

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :
LOCAL 2150, I.B.E.W., AFL-CIO : Case V
Involving Certain Employees of : No. 15610 ME-792
JEFFERSON WATER AND ELECTRIC : Decision No. 20511
DEPARTMENT :

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, by Mr. Scott D. Soldon, 788 North Jefferson Street, P. O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of the Petitioner.

Lindner, Honzik, Marsack, Hayman and Walsh, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 700 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Municipal Employer.

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

Local 2150, I.B.E.W., AFL-CIO, having filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify a bargaining unit previously certified by the Commission, consisting of all regular production, maintenance, clerical and operating personnel of the City of Jefferson Water and Electric Department 1/ by determining whether a newly created position, Office Manager, should be included in said unit; and hearing on said petition having been held on December 12, 1982, at Jefferson, Wisconsin, before Examiner Robert M. McCormick; and the parties having filed briefs by January 17, 1983; 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 Local 2150, I.B.E.W., AFL-CIO, hereinafter referred to as the Union, is a labor organization representing employes for the purpose of collective bargaining, and has its offices located at 6227 West Greenfield Avenue, West Allis, Wisconsin 53214.

2. That Jefferson Water and Electric Department, hereafter referred to as the Utility, is a municipal employer and has its offices located at 121 W. Racine Street, Jefferson, Wisconsin 53549.

3. That on July 24, 1972, following an election conducted by it, the Wisconsin Employment Relations Commission certified the Union as the exclusive representative for the purposes of collective bargaining in the following appropriate bargaining unit: 2/

All regular production, maintenance, clerical and operating personnel of the City of Jefferson Water and Electric Department, excluding all supervisory and managerial employes.

1/ While the municipal employer has been variously referred to, it was ascertained at the hearing that the correct name is Jefferson Water and Electric Department, and the caption has been amended to reflect this fact.

2/ City of Jefferson (Water and Electric Department), (11039).

4. That the instant proceeding was initiated on August 19, 1982, by a petition filed by the Union wherein it contends, contrary to the Utility, that the newly created position of "Office Manager", occupied by Sue Gillingham, is not managerial, supervisory or confidential in nature, and therefore should be included in the bargaining unit.

5. That the position of Office Manager is one newly created by the Utility after several years of consideration and following the recommendation of a study done by the Utility's accounting firm; that it created said position in order to modify and improve office systems and procedures; that prior to its creation, there were two office positions in the bargaining unit, bookkeeper and a billing clerk, whose occupants reported directly to the Utility Manager, Mr. Herbert Waraczynski.

6. That Sue Gillingham is the first and only incumbent in the Office Manager position starting her employment on June 1, 1982; that she was hired on a yearly individual contract, which provided for an annual salary; that she reports to Herb Waraczynski, who as Utility Manager, directs the entire Utility which includes, in addition to the office employes, six full-time and four part-time plant employes.

7. That the present and anticipated duties of the Office Manager consist of a combination of new duties and duties previously performed by the Utility Manager or the other two office employes; that although she has not had occasion to exercise such authority to date, the Office Manager has been informed by the Utility Manager that she has the authority to discipline, suspend or discharge the other two office employes, to discuss any written grievances with them pursuant to Step 1 of the contractual grievance procedure, to assign overtime and approve their vacation requests, and to interview and hire both temporary replacements and new employes for the office, should the Utility Commission approve a new position; that unlike the two office bargaining unit employes, Gillingham does not receive overtime or extra pay for hours worked beyond 5:00 p.m., and her biweekly wage is calculated on the basis of her yearly salary; that Gillingham was told sometime after her hire, that she had such detailed supervisory authority, though at the time of hire she was given a job description which alerted her that she was expected to direct and supervise personnel.

