

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
AFSCME COUNCIL 40, AFL-CIO  
Involving Certain Employees of  
MARATHON COUNTY  
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Case 53  
No. 39018 ME-196  
Decision No. 19130-E

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council #40,  
AFSCME, AFL-CIO, N-419 Birch Lane, Hatley, Wisconsin 54440,  
appearing on behalf of the Union.  
Mr. Dean R. Dietrich, Mulcahy & Wherry, S.C., Attorneys at Law, P.O.  
Box 1004, Wausau, WI 54401-1004

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

Wisconsin Council 40, AFSCME, AFL-CIO having, on June 29, 1987, filed a petition with the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of employees of the Marathon County Courthouse by determining whether the Assistant Corporation Council should be included in that bargaining unit; and a hearing having been conducted on October 20, 1987, in Wausau, Wisconsin, before Examiner Marshall L. Gratz; and a stenographic transcript of the proceedings having been prepared; and briefing by the parties having been completed December 14, 1987; and the Commission having considered the evidence and arguments of the parties, and being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. That Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization having its offices at N-419 Birch Lane, Hatley, Wisconsin.

2. That Marathon County, hereinafter referred to as the County, is a municipal employer having its offices at the City Hall, Wausau, Wisconsin.

3. That the Union is the exclusive collective bargaining representative for certain employees of the County in a bargaining unit described as follows:

All regular full-time and regular part-time professional employees in the employ of Marathon County pursuant to the Wisconsin Employment Relations Commission Decision No. 19129-D, Case LII, No. 27546, ME-1970 for the purposes of conferences on wages, hours and conditions of employment. Employees expressly excluded from representation include all confidential, supervisory and managerial employees and all other employees of Marathon County.

4. That, on June 29, 1987, the Union petitioned the Commission to clarify the unit described in Finding of Fact 3 to include in that unit the position of Assistant Corporation Counsel, currently held by Thomas Finley.

5. That the Corporation Counsel staff consists of four people: the Corporation Counsel; Assistant Corporation Counsel, Mr. Finley; and two secretaries.

6. That in his capacity as Assistant Corporation Counsel, Finley has represented Marathon County in litigation involving the County, including a lawsuit involving former county administrator Mr. Charles Balczun which raised compensation issues, a suit involving the location of a new jail, and a suit involving the Marathon County Handicapped Children's Education Board; that in each of these matters, Finley worked jointly with the Corporation Counsel; that Finley

spends 90% or more of his time working on matters for the Department of Social Services, including petitions for juveniles in need of protection and services, child support matters for the Child Support Agency, and general relief matters; that Finley represents and advises the County's Forestry, Recreation, Zoning and Planning Committee, which discusses matters of County policy, and meets with this committee on an as-needed basis; that Finley participates in drafting advisory opinions for County officials when assigned to do so by the Corporation Counsel; that Finley advises the County as to some contracts with third parties, including purchase contracts, but excluding labor contracts; that Finley attended a training program in 1985 and 1986 called the Certified Managers' Program; that Finley's spending authority on behalf of the County has consisted of signing payment vouchers when the Corporation Counsel is absent; that Finley's job duties are determined by the Corporation Counsel; that Finley does not participate sufficiently in the formulation, determination and implementation of County policy, or have sufficient authority to commit the County's resources so as to render him a managerial employee.

7. That, among the various matters in which Finley has represented the County, he was involved in a case involving the discharge of the County Human Resources Director under the Home Rule Statute; that the County Administrator specifically asked that the Corporation Counsel's office handle that litigation rather than outside counsel; that the County Board passed a resolution to delegate the matter to the Corporation Counsel's office.

8. That Finley is not involved in negotiating any labor agreements in the County; that he does not participate in discussions of bargaining proposals or assist in the preparation of research for bargaining; that he has never participated in a mediation or an arbitration; that Finley has never adjusted an employee's grievance nor participated in a hiring during his tenure as Assistant Corporation Counsel; that, in four years, Finley has represented the County twice in unemployment compensation matters; that he has worked on one or two discrimination complaint cases; that a private law firm is the County's labor counsel; that Finley does not have sufficient access to or involvement in confidential matters relating to labor relations so as to render him a confidential employee.

