

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 JACKSON COUNTY : Case 21
 : No. 43904 ME-413
 Involving Certain Employes of : Decision No. 17828-E
 :
 JACKSON COUNTY :
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Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40,
 Ms. Kerri Sullivan-Flock, Corporation Counsel/Personnel Director, 307
 Main Street, Black River Falls, WI 54615, for the Employer.

AFSCME

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

On April 9, 1990, Jackson County filed a petition requesting that the Wisconsin Employment Relations Commission clarify an existing collective bargaining unit currently represented by Local No. 2717, AFSCME, AFL-CIO, to determine whether the positions of County Conservationist and Personnel/Corporation Counsel Secretary should be excluded therefrom. Hearing in the matter was held on August 21, 1990, in Black River Falls, Wisconsin, before Examiner David E. Shaw, a member of the Commission's staff. A stenographic transcript was prepared by September 4, 1990; post-hearing briefs were submitted by October 1, 1990. The Commission, having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. Jackson County, hereafter the County, is a municipal employer with offices at the Jackson County Courthouse, 307 Main Street, Black River Falls, Wisconsin 54615.

2. Local No. 2717, AFSCME, AFL-CIO, hereafter the Union, is a labor organization with offices at Route 1, Sparta, Wisconsin 54656.

3. Pursuant to a collective bargaining agreement in effect at all times relevant to this proceeding, the Union has been the certified exclusive representative of a bargaining unit defined as:

... all regular full-time and regular part-time County Courthouse employes, excluding elected officials, supervisory, managerial, confidential, seasonal, temporary, casual and all other employes of the County. 3/

4. The Jackson County Conservationist, in coordination with the Land Conservation Committee, is responsible for various technical, administrative and educational duties in furtherance of the County's land conservation program. Pursuant to a job description published April 4, 1986, relevant aspects of the position are as follows:

POSITION PURPOSE:

A County Conservationist must perform in an administrative capacity and must be able to perform in a technical capacity to carry out the programs of the land conservation committee under the direction and supervision of committee members. The County Conservationist is responsible for managing the Land Conservation Department Office, for supervising Land Conservation Department Employees, and for coordinating and directing land conservation programs and activities in the County.

SUPERVISION/PERFORMANCE EVALUATION:

The County Conservationist is under the overall supervision of the Land Conservation Committee members who will provide policy and program direction and who will be responsible for evaluating the County Conservationist's work performance. The County Conservationist shall provide his/her own day-to-day supervision and shall be

1/ The Union was initially certified as the representative of a unit with a somewhat different composition, in Dec. No. 17828 (WERC, 7/80).

responsible for the day-to-day supervision of all LCC employees. The County Conservationist shall coordinate his/her technical work with the District Conservationist to ensure that technical standards are met. The District Conservationist shall provide supervision for all LCC employees while engaged in technical soil and water conservation work.

RESPONSIBILITIES:

* * *

Administrative Duties

1. Prepares and updates annual long-range plans under the direction of LCC members.
2. Prepares LCC budgets under the direction of LCC members and monitors the monthly fiscal affairs of the LCC.
3. Prepares the annual report of the LCC and other special reports requested by the LCC.
4. Coordinates LCC meetings; in cooperation with chairman and cooperating agency personnel prepares agendas and minutes.
5. Prepares monthly reports of activities of LCC employees for LCC meetings.
6. Becomes familiar with federal, state and local agencies and their programs and coordinates these programs with county LCC programs.
7. Plans and supervises the day-to-day work of LCC employees.
8. Prepares work performance evaluations for LCC employees.
9. Is responsible for the planning and implementation of the County's erosion control program.

