

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT COUNCIL 48, AMERICAN	:	
FEDERATION OF STATE, COUNTY &	:	
MUNICIPAL EMPLOYEES, AFL-CIO,	:	
AND ITS AFFILIATED LOCAL 2,	:	Case 109
	:	No. 48702 MP-2687
Complainant,	:	Decision No. 27606-B
	:	
vs.	:	
	:	
CITY OF GREENFIELD,	:	
	:	
Respondent.	:	
	:	

Appearances:

Ms. Monica M. Murphy, and Mr. Robert E. Haney, Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO, and its affiliated Local 2, referred to below as the Union.

Mr. Robert W. Mulcahy, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the City of Greenfield, referred to below as the City.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural history of this matter up to August 24, 1993, is set forth in City of Greenfield, Dec. No. 27606-A (McLaughlin, 8/93), which granted the City's motion to hold the complaint in abeyance pending the issuance of a Commission decision on a Unit Clarification petition involving the same parties. The Commission issued its unit clarification decision on October 26, 1993. In a letter dated October 28, 1993, I asked that the parties "advise me on your position on how to most efficiently process the complaint." In a letter filed with the Commission on November 3, 1993, the City asked that the complaint be dismissed. In a letter filed with the Commission on December 1, 1993, the Union opposed the City's motion and asked that a briefing schedule on the complaint be established. In a letter dated December 10, 1993, I stated that "I do not believe I have the authority to act on the complaint without issuing Findings of Fact, Conclusions of Law and formal Order", that I would direct that a transcript of the May 11, 1993, hearing be prepared and that the parties should "confer regarding a briefing schedule." In a letter filed with the Commission on February 21, 1994, the Union requested a copy of the transcript and suggested a briefing schedule. In a fax filed with the Commission on February 28, 1994, the City renewed its motion to dismiss, contending "(f)urther expense and litigation on this matter is nothing short of frivolous and a waste of both the City and the Commission's resources." In a letter to the parties dated March 9, 1994, I stated the following:

. . . The motion seeks action beyond my discretion and must be denied. Even if the complaint should be dismissed, the dismissal requires certain action on my part. Sec. 227.44(8), Stats., requires that "(a) stenographic . . . record . . . shall be made in any . . . class 3 proceeding." The April 8, 1993, notice of hearing states that this matter has been heard as a

"class 3 proceeding." Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats., underscores this requirement. Sec. 111.07(5), requires me to "make findings and orders." Sec. 227.47 Stats., clarifies that my decision "shall be in writing accompanied by findings of fact and conclusions of law." I cannot simply dismiss the above noted matter. Rather, I must assemble the record and write a written decision based on that record. I have not compelled the filing of briefs or your request of a transcript. I have afforded each of you the opportunity to file briefs. If either or both of you wish to waive the filing of a brief, that is your choice. I cannot compel either one of you to order a transcript. I must, however, order a transcript for the agency, and must await that transcript and your briefs (if you choose to file them), before preparing my decision. . . .

On May 20, 1994, a transcript of the May 11, 1993, hearing was supplied to the Commission. By June 30, 1994, each party filed a brief. On July 9, 1994, the parties submitted a series of exhibits for admission into the record.

FINDINGS OF FACT

1. The City of Greenfield, referred to below as the City, is a municipal employer with offices at 7325 West Forest Home Avenue, Greenfield, Wisconsin.

2. Local 2, AFSCME, AFL-CIO, affiliated with Milwaukee District Council 48, referred to below as the Union, is a labor organization with offices at 3427 West Saint Paul Avenue, Milwaukee, Wisconsin.

3. In February, 1981, the Union was certified as the exclusive representative of a bargaining unit described as follows:

All regular full-time, regular part-time and temporary clerical employees in the City Hall, Fire Department, Police Department, Municipal Court and Health Department, excluding the Deputy City Clerk, Secretary to the Director of Public Works, Secretary to the Police Chief, and all supervisory, professional, confidential and managerial employees.

4. The City and the Union have been parties to a series of collective bargaining agreements, including one which covered calendar year 1992. That agreement contains a grievance procedure which provides for arbitration as its final step.

5. Kathy Kasza is the incumbent Assistant Comptroller/Accountant, a position held by the employer to be newly created and unrepresented, with the following position description:

CITY OF GREENFIELD

JOB DESCRIPTION

ASSISTANT COMPTROLLER/ACCOUNTANT

REPORTS TO: Comptroller/Accountant

PURPOSE OF POSITION: The Assistant Comptroller/Accountant supervises daily operations of the Accounting and Data Processing Departments, maintains computerized financial and payroll systems, and assists in preparing financial reports.

ESSENTIAL FUNCTIONS:

- 1) Supervises daily operations of Accounting and Data Processing Departments relative to staff work assignments and evaluation of work performed.
- 2) Maintains computerized accounting and payroll systems. Prepares payroll and associated reports.
- 3) Prepares bank reconciliations, financial statements and other accounting reports, as requested by the Comptroller/Accountant, Mayor and Common Council.
- 4) Provides budget, payroll and associated confidential personnel information, as required, to appropriate city officials and agents.
- 5) Prepares information, agendas and minutes for the Finance Committee.
- 6) Interfaces with employees in resolving problems related to payroll, personnel issues, and/or budgetary expenditures.
- 7) Assists the Comptroller/Accountant in preparing and monitoring the City budget.

