

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO
and LOCAL 1287-CH, AFSCME, AFL-CIO

Involving Certain Employees of
CITY OF WAUSAU

Case 90
No. 56562
ME-950

Decision No. 20916-I

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO, and Local 1287-CH, AFSCME, AFL-CIO.

Mr. William P. Nagle, City Attorney, Wausau City Hall, 407 Grant Street, Wausau, Wisconsin 54403-4783, appearing on behalf of the City of Wausau.

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

On June 8, 1998, Wisconsin Council 40, AFSCME, AFL-CIO, and its affiliated Local 1287-CH, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission clarify an existing bargaining unit of City of Wausau employees represented by Local 1287-CH to include the position of City Clerk. Thereafter, the City of Wausau advised the Commission that it objected to the inclusion of the City Clerk position on the bases that it is confidential, managerial and supervisory.

No. 20916-I

Hearing was held on the petition before David E. Shaw, a member of the Commission's staff, on October 27, 1998 in Wausau, Wisconsin, and on November 6, 1998 in Madison, Wisconsin. At hearing, the parties stipulated to having the Commission take administrative notice of the record in CITY OF WAUSAU, DEC. NO. 20916-F (WERC, 5/98). A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs in the matter by February 9, 1999.

Having considered the evidence and arguments of the parties, and being fully advised in the premises, the Commission now makes and issues the following

FINDINGS OF FACT

1. The City of Wausau, hereinafter the City, is a municipal employer with its principal offices located at 407 Grant Street, Wausau, Wisconsin 54403-4783.

2. Wisconsin Council 40, AFSCME, AFL-CIO, Local 1287-CH, hereinafter the Union, is a labor organization which has its principal offices located at 7111 Wall Street, Schofield, Wisconsin 54476.

3. Since 1983, the Union has been the certified exclusive bargaining representative for a unit described in the 1995-97 collective bargaining agreement as:

all regular full-time and regular part-time employees of the City employed in the City Hall and related buildings as described pursuant to W.E.R.C. Decision No. 20916, Case XXVII, No. 30999, ME-2175, but excluding department heads, supervisory, managerial, confidential, seasonal/temporary employees and all other City employees currently represented.

4. Gary Klingbeil has held the position of City Clerk for the City since January of 1986 when he was appointed to the position by the City's then-Mayor. The position of City Clerk has been excluded from the bargaining unit since this unit was organized.

The City's organizational structure includes a Finance Department headed by the Finance Director and consisting of four divisions: Building Maintenance, Clerk, Treasurer and Accounting. The City Clerk is the administrative head of the Clerk Division. In addition to the Clerk, there are two other full-time employees in the Clerk Division, the Confidential Administrative Specialist, Mary (Stieber) Goede, who also functions as Deputy Clerk, and the Clerical Assistant II, Pam Brick. Another Confidential Administrative Specialist, Kelly Michaels-Saager, works primarily in Finance but helps out when needed in the Clerk's office. Goede's position is not in the bargaining unit and Brick's position is in the bargaining unit represented by the Union. Both Goede and Brick report to Klingbeil. Klingbeil reports to the

Finance Director, Mary Ann Groat, and is third in rank in the Department behind Groat and the Assistant Finance Director/Treasurer, Dennis Whalen, and would function as the head of Finance, if need be, in their absence. Groat, Whalen and Klingbeil attempt to coordinate their vacations so that one of them is always present.

The position description for Finance Director lists under “Essential Duties and Responsibilities”:

- * Supervises Clerk, Treasurer, Accounting and Building Maintenance operations. Hires professional, clerical and technical personnel. Evaluates employee performance, imposes discipline, authorizes salary increases, and approves time sheets.

The position description for Assistant Finance Director/Treasurer lists under “Essential Duties and Responsibilities”:

- * Directs and reviews subordinate financial/fiscal employees’ tasks. Participates in hiring subordinate employees. Prioritizes and assigns tasks. Prepares employee performance evaluations. Implements discipline and recommends discharge.

5. The City Clerk is an officer of the City pursuant to Sec. 62.09(1), Stats., and pursuant to Sec. 62.09(3)(b)1, Stats., and Ch. 2.08.010 of the City’s ordinances, the Clerk is appointed by the Mayor for an indefinite term. The statutory duties of the Clerk are set forth in Sec. 62.09(11), Stats. The existing position description for the City Clerk position lists the following as to the purpose and essential duties of the position:

Purpose of Position

The purpose of this position is to plan, coordinate, direct and perform City Clerk activities according to statutes and ordinances for the City of Wausau.

