

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

AFSCME COUNCIL NO. 40

Involving Certain Employes of

CITY OF RICHLAND CENTER

Case 10

No. 52272 ME-751

Decision No. 17950-A

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Boardman, Suhr, Curry, and Field, S.C., Attorneys at Law, by Mr. Steven C. Zach, One South Pinckney Street, Madison, Wisconsin, appearing on behalf of the City.

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

Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition on March 10, 1995, requesting that the Wisconsin Employment Relations Commission clarify an existing collective bargaining unit of certain employes of the City of Richland Center to include the positions of Janitor, Deputy Clerk/Treasurer and Administrative Assistant/Deputy City Clerk/Treasurer.

Hearing was conducted on June 9, 1995, in Richland Center, Wisconsin by Examiner Amedeo Greco. At the hearing, the Union moved to amend its petition by also seeking the unit inclusion of the Assistant to the Mayor, which amendment the City opposed as untimely. At the hearing, the parties agreed to inclusion of the Janitor position in the Union bargaining unit. The hearing was transcribed and the parties thereafter filed briefs which were received by August 7, 1995.

By letter dated January 16, 1996, the Commission contacted the parties regarding certain evidentiary matters. These matters were resolved February 13, 1996 and the record was then closed.

The Commission having considered the record evidence and the parties' arguments, and being fully advised in the premises, issues the following

No. 17950-A

## FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, herein referred to as the Union, is a labor organization which has its offices located at 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903.

2. The City of Richland Center, herein referred to as the City, is a municipal employer which has its offices located at 182 North Central Avenue, Richland Center, Wisconsin 53581.

3. In October, 1979, the Union filed an election petition whereby it sought to represent all blue-collar employes of the City. The Union expressly excluded both "confidential" and "clerical" employes from the proposed unit. The City opposed the petition contending that there should be five departmental blue collar units (street, parks, cemetery, water and waste water) instead of a single overall blue collar unit. In City of Richland Center, Dec. No. 17950 (WERC, 7/80), the Commission found the Union's proposed unit to be appropriate and rejected the City's proposed units as resulting in "undue fragmentation". In City of Richland Center, Dec. No. 17950 (WERC, 8/80), the Commission certified the Union as the exclusive bargaining representative for a unit consisting of

"all regular full-time and regular part-time employes of the City of Richland Center, employes (sic) in the Street Department, Parks Department, Cemetery Department, Water Department and Waste Water Treatment Plant, excluding managerial, supervisory, confidential, clerical and casual employes."

4. The current collective bargaining agreement between the Union and the City runs from January 1, 1994, to December 31, 1995, and contains a unit description which continues to exclude both "confidential" and "clerical" employes. At the time of the hearing, there were about 18 members in the bargaining unit. In addition to the blue collar unit, there is a City Police Department unit of approximately 10 employes. There is also a bargaining unit of employes of the Public Utility Commission of Richland Center.

5. Deputy Clerk/Treasurer Melinda Jones, Administrative Assistant Shawn Wilson-Walsh, and Assistant to the Mayor Luella Edwards all work in City Hall. The first two positions, or predecessor clerical positions, were in existence at the time the bargaining unit was formed in 1980 and certified by the Commission. The Assistant to the Mayor position was created in 1986. Said positions never have been included in the bargaining unit set forth in Finding of Fact 3.

6. Assistant to the Mayor Edwards works on the second floor of City Hall and has held her full-time position since 1986. She reports directly to the Mayor (a part-time position), and answers his telephone, opens and reads his mail, and deals with the public on his behalf. She types

the Mayor's correspondence; attends closed City Council meetings when invited by the Mayor; and is privy to discussions and written correspondence between the Mayor and the City's Attorney regarding labor matters. She reads confidential labor relations correspondence and has discussions with the Mayor and other members of the City's Personnel Committee relating to labor relations or grievance matters which are pending before the City and/or its Personnel Committee. She therefore is privy to the legal strategy employed by the City in labor matters. She does not participate in any of the City's contract negotiations with its unions and she does not cost out any contract proposals.