- 8) Attends Common Council, Finance Committee and city staff meetings, as necessary. Represents the City at meetings, conferences and hearings, when required.
- 9) Provides back-up to the Information Systems Specialist in operating the city's computer system.
- 10) Assumes the duties of the Comptroller/Accountant in his/her absence.
- 11) Performs other duties, as assigned by the Comptroller/Accountant.

PHYSICAL DEMANDS OF POSITION

- 1) Standing, walking, sitting and stooping.
- 2) Kneeling, crouching, climbing, balancing and bending/twisting.
- 3) Reaching, feeling, talking and hearing.
- 4) Far vision at 20 ft. or further, and near vision at 20 inches or less
- 5) Lifting, carrying, pushing/pulling: 40 lbs. or less.
- 6) Handling, grasping and fingering: calculator, computer keyboard, etc.

ENVIRONMENTAL/WORKING CONDITION OF POSITION

- 1) Inside workplace environment.

EQUIPMENT USED:

- 1) Typewriter, calculator, copy machine, computer terminal, fax machine, telephone and micro-computer.
- 2) Hand tools, such as hammers, wrenches, screwdrivers, etc.
- 3) Car.

EDUCATION/LICENSE/CERTIFICATION REQUIREMENTS:

- 1) Associate's (sic) degree in accounting, or related field, from an accredited college. Knowledge of general accounting principles, payroll and use of micro-computer programs. Prior experience should include a position of a supervisory nature. Bachelor's degree in accounting or related field is desirable.

- 2) Experience in municipal finance helpful.

KNOWLEDGE AND SKILLS REQUIRED FOR POSITION:

- 1) Effective communication, oral and written.
- 2) Read, write, add and subtract.
- 3) Skill in directing the work and supervision of employees.
- 4) Working knowledge of office practices and procedures, and skill in their application.

MEDICAL:

Applicants may be required to submit to a medical examination prior to appointment, consistent with requirements of the position, at the discretion of the Personnel Director.

RESIDENCY:

Residency is required within one (1) year after completion of a six-month probationary period, which would be a fifteen (15) mile radius of the City from South 76 Street and West Layton Avenue. Employees hired prior to December 6, 1977 are grandfathered from the residency requirement.

SALARY AND BENEFITS:

Wages and benefits are determined by the current union contract or general non-represented City ordinance in effect. Such benefits as Wisconsin Retirement Fund, health and life insurance, sick days, holidays, vacations, overtime pay and other fringe benefits generally appear in the contract or ordinance.

BACKGROUND:

All applicants may be fingerprinted and a record check made of local, state or federal authorities. A conviction is not an automatic bar to employment.

Kasza began with the City as part-time bookkeeper in March, 1985; her hours increased from 20 to 30 hours per week in 1986; in February, 1989, she became full-time. Her position description as Bookkeeper was as follows:

JOB DESCRIPTION

BOOKKEEPER or PART-TIME BOOKKEEPER

Desirable Training and Experience:

Graduation from high school with additional coursework in business, office, data processing and accounting is preferred. An associate degree in the accounting field is highly desirable.

Experience in municipal finance, accounting, payroll,

and the public budgeting process would be helpful. Additional experience in an automated environment, with knowledge in the use of personal computers and spreadsheets, is beneficial.

The ability to effectively communicate with the public, the staff, and other City departments, is required.

. . .

JOB DESCRIPTION

BOOKKEEPER or PART-TIME BOOKKEEPER

General Nature of the Bookkeeper Position:

Works under the general direction of the City Treasurer/Comptroller, performing duties relating to the maintenance of the municipal accounting system according to generally accepted accounting principles and other required government standards. Assists the City Accountant and the Treasurer/Comptroller in preparing, compiling, and maintaining the annual municipal budget and other financial reports. Knowledge of the payroll system and other health and benefit programs maintained by the City is required. An automated environment exists, requiring data entry, maintenance and retrieval of information on a computerized data base using CRT's, personal computers, and other automated systems. Contact with the general public and other City departments, using effective communication skills, is required. This position deals with confidential personnel, payroll and budget related matters, and should be considered management in nature.

. . .

JOB DESCRIPTION

BOOKKEEPER or PART-TIME BOOKKEEPER

General and Specific Duties:

- 1.) Assist the City Accountant and Treasurer/Comptroller in maintaining the automated general ledger accounting system in accordance with generally accepted accounting principles (GAAP), on the computer, which includes the posting, balancing, and reconciliation of all general and subsidiary ledgers.
- 2.) Assist the City Accountant in maintaining and updating the required fund accounting for the debt service fund, capital equipment fund, public works funds, refuse fund, escrow fund, sinking fund, sewer service fund, and other required fund accounts.
- 3.) Assist in the processing of monthly financial statements and other operating reports as required.
- 4.) Work in maintaining the payroll system,

including the processing of the biweekly payroll, and other related payroll reports and records.

