

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

:

In the Matter of the Petition of :

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WISCONSIN COUNCIL 40, AFSCME, : Case 101

AFL-CIO, : No. 39440 ME-216

: Decision No. 26020-A

Involving Certain Employes of :

:

WAUKESHA COUNTY :

:

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Petitioner AFSCME.

Michael, Best & Friedrich, Attorneys, by Mr. Robert M. Ling, Jr., Suite 2000, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4286, appearing on behalf of the County.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of Teamsters Local 200.

Love, Voss, Dreyfus & Murray, Attorneys at Law, by Mr. Lee S. Dreyfus, Jr., 241 Wisconsin Avenue, Waukesha, Wisconsin 53186, appearing on behalf of ACCORD.

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

Wisconsin Council 40, AFSCME, AFL-CIO filed a petition with the Wisconsin Employment Relations Commission on September 28, 1987, requesting the Commission to clarify an existing bargaining unit of Waukesha County employes by including within it some 53 employes in 45 separate classifications currently unrepresented. After extensive discussions between the parties, a hearing was ultimately scheduled. Prior to the hearing, Waukesha County on August 31, 1988 filed a petition with the Commission to clarify an existing bargaining unit represented by AFSCME, Council 40 by excluding from it the Clerk Typist III in the County's Sheriff's Department, on the ground that that employe was a confidential employe. Hearings on both petitions were held before Examiner Christopher Honeyman on September 7 and December 8 and 9, 1988 in Waukesha, Wisconsin. Teamsters Local 200 and the Association of Civilian Correctional Officers and Radio Dispatchers (ACCORD) were allowed to intervene during the hearing. A transcript was made of the hearing, and the parties filed briefs and reply briefs until April 10, 1989. The Commission, having considered the record and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit and Directing Election.

FINDINGS OF FACT

1. Waukesha County, herein the County, is a municipal employer and has its principal offices at 515 West Moreland Boulevard, Waukesha, Wisconsin 53188.
2. Wisconsin Council 40, AFSCME, AFL-CIO, herein AFSCME, is a labor organization and has its offices at 5 Odana Court, Madison, Wisconsin 53719.
3. Teamsters Local 200, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein Teamsters, is a labor organization and has its offices at 6200 West Bluemound Road, Milwaukee, Wisconsin 53213.

4. The Association of Civilian Correctional Officers and Radio Dispatchers, herein ACCORD, is a labor organization and has its principal offices c/o Mr. Lee S. Dreyfus Jr., Love, Voss, Dreyfus & Murray, Attorneys, 241 Wisconsin Avenue, Waukesha, Wisconsin 53186.

5. At all material times, AFSCME has represented various employes of Waukesha County in the following collective bargaining units:

Local 2494, Unit A:

All clerical, maintenance, and custodial employes employed in the Waukesha County Courthouse, and all maintenance and custodial employes employed in the University of Wisconsin, Waukesha facility, excluding elected County officials, professional employes, craft employes, confidential employes, supervisory employes, and all other County employes, as certified by the Wisconsin Employment Relations Commission under date of July 3, 1968, Decision No. 8545.

Local 2494, Unit B:

All Waukesha County Health Department employes in the classifications of sanitarian, sanitarian aide, laboratory technician aide and bacteriologist but excluding all other County employes, as voluntarily approved by the County pursuant to a cross check of employe union membership on October 14, 1966, and employes in the classification of public health technician as voluntarily recognized by the County on January 1, 1974.

Local 2494, Unit C:

All Waukesha County Department of Social Services employes classified as Social Workers, but excluding clerical employes, supervisors, and all other employes as certified by the Wisconsin Employment Relations Commission under date of May 25, 1967, Decision No. 7994.

Local 2494, Unit D:

All Waukesha County Department of Social Services employes employed as homemakers, but excluding Social Workers, clerical employes, supervisors, and all other employes as certified by the Wisconsin Employment Relations Commission under date of May 25, 1967, Decision No. 7994.

Local 2494, Unit E:

All Waukesha County Department of Social Services employes classified as Case Aides, but excluding homemakers, social workers, clerical employes, supervisors, and all other employes, as voluntarily recognized by the County on January 11, 1971.

