

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**LOCAL 720, AFSCME, AFL-CIO**  
Involving Certain Employees of  
**DANE COUNTY HOUSING AUTHORITY**

Case 1  
No. 53123  
ME-797

**Decision No. 17130-B**

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Appearances:

**Mr. Jack Bernfeld**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of Local 720, AFSCME, AFL-CIO.

LaFollette, Godfrey & Kahn, by **Attorney Jon E. Anderson**, One East Main Street, P.O. Box 2719, Madison, Wisconsin 53701-2719, on behalf of the Dane County Housing Authority.

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

On March 15, 2001, Local 720, AFSCME, AFL-CIO, filed a petition to clarify bargaining unit with the Wisconsin Employment Relations Commission seeking to include the position of Staff Accountant, currently held by Debra Wells, in an existing bargaining unit of employees of the Dane County Housing Authority that it represents. Thereafter, the Dane County Housing Authority objected to the inclusion of the position on the basis that the parties had previously agreed to exclude the position and that the incumbent in the position was both a confidential and a managerial employee.

Dec. No. 17130-B

Hearing was held in Madison, Wisconsin on August 29, 2001 and November 28, 2001, before Examiner David E. Shaw of the Commission's staff. The parties submitted post-hearing briefs and by February 19, 2002, advised the Commission that they would not be filing reply briefs.

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

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

### **FINDINGS OF FACT**

1. Wisconsin Council 40, AFSCME, AFL-CIO, and its affiliate Local 720, AFSCME, AFL-CIO, hereinafter jointly referred to as the Union, are labor organizations with their principal office located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717. Since 1979, the Union has been the certified exclusive collective bargaining representative of employees of the Dane County Housing Authority in a collective bargaining unit consisting of: "all regular full-time and regular part-time employees of the Dane County Housing Authority excluding all supervisory, confidential and craft employees."

2. Dane County Housing Authority, hereinafter referred to as the Employer or DCHA, is a municipal employer with its principal offices located at 2001 West Broadway, Madison, Wisconsin 53713. DCHA is overseen by a Board of Commissioners and with State and federal funds provides housing and housing assistance for low income families in Dane County in the form of counseling, down-payment assistance to moderate income families and loans to low income families and owners that rent to low income families. Carolyn Parham has been employed by DCHA since 1990. Parham held the position of Assistant Director from 1994 until the latter part of January, 2000, when she became DCHA's Executive Director, which position she has held since that time.

Parham reports directly to the Board of Commissioners. Reporting to Parham is the Program Manager, Tom Conrad, who is in charge of the Section 8 Program. The Section 8 Program is the largest program DCHA administers and assists eligible families in paying for housing. Except for Conrad, all of the individuals employed in Section 8 are in the bargaining unit represented by the Union, and make up the entire unit.

Business Manager Paul Schultz also reports to Parham. Schultz is in charge of the Financial Department, which consists of Schultz and the Staff Accountant, Debra Wells. The Executive Director, Program Manager, Business Manager and Staff Accountant positions are not been included in the bargaining unit.

3. The parties' 1998-2000 collective bargaining agreement contains, in relevant part, the following recognition clause:

**ARTICLE I**  
**RECOGNITION**

The Employer recognizes the Union as the exclusive bargaining representative for all regular, full-time and regular, part-time employees, excluding all supervisory, confidential and craft employees, for the purposes of conference and negotiations with the Employer, or its authorized representative, on questions of wages, hours and other conditions of employment. Decision No. 17130 (Wisconsin Employment Relations Commission).

. . .

4. The Union filed a petition for an election among DCHA's employees on April 20, 1979.

Prior to the election, the Dane County Corporation Counsel's office sent the following letter to the Commission which read, in relevant part, as follows:

July 16, 1979

Wisconsin Employment Relations Commission  
Suite 200  
14 West Mifflin Street  
Madison, WI 53703

ATTENTION: Kitty Jalowitz

RE: Dane County Housing Authority

Dear Ms. Jalowitz:

You have requested a list of the names of eligible persons to vote in the upcoming election at the Dane County Housing Authority. After consulting with the Executive Director of the Authority, I believe that the following persons are eligible to vote:

Scot Gamble	Roberta Roth
Mildred Lane	Ann Maynard
Shelby Hanson	Emmett Woodward
Robert Mazzone	Joe Lynde
Jane Goodrich	Marll Thiede
Jean Tyree-Frances	

Of the above employees, Gamble, Hanson, and Roth are CETA employees (If that fact makes any difference as to their voting eligibility). The list of names above excludes the Executive Director, the Assistant Executive Director, the Accountant and Independent contractors.

...

In the course of the election proceeding, the Union and DCHA stipulated that the unit appropriate for collective bargaining “consists of all regular full-time and regular part-time employees in the employ of the Authority, excluding supervisory, confidential and craft employees, and that the individuals occupying the positions of Executive Director, Assistant Executive Director, and Accountant should be excluded from the eligibles in any election conducted herein, as well as independent contractors serving as Resident Managers”. At the time the parties reached the stipulation, the position responsible for performing the accounting functions at DCHA was the “Accounting Specialist”.

The job description for the Accounting Specialist provided as follows:

### **ACCOUNTING SPECIALIST**

#### **Basic Function:**

Maintains all revenue and expenditure accounts for the Dane County Housing Authority; does related work as required.