5.) Assist the City Accountant and Treasurer/Comptroller in preparing, compiling, and maintaining the annual City budget and cash flow forecast.

6.) Work in maintaining and monitoring adherence to the City purchase order system, and processing of related invoices as received.

7.) Coordinate and maintain the accounts receivable billing system, including the aging of receivables, and contact with the collection agency as appropriate. Requires the processing of ambulance and false alarm invoices.

8.) Assist the City Accountant in maintaining and updating the inventory of fixed assets of municipal projects.

9.) Coordinate and assist in the operation and maintenance of computer hardware and software maintained in the Accounting Department, including PC's, CRT's, printers, and spreadsheet applications.

10.) Perform computer system operations and activities relating to the Accounting Department, including:

- a.) Interfacing of year-to-date data files with the general ledger.
- b.) Back-up of accounting files.
- c.) Processing system journal entries.
- d.) Closing of the month's activity, including preparation of trial balances, and revenue and expenditures guideline reports.
- e.) Data entry of budget information received from various departments.
- f.) Other related data entry work.

11.) Prepare necessary reports, letters and schedules for the Treasurer/Comptroller, through the use of wordprocessing and spreadsheets.

12.) Prepare and compile necessary disbursement schedules of various funds for presentation by the Treasurer/Comptroller to the Finance Committee and the Common Council.

13.) Attend meetings, seminars, and conferences as authorized in performance of the job.

14.) Assist the City Accountant in reconciliation of various bank statements.

15.) Assist in maintaining and reviewing account distribution of expenditures and revenue to determine if they are recorded in the proper accounts. Also

includes the distribution of payroll to the appropriate accounts.

16.) Work with other departments as authorized and directed by the Treasurer/Comptroller, relating to inquires on the budget, payroll, departmental expenditures, and proper verification of receipts and disbursements.

17.) Performs any other related assignments and tasks as directed.

Prior to August, 1990, the City's fiscal and financial affairs were overseen by a Treasurer/Accountant. Upon the retirement of the incumbent at that time, the City separated the two functions, raising the former represented deputies into Acting Treasurer and Acting Controller status. On January 3, 1992, Kasza was herself appointed Acting Comptroller/Accountant. The City hired John Possell as the Comptroller/Accountant in April, 1992, at which time Kasza continued to serve as Acting Comptroller/Accountant, to provide continuity and other services (including signing) related to the financial audit then underway. On November 30, 1992, Kasza was reclassified into the newly created position of Assistant Comptroller/Accountant, at which time her salary was changed from the contractual \$11.62 an hour to an annual \$27,000, as set by ordinance. During the period she served as Acting Comptroller/Accountant, Kasza was paid at the entry level rate for that position. She has a high school diploma and an associate degree in accounting from MATC.

Kasza supervises the Accounting Clerk, Information Specialist, Accounting Student Intern, and a vacant Data Entry Intern position. Kasza assigns and directs the work of the Comptroller's Office staff. Possell and Kasza have the same authority to effectively recommend discipline. During Kasza's tenure in the department there has not been an occasion to discipline or lay off employes. Kasza has the authority to approve vacation and/or disapprove vacation and sick leave requests. Kasza was involved in adjusting a bargaining unit employe's grievance regarding his placement on the salary schedule. Kasza has been involved in interviewing and selecting temporary employes and unpaid personnel such as student interns. She was responsible for initiating and administering a student intern program in which she has had influence over student grades. The City does not have a formal evaluation process for permanent employes. The only evaluation is performed at the end of a new employe's probationary period. Kasza independently performed probationary period evaluations, while serving as Acting Comptroller/Accountant, for two current unit members. These evaluations allowed two current employes to successfully complete probation. While still serving as Bookkeeper, Kasza exercised authority to hire a student intern, who has since become a permanent employe. In January 1991, Kasza interviewed candidates and hired a Data Processing Specialist. She has also been responsible for hiring student interns and other data entry interns. Kasza has attended Personnel and Finance Committee meetings since 1988-1989. Based on established formulas and information received from the Milwaukee Metropolitan Sewerage District, Kasza prepares the initial budget for the Water and Sewer Commission.

As part of the City's budgeting process when collective bargaining agreements are being negotiated, the City places money for contract settlements in various accounts such that the funds are available but not readily apparent to the Unions. To do this the Finance Committee, meeting as the Budget Committee with the Mayor and the Common Council President, have a closed session to determine how much money should be placed in what accounts. Kasza

is present for those meetings. Except for participating in these closed sessions, neither Possell nor Kasza have a formal policy-making role in collective bargaining sessions. Kasza has, however, had input in developing City bargaining proposals. This input dealt with uniform allowances, overtime provisions and standardizing various fringe benefits. She recommended changes in time off policies in the police contract, which would have lowered the City's financial obligation. Kasza performs costing functions for labor negotiations. Kasza and the Controller/Accountant are the only two individuals who have full access to the City's entire data base and are aware of the accounts in which collective bargaining monies are placed.

