to the head." SELRA recognizes the possibility that the traditional structure may be altered from time to time. Sec. 111.81(13), Stats., defines "management" to include personnel such as "division administrators, bureau directors, institutional heads, and employes exercising similar functions and responsibilities as determined by the Commission." (Emphasis supplied) Those positions identified are, per se, engaged in predominately executive and managerial functions, however, the statutory scheme also recognizes that other employes can also exercise "similar functions and responsibilities" and therefore be designated "management". Thus, in the context of the PSC, it follows that if "management" functions are delegated to positions other than Division Administrators, Bureau Directors or institutional heads, those positions are also "management". The reorganization eliminated traditional management positions such as the Bureau Directors, and also delegated traditional management functions of the Commission's Chair, Division Administrators, and Bureau Directors to the Commission's Chief Counsel, the Division Chief Counsels, and the Administrator of the Examining Division. The record establishes that the reorganization was substantive and functional and planned and implemented well before the instant petition for unit clarification was filed. The management structure adopted was the more democratic, collegial structure envisioned in the Total Quality Movement (TQM). Decisions are not from the top down, but are shared by a council or team and development of that concept is a dynamic process. The concept was in its early stages at the time of the petition, and as it further developed, the members of the various management teams, including the five involved in this

proceeding, have become "more and more an absolute as management".

The restructuring of the PSC included the creation of the Administrative Council, which essentially manages the agency through the exercise of the Chair's administrative authority, which she delegated to the Council. That delegation is accomplished by designating a decision as a "number three" type of decision, and "type three" decisions acted upon by the Council are greatly in excess of 50 percent. Those decisions include budget development, budget reallocation, merit and exceptional performance awards, position allocation and reallocation, labor contract interpretation and development of overall organizational structure, agency-wide strategic planning and most other agency-wide administrative issues. Vacancies at the PSC come before the Council, which decides whether vacancies will or will not be filled and when. In creating the Administrative Council, the PSC adopted "team management" as its method of management. Management authority was delegated from single individuals occupying traditional management positions to the management teams. All decisions made on those teams are reached through consensus with each team member having an equal vote. Thus, all members of the Administrative Council are "peer participants" in the decisions, including the Chair. Management through participation of the team members is as much the "exercise of executive and managerial functions" as management by the Chair herself or the Commission.

The State asserts that the positions of Chief Counsel and Administrator of the Examining Division, both being members of the Administrative Council, are per se, "management".

The State asserts that the team management concept is also observed on the division level at the PSC where the Bureau Director positions were eliminated and the authority of the Division Administrator was delegated to the Division's Core Management Team (CMT) for all "type three" decisions. Middle management has been eliminated and replaced by the CMT, which has assumed many of the duties of the Division Administrator and all of the duties of the eliminated Bureau Director positions and has the basic managerial responsibility for each division and its resources. Division Chief Counsels are members of their respective divisions' CMT and now direct employees to perform, or not perform, certain activities as a representative of management. The CMT sets priorities, work assignments and work loads of division employees. During team meetings, performance of employees is discussed including a matter that could have resulted in the termination of an employee, with regard to which the CMT involved developed a strategy to address the situation. The decisions of the CMT are also reached through consensus and Division Chief Counsel Mussallem testified that in the two years he has been on the CMT in his division, there had not been an instance where the Division Administrator had pulled rank and made the decision. Thus, the individual members of the CMT participate in the exercise of functions which are clearly executive and managerial when exercised by a Division Administrator or Bureau Director in a traditional structure. As members of the Division CMT's, the Division Chief Counsel positions should also be considered "per se management" and excluded from the bargaining unit.

CHIEF COUNSEL - PSC (STEVEN SCHUR)

Petitioner asserts that as Chief Legal Counsel for the PSC, Schur does not directly supervise any other attorneys and that his position description was prepared in anticipation of the present litigation. According to that position description, Schur spends 30 percent of his time on "litigation and representation activities", 50 percent on "providing advice to the Commission and staff", and 25 percent on "management and supervision" and 5 percent on "other legal work". According to Schur's testimony he spends anywhere from 40 percent to 50 percent of his time providing advice to the Commission and also provides consultation to division teams. When he was first called to testify, Schur indicated that he spent 20 percent of his time on litigation and representation activities, however when he was recalled to complete his testimony, Schur acknowledged that he was spending closer to 40 percent of his time on those activities. While Schur claims that one of his everyday functions involves activities related to formulating, determining and implementing regulatory policy, his activity in that area involves consideration of all legal questions which may come before the Commission and providing advice in that respect and Schur testified that this "legal review" is representative of the manner in which he is involved in the formulation, determination, and implementation of regulatory policy. Petitioner asserts that Schur is not predominately engaged in executive or managerial functions, nor does he have the authority to effectively commit the employer's resources in a fashion which raises the application of the managerial exception. Schur's involvement in formulating, determining and implementing policy is through his role as a member of the Administrative Council. However, he primarily provides legal advice to the Commission, and has no authority to order any other member of the Council to take specific action. Further, as Pfeifer testified, the Administrative Council has no input into substantive policy matters. Serving on the Administrative Council does not indicate that Schur significantly participates in the formulation, determination and implementation of management policy, and the Commission has held that merely making recommendations and offering advice on policy matters as a member of a management committee does not, in itself, exempt the attorney as managerial. In order to be exempted, it must be shown that the attorney has the authority to compel others to abide by his/her recommendation, and that the attorney's recommendations are not subject to review, comment or consensus by the rest of the team or by superiors. The record indicates that Schur does not have such authority to make recommendations and his management committee involvement is insufficient to provide a basis for excluding him as a managerial employe.

As to the alleged confidential status of Schur, Petitioner asserts that the record establishes that between January of 1991 and the date of hearing (September, 1992) Schur has not represented the PSC in collective bargaining, has not handled grievances for the PSC, nor has he been assigned first or second-step responsibility for grievances. Further, while Schur advises the Administrative Council, he is not privy to confidential information in that capacity. The Council does not generally become involved in discipline matters and while it has been contacted by DER for input on bargaining points, the Council is not involved in collective bargaining beyond that. Petitioner also notes that the Council's input was not solicited as relates to the bargaining between the State and Petitioner. Thus, Schur's exposure to collective bargaining information is de minimis, and insufficient to trigger the application of the confidential exception.

In its reply brief, Petitioner argues that the State's assertion that managerial status is indicated by the level of the individual by whom they are supervised or to whom they offer advice ignores that the attorneys are not "engaged predominately in executive or management functions". They advise or recommend, and do not decide or direct. With regard to the claimed confidential status of Schur, Petitioner asserts the evidence does not support the State's claim and its reliance on Schur's position description and his testimony. Utilizing the State's formula for computing the amount of time spent on matters set forth in the position descriptions, it appears that Schur spends only two and a half percent of his time representing the PSC in personnel actions, including those functions related to litigation involving personnel matters, and 10 percent of his time advising the Commissioners in legal matters affecting the agency including legislative and personnel matters. Petitioner notes that neither of those goals is focused exclusively on confidential labor relations matters. Thus, Schur's position description allocates less than 12 percent of his time to confidential matters. Further, Schur's activities on the Administrative Council do not expose him to the kind of confidential labor relations information required to trigger the confidential exception. The de minimis exposure claimed by the State can be assigned elsewhere.

The State contends that Schur's position description and his testimony establish that he is assigned to "personnel" related matters. Schur has worked with DER on matters before the Personnel Commission, is involved in collective bargaining through his membership on the Administrative Council and has provided advice on grievances by the Concentrated Program for Performance Development (CPPD) for employees. As such, he is the PSC's "personnel attorney" and properly excluded as "confidential".

As a member of the Administrative Council, which develops different strategies for the agency and engages in strategic planning for the PSC in terms of that agency's missions and goals, Schur is involved in policy. Only the PSC Chair can direct a member of the Council to do or not do something. All members of the Council have to be present at the meetings and a rotating facilitator is used to chair the meeting. Schur's position description describes him as not only the "Chief Counsel" but also as "a critical member of the senior agency management team" who "works under the general direction of the Commission, the Chairperson, and the Executive Assistant in the formulation, determination and implementation of regulatory policy and strategic plans for the agency." The position description also states that the incumbent "assumes a role of leader, coach, facilitator and supporter of the Quality Management style." Schur's management functions are also indicated on his time sheets for the period January 1, 1991 through June 27, 1992 (Respondent's Exhibit 16). Of his time, 53.8 percent (2,104) hours were logged for "general administration" activities. He testified those activities are of the type attributed to "management" personnel.

ADMINISTRATOR OF THE EXAMINING DIVISION - PSC
(ANN PFEIFER)

Petitioner asserts that to be exempt under SELRA as a supervisory position, the incumbent's

principal work must be different from his/her subordinate, and the incumbent must possess supervisory authority. Pfeifer's principal work is like that of her subordinate's, and she does not possess the requisite supervisory authority. Pfeifer supervises an activity, rather than individuals.

Pfeifer estimated she spends approximately 12 1/2 percent of her time on hearing-related responsibilities, approximately 35 percent of her time providing legal opinions to the PSC Chair, and being involved with a number of work groups, and five percent on records-related matters. Combined the above activities consume at least 62 1/2 percent of Pfeifer's time.

Pfeifer testified she devoted approximately 60 hours during the period of January, 1991 to September 28, 1992 responding to inquiries or complaints regarding employes, approximately one hour per week counseling employes regarding their performance, and approximately 30 hours during that period to training new employes. Thus, Pfeifer spends a de minimis amount of time on those activities. The record also indicates Pfeifer forwards her annual employe evaluations to the Personnel Department, and only sporadically attends the hearings of other attorneys in the office. Pfeifer has never issued a written reprimand or suspension to an employe, nor ever recommended discipline as to either of the attorneys or non-attorneys in her office, nor terminated any attorney or non-attorney. Pfeifer's involvement on an interview panel only amounted to de minimis involvement in the hiring decisions in her division. Further, Pfeifer has not been involved in any interviewing process or any hiring decisions since 1991. Pfeifer has never exercised the authority to effectively recommend hiring. Pfeifer's assignment of work to other attorneys in her office is made on the basis of attorney availability, and does not require the exercise of great discretion. Thus, Pfeifer's principal work is not significantly different from that of her subordinates, and the amount of supervisory activity she performs must be considered de minimis.

With regard to alleged confidential status, Petitioner asserts that the record indicates Pfeifer does not have access to confidential labor relations information required to trigger the confidential exception, and has never represented the PSC in matters before the Personnel Commission, in arbitration, or at the bargaining table. Pfeifer's exposure to collective bargaining matters is limited to being a member of the Administrative Council and the Council's labor relations activities are limited. The Council has some contact with the Personnel Department to assess which bargaining issues are important to the committee, and also receives information regarding settlements and instructions on the administration of various contracts. The information associated with these activities hardly exposes the council members to the "full range" of considerations bearing on the State's ultimate strategy in bargaining. Such de minimis exposure to labor relations information is insufficient to trigger the confidentiality exception for Pfeifer. Pfeifer also has limited involvement in the grievance process and has not spent any time settling formal grievances and the Council also has no grievance involvement. Petitioner asserts that the most telling evidence in this regard is the State's recognition that the confidential exception, by itself, does not exempt Pfeifer. Petitioner also asserts that exempting Pfeifer as a confidential employe would be contrary to the Commission's policy against dispersment.

With regard to alleged managerial status, Petitioner asserts that there is no evidence in the record to indicate Pfeifer participates in policy-making beyond her participation on the Administrative Council and its work groups. Those work groups are not involved in the "high level" managerial policy-making which would trigger the managerial exception and only deal with basic operational matters, such as teleanswering, routing, computer allocation, etc. Pfeifer concedes the Administrative Council has little input into "substantive" policy matters, and Pfeifer's authority on the Council is limited to participation, as decisions are made on a consensus basis and are subordinate to the authority of the PSC Chair. There is no evidence that Pfeifer is involved in policy matters independent of her participation on the Administrative Council. There is also no evidence that Pfeifer has the authority to commit the State's resources on a level sufficient to trigger the managerial exception. Her resource allocation is limited to activities on the Administrative Council, which has some involvement in allocating unallocated funds, general budget policy and large equipment purchases. Those activities do not significantly affect the nature and direction of the PSC or even the Examining Division. Similarly, Pfeifer's independently submitting budget requests for items, such as equipment and furniture, and suggesting areas for budget cuts do not affect organizational direction.

In its reply brief, Petitioner asserts that the State's contention that there should be a per se managerial exemption beyond those positions set forth in the statute based upon who the occupant of the position reports to, and the bases that they are occasionally delegated managerial or executive responsibilities or serve on a management team, is inconsistent with both the statutory requirements and Commission precedent. The Commission has previously held that mere participation on a management team did not rise to the level of exercising the same functions and responsibilities as Division Administrators, etc., and does not trigger the managerial exclusion. The incumbent in a position must be predominately engaged in executive and managerial functions as demonstrated by that individual's significant participation in the formulation, determination and implementation of management policy. Wisconsin State Attorneys' Association, supra. To accept the State's position would permit it to remove all of its attorneys from SELRA's coverage by assigning them to some kind of management team.