#### **Duties and Responsibilities:**

1. Classifies and codes receipts, expenditures, and transfers of funds and records all financial transactions.

2. Maintains ledgers, prepares trial balances, audits invoices, purchase orders, payrolls, and expense accounts. Maintains fixed asset records.
3. Prepares financial statements and fiscal reports or summaries reflecting the financial operations and condition of the Authority, and submits these reports to the Executive Director, the Board of Commissioners, the Dane County Board, and the Department of Housing and Urban Development.
4. Maintains records on all bank and investment accounts.
5. Prepares and submits required information to taxing agencies.
6. Requisitions monies from all available sources.
7. Provides information pertaining to budget appropriations versus expenditures. Prepares initial budgets and revisions, as needed, and submits these budgets to the Executive Director and to appropriate governing body for review and approval.
8. Prepares books or record and account for official audit. Coordinates and assists independent outside auditors and prepares work papers as necessary. Investigates and/or resolves findings of the independent outside auditors and adjusts books and records.
9. Coordinates employee benefit package and other personnel matters. Maintains employee leave records.
10. Attends Board meetings when requested, prepared to interpret reports.

Minimum qualifications:

Education and Experience:

Any combination equivalent to an Associate Degree in accounting from an accredited college and one year of complex bookkeeping or accounting experience. Relevant experience will be substituted for education on a year-for-year basis.

Knowledge and Abilities:

Knowledge of the methods, practices and procedures of modern bookkeeping and accounting; ability to learn and apply governmental accounting procedures; knowledge of modern office practices, procedures, and methods; knowledge of basic statistical methods and applications; ability to interpret and follow complex written and oral instructions; ability to prepare neat, concise, and accurate reports; ability to identify problems and recognize their component parts; ability to establish and maintain effective working relationships.

Of the above-listed duties for the Accounting Specialist, current Accountant Wells performs 1., 2. – except that she does not prepare general ledgers, ledger trial balances or maintain fixed asset records, 4., to the extent she prepares the accounts receivable sheets and gives them to Schultz to do the general ledgers, and 9., to the extent that she is responsible for giving employees the applications and filing the completed applications for the various insurances, and keeping the employee time sheets, but has no responsibilities regarding “other personnel matters”.

5. The accounting functions have been performed by a number of people at DCHA over the years. Marilyn Haynes began in the “Accounting Specialist” position in September of 1979 performing the accounting functions for the Section 8 program, while Audrey Abrahamson performed the accounting functions in the Public Housing Section. Abrahamson retired in 1992 or 1993 and Daniel Walsh was hired as an “Accounting Specialist” to replace her. Part-time Accounting Specialists were also hired. Walsh left and another part-time Accounting Specialist was hired. The three part-time Accounting Specialists left for various reasons and two full-time Accounting Specialists were hired, one being terminated, and the other leaving after a brief time. Haynes then was the only remaining Accounting Specialist at DCHA.

Wells was hired as temporary help in July of 1996 to assist Haynes by doing data entry work on the computer. In August or September of 1996, DCHA contracted with Larry Sherven and his consulting company to assist Haynes with the computer accounting work. In September of 1996, Haynes left DCHA’s employ. In October of 1996, Wells was hired as a regular full-time employee by DCHA and was the only “in-house” employee doing any accounting functions for DCHA. Sherven, as a “fee consultant”, was contracted to perform the general ledger work, budget work, and HUD reports. Near the end of 1996, HABCO, an outside consulting company, was retained to provide some of the accounting functions Sherven had not been able to complete. Sherven and HABCO then performed the general ledger work, budget work and HUD reports, with Wells performing some of the other

functions Haynes had previously performed. Sherven left sometime in 1999 and that work was contracted out to HABCO, with another outside consulting firm, Wegner and Associates, also performing those functions for a short time until Schultz was hired in the newly-created Business Manager position in 2000.

6. Wegner and Associates were retained to perform an internal audit and an organization and time study in early 2000. Individual staff were interviewed about their duties, including Wells, and pre-existing job descriptions were reviewed. As a result, the following job descriptions were created for the positions of Business Manager and Staff Accountant, respectively:

<b>Title:</b>	Business Manager
<b>Classification:</b>	Exempt/Non-represented
<b>Reports to:</b>	Executive Director

**General Description:**

The Business Manager provides overall direction for all activities related to administration, personnel, information systems, office management and safety. This position reports directly to, and works closely with, the Executive Director.

**Duties and Responsibilities:**

- Participates as a contributing member of the management team.
- Oversees staff accountant, accounting clerks, bookkeepers and IS personnel.
- Writes policies and procedures.
- Performs all personnel functions and processes payroll.
- Develops internal control procedures, develops and conducts in-house audits.
- Prepares accounting reports for HUD and other funding sources.
- Analyzes financial data and generates various computer reports.

- Prepares and analyzes annual agency budgets.
- Makes suggestions for allocations of resources.
- Maintains all program budgets and balances program accounts.
- Controls expenditures and works with program managers on budgets, spending, etc.
- Oversees daily accounting activities and functions.
- Maintains general ledger and prepares journal entries.
- Maintains and reconciles bank accounts.
- Writes proposals and maintains records for insurance.
- Maintains records for fixed assets.
- Maintains tenant accounts receivable.
- Updates, reviews and controls accounts payable.
- Updates, reviews and controls loan programs.
- Responsible for IS functions.
- Learns computerized accounting software.

**Skills and Qualifications:**

- BS or BA degree preferred in health care, management, or finance.
- MBA or Masters of Science in Management.
- GAAP accounting and fund accounting.
- Non-profit business management experience preferable.



- Demonstrates a high level of interpersonal and communications skills.
- Effective writing and analytical skills to produce documents and business plans in a concise and timely manner.
- Ability to respond quickly and positively to shifting demands.