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

#### CONCLUSION OF LAW

That the position of Assistant Corporation Counsel in Marathon County, currently held by Thomas Finley, is neither managerial nor confidential and that Finley, therefore, is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and is appropriately included in the unit described in Finding of Fact 3, above.

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

#### ORDER CLARIFYING BARGAINING UNIT 1/

1. That the position of Assistant Corporation Counsel is included in the bargaining unit described in Finding of Fact 3, above.

Given under our hands and seal at the City of  
Madison, Wisconsin this 23rd day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Hempe  
A. Henry Hempe, Commissioner

Footnote 1 on page 3.

- 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.

(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.

## MARATHON COUNTY

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

#### POSITIONS OF THE PARTIES

The County argues that Finley has effectively participated in the formulation, determination and implementation of management policy of the County to the extent that he should be excluded from the bargaining unit described in Finding of Fact 3, above. The County points to Finley's work in providing legal assistance and advice to the County Board, County Board Committees and Department Heads, as well as his close working relationship with the Corporation Counsel as evidence that he assists in the development and implementation of policy to the extent that he is a managerial employee.

The County argues that Finley's work on several litigation matters involving personnel issues, in addition to his close working relationship with Corporation Counsel, necessarily expose him to confidential information not available to the Union. It argues that the Assistant Corporation Counsel must serve in a "confidential relationship with the Corporation Counsel and the County officials," so that the position should be excluded from the unit on a confidential basis.

The Union argues that Thomas Finley, the occupant of the disputed position, is neither managerial nor confidential and thus is a municipal employee. It argues that the evidence adduced at the hearing shows that Finley lacks authority to commit the County's resources and does not have access to or deal regularly with "confidential personnel records." The Union stresses Finley's testimony that 90% or more of his time is spent on social services, which is non-confidential and non-managerial work that is consistent with the work done by members of the bargaining unit. In sum, the Union argues that any of Finley's duties that could be considered to involve managerial or confidential matters are so incidental as to be de minimus, and insufficient to render him either managerial or confidential.

#### MANAGERIAL STATUS

In making a determination if a position is managerial, we consider the extent to which the employee participates in the formulation, determination and implementation of management policy, and the degree to which the employee possesses effective authority to commit the employer's resources. 2/ A review of the record indicates that Thomas Finley, the incumbent Assistant Corporation Counsel, does not participate in the formulation, determination and implementation of management policy or have sufficient authority to commit the County's resources for us to conclude that he is a managerial employee.

The County relies primarily on Finley's role as legal advisor to the Forestry, Recreation, Zoning and Planning Committee and to the County on routine County matters as well as County litigation to support its argument that he is managerial. The evidence fails to satisfy the test for managerial status established by the Commission, however. Finley's legal representation duties do not constitute the formulation, determination and implementation of management policy. As we stated in a case involving municipal attorneys: 3/

The performance of professional responsibilities loyal and favorable to the management . . . does not constitute grounds for the conclusion that said professionals are managerial employees.

In addition, Finley really has no authority to commit the County's resources. The contract advice Finley gives the County, including advice as to purchase contracts, and the spending vouchers he signs, do not constitute the committing of

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2/ Milwaukee County (Sheriff's Department), Dec. No. 24855 (WERC, 10/87).

3/ Association of Municipal Attorneys of Milwaukee, Dec. No. 12035-A (WERC, 2/74) aff'd, 71 Wis. 2d 709, 239 N.W. 2d 63 (1976).

County resources to the extent required by our standard. Finley has no budgeting responsibilities or authority to allocate funds. To be considered managerial, the employee must have authority to allocate resources in a manner "which significantly affects the nature and direction of the employer's operations." 4/ Finley's position fails to meet this test. 5/

#### CONFIDENTIAL STATUS

The Commission has held that for an employee to be confidential, the employee must have access to, knowledge of, or participate in confidential matters relating to labor relations. In order for information to be confidential, the information must:

1. 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
2. must not be available to the bargaining representative or its agents. 6/

