

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :  
LOCAL 60, AFSCME, AFL-CIO : Case 14  
Involving Certain Employees of : No. 48285 ME-608  
CITY OF FITCHBURG : Decision No. 26874-B  
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Appearances:

Mr. Darold O. Lowe, with Mr. Michael J. Wilson on the brief, Staff  
Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana  
Court, Madison, Wisconsin 53719-1169, on behalf of Local 60.  
DeWitt, Porter, Huggett, Schumacher and Morgan, S.C., by Ms. Linda Zech, 2 East

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

On October 6, 1992, Local 60, AFSCME, AFL-CIO ("the Union") filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing bargaining unit involving certain employees of the City of Fitchburg ("the City"). By its petition, the Union sought the inclusion into the unit of the positions of Clerk of Courts/Staff Supervisor and Solid Waste Coordinator. Hearing in the matter was held on March 19, 1993, in Fitchburg, Wisconsin, before Hearing Examiner Stuart Levitan, a member of the Commission's staff. The City stated at hearing that the position of Solid Waste Coordinator did not exist, which assertion the Union accepted. A stenographic transcript was prepared by March 23, 1993. The Union submitted written arguments on April 1, 1993, and waived its right to file a reply brief. The City filed written arguments on April 23 and May 11. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Local 60, AFSCME, AFL-CIO, herein the Union, is a labor organization with offices at 5 Odana Court, Madison, Wisconsin.

2. The City of Fitchburg, herein the City, is a municipal employer with offices at 2377 South Fish Hatchery Road, Fitchburg, Wisconsin.

No. 26874-B

3. On June 12, 1991, the Wisconsin Employment Relations Commission certified the Union as the exclusive collective bargaining representative for a unit defined as follows:

All regular full-time and regular part-time employees of the City of Fitchburg, excluding confidential, supervisory, managerial, craft, law enforcement employees with the power of arrest, and professional employees and employees in existing bargaining units.

There are approximately 17 members of this bargaining unit, working in scattered sites (the Community Center, the utility building, the public safety building, and City Hall).

4. The definition of the bargaining unit, and the eligibility list for an election, were stipulated to by the parties on April 19, 1991, in the presence of Hearing Examiner Stuart Levitan. The position of Clerk of Courts/Office Supervisor was in existence on April 19, 1991, since which time the position, the incumbent, and the duties have remained unchanged. The City on April 19, 1991 claimed exclusion of the position of Clerk of Courts/Staff Supervisor on the grounds of supervisory status, which representation the Union did not challenge.

5. The City employs four full-time dispatcher and one police assistant (formerly the animal control officer) positions represented by the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division; about 18-19 police officers represented by Teamsters Union Local 695; four unrepresented sergeants; one unrepresented lieutenant; about eight to ten unrepresented part-time dispatchers, and Police Chief Terry Askey.

Dispatcher shifts are 0700-1500; 1500-2300 and 2300-0700 hours; dispatchers may choose their shifts on the basis of seniority. The police assistant works 0800-1600, Monday-Friday. Each shift has a sergeant; the lieutenant works either 1100-1900 or 1200-2000 hours. Depending on various variables, a normal 1500-2300 shift might find at work the Police Chief, the lieutenant, a sergeant, the Office Staff Supervisor and one dispatcher. The collective bargaining agreement also provides for vacation selection on the basis of seniority. Overtime is offered on the basis of seniority, if part-time dispatchers are not available. Overtime can be taken either as compensatory time or in money; as long as the employee's compensatory time balance is less than 40 hours, the choice of time off or cash payment is the employee's. The scheduling of compensatory time off is similar to that of vacation.

6. The position description for the Clerk of Courts/Office Staff Supervisor, substantially accurate in its terms, is as follows:

**Position Summary:**

Under the general direction of the Police Chief, plans, organizes, and directs the court operation with the Police Department. Insures that dispatchers give prompt and accurate dispatching of proper police and/or medical emergency units requiring service and insures that accurate information concerning non-emergency inquiries is furnished. Decisions within areas of responsibility are made independently. Supervision received is general with periodic review of progress. Supervises dispatchers. Supervision given is limited. Work plans are discussed with periodic review of progress. There is frequent interaction with the

general public.

**Duties/Responsibilities:**

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

50%A. Insure that all clerical services are provided in an efficient manner.

1. Formulates and implements correspondence concerning the municipal court system.

2. Issues summons, warrants, and court-ordered assessments.

3. Makes decisions concerning scheduling of municipal court activities. Assures appropriate parties are available for court appearances.