**Title:** Staff Accountant  
**Classification:** Non-exempt/non-represented  
**Reports to:** Pending approval of organizational structure

**General Description:**

The Staff Accountant completes multiple accounting functions to support the Business Manager.

**Duties and Responsibilities:**

- Maintains the set up of Section 8 vendors in computer system after intake and certification has been performed.
- Codes transactions for receipts and expenditures and then records all financial transactions on general ledger.
- Maintains ledgers, expense accounts, accounts payable and accounts receivable functions and housing assistance transactions.
- Maintains records on all bank and investment accounts.
- Performs monthly bank reconciliations.
- Requisitions monies from appropriate sources.
- Coordinates employee benefit package and other personnel matters.

- Performs data entry and maintenance of loan receivable accounts in accordance with rehabilitation programs.
- Perform annual issuance and reconciliation of Form 1099s.
- Responsible for completion of regulatory schedules and reports (annual and monthly).
- Performs computer system backups in accordance with established schedules.
- Assists in year-end closeout procedures.
- Prepares books of record and other reports in preparation for annual audit.
- Complete DCHA payroll on a biweekly basis and maintain all payroll-related information for employees.
- Organize property management company reports and related documents.

**Skills and Qualifications:**

- Any combination equivalent to an Associate Degree in accounting from an accredited college and one year of fund accounting experience. Relevant experience will be substituted for education or a year-for-year basis.
- Ability to learn and apply fund accounting and GAAP procedures.
- Knowledge of technically current accounting methods and systems.
- Knowledge of financial analysis and applications.
- Effective organizational skills.
- Computer literacy to include general ledger and spreadsheet applications.

7. Of those “Duties and Responsibilities” listed for Staff Accountant, Wells performs the following:

- Codes transactions for accounts payable, e.g., rent, phone bill, office supplies, but does not perform any general ledger work.
- Maintains ledgers, expense accounts, accounts payable and accounts receivable functions, which consists of keeping the cash receipt and cash disbursement journals and giving them to Schultz to enter in the general ledger. Wells has not done housing assistance transactions since 2000, when Section 8 staff started doing that work.
- Maintains records on all bank and investment accounts.
- Performs monthly bank reconciliations.
- Handles the paperwork new employees complete to obtain fringe benefits (e.g., health insurance, retirement, deferred compensation) and sees that the appropriate amounts are deducted from the employee’s paycheck. Wells is not involved in “other personnel matters”.
- Performs data entry – cash receipts and cash disbursement entries, and cuts checks that have been authorized for loans for rehabilitation.
- Performs annual issuance and reconciliation of Form 1099’s. This consists of entering the appropriate commands to the computer, which then prints out the completed forms for the landlords to whom DCHA pays rental assistance.
- Responsible for completion of annual and monthly regulatory schedules and reports, which consists of doing the annual reports for the cash receipts and cash disbursements journals.
- While Wells previously performed computer system backups, the Program Manager now performs this function.

- Assists in year-end closeout procedures. This consists of entering the appropriate commands in the computer, which then does the calculations and closes out the year-end from which Wells then prepares the year-end statement.
- Prepares books of record and other reports in preparation for annual audit for those reports or journals for which Wells is responsible.
- Completes payroll on a biweekly basis and maintains all payroll-related information for employees. Wells provides the necessary information to an outside company which cuts the paychecks

Wells also is responsible for fixing problems with the copier and the computers and installing software. If she cannot fix the problem herself, she calls the outside copier repair provider or the outside technical support provider to fix the problem and informs Parham and Schultz she is doing so. DCHA purchases blocks of time from its outside technical support provider and if the computer problem will take more than an hour or two to fix, Wells will consult with Schultz before having the work done. If there is a problem and Wells is not present, Conrad or Program Assistant Cassandra Phillips call the outside repair or technical support provider. Wells did not participate in the selection of the technical support provider, nor in negotiating the contract with the provider selected, PowerNet, nor in deciding how much time to purchase.

Wells does not, and has not performed budget preparation, general ledger work, HUD reports, nor financial analysis and reports, which work is currently performed by Schultz.

8. Wells does not open the mail or type any correspondence for Parham, Schultz or Conrad. Wells does not attend DCHA Board meetings and has not attended any meetings with management at which personnel matters have been discussed. Wells has not participated in negotiations or in meetings to prepare for negotiations, nor in preparations for negotiations beyond preparing "cost analysis data sheets", at Parham's direction, for use by DCHA's outside labor counsel to prepare a wage and benefit costing analysis for use in negotiations with the Union. The information Wells provided on the "cost analysis data sheet" consisted of identifying each employee in the bargaining unit represented by the Union, job title, date of hire, annual hours, base hourly wage rate, whether the employee takes the health insurance and dental insurance and if so, whether it is a single or family plan, the amount paid per month for each employee for life insurance and long-term disability insurance, the percentage DCHA pays toward the employee's retirement, and the premium rates and amounts employer/employee pays for health and dental insurance. Wells has also done projections showing what would happen if payroll was increased by a certain percentage.

Wells has no involvement in handling grievances.

In February of 2000, Wells was out of work for a month for surgery and her work was performed by the Program Assistant, Cassandra Phillips, whose position is in the bargaining unit.

9. In 1999, the DCHA Board was evaluating the then-Executive Director and had concerns regarding her attendance at work, cell phone usage, expense reports, and the manner in which DCHA funds were being utilized. Wells was aware of the Board's concerns and contacted the Board Vice-Chair, Judith Wilcox, and offered to provide the Board with information. Wells provided the records of the Director's cell phone use and reimbursement she had made for personal calls, and the Director's time sheets, as well as attendance data she had kept on her own - not as part of her job duties. After the Director resigned, the Board had questions about transfers that had been made from DCHA's reserve fund account to its operating account. Wilcox asked Wells to obtain the information for the Board because she was the only person on site at DCHA at the time who could decipher the records and inform the Board if and when the transfers had been made. Wells provided the Board with that information. While the Board's dispute with the then-Director was known to the public, Wells did not want it known at the time that she was providing the information to the Board and Wilcox tried to protect Wells in that regard. Wilcox was unaware at the time whether Wells was or was not in the bargaining unit.