In her capacity of being in charge of payroll, she has the authority and responsibility to interpret and apply rules regarding time cards and time records. Falsification of time records can lead to disciplinary action. Kasza is responsible for notifying department heads about the importance of accurate time records. Kasza herself would not be involved in disciplining employees of other departments for falsifying time records. Kasza has the authority and responsibility to review all time sheets to determine that overtime is paid in accordance with City policies. Kasza applied the policy requiring bargaining unit members to be in pay status on the day before and after a holiday. Kasza has the authority and responsibility to raise payroll questions with department heads and to take action based on the response. If a department head disagrees with Kasza's payroll interpretation, she will yield to department head. Kasza maintains the City's official sick leave and vacation records for all full-time employees. She routinely checks to make sure that there is available time in appropriate banks. If there is not an adequate balance, Kasza withholds pay. On at least one occasion, she notified the Deputy Chief of Police and Mayor of her belief that a bargaining unit member was improperly receiving both sick leave and call-in pay; she was told to leave the matter alone. Routinely she has to recompute overtime and other pay items. On at least one occasion, she reported to the Mayor that she felt two particular officers were accumulating an extraordinary amount of overtime; the matter was subsequently addressed. In interpreting and applying policies concerning overtime pay, Kasza has had occasion to raise eligibility questions regarding Police Department bargaining unit personnel. These inquiries have resulted in the withdrawal of overtime payment requests. In reviewing payroll activities, Kasza has on at least one occasion (December, 1992) required a Local 2 employe to reimburse the City approximately \$800 for overpayment.

The City holds monthly department head meetings and weekly agenda meetings. Kasza attended these meetings while serving as Acting Comptroller/Accountant. She currently attends these meetings when the Comptroller/Accountant is not able to be present. Kasza has some effective authority to recommend adjustments within line items of her budget, and would have authority to make such adjustments if serving as Acting Comptroller/Accountant. In the absence of the Comptroller/Accountant, Kasza is in charge. The Treasurer is in charge when both the Comptroller/Accountant and Kasza are absent. She attends closed sessions meetings at which personnel and financial matters are discussed. She has appeared as a management witness in an arbitration proceeding brought by Local 2. Kasza has prepared management exhibits for an interest arbitration proceeding. Kasza interacts directly with department heads, alderpersons and the Mayor. Kasza represents the Department at council meetings and committee meetings in the absence of the Comptroller/Accountant.

Kasza was a union steward for one year, participating in bargaining for the 1989-1991 collective bargaining agreement. When Kasza served in a union capacity, she did not have the degree of access to confidential labor relations matters that she has now.

Kasza has sufficient access to and knowledge of confidential labor relations matters to be deemed a confidential employe.

6. The City maintains a Municipal Court, the Hon. Thomas Wilkoski, Municipal Judge, presiding. There are three clerical/support positions -- Court Administrator (formerly Court Clerk), Court Clerk and Typist -- all represented by AFSCME Local 2. The position description adopted by the Common Council on October 22, 1992, identifies the duties and responsibilities of the Court Administrator as follows:

CITY OF GREENFIELD

JOB DESCRIPTION

COURT ADMINISTRATOR

REPORTS TO: Municipal Judge

PURPOSE OF POSITION: Under direction of the Municipal Judge, the Court Clerk (sic) is responsible for the administration, supervision and management of the Municipal Court. Also assists the Municipal Judge in performing his/her statutory duties.

ESSENTIAL FUNCTIONS:

- 1) Knowledge of modern office practice and procedures, and skilled in their application. Good knowledge of business English, spelling and composition.
- 2) Data entry. Ability to type 50 wpm, operate the department computer and word processor, and take shorthand at 80 wpm.
- 3) Responsible for follow-up on case records, including correspondence.
- 5) Records in-court proceedings, findings and orders.
- 6) Responsible for maintaining confidentiality in interviews and making recommendations for new hires.
- 7) Responsible for matters of a confidential nature, such as discipline, and layoff, rehire, suspension and discharge recommendations to Municipal Judge.
- 8) Follows directive of Municipal Judge to rehire, (sic) suspend and discharge employees.
- 9) Receives employee complaints and handles grievances in a confidential manner in the absence of Municipal Judge.
- 10) Prepares annual budget, and compiles monthly and quarterly financial and statistical reports.
- 11) Coordinates, assigns and evaluates work of Municipal Court personnel.

- 12) Establishes office procedures and designs computer forms and reports.
- 13) Approves all department purchases.
- 14) Attends meetings with and on behalf of the Municipal Judge.
- 15) Maintains time cards of Municipal Court employees.
- 16) Performs other duties, as assigned by supervisor.

PHYSICAL DEMANDS OF POSITION:

- 1) Standing, walking, sitting and stooping.
- 2) Kneeling, crouching, climbing, and bending/twisting.
- 3) Reaching, feeling, talking and hearing.
- 4) Far vision at 20 ft. or further, and near vision at 20 inches or less
- 5) Lifting, carrying, pushing/pulling: 10 lbs. or less.
- 6) Handling, grasping and fingering: filing, typing, writing, etc.

