

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Involving Certain Employes of
CITY OF RICHLAND CENTER

Case 49
No. 55444
ME-901

Decision No. 28689-B

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

Boardman, Suhr, Curry & Field, by **Attorney Steven C. Zach**, One South Pinckney Street, Suite 410, P.O. Box 927, Madison, Wisconsin 53701-0927, appearing on behalf of the City of Richland Center.

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

Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, filed a petition with the Wisconsin Employment Relations Commission on July 28, 1997, requesting that the Commission clarify the bargaining unit of the regular full-time and regular part-time clerical employes of the City of Richland Center, hereinafter the City, to include the positions of Administrative Secretary and Community Service Aide in the City's Police Department. The City has opposed the petition on the bases that the Administrative Secretary position is confidential and that the parties had a previous agreement that the Community Service Aide position would be "non-union".

Hearing was held before an Examiner on the Commission's staff, David E. Shaw, on November 20, 1997 in Richland Center, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by February 4, 1998.

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Having considered the record in the matter, and being fully apprised in the premises, the Commission now makes and issues the following

FINDINGS OF FACT

1. The City of Richland Center, hereinafter the City, is a municipal employer with its principal offices located at 182 North Central Avenue, Richland Center, Wisconsin 53581. As part of its statutory obligations, the City maintains and operates the City of Richland Center Police Department, hereinafter the Department, which is located at 159 North Church Street, Richland Center, Wisconsin, approximately one block from City Hall. For approximately the last 12 years, Craig Chicker has been the City's Police Chief. At all times material herein, the City has had a Police and Fire Commission that oversees the City's Police Department with regard to such matters as discipline of Department employes. The Department consists of Chief Chicker, ten full-time and four part-time police officers, an Administrative Secretary, a Community Service Aide, two crossing guards and one maintenance man. The City is run by an elected city council and elected mayor.

2. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Union, is a labor organization with its principal offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903. On April 5, 1996, the Commission directed a representation election among the City's eligible regular full-time and regular part-time clerical employes and on April 19, 1996, the Commission conducted said election. On May 3, 1996, the Union was certified as the exclusive collective bargaining representative of the City's regular full-time and regular part-time clerical employes, excluding supervisory, managerial and confidential employes.

In addition to said clerical bargaining unit, the City also has a law enforcement bargaining unit consisting of employes with the power of arrest who are represented by a local affiliate of the Union, Local 2085-A, AFSCME, AFL-CIO, a blue-collar bargaining unit of its Public Works employes, represented by another local affiliate of the Union, Local 2387-A, AFSCME, AFL-CIO, and a bargaining unit of employes of the Richland Center Utility, represented by Local 965, International Brotherhood of Electrical Workers. The Union represents the clerical bargaining unit through its local affiliate, Local 2387-A.

3. The incumbent employe in the Administrative Secretary position is Peggy Adsit, who has held the position for the past seven years. Adsit reports directly to Chief Chicker and he is her immediate supervisor. Adsit is the only full-time clerical employe in the Police Department and performs various clerical duties in that regard, including computer data entry, retrieving information from the computer for the officers, typing letters or other correspondence for the Chief and officers, typing court documents, etc., filing, receiving payment for tickets and issuing receipts for same, entering citations and dispositions in the ledger or citation book,

keeping track of bills and sending them to City Hall, typing inter-office memos for the Chief, and acting as receptionist and answering the phone for the Department.

Adsit has no role in negotiations with any bargaining unit, does not type management proposals for negotiations with any bargaining unit, does not sit in on negotiation strategy sessions with the City's bargaining team or meetings with the City's labor attorney, and does not do any costing for the City's bargaining team, but has provided figures for the Chief when asked. Adsit types letters from the Chief to the City's labor attorney regarding his position on pending grievances or disciplinary matters, positions he wants taken on issues in negotiations with the law enforcement unit, or information requested by the labor attorney from the Chief as to pending grievances or negotiations, evaluation summaries of the sworn employees in the Department that the Chief provides to the PFC, and which note areas in which employees are doing well and areas that need improvement, comparative rankings of officers for the PFC, and letters to citizens regarding complaints filed against individual police officers. Adsit also types statements from the Chief to the City Council regarding disciplinary matters and letters or statements to the PFC regarding disciplinary situations, which are normally seen by individual employees or their bargaining representative. Adsit also types the Chief's correspondence to the PFC regarding pending grievances which are generally not seen by the affected employee or his/her bargaining representative. Personnel files of Police Department employees are kept in Chief Chicker's office and are not accessible by Adsit.

The Police Department is housed in a building approximately one block from City Hall. The only other claimed confidential employee in the City's employ is the Mayor's Administrative Assistant, Luella Edwards, who is located at City Hall. The amount of confidential correspondence typed by Adsit for Chief Chicker related to confidential labor relations matters varies from approximately 6 to 12 pieces per year. It would unduly disrupt the operation of the Police Department to assign Adsit's confidential duties to the Mayor's Administrative Assistant.

4. The predecessor position to the Community Service Aide was that of Meter Maid. In 1985, the Meter Maid position became the Community Service Aide. Police Department employees had been organized and obtained their first collective bargaining agreement in 1973. At that time the bargaining unit included the Meter Maid and the Secretary position.

5. In 1977 the incumbent Meter Maid and her spouse (who was employed as a City police officer) moved away from the area.

6. In 1978, the City attempted to increase its number of police officers by hiring a person to act as a 3/4th's time police officer and 1/4th time meter parking enforcement officer, who shared meter enforcement duties with full-time police officers.

7. In 1984, the City amended its parking ordinances to reflect a "chalk" system of parking regulation. In 1985, the City created the position of Community Service Aide.

8. In 1985, the City hired Donald Maxwell as the City's first Community Service Aide with the intention and expectation of moving him into a police officer position when one became vacant. Maxwell was granted the power to make arrests as the Community Service Officer.

9. The incumbent Community Service Aide, Jenny Lou McDougal, was hired in 1985 after Maxwell had been moved to a police officer position. McDougal was not and has not been granted any powers of arrest. As Community Service Officer, McDougal issues tickets for parking violations, records the tickets, and sends out "overdue notices" when necessary. From time to time, McDougal also works the front desk in the Police Station where she answers the phone, acts as a dispatcher, handles "walk in" complaints, types reports, and performs other clerical duties as in the absence of the Administrative Secretary or as directed by the Chief.

10. At or about the time Donald Maxwell was hired as the City's first Community Service Aide, agreement was reached between the City and Local 2085-A that 1) police officers would no longer have parking enforcement duties requiring the issuance of parking tickets and 2) the Community Service Aide would be "non-union."

11. When Maxwell's successor, Jenny Lou McDougal, was hired she was told her position would remain a "non-union" position. McDougal has not been included in any bargaining unit. When the position of Community Service Aide was originally created in 1985 there were three bargaining units in existence: law enforcement, public works, and utilities.

12. The position description for Community Service Aide includes a statement that "(t)his position is a non-union position as previously agreed upon by Local 2085-A, AFL-CIO, as of February 16, 1985. Said position description lists no duties of a supervisory, managerial or confidential nature nor does the incumbent of said position perform any such duties. At hearing, the parties stipulated that in the event said position is included to be included in a bargaining unit, it is appropriately included in the bargaining unit consisting of the City's regular full-time and regular part-time clerical employees.

13. It is unclear whether the agreement between the City and Local 2085-A AFSCME that the Community Service Aide would be "non-union" meant the parties intended to exclude the Aide position from the police officer bargaining unit represented by Local 2085-A or from any present or future AFSCME-represented bargaining units.

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

CONCLUSIONS OF LAW

1. The occupant of the position of Administrative Secretary in the City of Richland Center Police Department 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. Because it is unclear whether the 1985 agreement between Local 2085-A, AFSCME and the City that the Community Service Aide would be "non-union" relates only to exclusion of the Aide from the sworn employe bargaining unit represented by Local 2085-A or to exclusion from any present or future AFSCME unit, the agreement does not establish a valid basis for excluding the Aide from the AFSCME clerical unit formed in 1996.

3. The occupant of the position of Community Service Aide in the City of Richland Center Police Department is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., and is appropriately included in the bargaining unit consisting of the City's regular full-time and regular part-time clerical employes described in Finding of Fact 2.

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

ORDER

1. The position of Community Service Aide in the City of Richland Center Police Department is included in the collective bargaining unit consisting of the City's regular full-time and regular part-time clerical employes described in Finding of Fact 2.

2. The position of Administrative Secretary in the City of Richland Center Police Department shall continue to be excluded from the collective bargaining unit consisting of the City's regular full-time and regular part-time clerical employes described in Finding of Fact 2.

Given under our hands and seal at the city of Madison, Wisconsin, this 18th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Commissioner Paul A. Hahn did not participate.

CITY OF RICHLAND CENTER

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

The Union filed a petition requesting that the Commission clarify the City's clerical bargaining unit to include the position of Administrative Secretary in the Police Department and the "Parking Enforcement Secretary" in the Police Department. The Union's request was subsequently clarified with regard to the "Parking Enforcement Secretary" position to mean the Community Service Aide position held by McDougal. The City has objected to the inclusion of the two positions on the bases that the Administrative Secretary is a confidential employe and that the position of Community Service Aide had been excluded as a non-union position by prior agreement of the parties.

At hearing in this matter, the parties were notified that the Commission would take administrative notice of the record in a prior unit clarification case involving these same parties (Case 10, No. 52272, ME-751, DEC. NO. 17950-A). The parties also stipulated at hearing that if the position of Administrative Secretary is found to be a municipal employe, it would properly be placed in the clerical bargaining unit represented by the Union; that if there was found to be no agreement to exclude the Community Service Aide position, it would be properly included in the clerical bargaining unit represented by the Union; and that the only other claimed confidential employe, other than the Administrative Secretary in the Police Department at issue in this case, is the Administrative Assistant to the Mayor, a position held by Luella Edwards. Finally, the parties stipulated that no one has been able to find a copy of a written agreement with regard to the union status of the Community Service Aide position.

POSITIONS OF THE PARTIES

Union

With regard to the Administrative Secretary position, the Union asserts that the position is not a confidential employe under the Commission's standards. The Union asserts there is very little, if anything, that the incumbent employe, Adsit, does that can be considered confidential, as the Commission defines that term, and that given the close proximity of the Mayor's Administrative Assistant, Edwards, there would be little or no disruption to the City's operation if the truly confidential work were reassigned.

With respect to the exhibits offered by the City on an in camera basis to demonstrate Adsit's confidential duties, the letter to the City's labor attorney of September 9, 1994 regarding a disciplinary matter was in essence a cover letter with the letter of discipline that went to the officer.

The disciplinary letter from the Chief to the PFC would have been placed in the

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affected employe's personnel file were it not for the fact that the discipline was overturned by an arbitrator and the employe's personnel file cleansed regarding that discipline. The document described as a complaint filed by a citizen regarding one of the police officers is in essence a "citizen complaint" and, as such, is a public record. The information provided to the Union also does not indicate whether Adsit had anything to do with preparing that document. The synopsis of the individual officers' personnel evaluations contains information that was previously shared with each individual officer. The document that consisted of overall performance evaluations comparisons between 1995 and 1996 again contained information that had previously been shared with the individual officers. With regard to the post-hearing documents submitted by the City in camera, the brief descriptions of those documents provided to the Union is not sufficient to determine their nature or which were "typed" and which were "inspected" by her. To the extent that documents were "inspected" by Adsit, that work can easily be assigned to someone in management.

Any document which was directed to or copied to a bargaining unit employe cannot be considered confidential in the labor relations sense. Similarly, evaluation documents or documents containing information from evaluations cannot be considered confidential material, since that information has been shared with the individual officers or are simply restatements of that information. Certified eligibility lists have nothing to do with labor relations and cannot be considered confidential and there also does not appear to be anything of a confidential nature with regard to the letters to the PFC regarding hiring issues. That is also the case with letters to County Sheriff Berglin.

Of the documents offered by the City spanning the period from March, 1994 to November, 1997, there were only two documents of a truly confidential nature, which were letters regarding "bargaining positions". The Union finds it inconceivable that the inconvenience of having that work typed by the Administrative Assistant in City Hall would be considered so great as to deny Adsit's right to representation.

With regard to the Community Service Aide position, the Union asserts that the City admits there is no statutory basis upon which to exclude the position from this bargaining unit. Rather, the City claims the position should be excluded pursuant to an agreement of the parties. The Commission has held that where the parties have agreed to include or exclude certain positions from the bargaining unit, it would not allow either party to alter the unit's scope through a unit clarification except under certain limited conditions. CITY OF SHEBOYGAN, DEC. NO. 7378-A (WERC, 5/89); MANITOWOC COUNTY, DEC. No. 7116-C (WERC, 11/91); FOREST COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 27552 (WERC, 2/93). Application of those conditions depends upon the existence and nature of the agreement to exclude a position. Here, the agreement upon which the City relies was described by Chief Chicker, who was not the Chief of Police at the

time, and who testified that he had no personal involvement with the making of the agreement. The Union notes the background of the Community Service Aide

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position and how it developed from a "Meter Maid" position that had been included in the law enforcement bargaining unit until the position was abolished in 1978, and how the Community Service Aide position was created in February of 1985 when the City hired Maxwell into that new position with the expectation he would be shortly hired as the City's next full-time police officer. While Chief Chicker testified there was a written agreement between the union representing the employees with the power of arrest (Local 2085-A) and the City that the Community Service Aide position would be "non-union", he conceded that he had never seen the agreement, could not locate it in the Department's files, and had been told that the City also could not find a copy of it in its files. The Chief did not recall if Maxwell had the power of arrest when he was in the Community Service Aide position, but that to the best of his knowledge, McDougal has never had the power of arrest.

While it is unclear from the Chief's testimony whether any agreement to exclude the Community Service Aide position actually existed, it is clear from the record that since McDougal took the position to the present, the Community Service Aide position has not been included in any bargaining unit. Also clear is that the agreement, if it exists, was between the City and the bargaining unit of sworn law enforcement officers. Thus, such an agreement would be relevant only if inclusion of the Community Service Aide position in the law enforcement bargaining unit was being sought. As that is not the case, such an agreement is irrelevant to this proceeding, where the issue is the position's inclusion in, or exclusion from, a clerical bargaining unit. The City is arguing that an employer and a labor organization are able to enter into an agreement that a particular employe is not only excluded from that labor organization's bargaining unit, but also excluded from all bargaining units, including those not yet in existence. Commission case law does not support such a proposition. Since there was no agreement between the union representing the clerical bargaining unit and the City to exclude the Community Service Aide position, the position should be included in the clerical bargaining unit.

City

The City notes that the Administrative Secretary is the only clerical employe for the City's Police Department, which is housed approximately one block from City Hall. The Administrative Secretary is supervised by the Chief of Police and serves as his secretary. The Chief is actively involved in labor relations for the City with respect to the Police Department employes, drafting initial proposals, attending bargaining sessions, providing input to the City's labor attorney and administering grievances, as well as being the City's principal contact with its Police and Fire Commission (PFC) with regards to Police Department discipline. The Administrative Secretary types confidential correspondence for the Chief, and thereby has access to confidential labor relations material, including the following: initial proposals for negotiations; correspondence to the

City's labor attorney regarding labor negotiations; grievance documents regarding police unit members; correspondence to citizens regarding complaints involving police unit members; memorandums to the PFC regarding disciplinary actions involving police unit

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members; and evaluations and summaries of police unit member's yearly evaluations. (Employer Exhibits 1-7). The incumbent, Adsit, acknowledged that she has access to confidential labor relations material and the Chief testified her duties include serving as his secretary and that it would not be practical to have someone else located in another building perform those duties. The only other confidential clerical position in the City is the Mayor's Assistant, Edwards, who has a full scope of duties at City Hall.

The City notes that while a *de minimis* exposure to confidential materials is generally insufficient grounds to exclude an employe from a bargaining unit, notwithstanding the amount of actual confidential work performed, an employe may be found to be confidential where the employe is the only one available to perform confidential work, or where the management employe to whom the employe is assigned performs a significant labor relations responsibility and the work cannot be reassigned to another employe without undue disruption of the employer's organization. VILLAGE OF OREGON, DEC. NO. 28110-C (WERC, 4/96). Thus, even assuming Adsit's contact with confidential labor relations matters does not involve a substantial portion of her daily activities, her position is still confidential, since she is the only full-time clerical employe in the Police Department, the Chief is significantly involved in the Department's labor relations, and the only other confidential clerical employe is the Assistant to the Mayor who is fully occupied by her job duties and is located in the City Hall, one block away from the Police Department.

Further, the facts in the instant case are analogous to the circumstances in those cases where the Commission found that transfer of the confidential work from the claimed confidential clerical employe in issue to a different physical location would constitute undue disruption for the municipal employer. CITY OF MANITOWOC, DEC. NO. 7667-C (WERC, 4/95); CITY OF GREENFIELD, DEC. NO. 26423 (WERC, 4/90); CITY OF MAUSTON, DEC. NO. 21424-E (WERC, 11/93); and VILLAGE OF HALES CORNERS, DEC. NO. 27604-A (WERC, 11/93). Thus, both the record and Commission precedent support a conclusion that the Administrative Secretary is confidential on the bases that she is the Chief's only clerical support, the Chief has labor relations responsibility, the position has access to confidential labor relations information and transferring work elsewhere would be unduly burdensome.

With respect to the Community Service Aide position, the City asserts that the history of the position serves as the basis for its exclusion. At one time, the City had a "Meter Maid" position, which was eliminated when the then-incumbent left in 1977, with the police officers taking over those duties. In 1984 the City removed the parking meters and went to chalking tires. In 1985, the City agreed to remove parking enforcement duties from the sworn police officers in exchange for the Union's agreement that the newly-created Community Service Aide position would be a non-

union position. Maxwell was hired into the position in February of 1985 with the understanding that he would transfer into a police officer position in May of 1985, and when that occurred, McDougal was hired. The City notes that the job description for the

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position contains the provision: "This provision is a non-union position as previously agreed by Local 2085-A, AFL-CIO, as of February 16, 1985." That agreement between the City and the Union, as well as McDougal, who took the job knowing the position would be a non-union position, serves as the basis for the City's opposition to inclusion of the position into the bargaining unit. While the parties were not able to find any written agreement pertaining to the exclusion, a definitive written agreement is not essential in order for the Commission to find an agreement to exclude a position from a bargaining unit. VILLAGE OF OREGON, DEC. NO. 28110-C, supra, citing, WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 24604-C (WERC, 10/92).

The City asserts that the agreement to exclude the position is substantiated by several items of proof. The first is the job description memorializing the agreement. The second is the testimony of the Chief, who was employed in the Police Department and was a member of the union at the time of the agreement. The Chief recounted the history leading to the exclusion of the position from union representation. Last, McDougal testified that she understood the position would be non-union, and that the job duties have not changed since she took the position in 1985. The record establishes that the parties agreed that a non-union Community Service Aide position would be created in exchange for removing parking enforcement duties from the police officers. It is the Commission's long-standing rule that such an agreement will be honored unless the position did not exist at the time of the agreement, the position was initially excluded on statutory grounds, or the position has changed or the existing unit is repugnant to MERA. WISCONSIN DELLS SCHOOL DISTRICT, supra. Here, the position existed at the time of the agreement and was in fact the motivation for the agreement. The exclusion was not based on any of the statutory exemptions, and as indicated by the incumbent, the job duties have not substantially changed since the position was created. Moreover, the exclusion of the position is not repugnant to the policies behind MERA. Thus, the agreement should be honored.

DISCUSSION

Administrative Secretary

The Commission has consistently held that in order for an employe to be held confidential, that employe must have access to, knowledge of, or participation in, confidential matters relating to labor relations. Confidential information is that which is not available to the bargaining representative or its agents, and which deals with the employer's strategy or position in collective bargaining, contract administration, litigation or similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer. City of RICHLAND CENTER, DEC. NOS. 17950-A (WERC, 2/96); VILLAGE OF SAUKVILLE, DEC. NO. 26170 (WERC, 9/89); DANE COUNTY, DEC. NO. 22976-C (WERC, 9/88). In making a determination as to

confidential status, the Commission is mindful of the need to balance the statutory right of employees to engage in concerted activity with the right of employers to conduct

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labor relations through employees whose interests are aligned with management. CITY OF SEYMOUR, DEC. NO. 28112 (WERC, 7/94), at page 6. In striking this balance, the Commission looks to, among other things, the amount of confidential work to be performed, the number of employees available to perform the work, and the degree of disruption that would be caused to the employer's operation if confidential work is reassigned. CITY OF SEYMOUR, supra; CITY OF GREENFIELD, DEC. NO. 26423 (WERC, 4/90), at page 8. Also, as we held in VILLAGE OF SAUKVILLE, DEC. NO. 7667-C (WERC, 4/95):

While a de minimis exposure to confidential matters is generally insufficient grounds for exclusion of an employee from a bargaining unit, BOULDER JUNCTION JOINT SCHOOL DISTRICT, DEC. NO. 24982 (WERC, 11/87) we have also sought to protect an employer's right to conduct its labor relations through employees whose interests are aligned with those of management. COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 9, DEC. NO. 23863-A (WERC, 12/86). Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work TOWN OF GRAND CHUTE, DEC. NO. 22934 (WERC, 9/85) and, similarly, where a management employee has significant labor relations responsibility, the clerical employee 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 employee without undue disruption of the employer's organization. HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88).

The Union notes that the Administrative Secretary does not spend a significant amount of her time performing confidential duties with regard to labor relations. In fact such duties may be limited to as little as typing six to twelve documents in a year that would fall within the definition of "confidential matters", e.g. correspondence to the City's labor attorney regarding bargaining proposals, the Chief's position on pending disciplinary matters or grievances and his correspondence to the City's PFC in support of his position on recommended discipline of a Police Department employee. While such an amount of correspondence over the course of a year might normally be considered de minimis, we are satisfied that the reassignment of such work would unduly disrupt the City's operation.

The record establishes that the Chief of Police is the primary management representative of the City with regard to labor relations matters involving its bargaining unit of sworn employees and that he is the primary liaison between the City and the City's labor attorney with regard to labor relations matters involving those sworn employees. The Chief is involved, as part of the City's

bargaining team, in negotiations with the bargaining representative of its sworn employees, and is the first step in the contractual grievance procedure with regard to those sworn employees.

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The record evidence also establishes that the Administrative Secretary is the only full-time clerical employe in the Police Department (and the only clerical employe in the Department other than the Community Service Aide position also at issue in this case) and that the Police Department is housed in a separate building approximately one block from the City's offices at City Hall. Further, the only other claimed confidential employe in the City is the Assistant to the Mayor, Luella Edwards, who is located on the second floor of City Hall. Therefore, given the Chief's role in labor relations matters on behalf of the City and the lack of another confidential secretarial position to whom the confidential work could be reassigned without undue disruption, we have concluded that Adsit is a confidential employe within the meaning of Sec. 111.70(1)(i), Stats.

Community Service Aide

The City's assertion that this position should remain excluded is based upon an alleged agreement with the Union that the Community Service Aide position is "non-union".

The Commission has repeatedly held that where the parties have agreed to include or exclude certain positions from the bargaining unit, it will not allow either party to alter the unit's scope through a unit clarification petition unless:

- (1) the positions in dispute did not exist at the time of the agreement; or
- (2) the positions in dispute were voluntarily included or excluded from the unit because the parties agreed that the positions were or were not supervisory, confidential, etc.; or
- (3) the positions in dispute have been impacted by changed circumstances which materially affect their unit status; or
- (4) the existing unit is repugnant to the Act.

CITY OF RICHLAND CENTER, DEC. NO. 17950-A, supra, at p. 8; FOREST COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 27552 (WERC, 2/93).

When determining whether an agreement to include or exclude positions from a unit exists, we examine all relevant evidence including any agreement by the parties to a bargaining unit description, any agreement by the parties to the eligibility list utilized in the election, the historical inclusion or exclusion of the position from the unit, and pertinent bargaining proposals or contract provisions. Thus, an agreement to include or exclude positions need not be explicitly stated by the

parties and can be established by circumstantial evidence. However, unless we are satisfied that the agreement was clearly understood by all parties, we will not honor same and

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will proceed to meet our statutory obligations under Sec. 111.70(4)(d)2.a., Stats. to determine "the appropriate bargaining unit for the purpose of collective bargaining." WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 24604-C (WERC, 10/92), citing DEPERE SCHOOL DISTRICT, DEC. NO. 25712-A (WERC, 10/90).

Even though no written document constituting an agreement that the Community Service Aide position would be considered "non-union" could be located, we are satisfied that such an agreement between the City and the Union's affiliate Local 2085-A did exist, based upon the reference to said agreement in the position description (Joint Exhibit 2) and the continued exclusion of the position, as well as Chief Chicker's detailed testimony as to his recollection as a member of the bargaining unit of how the agreement was reached. However, particularly in the absence of a written agreement, it is not clear whether the parties agreed in 1985 to exclude the Aide position from the then-existing AFSCME law enforcement unit or to exclude the position from any AFSCME units, whether then existing or organized in the future. Given this lack of clarity, we are not satisfied that the scope of the agreement to exclude the Aide was clearly understood by the parties to the agreement. Therefore, under our holding in DEPERE, the agreement does not provide a sound basis for exclusion of the Aide position from the AFSCME clerical unit formed in 1996.

The parties stipulated that absent a finding that a binding exclusion agreement exists, the Aide position is appropriately included in the AFSCME clerical unit.

Given the foregoing, we have ordered inclusion of the Aide position in the clerical unit.

Dated at Madison, Wisconsin, this 18th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Commissioner Paul A. Hahn did not participate.

gjc

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