10. Wells' office is located next to Executive Director Parham's office and she has access to Parham's office for the purpose of leaving papers or checks on Parham's desk when she is not there, but is not otherwise authorized to be in Parham's office unattended. Wells does not have access to employees' personnel files which are kept in a locked file cabinet in Parham's office. While Wells is one of the "administrators" of the computer system and is able to access correspondence Parham has typed on the computer, she is not authorized to access Parham's correspondence. Parham does not usually store correspondence relating to personnel matters on her computer, and instead prints them out and then deletes them or types them on her personal computer at home.

As of 2000, and currently, Wells is paid \$15.01 per hour or \$1201 on a bi-weekly basis. This places her below four pay classifications and ahead of eight pay classifications listed in the 1998-2000 collective bargaining agreement between the Union and DCHA. Wells does not have any type of degree in accounting or finance. Schultz receives a salary of \$41,000 a year as Business Manager and has a bachelor's degree in Accounting.

11. The Union and the Employer agreed to exclude the “Accountant” position at the time of the representation election in 1979 based upon the position’s confidential or supervisory duties.

12. Wells does not hold the equivalent of the “Accountant” position that existed at the time of the representation election in 1979.

13. Debra Wells does not have sufficient access to, knowledge of, or participation in confidential matters relating to labor relations to be a confidential employee, and any confidential duties can be performed by the Business Manager, Paul Schultz, without undue disruption of the Employer’s organization.

14. Debra Wells does not have sufficient participation in the formulation, determination and implementation of policy or have sufficient authority to commit the Employer’s resources to be a managerial employee.

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

#### **CONCLUSION OF LAW**

Debra Wells, in the position of Staff Accountant, is neither a confidential nor a managerial employee within the meaning of Sec. 111.70(1), Stats., but is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

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

**ORDER CLARIFYING BARGAINING UNIT**

The Staff Accountant shall be included in the bargaining unit referenced in Finding of Fact 1.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of June, 2002.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Steven R. Sorenson /s/

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Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

**DANE COUNTY HOUSING AUTHORITY**

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

**Union**

The Union contends that Wells is a “municipal employee” and that her position should be included in the bargaining unit. The Union disagrees with the Employer’s contentions that Wells’ position is both confidential and managerial and that the parties have agreed to exclude the position held by Wells.

Regarding the contention that Wells’ position cannot be included because the parties agreed to exclude the “Accountant” from voting in the 1979 representation election, the Union asserts the exclusion of the individual in that position at the time is irrelevant in determining Wells’ status. The parties stipulated to a unit description excluding “supervisory, confidential and craft employees” and not specifically excluding the Accountant. The agreement that the person in the Accountant position was not eligible to vote in the election must be viewed in the context of that stipulation and the Commission’s certification, i.e., that the persons not eligible to vote – Executive Director, Assistant Director and Accountant – were supervisory and/or confidential. Had the parties intended to exclude the Accountant for other reasons, they would have specifically identified the position as an exclusion in the unit description. They did not do so.

The Commission has also looked to the contractual language used to describe the scope of the bargaining unit to determine the parties’ intent. CRAWFORD COUNTY, DEC. NO. 17109-D (WERC, 8/01). Here, the parties incorporated the bargaining unit set forth in the Commission’s certification, which does not specifically exclude the Accountant position. Thus, the language adopted by both the parties and the Commission supports the conclusion that the parties did not intend to permanently exclude the Accountant position.

Further, even if it is found the parties had intended to exclude the Accountant position, the record is clear that Wells is neither an “Accountant” nor an heir to the “Accountant” who was excluded from the eligibility list. In that latter regard, the identity of the incumbent “Accountant” who was excluded from voting is not known. Haynes was hired in 1979, shortly after the Union was certified as the bargaining representative and she apparently held the title of “Accounting Specialist” at the time she resigned in 1996. It appears she functioned as the “Accountant” during all or part of her employ with DCHA, and that her accounting duties were thereafter performed by a number of individuals or outside consultants. The record shows that while the Employer has now given Wells the title of “Staff Accountant”, she has never performed the major accounting tasks of general ledgers, budgets and HUD reports for



DCHA - which are now performed by the Business Manager. Wells was hired to do data entry work and to work under Haynes and was not given a job title until 2000, when the Employer gave her the title of "Staff Accountant". An employer cannot simply assign a job title and thereby deny union representation of the position.

The record establishes that a substantial number of the duties listed in the "Accounting Specialist" job description are not performed by Wells. Wells' undisputed testimony was that of the array of job descriptions presented at hearing, the description listing duties most akin to hers was that of "Bookkeeper". The record is clear that Wells is not heir to the Accountant excluded from voting in the representation election, and that she does not perform the duties that have been done by the Accountants that have been employed by DCHA. The position that is assigned to perform the true "accountant" functions at DCHA is the Business Manager. Thus, the exclusion of the Accountant from voting in the representation election is irrelevant in this case.

As to the contention that Wells' position is "managerial", the Union asserts that Wells does not meet either of the well-settled criterion for determining managerial status. The record demonstrates that Wells does not participate in the formulation, determination and implementation of management policy, and has no duties related to those tasks. Wells also does not possess the effective authority to commit DCHA resources. As to the claim that she can obtain computer repair services, the record demonstrates that her ability to do so is extremely limited.

