STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 742, Affiliated With DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and PAT MERKOVICH, Complainant, vs. CUDAHY PUBLIC LIBRARY, Respondent.	Case 2 No. 45561 MP-2470 Decision No. 26931-C

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, Suite 200, 611 North Broadway, Milwaukee, Wisconsin 53202-5004, by Ms. Monica M. Murphy, appearing on behalf of the Complainants.

Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, by Mr. Robert W. Mulcahy and Mr. John J. Prentice, appearing on behalf of the Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 1, 1992, Commission Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum wherein he dismissed the complaint in the above matter based upon his conclusion that the Cudahy Public Library had not committed any of the alleged prohibited practices. The Complainants timely filed a petition for review with the Wisconsin Employment Relations Commission pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument, and the briefing schedule was completed on July 1, 1992.

Having considered the matter and being fully advised in the premises, the Wisconsin Employment Relations Commission hereby makes the following

ORDER 1/

The Examiner's Findings of Fact, Conclusions of Law and Order are

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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

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affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of October, 1992.

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/ Continued

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.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

As initially filed on April 9, 1991, the instant complaint alleged that Complainant Union is the certified representative of a bargaining unit of Respondent's employes which unit has at all material times included Complainant Merkovich. It further asserts that Respondent violated Secs. 111.70(3)(a)1, 2, 3, and 4, of the Municipal Employment Relations Act (MERA) beginning on or about February 8, 1991, by bargaining directly with Complainant Merkovich regarding terms and conditions of her employment; by failing and refusing to contact or bargain with Complainant Union regarding Complainant Merkovich's terms and conditions of employment, even when requested by Merkovich to do so; and by conducting itself on several occasions in a manner designed to intimidate and harass Complainant Merkovich causing her emotional and physical distress and undermining Complainant Union's status as Complainant Merkovich's bargaining representative. As amended on June 25, 1991, the complaint further alleged that Respondent had violated the above sections of MERA on June 14, 1991, by informing Complainant Merkovich that her employment was terminated as of June 28, 1991 and that she was being replaced with a new hire. At the complaint hearing, Complainants were permitted to further amend the complaint to allege that Respondent also failed or refused to bargain with the Union concerning the impact on bargaining unit wages, hours and conditions of employment caused by the creation of a confidential secretary position. The amended complaint requests that Respondent be ordered: to reinstate Complainant Merkovich to her position as administrative secretary; to bargain with Complainant Union regarding changes in the terms and conditions of employment of Complainant Merkovich; to cease and desist from committing prohibited practices against Complainant Union, its agents and the employes it represents; to make Complainant Merkovich whole for any losses suffered as a result of Respondent's prohibited practices; and to provide such other relief as appears to be just and proper.

In its answer filed on July 5, 1991, as amended at the hearing to meet Complainants at-hearing complaint amendment, Respondent denied that it committed any of the alleged prohibited practices. Respondent asserted that the amended complaint fails to state a cause of action under MERA because Complainant Merkovich was not a member of the bargaining unit represented by Complainant Union but rather was employed at all material times employed in a confidential position such that she was not a "municipal employe" within the meaning of Sec. 111.70(1)(i), Stats. Respondent notes in that regard that Complainant Merkovich was not on the eligibility list used in the election and that when she attempted to vote in the election, her ballot was challenged. Respondent's answer also asserts that the complaint constitutes harassment of the Respondent by Complainant Union and an attempt "to force Respondent to be without any confidential secretary in its upcoming initial contract negotiations and for other matters." Respondent requested in its answer that the amended complaint be dismissed and that Complainants be ordered to pay Respondent's costs and attorneys fees and such other relief as may be deemed appropriate.

The Examiner's Decision

As to Complainant Merkovich, the Examiner concluded that Respondent Cudahy Public Library did not commit any prohibited practices because Merkovich was not a municipal employe. The Examiner based his conclusion as to

Merkovich's confidential status upon the following rationale:

