

STATE OF WISCONSIN  
CIRCUIT COURT  
MARATHON COUNTY

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LOCAL 1287-CH, AFSCME,  
AFL-CIO,

Plaintiff,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION  
and CITY OF WAUSAU,

Defendants.

**DECISION**

Case No. 98CV408

[Decision No. 20916-G]

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

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**PROCEDURAL POSTURE**

This matter arose after the plaintiff, LOCAL 1287-CH, AFSCME, AFL-CIO (“hereinafter the Union”), filed a petition for unit clarification requesting five City of Wausau positions be included in a bargaining unit of certain Wausau City Hall and City of Wausau employees. The five positions include: (1) Confidential Office Assistant to the Mayor; (2) Confidential Office Assistant in the Fire Department; (3) Confidential Office Administrative Specialist in the Wausau Area Transit System; (4) Confidential Administrative Specialist in the Clerk’s Division; and (5) Confidential Administrative Specialist in the Finance Department. The plaintiff argued the positions did not encompass enough confidential duties to be excluded from the bargaining unit within the meaning of WIS. STAT. § 111.70(1)(i).

The matter was heard on December 16, 1997 before a hearing examiner for the Wisconsin Employment Relations Commission. On May, 18, 1998 the hearing examiner found the positions were confidential within the statute’s meaning and should continue to be excluded from the bargaining unit. On July 3, 1998 a panel of three

additional commissioners affirmed that decision and the plaintiff subsequently petitioned this court for review.

### STATEMENT OF FACTS

The employees represented by the Union consist of regular full-time and part-time employees of the City of Wausau employed within City Hall and related buildings. The represented group does not include departmental heads, supervisory, managerial, confidential and seasonal/temporary employees or other city employees represented by other unions.

The five positions the Union now seeks to include in the bargaining unit are classified by the city as “confidential”. Because persons employed in confidential positions are exposed to sensitive information they cannot be included in a union with persons classified as “municipal” under WIS. STAT. § 111.70(1)(i). As such, the five positions at issue are excluded from the Union. The Union argues the confidential duties involved in the five positions are “de minimis” and the positions are therefore improperly excluded from the Union.

### Standard of Review

The judicial review of findings of fact by an agency is governed by statute and limited in scope. Under WIS. STAT. § 227.57(6) judicial review of an agency’s decision is limited in that “the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed findings of fact.” The court may only set aside agency action or remand the case “if it finds the agency action depends on any finding of fact

that is not supported by substantial evidence in the record.” Section 227.57(6).

As long as a reasonable person could reach the same conclusion based on evidence in the entire record, the court must affirm the agency’s findings even against great weight or clear preponderance of the evidence. Hamilton v. DILHR, 94 Wis. 2d 611, 288 N.W.2d 857 (1980). Only the agency may make an independent determination of fact, however, the trial court’s review of a case ab initio could result in a different outcome. Briggs & Stratton Corp. v. DILHR, 43 Wis. 2d 398, 168 N.W.2d 817 (1969).

Therefore, the reviewing court must search the record to locate substantial evidence supporting the agency’s decision. VandeZande v. DILHR, 70 Wis. 2d 1086, 236 N.W.2d 255 (1975). The trial court must rely on the agency’s assessment of witness credibility and must uphold a commission’s findings if the court finds any credible evidence in the record supporting such findings. See Gornason v. DILHR, 94 Wis. 2d 537, 289 N.W.2d 270 (1980).

### OPINION

This court has searched the record and holds the agency’s findings are supported by substantial evidence. The five positions the Union seeks to have reclassified have sufficient access to and involvement in confidential matters to warrant their confidential classification. Although, “de minimis exposure to confidential duties is insufficient grounds for excluding an employe from a bargaining unit” (Boulder Junction Jt. School District, Dec. No. 24982 (WERC, 11/87), the court finds there is substantial evidence

in the record to show the five positions have more than de minimis exposure to confidential duties.