The Union also disputes the contention that Wells is a confidential employee. Wells does not meet the criteria for determining confidential status. She is not involved as an observer or as a participant in developing or communicating the Employer's strategy or position in collective bargaining, contract administration, litigation, or similar matters pertaining to labor relations or grievance handling. She does not type or handle correspondence for supervisory or managerial employees or correspondence relating to confidential labor matters, nor does she attend meetings where labor relations issues are discussed.

Wells does not have access to information unavailable to the Union. While she does have access to the computer system, she is not authorized to access management's files. The Commission has held that the potential for an employee to abuse their computer access is not a sufficient basis on which to find confidential status; rather, the question is whether their actual duties require access to confidential labor relations matters. MINERAL POINT SCHOOL DISTRICT, DEC. No. 22284-A (WERC, 3/99), aff'd MINERAL POINT UNIFIED SCHOOL DISTRICT v. WERC, 251 Wis. 2d 325 (Ct.App. 2002).

While the Employer might argue that Wells is the logical person to perform a confidential function at DCHA, in the five years she has been employed at DCHA she has not performed confidential work for the Employer. Management people at DCHA type their own correspondence and the Director testified that if it involved a sensitive matter, she typed the document at home.

The location of Wells' office is also not meaningful. The record indicates that the former Secretary to the Director had that office before Wells, and that she was in the bargaining unit.

Wells' preparation of salary cost projections used by the Employer in negotiations consisted of applying a percentage to salaries and was only done one time. Thus, even if this task is considered to be confidential, it is *de minimis*, and insufficient to deprive Wells of inclusion in the bargaining unit.

### **Employer**

It is the Employer's position that the Staff Accountant position should remain excluded from the bargaining unit pursuant to the "deal is a deal" caselaw of the Commission, as well as the incumbent's confidential and managerial status.

With regard to a "deal is a deal", the Commission has held that it will not modify a voluntarily agreed-upon unit where the parties have agreed to include or exclude certain positions from the bargaining unit unless:

1. The positions in dispute did not exist at the time of the agreement; or
2. The positions in dispute were voluntarily included or excluded from the unit because the parties agreed that the positions were or were not supervisory, confidential, etc.; or
3. The positions in dispute have been impacted by changed circumstances which materially affect their unit status; or
4. The existing unit is repugnant to the Act.

ELCHO SCHOOL DISTRICT, DEC. NO. 27640-C (4/97).

Among the evidence the Commission considers in determining whether such an agreement exists is the following:

- any agreement by the parties as to a bargaining unit description;
  - any agreement by the parties as to the eligibility list utilized in the election;
  - the historical inclusion or exclusion of the position from the unit;
- and
- any pertinent bargaining proposals or contract provisions.

CITY OF RICHLAND CENTER, WERC DEC. NO. 28689-B (5/98).

An agreement to include or exclude positions need not be explicitly stated by the parties, and can be established by circumstantial evidence, as long as the Commission is satisfied that the agreement was clearly understood by all parties. CITY OF RICHLAND CENTER, SUPRA.

Here, it is clear that the Staff Accountant position existed at the time the parties reached agreement on the description of the appropriate collective bargaining unit. The position of Accountant was specifically referenced in the Commission's Findings of Fact set forth in the Direction of Election. Further, the Direction of Election does not exclude the position of Accountant based on any of the statutory exclusions. The parties agreed to exclude the position, but not on the basis of its statutory status. While there have been changes in the number of accounting positions and in the duties over the years, there is no evidence that there have been material changes warranting a re-examination of the deal struck by the Employer and the Union.

The "deal is a deal" policy recognizes that when the parties themselves have defined the parameters of a bargaining unit, and if that unit as defined is not repugnant to MERA, the Commission will not entertain a unit clarification petition contrary to the wishes of one of the parties to the deal. Here, the initial definition of the bargaining unit was voluntarily established, and throughout the bargaining relationship, the position of Accountant has been excluded from the unit. The evidence is uncontroverted that no accounting position at DCHA has ever been in the bargaining unit since the unit's inception over 20 years ago. This evinces an intent on the part of the parties that the bargaining unit will not include employees performing accounting functions. The policy of the Commission protecting the "deal" made by employers and unions fosters bargaining unit stability and recognizes that the parties themselves are in charge of their relationship. That policy should not be changed on the facts in this case.

With regard to whether the Staff Accountant is a confidential position, the Employer asserts that it meets the Commission's criteria for determining confidential status. The Commission has held that notwithstanding the actual amount of confidential work conducted, and assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, or where that work cannot be assigned to another employee without undue disruption of the employer's organization. MANITOWOC COUNTY, DEC. NO. 7116-C (WERC, 11/91). The Commission has recognized that possible future confidential duties, combined with current exposure to confidential matters, may warrant a position's exclusion as confidential. CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97). The Commission has also recognized that to suggest that an employee be based in a bargaining unit until such time as an employer can prove his significant involvement in confidential matters, virtually ensures that such involvement will never develop. CITY OF APPLETON, DEC. NO. 12917-B (WERC, 9/82).

Further, the Commission has acknowledged that it must balance the right of employees to engage in concerted activity with the right of employers to conduct labor relations through employees whose interests are aligned with management. In striking that balance, the Commission has considered, among other things, the amount of confidential work to be performed; the number of existing and available confidential employees; and the degree of disruption that would be caused to the Employer's operation if confidential work was re-routed to existing confidential staff. CITY OF WAUSAU, DEC. NO. 20916-F (WERC, 5/98); CITY OF DODGEVILLE, DEC. NO. 22169-A (WERC, 6/98). The Commission has held that an employer is entitled to confidential support staff needed to operate without undue disruption, and recognized that a municipal employer needs at least one support employee who can perform such duties related to collective bargaining and contract administration. ELCHO SCHOOL DISTRICT, SUPRA.