Essential Duties and Responsibilities

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- * Plan, direct, and supervise assigned staff including City Clerk office and print shop. Set work priorities and assign tasks.

- * Prepare and implement Department goals, policies and procedures.
- * Act as secretary to the Council. Attend City Council and various committee meetings. Record and prepare minutes for typing. Prepare council meeting agendas; supervise typing and distribution. Review materials for completeness and accuracy. Sign resolutions, ordinances, and bonds, etc. Preserve records of all council actions.
- * Advise Mayor regarding committee appointment expirations, coordinate letters of appointment and thank you notices to retiring committee members.
- * Act as Secretary to Board of Review and Zoning Board of Appeals. Schedule meetings, prepare agendas, record proceedings, and prepare follow-up on appeals for City Boards.
- * Prepare legal notices and distribute for publication.
- * Supervise official city records maintenance. Update and maintain Code of Ordinances. Maintain custody and care of City Corporate Seal.
- * Conduct and administer all elections within the City. Supervise ballot and election notice printing, train poll workers and provide registration materials. Supervise voting machine maintenance. Supervise and prepare voter registration and related computerized registration lists. Supervise tabulation for City of Wausau and act as City's Chief Election Official and serve on Board of Canvass. Prepare or supervise preparation of election documents. Purchase and distribute election supplies. Register electors and administer campaign financing program.
- * Supervise and issue all City regulated licenses, permits, and applications. Respond to oral and written inquiries regarding license requirements and restrictions.
- * Supervise City documents microfilming/microfiching.
- * Prepare and implement census documentation.
- * Receive claims and suits against the City. Receive and validate petitions.

- * Provide information to the public, news media representatives, civic groups and other interested groups and individuals regarding City Clerk activities and records.
- * Maintain knowledge of current ordinances, statutes, rules, and regulations regarding City Clerk activities.

The City Clerk position is compensated at Pay Grade 12 which in 1998 had a minimum of \$32,387.00 and a maximum of \$45,456.00 annual salary. The Confidential Administrative Specialist position held by Goede is compensated at Pay Grade 6 with a minimum annual salary of \$22,061.00 and a maximum of \$30,963.00 in 1998. The highest paid position in the bargaining unit is Accounting Assistant II, which received a wage of \$13.67/hour in 1997.

The minimum training and experience required to hold the position of City Clerk is an "Associate Degree in Business, Finance, Political Science or Public Administration, six to nine years of municipal administrative experience, or any combination of education and experience that provides equivalent knowledge, skills and abilities." The minimum training and experience required for the Confidential Administrative Specialist position is an "Associate degree in Accounting/office management, three to five years office experience, or any combination of education and experience that provides equivalent knowledge, skills, and abilities. Notary Public required."

Klingbeil's compensation is based in part on his administrative and supervisory responsibilities.

6. Klingbeil formally evaluates the performance of the employees in the Clerk's office, both as to annual evaluations and the evaluation of probationary employees for the purpose of deciding whether to retain that employee. Klingbeil made the decision that Brick had satisfactorily completed her six-month probation.

Klingbeil participated in the hiring of Goede and Brick, as well as previous employees in the Clerk's office. With regard to the hiring of Brick, Klingbeil and Groat first discussed what type of position was needed in the Clerk's office following the death of the person in the Printing Resource Specialist position in August of 1997. Klingbeil and Groat decided to eliminate the Printing Resource Specialist position and combine those functions with what had been a part-time clerical position in the office, creating a full-time Clerical Assistant II position, for a net loss of half of a position. The position's primary functions would be clerical and it would be located in the Clerk's Office, unlike the Printing Resource Specialist who had worked primarily in the print shop in the basement of the City's offices. The City's Human Resources Department received the applications for the Clerical Assistant II position and after the preliminary screening, approximately one hundred applications were then

submitted to Finance. Michaels-Saager further screened the applications, reducing the number to twenty-five, from which Groat and Klingbeil then selected those applicants who would be offered interviews. Groat and Klingbeil then interviewed those applicants and Klingbeil made the final decision as to the individual to be hired. (Groat had ranked another applicant ahead of Brick, but deferred to Klingbeil's choice.)