7. Judd Elliott has been City Clerk/Treasurer since approximately 1988. His office is on the first floor of City Hall, and is staffed by himself, the Deputy Clerk/Treasurer and his Administrative Assistant. Elliott's duties include taking minutes of closed meetings of the Common Council during which confidential labor relations matters could be, but historically have not been, discussed. If Elliott could not perform the duty, he would be replaced by his Deputy.

During preparation of the annual City budget and during collective bargaining with the police bargaining unit and the blue collar City unit, Elliott is asked by the City to provide information as to the wage and fringe benefit cost of various percentage increases. Although Elliott has the skills to perform this work himself, he has historically directed the Deputy Clerk/Treasurer or the Administrative Assistant to perform the work because they are more familiar with the data which is needed to perform the computations. The budget/bargaining proposal costing work takes approximately 20 hours per year. Aside from his knowledge of possible bargaining proposals, he has no role in the collective bargaining process.

The Clerk/Treasurer's office has a fax machine which, from time to time, receives confidential labor relations material for the Mayor. Although the City Clerk/Treasurer typically handles all faxes, depending on the time of the receipt of the confidential material, any of the three employes in the office might deliver the fax to the Assistant to the Mayor.

City mail is delivered to the Clerk/Treasurer's office and reviewed by the City Clerk/Treasurer. Mail addressed to the Mayor is typically delivered unopened to the Assistant to the Mayor.

City personnel files are located in the City Clerk/Treasurer's office and all three employes have keys to the files.

The City Clerk/Treasurer's office is small and if the City Clerk/Treasurer were to have a conversation with someone about confidential labor relations matters, the Deputy or Administrative Assistant would be able to overhear the conversation.

8. Deputy Clerk/Treasurer Jones has been employed in her position since January, 1994. She reports directly to the City Clerk/Treasurer and occasionally fills in for him during his absences. For instance, she once prepared the written minutes of a City Council meeting because

the City Clerk was behind in his work. She works between the hours of 7:30 a.m. - 4:30 p.m. where she mainly performs clerical and other related duties, which to some extent involve use of City computers. Her duties do not expose her to any confidential labor communications involving City personnel and she has not been privy to any confidential labor communications involving the Mayor or the City Clerk. Jones has access to payroll records, personnel files, and to the fax machine in her office area. If the Assistant to the Mayor is absent, she may take telephone messages for the Mayor. At the direction of the City Clerk/Treasurer, she has done cost calculations as to wage and benefit increases.

9. Administrative Assistant Wilson-Walsh has held her position for about five and a half years. She works from 7:30 a.m. - 4:30 p.m. and reports directly to the City Clerk/Treasurer. She performs clerical and related duties, which to some extent involve use of City computers. She has not been involved in past collective bargaining negotiations and she is not privy to any confidential information involving the City's labor relations. She sometimes takes faxes to the Mayor's office and has access to the personnel and records in the Clerk/Treasurer's office. She has never performed any budget/collective bargaining costing work.

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

#### CONCLUSIONS OF LAW

1. The express exclusion of clerical employees from the bargaining unit precludes the Union from obtaining, over the City's objection, representation rights for any clerical positions by means of a unit clarification proceeding.

2. The Deputy Clerk/Treasurer and Administrative Assistant-Deputy Clerk/Treasurer, currently Melinda Jones and Shawn Wilson-Walsh, respectively, are not confidential employees within the meaning of Sec. 111.70(1)(i), Stats.

3. The Assistant to the Mayor, currently Luella Edwards, is a confidential employee within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER 1/

The positions of Assistant to the Mayor, Deputy Clerk/Treasurer and Administrative Assistant - Deputy City Clerk/Treasurer shall continue to be excluded from the bargaining unit set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/  
Herman Torosian, Commissioner

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

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

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

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

(Footnote 1/ continues on the next page.)

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(Footnote 1/ continues from the previous page.)

(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.

CITY OF RICHLAND CENTER

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

POSITIONS OF THE PARTIES

The Union

The Union's petition seeks to include the Assistant to the Mayor, Administrative Assistant, and Deputy Clerk/Treasurer positions into the bargaining unit set forth at Finding of Fact 3.