Local 1365:

All Waukesha County Park and Planning Department employes in the classifications of Park Maintenance Men and Greens Keepers, but excluding supervisors, office employes, and professional employes, as certified by the Wisconsin Employment Relations Commission, under date of January 5, 1976, Decision No. 14157.

Public Health Nurses:

All regular full-time and regular part-time professional registered nurses and public health nurses employed in the Waukesha County Department of Health excluding supervisors, administrators and all other employees of Waukesha County, as determined by Wisconsin Employment Relations Commission certification in Case No. LIII, No. 24727, ME-1686.

6. At all material times, Teamsters Local 200 has represented the following bargaining unit of Waukesha County employees:

All regular full-time and part-time employees of the Waukesha County Highway Department, excluding office employees, professional employees, guards, craftsmen, confidential employees, supervisors as defined in the Act and all other employees.

7. At all material times, ACCORD has represented the following collective bargaining unit of Waukesha County employees:

All civilian radio dispatchers and civilian correctional officers employed by the County of Waukesha in the Sheriff's Department, excluding law enforcement personnel, clerical employees, cadets, professional technical employees, supervisors as defined in the Act, and all other employees.

8. On September 28, 1987, AFSCME filed its original petition requesting clarification of the bargaining units listed in its single contract covering Locals 1365, and 2494 by inclusion within them of 53 employees in 45 named job titles. After extensive negotiations and revisions of the titles at issue, AFSCME at hearing contended that the following positions shared a community of interest with employees in the Local 2494, Unit A, identified above and should be so included by a Commission order clarifying said bargaining unit:

Emergency Government Coordinator
Humane Officer
Deputy Medical Examiner, and on-call replacement
Deputy Medical Examiner
Recycling Coordinator
Jail Cooks (3)
Correctional Services Assistant
Bus Driver Scheduler
Bus Drivers (5)
Communications Installer
Communications Technician
Computer Operator
Telecommunications Specialist
Network Support Technician
Senior Computer Systems Specialists (4)
Computer Systems Specialists (2)
Federal Job Training Contract Coordinator
Federal Job Training Employer Services Representative
Federal Job Training Program Coordinator
Federal Job Training Specialist
Federal Job Training Youth Program Coordinator
Architectural Engineering Technician
Senior Engineering Technician
Engineering Technician
Senior Child Support Investigator
Child Support Investigator
Fraud Investigator
Budget Technician
Recreational Therapy Assistant
Veterans Services Aide
Museum Registrar
Engineering Aide
Photographic Technician
Identification Aides
Collection Specialists;

and AFSCME further petitioned for the inclusion by unit clarification of the position of Community Health Educator in either the Sanitarians (Unit B) or Nurses bargaining units identified above.

9. On August 31, 1988, the County filed a petition with the Commission requesting that the bargaining unit identified as Local 2494, Unit A, be clarified by excluding from it the Clerk Typist III in the Sheriff's Department on the ground that said employe was a confidential employe. AFSCME opposes that petition on the ground that the employe in question is not confidential.

10. The County, contrary to AFSCME, contends that all of the positions identified in Finding of Fact 8 above do not share a community of interest with any employees in any bargaining unit currently represented by AFSCME or either of the intervening labor organizations. The County asserts that accretion into the bargaining units through a unit clarification is inappropriate and that an election should be held among said employees. The County further contends that the Senior Computer Systems Specialists, Computer Systems Specialists and Architectural Engineering Technician are professional employees and must be excluded from any potential nonprofessional unit and that the Computer Operator and Network Support Technician are confidential employees and thus must also be excluded from any potential nonprofessional residual unit.

11. Teamsters Local 200 intervened at the hearing to request that the five Bus Drivers and the Bus Driver Scheduler in the Department of Aging be accreted into the bargaining unit identified in Finding of Fact 6 above; AFSCME and the County oppose that request on the ground that those employees have no community of interest with said unit.

12. ACCORD intervened at the hearing to request that the three Jail Cooks in the Sheriff's Department should be accreted into the bargaining unit identified in Finding of Fact 7 above; the County and AFSCME oppose that request and contend that said employees share no community of interest with said bargaining unit.