Pfeifer's position should be included in the unit as she devotes at least 70 percent of her time to legal activity. Those activities related to the responsibilities Pfeifer has under her job description regarding developing, or assisting in the development, of rules and ruling on requests for confidentiality and open records is no more than providing legal advice and is included within that 70 percent. The only activity within those responsibilities that resembles policy-making is recommending rule proposals when appropriate and less than 10 percent of Pfeifer's time is devoted to that activity. Regarding Pfeifer's alleged confidential status, the State relies on her involvement with the Administrative Council, the goal in her position description which requires her to comply with provisions of the collective bargaining agreements for the represented staff, her supervisory analysis form, and the collective bargaining agreement. Petitioner asserts that the evidence does not support her exclusion as confidential. Thirty percent of Pfeifer's time is allocated to the section of her position description that includes requiring her to comply with provisions of the collective

bargaining agreements. There are 14 such goals under that section of the position description, resulting in an allocation of 2.14 percent of Pfeifer's time to that goal under the State's method of calculating time. That requirement also does not expose Pfeifer to confidential labor relations information dealing with the employer's strategy in collective bargaining, contract administration or similar litigation. The terms of the collective bargaining agreements are available and known to the unions, and Pfeifer's position description does not indicate that she is exposed to employer labor relations secrets. That is also true of her involvement on the Administrative Council. Even if Pfeifer was exposed to such information in that regard, it could be easily concentrated within one individual rather than dispersed. Petitioner also asserts that the State's claim that Pfeifer's supervisory analysis form and contract role exempt her position, amounts to an admission by the State that the confidential exception standing alone is not sufficient.

As to Pfeifer's alleged supervisory status, the State cannot rely on Pfeifer's position description and ignore her testimony. Her testimony reveals she has not exercised the kind of authority required to find a supervisory exclusion and that her principal work is the same as that of her subordinates. The bulk of the activities set forth in the position description regarding the administration, direction and supervision of the work and staff of the Division are routine, and do not trigger the exclusion.

The State first asserts that Pfeifer's position should be excluded as confidential. It argues that exemption is related to the management and supervisory exemptions in that the basis for a confidential exemption is also found in those other types. Pfeifer is a member of the Administrative Council, which essentially manages the agency and gets involved in collective bargaining matters and personnel matters. As a supervisor, Pfeifer has specific duties related to the grievance procedure and her position description provides that the individual in her position must have "knowledge of State civil service procedures, collective bargaining agreement provisions, affirmative action/equal employment opportunities policies and guidelines. . ." That is also confirmed in the collective bargaining agreement where Pfeifer is involved in the grievance process as the first-line supervisor of the two members of the bargaining unit represented by Petitioner. The State reiterates its assertion that it is the assigned duties of the position which count and the fact that Pfeifer is blessed with subordinates who have not required discipline, formal or informal, does not detract from her position being supervisory and designated as "confidential". Further, her position has access to and knowledge of "confidential" matters and that is all that is required for the exemption.

As to Pfeifer's membership on the Administrative Council, the State asserts that the same arguments it makes regarding Schur's position apply equally to Pfeifer's. As a member of the Council, Pfeifer helps "plan and execute business goals and strategies as part of the PSC's management team." She was involved in developing the biennial budget for her Division and her position is also assigned the task of developing administrative rules and ruling on requests for confidentiality and open records, both indicia of management functions.

As to the supervisory status of Pfeifer's position, the State asserts the evidence establishes that the position was advertised as a "supervisory" position, that her predecessor in the position was a supervisor and not in the Petitioner's bargaining unit, and that Pfeifer receives a supervisory add-on and supervises two Attorney 13's, two Steno Reporters and one Program Assistant III - Confidential. Pfeifer's Supervisory Analysis Form establishes that she has been assigned and possesses the traditional statutory supervisory authorities. Two of her five subordinates are members of Petitioner's bargaining unit, i.e., professionals, and the need for intensive supervision or discipline should be minimal. However, Pfeifer has worked with subordinates to overcome performance problems, and on one occasion extended the probationary period of one of the individuals in Petitioner's bargaining unit. Pfeifer has been involved in the recruitment and selection of professional and para-professional staff. There have been only four opportunities to fill positions in her Division, and she was involved in the interview process and made authoritative hiring recommendations, and in each case, her recommendation was followed. Pfeifer's principal work differs from that assigned to the Attorney 13 Hearing Examiners under her. The uncontradicted statements on Pfeifer's Supervisory Analysis Form indicate that her position spends 30 percent on supervisory functions and activities related to supervisory responsibilities, and 30 percent on work activities differing from her subordinates, with only 40 percent of her work being similar to the subordinates. Further, a summary of Pfeifer's work hours during 1991 (Respondent Exhibit 7) supports the conclusion that Pfeifer's principal duties differ from those of her subordinates. That exhibit indicates that Pfeifer spent only 108.78 hours conducting hearings during 1991, 5.23 percent of her time, while that is the principal task of the two Attorney 13 Hearing Examiners.

In response to Petitioner's assertions, the State contends that Pfeifer's involvement in the hiring process is more than de minimis. Further, the fact that the Division had little turnover does not mean that a "supervisor" is not a supervisor because she does not hire. The supervisory status is based on the assigned duties of the position and Pfeifer has been assigned all supervisory duties. The State also disputes the Petitioner's characterization of Pfeifer's work assignments to her subordinate attorney positions. Beyond considering the workloads of the subordinates and making assignments, Pfeifer also utilizes her knowledge of the abilities of the incumbents in deciding which type of cases to be assigned to that individual, as well as the individual's ability to move cases along. Thus, Pfeifer exercises discretion in making work assignments.

PSC DIVISION CHIEF COUNSEL POSITIONS
(GAS, WATER & FEDERAL INTERVENTION DIVISION - ROBERT MUSSALLEM)
(ELECTRIC DIVISION - BARBARA JAMES)
(TELECOMMUNICATIONS DIVISION - NATALIE SMITH-CROSETTO)

With regard to the State's claim that Mussallem's position is managerial, Petitioner asserts that while Mussallem is on the Division's Core Management Team (CMT), Mussallem's testimony establishes that his involvement is not of a nature which would trigger the managerial exception. The bulk of Mussallem's work, 70 percent, involves representing the Division and the PSC before

State or Federal courts and representing staff in matters before the PSC. Secondly, as a member of the CMT, Mussallem merely participates in consensus decision-making regarding low level resource distribution, establishing work assignments, and developing division priorities. While Mussallem is involved in discussing policy, his opinions are given no more weight than those of the other members of the CMT, and the decision of the CMT is ultimately subordinate to the decisions of the Commission. Mussallem also conceded that the Commission sets agency policy, while the CMT merely sets "staff policy" and that staff policy is subordinate to both the Division Administrator, who has the authority to veto the CMT's decision, and to the Commission. While Mussallem's activities may be relevant to the operation of the PSC, they do not "significantly affect the nature and direction" of the PSC's operations to the extent that the managerial exception would apply. Even if the decisions of the CMT did rise to that level, Mussallem has no independent policy-making authority and therefore would still not properly be exempted from SELRA's coverage. Finally, Mussallem lacks the authority to commit the State's resources in a fashion which would otherwise trigger the managerial exception. Mussallem's predominant function is offering legal advice to the PSC.

As to the claimed confidential exception for Mussallem, Petitioner asserts there is nothing in the record to indicate Mussallem's duties provide him with access to confidential matters in a manner sufficient to trigger this exception. While Mussallem may have access to disciplinary discussions involving some of the employees, based on his membership on the CMT, his role has largely been limited to providing legal advice in terms of personnel and the administration of discipline. Further, Mussallem's testimony does not clearly establish that those personnel matters do, in fact, encompass the terms of a collective bargaining agreement. Citing, City of Madison, supra, Petitioner asserts the Commission has held that an attorney who acts as a legal resource need not be excluded as a confidential employee. Like the attorney in the City of Madison case, Mussallem is simply a legal resource, and is not placed in a position where he must choose between the interests of the employer and those of the labor organization. Further, the record establishes that since the reorganization, Mussallem has not been involved in the issuance of written reprimands, suspensions or discharge of employees, has not represented the PSC or DER in grievance arbitration matters, and is not involved in the steps of the grievance arbitration process, nor in collective bargaining. Mussallem's involvement in labor relations matters through his activities on the CMT is de minimis. Mussallem's own testimony indicates that not more than five percent of his time is devoted to such activities. Mussallem's confidential labor relations activity therefore does not rise to the level so as to trigger the confidentiality exception. Thus, Mussallem is properly included in the bargaining unit represented by Petitioner.

In its reply brief, Petitioner asserts the State's claim that Mussallem should be excluded because employees "recognize his status when they seek his approval to do something" goes to a supervisory exclusion which has not been asserted as to Mussallem, and those instances cited by the State are administrative in nature. Petitioner also disputes that Mussallem's involvement in the federal intervention budget triggers the application of the managerial exclusion. Mussallem has no independent authority to effectively commit funds, as he must act in concert with others.

Mussallem's participation in the budget process concerns utilization of those funds and he does not have the authority to shift money in or out of the program. Mussallem merely recommends to others how to utilize the funds allocated for the particular program, and cannot make an independent decision.

With regard to James' position, Petitioner asserts that James' policy involvement is largely limited to participation on the Division's CMT and James does not have authority to make independent decisions. The CMT will meet without James if she is absent, and the Division Administrator has authority to veto the decisions of the other team members. While James contended that she spends 40 percent of her time representing the Commission in litigation and providing legal advice to the Commission and staff, and 60 percent of her time participating with Division Administrators and Assistant Administrators in developing and implementing strategic plans for the Division, her testimony reveals that she is involved in a number of legal proceedings that take up a considerable portion of her time. In light of that testimony, James' estimate is inaccurate and inconsistent with the amount of time allocated in her position description to policy matters, i.e., twice as much as the 30 percent allocated in the position description. James' testimony indicating that she spends a significant amount of time representing the PSC in legal matters seemingly would not permit her to devote a significant amount of time to policy matters.

Even if James' assessment is accurate, her position is properly included in the bargaining unit. Citing State of Wisconsin Attorneys' Association, *supra*, Petitioner asserts the Commission has held that service on a management committee does not, in and of itself, exempt an employee from SELRA's coverage. If the attorney's predominant function is to provide legal services and advice, and the attorney lacks the authority to compel the team to accept his/her recommendations, then the attorney cannot formulate and implement policy individually and the position will be included in the bargaining unit. James has no independent authority to formulate and implement policy and it appears her predominant function on the CMT is to provide legal advice. Further, James testified that the policy decisions addressed by the CMT concern both internal management policy and the development of public policy, with 20 percent of her time being devoted to the former. Thus, a good part of her time is devoted to matters not affecting the direction of the organization but, instead, its operations. James is not "predominately engaged in executive or managerial functions" and does not participate to a sufficient degree or at a high enough level to be excluded as a managerial employee.

As to James' alleged confidential status, Petitioner asserts that the record indicates she does not have sufficient access to, knowledge of, nor participation in, labor relations matters in a fashion sufficient to exclude her position as confidential. James has minimal involvement in small personnel matters, and receives collective bargaining status updates due to her participation on the CMT. She is not involved in bargaining, is not consulted regarding the bargaining process or bargaining strategy, nor is the CMT on which she serves consulted with regard to bargaining strategy. As to the status updates on negotiations, the status of negotiations is obviously known by the unions as well and nothing indicates the reports contain confidential information. To exclude

James' position based on her limited involvement through the participation on the CMT would violate the Commission's policy against dispersment of confidential work. There is no evidence to indicate that James' exposure, is, or would be, anything more than de minimis.

The allegation that James' position should be excluded as supervisory is not supported by the evidence. James concedes that at least 40 percent of her work is the same as that performed by other attorneys. James also lacks the requisite authority to trigger the supervisory exception. James does not directly supervise any employes in the Division, and cannot give independent direction to other employes and is not involved in the performance evaluations of the employes. There is no evidence to indicate that James has authority to effectively hire, fire, promote, transfer, discipline, or discharge employes. While her position description alludes to some of those activities, there is no evidence she performs those activities independently; rather, it appears the authority is nothing more than participatory. James' claim that she assigns work as part of her participation on the CMT is insufficient to trigger the supervisory exception. City of Madison, supra.

In its reply brief, Petitioner asserts the State implies that each and every member of the CMT must be exempt as management, since the team cannot act alone. The Commission has already held that attorneys who "cannot formulate and implement policy individually or without review, comment or consensus by other members" (emphasis added) of a management team or their superiors are not exempt as managerial. James' position description indicates that she spends 69 percent of her time representing the Commission in litigation, providing legal advice and maintaining her proficiency. Her activities regarding developing the Division's strategic plans are with, rather than independent of, the Administrator or Assistant Administrators, and she has no independent managerial authority.

Petitioner asserts that Crosetto's most recent position description indicates that she devotes 30 percent of her time to "coordination and management of overall division programs and operations of telecommunications utility regulation"; 25 percent to activities associated with the Core Management Team; 25 percent to representing the Commission in matters before courts and administrative agencies; five percent to the management and supervision of staff resources; 10 percent to providing legal advice to the Commission and Commissioners and staff; and five percent to education.

With regard to Crosetto's alleged supervisory status, Petitioner asserts that Crosetto does not perform work which is significantly different from that of her subordinate, Attorney Varda, the only employe supervised by Crosetto. Further, Crosetto does not possess the requisite supervisory authority. Crosetto admitted her position description accurately indicates that she spends only five percent of her time on supervisory activities. Further, Crosetto had not interviewed applicants for a position with the PSC since its reorganization, and while she had scheduled interviews for a time following the hearing, she did not possess the authority to effectively recommend the hiring of an employe without the approval of the Division's CMT. Crosetto also testified that she would be conducting the interview as part of a panel along with an individual from Petitioner's bargaining

unit. Indicative of a lack of supervisory authority is the fact that Crosetto has not counseled other employees regarding unsatisfactory work performance or behavior, has not discussed discipline problems with higher management, and has not recommended the administration of written or verbal reprimands, nor effectively recommended discipline.