The foregoing principles support the conclusion that the Staff Accountant position should remain excluded from the bargaining unit as a confidential employee. Wells has occupied the position of Staff Accountant since 1996. Wells operates in a support capacity to the management team for DCHA, working closely with the Business Manager and the Director in performing certain accounting functions that are central to the operation of the DCHA. She has provided information in support of collective bargaining, she knows how to work with spreadsheets and she maintains the fringe benefits program for the Employer. She has also been called upon to provide basic data concerning the collective bargaining process.

The record is also clear that the position is the only non-supervisory position excluded from the bargaining unit and has been excluded since its inception. No accounting function has ever been included in the bargaining unit. While the organizational table of DCHA clearly suggests that there is a secretarial position within the bargaining unit which could be

designated as “confidential”, the Employer has elected not to so designate that position. Rather, the Employer has designated the Staff Accountant position as “confidential” so that in the future, it may have a more central and integral role in providing support to the collective bargaining process which could be managed in-house without the use of outside consultants.

Further, the record reflects that the position is “aligned” with management. In investigating alleged misconduct of the former Executive Director, the position provided direct support to the DCHA Board concerning information the Board required regarding that misconduct. The record indicates a direct and discreet contact between the Staff Accountant and Board member Judith Wilcox concerning this sensitive personnel investigation. According to Wilcox, Wells made it clear to the Board that she was interested in working with the Board to get the information they needed. Wells knew the Board was investigating a personnel issue, and she was supporting the effort. The information collected by Wells and delivered to Wilcox was not available to anyone else in the organization, including both the Union and the then-Assistant Director.

Commission caselaw suggests that it will allow an employer to have one confidential employee, and in this case, that has been the Staff Accountant. Given that the nature of the Employer’s business is managing state and federal funds to provide housing to those in need, this is not illogical. Having someone with a background and experience in finance/accounting serve in a confidential capacity gives the Employer great flexibility in being able to respond to future personnel matters and/or disciplinary investigations. Further, having this person serve as a consultant to the collective bargaining process makes eminent sense in supporting the personnel function should it become more in-house. Commission caselaw recognizes that designating one in-house person to be in a support role to the collective bargaining process is acceptable, even if an outside consultant is used. A finding that the Staff Accountant is a confidential employee is also supported by numerous decisions of the Commission, and there is no evidence in the record to suggest that the position should be included, and some other position designated as “confidential”. Taking such an action would unnecessarily “upset the apple cart”, and would require the Employer to redefine its organizational table with regard to its collective bargaining and personnel functions. Preservation of the *status quo* in this instance does not offend MERA, makes great sense, and is consistent with a long-term relationship between the Employer and the Union.

With regard to the Staff Accountant position’s managerial status, the Employer asserts that the exclusion of managerial employees from the statutory definition of “municipal employees” is based upon the underlying theory that managerial employees exercise duties which are indicative of interests different from those of the bargaining unit personnel. MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 13735-B (WERC, 8/78). The uniqueness of managerial employees stems from their participation in the formulation, determination and implementation of policy, and the resulting responsibility for such participation, and/or the authority to commit the employer’s resources.

The record in this case clearly establishes that the Staff Accountant is the “go to” position with respect to problems with DCHA’s computer system. DCHA’s complete operation is computerized, and when problems arise, the Staff Accountant is one of the few employees in the DCHA who is called upon to solve the problem. While the Staff Accountant is not trained at the same level as a technology support person assigned exclusively to that function, clearly the Staff Accountant is the first line of interference in relation to problems with both software and hardware.

The Staff Accountant has the authority to commit the Employer’s resources by directing that an outside consultant be called in to provide assistance in rectifying any computer hardware or software problems. While this service is purchased by the Employer, and is based upon a pre-determined number of minutes, use of those minutes is committing the Employer’s resources no less than if the Employer were charged an hourly rate for those services. Clearly, the Staff Accountant has the authority, and has exercised that authority, to call and have technology support for both software and hardware on-site to rectify a problem relating to the computers needed for the Employer’s operation. This authority to commit the resources of the Employer is sufficient to establish that the Staff Accountant is a managerial employee.

## **DISCUSSION**

### **“Deal Is A Deal”**

We must first address the Employer’s assertion that the parties’ agreement to exclude the “Accountant” position when they stipulated to the appropriate collective bargaining unit in 1979 precludes the Union from now petitioning to include the position held by Wells.

The Commission has consistently held that we will not modify a voluntarily agreed-upon unit where the parties have agreed to include or exclude certain positions from the bargaining unit unless:

1. The positions in dispute did not exist at the time of the agreement; or
2. The positions in dispute were voluntarily included or excluded from the unit because the parties agreed that the positions were or were not supervisory, confidential, etc.; or
3. The positions in dispute have been impacted by changed circumstances which materially affect their unit status; or

4. The existing unit is repugnant to the Act. 1/

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1/ CITY OF SHEBOYGAN, DEC. NO. 7378-A (WERC, 5/89); ELCHO SCHOOL DISTRICT, DEC. NO. 27640-C (WERC, 4/97), WISCONSIN INDIANHEAD TECHNICAL COLLEGE, DEC. NO. 11380-C (WERC, 2/99).