13. The employees in the classification listed in Finding of Fact 8 above have diverse wages, hours and conditions of employment, places of work and duties and skills, supervision, training and work purposes. They do not fall within the present defined scope of any one of the existing bargaining units now represented by AFSCME, Teamsters or ACCORD. Said employees do not share a community of interest with the employees in any existing unit which is sufficiently compelling to warrant placement of any of said employees in an existing unit.

14. The Community Health Educator, Janet Smith, is employed by the County in the Health Department, and shares some types of teaching duties with public health nurses. Smith has a Bachelor's Degree in community health education, has substantial discretion in designing educational programs, works in the same office area as public health nurses and has similar working conditions to them. Her classification did not exist when the unit described above as the Nurses unit was formed. The Community Health Educator shares a sufficient community of interest with Public Health Nurses to be appropriately included in that unit.

15. The Clerk Typist III in the Sheriff's Department performs general secretarial duties for the Sheriff and other high-ranking officers of the Department. The Clerk has had access to confidential labor relations material involving grievances and a lawsuit against the County, but has not performed any work with respect to negotiations. The Clerk, Mary Orcholski, performs a wide variety of duties, and those duties which involve working with confidential labor relations material represent only a small portion of her work time. The County employs other employees who are available to handle confidential labor relations duties, if needed. Orcholski's access to and participation in confidential labor relations matters is not sufficient to warrant finding her to be a confidential employee.

16. The position Jail Cook was created in 1982, and, prior to its creation, the work was performed by correctional officers and matrons. The three Jail Cooks work in the kitchen in the County jail, close to correctional officers in location, but remain in the kitchen area during the work day. Elsewhere in the jail there are employees represented both by AFSCME and ACCORD. While Jail Cooks have a certain community of interest with employees represented by both AFSCME and ACCORD, a community of interest sufficient to warrant inclusion of the Jail Cooks in either the AFSCME or ACCORD units does not exist.

17. The Bus Drivers and Scheduler work in the Department of Aging, but under different working conditions. The Scheduler works alone in her office, scheduling pickups of clients for the five vans used by the Drivers. The Drivers spend most of their time alone on the road, but while they report to the Department of Aging, in which there are other employees represented by AFSCME in the Courthouse unit identified above as Local 2494, Unit A, for general supervisory purposes, they report to work at the Transportation Department, where there are employees represented by Teamsters, to fuel and collect their vans. While there is a certain community of interest between the Scheduler and Drivers and the employees represented by AFSCME and Teamsters, a community of interest sufficient to warrant inclusion of these positions in the AFSCME or Teamster units does not exist.

18. The two Computer Systems Specialists and four Senior Computer Systems Specialists work in the Department of Information Systems, which was created in or about 1986. The County does not require the Specialists to hold a degree. Specialists design and implement management information systems in

various departments of the County. The work is predominantly intellectual and varied in character and cannot be standardized in relation to a given period of time. The positions do not require a consistent exercise of discretion or knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction.

19. The Architectural Engineering Technician designs and develops construction specifications for County facilities; has an office in the Department of Facilities Management; and has substantial discretion in design and in supervision of contractors. A Bachelor's Degree can substitute for four years of the position's six years of required experience. The position involves work of a predominately intellectual nature which requires the consistent exercise of discretion and judgement of such character that output cannot be standardized overtime. The position requires knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction.

20. The Computer Operator and Network Support Technician both work, at times alone, in the County's central computer room. Information maintained on the computer includes confidential negotiations and grievance-handling information utilized by the County Personnel Department. Neither employe has responsibilities which require them to have access to confidential labor relations information maintained on the computer. Neither employe has any other participation in confidential labor relations matters. The Computer Operator and the Network Support Technician do not have access to or participation in confidential labor relations matters which is sufficient to render them confidential employes.

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

CONCLUSIONS OF LAW

1. A bargaining unit of all regular full-time and regular part-time employes of Waukesha County who are not presently included in an existing collective bargaining unit, excluding professional employes, confidential employes, supervisory employes and managerial employes, is an appropriate unit for collective bargaining within the meaning of Sec. 111.70(4)(d)2.a. Stats.

2. A question concerning representation within the meaning of Sec. 111.70(4)(d)3, Stats., currently exists among the employes of Waukesha County in the appropriate bargaining unit set forth in Conclusion of Law 1.

3. The Community Health Educator is appropriately included in the bargaining unit described in Finding of Fact 5, above, as the Nurses unit.