With regard to Crosetto's alleged managerial status, the record indicates that while Crosetto periodically meets with the Division CMT, individual employees, and other groups, there is nothing to indicate those meetings significantly involve her in the formulation, determination and implementation of management policy. The record also indicates that Crosetto devotes relatively little time to those activities and that much of the time she does spend on such meetings is spent providing legal advice. Based on Crosetto's testimony regarding her time spent on hearings and preparation for hearings, she is predominately engaged in providing legal services and advice to the Agency. There is nothing in the record to indicate that Crosetto has the level of control over the State's resources required to trigger the managerial exception.

As to Crosetto's alleged confidential status, Petitioner asserts that there is no evidence in the record to indicate that Crosetto has access to the type of confidential information which triggers the confidential exception. There is no evidence that Crosetto is involved in collective bargaining, grievance administration, litigation or other matters that would provide her with access to information not available to the bargaining representative and there is no such indication in Crosetto's position description.

In its reply brief, Petitioner asserts that the State bases its argument as to the application of the managerial exclusion on a claimed "supervisory element" of the management exclusion. Crosetto testified that only 15 hours out of a week are committed to meetings, and that only seven of those hours are devoted to CMT meetings. The remaining eight hours are devoted to meetings with individuals or groups other than the CMT, and in those meetings Crosetto provides legal advice. Beyond that, Crosetto's testimony reveals she has de minimis supervisory responsibility relative to one employee who works with her on the Wisconsin Bell case. Both Crosetto's position description and her testimony indicate she spends most of her time as a litigator and, thus, is appropriately included in the bargaining unit.

The State contends with regard to Mussallem that, similar to the other Division Chief Counsel positions, Mussallem is a member of the his Division's CMT. As such, his position possesses and exercises duties and responsibilities delegated by the Division Administrator, as well as those duties and responsibilities traditionally performed by a Bureau Director. His position participates on an equal basis with other members of the CMT in consensus decision making regarding matters such as resource distribution, work assignments and the development of Division priorities and policy. With regard to the latter, as a member of the CMT Mussallem actively participates in managing the resources and programs of the Division, and is involved in the development, formulation and determination of Division policy and strategic plans. Mussallem now directs Division employees to perform tasks because he represents management. He assigns

work to Levine, a member of Petitioner's bargaining unit, and is involved in prioritizing work assignments of Division employees. Mussallem's managerial status is also recognized by the other employees when they seek his approval to "do something." Mussallem has met with the Division Administrator to discuss performance problems of an employee and is personally involved in the \$200,000 federal intervention budget.

With regard to James, the State again notes that the organizational structure of the PSC was altered and asserts that the same management functions of the Division Administrators and Bureau Directors which were the basis for designating them as "management" have been delegated to James as a member of the CMT, thus entitling her to exemption as management. The State asserts the Petitioner's arguments reflect a total misunderstanding of the Team Management Concept. James' participation in team decisions is exactly the same as all of the other team members. Decisions are reached on a consensus basis, and matters are discussed and considered until there is accord. The fact that the team may act in James' absence is irrelevant. Under Petitioner's logic, no members of the CMT could be considered "management", and therefore, there could be no "management" exemptions in the Electric Division. All of the members of the CMT participate on an equal basis and make decisions pertaining to reward, reprimand, hiring, firing, etc. Further, James' position description describes her position as being a "critical member of the Division Management Team" with duties "in the formulation, determination, and implementation of electric industry regulatory, policy and strategic plans for the Electric Division." Her position's work activities are consistent with that goal. James testified that she spends 60 percent of her time on "management" tasks. The State disputes Petitioner's assertion that James' estimation of the amount of time she devotes to management tasks cannot be accurate, given the amount of time she has spent representing the Division in major cases. James' uncontradicted testimony is that she devotes 70 to 90 hours per week to her work, thus allowing her to spend the amount of time she does on her management duties, as well as performing her duties related to providing legal representation and advice to the Division. The State notes that James was involved in the Wisconsin Advance Plan, which clearly involves policy, and has been designated formally as "being in charge" of the Division in the absence of the Administrator.

The State also reasserts its argument that "management" personnel have confidential and supervisory components. The State disputes Petitioner's assertion that James' position has the same principal work as that of the other attorney in the Division, Ludwig. Ludwig has no management duties whatsoever, while James' position description references supervisory duties as a member of the CMT. James in fact spends only a minor amount of her time on tasks assigned to Ludwig. Further, James assigns work to Ludwig and others in the Division and is involved in the annual evaluation of employees.

The State also asserts that the Petitioner fails to recognize the distinction between providing legal advice which is integral to policy formulation and determination and development, and legal advice which implements that policy. The evidence indicates that a very substantial part of the advice James provides is of the former variety. The State also asserts that the team concept of

management relies on the participation of team members who have different occupational backgrounds and perspectives, with each member providing management advice from their respective professional training and experience. The fact that James' professional training and experience are in law does not mean that her advice is not the formulation, development and determination of policy function that the other "management" members of the team exercise. The team concept is built upon participatory management with the team making decisions rather than using the traditional autocratic style of management. The State asserts that James, as are the other members of the CMT, is entitled to the management exemption.

The State asserts that the record reflects the PSC's reorganization and the philosophy, goals and objectives of that reorganization and that certain divisions have moved faster toward achieving those goals and objectives. According to the State, the position occupied by Crosetto represents the position that has progressed the farthest in terms of the overall objectives of the Team Management Concept. The State asserts that the position should serve as the "template" in considering the other CMT positions involved in this hearing in that Crosetto's position reflects the nearly "final product". That final product, rather than the snapshots of the individual positions that are along the development continuum, should be considered in determining whether the positions on the CMT's should be deemed "management".

As a member of the CMT for the Telecommunications Division, Crosetto enjoys all of the delegated and assumed "management" functions of the Division Administrator, and the eliminated Bureau Director positions. The State compares the position description of Crosetto's position at the time of reorganization and her current position description at the time of hearing, and asserts that the latter reflects the evolution of her position in a manner consistent with the intent, purpose, goals and objectives of the reorganization. Further evidence of the evolution is the supervisory assignments to Crosetto. The Supervisory Analysis Form for her position shows that she clearly meets the statutory definition of a supervisor, indicating that 60 percent of her principal duties differ from those assigned to the attorney subordinates she supervises. Crosetto's current position description reflects the emphasis on management functions, Goal (A): "coordination and management of overall Division programs and operations" and the work activities under that goal, along with Goal (B), assigning Crosetto's position duties and responsibilities and functions of "developing and implementing strategic plans for the Division's activities on a short-term and a long-term (six year) basis", establish that 55 percent of her assigned duties are "executive and managerial functions". Crosetto also testified that the Division is in the process of establishing new policy directives, and that she is involved in that process. Further, in the next Wisconsin Bell case, Crosetto will be making assignments to carry out the PSC's policy. Also, the concepts of the Intra-LATA and access charges are being restructured, reflecting policy changes, and Crosetto was involved in that restructuring. Adding the "supervisory" element of "management" to the duties and responsibilities of Crosetto's position, the State concludes that the position must be excluded on the basis of the management exemption.

CHIEF COUNSEL OF THE DEPARTMENT OF EMPLOYE TRUST FUNDS

(ROBERT WEBER)

Petitioner asserts that Weber is not properly excluded as a supervisory employe for several reasons. First, at the time of hearing, Weber technically had no subordinates over which to exercise supervisory authority. Eisenbrandt was a project, rather than a permanent, employe at that time. The State speculates that the then-pending budget would be approved and result in Eisenbrandt's full-time appointment. Such speculation is an insufficient basis for excluding an individual as supervisory. Second, even if Eisenbrandt is made permanent, Weber would still not qualify for a supervisory exclusion, since his principal work does not differ from that of Eisenbrandt, i.e., Weber is principally engaged in providing legal services to the ETF. Further, such supervisory activities are de minimis. Weber testified that he assigns Eisenbrandt, supervises her performance, writes her evaluations and approves her training requests and performs the "other usual supervisory functions". His estimate as to the amount of time spent on those activities was approximately 10 percent. Both quantitatively and qualitatively, Weber's position does not meet the test for excluding a position as supervisory.

Petitioner also asserts that the record does not support excluding Weber's position on the basis that it is a confidential position. Weber does not have access to the confidential information which triggers the exclusion. Weber has not served on the State's bargaining team, and while he might be consulted for information which would be used in bargaining, the information divulged by Weber is available to both union or management representatives, and would be provided to either. The benefit information Weber possesses is not a product of collective bargaining or a collective bargaining agreement, but is instead "statutory driven" and the benefits which are distributed by the ETF are not dependent upon the recipient's bargaining unit status. There is also nothing in the record to indicate Weber is involved in grievances or personnel-related litigation. Thus, the position is not properly excluded as confidential.

Petitioner also asserts that Weber is not properly excluded as a managerial employe as he lacks the requisite managerial authority. There is no evidence indicating Weber is engaged in the formulation, determination and implementation of management policy. Instead, the evidence indicates he is primarily engaged in providing the ETF Board and the attached boards with legal advice. There is no evidence to indicate Weber has the authority to commit the State's resources in a fashion which significantly affects ETF's direction. Weber's role in the development of ETF's budget is to prepare information concerning the legal services aspects of the Department's budget, i.e., providing advice as to the monies to be requested for outside counsel and for developing requests for new positions. Weber's advice and requests are then presented to ETF's Deputy Secretary and the administrator of the Division of Program Development and Evaluation. It is they, rather than Weber, who possess the authority to allocate that Department's resources.

In its reply brief, Petitioner disputes the State's claim that Weber's position is managerial based on the high level of management personnel to whom he provides legal advice. Providing legal advice is not a managerial function, and the fact that he provides that advice to a high level of

management does not make him a manager. Nor does drafting a provision of the State's administrative code result in his being a managerial employee. As to the alleged confidential status of Weber, Petitioner disputes that the requisite access to confidential information includes access to any confidential information affecting the employer-employee relationship. Such information must relate to traditional labor relations matter involving represented employees, and must not be available to the bargaining representative. Wisconsin State Attorneys' Association, supra.; Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88). Similarly, a de minimis exposure to confidential materials is not sufficient to trigger the exception, and this is especially true where there is another confidential employee available to perform the work. Milwaukee County, Dec. No. 7135-S (WERC, 2/85). Petitioner asserts that the Commission should not depart from that established precedent. Providing legal advice to the boards and high level management personnel regarding insurance, retirement benefits and deferred compensation does not support a finding of confidential status. The information Weber provides to the State's bargaining agents is also available to the unions' bargaining representatives. Weber also indicated that if he were called on to participate in collective bargaining, he would have a conflict of interest, since he is Chief Counsel for the Public Employee Trust Funds and in that role is privy to confidential information relating to the interests of the participants. That confidential information does not relate to the State's collective bargaining interest strategy or position in bargaining.

The State asserts that Weber's position of Chief Counsel should be excluded on the basis that it is confidential and managerial and is per se management. According to the State, this is clearly a case of a position which is "privy to confidential matters affecting the employer/employee relationship." The evidence indicates that the position is privy to matters which are directly or indirectly related to "wages, hours and other conditions of employment." One of the boards affiliated with the ETF, the Group Insurance Board, establishes the insurance packages available to State employees, including those represented by Petitioner and the Wisconsin Federation of Teachers, with which Petitioner is affiliated. Similarly, the Teacher Retirement System and other boards affiliated with the ETF, especially the Wisconsin Retirement System, may also affect members of Petitioner or the Federation. The legal advice Weber provides to those boards and higher-level ETF management personnel currently relates to matters affecting the employer-employee relationship. That effect is on a large, broadscale basis touching every union that represents State employees and the areas involved are significant, i.e., insurance, retirement benefits, deferred compensation, etc. Weber's position does not operate in a vacuum and in order to render advice and perform his duties he has access to "confidential" information, especially in the area of collective bargaining. The "confidential" exemption exists because it is recognized that a person cannot serve two masters. In order to avoid the potential conflict of a person in a bargaining unit becoming privy to confidential matters which would place that person in jeopardy of having to serve two masters, the Legislature determined that a person would be exempt from the bargaining unit in order to avoid that conflict. The State asserts that Commission caselaw is in accord. Weber's position as someone dealing on behalf of the employer with subjects that are at the very core of the major items the unions seek in collective bargaining, fits squarely within the spirit and intent of the "confidential" exemption.

With regard to Weber's managerial status, the State asserts that his position is in direct line to the Office of the Secretary of ETF and his direct supervisor is the Deputy Secretary. Weber's position description also indicates that he provides legal counsel and assistance to the Department's Secretary and staff and to the ETF, and to the attached boards, and that the decisions he makes "frequently set administrative precedents" which are clearly policy. The State also asserts that Goals (A) and (B) in his position description assign him duties which are clearly "management" and involve him in dealing directly with higher-level management personnel such as the Secretary, the boards associated with the ETF, high-level administrators, DER's Secretary and the Governor's designees. Weber is also involved in developing the budget for legal services at the ETF. Weber was the primary author of, and worked with DER regarding, ETF 11, Wisconsin Administrative Code. The State asserts that unions are now negotiating "protective status" for employees and that Weber usually receives calls from management-side corporation counsels or city attorneys regarding protective status. The duty disability benefit program also involves "confidential" aspects usually associated with management. According to the State, most critical to Weber's management position are the types of boards associated with the ETF and the services ETF performs. The ETF administers the Wisconsin Retirement System and related fringe benefit programs for employees of state and local governments. The WRS and those boards attached to the ETF directly determine and affect the policy at the highest level. Weber is integrally and profoundly involved in advising those higher-level management bodies for a predominant part of his work time.

The State also notes that Weber testified that the recent representation election will result in WPEC representing 20 to 30 ETF employees and that WPEC is affiliated with the WFT, as is Petitioner. The natural consequence of that event is that there will now be "confidential matters" with which Weber, as General Counsel, will become involved.