The County argues that the Assistant Corporation Counsel for Marathon County has participated in the kind of litigation that requires his exclusion from the bargaining unit, citing City of Madison, Dec. No. 23183 (WERC, 1/86). At issue in City of Madison was the exclusion or inclusion of those City employees whose positions require a law degree or a license to practice law in Wisconsin, but not including the positions of City Attorney or Madison Equal Opportunity Commission Hearing Examiner. It was alleged in that case that certain Assistant City Attorneys should be excluded from the bargaining unit on the grounds that they were confidential or supervisory. Specifically, the City contended that two of the Assistant City Attorneys were confidential employees. The Commission concluded that one of the two was a confidential employee, citing the following work activities: he had conducted investigations to determine whether employees had violated the City's residency ordinance; he had represented the City in the grievance procedure, arbitration, and litigation resulting from an arbitrator's award; he had represented the City in grievances involving the denial of residency requirement waivers. The Commission was persuaded his involvement in grievance handling and litigation, which exposed him to information not available to the bargaining representative, and which constituted approximately 25 percent of his time, was sufficient to exclude him as confidential.

A majority of the Commission also concluded, however, that the other Assistant City Attorney was not confidential (with Commissioner Gordon dissenting). The majority noted that, while she defended the City in equal rights and discrimination litigation, she was not directly involved in collective bargaining or contract administration disputes between the City and the exclusive representatives of the various collective bargaining units:

Thus, her litigation activities are unlike those of O'Brien which bring him into pre-disciplinary investigations, grievance disposition issuance and arbitrations which, in turn, directly involve him in the City's contract administration activities and strategies.

Marathon County is correct in stating that the Commission has found that legal counsel may, in appropriate circumstances, be confidential. The test remains, however, one in which employees are excluded as confidential by reason of their participation in the employer's labor relations function and their access to

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4/ Portage County, Dec. No. 6478-C (WERC, 10/87).

5/ Finley's attendance at a Manager's Training Program, even when considered along with other evidence presented by the County, is insufficient to prove that he is a managerial employee.

6/ Appleton Area School District, Dec. No. 22338-B (WERC, 7/87); Menomonee Falls School District, Dec. No. 13492-A (WERC, 10/85).

sensitive labor relations information which would not normally be available to the Union. We conclude that Assistant Corporation Counsel Finley does not meet this test. His work resembles that of the Assistant City Attorney we found not to be confidential in City of Madison. Like that employee, he has participated in some litigation involving personnel issues, but is not involved in grievance handling or contract administration disputes.

Moreover, the record in this case indicates a lower level of involvement in such litigation than is recounted regarding the non-confidential employee in City of Madison. Finley testified that 90% of his time is spent on work involving social services, and that he has not been involved in preparing bargaining proposals or strategy. The record indicates that he has been involved in only a few employment cases and no employee grievances. The record has no evidence to support a conclusion that Finley has access to or knowledge of information which is not available to the bargaining unit or its agents. Finally, the County suggests that Finley may have access to confidential information by virtue of his proximity to the Corporation Counsel. Finley's testimony, however, was that a private law firm does the County's labor work, not the Corporation Counsel.

We also note Finley's testimony that the County Board had considered the types of matters the County Corporation Counsel office would handle when it created the office, and that it was specifically discussed by the Board that the Corporation Counsel would not handle labor relations matters. Finley testified that it was for this reason that the Board passed a resolution allowing that office to handle the matter discussed in Finding of Fact 7, above. This evidence, while not dispositive in and of itself, lends support to our conclusion that Finley is not a confidential employee.

The record cannot support a conclusion that Finley meets our established standard of who is a confidential employee. At most, Finley has occasional access to confidential information; that access is insufficient to render him a confidential employee. 7/

In summary, we conclude that the record lacks evidence to support a finding that Thomas Finley, the Assistant Corporation Counsel, is either a managerial or confidential employee, and therefore he is a municipal employee.

Dated at Madison, Wisconsin this 23rd day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman,

Herman Torosian  
Herman Torosian, Commissioner

A. Henry Hempe  
A. Henry Hempe, Commissioner

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7/ Village of Ashwaubenon, Dec. No. 23746 (WERC, 6/86); City of Milwaukee (Police Department), Dec. No. 11971-D (WERC, 6/81); Crawford County, Dec. No. 16931 (WERC, 3/79).