4. The Architectural Engineering Technician is a professional employe within the meaning of Sec. 111.70(1)(L), Stats.

5. The Senior Computer Systems Specialists and Computer System Specialists are not professional employes within the meaning of Sec. 111.70(1)(L), Stats.

6. The Computer Operator, Network Support Technician and the Clerk Typist III, Sheriff's Department, are not confidential employes within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNITS 1/ AND DIRECTING ELECTION

1. The position of Clerk Typist III, Sheriff's Department, shall remain in the bargaining unit described in Finding of Fact 5, above, as Local 2494, Unit A.

2. The position of Community Health Educator is hereby included in the bargaining unit described in Finding of Fact 5, above, as the Nurses unit.

3. An election by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Direction in the voting group set forth in Conclusion of Law 1 among all employes included therein who were employed on September 27, 1989, except such employes as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of said employes desire to be represented by Wisconsin Council 40, AFSCME, AFL-CIO, or by either Teamsters Local 200 or the Association of Civilian Correctional Officers and Radio Dispatchers if either notifies the Commission in writing by October 13, 1989 that it wishes to participate in the election, or to remain unrepresented, for purposes of collective bargaining with Waukesha County on questions of wages, hours and conditions of employment.

Given under our hands and seal at the City of
Madison, Wisconsin this 27th day of September,
1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

1/ As the disposition of the unit clarification issues involving the Clerk
Typist III and Community Health Educator are final, our Order as to those
positions is now subject to the right of petition for rehearing and
judicial review. The remainder of our decision is not presently
reviewable. See West Allis v. WERC 72 Wis.2d 268 (1976).

(Footnote 1/ continued on page 7)

1/ continued

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.

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, 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.

WAUKESHA COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER CLARIFYING
BARGAINING UNITS AND DIRECTING ELECTION

BACKGROUND

The original petition in this matter was filed on September 28, 1987 by Wisconsin Council 40, AFSCME, AFL-CIO. The petition, as subsequently modified in the course of extensive negotiations between the parties, requests that the

Commission clarify one of several bargaining units represented by AFSCME as including some 40 different positions which are presently unrepresented. During the course of the proceeding, the various parties raised other contentions, detailed below. Two other labor organizations, Teamsters Local 200 and ACCORD intervened in this matter, on grounds also detailed below. After substantial time devoted to negotiations, hearing was held before Examiner Christopher Honeyman on September 7, December 8 and December 9, 1988, and briefs were filed by the parties until April 10, 1989. In addition, AFSCME filed a motion to reopen the record on April 24, 1989, which was denied by the Examiner on May 23, 1989.

While specific contentions relating to particular jobs will be detailed as relevant below, the broad outlines of the dispute are as follows: AFSCME contends that the bulk of the unrepresented classifications claimed belong in its Local 2494, Unit A grouping, known generally as the Courthouse unit. AFSCME also maintains that the Community Health Educator should be accreted into either the Sanitariums unit or the Nurses unit, both represented by AFSCME. Teamsters contend that the Bus Drivers and Bus Driver Scheduler should be accreted into the Highway Department employees unit which it represents. ACCORD contends that the Jail Cooks should be accreted into the Sheriff's Department unit of non-sworn law enforcement employees which it represents. The County contends that none of these classifications should be accreted into any bargaining unit without an election. In addition, the County maintains that the Senior Computer Systems Specialists, Computer Systems Specialists, and Architectural Engineering Technician are professional employees; and that the Computer Operator, Network Support Technician and Clerk Typist III in the Sheriff's Department are confidential employees, all of which contentions are opposed by AFSCME. Some of the essential facts are stated in the Findings and will not be repeated here.