**EXECUTIVE COUNSEL TO THE COMMISSIONER AND DEPUTY COMMISSIONER,
OFFICE OF THE COMMISSIONER OF SECURITIES (PATRICIA STRUCK)**

Petitioner contends that none of the activities listed in Struck's position description indicate that she has access to, knowledge of, or participates in confidential labor relations matters, nor do they indicate she has access to information which deals with the State's position in bargaining, contract administration, litigation or similar labor relations matters not available to the bargaining agents of represented employees. The confidential information Struck is exposed to in a role as liaison to organizations involved in the securities industry and her rendering of formal and informal ethical opinions regarding the agency's relationship with regulated industry, lobbyists, legislators, and outside employment of staff members, even if confidential, does not expose Struck to the confidential labor relations matters which would exempt her position as confidential. While Struck testified she has contact with employees who come to her with work-related problems concerning workplace behavior, harassment and personality conflicts, Struck's assistance to those employees is on an informal basis. Hence, her personnel involvement does not trigger the confidentiality exception.

Neither Struck's position description nor her testimony indicate that the managerial exception applies to her position. None of the activities listed in Struck's position description involve her in the formulation, determination, and implementation of management policy, nor do they indicate she has the authority to commit the State's resources. Those activities listed in the position description largely call on Struck to provide legal services and advice to the Commissioner, Deputy Commissioner, and Division Administrators. While Struck participates in periodic executive staff meetings at which policy matters are discussed, and provides input when requested, and makes revision recommendations as a member of the Administrative Rules Committee, there is no evidence she does anything more than offer her legal service to those committees. Even if Struck's participation were of a managerial nature, those activities would be a de minimis portion of her overall activity.

The State offered no argument in its Brief as to Struck's position.

GENERAL COUNSEL - OFFICE OF THE COMMISSIONER OF SECURITIES
(RANDALL SCHUMANN)

Petitioner asserts that the position description for Schumann's General Counsel position continues to accurately reflect the duties and the amount of time spent on those duties. Neither the position description, nor Schumann's testimony, indicates he is predominately engaged in executive and managerial duties which would trigger the managerial exception. Schumann's testimony reveals that his involvement in the annual rules revision process is as a "clearinghouse" for information, and organizing the meetings at which policy decisions are made. While Schumann attends policy-making meetings, his testimony indicates he has no independent policy-making authority, but is limited to participating on the rule revision team where decisions are made on a consensus basis, and the team's authority is subordinate to that of the Commissioner and Deputy Commissioner. There is no evidence Schumann has the authority to commit the State's resources. At most, Schumann performs de minimis managerial responsibilities, and therefore is not properly excluded as managerial.

With regard to supervisory duties, there is nothing in the record to indicate Schumann supervises any employes.

As to the alleged confidential status of the position, Petitioner asserts there is no indication in Schumann's position description or the record to indicate he has access to, knowledge of, or participates in confidential labor relations matters, thereby gaining access to information which is unavailable to union bargaining representatives. The record indicates Schumann has been involved in personnel matters before the Personnel Commission on two occasions; one, eight years prior to the hearing and the other, three-and-a-half years prior to the hearing. Those two instances, along with handling a grievance matter on behalf of the agency some months prior to the hearing, form the totality of Schumann's involvement in confidential matters. While Schumann testified the

Commissioner and Deputy Commissioner will "walk across the hall" to discuss the policy and legal implications of personnel disputes, Schumann testified he has not been involved in grievances raised by staff attorneys, and that there is no plan by which he is to become involved in such grievances. Further, Schumann has not appeared before any other State agencies or the Personnel Commission in any employer/employee-related dispute. Schumann does not represent the State in unemployment compensation cases, worker compensation cases, or grievance arbitrations. At most, Schumann's involvement in confidential labor relations matters is de minimis, and therefore he should be included in the collective bargaining unit.

In response to the State's arguments, Petitioner asserts that Schumann's position cannot be considered managerial based on his listing in the office telephone directory as executive, or because he advises the Commissioner and Deputy Commissioner and is a lobbyist for the Office, or because he has periodically filled in as Acting Commissioner. A listing in the telephone directory as an executive does not indicate he is predominately engaged in management, and Schumann's position description indicates he provides legal services to the Offices of the Commissioner. Periodically acting as a lobbyist does not predominately involve Schumann in managerial activities, and serving as Acting Commissioner does not warrant his exclusion as managerial. Had the Legislature intended to exclude Acting Commissioners, it would have specifically done so. With regard to the confidential status of Schumann's position, Petitioner reiterates that there is no evidence he is privy to any information concerning confidential labor relations matters and that his exposure to such matters is de minimis.

The State asserts that while the record might present a limited basis for a "confidential" exemption as to Schumann's position, the facts are nonetheless sufficient to warrant exclusion on that basis. Schumann is the General Counsel for the office and the record indicates he has handled matters before the Personnel Commission, has been involved in personnel matters and has handled grievance matters. He consults with and advises the Commissioner and Deputy Commissioner and that, by itself, is sufficient to exempt his position. The State asserts that realistically, a small agency such as the Securities Commission cannot be expected to have large volumes of personnel matters and that it is not the number of times one is involved in "confidential matters", but the fact that the position has access to receive "confidential matters" that is important.

The State asserts that the evidence clearly establishes Schumann's position is "management". He is listed in the office telephone directory under the heading "Executive" and he has served as "Acting Commissioner of Securities". Schumann advises the Commissioner and Deputy Commissioner in his capacity as agency General Counsel and in doing so, must ensure that all aspects of the agency's position on key finance market issues are coordinated and presented, assessing the need for the formulation of policy issues, rule revision, and developing position papers for executive review. His role in the annual rule revisions is beyond being "an informational clearinghouse". He provides analysis, critique and commentary on proposed rule changes and attends and participates in "policy making" meetings. Schumann and other management personnel of the agency are registered lobbyists on behalf of the agency and such registration is indicative of

management status. Schumann's time spent on those activities is not de minimis. The State also asserts that not just anyone is designated to serve as "Acting Commissioner" to perform "any duty or exercise any power or function assigned to the Commissioner. . ." Schumann's position has been so designated over the past 20 years. It is beyond challenge that the Commissioner is "management" and as such, the functions of the Commissioner are per se "executive and managerial". The position that has been delegated authority to perform those "executive and managerial" functions thus does exercise similar, if not identical, functions and responsibilities. Ipsa facto, Schumann's position must be exempt as management. The State also questions Petitioner's decision to challenge the exemption at this point in time, as Schumann has held the General Counsel position for almost 20 years and has not been in the bargaining unit. Petitioner's failure to challenge the position prior to this time reflects concurrence in his exempt status and Petitioner has failed to show any changes that have occurred which would now result in his position being required to be included in the unit.

**ATTORNEY 13 - SUPERVISOR, DIVISION OF HEARINGS AND APPEALS,
DEPARTMENT OF ADMINISTRATION (WAYNE WIEDENHOEFT)**

Petitioner asserts that with regard to the alleged supervisory status of Wiedenhoeft, he is engaged in duties similar to those of the employees he supervises, and is therefore properly included in the bargaining unit. Both Wiedenhoeft's position description and his testimony demonstrate that the bulk of his duties are similar to those of his subordinates. Further, even if it is determined that his remaining activity is sufficient to conclude that Wiedenhoeft is engaged in activity dissimilar from his subordinates, the record does not support a finding that he possesses sufficient supervisory authority to trigger the supervisory exception. It is clear that Wiedenhoeft does not have authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees. The decision to discharge an employee is made by the Division Administrator, and Wiedenhoeft's role is limited to conducting the pre-disciplinary investigatory interview. While Wiedenhoeft served on an interview panel that hired one of his subordinates, Wiedenhoeft did not possess authority to direct the panel to recommend a candidate for hire. Instead, the decision was reached by consensus, with the ultimate decision being made by Wiedenhoeft's supervisor. Petitioner also asserts that several of the activities listed in the position description as part of his supervisory duties are more akin to legal service and advice than to supervision. Wiedenhoeft testified that five to 10 percent of his total supervisory time was spent analyzing ALJ decisions prior to issuance to ensure proper procedures were followed and the application of appropriate laws, that he spent 25 percent of his supervisory time answering questions or assisting the staff in resolving complex factual or legal problems and approximately five percent of his supervisory time training new administrative law judges. Those matters consumed most of Wiedenhoeft's "supervisory time", and none of those activities are of the sort that would trigger the supervisory exception. Thus, Wiedenhoeft's work is predominately the same as that of his subordinate's, and he lacks supervisory authority sufficient to trigger the supervisory exception.

In its reply brief, Petitioner asserts that the State is attempting to create a hybrid exclusion

with respect to Wiedenhoeft's position in that it is attempting to create a "confidential-supervisor" exemption. Petitioner argues that attempt should be rejected. A review of Wiedenhoeft's position description indicates that of the activities listed under that area involving the supervision of the staff, only 7.5 percent of Wiedenhoeft's time is devoted to what can properly be characterized as "routine" supervisory activity. The rest of the activities are properly characterized as "coordination" activities. Further, even if it is assumed Wiedenhoeft devotes a full 20 percent of his time to supervisory activities, it remains that his principal work is the same as that of his subordinates, making the supervisory exclusion inapplicable.

The State asserts that there is a great deal of commonality with respect to the "confidential" and "supervisor" exemptions, with many of the same indicia supporting both exemptions, e.g., supervisors are involved in personnel matters such as hiring, firing, discipline, evaluating and rewarding employees that are also key factors for the confidential exemption. The State asserts that Wiedenhoeft's position has those common elements and should be exempt on both bases. Wiedenhoeft's position description, as modified by his testimony, reflects his assigned duties at the time of hearing and identifies duties and responsibilities that are shared by the confidential and supervisory exemptions. Under Goal (C) of the position description, Wiedenhoeft's position evaluates staff performance, hires, promotes, takes progressive discipline, reviews the work of subordinates and brings procedural and policy problems to the Deputy Administrator. Goal (D) of the position description indicates that the position documents personnel problems for the Deputy Administrator. As a supervisor, Wiedenhoeft is involved at the first step of the grievance procedure. Wiedenhoeft's uncontradicted testimony is that he prepares and signs annual performance evaluations without assistance, and that he has issued a verbal reprimand and has discussed problems over work rules affecting Petitioner's bargaining unit. The position would also be involved in pre-disciplinary, investigatory interviews. The State also notes that it is indicated on Wiedenhoeft's position description that his position supervises subordinate employees in permanent positions. The evidence also reveals that Wiedenhoeft supervises three Attorney - 13 positions and two support staff positions and is designated as the "Milwaukee Office Supervisor - Attorney 13, Supervisor". Wiedenhoeft testified that one-third of his time is devoted to the activities under Goals (C) and (D) of his position description, which are clearly supervisory duties. Wiedenhoeft conducts staff meetings two to three times each month, and conducts part of the unit meetings in Madison. Wiedenhoeft was involved in the hiring decision of Patzke, an Attorney - 13 in the Milwaukee office, and was also on the interview panel for Beckwith and Hackbarth. Wiedenhoeft recommended the latter two hires, and believes that his recommendation carried authority since his position would be their supervisor.

The State also asserts the Petitioner's contention that Wiedenhoeft's duties are similar to those of his subordinates is not supported by the record. There is no position description for the Attorney - 13 position in evidence which could be used to compare duties, while the record reveals that one third of the duties assigned to Wiedenhoeft's position are not similar to those of his subordinates. The State also asserts that Petitioner's contention that Wiedenhoeft's position does not have authority in the areas of hiring, promotion, transfer, discipline or discharge is unrealistic

and invalid. Promotions and transfers are personnel transactions within the definition of ER 1.02(36) and (46), Wis. Adm. Code, and like the hiring process, many levels of supervision effectively recommend those actions. However, as is the usual case in State service, the actual authority to hire, promote or transfer officially resides at a higher level. The State cites Sec. 230.03(4), Stats., as providing that the appointing authority is the "Chief Administrative Officer of an agency, unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes." The State asserts that it could not be seriously argued that a Bureau Director is not a supervisor because the Division Administrator has the "official" duty to hire, promote, etc. That same rationale applies with respect to first-line supervisory positions like Wiedenhoeft's. Similarly, just because the decision to fire an employe is made by the Division Administrator does not mean that Wiedenhoeft is not a supervisor. While the official decision is made by the Division Administrator, as would be the case in other agencies, in reality the recommendations of subordinate supervisors play an important role in the ultimate official decision. Under the Petitioner's contention, even a Division Administrator or Bureau Director could not be a supervisor because the appointing authority retains the final authority to appoint or terminate staff.

LEGAL COUNSEL FOR THE ETHICS BOARD -
(JONATHAN BECKER)

Contrary to the State's claim that Becker's position should be excluded as confidential, Petitioner asserts that there is nothing in the record to support a claim that Becker has access to, knowledge of, or participates in confidential matters related to labor relations, nor evidence that he has access to information dealing with the State's strategy or position in collective bargaining, contract administration, litigation or other such information not available to bargaining unit representatives.

Petitioner also disputes that Becker's position is managerial. Becker's advice on lobbying and ethics legislation does not constitute participating in a significant manner in the formulation, determination and implementation of management policy. Rendering an opinion based on an assessment of a factual situation in light of State laws, does not equate with formulating, determining and implementing management policy in a manner sufficient to trigger the managerial exception. To find that it did would result in virtually all attorneys employed by the State being excluded from SELRA's coverage. Even if it is determined that Becker's rendering of opinions involves some sort of policy-making, Becker lacks the authority to independently formulate, determine and implement management policy. Becker has never received written delegation of such authority from the Board, and he does not independently determine the level at which Board opinions are issued. That decision is made in concert with the Executive Director. There is also no evidence that Becker has the authority to commit the State's resources.