The Union contends the Commission decision in City of Sheboygan, Dec. No. 7378-A (WERC, 5/89) does not bar it from seeking to accrete these positions to the bargaining unit because they either were not in existence at the time or because they were deemed to be confidential by the parties in 1980. The Union asserts that any confidential duties that they may perform are de minimis and hence could be adequately performed by the City Clerk/Treasurer without undue disruption.

Alternatively, if the Commission will not add the clericals to the existing unit, the Union requests that it be allowed to seek to represent these employees in a separate clerical unit.

The City

The City contends that the positions of Administrative Assistant and Deputy Clerk/Treasurer were specifically excluded as clericals when the bargaining unit was formed in 1980 by agreement of the parties and that the Union's petition to expand the unit by means of a unit clarification is barred by this prior agreement. Citing Sheboygan and its progeny - wherein the Commission has ruled that it will not permit the expansion of an agreed-upon bargaining unit over a parties' objection absent certain specific exceptions - the City maintains that none of the exceptions apply and asks the Commission to dismiss the Union's petition.

Alternatively, if the Commission does not dismiss the petition outright, the City argues that the positions should be excluded because of their confidential status and that, furthermore, none of the three employees in dispute shares a community of interest with other bargaining unit members.

The City objects to any consideration of the Union's amendment of the petition at hearing, arguing that it did not have adequate notice to address whether the Assistant to the Mayor should be



included in the unit and that said position, in any event, is confidential and hence should be excluded. The City further argues that in the context of this unit clarification case, it is inappropriate for the Commission to consider the question of a separate clerical unit.

DISCUSSION:

Initially, we must determine whether the Union's effort to add these three clerical positions to the blue collar unit through a unit clarification petition is barred by the scope of the collective bargaining unit. The Commission repeatedly has held that where the parties have agreed to include or exclude certain positions from the bargaining unit, it will not allow either party to alter the unit's scope through a unit clarification petition 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. <sup>2/</sup>

Here, it is clear that clerical positions existed at the time of the Union's 1979 petition and that the Union's election petition, the Commission's Certification and the parties' current contract all expressly excluded clerical employees.

Under these circumstances, clerical employees have always been excluded from the unit without regard to whether they are or are not confidential. Thus, it does not matter whether or not the parties in 1980 believed any existing positions to be confidential. The positions were excluded either way.

Nor does it matter that the Assistant to the Mayor position wasn't created until 1986. The blue collar unit generally excludes clerical employees and that generic exclusion governs the unit

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<sup>2/</sup> City of Sheboygan, Dec. No. 7378-A (WERC, 5/89); Manitowoc County, Dec. No. 7116-C (WERC, 11/91); Forest County (Sheriff's Department), Dec. No. 27552 (WERC, 2/93). See, generally, Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76), and City of Cudahy, Dec. No. 12897 (WERC, 9/74).

status of clerical positions whenever created. 3/

Thus, we reject the Union's contentions that either of the first two exceptions cited above allow it to seek inclusion of clerical employees in the blue collar unit through a unit clarification. As there is no assertion of material changed circumstances and as the existing unit is not repugnant to the Municipal Employment Relations Act, we conclude that a unit clarification petition is not an available method by which the clerical employees can be included in the existing unit.

The Union has indicated that it will seek an election in a separate clerical unit if its unit clarification petition is unsuccessful. Because the parties did not litigate whether such a unit is appropriate, we state no view on that question herein. However, because the parties have litigated the confidential employee vs. municipal employee status of the three positions in issue, we think it is appropriate to resolve that issue so that the parties will not be subjected to unnecessary delay and expense if such an election petition is filed.