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When determining whether an agreement to include or exclude positions from a unit exists, we must examine all relevant evidence including any agreement by the parties to a bargaining unit description, any agreement by the parties to the eligibility list utilized in the election, the historical inclusion or exclusion of the position from the unit, and pertinent bargaining proposals or contract provisions. Thus, an agreement to include or exclude positions need not be explicitly stated by the parties and can be established by circumstantial evidence. However, unless we are satisfied that the agreement was clearly understood by all parties, we will not honor same and will proceed to meet our statutory obligations under Sec. 111.70(4)(d)2.a., Stats. to determine “the appropriate bargaining unit for the purpose of collective bargaining.” WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 24604-C (WERC, 10/92).

Due to the passage of time, the only contemporary evidence available from which to determine the parties’ basis for agreeing to exclude the “Accountant” position is the July 16, 1979 letter from Dane County which includes a suggested eligibility list excluding the Executive Director, Assistant Executive Director and Accountant, and the Commission’s Finding of Fact 3 in its Direction of Election involving these parties:

3. That during the course of the hearing in the instant matter the parties stipulated that the unit appropriate for collective bargaining consists of all regular full-time and regular part-time employees in the employ of the Authority, excluding supervisory, confidential and craft employees; and that the individuals occupying the positions of Executive Director, Assistant Executive Director, and Accountant should be excluded from the eligibles in any election conducted herein, as well as independent contractors serving as Resident Managers.

Other relevant evidence includes the unit description in the 1998-2000 collective bargaining agreement which does not specifically exclude the positions of Executive Director, Assistant Executive Director and Accountant, and the fact that no accounting positions have been included in the bargaining unit since its inception in 1979.

Considering all of the evidence, we conclude that: (1) the stipulated unit description from 1979 which excluded “supervisory, confidential and craft employees”, but did not specifically exclude the positions that the parties stipulated were not eligible to vote in the representation election; and (2) the current contractual unit description establish the parties agreement to exclude the Accountant positions on the basis of confidential status. The unit exclusion of any accounting position since 1979 is consistent with this conclusion. Thus, we are satisfied that the second exception to a “deal is a deal” is present here and therefore that it is appropriate to process this unit clarification petition on its merits.

Further, even if the second exception did not apply, we are satisfied that the position currently held by Wells is not the same “Accountant” position, or its equivalent, that the parties had originally agreed to exclude and thus that the first exception to the “deal is a deal” rule is also present. The record establishes that while it is not clear who held the position of “Accountant” at the time the parties agreed to exclude it, shortly thereafter Marilyn Haynes was hired into what appears to be the original position’s equivalent, i.e., the Accounting Specialist position. Wells testified that, of the “Duties and Responsibilities” listed in the position description for Accounting Specialist, she only performs all or parts of four of ten areas. Among the duties performed by Haynes from her hire in September of 1979 until her retirement in August or September of 1996, were the general ledger work, budget preparation, and HUD reports. After Haynes’ retirement, that work was performed by outside consultants, and has never been performed by Wells. The duties relating to general ledgers, budget preparation, financial analysis and HUD reports are currently performed by the Business Manager, Paul Schultz, who was hired in 2000 into that newly-created position. The record also indicates that DCHA has no records or documentation showing Wells as ever holding a position entitled “Accountant” or “Accounting Specialist” with DCHA, until Wells was given the “Staff Accountant” position description in 2000. Wells testified that while she performs many of the duties listed on that position description, she does not perform all of them, and still does not perform any budget or general ledger work.

In sum, the duties performed by Haynes as the Accounting Specialist are now performed by Schultz, Wells and an outside contractor. Thus, the position Wells now holds did not exist at the time the parties agreed to exclude the “Accountant”, and is not the equivalent of that “Accountant” position.

Given our conclusion that processing of the petition is not barred by “deal is a deal”, we turn now to the claimed confidential and managerial status of Wells.

### **Confidential Status**

It is well-settled that for an employee to be held confidential, such employee must have sufficient access to, knowledge of, or participation in confidential matters relating to labor



relations. MINERAL POINT UNIFIED SCHOOL DISTRICT v. WERC, 251 Wis.2d 325 (Ct.App. 2002). For information to be confidential, it must: (a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents. 2/ While a *de minimis* exposure to confidential matters is generally insufficient grounds for exclusion of an employee from a bargaining unit, 3/ we have also sought to protect an employer's right to conduct its labor relations through employees whose interests are aligned with those of management. 4/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, 5/ and, similarly, where a management employee has significant labor relations responsibility, the clerical employee assigned as his or her secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employee without undue disruption of the employer's organization. 6/

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2/ DANE COUNTY, DEC. NO. 22976-C (WERC, 9/88).

3/ BOULDER JUNCTION JOINT SCHOOL DISTRICT, DEC. NO. 24982 (WERC, 11/87).

4/ C.E.S.A. NO. 9, DEC. NO. 23863-A (WERC, 12/86).

5/ TOWN OF GRAND CHUTE, DEC. NO. 22934 (WERC, 9/85).

6/ HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88).

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The record establishes that Wells has had no involvement in matters relating to labor relations beyond what is, at most, a *de minimis* amount of involvement with collective bargaining on the Employer's behalf. That involvement has consisted of preparing basic compensation data for use by the Employer's outside labor counsel in the form of listing the wage rates, hours, and amounts paid for the various fringe benefits for the employees in the bargaining unit. Such information is available to the Union and its compilation does not make Wells party to the Employer's bargaining strategy. Providing information for use by the employer in collective bargaining or in responding to grievances, absent knowledge of the employer's grievance or bargaining strategy, generally does not render a position confidential within the meaning of the law. CITY OF CUDAHY, DEC. NO. 21887 (WERC, 8/84).