In its reply brief, Petitioner disputes the State's argument that Becker's position is excluded as "per se management" due to his position being involved in highly sensitive matters that are characteristic of executive or managerial employes. Petitioner asserts that Becker does not make

policy, but simply interprets law in light of the facts, and thus provides legal services as a lawyer, not as a manager. While the State concedes that Becker's position is not exposed to "traditional confidential matters", it argues that Becker is exposed to other confidential matters affecting the employer/employee relationship. The State, however, has not offered examples to support that claim. Providing opinions and advice to State officials, lobbyists and lobbying organizations in administering the licensing registration and reporting requirements affecting individuals and organizations engaged in lobbying and enforcing the applicable laws are not the type of activities that trigger the confidential exception. While Becker's position description indicates that he would have access to confidential information concerning the activities of State officials who are intimately involved in collective bargaining, there is nothing in the record to indicate Becker has, or will have, access to information concerning the State's strategy or position in bargaining, contract administration, litigation or similar matters. Thus, the State's claim of confidential status is unfounded.

The State notes that Sec. 111.81(7)(a), Stats., excludes persons who are "privy to confidential matters affecting the employer/employee relationship" and asserts that while it could be argued that Becker's position is not privy to traditional "confidential matters" involving collective bargaining, grievances, etc., he certainly is and can be privy to "confidential matters" involving the employer/employee relationships. The statutory restrictions on who can be members of the Ethics Board and the statutory statement of its duties and responsibilities indicate the attempt to isolate the Ethics Board and its members from potential conflicts of interest. The Board is to first prevent, and then deal with, ethical issues which might arise because of conflicts of interest. There are very elaborate measures for maintaining confidentiality related to the requesting and issuing of advisory opinions. The Board's deliberations and actions upon such requests are held in closed session, and no member or employe of the Board may make known the identity of the individual requesting the advisory opinion or of individuals or organizations identified in the opinion. The need for a "confidential" exemption for Becker's position is evidenced not only by his duties, but also by the fact that his position is involved in providing opinions and advice to State officials, lobbyists and lobbying organizations, as well as administering the licensing registration and reporting requirements upon individuals and organizations engaged in lobbying and enforcing the applicable laws. As noted in Goal II of his position description, Becker investigates alleged violations of "State officials. . .key managers, State employes, lobbyists and lobbying organizations." The State especially notes a provision which states that, "the Legal Counsel has access to confidential information concerning the activities of officials, including those intimately associated with the collective bargaining process on behalf of the State of Wisconsin." Thus, Becker has access to information regarding collective bargaining from management's perspective. He may also come in contact with and have access to, information from the other side of the employer/employee relationship via his duties related to registered lobbyists. Included among them are labor organizations, including the Wisconsin Federation of Teachers, with which Petitioner is affiliated. The State asserts that the rationale for exempting a position as confidential is that due to a person's position, he/she is in a position to be, or is, privy to matters of such a nature that the law excludes them from being in a bargaining unit. Becker's position meets that definition, and should be

excluded as confidential.

As to Becker's management status, the State reasserts its position that the General Counsel for an agency should be per se management. The State also asserts that the exemption applies to certain high levels of management who are engaged in "predominately and executive managerial functions" and other employes "exercising similar functions and responsibilities." Becker's position clearly meets that definition. The Ethics Board is involved in high-level, very sensitive and confidential matters requiring that the Board and its employes be "beyond reproach". The involvement in such high-level and sensitive matters is characteristic of persons identified as "executive and managerial". The State points to Goals I and II of Becker's position description, pertaining to requests for advice and information regarding the Ethics Code and lobbying law and the enforcement of standards of conduct and filing requirements for officials, lobbyists and lobbying organizations, respectively, as indicating that Becker's position is clearly involved at such high levels. Those provisions also indicate that the requests for advice and the Board's responses are confidential and not subject to the Open Records Law.

As is the case for other high-level administrators, Becker's duties are highly visible with "severe" consequences for "misperformance". Most significant is the fact that Becker's position is delegated the authority by the Board to prepare and sign responses to requests for advice by "informal" opinions. Becker also drafts the formal opinions for the Board and all of those assigned duties are ones found at the executive and managerial levels. Becker's position is probably more directly involved in policy than is the case in other agencies each time the Board issues a formal or informal opinion. Goal I of Becker's position description recognizes this in stating that "The Legal Counsel's role involves the exercise of important policy-making responsibilities." The State asserts that unless the statute or administrative code specifically addresses a point, any interpretation of the law is policy, and that is certainly true of the "gray areas" in the law. Becker's position is directly involved in formal and informal opinions and therefore he is directly involved in policy for a very substantial part of his work time. Thus, he should be excluded as managerial.

GENERAL COUNSEL - DEPARTMENT OF DEVELOPMENT
(DENNIS FAY)

Petitioner disputes the State's claim of Fay's managerial status. Petitioner asserts that neither Fay's position description nor his testimony indicate that he participates in a significant manner in the formulation, determination and implementation of management policy, or that he has the effective authority to commit the State's resources so as to affect the direction of the organization. The greatest extent of Fay's involvement in Department policy arises with his attendance at monthly one to two-hour long staff meetings, and through his informal meetings with the Secretary, at which his advice is sought with regard to legal, program and policy matters. However, there is no evidence that Fay's involvement is anything more than de minimis. Fay's involvement in the Department's grant loan programs is performing strictly legal functions and advising the Department on how well the contents of a particular contract meet the program and

policy goals of the Department. Such involvement in the contract administration does not involve Fay in the formulation, determination, and implementation of management policy to a degree sufficient to trigger the managerial exception. Fay is merely providing an opinion as to how well a particular legal provision meets the objectives of the Department. Thus, Fay is primarily involved in serving the Department's legal needs and is not involved in the managerial or executive activity.

With regard to the claim that Fay is a confidential employee, Petitioner asserts there is not sufficient evidence in the record to demonstrate Fay has access to confidential labor relations information that would trigger that exception. There is no evidence Fay is engaged in, has access to, or is consulted with regard to, collective bargaining. The record demonstrates that Fay has never appeared as the attorney of record before the Personnel Commission in the four years he has held his position, has never appeared as the first step in the grievance procedure under the union contracts, and has not appeared as an agency representative in a grievance process for non-represented employees. While Fay indicated he has been asked for advice regarding grievances raised by non-represented employees, such involvement is hardly sufficient to exclude the position as confidential.

In its reply brief, Petitioner asserts that Fay's position description reveals that he spends the bulk of his time providing legal advice and services and therefore should be included in the bargaining unit. Petitioner also disputes the State's argument that mere access to confidential information, without more, is sufficient to trigger the confidential exclusion. There is no evidence that Fay is exposed to the kind of information required to trigger that exclusion. The only activity listed in the position description which might fall within the ambit of the confidential exclusion is representing the Department before the State's Personnel Commission, one of the two activities under the heading of representing the Department in legal actions to which five percent of Fay's time is allocated. Thus, at best, Fay would spend two-and-a-half percent of his time on such activities. There is also no evidence indicating that Fay has access to confidential information concerning represented employees. Thus, Fay's position should be included in the bargaining unit.

The State first asserts that Fay's position should be exempted as "confidential", arguing that a broader interpretation of that exemption is indicated by the statutory language. There are no associated quantitative or qualitative limitations on the exemption and the common, ordinary meaning of the term "confidential" permits minimal involvement, either active or passive, in confidential matters "affecting the employer/employee relationship". The only requirement of the exemption is that the particular position have access to confidential matters. As DOD's General Counsel, Fay is the sole source of legal advice unless it is sought outside of the agency. As such, Fay is involved in personnel matters before they reach litigation, and is consulted and provides advice on such matters in a "preventive" mode. Fay has provided advice on grievances under the WSEU labor contract, and he is designated to represent the agency on matters coming before the Personnel Commission and had matters pending before that body at the time of hearing. Further, at the time of hearing, WEPEC was in the process of organizing state employees and 20 to 25 employees at DOD would be included in that bargaining unit. WEPEC is affiliated with WFT, as is

Petitioner. Thus, Fay's position meets the "confidential" exemption.

The State reiterates its assertion that executive and managerial functions include those which support a "confidential" exemption, and in that regard rely on those functions noted above. The State also asserts that in addition to those confidential functions, Fay's other duties also support a "management" exemption. Fay is the "Chief Legal Counsel" for the agency and his immediate supervisor is the Secretary of the Department. Goal (A) of his position description indicates that Fay is involved in policy matters, and Goal (C) indicates that he is responsible for the management and coordination of Department rule-making functions. Such duties are more than just providing legal advice. Fay's position summary also indicates that he is part of the Secretary's office management team with duties that include assisting in the development, formulation and implementation of department policy and procedures. That team has "high level" staff meetings once a month. The State reiterates its assertion that the Chief Legal Counsel or General Counsel position, whose role is to advise the Secretary's Office, and which requires the individual to come in contact with high-level, confidential matters, which do not necessarily always equate with the "employer-employee relationship, but include administrative strategies as well", must be exempt as management. The Secretary and other high-level administrators must feel confident that they can share such confidential matters with their Chief Legal Counsel, who may be called upon to develop policy, or to devise the means for others to implement the high-level strategies. According to the State, that need for confidence and trust goes to the heart of the "management" exemption. If the administrators who originate the high-level strategies are exempt, then certainly those to whom the high-level confidential strategies are entrusted and confided, must also be exempt. The same or similar functions and responsibilities of statutory management positions are found in Fay's position as well, and therefore, he should be excluded as "management".

DEPUTY LEGAL COUNSEL - DEPARTMENT OF ADMINISTRATION
(MARK SAUNDERS)

Petitioner disputes the claimed confidential status of Saunders' position, and asserts that beyond indicating that Saunders is to represent the Department before the State Personnel Commission, the Federal EEOC, and other administrative agencies, his position description does not indicate that his duties provide him with access to, knowledge of, or require his participation in, confidential labor relations matters, nor does it indicate that he is exposed to information regarding the State's position in collective bargaining, contract administration, litigation or other labor relations matters. While Saunders testified he has taken responsibility for internal grievance matters, his exposure to confidential labor relations matters is, at best, de minimis. Saunders is only occasionally involved with the third step of the grievance process, participating only when a represented employe is accompanied to a grievance hearing by an attorney. Saunders has offered limited advice in a single instance involving an employe who is a member of Petitioner. While Saunders testified that DOA has "across the board" involvement in collective bargaining matters, there is no evidence that he is involved in the process. Saunders conceded that SELRA delegates to DER the role as the State's agent in collective bargaining, and he testified that he is not aware of any specific delegation of such authority from DER to DOA. Saunders also conceded that DER was representing the State in a grievance arbitration involving the discipline of an Assistant District Attorney in the Milwaukee area. While Saunders testified he has appeared in unemployment compensation matters, his last such involvement was more than a year prior to the hearing. While Saunders has given some advice to supervisors and staff on approximately six occasions regarding the terms of a collective bargaining agreement, those supervisors and staff could have obtained the same information from DER. Allowing Saunders to be treated as a confidential employe would, in effect, allow the State to fragment the confidential work typically performed by DER among a number of employes. Since Saunders has no collective bargaining responsibility and his exposure to confidential information is de minimis, exempting his position would violate the policy against dispersment of confidential work, and his position is properly to be included in the bargaining unit.

While the State claims Saunders is exempt as a managerial employe, it has failed to demonstrate that he participates in a significant manner in the formulation, determination, and implementation of management policy.

In its reply brief, Petitioner disputes the State's argument that functions supporting a confidential exclusion can also be used to support a managerial exclusion. The State's argument overlooks the fact that Saunders predominately is engaged in providing legal services and advice. The Petitioner asserts that while the State used an outdated position description rather than the current description, and then argued that Saunders is exempt because his position descriptions indicate he is exposed to confidential information, Saunders' testimony was to the contrary. Further, regardless of which position description is used, Saunders has nothing more than a de minimis exposure to such confidential labor relations information, and the activities he has in that

area can be assigned elsewhere.

The State argues that the confidential exemption applies to Saunders' position and asserts that Petitioner again seeks a very narrow interpretation of that exemption and relies on an outdated position description, rather than utilizing Saunders' current position description. The current position description is signed by Saunders, his supervisor and the Personnel Manager, who have all attested that the duties listed accurately describe the assigned work of the position. That position summary also indicates that the position represents the Department "in legal actions and proceedings and provides advice on personnel-related matters". This is borne out by the work activities listed under Goal (A) of the position description (activities (A)1 and (A)2) which require Saunders to give legal advice and informal legal opinions to the Secretary, Division Administrators or attached boards and commissions on questions arising in all areas of Department activity, etc., including personnel matters, as well as advising and assisting management and the Personnel Director and district attorneys in connection with all stages of discipline and grievances concerning Department employees and assistant district attorneys. Six percent of his time is allocated to those activities. Further, Goal (B) of the position description indicates that 40 percent of Saunders' time is allocated to representing the Department at hearings and proceedings and providing advice on personnel-related matters. That includes representing the Department before the Personnel Commission and EEOC, and in Unemployment Compensation and Worker's Compensation hearings. Saunders has represented the Department before the Personnel Commission in matters ranging from classification actions to discrimination suits, and performs that service not only for the Department, but also for the attached boards. Saunders is also involved at the third step of the contractual grievance procedure. Part of Saunders' duties also include providing legal advice to district attorneys, including regarding disciplinary matters concerning members of the assistant district attorneys bargaining unit. Communication with the district attorneys in that regard, even if the matter does not result in formal discipline, reaches the level of involvement required for the "confidential" exemption. The record established that Saunders' position is directly involved in such confidential matters. The State asserts that "being only privy to just some part of confidential matters is sufficient under the common and ordinary use of the verbiage of the confidential exemption." The State notes that DOA is the focal point of budgetary matters for the State, and those matters include the monetary aspects of collective bargaining - wages and fringe benefits.

