

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO
AND DOOR COUNTY

Involving Certain Employes of

DOOR COUNTY

Case 51

No. 50468 ME-8312

Decision No. 24016-E

Appearances:

Mr. Dennis D. Costello, Corporation Counsel, Door County, 421 Nebraska Street, Sturgeon Bay, Wisconsin 54235, appearing on behalf of the County.

Mr. Gerald D. Uglund, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221, appearing on behalf of the Union.

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

On February 3, 1994, Wisconsin Council 40, AFSCME, AFL-CIO filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission clarify an existing bargaining unit of courthouse employes in Door County by including in said unit five dispatchers in the Emergency Services Department. On March 28, 1994, AFSCME filed a second petition involving the same bargaining unit, requesting inclusion of five corrections officers. On June 9, 1994, Door County filed two petitions, seeking exclusion from the same bargaining unit of the Purchasing Agent/Printer and the Director of Emergency Government Administrative Assistant for Emergency Services. A hearing on all four petitions was held on July 11, 1994 before Examiner Christopher Honeyman. At the hearing, AFSCME withdrew its petition concerning corrections officers, and the parties agreed to defer indefinitely any further action on the AFSCME petition concerning the dispatchers. Evidence was taken with respect to the two remaining positions at issue. A transcript was made, both parties filed briefs, and the record was closed on December 14, 1994. The Commission, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

No. 24016-E

FINDINGS OF FACT

1. Door County, herein referred to as the County, is a municipal employer, and has its principal offices at 421 Nebraska Street, Sturgeon Bay, Wisconsin 54235.

2. Wisconsin Council 40, AFSCME, AFL-CIO, herein referred to as the Union, and its affiliated local, Door County Courthouse Employees Local 1658, are labor organizations and have their offices c/o Gerald D. Uglund, P.O. Box 370, Manitowoc, Wisconsin 54420.

3. The Union is the certified collective bargaining representative of all regular full-time and regular part-time employees in the Door County Courthouse and Associated Departments, excluding supervisory, managerial, confidential, executive and professional employees, elected officials, library employees, and employees in other bargaining units.

4. The County, contrary to the Union, contends that the Purchasing Agent/Printer is a supervisory and managerial employee and that the Director of Emergency Government/Administrative Assistant for Emergency Services is a managerial, supervisory and confidential employee.

5. Connie Mathey is the incumbent in the position of Purchasing Agent/Printer. Mathey has held this position since January 1, 1994, the effective date of a reorganization which changed the position's title from Printer/Office Supplies. Mathey had been the incumbent in the previous position for nine years. Mathey has always bought the materials for the print shop, and continues to work as a printer for 50 to 60 percent of her work time. Initially, she worked two and one-half days per week, but within a few years of her initial employment the County moved the office supply stores into her office, and she then took over purchasing such materials including paper, pencils and similar disposable items. Her work time increased first to three days a week, then to four days a week, and finally to full-time.

Up to December 31, 1993, Mathey reported to the County Clerk, in the County Clerk's capacity as County Administrative Coordinator. Since that date she has reported to the County's Property and Finance Committee, but continues to work with the Administrative Coordinator on day-to-day matters. Mathey has a departmental budget, which includes funds for her own time and other costs, and money for printing materials. There are no other employees in Mathey's department. Mathey has authority to make purchases within the departmental budget, and also has authority to purchase other office supplies and equipment for other departments. Mathey has purchased fax machines and new window blinds for other departments, but in each case the Property and Finance Committee made the final decision on which item to buy, and the funds for the purchase came from the account of the department involved. Mathey worked closely with both managerial and

bargaining unit employes in the departments involved for each equipment purchase, and did not select such items using her own discretion. Mathey did use her own discretion to strike some potential County suppliers on grounds of reputation for quality and service.

Purchases of office supplies are on an open account and the Purchasing Agent has no set budget for such purchases; such purchases ultimately are ascribed to each department's own budget. A description of the Purchasing Agent's availability and functions was created jointly by Mathey, the County Clerk, and the Deputy County Clerk. Mathey attends department head meetings and gets copies of all notices regarding budgetary requests and schedules.

Mathey has no supervisory authority over any employe. Mathey does not have sufficient discretion and authority in committing the County's resources or in formulating, determining or implementing County policy to make her a managerial employe.