ENVIRONMENTAL/WORKING CONDITION OF POSITION:

- 1) Inside workplace environment.
- 2) Exposure to irate individuals.
- 3) Exposure to dust: historical files and records.

EQUIPMENT USED:

- 1) Typewriter, calculator, copy machine, computer terminal, fax machine, telephone and answering machine.

EDUCATION/LICENSE/CERTIFICATION REQUIREMENTS:

- 1) High school diploma.
- 2) Two years of administrative or clerical experience in a court, court office, law office, or related course work desirable.

KNOWLEDGE AND SKILLS REQUIRED FOR POSITION:

- 1) Effective communication, oral and written.

- 2) Initiative, resourcefulness and good judgement. Ability to work independently, with little or general directives.
- 3) Read, write, add and subtract.
- 4) Skilled in use of computer, telephone, typewriter, fax machine, calculator, copy machine and answering machine.
- 5) Good interpersonal skills.
- 6) Ability to type 50 wpm and take shorthand at 80 wpm.
- 7) Good knowledge of office practice and procedures, and skill in their application.
- 8) Develops Municipal Court Standard Operating Procedures.
- 9) Skill in handling difficult and complex office situations.

MEDICAL:

Applicants may be required to submit to a medical examination prior to appointment consistent with requirements of the position, at the discretion of the Personnel Director.

RESIDENCY:

Residency is determined by the current union contract or general non-represented ordinance in effect.

SALARY AND BENEFITS:

Wages and benefits are determined by the current union contract or general non-represented ordinance in effect. Such benefits as Wisconsin Retirement Fund, health and life insurance, sick days, holidays, vacations, overtime pay and other fringe benefits generally appear in the contract or ordinance.

BACKGROUND:

All applicants may be fingerprinted and a record check made of local, state or federal authorities. A conviction is not an automatic bar to employment.

Judith Kumprey is the incumbent Court Administrator, serving at the pleasure of Wilkoski in a position the City contends is unrepresented. She started with the City as Court Clerk in September, 1986, and was reclassified into her current position on October 7, 1992, at which time her salary went from an hourly \$11.41 to an annual \$27,000. Kumprey shares a private office with Wilkoski; the other personnel work in a common area.

Wilkoski is present for court during the morning and early evening on three or four Wednesdays a month. He has delegated substantial supervisory authority to Kumprey, such that she assigns and evaluates routine work on a daily basis; attends department head meetings; has authority to approve and/or deny overtime and time off without pay; maintains and approves time records; has signed Worker's Compensation reports as the supervisor; and would be a step in the grievance process, although she has never actually handled a grievance. On her own authority, she devised new procedures for vacation, sick leave and

time off. A denial of time off without pay which resulted in a grievance would entail a grievance against an action of Kumprey's. Neither Wilkoski nor Kumprey have a formal role in the City's labor relations function, and neither are privy to management's labor relations strategy. Wilkoski has not been the object of any grievances. Kumprey issued a verbal reprimand to one employe, and has the authority to issue written warnings as well. Kumprey would have the authority to send an employe home if the employe was unfit for duty, but would have to involve Wilkoski in possible suspensions and terminations. Since Kumprey has held her position there has been no opportunity to hire a regular employe. However, Kumprey has hired temporary employes, whose work is largely routine. On occasion, Kumprey has brought to Wilkoski's attention her concerns about compliance with office procedures; he has instructed her to handle matters as she saw fit. The City has no formal system of evaluation. In seeking to have a permanent part-time position made full-time, Kumprey took the initiative, working with the necessary City departments to implement the action. Kumprey worked with a building committee in designing current facilities. At no time relevant has the office experienced layoff, discharge or suspension. Kumprey attends weekly department head and agenda meetings. Kumprey works within line items of an adopted budget in making purchases, and signing purchase orders as a department head. Kumprey believes that she can transfer funds between lines in an adopted budget, in accordance with the citywide policy. Kumprey prepares an initial departmental budget, which Wilkoski largely approves without change.

Kumprey possesses supervisory authority in sufficient combination and degree to be deemed a supervisory employe.

7. In Decision No. 18304-C, issued on March 31, 1982, the Commission made the following Conclusions of Law:

1. That, since the position of Bookkeeper is not confidential, the occupant of said position is a "municipal employe" within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

2. That the position of Clerk of Municipal Court is neither a confidential nor a managerial position, and therefore, the occupant of that position is a "municipal employe" within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act, and that said position shares a sufficient community of interest with clerical employes in the bargaining unit so as to warrant the continued inclusion of said position in said unit, within the meaning of Section 111.70(4)(d)2.a. of the Municipal Employment Relations Act.

In that decision the Commission made the following Order Clarifying Bargaining Unit:

That the positions of Bookkeeper and Clerk of Municipal Court be, and hereby remain included in the appropriate bargaining unit described in Finding of Fact 2.

The Union was, at the time of this decision, the exclusive bargaining representative for the bargaining unit noted in the Commission's Order.