Klingbeil promoted an employee to Deputy Clerk in 1986 and has also hired a summer intern who works in the office in the summer and during breaks from school.

Klingbeil has the authority to discipline Goede and Brick, but has not had occasion to do so. Klingbeil had previously noted performance problems with the individual who had previously held the position of Deputy Clerk and discussed those problems with Groat. Approximately ten years ago, Klingbeil made the decision that a probationary employee was not passing probation and discussed his conclusion with the Finance Director and then terminated that employee.

Klingbeil fills out time sheets, and authorizes overtime for Goede and Brick and approves time off such as vacation, sick leave and personal holidays. Authorization for overtime and the leave request forms are submitted to Finance for record keeping purposes and to keep Groat informed, but Klingbeil's decisions in those regards are not subject to change by Groat.

The position description for Goede's position of Confidential Administrative Specialist states the position reports to the Finance Director and the City Clerk and does not list any specific supervisory duties or responsibilities.

Both Klingbeil and Goede assign and direct Brick's work.

Klingbeil has not adjusted any grievances, however, no grievances have been filed by employees in the Clerk's office while he has been Clerk.

7. As City Clerk, Klingbeil attends all meetings of the City Council, including closed sessions, and is responsible for seeing to it that minutes are taken of those meetings. Goede also attends those meetings and takes the actual minutes, which Klingbeil reviews and makes any needed changes before Goede types them in final form. Those minutes are kept in the Clerk's Office, and only Klingbeil, Goede and Michaels-Saager have access to those minutes.

With regard to public records requests, Klingbeil makes the decision as to whether the information will be released and in instances where he has a question in that regard he discusses the matter with the City Attorney.

The Clerk's office does not keep the personnel files of the City's employees, nor does it keep or have access to the files relating to labor relations matters involving labor litigation, collective bargaining or contract administration, which files are kept in the City's Human Resources Department. While Klingbeil has been present at closed sessions of the City Council when labor litigation matters or collective bargaining strategy have been discussed, he is not directly involved in those matters which are primarily the responsibility of the City Attorney's office, the Human Resources Department and the Human Resources Committee. Klingbeil does not attend meetings of the Human Resources Committee and the minutes of such meetings are the responsibility of the Human Resources Department.

The City's Mayor holds twice monthly staff meetings which are primarily attended by department heads and the City Planner and City Engineer. Klingbeil does not normally attend such meetings and only does so when requested.

8. As head of the Clerk Division, Klingbeil is responsible for and prepares that division's budget as well as the Elections budget. The budget is then submitted to Groat and reviewed by Groat and the Mayor, then submitted to a standing committee, the Finance and Economic Development Committee, for review, and then to the City Council for public hearing. Changes may be made in the budget during the review process. As Finance Director, Groat is responsible for the Finance Department's budget, which includes the budgets of its various divisions, and Klingbeil is not directly involved in the budget process after submitting the division budget to Groat. The Council makes the final approval on the budget. Klingbeil has made requests to the Finance Director to budget less in one account and more in another, some of which were approved and some denied after being reviewed by the Finance Director and the Mayor. Once the budget is passed, in order to make any changes in the division budget, Klingbeil would have to submit that request to Groat and it would go through the Finance and Economic Development Committee to the Council.

Klingbeil has the authority to expend all of the money budgeted for the Clerk Division and for the purposes it was allocated in the budget. Klingbeil chaired the committee that was in charge of purchasing the City's prior telephone system in 1989 or 1990 which cost in excess of \$124,000.00.

9. The City Clerk has supervisory duties and responsibilities in sufficient combination and degree to be a supervisor.

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

CONCLUSION OF LAW

The City Clerk (incumbent Klingbeil) is a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., and therefore is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT

The City Clerk position shall continue to be excluded from the bargaining unit represented by the Union.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of April, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

CITY OF WAUSAU

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

Union

The Union has petitioned for the inclusion of the position of City Clerk in the bargaining unit as a municipal employee. The Union notes that the City has asserted that the Clerk position is supervisory, confidential and managerial and has objected to the inclusion of that position on those bases. With regard to the alleged confidential status of the position, the Union asserts there are an inordinate number of confidential exclusions in the City in general, and specifically, the Clerk's Division alone would have three confidential employees. Based upon the Findings of Fact and the record in CITY OF WAUSAU, DEC. NO. 20916-F (WERC, 5/98), it can reasonably be concluded that the *de minimis* amount of confidential duties of the Clerk can be performed by the other confidential employees without undue disruption of the employer's operation. In that regard, the Union relies upon the testimony of the City's Finance Director, Mary Groat, at the hearing in the prior case involving these parties.