APPROPRIATENESS OF UNIT CLARIFICATION OR ELECTION:

The parties' positions concerning the central question of this matter are as follows:

AFSCME

AFSCME contends that its Local 2494 represents more than 400 of the 500-plus employees in all current AFSCME units combined, and that Local 2494 has been treated by AFSCME and the County and by the Commission in prior cases as a homogeneous group even though its contract lists a number of sub-units. The scope of these units, according to AFSCME, has expanded over the years, and at least one position (Juvenile Center Education Specialist) was voluntarily accreted into the Local 249 unit without an election. In one case in which an accretion election was held, the Commission referred in its direction of election to "an existing overall bargaining unit represented by ... (various local numbers of AFSCME)." AFSCME contends that it originally petitioned for a broadly described bargaining unit in the Courthouse and that the Commission erred in describing the unit in that direction of election as consisting of "clerical, maintenance and custodial employees" and excluding all other employees. AFSCME maintains that the County has taken improper advantage of this language by defining newly created positions, including positions removed from bargaining units after mere name changes, as being outside the ambit of what was intended to be a broad unit description, and then refusing to place the newly created or named positions in any unit. AFSCME contends that a review of the positions in the Courthouse unit demonstrates that the unit is not limited to simply clerical, maintenance or custodial classifications.

AFSCME asserts that there is a community of interest between all of the jobs at issue and those already within the Local 2494(A) unit, and that inclusion by unit clarification is therefore appropriate. AFSCME also argues that continuing the present unit restrictions will guarantee future disputes over newly created or altered jobs.

AFSCME asserts that although the positions at issue do not constitute a viable or proper independent unit, it will stand an election in such a unit if the Commission decides otherwise. AFSCME contends that to allow other unions to appear on the ballot, even for purposes of seeking to represent the limited number of positions in which they claim an interest, would encourage fragmentation of bargaining units, contrary to MERA's intent.

The County

The County contends that pursuant to Madison Metropolitan School District, 2/ the criteria by which the proper disposition of the bulk of the positions at issue here should be determined include those customarily used for determining community of interest questions. The County argues that AFSCME's Local 2494(A) represents only clerical, maintenance and custodial employes, and that despite job names which in some cases imply a broader scope, all of these positions in fact are clerical, maintenance or custodial in nature. The County asserts that AFSCME has separate bargaining committees for the different units within the Local 2494 contract, that they bargain different benefits, and further that new units have from time to time been created rather than lumping new groups into 2494(A). The County argues that this pattern shows that the parties have been careful not to include new jobs in existing units unless they really match the ambit of the unit concerned, and that therefore accretion into Local 2494(A) of any employe not performing "clerical, maintenance or custodial" duties is contrary to the clear language of the original election order, the contractual recognition clause, and the parties' past practice.

The County further argues that the positions at issue have in most cases existed for many years, but that only in a few instances has AFSCME formally asserted that any of them should be included within existing units. The County argues that this vitiates AFSCME's argument that the Local 2494(A) unit should be read broadly. In addition, the County contends that none of these positions share a community of interest with any of the units represented by any of the unions, for separate reasons in each case.

The County contends that AFSCME's position (taken in its brief) that a single overall unit should now be created is contrary to precedent as well as to the position AFSCME took at the hearing. The County notes that even in its brief, AFSCME continues to refer to its "various units," and notes further that AFSCME has lived with the unit descriptions as they exist for nearly 20 years.

The County opposes AFSCME's contention that a broad unit is intended within the Courthouse grouping, on the grounds that AFSCME did originally request such a broad description of the bargaining unit, but that the Commission determined not to order so broad a description of the Courthouse unit and that AFSCME accepted that determination for many years thereafter. The County further argues that the single unit which AFSCME now wants to create is contrary to MERA because it would improperly mingle professional employes with nonprofessional employes without a vote.

Teamsters

Teamsters Local 200 expresses an interest only in the Bus Drivers and Bus Driver Scheduler currently employed within the Department on Aging, and contends that these classifications share a substantial community of interest with employes in the Highway Department who are represented by Teamsters. The Teamsters contend on this basis that these two classifications should be accreted into the Highway Department unit, or that, in the alternative, they should be given a separate self-determination election to allow them to choose, either AFSCME's or Teamsters' existing units.

ACCORD

ACCORD did not file a written argument, but maintained at the hearing that the Jail Cooks and Correctional Services Assistant, all of whom are employed within the jail building like employes represented by ACCORD, have a community of interest with those employes and should be accreted into the unit now represented by ACCORD.

DISCUSSION

The central question in this case is whether we should direct an election in a separate nonprofessional residual unit, as urged by the County, or whether we should add the disputed unrepresented employes to the existing units through a unit clarification process, as urged by the three labor organizations.