In addition to Saunders' "confidential" functions, which also support a "management" exemption, a significant part of his duties include providing "legal advice to boards and commissions", including those that are attached to DOA or part of, or created by, the Executive Office. In that role, Saunders handles open records requests, which has included a recent request by Petitioner. Essentially, the position provides advice to "management" staff of the various boards and commissions, much as a Chief Legal Counsel does for an individual agency, and similarly, Saunders' position should be exempted as "management". Further, Saunders' position is assigned duties in connection with the Governor's Office, as well as the Lieutenant Governor's Office and the Legislature. The level at which "legal" advice is given reflects whether a position is entitled to the "management" exemption. Here, Saunders is called upon to advise the highest elected official in

the State and the need for confidentiality and for those high level positions to feel that they can confide in Saunders' position is "apparent and extremely urgent". Saunders' position confers at the same level as Division Administrators, who are statutorily exempt. Similarly, the exemption should apply to Saunders' position.

**ATTORNEY 14 - CONFIDENTIAL - DIVISION OF FINANCE, PLANNING, AND
POLICY STUDIES, WISCONSIN BOARD OF VOCATIONAL, TECHNICAL AND
ADULT EDUCATION (PATRICIA COLLINS)**

Petitioner asserts that the State's claim of confidential status for Collins' position is not supported by the evidence. Collins' exposure to confidential labor relations matters is limited at most. Collins has not participated in negotiations, nor received any proposals to review. Thus, there is no evidence that she has exposure to confidential labor relations information such as would trigger the confidential exception. While Collins was scheduled for several negotiation dates, her attendance would only occur if the Division's primary negotiator, Keith Krinke, does not attend. Beyond that, there is no evidence that Collins participates in confidential labor relations matters. Collins' involvement in grievances and discipline of employees has been limited to discussions over such matters with Krinke. Collins testified she has consulted with Krinke on bargaining and personnel matters combined, on only three or four occasions for less than 15 minutes at a time, and has met with the Division Director on a personnel matter on only one occasion for approximately an hour, and that the issue involved in that instance resolved itself. Collins also testified she met with Krinke on two occasions for approximately 10 minutes each time to discuss her role as backup negotiator. All of those instances taken together indicate Collins' involvement in labor relations is de minimis. Even if it is not considered de minimis, to exclude Collins' position would be contrary to the Commission's policy against dispersing confidential activity. There is no reason that the confidential duties of Collins could not be assigned to Krinke. Krinke has primary responsibility for labor relations and personnel matters, and is the primary negotiator from the Division, and could assume all responsibility for collective bargaining and confidential labor relations matters for the Division.

With regard to the asserted managerial status of Collins' position, Petitioner asserts there is no evidence that Collins is predominately engaged in executive and managerial functions that would significantly involve her in the formulation, determination and implementation of management policy, or that she has the effective authority to commit the State's resources. While there is some evidence that Collins has some exposure to policy issues, the position description reveals that her responsibilities are primarily of a legal nature. There is no indication in the record that Collins has the authority to independently determine, formulate and implement management policy, nor indication that Collins can compel acceptance of recommendations through the Board or the members of the committees on which she sits. Thus, Collins' position is not properly excluded as managerial, and should be included in the bargaining unit.

In its reply brief, Petitioner disputes that Collins' service on a management team sufficiently

involves her in policy matters to exclude her as managerial. According to her position description, Collins spends 35 percent of her time analyzing complex policy issues, with special attention to legal issues, 25 percent of her time providing legal assistance to the State Board, State Director and the districts and staff, 20 percent on the preparation of rules, 10 percent on representing the agency in administrative hearings and before legislative committees and conducting hearings, and 10 percent as a liaison on legal matters. Thus, Collins is a lawyer, working as a lawyer, providing legal services and advice. In response to the State's claim that Collins should be excluded as a confidential employe based on her role as a backup negotiator for Krinke, which allegedly exposes her to confidential information, and the claim that her predecessor performed confidential duties, Petitioner asserts that Collins has never been at the bargaining table, the bargaining unit involved is small, and another employe in the agency has primary responsibility for collective bargaining. The *de minimis* confidential work assigned to Collins can be easily reassigned to Krinke. Further, Krinke is invited to participate in bargaining as nothing more than an agency representative, with DER maintaining control of the bargaining process. Thus, Collins' role in backing up Krinke is something less than "backup negotiator", rather, she would be acting as a "backup agency representative". There is no indication in the record as to the frequency with which Collins would be called upon to back up Krinke, nor does the record show that Krinke's absences would impair DER's ability to bargain for the VTAE Board. In fact, Krinke testified that he missed several bargaining sessions and did not know if an agency representative attended any of the meetings he missed. The record also reveals that a great deal of bargaining time is spent on issues that do not concern the VTAE's small group of employes in the unit. There is no showing that Krinke cannot coordinate his schedule to allow him to participate in the bargaining sessions which directly affect the VTAE group and no reason offered that Collins' presence is required at every bargaining session. Thus, there is no showing of undue hardship to prevent the reassignment of Collins' "backup bargaining responsibilities". Consistent with the Commission's policy against dispersing confidential duties, Collins' position should be included in the bargaining unit.

The State asserts that Collins' position should be excluded on the basis that it is both "confidential" and "managerial". The State notes that Collins had only been in the position approximately eight months at the time of hearing, and that the State was involved in the first bargaining cycle when she was employed. Even so, she was involved in the collective bargaining process as the backup negotiator for Krinke and although she had not yet been "at the table", those duties are assigned to her position, and she is expected to be there when directed. It is the duties that are assigned to the position that are the key to finding the exemption. A new incumbent in a position must grow into the position, and cannot be expected to assume all of the duties immediately. Krinke testified that Collins' position is deeply involved in traditional "confidential matters". Her position description is basically the same as that of her predecessor, Alschuler, and he was involved in a variety of personnel matters, including a significant layoff situation. Alschuler was also assigned as backup negotiator and in fact, did participate in negotiations in the past. The State also asserts that preparation for collective bargaining is a crucial part of the process during which management participants become privy to "confidential" matters that are at the heart of the basis for the exemption. Strategy sessions with key management players, and access to key,

confidential, budgetary and personnel matters, is required. Collins testified that she had general discussions with Krinke, the agency's chief negotiator, and had been advised of scheduled bargaining dates and provided with copies of the Union's bargaining demands. In addition to the foregoing, Collins' position is also assigned other "confidential" duties related to collective bargaining and contract administration. Such duties require her to appear before the Personnel Commission, EEOC, and the Department of Education. Thus, just because Collins is new to the position and has had limited time to be exposed to "confidential" matters, does not mean the position is not properly excluded as "confidential".

The State asserts that the same duties and functions that establish that Collins should be excluded as "confidential" are also well-established functions of management personnel. Thus, to that extent, Collins' position is clearly "management". Other duties assigned to that position confirm that exemption is appropriate. According to the Position Summary, Collins' position "serves as a member of the policy development team involved in matters of policy implementation. . ." Those assigned duties are replete with policy involvement, and are allocated 35 percent of her work time. She is also delegated certain "executive and managerial" duties from the Division Administrator under Goal (D) of the position description. Thus, a very substantial part of the total duties assigned to Collins' position are "management" and the position should be excluded on that basis.

DISCUSSION

The Statutory Standards

Management Status

Section 111.81(13), of the State Employment Labor Relations Act (SELRA) provides:

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

In an earlier decision involving these parties, we noted the following with regard to the manner in which we will determine management status under the above provision of SELRA:

This definition specifically lists certain positions which, by virtue of their placement in the organization structure, are per se management positions. This listing however is not all inclusive. In previous cases, the Commission has given further meaning to the term "managerial" as that word appears in both SELRA and MERA.

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. 7/

The State takes the position that all of the positions in issue should be excluded on the basis that they are "management" and makes a number of general arguments we address at the outset. The State argues that the "managerial" and "executive" functions traditionally performed by division administrators, bureau directors and institutional heads have, in some cases, been delegated to others where departments or agencies have been reorganized from a traditional organizational structure and contends those delegated functions must be considered in determining managerial status, whether the functions are assigned directly to the position or have been delegated as part of a structural reorganization of the department. The State has also asserted that the Commission must look at the type of advice being given by the individuals in those positions, i.e., that there is strictly legal advice and there is advice that is so interrelated with the development, formulation and implementation of policy as to constitute involvement in developing and formulating policy indicative of "managerial" status. The State argues this is especially the case with respect to positions designated as "Chief Legal Counsel" or "General Counsel", which are counted on by high-level per se management personnel for advice and input on policy and high-level, confidential matters and whose loyalty to management must be without question.

We would agree that a position's title and the organizational level at which it functions and reports may be indicative of the position's status; however, they are not determinative. 8/ We

7/ State of Wisconsin, Dec. No. 11640-C (WERC, 1/86) at p. 11. (Citations omitted).

8/ In our decision in City of Milwaukee, Dec. No. 12035-A (WERC, 2/74), aff'd, 71 Wis.2d 709 (1976), we specifically rejected the argument that the functions of attorneys required they be treated differently:

The operation of the City is highly complex and technical in nature in many respects. It legislates through ordinances and resolutions. It sues and is sued. It adopts budgets and expends funds. No elected official, board or commission, or appointed department head or supervisor has all the expertise necessary to prepare for the establishment and formulation of these functions, nor to represent the City in the implementation thereof. They must rely on professional personnel and other employees for advice and counsel in such regard. The professional personnel not only

would also agree that simply because a position involves giving legal advice does not mean that the attorney incumbent cannot be considered to be participating in determining, formulating and implementing policy. It is the nature of the advice and input, as well as the extent of the involvement in such policy decisions, that must be considered in each case. There is no evidence to indicate that state employees engaged in the legal profession are to be treated differently from employees in other professions in this regard. We note that Sec. 111.825(1)(f)3, of SELRA, lists state employees in the legal profession as an appropriate collective bargaining unit, and that the Legislature did not deem it necessary to include general counsel positions in the categories of positions in Sec. 111.81(13) of SELRA considered to be per se management. While we acknowledge the difficulty of distinguishing between legal advice and policy advice, we see no need to alter our case-by-case approach. Therefore, to the extent that the State argues that Chief Legal Counsel and General Counsel positions are per se "management", that argument is rejected.

The State also asserts that the only quantitative limitation in Sec. 111.81(13) of SELRA is the word "predominately". It contends that "predominant" is a relative term, and to be "predominant" something must only be greater in relation to another. The State's definition, however, is too broad and ignores the context in which the term is used in the statute. While one area of duties may take a larger percentage of one's time than any other one area (as in the State's example), in our view, "executive and managerial functions" are not "predominant" unless they take more time than all other areas of duties combined.

With regard to the State's last general assertion in this area -- that being privy to confidential matters affecting the employer/employee relation is another indicia of management status -- we have previously made clear that we do not consider involvement in employment relations to also be an element of managerial status:

Finally, the Commission recognizes that in some of its past decisions on managerial status, under both MERA and the preceding Act, there have been statements and implications to the effect that a finding of such status requires some involvement by the personnel involved in the employment relations of the employer. It is our

includes attorneys, but also budget analysts, engineers and members of other professions. Such advice and counsel should be, and no doubt is, loyal to the City and favorable to its functions. However, the performance of professional responsibilities loyal and favorable to the management of the City does not constitute grounds for the conclusion that said professionals are managerial employees.

(At page 6).

holding herein that managerial status, unlike supervisory and confidential status, does not reflect a role in employment relations. Rather, managers are those persons who are involved with the employer's policies at a relatively high level of responsibility and, therefore, do not share the employees' community of interests so much as they are integrated with supervisory personnel. Indeed, many managers are also supervisors; but certainly the Legislature in excluding managers recognized them as other than supervisors or confidentials. Therefore, by this decision, we explicitly modify all of our past implications and statements to the effect that a role in employment relations is an element of managerial status. 9/

Supervisory Status

Section 111.81(7)(a), of SELRA defines "employee" as follows:

(7) "Employee" includes

(a) Any state employe in the classified service of the state, as defined in s. 230.08, except limited term employes, sessional employes, project employes, supervisors, management employes and individuals who are privy to confidential matters affecting the employer-employe relationship, as well as all employes of the commission.

Section 111.81(19), of SELRA, in turn, defines a supervisor as:

(19) "Supervisor" means 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 that the above definition differs from the definition of a "supervisor" contained in Sec. 111.70(1)(o)1, of the Municipal Employment Relations Act, in that it requires that the individual's principal work be different from that of his/her subordinates as well as

9/ Ibid., at page 6.

that the requisite supervisory authority be possessed. 10/ The Commission has held that in appropriate cases under SELRA, it will also consider the following factors in determining supervisory status: 11/

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 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.

10/ State of Wisconsin, Decision No. 11640-C (WERC, 1/86); State of Wisconsin, Decision No. 11243-C (WERC, 12/85); and State of Wisconsin, Decision No. 11243-K (WERC, 7/83). We have previously defined the term "principal work" and described the factors we consider in making our determination in that regard:

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 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.

(Decision No. 11243-C, at pp. 13-14)

11/ Ibid, footnote 6/. See also, State of Wisconsin (University of Wisconsin), Dec. No. 10320-B (WERC, 6/72).

5. Whether the supervisor is supervising an activity or is primarily supervising employees.
6. Whether the supervisor is a working supervisor or whether (s)he spends a substantial majority of his/her time supervising employees.
7. The amount of independent judgement exercised in the supervision of employees.

