

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
**VILLAGE OF ASHWAUBENON CLERICAL AND TELECOMMUNICATOR
EMPLOYEES' UNION, LOCAL 1889, AFSCME, AFL-CIO**

Involving Certain Employees of
VILLAGE OF ASHWAUBENON

Case No. 4
No. 49257
ME(u/c)-644

Decision No. 23746-C

Appearances:

von Briesen & Roper, S.C. by **Attorney James R. Korom**, 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin, appearing on behalf of Village of Ashwaubenon.

Mr. Michael J. Wilson, Representative, Wisconsin Council 40, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on behalf of Village of Ashwaubenon Clerical and Telecommunicator Employees' Union, Local 1889, AFSCME, AFL-CIO.

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

Village of Ashwaubenon Clerical and Telecommunicator Employees' Union, Local 1889, AFSCME, AFL-CIO filed a petition on September 4, 2001, with the Wisconsin Employment Relations Commission seeking to clarify an existing clerical bargaining unit of Village of Ashwaubenon employees represented by Local 1889 by including a Confidential Administrative Secretary and the Accountant. The Village opposes inclusion because it asserts the Confidential Administrative Secretary is a confidential employee and the Accountant is a professional employee.

Dec. No. 23746-C

Hearing in the matter was held in Ashwaubenon, Wisconsin, on February 6, 2002, before Examiner Lauri A. Millot, a member of the Commission's staff.

The Commission received written briefs by March 25, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Village of Ashwaubenon Clerical and Telecommunicator Employees' Union, Local 1889, AFSCME, AFL-CIO, hereinafter Union, is a labor organization representing certain clerical employees of the Village of Ashwaubenon for the purposes of collective bargaining with its offices located at 1566 Lynwood Lane, Green Bay, Wisconsin.

2. Village of Ashwaubenon, hereinafter Village, is a municipal employer with its offices located at 2155 Holmgren Way, Ashwaubenon, Wisconsin. The Village provides governmental services to the public of the Village of Ashwaubenon. The Village has three bargaining units: (1) the clerical unit at issue in this case which consists of 13 clerical employees; (2) a department of public works unit consisting of 20 employees; and (3) a public safety unit consisting of 35 employees. The Village employs an additional 332 full-time, part-time, summer and seasonal employees who are not represented for the purpose of collective bargaining.

3. In VILLAGE OF ASHWAUBENON DEC. NO. 23746 (WERC, 6/86), the Wisconsin Employment Relations Commission concluded that the Village Executive Secretary (the predecessor of the Confidential Administrative Secretary at issue here) was not a confidential employee.

The Commission based this conclusion on Finding of Fact 8, which read as follows:

That Tony Frigo has been Village President and Administrator since 1981; that as Administrator, Frigo manages the Village's affairs, including certain labor relations matters primarily involving Village administrators; that Frigo is also Personnel Director for the Village; that Rae Yakel has occupied the position of Executive Secretary since approximately 1979; that as Executive Secretary, Yakel performs secretarial duties as assigned by Frigo, including receptionist,

typing, filing, responding to correspondence, scheduling, and processing survey and plat maps; that Yakel also serves as recording secretary for the Finance and Personnel Committee, the Fire and Police Commission, and the Planning Board; that in that capacity, she has attended approximately three or four closed executive sessions of the Finance and Personnel Committee in the past four or five years (twice in the last year) wherein labor relations matters were discussed with respect to non-bargaining unit employees; that wage increases for employees in the Public Safety and Public Works Departments are discussed at the Village Board level and the Village Clerk usually takes minutes of closed sessions of the Village Board where these matters are discussed; that Yakel has access to personnel files that prior to the Village hiring an attorney, Frigo prepared contract proposals on behalf of the Village for negotiations involving the two bargaining units of Village employees and wage proposals for Village administrators; that Yakel would type said proposals; that since the Village attorney was hired, Frigo no longer prepares contract proposals for negotiations involving the two bargaining units, but continues to prepare Village proposals for wage increases for administrators; that Village administrators are not in any bargaining unit; that since the Village attorney was hired, Yakel types Village proposals for salary increases for administrators but does not type Village proposals for contracts involving the two bargaining units; that Frigo handles all grievances involving dispatchers if not settled by supervisors in the Public Safety Department; that Frigo is the Village's first step response for all grievances involving Village clerical employees; that Frigo has only received one or two grievances and one disciplinary problem – the latter involving an administrator - in the past year; that Yakel does not recall ever typing any internal memoranda about grievances that did not go to the employee or union involved; that Yakel would type any written proposed response to said grievances prepared by Frigo, but has never done so; that she had typed written reprimands which employees have then received; and that Yakel does not have access to, knowledge of, or participate in confidential matters relating to labor relations to a sufficient degree to be deemed a confidential employee.

In the Memorandum portion of the decision, the Commission stated:

As the Village correctly acknowledges, because the Village has few grievances “the handling of confidential labor relations matters has not been as great as a part of the Executive Secretary’s duties as it might otherwise be.” The Village argues, however, that to deny the Village President a confidential secretary in the circumstances would be to punish the Village for successful management. Notwithstanding that contention, we conclude, for the following reasons that the record does not warrant excluding the Executive Secretary position from the bargaining unit involved herein.

Much of the testimony from Village President Frigo centered on Yakel's access to, knowledge of, and participation in labor relations matters affecting Village administrators. For, as Personnel Director and Administrator, Frigo is chiefly responsible for preparing Village proposals and counter proposals for salary increases for administrators, as well as, handling contract administration concerns and grievances involving administrators. Yakel does any related typing required by Frigo. In addition, Frigo advises the Village Board on matters Frigo considers confidential including grievance or disciplinary problems involving administrators. However, administrators are not in any bargaining unit. Thus, Yakel's responsibilities and access to information relating to administrators are not of the type that deal with "the employer's strategy or position in collective bargaining . . . between bargaining representative and the employer."

A close review of the record and testimony reveals that the Village has had relatively few grievances or disciplinary problems over the past few years. In fact, Yakel could not recall ever having typed any written proposed internal memoranda on grievances prepared by Frigo and any written responses to grievances typed by Yakel were immediately given to the employee or union involved. Frigo estimates he received only one or two grievances from employees and one disciplinary problem (involving an administrator) in the past year. We conclude that Yakel's typing the Village's responses to grievances is not confidential work since Yakel has access to no more than does the grievant or representative in that regard. 4/

With respect to collective bargaining, as previously noted, Yde's Legal Secretary, not Yakel, now types all proposals, counter proposals, documents relating to Village strategy and position in bargaining and any other advisory correspondence from Yde to the Village Board or to the Village President relative to negotiations with the two bargaining units. Yde's secretary, not Yakel, is privy to confidential discussions between Yde and other Village management concerning collective bargaining matters. The record indicates Yakel may on occasion see confidential correspondence sent to Village President Frigo in this regard. However, we find this access to confidential materials unsubstantial and avoidable by the Village without undue interference with its organization and operation. We also find Yakel's responsibilities as recording secretary are de minimus. For, the record shows that Yakel has attended only three or four closed executive sessions of the Finance and Personnel Committee in the past four or five years --twice in the last year-- wherein labor relations matters involving administrators was discussed. Furthermore, labor relations matters involving employees in the Public Safety and Public Works Departments are discussed at the Village Board level and the minutes of those meetings are usually typed by the Village Clerk.

Our review of the record as a whole convinces us that Yakel performed more arguably confidential labor relations duties before the Village attorney and his Legal Secretary were hired. Moreover, it appears that Nooyen (who we conclude is confidential for reasons set forth below) now handles the bulk of the Village's clerical confidential labor relations tasks, primarily because Yde handles all contract negotiations and related matters for the Village. We find the small amount of confidential labor relations work done by Yakel is an insufficient basis for excluding her from a bargaining unit, especially where, as here, there is another confidential employee available to do the majority of the work. 5/ We therefore conclude that Yakel does not have access to, knowledge of, or participate in confidential matters, to a sufficient degree to be deemed a confidential employee.

As to Legal Secretary Nooyen, as previously mentioned, one of her primary responsibilities is to type all the collective bargaining proposals of the Village and to prepare various confidential reports and costing estimates for negotiations with two other bargaining units. She has access to confidential minutes from the Village Board's executive session relative to collective bargaining strategy, and she is privy to confidential discussions by Village administrators on collective bargaining matters. Moreover, she estimated that she spends approximately 25 to 35 percent of her time performing such responsibilities. The foregoing persuades us that she handles confidential collective bargaining information to such an extent that she is a confidential employee. Accordingly, we exclude her position from the bargaining unit involved herein. (Footnotes omitted.)

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4. As reflected in Finding of Fact 3, at the time VILLAGE OF ASHWAUBENON, DEC. No. 23746 (WERC, 6/86) was issued, the Village employed a Village Administrator/President and a Village Attorney. There was one bargaining unit clerical employee, the Executive Secretary, assigned to work with the Village Administrator/President and a confidential Legal Secretary employee assigned to work with the Village Attorney.

The job description for the Executive Secretary read as follows:

Title: Executive Secretary

Functions: Performs secretarial and responsible administrative work as the principal office assistant of the Village President-Administrator.

Duties: Serves as private secretary to the Village President - typing correspondence, answering phone.

Composes and types letters independently.

Composes, types and distributes agendas and meeting schedules.

Responsible for sorting and distributing of incoming mail.

Responsible for preparation of monthly travel report.

Process certified survey maps and plat maps.

Serves as recording secretary for Finance and Personnel Committee.

Serves as recording secretary for Police and Fire Commission.

Serves as recording secretary for Planning Board.

Responsible for cable TV input of public information.

Assists with Clerk's and Assessor's work as required.

Maintain filing system.

Performs other duties as may be directed.

Qualifications: Five years secretarial experience; knowledge of governmental policies and procedures, ability to take and transcribe dictation; ability to initiate and complete work assignments independently; ability to serve the public in an efficient and courteous manner; ability to keep information confidential.

5. Sometime after 1986, the Village hired a labor consultant to perform its labor relations work. In 1996, the labor consultant died and the Director of Administrative Services, Steve Kubacki, assumed responsibility for labor relations and collective bargaining. An Administrative Secretary who was not in the bargaining unit was assigned to work for the Director of Administrative Services while the bargaining unit Executive Secretary position referenced in Findings of Fact 3 and 4 continued to work for the full-time Village President.

The job description for the Executive Secretary as revised on November 21, 1996, read as follows:

I. Identification: Sheryl Schaut

Position Title: Executive Secretary

Reports To: Village President, Village Director of Administrative Services, Village Board Village Clerk

II. Job Summary:

This position is responsible for the performance of difficult and often sophisticated secretarial work for the Village President, Village Director of Administrative Services, Village Board and Village Clerk. Work in the area of Village Administration, economic development and public relations is a primary and integral part of the responsibilities of this position. Secondary backup work in the area of labor negotiations, insurance and classified personnel areas is also required.

III. Principal Duties & Responsibilities:

- A. Shall be responsible for the maintenance of all records, documents and communications generated to and from the Village President, Village Board and Village Director of Administrative Services.
- B. Serves as primary backup in the following areas for the Village Confidential Administrative Secretary:
 - 1. Processes worker's compensation, liability claims and automobile liability claims as appropriate with the Village of Ashwaubenon insurance carriers.
 - 2. Administers and maintains employee applications for health insurance, dental insurance, life insurance, income continuation and related Wisconsin Retirement data as appropriate.
 - 3. Maintains employee personnel records so as to ensure integrity of those particular documents.
 - 4. Performs confidential secretarial and related duties necessary in the office of the Village of the [sic] Director of Administrative Services, Village President, and Village Clerk.
 - 5. Maintains, records and types up confidential labor negotiations and other minutes.

- C. Prepares Village Board and committee agendas at the direction of the Village President, Village Board, Village Director of Administrative Services and Village Clerk.
- D. Assists the Village President and Village Director of Administrative Services in the preparation of documents as appropriate, for the formulation of the annual Village budget, working in conjunction with the Finance Director.
- E. Prepares documents including, but not limited to, the following: Requests for Proposals, memorandums, charts, forms and documents necessary for the orderly conveyance of information for the Village elected officials and citizens.
- F. Coordinates activities and communications between the Village Director of Administrative Services, Department Heads, elected officials and the general public.
- G. Attends the records proceedings of meetings as required.
- H. Collects and compiles information on miscellaneous projects as so requested by the Village President, Village Board, Village Director of Administrative Services and Village Clerk.
- I. Handles requests, callers and visitors for other governmental agencies in neighboring communities and attempts to dispose of issues and matters, or refers callers to the proper department and, if necessary, arrange for conferences and/or appointments with the Village President, Village Board, Village Director of Administrative Services, and Village Clerk.
- J. Takes and transcribes dictated materials as appropriate.
- K. Files Village/office correspondence and records, determining proper file designation to be used, and sees to the proper distribution and disposition of notices, memorandum directives, and related materials, as appropriate, as so directed by the Village President, Village Board, Village Director of Administrative Services and Village Clerk.
- L. Operates various office machines, not limited to fax machines, dictating equipment, and PC word processing equipment as a requirement of the position.
- M. Processes certified survey maps and plat maps.

N. Performs other duties as required by the Village President, Village Board, Village Director of Administrative Services, and Village Clerk.

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6. The Village reorganized again during 2001 resulting in the Village President and Village Clerk positions being reduced from full-time to a part-time positions. The bargaining unit Executive Secretary position was eliminated and a second non-bargaining unit Confidential Administrative Secretary position reporting to the Village President, Village Clerk and Village Director of Administrative Service was created.

In addition to the newly created Confidential Administrative Secretary position, the Village has two other confidential employees excluded from the bargaining unit: the Confidential Administrative Secretary assigned to the Director of Administrative Services (Bobbi Skalecki) and a Confidential Secretary in the Public Safety Department (Mindy Heise).

7. The job description for the new Confidential Administrative Secretary position reads as follows:

I. Identification:

Title: Confidential Administrative Secretary

Reports To: Village President, Village Clerk and Village Director
Administrative Services

II. Job Summary:

This position is responsible for the performance of difficult and confidential secretarial work for the Village Director of Administrative Services, Village President, and Village Clerk. Confidential work in the area of labor negotiations, employee compensation, health insurance, dental insurance and other classified personnel information, is a primary and intrical [sic] part of the responsibilities of the position.

III. Principal Duties and Responsibilities:

A. Shall be responsible for the maintenance of all records, documents, and communications generated to and from the Village Director of Administrative Services.

B. Processes worker's compensation, liability and automobile liability claims, as appropriate with Village of Ashwaubenon insurance carriers.

- C. Administers and maintains employee applications for health insurance, dental insurance, life insurance, income continuation and related Wisconsin Retirement data.
- D. Maintains employee personnel records so to insure integrity of those particular documents.
- E. Prepares Village Board and committee agendas at the direction of the Village Director of Administrative Services, Village President and Village Clerk.
- F. Assists the Village Director of Administrative Services in the preparation of documents as appropriate for the formulation of the annual Village budget, working in conjunction with the Finance Director and Village President.
- G. Prepares documents as such [sic], but not limited to, as follows: prepares Requests for Proposals, memorandums, charts, forms and documents necessary for the orderly conveyance of information for the Village elected officials and citizens.
- H. Performs confidential secretarial and related duties necessary in the office of the Village Director of Administrative Services, Village President and Village Clerk.
- I. Maintains, records, and types confidential labor negotiations, proposals, grievance processing documents, costing data, and other minutes, which will contain confidential labor relations strategies prior to their communication to Union representatives.
- J. Coordinates activities and communications between the Village Director of Administrative Services, Department Heads, Elected Officials, and the general public.
- K. Attends and records proceedings of meetings as required.
- L. Collects and compiles information on miscellaneous projects as so requested by the Village Director of Administrative Services, Village President and Village Clerk.
- M. Handles requests, callers and visitors for other governmental agencies in neighboring communities and attempts to dispose of issues and matters or refers callers to the proper department, and if necessary, arranges for conferences and/or appointments with the Village Director of Administrative Services, Village President and Village Clerk.

- N. Takes and transcribes dictated materials as appropriate.
- O. Files Village/office correspondence and records, determining proper file designation to be used, and sees to the proper distribution and disposition of notices, memorandum directives, and related materials, as appropriate, as so directed by the Village Director of Administrative Services.
- P. Operates various office machines, not limited to fax machines, dictating equipment, PC word-processing equipment, as a requirement of the position.
- Q. Performs other duties as required by the Village Director of Administrative Services.
- R. Maintains all safety/loss control records (Accidents, Workers Compensation claims, Claims of Damage, etc.)
- S. Typically assigned to the work station in the Village Clerk's office 2 days per week and the Village President's office for 3 days per week.

. . .

8. The incumbent in the new position of Confidential Administrative Secretary is Terri Lewis. Lewis is a 22-year employee with the Village in the position of Payroll/Accounts Payable Clerk who moved to the Confidential Administrative Secretary position through a non-bargaining unit posting procedure during November, 2001. Lewis works a 37 ½ hour, Monday through Friday, work week and receives compensatory time for any hours worked in excess of her regular schedule. Lewis is paid the same amount as the other Confidential Administrative Secretary, Skalecki. It is the Village's intent to cross-train Lewis and Skalecki.

Village President Ted Pamperin, Director of Administrative Services Kubacki, Skalecki and Lewis share an office area. The area is in the shape of a square with Kubacki's office in the northwest corner and Pamperin's office in the southwest corner. Lewis is situated east of Pamperin's office and Skalecki is situated east of Kubacki's office. Lewis and Skalecki's office areas are separated by a glass wall that has a door to allow entry. Kubacki and Pamperin's offices are enclosed by full walls and have doors that allow them to exit into the open offices of Skalecki and Lewis respectively. Lewis cannot overhear a conversation between Kubacki and Skalecki if they are talking in Skalecki's work area. Lewis and Skalecki's computers are networked which allow them access to shared files.

9. Lewis is assigned to work for Village President Pamperin three days a week. Lewis receives telephone calls and e-mails for Pamperin, assists Pamperin in communications with legislators, and prepares and types correspondence for Pamperin.

Lewis is responsible for the preparation, assembly and distribution of materials Village Board members receive prior to Board meetings, which include the meeting agenda and supplemental materials. The materials distributed sometimes contain confidential labor relations information such as bargaining status reports from the Director of Administrative Services. Lewis does not prepare these confidential materials and is not expected to review/read them as part of her job. Lewis receives agenda requests from Village Board members and supervisory/administrative personnel and then prepares the meeting agenda. Lewis has received communications from the Village's attorney regarding the Village Board agenda and items included on that agenda. During Lewis' first three months in the Confidential Administrative Secretary position, she spent approximately 50% of her time preparing agendas and agenda materials.

Lewis has assisted employees who are completing claim reimbursement forms to be submitted to DJB Associates, the Village's third party cafeteria benefits plan administrator. Lewis acts as a back-up to Skalecki in processing correspondence to DJB Associates.

Lewis has access to Village employee personnel files, which are kept in Skalecki's office and are Skalecki's responsibility. Lewis has filed documents into employee personnel files.

Lewis has made modifications on at least two occasions to documents utilized by the Director of Administrative Services in collective bargaining negotiations with the clerical bargaining unit. At Kubacki's request, Lewis telephoned approximately ten other municipalities for information and contract language regarding nepotism, residency, and wage rates and has provided the information to Kubacki for potential use in collective bargaining or litigation.

10. Lewis is assigned to work for the Village Clerk, Charlotte Nelson, two days a week and is physically located in the Village Clerk's Office on these days. Lewis performs clerical responsibilities for Nelson and helps "wherever she is needed."

On one occasion, Lewis received typed Closed Session Minutes of the Village Board from the Village Clerk and distributed the minutes to the appropriate personnel by either hand-delivering the minutes or placing the minutes in an envelope. Lewis did not review the minutes prior to their distribution. Lewis has been told that in the future she may type minutes taken by the Village Clerk including the closed session portions of Village Board meetings.

When requested by Pamperin or Kubacki, Lewis leaves her work station in the Clerk's Office to assist them.

11. Skalecki has the primary responsibility for the Village confidential labor relations work. Lewis performs confidential labor relations work for Kubacki on an as-needed basis when Confidential Administrative Secretary Skalecki is performing duties which Kubacki does not wish to interrupt.

12. Lewis does not have sufficient access to, knowledge of, or participation in confidential matters relating to labor relations to be a confidential employee.

13. The incumbent in the position of Accountant in the Village's Finance Department is Kim Taylor. Taylor was hired by the Village during the Spring of 2000. In addition to Taylor, the Finance Department consists of the Network Specialist, the Payroll Clerk and the Accounts Receivable Clerk, all of whom are supervised by Stephanie Meyers, Village Finance Director.

Taylor works a 37 ½ hour work week, beginning at 8:00 a.m. and ending at 4:30 p.m. Monday through Friday. Taylor earns an annual salary of \$34,000. Taylor receives compensatory time for all hours worked in excess of her regular hours.

14. The Village created the position of Accountant/Computer Specialist in August, 1997, as a non-represented professional position. The Union was aware of and did not object to the District's belief that the position was excluded from the unit because the incumbent would be a professional employee.

The Accountant/Computer Specialist position was held by Theresa Cole who held two (2) two-year degrees when hired, one in Accounting and one in Computer Programming, and who completed her four-year Bachelor's degree in Accounting while employed by the Village. The job description for the position held by Cole read as follows:

. . .

II. Objective:

Under general supervision of the Director of Finance, performs accounting and financial services for the Village of Ashwaubenon.

III. Relationships:

Reports to: Director of Finance

Has some supervisory duties as designated by the Director of Finance. Has work contacts with Village appointed officials, division and department heads and staff, co-workers, outside governmental agencies, auditors, local bank representatives, and computer programmers.

IV. Typical Duties:

1. Reviews, records and processes financial transactions, including proper coding, and receipts, and journal entries. Coordinates the data processing of these functions.

2. Conducts internal financial reporting through the analysis of general ledger for proper distribution of charges and clear presentation in accounts. Administers monthly financial statements.
3. Prepares adjusted journal entries. Updates and maintains chart of accounts and job numbers. Prepares financial statements, reports and analyses of various funds.
4. Reviews computerized bi-weekly Village employee payroll for accuracy. Researches payroll problems and takes corrective action as required. Updates payroll system for compliance to mandates. Oversees development of new computer programs as needed. Coordinates year-end payroll procedures and processing of W-2 forms.
5. Assists in the annual budget process in the preparation and review of all budgets. Updates and maintains budgets.
6. Prepares reports as required by outside governmental agencies (*example: sales tax reports*).
7. Provides auditors with financial information as needed.
8. Performs financial analyses and conducts special projects as required. Responds to division and department head questions regarding their budget reports.
9. Performs petty cash audits as required.
10. Assists in the operation and maintenance of network and AS400 computer operations. Trains personnel in software packages.
11. Performs other duties as assigned or required.

Requirements:

1. Associates or Bachelors Degree in Accounting, Finance or related area.
2. Minimum of two years of accounting experience.
3. Thorough knowledge of Generally Acceptable Accounting Principles.
4. Must possess financial judgment and excellent ability to work with financial data accurately and efficiently.

5. Knowledge of Wisconsin and Federal laws and statutes governing accounting and payroll functions.
6. Ability to establish and maintain effective working relationships with Village appointed officials, division and department heads and staff, co-workers, outside governmental agencies, auditors, local bank representatives, and computer programmers.
7. Ability to analyze and interpret fiscal records.
8. Ability to analyze and design effective accounting systems and procedures.
9. Ability to communicate effectively in verbal or written form.

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15. Consistent with the Village's practice of reviewing and potentially revising job descriptions when a vacancy arises, when Cole left the Accountant/Computer Specialist position the Village determined that the computer duties would be removed from the Accountant position due to an increase in the workload. As a result, item number 10 in the "Typical Duties" section of the job description set forth in Finding of Fact 14 above was removed. With item number 10 removed, the job description that Taylor viewed prior to her hire is also the current job description for the Accountant position.

16. Taylor is responsible for ensuring that credits and debits are correctly recorded to Village accounts. Taylor reviews accounts payable and payroll. Taylor reviews Village accounts to determine whether an erroneous entry has been made to the account. Taylor and her supervisor, Meyers, are the only individuals that have the authority to determine which account will be disbursed from and which account will be credited with revenue. Taylor does not have the authority to create a new account. Taylor prepares approximately ten (10) journal entries per day. Meyers must initial the entries before they are journalized. Taylor enters the approved journal entry into the computer system. Taylor records and processes transactions monthly. Taylor receives hard copies of receipts for checks received by the Village. Taylor determines which revenue account the check should be debited to and enters a cash receipt into the computer. Taylor spends approximately 75% of her time performing these responsibilities.

Taylor journalizes credit and debit transactions. Taylor corrects entries through a journalizing procedure. Approximately 15% of Taylor's time is spent journalizing.

Taylor prepares monthly year-to-date statements for the Village Board. These statements are prepared consistent with Generally Accepted Accounting Standards Board principles and include revenues, expenditures and the status of the fund balance. During the

first few months of Taylor's employment, she submitted the statements to her supervisor, Meyers, prior to the reports being distributed to the Board members. Taylor has responded to questions from Kubacki regarding the statements. Taylor does not regularly attend Village Board meetings to respond to questions regarding the year-to-date statement. Taylor spends approximately 3% percent of her time performing this responsibility.

Taylor reviews payroll to verify that expenditures are charged to the correct accounts. Taylor and Meyers respond to questions from the Payroll Clerk. In the absence of Meyers, Taylor authorizes the processing of payroll. Taylor calculates retiree expenses for health, dental and life insurance monthly, journalizes the receipts representing the retiree contribution toward the premiums, enters the receipts into the proper account on the computer and posts the entries. Approximately 1% of Taylor's time is spent on payroll.

Taylor's budget process responsibilities in 2001 were limited due to her recent hire and encompassed separating all expenditures by fund. Taylor's role in budget preparation will increase during 2002 and subsequent years.

Taylor prepares monthly reports including the sales tax reports. Taylor reconciles accounts at least two times per year. Taylor identified an error in fuel cost allocations and changed the expense accounts to correctly record the expenses.

Taylor, Meyers and two other employees identified by the Village respond to inquiries from bank representatives regarding wire transfers.

Taylor was involved in the Village inventory of physical property. Taylor calculated the total cost of the physical inventory and compared it to the amount included in the general ledger account. Taylor identified that the inventory in comparison to the general ledger did not balance, reviewed the ledgers and accounts, and made an adjustment.

Taylor has completed special projects for Steve Kubacki, Village of Ashwaubenon Director of Administrative Services. These included a history of 2001 salaries for each public safety employee and a public safety overtime report that identified each employee, the amount of overtime hours each employee worked and the amount of overtime costs associated with the hours.

17. Taylor holds two (2) four-year degrees from Northern Michigan University: the first in Business Management was earned in 1990 and the second in Accounting was earned in 1999. Taylor also completed a two-year internship in accounting with the Anderson, Tackman CPA firm. During her tenure with Anderson, Tackman, Taylor attended tax seminars addressing the changes in tax code. Taylor completed the Certified Public Accounting review course during the summer of 2001 and took the examination, but was unaware of her results at the time of hearing.

Taylor's work is predominantly intellectual and varied in character involving the consistent exercise of discretion and judgment in its performance. The character of the work and result accomplished cannot be standardized in relation to a given period of time. The work requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education.

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

CONCLUSIONS OF LAW

1. The incumbent in the position of Confidential Administrative Secretary is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., and is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. The incumbent in the position of Accountant is a professional employee within the meaning of Sec. 111.70(1)(L), Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The Confidential Administrative Secretary is included in the clerical bargaining unit represented by the Union and the Accountant continues to be excluded from that unit.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of August, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

VILLAGE OF ASHWAUBENON

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

POSITIONS OF THE PARTIES

The Village argues that Confidential Administrative Secretary Lewis should continue to be excluded from the bargaining unit because she is a confidential employee and that Accountant Taylor is a professional employee who should continue to be excluded from the non-professional unit.

The Village asserts that the Confidential Administrative Secretary is a new position created in August of 2001 when the prior bargaining unit Executive Secretary position was eliminated. The Village then reorganized and determined that it desired to interchange two Confidential Administrative Secretary positions. The Village argues that the creation of the Confidential Administrative Secretary had a twofold rationale. First, the previous incumbent in the Executive Secretary position identified a conflict in that she "felt awkward and compromised" when given confidential information relating to the bargaining unit, negotiations, grievances and similar labor information. Second, the growth of the Village in terms of population and business and commercial planning and development has resulted in an increase in both confidential and other work which justify a second Confidential Administrative Secretary position.

The Village argues that Commission case law supports a finding that the Confidential Administrative Assistant is a confidential employee. The Village likens this position to the Administrative Assistant position in CUDAHY PUBLIC LIBRARY, DEC. NO. 26931-B, (WERC, 5/92) and the Secretary to the Administrative Coordinator in DUNN COUNTY (COURTHOUSE), DEC. NO. 8170-A (WERC, 10/91) in that the job responsibilities justify exclusion. It further asserts that the Village created the position in good faith with a desire to address "in the future . . . the need for versatility and coverage on confidential matters. . ." and any attempt to delegate all confidential work to the other Confidential Administrative Secretary would cause an "undue hardship" on the Village.

With regard to the Accountant position, the Village argues that the job duties are intellectual in nature, non-manual, challenging and constantly changing. The Village argues that there is minimal repetition and the work output cannot be standardized. Further, the Accountant position requires knowledge of accounting standards, practices, applications and laws, which Taylor possesses. Finally, the incumbent recognizes herself as a professional and the Village contends that the Commission should do the same.

The Union initially argues that the Commission determined in VILLAGE OF ASHWAUBENON, DEC. NO. 23746, (WERC, 6/86) that the Executive Secretary to the Village President was not a confidential employee, that a material change has not occurred and, that as

a result, the prior decision is afforded determinative weight. The Union argues that even if the Commission were to find that a material change has occurred, the confidential work Lewis is performing is *de minimis* and can be reassigned without undue disruption to the Village's operation.

With regard to the Accountant position, the Union initially argues that it did not agree to exclude the Accountant/Bookkeeper position from the bargaining unit when the position was initially created, but further, even if there was a belief by the Village that there was agreement, the Union avers that our decision in MARINETTE COUNTY, DEC. NO. 26675 (WERC, 11/90) requires that we make a determination in this proceeding as to whether the position is professional.

On the merits, the Union asserts that the Accountant position does not meet the statutory criteria of a professional employee. The Union first argues that the critical preparation for the position is on-the-job accounting experience and not an associates degree or bachelors degree. It next asserts that Taylor does not exercise discretion and judgment since her supervisor oversees, must initial, and approves any decisions she makes; that the work she is doing is standardized bookkeeping since she spends most of her time allocating funds, reviewing arithmetic and mathematical computations; and finally, that this Accountant position is different from the Accountant position in ONEIDA COUNTY, DEC. NO. 9134-D (WERC, 7/83).

DISCUSSION

In this case, we are asked to determine whether the Confidential Administrative Secretary and Accountant should be included in this clerical bargaining unit.

The Village takes the position that the Confidential Administrative Secretary is a confidential employee and the Accountant is a professional employee -- both of whom are properly excluded from the bargaining unit. In contrast, the Union argues that the Commission has already determined that the Confidential Administrative Secretary, previously known as the Executive Secretary, is not a confidential employee and that the prior decision is entitled to determinative weight. With regard to the Accountant, the Union contends she is a non-professional bookkeeper who should be included in the unit.

Confidential Administrative Secretary

We have held that a party seeking to litigate an issue which has already been decided by the Commission must show a material change in circumstances. CITY OF MILWAUKEE, DEC. NO. 6960-J (WERC, 5/89). Here, the Union asserts that there has not been a material change because the Confidential Administrative Secretary is performing essentially the same work as the former Executive Secretary. The Village argues that a material change has occurred

because for purposes of “efficiency and effectiveness,” it has reorganized, eliminated the Executive Secretary position, and created the second Confidential Administrative Secretary position.

The Executive Secretary performed work for to the Village President who did not have any direct responsibility for collective bargaining or labor relations. The Village Attorney was responsible for these functions and had a confidential employee, the Legal Secretary, who performed his clerical labor relations work. The Director of Administrative Services now is responsible for collective bargaining and labor relations and a non-bargaining unit Confidential Administrative Secretary (Skalecki) performs his confidential labor relations work. Lewis primarily works for the Village President, Village Board and Village Clerk.

However, since the Commission’s 1986 decision, Village has reorganized and added confidential labor relations duties to the responsibilities of the former Executive Secretary position now held by Lewis. We are satisfied that this change is material to the issue of confidential status and thus entitles the Village to again litigate the matter and seek a result that differs from that reached in 1986. Thus, we turn to the merits of whether Confidential Administrative Assistant Lewis should continue to be excluded from the bargaining unit as a confidential employee.

Section 111.70(1)(i), Stats., defines a municipal employee in pertinent part as:

. . . any individual employed by a municipal employer other than an independent contractor, supervisor, or **confidential**, managerial or executive employee. (Emphasis added.)

The statutory term “confidential . . . employee” is not statutorily defined. With judicial approval (See MINERAL POINT UNIFIED SCHOOL DISTRICT V. WERC, CASE 00-CV-126, (CT. APP. 1/02) RECOMMENDED FOR PUBLICATION), we have defined a confidential employee as having sufficient access to, knowledge of, or participation in confidential matters relating to labor relations. For information to be confidential, it must: (a) 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 (b) be information which is not available to the bargaining representative or its agents. 1/

1/ DANE COUNTY, DEC. NO. 22796-C (WERC, 9/88).

While a *de minimis* exposure to confidential labor relations matters is generally insufficient grounds for exclusion of an employee from a bargaining unit, 2/ we have also sought to protect an employer’s right to conduct its labor relations through employees whose

interests are aligned with those of management. 3/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, 4/ and, similarly, where a management employee has significant labor relations responsibility, the clerical employee assigned as his or her secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employee without undue disruption of the employer's organization. 5/

2/ *BOULDER JUNCTION JOINT SCHOOL DISTRICT, DEC. NO. 24982 (WERC, 11/87)*

3/ *CESA AGENCY NO. 9, DEC. NO. 23863 (WERC, 12/86)*

4/ *TOWN OF GRAND CHUTE, DEC. NO. 22934 (WERC, 9/85)*

5/ *HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88)*

As evidenced by our 1986 decision and the record before us now, the Village has always had a confidential employee excluded from the bargaining unit (Nooyen in 1986 and now Skalecki) who provided clerical support for the Village employee with primarily labor relations responsibilities (the Village Attorney in 1986 and Director of Administrative Services Kubacki now). As also evidenced by our 1986 decision and the record before us, it is clear that a second clerical employee (Yakel in 1986, Schaut immediately prior to Lewis, and now Lewis) will from time to time perform confidential labor relations work. From 1986 to 2001 (when the Village unilaterally excluded Lewis from the unit), the employee performing this occasional confidential work has been included in the clerical unit.

To a large extent, the issue of Lewis' confidential status turns on the question of whether her occasional confidential work generated by the part-time Village President and Director Kubacki can be assigned to Skalecki (or Heise) without "undue disruption of the employer's organization." Based on the evidence and argument before us, we conclude that this question should be answered in the affirmative. We reach this conclusion for several reasons.

First, three bargaining units with fewer than 70 employees generate a limited amount of confidential work. Particularly in the context of the availability of two other confidential clerical employees (Skalecki and Heise), it is clear that there is a *de minimis* amount of confidential work for Lewis to perform even as currently assigned by the Village President and Village Director.

Second, while it is clear that Skalecki has a variety of important responsibilities and often has little time to spare, we are not persuaded that she cannot perform all confidential

work generated by the Village President and Village Director. In reaching this conclusion, we acknowledge the Village's argument that it may be a more "efficient and effective" use of resources to keep Skalecki working on a non-confidential project instead of having her perform confidential labor relations work that arises suddenly. However, it is worth noting that most confidential work does not arise suddenly and thus can be anticipated and scheduled along with other work priorities. Further, the "undue disruption" standard is not met by the occasional "disruption" that may be caused if unanticipated needs arise that require Skalecki (or Heise's) immediate service to perform confidential labor relations work. Lastly, as noted by the Union, the cross training of Lewis and Skalecki provides the Village with the flexibility of using Lewis to perform some of Skalecki's normal non-confidential work should that be necessary to allow Skalecki to perform confidential labor relations work.

The Village has also expressed concern that given the close relationship (and close quarters) which the Village President, Village Director, Skalecki and Lewis share, Lewis will inevitably become aware of certain confidential labor relations information. To the extent this information is communicated because the Village President and Director choose to involve Lewis in discussions of labor relations issues and strategy, we have held that a municipal employer's decision to use a clerical/administrative employee as a "sounding board" is not a persuasive basis for excluding that employee from the bargaining unit as a confidential employee. BROWN COUNTY, DEC. NO. 22379-A (WERC, 8/88); CITY OF CUDAHY, DEC. NO. 21887 (WERC, 8/84). To the extent the concern is that the close physical proximity inevitably leads to the knowledge of confidential labor matters, the record here establishes that the existing office structure allows for maintaining confidentiality if used prudently by the Village President, Village Director and Skalecki.

In closing, we note that the Village functioned successfully for 16 of the last 17 years without the additional confidential employee it seeks to preserve in this proceeding. While unit inclusion may have occasionally placed the employee serving as the Village President's secretary in uncomfortable circumstances when inappropriately asked for information by Union represented employees, we are on balance persuaded that the Village continues to have the capability to have its confidential labor relations needs successfully met without a third confidential clerical employee.

Thus, we have ordered the inclusion of the Lewis in the unit.

The Village cites our decisions in CUDAHY PUBLIC LIBRARY, DEC. NO. 26931-C (WERC, 10/92) and DUNN COUNTY (COURTHOUSE), DEC. NO. 8170-A (WERC, 10/91) in support of its position. We find both cases distinguishable. In CUDAHY PUBLIC LIBRARY, the employee found confidential was the only clerical employee of the municipal employer and performed the clerical work for her supervisor who had the day-to-day labor relations responsibilities for the employer. Lewis is not the only clerical employee of the Village and is not the clerical employee primarily assigned to perform work for Director of Administrative Services Kubacki – the Village employee with day-to-day labor relations responsibilities. Thus, CUDAHY, provides support for the exclusion of Skalecki who performs Kubacki's clerical work by not for the exclusion of Lewis.

In DUNN COUNTY, the employee found confidential by the Commission majority (Commissioner Torosian dissenting) was one of four confidential employees performing confidential work generated by the equivalent of five bargaining units and 425 employees. Here, if excluded, Lewis would be one of three confidential employees performing confidential work generated by three bargaining units and 68 employees. Clearly, there is significantly less work here than was present in DUNN COUNTY. In addition, unlike DUNN COUNTY, we are satisfied that it would not be unduly disruptive to have Lewis' *de minimis* confidential responsibilities performed by the other two confidential employees.

Accountant

We next address the position of Accountant. The Village takes the position that the Accountant is a professional employee and therefore properly excluded from the non-professional bargaining unit. Further, the Village presented evidence that at the time the Accountant/Computer Specialist position was created the parties agreed to exclude it from the bargaining unit because it would be held by a professional employee.

As to this latter Village argument, we will honor an agreement between the parties regarding the inclusion or exclusion of a position from the bargaining unit unless:

1. the positions did not exist at the time of the agreement; or
2. the positions were included or excluded based on an agreement that the employees holding the positions were(or were not) supervisors, confidential employees, etc. or
3. the positions in dispute have been impacted by changes in circumstances which materially affect unit status; or
4. the existing unit is repugnant to the Municipal Employment Relations Act.

THE SCHOOL DISTRICT OF JANESVILLE, DEC. NO. 6678-A (WERC, 2/02).

Exception 2 is applicable here. Where, as here, the agreement to include or exclude a position is based on an incumbent's possession (or lack of) of a statutory defined employee status (i.e. supervisor, confidential, professional, etc.), we are not bound by the parties prior understanding/agreement and apply the law to the facts presented. MARINETTE COUNTY, DEC. NO. 26675 (WERC, 11/90). Thus, we proceed to the merits of whether the Accountant is a professional employee.

When determining whether an employee is a professional employee, we apply Sec. 111.70(1)(L) Stats., which defines the term "professional employee" as follows:

1. Any employee engaged in work:
 - a. Predominately intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

- b. Involving the consistent exercise of discretion and judgment in its performance;
 - c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
 - d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process; or
2. Any employee who:
- a. Has completed the course of specialized intellectual instruction and study described in subd. 1 d:
 - b. Is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in subd. 1.

The Union contests whether the work Taylor performs requires knowledge of an advanced type customarily required by a prolonged course of specialized intellectual instruction and study at an institution of higher education as required by Sec. 111.70(1)(L)1.d., Stats.

The job description for the Accountant position requires a Bachelors or Associate degree in accounting, finance or a related field and two years accounting experience. The issue here is whether Taylor's work requires knowledge that is "customarily" acquired through receipt of a four-year specialized Bachelors degree (which would satisfy the requirement of Sec. 111.70(1)(L)1., d., Stats.) or a two-year specialized Associate degree (which does not meet that statutory standard).

Taylor testified that a two year degree would give an employee bookkeeping skills but not the accounting skills needed to perform the work in question. She further testified that although experience at an accounting firm would also provide useful skills, access to such experience would only be available to those employees with a four-year specialized degree. While we acknowledge Meyers testimony that an individual with a two-year degree and certain types of experience could perform the work in question, we are persuaded from Taylor's testimony that the knowledge needed to perform the work in question is "customarily" acquired through a four-year specialized degree. We note that Taylor holds such a four-year degree and Taylor's predecessor did as well. Given all of the foregoing, we find that Taylor's work meets the requirement of Sec. 111. 70(1)(L)1.d., Stats.

Taylor independently reviews and analyzes Village accounts, allocates funds, and journalizes errors. She reviews the work of the accounts payable/payroll employee. Taylor independently prepares reports that are distributed directly to the Village Board. The record establishes, and the Union does not contest, that Taylor is engaged in work that is predominantly intellectual and varied in character and meets the criterion of Sec. 111.70(1)(L)1.a., Stats.

The next question is whether the work Taylor performs requires that she exercise discretion and judgment. We find that it does. This is not a situation where Taylor's supervisor makes all decisions, rather Taylor's supervisor regularly reviews only journal entries and cash disbursements and does so in order to be apprised of these types of financial activity within the Village. Taylor is responsible for account analysis and correction. Taylor determines which account will be credited and debited. Taylor verifies payroll expenditures. These functions require that she regularly exercises discretion and judgment and therefore meet the requirement of Sec. 111.70(1)(L)1.b., Stats.

Finally, we look to determine whether the work Taylor performs is of the character that can be standardized over a fixed period of time. Although we acknowledge that budgeting schedules, audit schedules and monthly accounting schedules are relatively standardized, the work that Taylor performs in the completion of budget preparation, auditing and accounting is not standard nor fixed. Thus, the work satisfies the requirement of Sec. 111.70(1)(L)1.c., Stats.

Given all of the foregoing, we conclude that the Accountant is a professional employee and have ordered her continued exclusion from the unit on that basis.

Dated at Madison, Wisconsin, this 5th day of August, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steven R. Sorenson /s/

Steven R. Sorenson, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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