* * *

5. Since July 1, 1986, Gaylord Olsen has been the County Conservationist, with duties consistent with those listed in Finding of Fact 4. The County Land Conservation Office consists of the Conservationist, the Watershed Project Technician and a secretary, all of whom are currently within the bargaining unit. There are also three independent contractor positions assigned to the office (Resource Planner, Wildlife Damage and Abatement Consultant, and Conservation Aide). Olsen has had varying responsibilities when the County has hired personnel or contracted with outside consultants, including the initial screening of applicants, drafting interview questions, and conducting/scoring interviews. When the County hired a new Watershed Protection Technician (approximately two months after the filing of the petition in the instant proceeding), Olsen, along with the Corporation Counsel/Personnel Director, wrote the questions for the interview, and was one of seven persons who interviewed and scored candidates for that position. The hiring decision for that position was based on the aggregate scores; the applicant whom Olsen ranked first was ranked second overall, but did receive the position when the top-ranked applicant (whom Olsen had ranked second) declined an offer. For one independent contractor position, the Land Conservation Committee gave Olsen authority to both identify candidates and make a hiring decision. Olsen has conducted the performance evaluation for the two County employees in his office and for the Wildlife Consultant, Resource Planner and Conservation Aide; the Land Conservation Committee uses these latter evaluations in considering contractor extensions. The position descriptions for the Technician and secretarial positions establish that such positions are under the supervision of the Conservationist, who spends approximately one-quarter of his time performing supervisory tasks. No other County employee, other than the elected Supervisors who constitute the Land Conservation Committee, provide supervision for these positions, or for the Conservationist.

6. Olsen receives correspondence on a department-head mailing list, and he has the same responsibility and authority to prepare an office budget as other County department heads. Olsen has recommended an increase in the pay

scale for the Technician, which the Land Conservation Committee agreed to, but which was ultimately rejected by the County's bargaining committee. Olsen attends regular department head meetings, but in late 1989 he was asked to leave one such meeting when the discussion turned to labor/management relations. As there are no time-clocks used in the Land Conservation Office, the employees use time sheets, which Olsen is responsible for reviewing. He also has authority to grant requests for vacation, sick leave, and overtime (which is paid in compensatory time off). The granting of overtime is essentially routine, and its use is largely left to the discretion of the employee; it typically arises when the employee is on-site with a farmer and needs to work past 4:30 p.m.

7. Olsen has the authority to discipline up to the issuance of written warnings; anything further must go to the Land Conservation Committee. Olsen has issued oral reprimands, of which he has informed the committee after the fact. Certain department heads in the larger departments of the County do have the authority, which Olsen does not, to impose discipline up to and including discharge without prior approval from their oversight committee.

8. In its relevant portions, the position description for the Jackson County Personnel Secretary provides as follows:

GENERAL DESCRIPTION OF THE POSITION:

Subject to the direction and supervision of the Corporation Counsel/Personnel Director, the Personnel Secretary shall be responsible for the day-to-day operations of the Personnel Department.

PERSONNEL SECRETARY DUTIES AND RESPONSIBILITIES:

Subject to the direction and supervision of the Corporation Counsel/Personnel Director, the Personnel Secretary's duties and responsibilities shall include, but shall not be limited to the following:

- A. Initiate payroll changes in salary, vacation accrual, sick leave accrued, payroll deduction, etc.
- B. Calculate back pay when necessary.
- C. Prepare Personnel Committee meeting notices.
- D. Draft and place all advertisements for County employment.
- E. Serve as secretary to the Personnel Committee.
- F. Process complaints and questions from employees regarding fringe benefits.
- G. Assist the Corporation Counsel/Personnel Director and the Personnel Committee in processing grievances, preparing for negotiations and handling related personnel matters.
- H. Prepare the Personnel Department budget.
- I. All other duties as assigned by the Corporation Counsel/Personnel Director and Personnel Committee.

QUALIFICATIONS:

The Personnel Secretary shall possess a high school diploma or the equivalent. The successful candidate shall have excellent typing, bookkeeping and recordkeeping skills. The successful candidate shall also have a demonstrated ability to effectively communicate with people and shall have excellent organizational skills.

* * *

JACKSON COUNTY CORPORATION COUNSEL SECRETARY

General Description of the Position:

Subject to the direction and supervision of the Corporation Counsel/Personnel Director, the Corporation Counsel/Personnel Secretary shall be responsible for the day-to-day operations of the Corporation Counsel

Office.

Duties and Responsibilities:

Subject to the direction and supervision of the Corporation Counsel/Personnel Director, the Corporation Counsel Secretary's duties and responsibilities shall include, but shall not be limited to the following:

- a. Prepare all paperwork and correspondence for Chapter 55 Guardianship and Protective Placement actions.
- b. Prepare all paperwork and correspondence for Chapter 51 Commitments.
- c. Type all pleadings and correspondence for Corporation Counsel.
- d. Schedule court appearances when necessary.
- e. File court documents when necessary.
- f. Any other duties as assigned by Corporation Counsel.