In order for an employee to be held confidential, that employee must have access to, knowledge of, or participation in confidential matters relating to labor relations. Confidential information is that which is not available to the bargaining representative or its agents, and which deals with the employer's strategy or position in collective bargaining, contract administration, litigation or similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer. 4/ In reviewing an allegation of confidential status, the Commission is mindful of the need to balance the statutory 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. 5/ In striking this balance, the Commission looks to, among other things, the amount of confidential work to be performed, the number of employees available to perform the work, and the degree of disruption that would be caused to the employer's operation if confidential work is reassigned. 6/

The record establishes that the Assistant to the Mayor is a confidential employee under Sec. 111.70(1)(i), Stats., and hence cannot be included in any bargaining unit. 7/

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3/ See Edgerton School District, Dec. No. 18656-A (WERC, 5/90).

4/ Dane County, Dec. No. 22976-C (WERC, 9/88); Village of Saukville, Dec. No. 26170 (WERC, 9/89) at page 6.

5/ City of Seymour, Dec. No. 28112 (WERC, 7/94) at page 6.

6/ City of Seymour, supra, at pages 7-8; City of Greenfield, Dec. No. 26423 (WERC, 4/90) at page 8.

7/ The City claimed at hearing that it needed additional time to prepare and respond to the Union's motion at hearing to accrete this position to the bargaining unit. Since the instant

As stated in Finding of Fact 6, Assistant to the Mayor Edwards is privy to discussions and written correspondence between the Mayor, the Common Council's Personnel Committee and the City's attorney regarding confidential labor matters; and thus she is privy to the legal strategy employed by the City in confidential labor matters. This evidence establishes that Edwards is a confidential employe under Sec. 111.70 (1)(i), Stats.

However, the record establishes that Administrative Assistant Wilson-Walsh and Deputy Clerk/Treasurer Jones are not confidential employes, and that they therefore are eligible to be included in an appropriate collective bargaining unit.

As to the confidential status of the Deputy Clerk/Treasurer and the Administrative Assistant, the City relies in part upon their potential access to confidential facsimile transmissions, confidential telephone calls, confidential conversations, confidential mail and the City's computer system. We do not find any of these assertions to be particularly persuasive.

First, it is important to note that the Clerk/Treasurer does not have any general involvement with confidential labor relations matters via the facsimile transmissions, telephone calls or mail received in his office. Further, he would not normally have occasion to discuss confidential labor relations matters in his office with another individual. Thus, the amount of confidential labor relations material or information that would ever find its way into the Clerk/Treasurer's office is minimal at best. Further, it is clear from the record that to the extent such confidential information is present, it is the Clerk/Treasurer who normally handles the mail and facsimile transmissions. Lastly, the City computers have internal "password" security which can be used to deny employes access to any confidential labor relations material they may contain. Combining all of the above with the reality that the Clerk/Treasurer can direct the two employes in question to avoid any exposure to confidential labor relations materials (whether contained in personnel files or elsewhere), the potential access these two employes might have to the minimal confidential labor relations material present in the office falls far short of establishing a persuasive basis for their exclusion from any unit as confidential employes.

More significant is the matter of the costing duties which the Clerk/Treasurer has historically assigned to either of these employes. Clearly, the costing of potential bargaining proposals provides significant access to important confidential labor relations material. However,

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record establishes that Edwards is a confidential employe, there is no need for additional hearing or for a ruling on the City's request to have allegedly confidential documents prepared by the Assistant become part of the record herein.

the record also clearly establishes that the Clerk/Treasurer has the skills and the time to perform this work (which typically may take 2-3 days per year to perform). Under the circumstances present herein, we are persuaded that this costing work can be performed by the Clerk/Treasurer without undue disruption of the Employer's operation. While we acknowledge that this may decrease the efficiency with which this work is performed, we do not find this loss of efficiency to be a valid basis for depriving two employes of the rights of municipal employes including the opportunity to determine whether they wish to be represented by a labor organization for the purposes of collective bargaining. Therefore, we conclude that the costing duties are not a valid basis for concluding these two individuals are confidential employes.

Therefore, as indicated above, if the Union were to file an election petition seeking to represent clerical employes, these two individuals would be eligible to vote in any such election if the clerical unit were found to be an appropriate one.

Dated at Madison, Wisconsin this 23rd day of February, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/  
Herman Torosian, Commissioner

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