Wells also has done one or two cost projections showing the amount payroll would increase if wages were increased by a certain percentage. It is not clear if this was done with regard to all employees for budget purposes or only for the bargaining unit employees. Even

assuming it was for the latter, such would amount to a *de minimis* exposure to the Employer's collective bargaining strategy. 7/

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7/ *SHAWANO COUNTY (MAPLE LANE HEALTH CARE CENTER)*, DEC. NO. 7197-D (WERC, 8/94); *CITY OF LANCASTER*, DEC. NO. 27180 (WERC, 2/92).

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Wells does not perform any duties for management related to confidential correspondence, has not attended meetings where personnel matters have been discussed, nor has she had any participation in matters related to collective bargaining beyond that noted above.

The Employer cites Wells' having provided information to the Board's Directors regarding the former Executive Director as demonstrating her position is "aligned with management". Importantly, we note that the former Executive Director was not an employee represented by the Union, but was a "management" employee. Further, Wells approached the Board and volunteered to provide information. Thus, her clandestine involvement in the Board's investigation was not part of her job responsibilities, but was a result of her having volunteered to provide the information. Therefore, Wells' role in the Executive Director's departure was not confidential labor relations work.

The Employer also asserts that the Commission has permitted employers to have at least one confidential employee, and that in this case, Wells has been designated to carry out that function. According to the Employer, this makes sense given her background and experience in finance and accounting, and this will make even more sense should the personnel functions be performed more in-house, as the Director has been considering doing.

As we previously stated, the Commission has held that notwithstanding the actual amount of confidential work performed, the employee may be found to be confidential where that person is the only one available to perform legitimate confidential work. *TOWN OF GRAND CHUTE*, SUPRA. That is not the case at DCHA. As the Business Manager, Schultz has access to any information to which Wells has access and his financial and accounting skills and background exceed that of Wells. Further, the position description for Business Manager Schultz indicates he already has a role in personnel functions, 8/ so that his assuming whatever confidential duties Wells might have performed in the past with regard to providing payroll

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8/ Schultz' position description includes as a duty, "Performs all personnel functions and processes payroll." (Exhibit 12).

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and fringe benefits data would not be duly disruptive of the Employer's organization. OREGON SCHOOL DISTRICT, DEC. NO. 28110-C (WERC, 4/96). Unlike the case in MENOMONIE SCHOOL DISTRICT, DEC. NO. 14738-C (WERC, 10/01), there is no evidence, and no argument, that the person to whom such work would be shifted does not have the skills or time to do the work.

As far as relying on what Wells' confidential clerical and costing duties would be if DCHA decided to bring its labor relations functions in-house, the record indicates that this is something that Director Parham has been considering, but there is no plan to do so at this point, and it does not appear that the subject has even been broached with the Board. Such possible future confidential duties are too speculative to warrant exclusion at this time. WAUKESHA JOINT SCHOOL DISTRICT, DEC. NO. 10823-A (WERC, 3/81).

Given the foregoing, we do not find a sufficient basis upon which to exclude Wells as a confidential employee.

### **Managerial Status**

With regard to determining managerial status, we have stated:

Managerial employees are excluded from the definition of municipal employees pursuant to Sec. 111.70(1)(i), Stats. The Commission has developed a definition of managerial status through case law in the absence of a statutory definition of a "managerial" employee. In determining whether a position is managerial, the Commission considers the degree to which the incumbent of the position actually participates in the formulation, determination and implementation of management policy or possesses the authority to commit the employer's resources. See, e.g., Milwaukee VTAE, Dec. No. 8736-B (WERC, 6/79); Northwood School District, Dec. No. 20022 (WERC, 10/82); Marinette County (Pineview Health Care Center), Dec. No. 26154-B (WERC, 3/92), and cases cited therein. The necessary level of managerial responsibility must be "at a relatively high level". As we stated in Marinette County (Pineview Health Care Center), Dec. No. 26154-B (WERC, 3/92):

To confer managerial status, an individual's authority to commit resources must involve allocation of resources in a manner which significantly affects the nature and direction of the employer's operations. Authority to significantly affect the nature and direction of the municipal employer's operations includes, inter alia, authority to determine the following: the kind and level of services to be provided; the kind and number of employees to be utilized in providing services; the kind and number of capital improvements to be made; and the systems by which the services will be provided, including the use of outside contractors. (Footnotes omitted).

MENOMONEE COUNTY, DEC. NO. 26983-B (WERC, 4/95).

The Employer essentially relies upon Wells' duties and responsibilities with respect to DCHA's computer system as the basis for its claim that she is a managerial employee. Specifically, the Employer cites Wells' responsibility for addressing problems with the system's software and hardware and her ability to call outside technical support to rectify the problem.

Wells is the person primarily responsible for trying to solve software and hardware problems. However, this is not a managerial policy responsibility. As to Wells' ability to request outside assistance, DCHA purchases blocks of time from the outside consultant and Wells is pre-authorized to spend that time in blocks of up to two hours. If the problem will take longer to rectify, Wells will first discuss it with Schultz before having the outside consultant perform the work. Wells' limited authority to expend the Employer's resources in this regard does not "significantly affect the nature and direction of the Employer's operations."

We conclude from the foregoing that Wells is not a managerial employee.

Based upon our findings, we have concluded that Wells is neither a confidential employee, nor a managerial employee, and therefore have ordered that the position of Staff Accountant be included in the bargaining unit set forth in Finding of Fact 1.

Dated at Madison, Wisconsin, this 25th day of June, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

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Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