Confidential Status

Section 111.81(7) of SELRA excludes from the definition of "employee" those "individuals privy to confidential matters affecting the employer-employee relationship." The Commission has held that for an employee to be considered a confidential employee, and thus excluded from "employee" status, the employee must have access to, knowledge of, or participate in confidential matters relating to labor relations. 12/ We have 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. 13/

The Disputed Individuals

Wiedenhoeft

Wiedenhoeft holds the position of Attorney 13-Supervisor in the Milwaukee office of DOA's Division of Hearings and Appeals. Wiedenhoeft's position was created in 1991 and he is the first individual in the position. In addition to Wiedenhoeft, there are three Administrative Law Judges (ALJ's) and two clerical positions in the Milwaukee office.

The record indicates that quantitatively Wiedenhoeft spends at least two-thirds of his time performing work similar to that of the three ALJ's -- conducting hearings, reviewing records and preparing decisions. We note, however, that qualitatively, Wiedenhoeft is responsible for running the Milwaukee office and provides the only on-site supervision of the staff in that office. It is Wiedenhoeft's responsibility to ensure that Division policies and procedures are followed in the Milwaukee office. For those reasons, we have concluded that Wiedenhoeft's primary function is to

12/ State of Wisconsin, Dec. No. 11640-C (WERC, 11/86), citing, State of Wisconsin, Dec. No. 14143-B (WERC, 10/77).

13/ Ibid., citing, Walworth County, Dec. No. 18846 (WERC, 7/81).

administer the Division's Milwaukee office and supervise its staff. Hence, we have found that his principal work differs from that of his subordinates.

With regard to Wiedenhoeft's supervisory authority, the record indicates he is responsible for monitoring the work of the ALJ's and of the support staff in the office, for doing the annual evaluations of those employees, and for reporting personnel problems to the Deputy Administrator, Lundstrom. With regard to discipline, Wiedenhoeft is responsible for doing the pre-discipline investigation, including meeting with the subject employee and the employee's bargaining representative. Wiedenhoeft is also designated as the first step in the grievance procedures that apply to the three ALJ's who are in Petitioner's bargaining unit and the two support staff employees who are in the clerical bargaining unit. We are satisfied that, on the whole, Wiedenhoeft possesses supervisory authority in sufficient combination and degree so as to meet the definition of a supervisor under SELRA. Therefore, he is appropriately excluded from Petitioner's unit and we need not resolve the parties' dispute as to whether Wiedenhoeft is also confidential.

Bernstein

The record establishes that in his capacity as General Counsel at DILHR, Bernstein has represented the Department in grievance arbitration, before the Personnel Commission, the Equal Employment Opportunities Commission and in unemployment compensation hearings in litigation involving Department employees, including members of the bargaining unit represented by Petitioner. At the time of hearing there were approximately 2,000 employees at DILHR and Bernstein testified that even with the then-Assistant General Counsel, Randall, taking some of the work in that area, he was still spending approximately a third of his time working on personnel-related matters. In addition to representing DILHR in litigation involving employee claims against the Department, Bernstein is also involved in consultations regarding serious disciplinary matters, including the recommendation to discharge an employee.

Although Bernstein has had little or no involvement in collective bargaining, we are satisfied that the depth of his involvement on behalf of the Department in personnel matters, especially with regard to employee disciplinary matters, and his representation of the Department in litigation involving employee claims against the Department, are together sufficient to place his position within the "confidential" exception in Sec. 111.81(7) of SELRA. Therefore, he is appropriately excluded from Petitioner's unit and we need not resolve the parties' dispute as to whether Bernstein is also a supervisor or management.

Collins

At time of hearing, Patricia Collins had held the position of General Counsel at the Wisconsin Board of Vocational, Technical and Adult Education since October of 1992, approximately five months. Collins is classified as an Attorney 14-Confidential.

The job description for Collins' position allocates ten percent of her time to providing advice to the Board, the Director and to managers and supervisors on a variety of legal matters, including personnel transactions, disciplinary matters, and bargaining issues, and to serving as the backup to the agency's Personnel Director in the negotiations with the Education Bargaining Unit's representative. During the approximately five months Collins had been in the position she spent only a de minimis amount of her time on such matters. Her testimony indicated that she had four discussions with the Personnel Director regarding personnel matters and bargaining totalling approximately one hour of her time, and one discussion with agency's Assistant State Director regarding a disciplinary matter. While her predecessor in the position appears to have been more involved in such matters, that may be explained by his having held the position for approximately eleven years, while Collins is not only new in the position, but also was just recently graduated from law school when she started in the position. Further, the agency's Personnel Director, Keith Krinke, has been in that position since 1989 and has many years of experience with the State working in labor relations, including having represented the State as "chief negotiator" in negotiations with a number of bargaining units and in grievance arbitrations while employed at the State's Department of Employment Relations. Conversely, Collins has no prior experience or special training or expertise in those areas, and we think it doubtful that Krinke will rely on Collins for advice to the same extent he may have sought advice from her predecessor. To the extent that Collins may be asked to fill in for Krinke at bargaining sessions, she had not done so at time of hearing, and it would be too speculative at this point to rely on that aspect to exclude the position as confidential.

Therefore, we are not convinced that Collins' involvement in confidential matters will amount to more than a de minimis amount of her time and have not excluded her position as confidential.

We now turn to the issue of whether Collins is "management".

Collins' input into policy decisions is analyzing and providing advice on the legal issues involved in the policy matter under consideration. Collins' position description allots 35 percent of her time to Goal A (Prepare analyses of complex policy issues with special attention to legal issues as assigned by Division Administrator or his designee); however, Collins credibly testified that she spent approximately 25 percent of her time in that area. Further, Collins presents her analyses to the Bureau Director or Division Administrator, who then makes a recommendation to the Board. Analyzing or drafting proposed legislation or administrative rules are functions that pertain to the implementation of Board policy, but they are facets of broader areas and the time allotted to those functions would not be the total time allotted to the general area, e.g., Goal B. (Provide legal assistance to the State Board, State Director, . . . on a wide variety of legal matters) is allocated 25 percent on Collins' job description, but only one of the eight functions listed (B.4) pertains to policy development or implementation. In addition, Collins credibly testified that she had spent approximately ten percent of her time performing functions under Goal B, as opposed to the 25 percent allocated in the job description.

Based upon the record, we have found that Collins is not engaged "predominately" in "managerial functions" and thus is not "management".

Given the foregoing, Collins is an "employee" appropriately included in Petitioner's unit.

Saunders

Since 1990, Mark Saunders has held the position of Deputy Legal Counsel in the Department of Administration (DOA) Office of the Secretary and is classified as an Attorney 14-Confidential. At time of hearing there were approximately 850 employes at DOA, some of whom are represented by the Wisconsin State Employees Union and some by Petitioner, including the attorneys in DOA's Division of Hearings and Appeals. Saunders reports to the Legal Counsel in the Office of the Secretary, Edward Main.

Saunders' current position description and his testimony indicate that his duties in the area of providing advice regarding personnel matters and defending DOA in administrative hearings involving DOA personnel have increased, despite the fact that DOA is no longer primarily responsible for advising district attorneys with regard to disciplinary actions against assistant district attorneys. Saunders testified that he has spent 30 percent to 40 percent of his time in this area and that he is consulted in cases of discipline or potential discipline, while either he or Main are consulted in cases that could potentially result in termination. Most often, the advice sought from Saunders is with regard to the manner in which an investigation should be conducted into an alleged violation of work rules. Saunders is also consulted by DOA's Personnel Director as to the interpretation or application of collective bargaining agreements covering DOA employes. Saunders testified that he had been consulted during the year prior to hearing on at least seven occasions. That none of those occasions involved the Agreement between the State and Petitioner makes no difference. 14/ Saunders was also consulted as to an oral reprimand given to a member of Petitioner's bargaining unit in DOA's Division of Hearings and Appeals during the year prior to hearing.

Saunders also represents DOA at the third step of the grievance procedures where a represented employe is accompanied by an attorney and had done so two or three times in the year and a half prior to hearing. Besides representing DOA in administrative hearings involving DOA employes, Saunders also advises DOA's Bureau of Personnel regarding the propriety of claims for unemployment compensation filed by former DOA employes.

We are satisfied that, on the whole, Saunders' involvement in confidential labor relations matters is sufficient to justify the exclusion of his position as "confidential". Thus, he is

14/ Dec. No. 11640-C, supra.

appropriately excluded from Petitioner's unit and we need not resolve the parties' dispute as to whether Saunders is also "management".

Becker

In this case, there are two areas of responsibilities of Becker's position as Legal Counsel to the Ethics Board that involve policy decision-making. The first and foremost is Becker's role regarding requests for advice and the Board's response to those requests. Becker drafts the Board's formal opinions interpreting the State's Ethics Code and lobbying law as applied to specific circumstances and also issues written informal opinions under his own signature in cases where he and the Board's Executive Director agree that a formal opinion is not warranted. In regard to the latter, Becker first reviews the requests and makes a recommendation to the Executive Director as to whether the opinion should be issued as an informal (staff level) opinion or as a formal opinion of the Board, with Becker's recommendation being followed approximately 90 percent of the time. There is nothing in the record that suggests that the informal opinions issued by Becker are reviewed by anyone else prior to their issuance. While Becker's role in this area certainly involves giving legal advice and legal research, there are also significant policy considerations involved in determining how or if the law applies in a new situation or in deciding how an ambiguous statute is to be applied. We are not convinced that the functions can practically be separated. According to the record, Becker spends approximately 40 percent of his time in this area. Becker also spends approximately 25 percent of his time ensuring that the Board is fulfilling its statutory responsibilities in administering its programs for financial disclosure by public officials and the licensing and registration of lobbyists and lobbying organizations; i.e., implementing Board policy.

The two areas, taken together, constitute the majority of Becker's time and we have, therefore, found him to be "predominately" engaged in those managerial functions. Thus, we have found Becker's position to be "management" within the meaning of Sec. 111.81(13), Stats., and he is therefore appropriately excluded from Petitioner's unit. Given this conclusion, we need not resolve the parties' dispute as to whether there are other statutory bases which also exclude Becker from "employee" status.

Fay

In his position as General Counsel at DOD, Fay is somewhat unique from the incumbents in the other general counsel positions at issue, in that he had been employed by DOD for approximately 15 years in other capacities, including bureau director of two different bureaus and section chief of a section dealing with research in policy and legislative issues. Fay testified that, consistent with his job description, he spends approximately 30 percent of his time providing legal advice on policy and administrative questions. Fay further testified that he spends approximately one-third of his time, as opposed to 20 percent in the job description, providing overall guidance in the negotiation, preparation and administration of grant and law contracts, etc. In addition to making final recommendations in that area to the Secretary, Fay indicated most of his advice is not

strictly of a legal nature; rather, much of it relates to whether the contents of the contracts meet DOD's program and policy goals. Fay testified that due to his prior experience in the Department, he is familiar with its overall goals and the Department's particular goals for its various programs, and that his familiarity with DOD goals and policies was part of the reason he was hired for the General Counsel position at DOD.

Fay also testified that he spends approximately 15 percent of his time managing and coordinating the drafting of DOD's administrative rules, and that in doing so, his advice is both as to the substance and policy of the rule, as well as the legal and technical drafting aspects of the rule.

Finally, Fay testified that in addition to attending monthly management staff meetings, the Secretary, whose office is approximately ten feet from Fay's, very frequently seeks his advice or input and that while some is strictly legal advice, at times, the advice sought is more related to policy and programs.

We are satisfied that, based in large part on his prior experience with DOD, Fay participates significantly in the formulation, determination and implementation of management policy and is engaged predominately in managerial functions in his position as General Counsel at DOD. Thus, he is "management" and appropriately excluded from Petitioner's unit. Given our conclusion, we need not resolve the parties' dispute as to whether Fay is confidential.

Schumann and Struck

Schumann and Struck hold the positions of General Counsel and Executive Counsel, respectively, at the Office of Commissioner of Securities. Both Schumann and Struck attend weekly staff meetings of the Commissioner, Deputy Commissioner and the Administrators of the four divisions. Both have been designated as "Acting Commissioner" in the absence of the Commissioner and Deputy Commissioner.

Schumann spends approximately 40 percent of his time serving as General Counsel of the Office of the Commissioner, which includes providing legal advice and representation and some policy-related advice. Similarly, Struck spends approximately 35 percent of her time functioning as Executive Counsel to the Commissioner and Deputy Commissioner, although there is a greater emphasis on legal advice in her role. In both cases, the full amount of time allocated to performance of those functions cannot be designated as being related to the formulation, determination and implementation of management policy.

Schumann is in charge of the agency's review of the statutes and administrative rules review process, and spends approximately 30 percent of his time performing related functions. The process involves developing and revising amendments from each division and also includes consideration of proposed revisions from the regulated industry, making sure that the proposed statutes and rules meet agency goals and policies, and preparing final drafts and recommendations

for the Commissioner's review. Following meetings of the Commissioner, Deputy Commissioner, Schumann, Struck and the Division Administrators involved, decisions on the proposed revisions are made on a consensus basis after discussion of the legal and policy considerations, with the intent being to do what is best for the agency and the investing public.

Both Schumann and Struck are registered lobbyists for the agency for the purpose of having agency-developed legislation introduced and passed. The new legislation is developed in connection with the rule revision process. Schumann and Struck draft the proposed legislation, which is then submitted to the Legislative Reference Bureau, and both then prepare working papers and memoranda discussing the underlying policy reasons for the proposed legislation for the members of the legislative standing committees which hold hearings on the proposed legislation. Both then lobby on behalf of the agency for passage of the legislation.