Further, the court finds substantial evidence in the record showing that re-assigning the confidential duties of these five employees would be a significant interference. “Unless the confidential work can be assigned to another employee without undue disruption of the employer’s organization” the employee may be classified as confidential. Price County, Dec. No. 11317-B (WERC, 9/25/89).

#### **A. Confidential Office Assistant to the Mayor**

This half-time position is filled by Jennifer Youtsos (hereinafter “Ms. Youtsos”) and reports directly to the mayor. Ms. Youtsos testified she spends approximately 25%, and often more, of her time performing confidential duties in the mayor’s office. Ms. Youtsos is the first person to view any confidential mail coming into the mayor’s office from any union, personnel committee meeting or negotiation. Ms. Youtsos reviews the correspondence and pulls any relevant information to attach to the correspondence to assist the mayor in subsequent meetings in the matter.

Additionally, once-a-month, Ms. Youtsos prepares minutes from council meetings, including closed session meetings, and is responsible for filing those minutes as well as filing confidential matters such as employee grievances and the mayor’s confidential notes on various issues. Further, Ms. Youtsos receives phone calls of a confidential nature from employees and department and union heads concerning complaints and is responsible for determining the

basis of those complaints and reporting them to the mayor. Ms. Youtsos also testified many of the files she prepares are locked and confidential and shared only with the mayor and others involved in the relevant labor negotiations.

While Ms. Youtsos' position is only half-time it is clear much of that time is spent handling confidential matters in the mayor's office and she has more than de minimis exposure to these matters. There is substantial evidence in the record showing she is frequently a party to confidential correspondence, notes and decisions regarding labor matters, including the mayor's personal notes. Not only is she responsible for filing this information but she is responsible for typing closed session minutes and screening confidential correspondence.

Ms. Youtsos testified at times she spends more than 25% of her time on confidential matters. Although a percentage of Ms. Youtsos' time is not spent on confidential matters there is no evidence in the record showing how this percentage could be transferred to another confidential employee without disruption or inefficiency resulting. In fact, Jacquelin Peterson (hereinafter "Ms. Peterson"), Human Resources Director for the City of Wausau, testified she did not see how there could be any shifting of the confidential duties away from this position.

The court finds the position of Confidential Office Assistant to the Mayor should remain classified as confidential.

## **B. Confidential Office Assistant in the Fire Department**

This position is currently filled by Tammy Friedrich (hereinafter “Ms. Friedrich”) who works out of the Wausau Central Fire Station located on the corner of Thomas Street and Grand Avenue. Ms. Friedrich is the only clerical employee for the fire department and reports directly to the Fire Chief. Ms. Friedrich is responsible for handling all incoming phone calls to the fire department, including confidential phone calls from employees.

Ms. Friedrich also handles the charting of all employee absences such as sick-time, family leave etc. Further, when the fire chief receives an employee grievance he instructs Ms. Friedrich to gather information pertaining to the grievance, especially as related to absences. Additionally, Ms. Friedrich is responsible for follow-up filing and research on those labor issues.

The record shows this position involves a substantial amount of confidential duties. While the charting of matters such as leave time is not alone a basis for confidential status (City of New Berlin, Dec. No. 13173-B (WERC, 8/25/83), Ms. Friedrich’s duties relating to these matters goes beyond mere charting. Initially Ms. Friedrich logs each fire department employees’ absences, however, when a grievance occurs the fire chief testified Ms. Friedrich is instructed to prepare research on that particular employee’s absences. According to the fire chief and Ms. Friedrich, the two then discuss Ms. Friedrich’s findings. Ms. Friedrich’s knowledge of grievances pertaining to particular employees shows access to labor

matters beyond simple charting of absences.

Although individual employees have access to their own absence information, it is the fact Ms. Friedrich researches the absences looking for specific patterns related to grievances that elevates the matter to a confidential level. Ms. Friedrich's duties in this respect involve her making direct decisions about the employee's absence records. Further, the fire chief testified after sharing this information with the grievant, Ms. Friedrich is responsible for subsequent requests from the personnel department on the grievant and filing of any records in the matter.

Finally, Ms. Friedrich is the only clerical employee in the fire department. She is responsible for absence requests of the whole fire department and has frequent, if not daily, direct contact with the fire chief. Ms. Friedrich is clearly the only person in the fire department available to perform her duties, whatever percentage is confidential.

Additionally, the fire department is located over a mile from Wausau City Hall. Even if the actual amount of confidential work was not significant, which the court believes it is, "unless the confidential work can be assigned to another employee without undue disruption of the employer's organization" the employee may be classified as confidential. Price County, Dec. No. 11317-B (WERC, 9/25/89).

The record clearly shows to move these duties or this individual out of the fire department would be extremely disruptive. The duties directly relate to the maintenance of

employees and issues within the fire department and are performed by a single individual at that location. Granted, three fire stations are located in the City of Wausau, however, to have the activities of fire department employees directed out of one of the three stations is obviously less disruptive than having the fire department's confidential issues directed out of a disconnected location, such as City Hall.

Additionally, Ms. Peterson testified the human resources office relies on this position as related to confidential issues involving labor relations. Ms. Peterson testified the location of this position being at the central fire station is "key" to identifying relevant labor matters.

There is substantial evidence in the record supporting the Confidential Office Assistant in the Fire Department retaining its confidential status.

**C. Confidential Administrative Specialist**  
**in the Wausau Area Transit System**

This position is filled by Shirley Freiberg (hereinafter "Ms. Freiberg"), who works out of the Wausau Area Transit System offices (hereinafter "WATS") located at 420 Plumer Street. Ms. Freiberg is the only clerical worker within the WATS offices.

As part of Ms. Freiberg's duties she is occasionally present at closed Transit Committee meetings where preliminary budget figures and monthly financial statements are discussed. In addition to budget matters, issues such as management strategy with regard to labor relations, grievances and discipline are also discussed at



those closed meetings. Ms. Freiberg is also responsible for preparing the minutes from closed session meetings.

As the only clerical worker for the four management employees at WATS, Ms. Freiberg also occasionally prepares the four management employees' clerical work. Ms. Freiberg is frequently the only person in the WATS office and is responsible for handling any incoming issues, including grievance calls from employees and opening any confidential mail coming into the WATS office. Ms. Freiberg also files grievances and management responses within the personnel files located in her office.

Finally, Ms. Freiberg is the only WATS employee not a licensed bus driver and is responsible for scheduling and monitoring random drug testing for WATS employees. As even the four management employees are part of the testing pool, Ms. Freiberg is the only employee privy to information about which employees are being tested and at what times.

Sufficient evidence exists in the record to support this position remaining confidential. As with the Office Assistant in the Fire Department, Ms. Freiberg is the only clerical employee in the WATS office. She alone is the gatekeeper for all confidential employee grievance phone calls and mail and often the only person in the office when this information comes in. Additionally, she is present at closed meetings where labor matters are discussed and is responsible for preparing those minutes.

Again, as with the fire department, the WATS offices are located outside Wausau City Hall. The record shows Ms. Freiberg

performs duties unique to WATS that would be made far more difficult by being reassigned to another confidential employee located outside the WATS offices. While Ms. Freiberg may spend only a portion of her time on confidential matters, this again is a situation where even if the actual amount of confidential work is not significant, “unless the confidential work can be assigned to another employee without undue disruption of the employer’s organization” the employee may be classified as confidential. Price County, Dec. No. 11317-B (WERC, 9/25/89).

In this case, Greg Seubert (hereinafter “Mr. Seubert”), WATS Transit Director, testified that to reassign Ms. Freiberg’s tasks would be costly and disruptive. Mr. Seubert testified because of the unique scheduling problems of WATS employees, which Ms. Freiberg is familiar with, especially related to drug testing, to reassign this duty to another individual would increase costs and possibly compromise the tests. Clearly, to reassign Ms. Freiberg’s confidential duties to another employee would be disruptive. Ms. Peterson, the human resources director also supported this position.

There is credible and substantial evidence in the record to support classifying the Confidential Administrative Specialist in the Wausau Area Transit System as confidential.

**D. Confidential Administrative Specialist**  
**in the Clerk’s Division of the Finance Department**

Mary Ann Stieber (hereinafter “Ms. Stieber”) currently fills this position. Ms. Stieber attends almost every Wausau Common

Council meeting, both open and closed, takes minutes of the meetings and prepares and distributes the minutes to any relevant party. Ms. Stieber testified at times preparation and distribution of the minutes can take up a major portion of her time. Ms. Stieber also works out of the office where all closed session minutes of any common council committee are housed.

Ms. Stieber is responsible for managing and assigning work to any part-time clerical or seasonal workers in the office and for developing the job description and duties for potential new clerical workers. Further, Ms. Stieber handles a majority of the mail coming through City Hall as well as other types of correspondence that at times includes confidential alderperson mailings. Finally, when the Wausau City Clerk is absent Ms. Stieber acts as the city clerk and is able to perform any function of the regular city clerk, including attending council meetings and signing contracts.

The record shows Ms. Stieber's presence and involvement with all closed council meetings as well as her directing other employees and developing new positions is clearly more than de minimis involvement with confidential issues. Further, her ability to fill in as the city clerk and engage in various confidential duties would be severely hampered were her position to be reclassified as "municipal". Finally, there is no evidence in the record showing how the confidential duties involved with this position could be transferred to another employee without causing disruption.

The record clearly contains substantial evidence to support the Confidential Administrative Specialist in the Clerk's Division of Finance Department remaining confidential.

**E. Confidential Administrative Specialist**  
**in the Finance Department**

This position is currently filled by Kelly Michaels-Saager (hereinafter "Michaels-Saager"). As part of her job duties Ms. Michaels-Saager is one of the first people to have contact with written budget materials relating to labor relations. Ms. Michaels-Saager then prepares estimated budgetary figures in the form of spread sheets. These spread sheets contain, among other information, figures relating to reserve dollars for personnel costs for represented employees.

This position also acts as deputy city clerk and Ms. Michaels-Saager has participated in meetings involving planned employee hiring as well as supervising employees on occasion. Further, she occasionally attends closed session council meetings and takes and prepares minutes from those meetings. Ms. Michaels-Saager also has access to employee disciplinary memos and closed session minutes for meetings she does not attend.

The record shows this position has substantial access to confidential information. Ms. Michaels-Saager testified at times her preparation of confidential budget figures can take up as much as 25% of her time, especially from July until November. Ms. Michaels-Saager also testified the budget information she has access to and prepares is confidential and not accessible by any

labor union. Ms. Michaels-Saager's access to closed session meetings and their minutes, even if only occasionally, also adds to the overall access she has to confidential information. This is also true when performing the duties of deputy clerk.

Ms. Peterson also testified she has often obtained confidential information on labor budget matters from Ms. Michaels-Saager and has found her to be the only person knowledgeable on certain confidential matters. For example, closed session meetings, eliminating certain positions and general labor relations. Ms. Peterson testified she could not identify another person besides Ms. Michaels-Saager who had the technical knowledge of the finance operation to whom she could ask for help. Additionally, Ms. Peterson testified without Ms. Michaels-Saager being allowed access to confidential budget information the budget process would be severely hampered and would not be timely.

The record shows Ms. Michaels-Saager performs more than a de minimis amount of confidential work and also shows her duties could not easily be transferred to another confidential employee. There is substantial evidence in the record to support the Confidential Administrative Specialist in the Finance Department retaining confidential status.

### CONCLUSION

Based on the foregoing, there is substantial evidence in the record to support the agency's findings as well as inferences that could be drawn from such evidence. This court affirms the decision of the agency.

Dated this 13th day of April, 1999.

BY THE COURT

Dorothy Bain /s/  
HON. DOROTHY L. BAIN

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