* * *

9. Lynn DeGroot is the incumbent Personnel Secretary, with duties as those are defined in Finding of Fact 8. Apart from the Personnel Director, she is the only employe of the personnel office. As Secretary for the Personnel Committee, she types minutes from both open and closed meetings, with subject matter including County negotiation strategy and contract administration. She types minutes for all closed meetings which include the Personnel Director, including other committees' meetings. DeGroot has access to all County personnel files. Given the arrangement of the office area, she frequently overhears confidential discussions between the Personnel Director and other County managers, even though she may not be a formal part of such conversations. DeGroot opens all mail addressed to the Personnel Director, and types all of the Personnel Director's correspondence, including all correspondence with the County's special attorney for labor relations. When DeGroot is on vacation, confidential typing is put on hold until her return. DeGroot assembles material for the Personnel Committee which relates to contract negotiations. DeGroot also assists in the investigation of grievances and the preparation of the responses thereto. On an unknown number of occasions, a member of the bargaining unit also typed minutes of closed meetings of the Highway Committee, at which grievances were discussed.

10. The position of County Conservationist does possess and exercise supervisory authority in sufficient manner to be deemed a supervisory employe.

11. The position of Corporation Counsel/Personnel Secretary does have sufficient access to and involvement in confidential matters relating to labor relations to render it a confidential employe.

CONCLUSIONS OF LAW

1. That the occupant of the position of County Conservationist, Gaylord Olsen, is a supervisory employe within the meaning of Sec. 111.70(1)(o), and is therefore excluded from the bargaining unit described in Finding of Fact 3.

2. That the occupant of the position of Corporation Counsel/Personnel Secretary, Deborah DeGroot, is a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and is thereby excluded from the bargaining unit described in Finding of Fact 3.

ORDER CLARIFYING BARGAINING UNIT 2/

The positions of County Conservationist and Corporation Counsel/Personnel Secretary shall be, and hereby are, excluded from the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of
Madison, Wisconsin this 5th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

(Footnote 2/ appears on page 6.)

2/ 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.

(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.

JACKSON COUNTY

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

POSITIONS OF THE PARTIES

The County asserts and avers that the Corporation Counsel/Personnel Secretary is a confidential employe, and that the County Conservationist is a supervisory employe, and that both are therefore to be excluded from the bargaining unit. The Union denies same, asserting that the two positions are both municipal employes properly included within the bargaining unit.

In support of its position, the County asserts that the Personnel Secretary's confidential status is based on her access to, knowledge of, and participation in confidential labor relations matters, as shown by her duties as secretary to the Personnel Committee and Personnel Director (i.e., typing minutes of closed meetings dealing with contract administration and collective bargaining, access to personnel records, preparation of confidential correspondence for the Personnel Director/Corporation Counsel, etc.) The Union asserts to the contrary, stating that the confidential conversations the incumbent overhears can be overheard by anyone present in the Personnel Office, that minutes of closed committee meetings have also been typed by other bargaining unit employes, and that the County contracts with an outside law firm for its labor relations, thus directing much of its confidential communications through that office.

Regarding the Conservationist, the County contends that the incumbent is responsible for a number of supervisory duties, including decisions to hire, assign and direct, evaluate, and discipline. To the contrary, the Union contends that the Conservationist spends only about one-fourth his time in alleged supervisory duties, that he gives only routine direction to the office personnel, and that final authority in hiring and firing rests with the County's Land Conservation Committee.

DISCUSSION

The statutory and case law definitions of supervisory and confidential employes are clear and well-established. We have concluded that the record evidence as to the disputed positions satisfies those definitions.

A supervisory employe is one with the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes ... or to effectively recommend such action" Sec. 111.70(1)(o)1., Stats. Our case law has interpreted the statutory provision to set the following as relevant indicia of supervisory status:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised and the number of other employes 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 her skill or for her supervision of employes;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether she spends a substantial majority of her time supervising employes; and
7. The amount of independent judgment and discretion exercised in the supervision of employes. 4/

3/ Juneau County, Dec. No. 18728-A (WERC, 1/86); City of Mauston, Dec. No. 21424-B (WERC, 10/86).

The Commission has held that not all of the above factors need be present, but if a sufficient number of said factors appear in any given case the Commission will find an employe to be a supervisor; further, even though an employe may spend a majority of her time doing non-supervisory duties, the Commission has found supervisory status where sufficient responsibilities and authority are present. 5/

This is the second time in a little over five years that we have considered the employment status of the Jackson County Conservationist. Previously, we found the position to be a municipal employe. 6/ We now find to the contrary.