Schumann also spends approximately 25 percent of his time ensuring that the agency's positions on key financial market issues are coordinated and presented, which includes assessing the need for formulating policy on issues, prioritizing the issues, preparing position papers on those issues for the Commissioner's review, representing the agency in contacts with the industry professionals and associations and with legislators concerning those issues, and ensuring that the Commissioner's position is implemented agency-wide.

Struck spends approximately five percent of her time advising the Commissioner and the Deputy Commissioner on all aspects of Chapter 552 - Corporate Takeover Law and approximately 20 percent of her time advising the Commissioner and the Deputy Commissioner on all aspects of Chapter 553 - Franchise Investment Law. The functions included in those responsibilities are similar to Schumann's above-stated duties.

Both Schumann and Struck have been designated as Acting Commissioner in the absence of the Commissioner and Deputy Commissioner. When both the Commissioner and Deputy Commissioner are out of the office, the Commissioner officially delegates his authority to perform any and all powers and functions of his office. Struck has been so designated five times in the period from 1991 to May of 1993. Further, in 1989, Struck was designated to serve as Acting Deputy Commissioner when the Deputy Commissioner had resigned, and served in that capacity for several months. Since 1991, Schumann has been designated as Acting Commissioner on one occasion, in April of 1993.

Considering all of the foregoing, we are satisfied that both Schumann and Struck spend a majority of their time engaged in functions significantly involving the formulation, determination and implementation of agency policy. Thus, they are "management" and appropriately excluded from the unit. Given this conclusion, we need not resolve the parties' dispute as to whether there are alternative bases for their exclusion.

Schur

As Chief Counsel at the PSC, Schur is a member of the PSC's Administrative Council and spends anywhere from 25 to 50 percent of his time preparing for meetings, attending meetings of the Council, and performing related activities. The record indicates that the management structure of the PSC was reorganized in 1990, and that much of the management authority was delegated from the Chair to the Administrative Council, with the Administrative Council being charged with managing and implementing the reorganization itself. The Administrative Council, along with the Administrative Council Plus, has been charged with developing the long-range strategic plan for the PSC, which included defining the agency's mission, setting goals, and developing strategies for meeting those goals. The Administrative Council has also been delegated the responsibility for setting the agency's budget. The individual divisions prepare estimates for both the annual and biennial budgets, and those are then submitted to the Administrative Council for its review and approval, with the Council making the final decision.

In addition to his role on the Administrative Council, Schur also spends approximately half of his time providing advice to the Commission and its staff. That advice includes both legal and policy advice and Schur participates with the Commission as a "senior policy advisor" in discussions on important Commission cases and issues.

While Schur does not have the authority to determine and implement policy on his own, we are satisfied that his policy advice to the Commission and his participation as a member of the Administrative Council, which has essentially been delegated the authority to formulate and determine Commission policy and allocate the PSC's resources, warrants a finding that Schur is engaged predominately in managerial functions. Thus, Schur is "management" and appropriately excluded from the unit. Given our conclusion, we need not resolve the parties' dispute as to whether there are alternative bases for his exclusion.

Pfeifer

Pfeifer has held the position of Administrator of the Examining Division at the Public Service Commission (PSC) and is classified as an Attorney 13 - Management. In addition to Pfeifer, the Examining Division consists of two Hearing Examiners who are attorneys, two Stenographers and one Program Assistant.

Pfeifer's latest position description allocates 30% of her time to conducting hearings and 20% of her time to preparing decisions and recommendations, work similar to that of her subordinates. However, the "supervisory analysis form" for Pfeifer's position allocates only 40% of her time to performing work similar to her subordinates. Pfeifer testified that beginning in 1991 she spent much less of her time performing such duties due to the increase activity and responsibilities of the Administrative Council and the various work groups. Irrespective of the amount of time Pfeifer spends performing work similar to the Examiners, Pfeifer is the administrative head of the Examining Division and the only individual directly responsible for supervising the employees in

that Division and for ensuring that the functions of the Division are properly performed. In that regard, it may be said that qualitatively, Pfeifer's principal work differs from that of her subordinates.

With regard to Pfeifer's supervisory authority, the record indicates that Pfeifer has been involved in the hiring of four Examiners, including the two incumbents, since becoming Administrator of the Division. In each case, Pfeifer was involved in interviewing the candidates, either with two others or by herself and ultimately made the recommendation as to who should be hired. In all four cases, Pfeifer's recommendations were accepted by the appointing authority, i.e., the Chair of the PSC. While Pfeifer has not had occasion to discipline anyone since becoming Division Administrator, she has extended a new employee's probationary period by a month. Pfeifer's supervisory analysis form also indicates that she has the authority to effectively recommend discipline, up to and including discharge, to the level at which such action can be authorized; again, that is the Chair of the PSC. Pfeifer is the only individual within the Division with such authority and is the only individual that evaluates the performance of the other employees in the Division. Pfeifer assigns work to her subordinates and in the case of the Examiners, the assignments are made on the basis of their experience, availability, and, if possible, their areas of interest. Based upon the record, we are satisfied that Pfeifer exercises supervisory authority to a sufficient degree that she meets the statutory requirements to be deemed a "supervisor", and is therefore appropriately excluded on that basis. Given our conclusion, we need not resolve the parties' dispute as to whether there are alternative bases for her exclusion.

James, Mussallem and Smith-Crosetto

James, Mussallem and Smith-Crosetto hold the positions of Division Chief Counsel for their respective PSC divisions and as such are members of their respective division's Core Management Team (CMT). Pursuant to the reorganization in 1990, much of the authority for managing the divisions was delegated to the CMTs. The Division CMTs have been delegated the responsibility for managing the Division and its resources and formulating, determining and implementing the regulatory policy for the respective Divisions, albeit consistent with overall agency policy. While the Division Administrator retains the authority to override the decisions of the CMT, at time of hearing that had rarely, if ever, occurred.

As we have previously discussed herein, assignment to, and participation on, management teams can be indicative of managerial function to the extent the individual's function and responsibility relates to policy choices. Here, a portion of these individuals' work time has been formally allocated to participation on these CMTs, and their participation is expected to be beyond that of providing legal advice and is intimately involved in the formulation, determination and implementation of both Division managerial policy and regulatory policy. Further, the record indicates that the CMTs allocate Division resources in the form of approving positions, the filling of vacancies and the transfer of positions. While the decisions of the CMTs are made by consensus and are subject to override, the record establishes their policy decisions are almost never

overridden. Under such circumstances, we are satisfied that CMT participation is a managerial function.

However, the percentage of work time spent performing or participating in functions related to the overall management of the Division and upon the Division's CMT varies between the three individuals.

Based upon her 1993 position description and testimony on the record, we conclude Smith-Crosetto spends 55% of her time engaged in "management" functions. While James' and Mussallem's 1990 position description allocates only 30% of their time to management functions, James credibly testified she spends 60% of her time after the reorganization on management duties as part of the Division CMT and TQM and less time on representing her Division in litigation. Mussallem, on the other hand, credibly testified he does approximately the same amount of legal work after the reorganization as before, although it is divided differently - it now being 33% of his time spent on representing the PSC before federal regulatory agencies and 35% spent on representing Division staff in contested case hearings before the PSC.

Given the foregoing, we have found that James and Smith-Crosetto are sufficiently involved in the formulation, determination and implementation of management policy so as to be engaged predominately in managerial functions within the meaning of Sec. 111.81(13), Stats.

Thus, these two individuals are "management" and appropriately excluded from the unit. Given our conclusion, we need not resolve the parties' dispute as to whether there are alternative bases for their exclusion. However, because Mussallem is not predominately engaged in managerial functions, he is appropriately included in the unit.

Weber

As to the question of whether Weber is a confidential employee, his job description allocates 10 percent of his time to matters that include representing the Department in worker's compensation and unemployment compensation proceedings and before the Personnel Commission in actions involving claims by Department employes, reviewing investigations of misconduct by Department employes for the purpose of making recommendations as to the appropriate discipline to be imposed, including termination, and representing the Department in the negotiation and settlement of claims against it.

Weber estimated that he spent somewhat less than 5 percent of his time on such duties in the three years he had been in the position. While that amount of time may well be considered de minimis, Weber is the only in-house legal counsel who performs those duties for the Department, and there is no evidence that anyone else in the Department is also assigned such duties. Moreover, it is possible that time associated with confidential labor relations matters will increase with the presence of the WPEC employes in the Department. We have previously held that:

While a de minimis exposure to confidential materials is generally insufficient grounds for exclusion of an employe from a bargaining unit, we have also sought to protect an employer's rights to conduct its labor relations through employes whose interests are aligned with those of management. 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. 15/

For those reasons, we have found Weber to be a confidential employe. Thus, we need not determine whether Weber is also a management employe.

Dated at Madison, Wisconsin this 14th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

I dissent as to Weber.

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

15/ Village of Saukville, Dec. No. 26170 (WERC, 9/89), See also, Village of East Troy, Dec. No. 26553 (WERC, 7/90).

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

DISSENTING OPINION OF COMMISSIONER A. HENRY HEMPE

I dissent solely on the issue of whether Robert Weber, Chief Counsel for the Department of Employee Trust Funds since 1990, is a confidential employee. My colleagues would find that he is. While the issue is a close one, on balance I believe the evidence more strongly favors the result I reach. In my opinion, Weber belongs in the bargaining unit.

While Weber provides advice to the various boards at ETF that make decisions impacting insurances, retirement benefits, etc., affecting State employees, there is no evidence that his role in that regard gives him access to confidential information affecting the employer-employee relationship or knowledge of confidential matters relating to labor relations. The evidence instead shows that Weber responds for the Department to inquiries from both public employers and labor organizations regarding the propriety and impact of bargaining proposals as they relate to benefits provided and regulated by ETF. That advice is technical in nature, e.g., it addresses what is being proposed is permitted under the statutes and regulations administered by ETF. Similarly, Weber's involvement in the Duty Disability Program protective status determinations and appeals procedures does not make him privy to "confidential" matters relating to labor relations, as we have defined that term. 16/

While Weber does have some involvement in personnel matters, such as representing the Department in Worker's Compensation and Unemployment Compensation proceedings or before the Personnel Commission and reviewing pre-discipline investigations involving Department employees, his job description allocates 10 percent of his time to the area that includes those duties, but Weber testified he spent less than 5 percent of his time on such duties in the three years he had been in the position. While the State speculates that time would be increasing due to 20-30 employees in the Department having been recently become represented, there is no evidence on which to base such a conclusion at this point. Given his lack of access to confidential matters, I have concluded that Weber is not a confidential employee.

I would further conclude Weber is not a management employee. Weber's position as Chief Counsel for the Department of Employee Trust Funds is one for which the State again stresses the

16/ To the extent Weber is involved in such determinations, I would consider his role similar to that of the position at issue in State of Wisconsin, Dec. No. 11885-M (WERC, 11/82) where that individual made decisions on teacher's requests for certification that could affect their ability to bump or transfer. However, in this case, Weber's involvement is even less, as he does not, himself, make the determination. Further, unlike the situation in the earlier case, these determinations would not appear to affect anyone in the bargaining unit in which the position would be placed.

fact that he provides advice and works intimately with high level officials on the state and local level and is privy to confidential matters. The same, however, may be said of many attorneys working in State service. Again, it is the nature of the advice provided as it relates to the individual's role in the formulation, determination and implementation of management policy and the degree of that participation that determines managerial status. A review of the record indicates that Weber is primarily engaged in providing legal advice to those boards for which he works. Weber's position description allocates 20 percent of his work time to duties related to drafting, negotiating and interpreting and implementing contracts and agreements with other governmental agencies and private contractors and insurers. Twenty-five percent of his time is allocated to providing legal consultation to the Department's secretary and to the various boards and funds and those duties are related to interpreting statutory and case law as well as State and federal administrative rules. Twenty-five percent of his time is also allocated to providing comprehensive legal representation for the Department in administrative hearings and supervising the Department's appeal process. In doing so, Weber represents the Department in proceedings before attached boards, defending against appeals of Department decisions or direct appeals of employer decisions. In lawsuits involving the Department, Weber acts as liaison between the Department and the attorneys from the Department of Justice representing the Department in court. Weber estimated that in 1990 and 1991 he was spending approximately 50 to 60 percent of his work time, as opposed to the 25 percent allocated in his position description, representing the Department in administrative appeals, although that time appeared to be decreasing. I am satisfied that for the most part, Weber is engaged primarily in providing legal advice and representation for the Department and the various boards within ETF.

While the record indicates that Weber has an involvement in the development and formulation of policy in the form of developing legislation and administrative rules and proposed changes necessary to implement department programs, that has not been a significant part of his role as Chief Counsel to the ETF, either in terms of time devoted to such activity, or the significance of that aspect of his position. Similar to our finding in an earlier case, I conclude that "while his professional inputs are often relied upon by those he advises and represents, and while he provides advice and representation in a manner that is loyal and favorable to the management of the (Department). . . such do not constitute grounds for the conclusion that (Weber) is a managerial employe." 17/ Although the State makes much of Weber's involvement in determinations of eligibility under the Duty Disability Program or Protective Service status, which determinations

17/ County of Kenosha, Dec. No. 15371 (WERC, 3/77). Similar to Weber, the individual in that case submitted budget requests for the operation of his own office, and did have an isolated example of formulating and implementing policy.

may affect individuals represented by labor organizations, that factor does not pertain to Weber's managerial status, and I see no significant difference between Weber's role providing advice in that regard, and the roles of assistant city attorneys defending municipal employers in administrative or judicial proceedings against claims by employees of that municipal employer who may be represented by a labor organization. 18/

Dated at Madison, Wisconsin this 14th day of July, 1997.

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

18/ City of Milwaukee, Dec. No. 12035-A, supra.; City of Madison, Dec. No. 23183, supra.