6. Rita Sienkowski is the incumbent Director of Emergency Government/Administrative Assistant for Emergency Services. This position is an amalgam of positions in two different departments, both of which work out of the same office. As Director of Emergency Government, Sienkowski has one subordinate, the Deputy Director, Dan Williams. But in Sienkowski's capacity as Administrative Assistant for Emergency Services, Williams is Sienkowski's superior, since he is also Deputy Director of Emergency Services. The Director of Emergency Services is Dick Burress. Sienkowski works Monday to Friday, on an eight-hour day basis, while Burress and Williams, both of whom are primarily employed as paramedics by the County, work rotating 24-hour shifts with the other County paramedics.

As Administrative Assistant for Emergency Services, Sienkowski directs the work of a full-time insurance billing clerk and a part-time clerk typist. The two office employes seek Sienkowski's approval for their leave requests. Both the Director of Emergency Services and the Deputy Director of Emergency Services are regularly absent from the Emergency Services offices which are located two miles from the County Courthouse.

When the incumbent billing clerk was hired, Sienkowski reviewed the applications, participated in the interview process with Director Burress and two County Board members, and then discussed with Burress which of the two best applicants should be hired. During those discussions, Burress sought Sienkowski's opinion as to who to hire, and ultimately hired the applicant Sienkowski had identified as the best choice.

Sienkowski and Burress jointly evaluate the work performance of the billing clerk and clerk typist and meet with the employes to review the evaluation. Sienkowski signs the evaluation as the employes' "immediate supervisor" and Burress signs as the department head.

When the part-time clerk filed a grievance as to a verbal reprimand received from Burress,

the grievance was initially filed with Sienkowski.

In her capacity as Administrative Assistant for Emergency Services, Sienkowski types all of Director Burress' correspondence, including employer grievance responses and proposals Burress is preparing for collective bargaining with the bargaining unit of County paramedics. She attends and prepares minutes of monthly County Emergency Services Committee meetings at which collective bargaining issues may be discussed. Sienkowski has also assisted the County (through research and document preparation) in its defense against discrimination complaints filed by County employees.

Sienkowski is responsible for superintending, and applying for money to cover, two budgets which together fund the Emergency Government activities. While Sienkowski has authority to expend funds from these budgets, the budgets are created according to state and federal formulas, and she has little independent discretion in obtaining the funds. Sienkowski can act to ban open burning in a dry season, but has done so only upon request by a local fire chief followed by confirmation from the Wisconsin Department of Natural Resources. She reports monthly to the Emergency Services Committee and writes quarterly reports on the use of grant funds. Sienkowski can allocate funds to line items in drafting the two budgets she is responsible for, but cannot alter the allocation once made without County Board approval. Sienkowski works approximately 65 percent of her time as Director of Emergency Government, and approximately 35 percent of her time as Administrative Assistant. Sienkowski is familiar with spreadsheets and has spent a significant amount of time developing better billing methods for the County's ambulance service.

As Administrative Assistant for Emergency Services, Sienkowski has sufficient access to and involvement in confidential matters relating to labor relations to be deemed a confidential employe.

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

CONCLUSIONS OF LAW

1. The occupant of the position of Purchasing Agent/Printer is neither a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats. nor a managerial employe within the meaning of Sec. 111.70(1)(i), Stats, and therefore is a municipal employe within the meaning of Section 111.70(1)(i), Stats.

2. The occupant of the position of Director of Emergency Government/ Administrative Assistant for Emergency Services is a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and therefore is not a municipal employe within the meaning of Section 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT 1/

1. The position of Purchasing Agent/Printer is hereby included in the bargaining unit described in Finding of Fact 3.

2. The position of Director of Emergency Government/Administrative Assistant for Emergency Services is hereby excluded from the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin,
this 28th day of July, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

1/ (footnote found on pages 5 and 6).

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49,

(continued on page 6)

1/ (Continued)

petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

...

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the

institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

Door County

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

The questions before the Commission are whether the Purchasing Agent/Printer is a supervisory or managerial employe, and whether the Director of Emergency Government/Administrative Assistant for Emergency Services is a supervisory, managerial or confidential employe. The central facts with respect to each position are set forth in the Findings of Fact and need not be repeated here.

Purchasing Agent/Printer

The County contends that following the abolition and recreation of the Purchasing Agent position, Ms. Mathey is now a department head and has similar authority to other department heads. She reports only to her oversight committee and is under the "general jurisdiction" of the Administrative Coordinator. The County asserts that Mathey sets her own workday schedule, establishes the priorities for her department, and that she has authority to purchase larger items such as desks, copiers, fax machines, chairs and other property for the County. The County argues that she controls the inventory by purchasing what is necessary to refill supplies, and uses discretion in selecting new or different office supplies or equipment. The County contends that Mathey has authority to enter into contracts for servicing of equipment purchased by her for the County, and to negotiate the terms for such contracts. The County asserts that while Mathey is the only person in the department at the present time, she will obviously be the supervisor for anyone hired for her department at a later date, and therefore has supervisory authority even though it is not presently exercised. The County further contends that Mathey can allocate and commit the County's resources in a manner which significantly affects the nature and direction of the County's operations.