Residual units have historically been found to be appropriate by the Commission for several reasons. Residual units, of course, consist of all unrepresented municipal employes of a municipal employer; thus, the statutory interest in avoiding further fragmentation of bargaining units is served since the existence of a residual unit assures the municipal employer that it will not be confronted with any additional units in the future. 3/ In addition, stability in existing bargaining relationships between the municipal employer and existing labor organizations is maintained when a residual unit is established. 4/ As we are satisfied that the residual unit is appropriate herein because it serves the interests recited above and because an election in such a unit will allow the employes in question to freely opt for union representation or a continuation of their unrepresented status, we are strongly inclined to reach that result unless there is a compelling reason to place them in an existing unit through the unit clarification process.

Placement in an existing unit through the unit clarification process would clearly be warranted if any of the positions fell within the confines of an existing unit description. Thus, for instance, if there were an existing unit consisting of all nonprofessional County employes, we would simply include the positions within that unit without an election unless the continuing majority status of the labor organization was implicated. No such unit is present here and none of the existing unit descriptions can reasonably be interpreted to include the positions in question. 5/

Placement in one of the existing units could also be warranted if the record demonstrated a compelling community of interest 6/ between the disputed employes and those employes in an existing unit. 7/ However, the record indicates that no such compelling community of interest is present here. While in some instances, a certain community of interest does exist, it is in no case sufficient to overcome the interests served by an election in a residual unit.

3/ Once a residual unit is established, thereafter all new positions are either placed in said unit or in existing units, as appropriate, assuming the continuing majority status of the bargaining representative is not implicated so as to require an election.

4/ City of Watertown, Dec. No. 24798 (WERC, 8/87).

5/ In reaching this conclusion, we rely on the language of the unit descriptions themselves, and the general prior failure of the unions involved herein to assert a claim for the positions under this theory, and the specific information contained in the record regarding the various positions in question here.

6/ When evaluating community of interest, we look to factors such as common supervision and work location, common duties, skills, wages, hours and conditions of employment, common career aspirations, training and work purpose, See Arrowhead United Teachers v. WERC, 116 Wis.2d 580 (1984).

7/ Dane County, Dec. No. 15696-A (WERC, 12/88).

We also note that as to certain positions, the strength of any community of interest is equally shared by more than one of the competing labor organizations. 8/ Therefore, placement of any of the disputed positions in an existing unit is not warranted under such a rationale either.

Given the foregoing, we are satisfied that direction of an election in a residual unit is appropriate.

AFSCME has indicated a desire to participate in a residual representation election, should one be directed. We deem it appropriate to allow Teamsters and ACCORD to express such an interest by October 13, 1989 as well. Accordingly, we have directed an election wherein the employes can choose between AFSCME, no representation, and, upon timely notification, representation by Teamsters and/or ACCORD.

SPECIFIC POSITIONS AT ISSUE

Having determined that direction of an election in a nonprofessional residual unit is appropriate, we turn to resolution of the parties' disputes over whether certain positions must be excluded from that unit because they are professional or confidential employes.

Senior Computer Systems Specialists and Computer Systems Specialists

The County employs two Computer Systems Specialists and four Senior Computer Systems Specialists in its information systems department; the senior position is reached by experience in the junior position of the same general title, and performs similar work with somewhat greater autonomy and sophistication. The County maintains that the positions are professional and therefore ineligible for inclusion in the nonprofessional residual unit. AFSCME asserts that the positions are nonprofessional.

Section 111.70(1)(L) Stats., defines a professional employe in pertinent part as an employe engaged in work:

- a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
- b. Involving the consistent exercise of discretion and judgement 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 an employe in the process of becoming so qualified.

Both positions require the incumbent to research, design, implement and maintain data processing systems, to conduct interviews with departmental personnel to determine the adequacy of those systems, and to prepare and analyze programs, as well as to train employes in computer use. The requirements of the job are (in varying degree depending on level) knowledge of principles and practice in computer science and data processing, knowledge of programming techniques and programming languages, and ability to analyze and develop management information systems. The position does involve a degree of discretion and independent judgement in the choice of methods for data processing. But the position does not require any more formal education than high school graduation or a G.E.D., and it allows substitution for the experience requirement by college-level education (in business or public administration or computer science) only to a maximum of two years. This distinguishes the positions at issue from the data processing analyst in City of Cudahy 9/, who was found to be a professional employe partly because the employer in that case had an expressed preference for a college degree which

8/ While Teamsters urge us to consider directing accretion elections which would allow small groups of employes to determine whether they wished to be added to existing units, we reject that option because inter alia if the employes reject union representation they are left stranded in inappro-priate and fragmented groups of the purposes of collective bargaining. See Fox Valley Technical Institute, Dec. No. 13204 (WERC, 12/74).