8. In 1992, as part of the City's effort to assure its compliance with the Americans With Disabilities Act, Walt Ninkovich, the City's then-incumbent Personnel Director, reviewed all City job descriptions. After determining neither Kasza's nor Kumprey's job descriptions fit their then current duties, Ninkovich determined that the City should review their positions, updating their job descriptions to accurately reflect their duties. On August 10, 1992, the City filed a Unit Clarification Petition with the Commission, seeking to

have the positions of "Court Clerk" and "Bookkeeper" excluded from the bargaining unit. Between the filing of this petition and October of 1992, Ninkovich directed the preparation of job descriptions for the positions of Assistant Comptroller/Accountant and Municipal Court Clerk. The City Council's Personnel Committee and Common Council approved those job descriptions by the end of October, 1992. Neither Kasza nor Kumprey applied for these positions. The City did not post either position or use the Civil Service examination process to fill either position. In roughly the same time period, the City filled two secretarial positions through the Civil Service examination process. The City considers the Court Clerk and Bookkeeper positions vacant, but has taken no action to fill either.

9. In December of 1992, during the hearing on the Unit Clarification Petition noted in Finding of Fact 8, the Union first learned that Kumprey and Kasza occupied positions under job titles other than Court Clerk and Bookkeeper. The Union responded by requesting, in a letter dated December 18, 1992, to the City's Mayor, "to negotiate any pay increases for the" positions of Assistant Comptroller/Accountant and Court Administrator. The Union had unsuccessfully tried in collective bargaining, leading up to and preceding the agreement covering 1992, to bargain either a reclassification or a pay increase for the positions of Court Clerk and Bookkeeper. The City did not respond to the Union's letter of December 18, 1992, and has refused to negotiate the wage rate for the positions of Assistant Comptroller/Accountant and Court Administrator. On January 12, 1993, Ninkovich acted to discontinue Union dues deductions for Kasza and Kumprey "effective November 30, 1992." The Union filed grievances on

the City's unilateral actions regarding these positions. The City has, between 1985 and the present, added not less than five positions to the unit represented by the Union, and has acted in that time period to add hours to not less than three positions.

10. The Commission determined the issues posed by the August 10, 1992, Unit Clarification Petition in Decision No. 18304-G, issued on October 26, 1993. In that decision, the Commission made the following Conclusions of Law:

1. The incumbent Assistant Comptroller/Accountant is a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and therefore is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

2. The incumbent Court Administrator is a supervisory employe within the meaning of Sec. 111.70(1)(o), Stats., and therefore is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

The Commission, in that decision, issued the following Order Clarifying Bargaining Unit:

The positions referenced in the Conclusions of Law 4 shall continue to be excluded from the bargaining unit described in Finding of Fact 4.

Finding of Fact 4 of that decision is stated above as Finding of Fact 3.

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The City is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The incumbents of the positions of Assistant Comptroller/Accountant and of Court Administrator are not municipal employes within the meaning of Sec. 111.70(1)(i), Stats.

4. The City, by unilaterally removing the incumbents of the positions of Assistant Comptroller/Accountant and of Court Administrator from the bargaining unit represented by the Union, did not commit any violation of Secs. 111.70(3)(a)1, 3, or 4 Stats. The presence of grievance arbitration in the parties' labor agreement coupled with the absence of a stipulation to incorporate pending grievances concerning the City's conduct toward those positions makes it inappropriate to exercise the Commission's jurisdiction to determine the alleged violation of Sec. 111.70(3)(a)5, Stats.

ORDER 1/

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or

The complaint filed by the Union is dismissed.

Dated at Madison, Wisconsin this 25th day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

CITY OF GREENFIELD

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges violations of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats. The Union filed grievances regarding the City's conduct, and held those grievances in abeyance pending the outcome of the Unit Clarification and of this matter. The parties discussed incorporating the alleged contract violations into this proceeding, but were unable to reach a stipulation. Accordingly, Sec. 111.70(3)(a)5, Stats., plays no role in this matter. 2/

The issue remaining is whether the Commission's Unit Clarification decision effectively addressed the allegations posed by the complaint. One of the allegations of the complaint was directly addressed by the Commission. The Union's complaint, among other items, sought to have Kasza's and Kumprey's testimony in the Unit Clarification hearing "stricken from the record . . . to eliminate any possible taint in their testimony due to receiving approximately a \$3,000 per year raise from the Respondent just prior to the hearing." That issue was addressed by the Commission 3/ and need not be further discussed here. Secs. 111.70(3)(a) 1, 3 and 4, Stats., govern the remaining allegations.

THE PARTIES' POSITIONS

The Union's Position

After a review of the background to the complaint, the Union argues that the record poses seven issues:

- 1) Following the issuance of WERC Decision No. 18304-C, and prior to December 1, 1992, did the duties and responsibilities of the position titled Municipal Court Clerk significantly change?
- 2) If the answer to 1 is yes, was the position of Court Administrator created by renaming the (position) titled Municipal Clerk?
- 3) Following the issuance of WERC Decision No. 18304-C, and prior to December 1, 1992, did the duties and responsibilities of the position titled Bookkeeper significantly change?
- 4) If the answer to 3 is yes, was the position of Assistant Comptroller/Accountant created by renaming the (position) titled Bookkeeper?
- 5) If the answers to 1 and 2 are both yes, was the position of Court Administrator a bargaining unit (position) subject to the terms of the collective

2/ See Waupun School District, Dec. No. 22409 (WERC, 3/85) at 9-10.