8. That prior to commencement of negotiations in the fall of 1982 for a 1983 contract, Gillingham was asked by the Utility Manager to submit any suggestions for changes in the current collective bargaining agreement; that she did submit two written suggestions, one of which was included in the Utility's initial list of proposals; that she was present at the two negotiating sessions where she sat in on the Utility's caucus while strategy was discussed; that Gillingham was not present at the Utility's caucus when wage proposal limits were discussed; that due to a prior commitment she was not present at the Executive Session of the Utility Commission at which the upcoming negotiations and the Utility's position was discussed; that Gillingham first saw the Utility's complete list of proposals the afternoon before the initial negotiating session with the Union; that in response to the Union's wage proposal for a wage adjustment for one of the office employes, Gillingham was directed to research wage rates paid by the City, and pursuant to said investigation, was to make a recommendation to the Utility Commission regarding the Union's proposed adjustment; that Gillingham has recently typed drafts of bargaining proposals for the Utility Manager for presentation to the Utility Commission for approval as potential bargaining proposals made by the Commission to the Union; and in addition, she typed correspondence of the Utility Manager to the Utility's labor relations attorney which contained information required in contemplation of the Utility making a grievance response to the Union; that such materials were not previously typed by any other employe in the Utility office, but rather were processed by personnel in the City Attorney's office.

9. That Gillingham also negotiates and approves deferred payment schedules for customers of the Utility who are in arrears; prepares financial data in a monthly report submitted to the Utility Commission, duties previously performed by the Utility Manager or the bookkeeper; Gillingham makes recommendations to the Commission with regard to the minor purchases of office equipment and is currently researching in preparation for a recommendation to the Commission for purchase of a new computer system.

10. That though Gillingham performs routine clerical duties and many bookkeeping duties as Office Manager, which were previously performed by bargaining

unit employes, the duties of Office Manager are of a supervisory and confidential nature in sufficient combination and degree so as to make the occupant of the position of Office Manager, a supervisory and confidential employee; and that Gillingham does not participate to a sufficient degree in the formulation and implementation of management policy and does not possess the authority to commit the Utility's resources so as to constitute her a managerial employee.

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

CONCLUSION OF LAW

That the occupant of the position of Office Manager is a supervisory and confidential employe and therefore not a "municipal employe" within the meaning of Sec. 111.70(1)(b) of the Municipal Employment Relations Act.

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

ORDER 3/

That the position of Office Manager be, and the same hereby is, excluded from the bargaining unit represented by Local 2150, I.B.E.W., AFL-CIO.

Given under our hands and seal at the City of
Madison, Wisconsin this 7th day of April, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Gary L. Covelli
Gary L. Covelli, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

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- 3/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

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(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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. 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.

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

This proceeding was initiated by the Union's petition to clarify an existing certified bargaining unit with respect to the status of Sue Gillingham, who occupies the recently created position of Office Manager at the Jefferson Water and Electric Department (the Utility). The City contends that the position is supervisory, confidential and managerial and therefore excluded from the bargaining unit. The Union disputes each of these contentions.

Of central importance in the Commission's conclusion in this case is the situation leading to the creation of the new position. The record indicates that for several years prior to the initial hire of Gillingham, the Utility was aware of the need to improve its office procedures and systems. In 1981 the Utility requested its accounting firm to study the situation and make recommendations for improvement. One key recommendation was the creation of an Office Manager position who was to implement a number of other proposed changes affecting billing, inventory control, financial reporting, and budgets. The Office Manager was also to assume a combination of other duties previously performed by either the Utility Manager or the other two clericals and unit employes.

The fact that this is a newly created position combined with the fact that Gillingham has only occupied the position since June 1, 1982, makes it difficult to ascertain exactly the nature of the regular duties of the position. The Union asserts that many of the Utility's duty assignments for the position are executory and that it has simply assigned bargaining unit work to an employe with a new title. However, the Commission is convinced that the creation of the new position arose out of a planned study by the Utility in order to significantly modify past office procedures. The Utility has already assigned Gillingham duties and authority which properly exclude her from the unit. The record evidence does not indicate that the Utility was spreading supervision over several positions merely to obtain the exclusion of the Office Manager from the bargaining unit.

Supervisory Status:

Section 111.70(1)(b) of MERA excludes supervisors from the definition of "municipal employe". Section 111.70(1)(o)(1) defines "supervisory" as follows:

As to other than municipal and county firefighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, or to adjust their grievance or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the WERC, in determining whether the criteria of Section 111.70(1)(o)1 are present in sufficient combination and degree to warrant a conclusion that the position in question is supervisory, considers the following factors:

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 persons exercising greater, similar or lesser authority over the same employes.
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his 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 he spends a substantial majority of his time supervising employes.
7. The amount of independent judgment and discretion exercised in the supervision of employes. 4/

When the position of Office Manager was advertised in area newspapers, it contained the following statement of duties: "Direct, supervise and be responsible for office personnel. Plan, maintain and review associated office systems for the Jefferson Water and Electric Utility."