4. Reviews all new laws and procedures. Attends schools, seminars and conferences.

5. Provides copies of new laws, regulations and procedures to police officers.

6. Records all fines and levies concerning the municipal court system. Reconciles books, makes bank deposits, and corresponds with banks as necessary.

7. Makes recommendations to the Chief on hiring of civilian personnel for dispatchers.

8. Recommends purchase of court and office equipment.

9. Determines needs, locates supplies and makes purchases of routine supplies and equipment.

10. Maintains inventory records of supplies and inspects shipments of supplies for the municipal court system.

**50% B. Provide administrative support to the Police Department.**

1. Schedules dispatchers and animal control officer.

2. Schedules schools and training for dispatchers.

3. Approves and records vacation, sick time and comp time.

4. Directs personnel to report to work when minimal staffing is involved.

5. Determines office procedures and sequence of work to be performed.

6. Composes letters, memoranda, and schedules appointments for the Chief.

7. Tabulates statistical data, maintains inventory records,

and assists with the completion of forms,  
license permits and receipts.

8. Provides accurate information to the general public.

**Knowledge and Ability:**

Knowledge of information that can be released to the public and other officials and which information is restricted. Ability to deal effectively with the general public, communicate effectively orally and in writing, type, operate computer equipment.

**Qualifications:**

Associate degree in Police Science, Office Management or related field. One year of experience as a dispatcher or performing duties in a police department or legal office.

7. Susan Eifert, the incumbent Clerk of Courts/Office Staff Supervisor, works 37.5 hours weekly, 0800-1600 hours, Monday-Friday (1200-2000 on court days), in an office located at the police department safety building, 5791 Lacy Road. Apart from the court bailiffs, and Municipal Judge Hamdy Ezalarab, Eifert is the sole employee in the clerk of courts department. Eifert's primary duties are to prepare court orders and other documents for Ezalarab's signature, schedule court sessions, and perform other administrative tasks. On average, Eifert spends less than an hour in daily supervision of the dispatchers, including handing out assignments. When Eifert is not on duty, direction of dispatchers is provided by the on-duty sergeant or lieutenant. Her annual salary is approximately \$28,000. For weekly hours over her normal load, Eifert receives premium pay. When the City hires new dispatchers, Eifert schedules interviews and sits on the interview panel with one full-time dispatcher and the lieutenant (formerly, a sergeant so participated); the interview panel then makes a recommendation on hiring to the Chief of Police, who then interviews the candidate before making a decision. Over the past year, the committee, operating by consensus, recommended two hires to the Chief, both of which he approved. In the event the committee was deadlocked, the committee would probably report its divided opinion to Askey, leaving it to him to interview and select. In 1992, Eifert reported to the Chief that a dispatcher was misusing sick leave, which report resulted in the dispatcher's termination. Eifert reports her personal personnel matters (vacation, sick leave, etc.,) to Lieutenant Blottner and Chief Askey. Eifert has denied compensatory time off requests when they conflict with previously scheduled vacation, or when they posed the risk of an unfilled shift. Eifert is not a step in the grievance process, and has no authority to satisfy or adjust a grievance. Once, when Eifert gave an employee a directive, and the employee told her to, "fuck off," Eifert reported the matter to the Chief and recommended a letter of reprimand, which was issued; Eifert does not have the authority to issue such a reprimand on her own authority. If a dispatcher reports and is unfit for duty, Eifert would send the dispatcher home and report the incident to Askey. Employees are required to report illness four hours before the start of their shift, unless in cases of emergency. If a first-shift dispatcher called in to report illness with less lead time, the on-duty sergeant would have authority to approve sick leave and find a replacement. Eifert herself dispatches about an hour each day, primarily providing breaks.

8. In addition to the work-force and representation identified in Finding of Fact 4, the City employs approximately nine highway, parks and utility maintenance workers, represented by Teamsters Local 695. During collective bargaining for the several units, the City's negotiating team consists of City Administrator Daniel Elsass; the chairpersons of the Fitchburg

Common Council's Personnel and Finance committees, and a position or positions from the affected department. The departmental representative is present primarily to provide technical expertise on questions of work rules or procedures (such as changes in the scheduling or shift procedures), but is privy to the City's bargaining strategy. Eifert has served and continues to serve as a departmental representative on the City's bargaining team during negotiations with the dispatcher unit. Eifert has also testified as a City witness in an arbitration proceeding.

9. Susan Eifert, the incumbent Clerk of Courts/Office Staff Supervisor, does have sufficient access to or involvement in matters relating to confidential labor relations to be deemed a confidential employee.

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

#### CONCLUSIONS OF LAW

1. The Union's unit clarification petition is not barred with respect to the position of Clerk of Courts/Office Staff Supervisor by the Union's prior failure to challenge the City assertion that the position was supervisory.

2. The incumbent in the position of Clerk of Courts/Office Staff Supervisor is a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Wis. 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/

The position of Clerk of Courts/Office Staff Supervisor shall continue to be excluded from the existing collective bargaining unit represented by Dane County Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO.

Given under our hands and seal at the City of  
Madison, Wisconsin this 23rd day of August,  
1993.

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

(Footnote 1/ appears on the next page.)

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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.

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.

(Footnote 1/ continues on the next page.)

(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.

CITY OF FITCHBURG

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

POSITIONS OF THE PARTIES

The Union

In support of its position that the bargaining unit should be clarified by the inclusion of the Clerk of Courts/Office Staff Supervisor, the Union asserts that the subject position is neither supervisory nor confidential, but rather a municipal employee who should be accreted to the existing residual bargaining unit. Further, there is no procedural bar to such accretion.

A dispute apparently exists as to the grounds the subject position was excluded from the voting group in April, 1991. The Union believes the exclusion was on the grounds of supervisory status, while the City contends it was purely for expediency. The City's argument is doubly confusing. First, it argues that there is nothing repugnant to the MERA by the exclusion of the subject position in the bargaining unit, even as it is arguing that the position is, and always has been, supervisory and confidential. Moreover, the City would have the Commission believe that the Union abandoned an otherwise eligible voter purely for expediency's sake, even in the absence of any depiction of confidential and/or supervisory status. The record, however, is clear as to the City's warranty of supervisory and/or confidential status on the part of the subject position.

While the City argues against inclusion of this position in the residual unit, the Union asserts such inclusion is appropriate. The description of this unit includes "all regular full-time and regular part-time employees ... excluding employees in existing bargaining units." Other City units exclude this position as outside their specific jurisdictional boundaries or by specific and express classification references. Further, no other bargaining unit has made a claim for this position. The residual unit is appropriate.

As to the merits, the Union argues that this position is neither supervisory nor confidential.

The bulk of the work performed by dispatch and the municipal court is routine and predictable. The subject position spends only an hour per day in the supervision of dispatchers. The subject position cannot discipline or effectively recommend discipline. Her role in the hiring of dispatchers is limited and not distinguishable from the role played by full-time dispatchers. The City's portrayal of the position's supervisory authority is exaggerated. The position is not supervisory.

Nor is the position confidential. Her attendance at bargaining sessions is for technical expertise alone, and there is nothing in the record to establish any involvement in confidential labor relations. Any information she provides is either available to the Union, or information which the City can obtain through the supervisory Lieutenant or Sergeants.

The subject position was voluntarily excluded on a statutory basis, namely claimed supervisory status, making this proceeding appropriate. The position now qualifies as neither supervisory nor confidential, making the position municipal. The residual unit is the appropriate unit to which the position should be accreted.

The City



In support of its position that petition should be dismissed, the City asserts that the Commission cannot issue an unconditional order expanding the unit to include the subject position, in that prior Commission decisions prohibit the procedure in the case of voluntary agreements concerning the unit. Uncontradicted evidence demonstrates that each and every factor identified in Midstate VTAE (Dec. No. 14526-A) is present, and that expansion of this unit under this procedure is barred.

As proof that the Midstate factors have been met, the record shows that the subject position was in existence on the date of the voluntary agreement as to unit composition; there have been no changes in job description or duties; the agreement was explicit and voluntary, and the only evidence in the record is that the agreement was one of expediency; the City continues to oppose expansion of the unit to include the subject position; no intervening events have been identified which would materially affect the status of the incumbent; there are no anticipated changes to the job; continued exclusion will not be repugnant to the MERA. The Union, having received the benefit of the City's concession in exchange for an agreement as to a timely election should not be permitted to now change its mind, especially given that the Union is not operating in good faith and is motivated by a desire to place pressure upon the City.

Notwithstanding the foregoing, the inclusion of the subject position would be inappropriate in that the position is supervisory and confidential.

The incumbent has substantial supervisory duties regarding the dispatchers and police assistant, consistent with those set forth in her job description. She has the authority to effectively recommend hiring, discipline and discharge; to direct and assign work; to respond to grievances, and to perform a number of other duties related to the many facets of her job. Clearly, the totality of the evidence demonstrates sufficient supervisory responsibility and authority for the subject position to be excluded from the unit.