3/ Dec. No. 18304-G at 30.

bargaining agreement until October 26, 1993?

6) If the answers to 3 and 4 are both yes, was the position of Court Administrator a bargaining unit (position) subject to the terms of the collective bargaining agreement until October 26, 1993?

7) If the answer to either 5 or 6 is yes, did the City engage in a prohibited practice by unilaterally altering the terms and conditions of employment of bargaining . . . (unit positions) subject (to) its collective bargaining agreement with the Union, prior to October 26, 1993?

The Union argues, after a review of the background, that the duties of the position of Court Clerk did change between the issuance of Dec. No. 18304-C (WERC, 3/82) and December of 1992. The Union acknowledges that those changes included the addition of managerial and supervisory duties, but asserts that the changes occurred gradually. The Union contends that it recognized the changes, then tried to reclassify the position and to have its wage rate increased. The City refused to do so, but by December of 1992, determined to rename the position, and to afford it the reclassification the City denied in bargaining.

A roughly parallel evolution converted the Bookkeeper position from a unit position to a confidential position. That the City petitioned to have the Court Clerk and Bookkeeper positions removed from the unit essentially establishes, according to the Union, that the job title changes are cosmetic. Since the positions could be removed from the bargaining unit only "by the City and the Union agreeing to do so" or by a Commission decision, it necessarily follows, according to the Union, that the City "does not have the authority to unilaterally remove the positions from the bargaining unit."

That the Court Administrator and Assistant Comptroller/Accountant positions are not new positions is established, the Union asserts, by the City's own actions. Noting that during Ninkovich's tenure as Personnel Director "four new positions were created", the Union argues that the different methods to create the positions belies any contention that the two positions at issue here were "new" positions. More specifically, the Union argues that Ninkovich himself acknowledged that the changed titles to the positions reflected nothing more than the duties performed by the Court Clerk and Bookkeeper at the time of his 1992 review of all City job descriptions. In sharp contrast to this stand the two secretarial positions which were created not to reflect duties already being performed but were "created . . . because of unfilled needs." That the City did not put the incumbents of the Court Administrator and Assistant Comptroller/Accountant positions through normal civil service procedures establishes, the Union argues, that those positions are not new. Finally, the Union asserts that if the positions were new, it "would have created vacancies in the old positions which would require filling."

Because the two disputed positions were not new, the Union argues that they were unit positions until removed in collective bargaining or by Commission decision. Neither occurred here, and the Union concludes the City's changing of the wages and conditions of employment for the two positions is, standing alone, a violation of the MERA. The Union contends the implications of not adopting this position are significant:

If the City were allowed to exclude positions from

bargaining units by changing their titles and unilaterally declaring the newly named positions exempt from collective bargaining, then any and every position could be excluded from collective bargaining . . .

The Union concludes that the allegations of the complaint must be sustained.

The City's Position

After a review of the background, the City contends that it "has no obligation to bargain the rate of pay accorded to positions which are properly excluded from the bargaining unit." Contending that the Commission "has routinely held that a municipal employer has no duty to bargain the establishment of positions within a governmental unit, even those in the bargaining unit" and that the assignment of a position to a department or the number of classifications or qualifications to fill a position "primarily relate to the formulation and management of public policy," the City concludes the removal of the disputed positions from the unit was permissive in nature. It is axiomatic, the City avers, that "positions which are excluded from the bargaining unit are not subject to collective bargaining . . ." This is true, the City concludes, as a matter of law and of contract.

The Commission's decision confirmed, the City argues, that the positions at issue here "shall continue to be excluded from the bargaining unit." It necessarily follows from this, according to the City, that the Commission "clearly intended to exclude these positions from the unit on the date of their creation by the City, that is, October 20, 1992, and not on the date of its order, October 26, 1993." That the City filed a petition for Unit Clarification establishes no more, the City asserts, than that it anticipated the Union's objection and started a procedure which "allowed the decisions to be made in the appropriate order."

That the Commission declined to strike the testimony of the incumbent Court Administrator and Assistant Comptroller/Accountant moots that issue in this case, according to the City.

The City concludes that the Commission's decision effectively resolved all the issues posed by the complaint, and that it follows that the complaint "should be dismissed on its merits." Any other conclusion would simply encourage litigation which the City characterizes as "a waste of time and money for all involved."

DISCUSSION

The Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)1, Stats., protects municipal employes from employer interference, restraint or coercion involving rights stated by Sec. 111.70(2), Stats. Violations of Sec. 111.70(3)(a)1, Stats., can either be independent or derived from other prohibited practices. 4/

The violation alleged here is derivative, flowing from the City's duty to bargain. As the Union puts it, the City's conduct in renaming the positions and removing them from the unit should be considered a "per se" violation of the duty to bargain. These allegations are subsumed in the discussion of the alleged violation of Sec. 111.70(3)(a)4, Stats.