Gillingham's testimony clearly established that up to the date of the hearing she had not in fact hired, fired, suspended, disciplined, laid off, recalled, adjusted grievances for, transferred or promoted any employe. While such a lack of demonstrated supervisory authority would often be determinative, other evidentiary facts surrounding the creation of the position must be noted. The office which Gillingham supervises has only two other employes (a bookkeeper and a clerk), each of whom has been employed there for many years. Gillingham testified that she has been advised by the Utility Manager that she has the power to hire, fire, suspend and discipline. She was also informed by the Utility Management that if there was a need to hire a temporary replacement or a new employe, she would interview the applicants and choose the new hire. Finally, though there has been no grievance initiated by an office employe since her hire, Gillingham has been told that she is the immediate supervisor referred to in Step 1 of the grievance procedure. Gillingham's testimony in that regard was corroborated by the Utility Manager, who testified that he no longer exercises any direct supervisory responsibility over the two office employes, having transferred that authority to Gillingham.

Noting the lack of Gillingham's exercise of supervisory authority, the Union has cited several Commission decisions for the proposition that the mere possession of potential authority is insufficient to make an employe a supervisor. 5/ These cases are distinguishable, however, in that in those factual situations, the employer had not yet hired the individuals alleged to be supervised. In the instant case, there is no doubt as to the existence or identity of the employes so supervised by Gillingham. The record indicates that Gillingham has not exercised her authority to date because no such transaction has arisen in her brief time on the job.

The Union also points out that there are only two other employes in the office, who have worked for years without any supervision other than that of the Utility Manager, and that they have in fact trained Gillingham in many of the office procedures. However, these factors are outweighed by the evidence that the Utility Manager and the Utility were dissatisfied with previously existing office operations and to remedy same, hired an Office Manager to effectuate certain changes pursuant to the recommendation of its accounting firm. Said move also allowed the Utility Manager to direct his attention to the Utility plant employes.

The Union also argues that Gillingham cannot be a supervisor because the Utility Commission has retained ultimate control over who is hired, as evidenced by the fact that Gillingham was interviewed not only by the Utility Manager but also by members of the Commission. However, the fact that the Utility Commission may possess the final authority in hiring does not negate the fact that Gillingham has been given the authority to effectively recommend the hire of employes and to supervise in other matters.

4/ Sheboygan Co. Handicapped Children's Education Board, (20217) 1/83; Waukesha County Technical Institute, (19751) 7/82; City of Milwaukee, (6960) 12/64.

5/ Oneida County, (12247) 11.73; Wood County, (13760) 6/75.

Confidential Status:

The Utility also contends that the Office Manager should be excluded from the bargaining unit as a confidential employe, citing her involvement in confidential labor relations as described in the Findings of Fact.

The Commission has consistently held that in order for an employe to be considered a confidential employe, such an employe must have access to, have knowledge of, or participate in confidential matters relating to labor relations. In order for the information to be confidential for such purpose it must be the type of information which: 1) deals 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) is not information that is available to the bargaining representative or its agents. 6/

The record evidence as set forth in the Finding of Fact 9, clearly supports the conclusion that Gillingham participates in the Utility's collective bargaining processes especially the preparation of bargaining proposals which are not meant for immediate examination by the Union. The Commission has therefore excluded the position of Office Manager from the bargaining unit on the alternate basis that the occupant is a confidential employe.

The Utility also seeks to exclude the position in question on grounds that the occupant functions as a managerial employe. The Commission is satisfied from the record evidence, recited in the Finding of Fact 9, that the occupant does not participate, to a sufficient degree, in the formation of management policy and does not substantially commit the Utility's resources. We have therefore declined to exclude the position on grounds that it is managerial.

Dated at Madison, Wisconsin this 7th day of April, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Gary L. Covelli*
Gary L. Covelli, Commissioner
Marshall L. Gratz
Marshall L. Gratz, Commissioner

6/ City of Wausau, (14807) 7/76.