> Most of the amended complaint allegations rest on the premise that Complainant Merkovich was a municipal employe entitled to the protections of MERA on and after February 8, 1991 when Respondent is alleged to have violated her MERA rights. The Examiner has concluded that she was not a municipal employe, but rather that hers was a confidential employe position at those times.
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> Both parties argue strenuously, in effect, that the other is estopped from claiming in this proceeding that Complainant Merkovich was or was not a confidential employe at material times on and after February 8, 1991. It is the Examiner's opinion, however, that neither the representation election case nor the failure of the parties to file a post-certification unit clarification petition concerning Complainant Merkovich's status deprives either of them of the right to argue herein about what her status was at times following the Certification of Respondent Union as representative of the bargaining unit described in Finding of Fact 11. The WERC did not have occasion to hear evidence on or to rule on Complainant Merkovich's status in the Direction of Election which it issued, because that issue was not raised during the course of the representation case. At most, the absence of a dispute about the Union's proposed inclusion of the Secretary/ Bookkeeper position might be viewed as a stipulation to the inclusion of that position in the bargaining unit. However, there were some significant developments in the nature of Complainant Merkovich's job as well as a change in its title during the pendency of the representation case. Specifically, the job changed from temporary to permanent; the pay rate was increased; weekly hours were increased from 15 to 20; work days were changed from Monday-Wednesday-Friday to every weekday; and a new and materially expanded description of duties and responsibilities was approved by the Library Board, as set forth in Finding of Fact 13. In these circumstances, Respondent cannot be deemed foreclosed from asserting herein (as it has) that the Administrative Secretary position had become that of a confidential employe by the time of the events on and after February 8, 1991 which comprise the prohibited practices alleged in the amended complaint. By so concluding, the Examiner is definitely not to be understood as treating union silence in the face of unilateral eleventh-hour eligibility list correspondence from the employer as sufficient to bind anyone regarding the legal status of Complainant Merkovich's position. Rather, notwithstanding all of the contentions and counter-contentions about which of the parties had the burden of doing what, when, about the status of Complainant Merkovich's position, the bottom line is that her status as a municipal employe or a confidential employe at any given point in time

turns on the nature of her job at the point of time in question, rather than on any of the litigation-related considerations advanced by the parties. In other words, as Complainant Merkovich and Respondent jousted with one another during and after the representation case about Complainant Merkovich's status, they both were acting at their peril, i.e., taking the risk that they might sub-sequently turn out to be incorrect about what her status was at critical points in time.

The WERC's standards for determining whether a position is that of a confidential employe so as to be excluded from the Sec. 111.70(1)(i), Stats., definition of municipal employe are well established. As reiterated in, Village of Saukville, Dec. No. 26170 (WERC, 9/89), those standards are as follows:

> It is well-settled that, 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, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and, (B), be information which is not available to the bargaining representative or its agents. 1/
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> While a de minimis exposure to confidential materials is generally insufficient grounds for exclusion of an employe from a bargaining unit, 2/ 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. 3/ Thus, notwith-standing 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 4/ and, similarly, where a management employe has significant labor relations respons-ibility, the clerical employe assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, unless the confidential work can be assigned to another employe without undue disruption of the employer's organiz-ation. 5/

1/ Dane County, Dec. No. 22976-C (WERC, 9/88).

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

3/ Cooperative Educational Service Agency No. 9, Dec. No. 23863-A (WERC, 12/86).

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

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

Complainant Merkovich's exposure to confidential matters was perhaps de minimis prior to Respondent's calling the February 8, 1991 meeting to make sure she was willing to perform the full range of her duties in the context of the newly-established collective bargaining relationship with Complainant Union. However, the record evidence amply reflects the elements necessary under the applicable case law standards to render her position that of a confidential employe at least as of the Library Board's approval of her revised job description on May 16, 1990, if not as of her earlier written acceptance of the Administrative Secretary position. The development and approval of her new and expanded job description making clear and specific reference to the confidential labor relations responsibilities of the position was not merely a paper exercise. As noted above, it was accompanied by a change from temporary to permanent employment status, to working every weekday, for $1.00 per hour more pay and for five more hours each week. She was Respondent's sole clerical employe. Her boss had sole day-to-day labor relations responsibilities. She and her boss shared a small office and possessed the only keys to the locked file cabinet containing Respondent's personnel and leave accounting records. It would have been unduly disruptive of Respondent's operations to have the confidential work assigned to another employe of Respondent. The Examiner has therefore concluded that as of at least May 16, 1990, and hence at all times material to the amended complaint, Complainant Merkovich's position was that of a "confidential employe" and hence not that of a "municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

Given the foregoing, the Examiner held:

> Respondent could not have committed any of the alleged prohibited practices as regards Complainant Merkovich because her position was not within the "Municipal Employe" class protected by MERA at any time material to the alleged unlawful conduct by Respondent, and not

within the bargaining unit as to which Complainant Union was certified as exclusive representative.

The Examiner also rejected Complainants' argument that Respondent violated the rights of other bargaining unit members by its treatment of Complainant Merkovich. In this regard, the Examiner concluded that Respondent's agents had not been shown to have been hostile toward municipal employes' exercise of MERA rights and that Respondent's conduct was not reasonably likely to unlawfully undermine Respondent Union or to otherwise interfere with, restrain or coerce municipal employes in the exercise of their rights under Sec. 111.70(2), Stats.

Turning to the allegation that Respondent failed to collectively bargain with Complainant Union, the Examiner held:

Alleged Violations of Duty to Bargain with Complainant Union

> The Examiner finds Complainants' allegations of Sec. 111.70(3)(a)4 and 1, Stats., refusals to bargain to be fatally flawed in several respects. While Respondent engaged in individual bargaining with Complainant Merkovich about her wages, hours and other conditions of employment, Respondent did not thereby violate MERA because, for reasons noted above, Complainant Merkovich was neither a municipal employe nor therefore a member of the bargaining unit represented by Complainant Union when the individual bargaining took place on and after February 8, 1991. Because Complainant Merkovich was not a member of Complainant Union's bargaining unit at any time material to the complained of refusals, Respondent owed Complainant Union no duty to bargain as regards her wages, hours and other conditions of employment. The decisions to create the Administrative Secretary position, to offer it to Complainant Merkovich, and to approve the revised job description for that position were made in February and May of 1990, during the pendency of the representation case and hence well before Respondent's duty to bargain with Complainant Union about anything arose. Furthermore, the decisions themselves would not be mandatory subjects of bargaining. See, City of Green Bay, Dec. No. 12402-B (Schurke, 1/75) esp. at 17, aff'd by operation of law, -C (WERC, 2/75), citing, City of Beloit, Dec. No. 12606-B (WERC, 11/74). Finally, the evidence does not establish that Complainant Union ever requested bargaining with Respondent on any of those subjects despite evidence that Respondent Union had knowledge of the creation of the Administrative Secretary position and that Respondent considered it to be that of a confidential employe. Complainant Merkovich's requests that Respondent meet with Complainant Union and her about the implications of her agreeing or not agreeing to perform the full range of her job duties were not -- in appearance or in record fact -- requests for bargaining made by or on behalf of Complainant Union. Hence, Respondents' refusals of Complainant's requests

that it convene and participate in such a meeting did not contravene Sec. 111.70(3)(a)4 and 1, Stats.

Positions of the Parties on Review

Complainants

Complainants argue that the Examiner erred by concluding that Merkovich was a confidential employe. They assert that despite his finding that Merkovich performed de minimis confidential duties, the Examiner nonetheless erroneously concluded Merkovich was a confidential employe at least by May 16, 1990, when her new job description was approved.

Complainants do not challenge Respondent's right to have a confidential employe. However, Complainants do question the method by which Respondent created a confidential position in this proceeding. In this regard, Complainants assert that Respondent never challenged Merkovich's inclusion in the bargaining unit during the election hearing before the Commission. Only when Merkovich's vote was challenged during the election itself did Complainant Union become aware of Merkovich's alleged confidential status. Complainants assert that an employer should not be allowed to pick out an employe who is a union supporter and eliminate them from a potential bargaining unit by adding confi-dential duties to their job description.

Given the foregoing, Complainants ask that the Examiner's decision be reversed.

Respondent

Respondent requests that the Examiner's decision be affirmed. It contends that Complainant Merkovich held a confidential position of Administrative Secretary established prior to the Union's certification and that the position's confidential duties were developed in good faith to provide confidential clerical assistance to management. Once the Union was certified, the confidential aspects of the Administrative Secretary position took on new significance. Thus, Respondent argues the position in question gradually evolved into a confidential clerical position which was also specifically excluded from the voter eligibility list used by the Commission in the election.

DISCUSSION

We have affirmed the Examiner's decision. As his extensive rationale, from which we have quoted herein, persuasively sets forth the basis for the dismissal of the complaint herein, we will not make an extensive response to the petition for review.

Suffice it to say that the record does not support the Complainants' contention that the Respondent decided to eliminate a Union supporter from the bargaining unit by adding insignificant confidential duties to her job. Instead, the record establishes that Merkovich was Respondent's only clerical employe; that Merkovich's supervisor was Respondent's day to day labor

relations representative and a member of Respondent's bargaining team; and that it would be unreasonable and unduly disruptive for the Respondent to have utilized some other employe to perform confidential work.

Thus, we concur with the Examiner's use of the Village of Saukville rationale as a valid basis for finding Merkovich to be a confidential employe and with his resultant dismissal of the complaint as to Merkovich.

We also affirm his dismissal of the complaint as to Local 742.

Dated at Madison, Wisconsin this 2nd day of October, 1992.

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