With regard to alleged supervisory status, the Union notes the testimony of Groat, the Human Resources Director, and the Confidential Administrative Specialists in the December, 1997 hearing that the latter were also supervisory employees and that the City Clerk was not. Groat testified:

Q. And when (sic) who you would anticipate would be responsible for supervision of that individual in the assignment of work?

A. I would - right. I would assume that it will be the administrative confidential specialist, and I guess why I'm assuming is based on history. Historically the City clerk does not spend time supervising the individuals within the division. That has always been left up to the deputy clerk's position. The City clerk has a lot of customer relations, spends a lot of time on customer relations, visiting people who come to the counter for liquor licenses, those types of things and is not interested or his goals are not necessarily pertaining to management of staff.

(12/97 Tr., p. 145)

The Human Resources Director, Peterson, testified that it was always the City's intention that the position of Confidential Administrative Specialist, held by Goede, would be supervisory. (12/97 Tr., pp. 166-167). Similarly, in its summary statement in the December, 1997

hearing, the City confirmed that the Confidential Administrative Specialist in the Clerk's Division, following the reorganization, assumed the duties of the former Deputy Clerk, including the authority to make final determinations regarding personnel matters. (12/97 Tr., pp. 127-129). In the hearing in this case, both Groat and Peterson testified that there have been no significant changes in the authority of either the City Clerk or the Confidential Administrative Specialist subsequent to the December, 1997 hearing before the Commission.

The Union notes the seven factors relied upon by the Commission in determining supervisory status, MANITOWOC COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 20847 (WERC, 7/83), and that the Commission does a case-by-case analysis of those factors to determine whether or not a "sufficient combination and degree" of supervisory authority exists. DOOR COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 20020 (WERC, 9/82). The Union asserts that in the instant case, the City Clerk has been, and continues to be, more or less a figurehead.

Regarding the position's alleged managerial status, the Union notes that the Commission has consistently held that a managerial employee either has a significant role in policy or has the authority to commit the employer's resources. KEWAUNEE COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 21344 (WERC, 9/84). Not every employee involved in preparing a budget for a department or a division is a managerial employee. KEWAUNEE COUNTY, *supra*. In KEWAUNEE COUNTY, the Commission defined the authority to commit the municipal employer's resources:

With respect to the second aspect of the standard, the effective authority to commit the municipal employer's resources, the commission has held that this power involves the authority to establish an original budget or to allocate funds for differing purposes from such a budget. The power must not be merely ministerial such as the authority to spend money from a certain account for a specified purpose.

In TOWN OF MADISON, DEC. NO. 17667-A (WERC, 6/80), the Commission explained that the exercise of judgment and discretion as to when budget expenditures should be made does not qualify as a managerial duty.

With regard to the fact that the Clerk position is an appointed position, the Union asserts that appointed positions are not automatically excluded from the rights secured to municipal employees in Sec. 111.70(2), Stats. ST. CROIX COUNTY, DEC. NO. 12423-A (WERC, 4/74).

Regarding the City's objection to the inclusion of the Clerk position on the basis of statute and City ordinance, the Union asserts that neither the statutes nor ordinances prohibit the accretion of the position. At most, it may mean that if the Clerk is not a supervisory,

managerial or confidential employee, possibly certain subjects of bargaining may be restricted, e.g., hiring, firing, promotion, exercise of seniority rights. The Union notes that there have been numerous decisions regarding the inclusion of such positions as Register in Probate, Deputy County Clerk, etc. in municipal employee bargaining units.

The Union concludes by arguing that the City's position is without merit and that the City has excluded an inordinate number of confidential employees from this bargaining unit. Whatever *de minimis* confidential duties the Clerk may have performed in the past can be performed by the Confidential Administrative Specialist without undue disruption. The Clerk position in this City is not a high-level position involved in the determination, development or implementation of policy and performs only ministerial duties involving the preparation of a budget. The Clerk does not present the budget before the Council or any of its committees and has no authority to change line item allocations of funds as budgeted. The actual duties and responsibilities of the Clerk position, both before and after the reorganization of the Finance Department, do not entail a sufficient degree and combination of supervisory and/or managerial authority. The former Deputy Clerk and her successors, i.e., the Confidential Administrative Specialists, exercise greater supervisory authority than the Clerk and the evidence indicates that the City fully intended that that "unusual arrangement" continue.

In its reply brief, the Union notes that the City objects to the inclusion of the Clerk because he is an "at will" employee appointed by the Mayor in accordance with City ordinance and State statutes, and thus that the Commission has no legal authority to accrete the position into the unit because the terms of the collective bargaining agreement regarding promotion, job posting, etc. conflict with the cited State statutes and City ordinance. Even if there is such a conflict, the Union contends the question remains as to whether or not the statutes can be harmonized. In its recent decision in ONEIDA COUNTY, DEC. NO. 24844-F (WERC, 1/99), the Commission discussed harmonization of statutes regarding employees who are appointed pursuant to State statutes by County officials. The Commission's rationale in that decision indicates that accretion is appropriate unless the disputed position is determined by the Commission to be a supervisory, managerial and/or confidential employee. If the Clerk does not otherwise qualify as a statutory exemption from the definition of a municipal employee only then does the issue of harmonization between conflicting statutes regarding certain subjects of bargaining need to be addressed. The Union asserts that harmonization is not required because City ordinances regarding appointment and removal do not have the standing of State statutes.

The Union asserts that the City Clerk's office is submerged in the City's Finance Department as one of four divisions under the direction and control of the Finance Director. The Finance Director's job description indicates that an essential duty of the position is:

“Supervises Clerk, Treasurer, accounting and building maintenance operation. Hires professional, clerical and technical personnel. Evaluates employee performance, imposes discipline, authorizes salary increases and approves time sheets.”

The City acknowledges that the Clerk is but third in the chain of command after the Finance Director and Assistant Finance Director/Treasurer in the Department. The City’s operation and practices, as they currently exist, warrant a finding that the Clerk is supervised by the Finance Director and that the Clerk’s supervisory/personnel authority, if any, was usurped first by the former Deputy City Clerk, and more recently by the two Confidential Administrative Specialists/Deputy Clerks.

The Union asserts that the City has a “fortuitous explanation for any occasion.” In the prior hearing, the City declared the Confidential Administrative Specialists to be both supervisory and confidential and elicited testimony from both Peterson and Groat in support of its position. At this hearing, the City, without reorganizing or changing its operations in any significant fashion, now claims that the Clerk throughout his tenure has been those employees’ supervisor.

The City also contends that the Clerk is a third confidential employee in the Clerk’s Division. It is hard to believe that there is justification for three out of four employees to be classified as supervisors and confidential employees.

In the previous case, the Commission found both Confidential Administrative Specialists/Deputy Clerks to be confidential employees based upon its good faith assumptions of the City’s representations. What confidential duties remain for the City Clerk, if any, could easily be assigned to the Confidential Administrative Specialists without undue disruption of the City’s operation. Based upon the record of the prior hearing and the record of this hearing, the Union finds it absolutely impossible to accept the City’s representations in good faith. The City’s false representations have enabled an inordinate number of exclusions which have perverted the rights of municipal employees and the Commission cannot continue to countenance this deprivation of those rights.

In CITY OF FOND DU LAC, DEC. NO. 8168-D (WERC, 7/98), the Commission accepted *carte blanche* the employer’s claim that although the chemist had never acted as a supervisor, the employer had nevertheless invested significant supervisory authority in the position. The testimony of the chemist that he had no such supervisory authority was not considered consequential. In the prior case involving these parties, it was the opposite version of the facts in FOND DU LAC, in that the City was depicting the City Clerk as a glorified receptionist who did not bother with management issues, while in this case, the Clerk has asserted that he has exercised supervisory authority all along, and the City now embellishes upon the history of the

Clerk's supervisory/managerial role. If the Commission were to follow the precedent of FOND DU LAC, it would disregard the employee's (i.e. the Clerk's) testimony and fully credit the testimony of employer witnesses. In this case, the City's witnesses have been impeached over the course of the two hearings, and the City should not be rewarded for such gamesmanship. While the Clerk appears to believe he is a supervisory/managerial employee, the prior sworn testimony of high-ranking City officials leads to a different conclusion.

Although it is asserted that the Clerk's pay is attributable to supervisory responsibilities, Groat and Peterson could not indicate how much in dollars and cents was so allocated. The City proffers conclusions unsupported by details or corroborating evidence.

The Union notes that the Commission traditionally looks beyond the job description and makes determinations based on the actual duties and responsibilities of a position. In SHAWANO COUNTY (MAPLE LANE HEALTH CARE CENTER), DEC. NO. 7197-A (WERC, 10/84), the Commission refused to accept the employer's representations regarding a laundry supervisor's authority to hire, fire, etc., or effectively recommend same, where the employee had been told she had such authority, but had not exercised it. The Union posits that municipal employers have caught on to a methodology to control the process by abusing the good faith assumptions of the Commission. Here, the City in essence argues that the Commission should blind itself to the City's earlier representations, and now relies upon the Clerk's job description to justify an exemption based on supervisory, managerial and confidential duties - the same job description that was in effect when Groat originally testified that the Clerk did not supervise employees.

The Union requests that the Commission order the accretion of the City Clerk position to this bargaining unit.

City

The City asserts that the City Clerk performs, by statute and by job description, duties which are supervisory, confidential and managerial. With regard to the position's confidential duties, the Clerk is required by law to prepare all closed session minutes of the Common Council, including any closed sessions pertaining to labor relations matters, and management's position in labor relations, and to maintain in its files and to disseminate upon direction or proper request, copies of those closed session minutes. The Clerk is required by Sec. 62.09(11), Stats., to attend, and regularly does attend, council meetings, including closed sessions dealing with negotiation strategy and other labor-related matters and has access to and knowledge of the required confidential matters. The Clerk's salary is reflective of these confidential duties.

It is clear from a review of the record and the exhibits that the City Clerk is properly excluded as a supervisor. The Clerk currently supervises two employees and has historically supervised employees. He is directly responsible for hiring and firing, disciplining, reprimanding, and complimenting these employees, overseeing their activities, their operations and projects, and for evaluating them. He approves their time off and overtime and has the sole and total ability to direct their activities. He also supervises a summer intern, numerous poll workers and on a temporary basis, public works employees at election time. The Clerk's salary is also reflective of his supervisory duties. Peterson testified in that latter regard, and Groat testified as to the Clerk's direct supervisory authority over the two employees. Further, pursuant to Sec. 62.09(11), Stats., the Clerk may appoint a deputy "who shall act under the Clerk's direction. . ." Thus, by law, the Clerk directs the activities of Goede, one of the two deputies, and is a supervisor by law.

The City also asserts that the Clerk is a managerial employee as established by the fact that the Clerk prepares, submits and participates in the preparation and adoption of the Clerk Division budget, and is also solely responsible for the budgetary expenditures during the year. The Clerk also participates in staff meetings and staff decisions as requested. The Clerk participates in the formulation, determination, and implementation of management policy, as evidenced by his participation in the Mayor's executive staff meetings, his involvement of the formulation, determination and implementation of the City Hall phone system, and his involvement in the expensive changeover from voting machines to computer ballots. The Clerk is the third in the chain of command in the Finance Department. Further evidence of managerial duties is his expenditure of budgeted money. For 1999, the Clerk had the ability to expend \$198,524 as the budget in the Clerk's Division.

The City also asserts that the Clerk's position is precluded by State law from being included in the bargaining unit. The Clerk is a creature of Secs. 62.09(1) and (11), Stats., and those provisions, together with City Ordinance 2.08, make the Clerk an employee serving at the will of the Mayor. No labor agreement can supersede State law and placing the Clerk in the bargaining unit would provide the Commission and its processes control over the Clerk's employment fate and would negate the Mayor's ability to discipline and ultimately to terminate the Clerk, e.g., the "just cause" provision in the Agreement would directly conflict with the Mayor's rights in this regard. The Agreement would even preclude day-to-day operational control over the position unless the control was in keeping with the Agreement.

In its reply brief, the City asserts that the record in the instant case is replete with sworn testimony that the City Clerk directly supervises two employees, one who is in the bargaining unit and one who is not. While the City's brief analyzed those responsibilities and duties, the Union's brief referenced only the record in the prior case involving these parties. That case held that the only reason Goede, the Confidential Administrative Specialist in the Clerk's office, was excluded was that she was confidential, and there was no finding by the

Commission that she was at all supervisory or that the Clerk was not supervisory. At hearing in this case, there was sworn testimony from the same individuals who testified in the earlier hearing that in fact the City Clerk is paid for his supervisory duties, that he supervises two employees, and that his position description requires him to supervise those employees. The Union's assertion that Groat testified in the earlier hearing that the Clerk was not a supervisor is not accurate. Her testimony was directed at the proposed abolition of the Printing Resource Specialist position and the replacing of it with a Clerical II position, which was done subsequent to that hearing. Her answer was "an assumption" based on "history" and, in any case, her answer was not clear. Groat, however, did not state that the Clerk was not a supervisor, nor did she state that he would not supervise the two positions. Both Groat and the Human Resources Director, Peterson, provided clear testimony in the hearing in this case regarding the Clerk's supervisory duties. The Union also relied upon excerpts from statements by Goede in the prior hearing that she provides "supervisory" duties. The fact that she provides supervisory duties with regard to the Clerical II at times does not diminish in any way the ability and duty of the Clerk to supervise both Goede and the Clerical Assistant II. The Clerk, in fact, does supervise those positions as the term is defined in statute and in Commission decisions.

The City distinguishes MANITOWOC, SUPRA, on the bases that the purchasing agent position at issue in that case did not receive any wage differential relative to his subordinates, and the Highway Commissioner had the authority to hire, layoff, discipline, etc. the employees in that department. Here, the Clerk is the head of the Division, and has the power to hire, layoff, discipline, suspend and discharge employees and receives far greater compensation than those two individuals he supervises. DOOR COUNTY, cited by the Union, is also distinguishable. That case involved positions whose authority to hire, fire, promote and direct employees was far less than that possessed by the Clerk, and as opposed to the employees in that case, the Clerk exercises "independent judgment and discretion" with regard to his supervisory responsibilities, and supervises personnel rather than just their activities.

The record shows that the Clerk is a managerial employee, in that he is involved in the City policies at a relatively high level of responsibility. He formulates and determines City policy, as well as implements it, as shown by his decisions regarding the voting machines and the City Hall phone system. His production of, management of, and expenditure of, his division budget in excess of \$200,000, proves he is managerial. He establishes the original budget for the Division and allocates funds from within that budget for various purposes, thus his power with regard to the budget is not merely ministerial.

The KEWAUNEE case cited by the Union involved two positions which were in no way analogous to the Clerk position and neither of those employees participated "to a significant degree in the formulation and implementation of policy". The Clerk prepares the budget, and makes the actual decisions as to what will be purchased, when it will be purchased, from

whom it will be purchased and how it will be purchased. He has discretion in the quality and quantity of expenditures. Similarly, compared to the positions at issue in TOWN OF MADISON, SUPRA, the Clerk establishes an original budget and determines all facets of the expenditures. Further, policy decisions in the Clerk's office are made by the City Clerk. The CITY OF NEW LONDON case cited by the Union also involved a position with far less supervisory and managerial authority than that possessed by the Clerk, and perhaps the most telling difference between the two cases is that the position in that case was compensated at an amount comparable to that of other employees. Finally, in CESA #11, DEC. NO. 22530-A (WERC, 12/98), the Commission found employees to be "managerial" when they helped draw up a department budget.

The City reasserts that by law the position of City Clerk must be excluded. The ST. CROIX COUNTY decision cited by the Union involved a Register in Probate whose statutory duties are far more limited than that of a City Clerk. An important distinction between that case and this is the fact that the positions in issue were covered by a collective bargaining agreement negotiated with the County. Thus, the argument that the County had modified the Court's appointive authority through collective bargaining was very strong. However, in that case, the Commission did state that "These arguments frame an issue which may someday have to be resolved, but it is neither the function nor the intention of the Commission to make such an interpretation in this representation case." Certainly, in that case the Commission did not feel confident given a "clean" fact situation, as is the case here, that its rationale would stand.

While the Union argued that the City has excluded "an inordinate number of confidential employees from the bargaining unit" it provided no evidence that is the case. The Clerk is required by statute to maintain all confidential matters relating to labor relations, and the fact that there is another person in his office who is also able to perform those duties does not diminish in any way the Clerk's obligation and duty in that regard. Information elicited at the earlier hearing cannot in any way diminish the Clerk's duties by job description and statute.

The City concludes that the City Clerk manages and supervises and maintains records for a large department in a large city, and as a statutory officer, should not and cannot be accreted to the bargaining unit.

DISCUSSION

Among the bases that the City has asserted for the City Clerk position remaining excluded from the bargaining unit are that the position is supervisory, confidential and managerial.

Considering first the position's supervisory status, the statutory definition of a supervisor in Sec. 111.70(1)(o)1, Stats., is as follows:

. . .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 employees, or to adjust their grievances or effectively 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.

The factors that we focus on in evaluating claims of supervisory status under Sec. 111.70(1)(o)1, Stats., are the following:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
3. The number of employees supervised and the number of persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skill or his/her supervision of employees;
5. Whether the supervisor is supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
7. The amount of independent judgment exercised in the supervision of employees. CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97).

Not all of the above factors need to reflect supervisory status for us to find an employee to be a supervisor. Our task is to determine whether the factors are present in sufficient combination and degree to warrant finding an employee to be a supervisor. ONEIDA COUNTY, DEC. NO. 24844-G (WERC, 6/98).

The Clerk is the administrative head of the Clerk Division in the City's Finance Department and reports to the Finance Director. The incumbent in the Clerk position, Gary Klingbeil, has held that position since being appointed by the then-Mayor in January of 1986. The position description for the City Clerk position, unlike the position descriptions for Finance Director and Assistant Finance Director which set forth specific supervisory functions, states only that the Clerk's duties include, "Plan, direct, and supervise assigned staff . . .Set work priorities and assign tasks." However, Klingbeil has participated in the hiring of both Goede and Brick and the earlier hiring of a Clerical Assistant I in the Clerk's office. Both Groat and Klingbeil testified that they jointly selected the applicants they would interview for

the Clerical Assistant II position in the Clerk's office, then jointly interviewed those applicants, and that Klingbeil made the final decision on who to hire (Brick). In addition, Klingbeil has hired a summer intern who works in the office when not at school. Klingbeil also does the formal evaluations of the other employees in the Clerk's office. Klingbeil made the decision that Brick satisfactorily completed probation, and approximately ten years ago he made the decision to terminate a probationary employee, although he first discussed the matter with the then-Finance Director.

Klingbeil approves the time off for Goede and Brick and has the independent authority to authorize overtime for those employees. Klingbeil has not adjusted any grievances, but there have not been any filed by employees in his office during his tenure as Clerk. There have not been any layoffs in the Clerk's office, but Klingbeil participated in the decision to eliminate the Printing Resource Specialist position and a part-time clerical position and to combine those functions into a new full-time clerical position in the office.

From both Goede's and Klingbeil's testimony, it appears that Goede's role regarding Brick is, for the most part, limited to assigning and directing her work and that any discipline involving Brick would be limited to reporting the problem to Klingbeil. The record also indicates that the Assistant Finance Director/Treasurer has had no role in the hiring or discipline of employees in the Clerk's office. We are therefore satisfied that Klingbeil functions as the immediate supervisor of both Goede and Brick.

Citing the testimony of several of the City's witnesses in the earlier hearing who have also testified in this case, the Union has asserted that their testimony is contradictory and thus not credible as a basis for now finding that the City Clerk is a supervisor. However, at the time of the prior hearing – December 16, 1997 - there had been no final decision made on the vacant Printing Resource Specialist position and the Clerk's office was utilizing temporary clerical help, as the part-time clerical position was also vacant. Thus, the testimony regarding Goede's (then Steiber) supervisory responsibilities was anticipatory at that point. Peterson's and Groat's testimony regarding Goede's supervisory authority was that they anticipated that she would perform the same "supervisory" functions as the prior Deputy Clerk. Although in a prior proceeding, the City argued that this limited testimony was sufficient to establish that Goede is a supervisor, the Commission made no findings and reached no conclusions in that regard.

The Union's frustration with the City's prior attempts to minimize the Clerk's supervisory role and present somewhat contrary tack is understandable. The Commission, however, does not control what a party in a unit clarification might allege or assert, and can only make factual determinations from the record and apply the law to these facts. In this case, Klingbeil testified directly and credibly with regard to his supervisory authority and responsibilities. Given Klingbeil's testimony and the concrete examples he cited of his having

exercised supervisory authority, we are satisfied that he has supervisory duties and responsibilities in sufficient combination and degree so as to be a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats. Thus, the City Clerk position will continue to be excluded from the bargaining unit.

Given our conclusion that the City Clerk is a supervisor, we need not determine whether the City Clerk is a confidential or managerial employee or respond to the City argument that the City Clerk cannot be included in a bargaining unit as a matter of law.

Dated at the City of Madison, Wisconsin this 22nd day of April, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