The Union contends that the Purchasing Agent/Printer has no employes to supervise, and that the Commission should not make a determination of supervisory status based on the hypothetical possibility that employes may at some time be hired to work under her. The Union contends that Mathey has had authority to purchase routine printing supplies and office disposable items for years; that there is little evidence of exercise of independent discretion; and that the largest items purchased in seven months' service in her new position were two fax machines, which purchase involved significant amounts of consultation with department heads and other employes. The Union also questions the job description entered into the record by the County on the grounds that the job description appears to have been augmented from the one actually approved by the County's Personnel Committee.

The Commission considers the following factors in determining if a position is supervisory in nature:

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 other 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 skills or for his supervision of employees.
5. Whether the supervisor is primarily 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. ^{2/}

We agree with the Union that the lack of evidence of any employees being supervised now, or in the immediate future, makes Mathey a non-supervisory employee.

We turn now to the issue of Mathey's purported status as a managerial employee.

The Legislature has excluded "managerial employees" from the definition of "municipal employees," but it has not provided a statutory definition of the former term. Section 111.70(1)(i), Stats. Instead, it has left to the Commission the case-by-case development of precise meaning to define those individuals whose relationship to management imbues them with interests significantly at variance with those of other employees.

^{2/} City of Kiel (Police Department), Dec. No. 11370-A (WERC, 3/83); Milwaukee County (Sheriff's Department), Dec. No. 22519 (WERC, 4/85).

There are two analytical paths to assess claimed managerial status. One considers the degree to which individuals participate in the formulation, determination and implementation of management policy; the other considers whether the individuals possess the authority to commit the employer's resources, either by exercising significant authority in the establishment of an original budget or by allocating funds for different program purposes within an original budget. 3/

For an individual to assume managerial status based on participation in program and policy, such involvement must be "at a relatively high level of responsibility." 4/ Managerial status based on allocation of the employer's resources necessarily entails significantly affecting the nature and direction of the employer's operations, such as the kind and level of services to be provided, or the kind and number of employees to be used in providing services. 5/

The change from Printer/Offices Supplies to Purchasing Agent/Printer increased the incumbent's responsibilities for purchasing, but did not add significant independent resource discretion and did not convert Mathey into a policy maker. While the County argues that Mathey's position is similar to two other County positions (Microfilm Coordinator and Tax Lister) found managerial in a prior proceeding, 6/ we find that her independent discretion in budgeting and purchasing falls short of the level found managerial in those two positions. In particular, the Microfilm Coordinator was found to have significant discretion in determining priorities for the County's microfilming needs, while the Tax Lister's departmental budget was more than twice Mathey's and the Tax Lister's department included at least one part-time employe in addition to the Lister herself. The largest items purchased in seven months since Mathey's position changed were, as the Union notes, two fax machines, and in both purchases Mathey's role appears to have been as an advisor rather than as one with independent authority. Her role in development of a budget involves only the limited budget (\$30,000 - \$35,000) of her own department, and all other purchases come from the budgets of departments controlled by others. Furthermore, the vast majority of her time appears to be spent either performing work as a printer or purchasing and arranging for storage of minor replaceable office supplies. We conclude that the Purchasing Agent/Printer is a specialist providing services to managerial employees, rather than a managerial employee herself.

3/ Milwaukee v. WERC, 71 Wis.2d 709 (1976); Eau Claire County v. WERC, 122 Wis.2d 363 (CtApp, 1984).

4/ Village of Jackson, Dec. No. 25098 (WERC, 1/88); Portage County, Dec. No. 6478-C (WERC, 10/87); Door County (Courthouse), Dec. No. 24016-B (WERC, 8/88).

5/ Village of Jackson, supra; Forest County, Dec. No. 17528-B (WERC, 6/85); Jackson County, Dec. No. 17828-B (WERC, 10/86); City of Whitewater, Dec. No. 24354 (WERC, 3/87).

6/ Dec. No. 24016 (WERC, 3/88).

Director of Emergency Government/Administrative Assistant for Emergency Services

The County contends that since October, 1993, Sienkowski has had authority to prepare an original budget, and complete authority to commit the County's resources. The County asserts that she has sole responsibility for the activities of the Emergency Government Department.