The overwhelming evidence also indicates that the position is confidential, and that taking this trusted position from the Chief of Police would be unduly disruptive of the police department under his supervision. The subject position is the first step in the grievance process for the dispatchers, even though the incumbent was not aware of this procedure at the time of hearing.

Without good reason, the Union has forced the City to respond to a dispute that was resolved by a voluntary agreement two years ago. The Commission should hold that, as a matter of law, the Union's petition is barred. In the alternative, the Commission should hold the subject position excluded from the unit on the grounds that it is supervisory and/or confidential.

The Union did not file a reply brief. In response to the Union's brief, the City posits further that the Union has failed to find any support in the record to demonstrate that this petition was appropriate. There isn't even a hint of evidence that the April, 1991 agreement was anything but a deal cut between the parties to expedite the process. While the City clearly asserted supervisory status as the primary grounds for exclusion, the Union has never accepted this analysis, as evidenced by this petition.

The Union's reliance on City of Sheboygan (Water Department) is not on point. In that case, there was evidence in the record supporting the Commission's decision. Here, there is nothing in the record supporting the Union's position, other than bald assertion and wishful conclusion. Moreover, no equitable purpose will be served by sanctioning the Union's conduct in this case.

Further, the subject position is not a municipal employee. The Union has cited only a tiny portion of the record testimony, ignoring the vast majority of evidence which unequivocally demonstrates the substantial supervisory and confidential duties of the position. The record shows that the incumbent exercises a great deal of independent discretion in regards to discipline and discharge, and that her decisions are routinely adopted and implemented by the Chief of Police. The Union's attempts to minimize the important confidential functions which have been an integral part of this position are also futile; it is difficult to imagine a more confidential role than sitting on the City's bargaining team, as this incumbent has done.

The petition should be denied as improper, or, in the alternative, a decision should be issued excluding the subject position from the unit on the statutory grounds of supervisory and/or confidential status.

#### DISCUSSION

The threshold question is whether the Union is foreclosed from pursuing this unit clarification by virtue of the agreement it reached with the employer regarding the initial voting group. We find that it is not so barred.

The Commission has held that where the parties have agreed to include or exclude certain positions from a collective bargaining unit, it will honor that agreement and will not allow a party to the agreement to pursue alteration of the bargaining unit's scope through a unit clarification petition unless:

1. The position(s) in dispute did not exist at the time of the agreement; or
2. The position(s) in dispute were voluntarily included or excluded from the unit because the parties agreed that the position(s) were or were not supervisory, confidential, managerial or executive (the so-called "statutory exemptions"), or;
3. The position(s) in dispute have been impacted by changed circumstances which materially affect their unit status; or
4. The existing unit is repugnant to the Act. 2/

Clearly, three of the conditions do not apply in the instant situation. The position at issue was in existence on April 19, 1991, when the parties reached their agreement. Changed circumstances have not materially affected the unit status of the position. The continued exclusion of the position would not make the bargaining unit repugnant to the MERA.

The Union's only remaining argument, therefore, is that the position was initially voluntarily excluded on one of the so-called "statutory exemptions," namely that the position was supervisory.

As noted in the Findings of Fact, the record satisfies us that in April, 1991, the City represented to the Union that the position was supervisory and

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2/ Edgerton School District, Dec. No. 18856-A (WERC, 5/90), City of Sheboygan, Dec. No. 7378-A (WERC, 5/89); see generally City of Cudahy, Dec. No. 12997 (WERC, 9/74), Milwaukee Board of School Directors, Dec. No. 16405-C (WERC, 1/76); West Allis - West Milwaukee Schools, Dec. No. 16405 (WERC, 1/89).

the Union did not challenge that representation. Given that scenario, we are satisfied that there was an agreement within the meaning of exception 2 above to exclude the position. Thus, the Union's petition is not barred. We turn, therefore, to consideration of this matter on its merits.

For an employe to be held confidential, such employe must have 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 or litigation, and (b) be information which is not available to the bargaining representative or its agent. 3/

The record establishes that the incumbent is a member of the City's bargaining team for the dispatcher unit. As a member of the team, she clearly is privy to the City's bargaining strategy and thus has sufficient access to or involvement in labor relations matters to be deemed a confidential employe.

Accordingly, we have not found it necessary to determine whether the position is also supervisory and have ordered the continued exclusion of the position from the collective bargaining unit represented by AFSCME.

Dated at Madison, Wisconsin this 23rd day of August, 1993.

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