In reviewing that prior decision, we put significant emphasis on the Conservationist's modest role in hiring (no voting participation), that the assignment of work to other employes was a relatively minor and incidental dimension of the job, and that the County had not, and was not, proposing to pay a supervisory premium.

Since that time, there have been a number of changes in the operations of the Land Conservation Office. The County has created and filled a new full-time position, that of Watershed Project Technician. It has also hired several independent contractor/consultants, including Resource Planner, Wildlife Consultant and Conservation Aide. Further, the growth in the Land Conservation Office has made more significant the other supervisory aspects of the Conservationist's job, such as performing evaluations and giving direction.

We discount the County's reliance on the Conservationist's claimed supervisory involvement with and authority over the independent contractors in that it overlooks a basic premise -- reflected in both statute and Commission case law -- that supervisory status cannot be found through the supervision of non-employes. 7/ Accordingly, the Conservationist's role in the "hiring" of the independent contractors, and his assignment and direction of them, is of no relevance in assessing the claimed supervisory status.

What remains, then, is the supervision of two employes. Regarding the filling of the Watershed Project Technician position, the record demonstrates that Olsen screened applications, developed interview questions, and played an equal role in evaluating candidates along with other interview panel members. Olsen has the authority to assign work. He also reviews timesheets and considers (approves) vacation, sick leave and compensatory time requests. Both Olsen and the Chairman of the Conservation Committee stated that, if discipline was necessary, the action would be taken by Olsen. Olsen has the independent authority to issue oral and written warnings but would review suspension or discharge recommendations with the committee, which would make the final decision. The record shows that Olsen completes performance evaluations for the Technician and the Secretary. Olsen used the evaluation process to warn a former Technician about appropriate behavior on the job. Olsen spends significant amounts of time supervising (approximately 25 - 30%) the employes in his department.

Reviewing again our rationale for retaining this position in the bargaining unit in our prior consideration, and the operational changes made since then, we conclude that, on balance, this position has now become supervisory. Given this conclusion, we need not address the alleged managerial status of the position.

We turn to the issue of the secretary to the Corporation Counsel/Personnel Director.

It is well-settled that, for an employe to be held confidential, such

4/ Juneau County, Dec. No. 18728-B (WERC, 1/87).

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

6/ As noted above, Sec. 111.70(1)(o)1., Stats., defines a "supervisor" in the context of authority over "other employes" (emphasis added). An independent contractor is, by definition, not an employe. For prior Commission cases excluding non-employes from coverage under this section, see, St. Croix County, Dec. No. 11179 (WERC, 7/72), and Wood County, Dec. No. 13760 (WERC, 6/75).

employe must have access to, knowledge of, or participation in confidential matters relating to labor relations; for information to be confidential, it must (a), deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and, (b), be information which is not available to the bargaining representative or its agents. 8/

While a de minimis exposure to confidential materials is generally insufficient grounds for exclusion of an employe from a bargaining unit, 9/ we have also sought to protect an employer's right to conduct its labor relations through employes whose interests are aligned with those of management. 10/ 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, 11/ and, similarly, where a management employe has significant labor relations responsibility, the clerical employe assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, unless the confidential work can be assigned to another employe without undue disruption of the employer's organization. 12/

Within that framework, we have no doubt that the secretarial position at issue is confidential. The record evidence establishes that the subject employe has close and continuing access to confidential materials. Neither the County's use of outside counsel for certain of its labor relations matters, nor the fact that one bargaining unit member may also have typed some minutes of closed meetings of one committee refutes the evidence establishing such confidential status.

The record supports that the Secretary types materials that relate to negotiation strategy and contract administration matters not known to the Union. She types confidential material that is transmitted to the County's Labor Relations counsel, as well as minutes from closed-session committee meetings that relate to negotiations and contract administration activities. The Secretary also assembles data for negotiations, assists in the investigation of grievances and, in fact, assisted in the preparation of this proceeding. For these reasons, we conclude that the disputed secretarial position is confidential.

Dated at Madison, Wisconsin this 5th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

7/ Dane County, Dec. No. 22796-C (WERC, 9/88).

8/ Boulder-Junction Joint School District, Dec. No. 24982 (WERC, 11/87).

9/ CESA Agency No. 9, Dec. No. 23863-A (WERC, 12/86).

10/ Town of Grand Chute, Dec. No. 22934 (WERC, 9/85).

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