The County asserts that as Administrative Assistant for the Department of Emergency Services, she supervises three individuals, including an insurance billing clerk, a Clerk Typist I and the Deputy Director of Emergency Government. The County argues that Sienkowski delegates duties and workload, sets up training, makes disciplinary recommendations, was significantly involved in the hiring process for one of the clerical positions, as well as being involved in evaluations. The County contends that Sienkowski identifies hazards in the County that are potential disasters, and develops plans to safeguard the citizens, acting as the link between the State, Federal and County governments in coordinating appropriate resources. She is the only person in Door County's government who can request federal disaster assistance or state assistance. She is also responsible for two budgets, one of \$5,100 and one of \$16,000, and has authority to make grant applications for these budgets and to make expenditures from them.

In terms of confidential status, the County argues that Sienkowski prepares documents for handling grievances by the Director of Emergency Services, and prepares all correspondence and assists the Director in preparing notes and presentations for contract bargaining sessions. The County requests that the position be excluded from the bargaining unit on all three of the argued grounds.

The Union contends that the record shows that Sienkowski is available to coordinate resources for emergency responders, but that a state liaison official independently evaluates the needs. The Union contends that Sienkowski has not yet prepared a budget, and that her budgetary authority is considerably less than her testimony would imply, because the record demonstrates that these funds are set by governmental formula. The position's sole clear authority over the County's resources that has been established in the record, the Union argues, is the routine purchase of sandbags from existing contractors. The Union contends that Sienkowski has no involvement with the Emergency Services budget other than to type it, and that she could not testify to any instance in which she had changed any usage of monies from one kind of function to another.

The Union argues that Sienkowski's work as Administrative Assistant does not require significant independent judgment, and that Sienkowski does not really supervise Williams. As to the one incident of a hire being made where she was present at the interview, the Union contends that Burress made the final decision of whom to hire.

As to the allegation of confidential status, the Union contends that there was no evidence presented that Sienkowski had processed any "confidential" material which was not received by the employe involved, and that her testimony that she had researched two Equal Rights complaints does not demonstrate that her inclusion in the unit deprives the County of such work, since the County has both a Human Resources Department and a Corporation Counsel's Department available for such functions. The Union contends that Sienkowski's involvement in preparing for bargaining is inconsequential, and that she could not even describe the volume of such work. The Union requests that the position remain in the bargaining unit.

The Commission has consistently held that in order for an employe to be considered a confidential employe, such an employe must have access to, have knowledge of, or participate in confidential matters relating to labor relations. In order for information to be confidential for such purposes it must be the type of information which (a) deals with the employer's strategy or position in collective bargaining, contract administration, litigation, or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) is not information which is available to the bargaining representative or its agents. 7/

While a de minimis exposure to confidential matters is generally insufficient grounds for exclusion of an employe from a bargaining unit, 8/ we have also sought to protect an employer's right to conduct its labor relations through employes whose interests are aligned with those of management. 9/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employe may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, 10/and, similarly, where a management employe has significant labor relations responsibility, the clerical employe assigned as her or his secretary may be found to be confidential, even if the actual amount

7/ Wonewoc-Union Center School District, Decision No. 22684 (WERC, 5/85).

8/ Boulder Junction Joint School District, Dec. No. 24982 (WERC, 11/87).

9/ CESA Agency No. 9, Dec. No. 23863-A (WERC, 12/86).

10/ Town of Grand Chute, Dec. No. 22934 (WERC, 9/85).

of confidential work is not significant, where the confidential work cannot be assigned to another employe without undue disruption of the employer's organization. 11/

Here, we are satisfied that Sienkowski has sufficient access to and involvement in confidential labor relations matters to warrant her continued exclusion from the bargaining unit as a confidential employe.

As Administrative Assistant for Emergency Services, Sienkowski performs all of Director Burress' confidential work including the typing of County bargaining proposals and grievance correspondence for a paramedic unit. She has also prepared material for the County's defense against discrimination litigation. While such confidential work does not take a significant amount of Sienkowski's time, we are persuaded that Burress has significant labor relations responsibilities and that his confidential work cannot be assigned to another employe without undue disruption of the County's organization. This is particularly so where the Emergency Services offices are located some distance from the County Courthouse where other confidential clerical employes work.

Given the foregoing, we have concluded Sienkowski should continue to be excluded from the bargaining unit.

Dated at Madison, Wisconsin, this 28th day of July, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

11/ Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88).