9/ Dec. No. 19507 (WERC, 3/82).

the incumbent was on the point of completing, and partly on the ground that the incumbent there was the senior official of the City's data processing department.

Unlike Cudahy, the County here has expressed no consistent preference for the education characteristic of a professional employe and we are satisfied that the work in question does not require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The evidence also does not demonstrate that the Senior Computer Systems Specialists have the discretion possessed by the data processing analyst in Cudahy, particularly in view of the existence of higher-level supervision within their department. Accordingly, though requirements (a) and (c) of a the definition of professional employe are satisfied in this instance, we find that these positions do not meet requirements (b) or (d), above. They are therefore included in the residual nonprofessional bargaining unit.

Architectural Engineering Technician

The Architectural Engineering Technician has an office in the Department of Facilities Management, and the position was created in late 1987. The position description for this position requires a high school graduation with six years' experience including drafting and architectural engineering duties, and allows substitution of a bachelor's degree in architectural engineering for four years of the work experience requirement. The original job description specified that the incumbent does manual and computer aided drafting and design, investigates layout, design, structure, materials and utilities of existing county buildings, and writes reports and requests for proposals for the design and construction of County facilities. County Labor Relations Manager Jim Richter, the sole witness to testify concerning this position, testified that the responsibilities of this position have been augmented since the position's creation. Richter testified that this employe has responsibility for the design and development of building and construction needs for the County including handicapped accessible entrances, remodeling of office spaces, design and development of a new roof at a building, and a portion of the project at the County's new ice arena. The Architectural Engineering Technician has the responsibility of developing specifications for contracting out, as well as working with the contractor and monitoring the work. Richter testified that this employe is assigned particular projects and has discretion as to the handling of his work within the projects assigned.

The level of discretion entrusted to the Architectural Engineering Technician, and the thrust of the original job description's emphasis on education, distinguishes this position from two similarly-titled positions which we have previously found not to be professional. In Milwaukee County 10/ we found the incumbents in the Architectural Engineering Technician position not to be professional employes because they lacked consistent exercise of discretion and judgement in their duties and because education beyond high school could be substituted for the experience requirement only up to two years. Similarly, the Engineering Technician in Milwaukee County 11/ was found not to be a professional position because the incumbents' main responsibility was construction site inspection, they had little independent discretion or design responsibilities, and their job descriptions made no reference to a requirement for college education. Here, however, there is substantial discretion vested in the Architectural Engineering Technician, who according to the only testimony presented at the hearing, functions in effect as an architect at least part of the time. Furthermore, the recognition given to education in this position combines with the exercise of discretion and the ability to specify the nature of the design to be carried out demonstrates professional status. We accordingly conclude that this position satisfies all of the requirement of Sec. 111.70(1)(L), Stats., and should be excluded from the residual bargaining unit.

Computer Operator and Network Support Technician

The County alleges that the incumbents in these two positions are confidential employes because their access to the computer console gives them potential access to all County computer-maintained records, including confidential labor relations data stored in the computer system by the County personnel office. AFSCME asserts that the positions are not confidential.

The record establishes that neither employe has job responsibilities which require that they have any specific involvement with the confidential data stored in the computer. Neither employe has any involvement in costing proposals or retrieving and printing confidential matter. Nonetheless, the County asserts the potential for either employe to improperly use their general access to the console to obtain confidential data should be sufficient to exclude these employes from any bargaining unit. We do not agree.

10/ Dec. No. 8765-G, (WERC, 9/84).

11/ Dec. No. 14786-B, (WERC, 4/80).

In our view, the critical question is whether a position's actual job responsibilities require sufficient access to, knowledge of or participation in confidential labor relations matters. Even when a position's responsibilities require access to confidential data, we have nonetheless found a position not to be confidential if performance of such responsibilities involves a de minimus amount of employer's time. 12/ Here, none of either position's actual responsibilities require that the employes have actual access to specific confidential data. The potential that an employe will abuse their general access to the computer to gain actual access to confidential matters is not sufficient to find these employes to be confidential.

Clerk Typist III, Sheriff's Department

Having resolved the parties' dispute as to inclusion of certain specific currently unrepresented employes in the nonprofessional residual unit, we turn to the County's contention that the Clerk Typist III should be excluded from the existing Courthouse unit as a confidential employe.

The incumbent in this position is secretary to the Sheriff, deputy inspector, business manager and senior law enforcement analyst of the Sheriff's Department. No other employes perform certain secretarial duties for these five officers, and Mary Orcholski, the incumbent, has access to the department's disciplinary and grievance files. She also types responses to grievances, employe evaluations, letters concerning pending charges for discipline, and documents relating to litigation against the County which involves the Sheriff's Department. She spends approximately 20% of her work week maintaining personnel records of one kind or another. She has not been used to type responses to grievances or drafting of letters relating to collective bargaining strategy. During the year before she testified, Orcholski had typed five or less disciplinary notices for the supervisors. She keeps track of supplies for the whole Sheriff's Department, and keeps a file on squad cars. She makes up the new employe files and closes out files for employes who leave. She does not sit in on meetings where bargaining strategy or grievance handling strategies were discussed. Orcholski did testify, however, that she had typed letters on at least one occasion to the County's attorneys concerning litigation. Orcholski testified that of the approximately 250 employes in the Sheriff's Department, she had been used to type evaluations for eight or nine of them, which included just those employes directly supervised by the Inspector or Deputy Inspector.

It is clear that the Clerk Typist III performs some confidential duties and has access to certain confidential files. However, access to or handling of data which is available to the union or employe does not constitute confidential work, and this type of data, including personnel files, constitutes the majority of the information which the County here refers to as confidential. Thus, it is clear that the vast majority of Orcholski's time is occupied by matters which are not confidential in the labor relations sense. The Clerk Typist III here appears, therefore, quite similar to the clerk typist III in Milwaukee County 13/, who spent about 5% of her time on confidential matters; or to the administrative secretary in the Department of Public Works in City of Port Washington 14/, who had some de minimis contact with confidential material, but for whom another employe was available to substitute. 15/ In view of the relatively small percentage of Orcholski's time spent performing confidential labor relations matters, we find that her confidential duties are de minimis and that she shall continue to be included in the Courthouse unit.

Community Health Educator

Lastly, we turn to the question of whether it is appropriate to honor AFSCME's request that we include the Community health Educator in either of the two existing AFSCME units containing professional employes.

The County's Health Department employs one Community Health Educator, Janet Smith, who is conceded by AFSCME and the County to be a professional employe. AFSCME contends that a community of interest exists between the Community Health Educator and either the Sanitarians bargaining unit or the Nurses bargaining unit, and that the position should be placed without an election in either of those two units at the Commission's discretion. The County contends that the Community Health Educator does not have a community of interest with any AFSCME represented employes and that accretion into the Local 2494(B) Sanitarians unit, at least, would be inappropriate because said unit included both professional and nonprofessional employes.

The record shows that the Community Health Educator works out of the Health Department offices, and has a cubicle in that area adjacent to the Public Health Nurses and Sanitarians. She has a Bachelor's Degree in community health education. She is required to develop and implement educational programs on health-related issues and presents these programs to community groups, service clubs, schools, etc., at times in conjunction with a Public Health Nurse. Thus, we find here a similarity of her duties to those functions commonly associated with a Public Health Nurse. We conclude from the record that the position shares a sufficiently strong community of interest with employes in the Nurses unit to be included therein. 16/

Dated at Madison, Wisconsin this 27th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

13/ Dec. No. 7135-S (WERC, 2/85).

14/ Dec. No. 21205-A (WERC, 11/84).

15/ Cf. Door County, Dec. No. 24016 (WERC, 8/89), in which the secretary in the Sheriff's Department was found a confidential employe because she performed more than de minimis amounts of work with confidential labor relations material and it was demonstrated to be impractical to transfer these duties to another employe.

16/ See Dane County, Dec. No. 15696-A (WERC, 12/88).