The Alleged Violation of Sec. 111.70(3)(a)3, Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a

4/ Monroe Water Department et. al., Dec. No. 27015-B (WERC, 4/93).

municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Union must, by a clear and satisfactory preponderance of the evidence, establish that: (1) a municipal employe was engaged in activity protected by Sec. 111.70(2), Stats.; (2) the City was aware of this activity; (3) the City was hostile to the activity, and (4) the City acted, at least in part, based upon its hostility to the employe's exercise of protected activity. 5/

There is no persuasive evidence to establish any of these elements of proof. Even if it is presumed Kasza and Kumprey were engaged in concerted activity, there is no evidence of City hostility to such activity or of any adverse action based on that hostility. Nor can it be assumed the City acted to discredit the Union. At most, the record shows a difference of opinion on the unit status of the two employes. There is no evidence the City's actions are part of a broader campaign to damage the Union. The evidence indicates the Union has, over time, gained, not lost, unit positions.

The Alleged Violation of Sec. 111.70(3)(a)4, Stats.

The ultimate focus of the Union's arguments is that the two positions at issue are those of Court Clerk and Bookkeeper. Since the Commission, in March of 1982, found them to be unit positions, it follows, according to the Union, that they remained unit positions until either bargained out of the unit or removed by Commission action. The Union never agreed to exclude the positions, and the Commission did not act to exclude them from the unit until October of 1993. The City's failure to bargain a wage rate for the renamed positions in 1992 thus, the Union concludes, constitutes a per se refusal to bargain.

As noted in City of Greenfield, Dec. No. 27606-A (McLaughlin, 8/93), State of Wisconsin, Dec. No. 18696 (WERC, 5/81) is the authority governing the Union's contention. Without repeating the earlier discussion of that case, it is appropriate to underscore the effect it has on this matter:

5/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

The significance of the State case . . . is that the Commission conditioned a finding of a prohibited practice on a difference of opinion between the employer and the Commission, and not on the Employer's unilateral actions standing alone. Having determined that the employes involved were confidential, the Commission concluded the employer's unilateral treatment of the employes as non-unit employes did not constitute an unfair labor practice. That the Commission took no action to remedy the employer's unilateral actions which preceded the Commission's ultimate determination is applicable . . . here. 6/

State of Wisconsin involved a position which had, in effect, been renamed. Thus, confronting facts analogous to those posed here, the Commission declined to follow the Union's per se violation theory. That the City acted unilaterally is, then, not the determinative issue here. Rather, the issue is whether, at the time the City unilaterally acted, the job duties of the incumbents of the disputed positions warranted a conclusion that neither was a municipal employe. 7/ Because the Commission has accepted the City's position, the City's unilateral acts, standing alone, do not warrant a conclusion that it violated Sec. 111.70(3)(a)4, Stats. Findings of Fact 5 and 6 were drawn directly from the Commission's decision to underscore that the positions were, at the time the City acted to remove/exclude them from the unit, not occupied by employes meeting the statutory definition of "Municipal employe."

The Union argues that this conclusion grants the City the authority to eviscerate the unit. This argument has persuasive force as a general proposition. The approach adopted by the Commission in State of Wisconsin, however, does have the virtue of not requiring a Commission determination in every situation in which changes in job duties over time may have affected a position's unit status. This has practical significance. As exemplified by the Assistant Comptroller/Accountant position, the Commission's approach assured the City it need not withhold confidential duties from the position until the Commission had time to act. This assures day to day administrative concerns are not subordinated to the Commission's case load at any particular time. The Commission's approach also has legal significance. If an employe's duties no longer meet the statutory definition of "Municipal employe," it is not apparent that the Commission has the authority to keep in a bargaining unit a position not statutorily eligible to be so included.

More significantly, the Union has not been left helpless in the face of the City's unilateral action. In this case, hearing was conducted in spite of the pendency of the unit clarification matter. This assured that if the City's actions were proven to be illegally harming the Union, the harm could be remedied. The record developed did not manifest action undercutting the Union.

What evidence there is on the point indicates the loss of two unit members has been offset, over time, by the addition of other unit positions. Only after it became apparent that the Union was not suffering immediate or irreparable harm

6/ Dec. No. 27606-A at 8.

7/ See also Cudahy Public Library, Dec. No. 26931-B (Gratz, 5/92), aff'd Dec. No. 26931-C (WERC, 10/92).

was the complaint held in abeyance. The Union's general concerns, although having persuasive force, lack a factual basis. The integrity of the unit has not been shown to have been at risk.

In sum, the City acted at its own peril in removing Kasza and Kumprey from the unit. Because the Commission has agreed with the City's contentions on their unit status, and because the record shows no demonstrated harm to the Union from the City's conduct, there has been no violation of Sec. 111.70(3)(a)1, 3 or 4, Stats. The complaint has, therefore, been dismissed.

Dated at Madison, Wisconsin this 25th day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner