

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
**CITY OF OCONTO FALLS EMPLOYEE UNION,
AFSCME, AFL-CIO**

Involving Certain Employees of
CITY OF OCONTO FALLS

Case 7
No. 56162
ME-3656

Decision No. 29401-B

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of City of Oconto Falls Employee Union, AFSCME, AFL-CIO.

Godfrey & Kahn, S.C., by **Attorney Robert W. Burns**, 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of City of Oconto Falls.

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

On September 21, 1998, the City of Oconto Falls Employee Union, AFSCME, AFSCME, AFL-CIO, filed a Petition to Clarify Bargaining Unit with the Wisconsin Employment Relations Commission as to a bargaining unit consisting of certain employees of the City of Oconto Falls. Hearing was held in Oconto Falls, Wisconsin, on December 17, 1998 before Examiner Richard B. McLaughlin, a member of the Commission's staff.

The petition sought to have the following positions included in the bargaining unit: Deputy Treasurer; Deputy Clerk; Administrative Assistant; and Water Operator/Assistant Wastewater Treatment Plant Operator. The City withdrew its objection to the inclusion of the

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position of Water Operator/Assistant Wastewater Treatment Plant Operator during the December 17, 1998, hearing. The City opposes the inclusion of the positions of Deputy Clerk and Deputy Treasurer as a matter of law. Beyond this, the City opposes the inclusion of the positions of Deputy Clerk and Administrative Assistant because they are confidential and opposes the inclusion of the position of Deputy Treasurer because the position is managerial and confidential.

A transcript of the hearing was filed with the Commission on January 15, 1999. The parties submitted briefs and reply briefs by March 22, 1999.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of Oconto Falls Employee Union, AFSCME, AFL-CIO, referred to below as the Union, is a labor organization, which has its offices located in care of 1566 Lynwood Lane, Green Bay, Wisconsin 54311.

2. The City of Oconto Falls, referred to below as the City, is a municipal employer, which has its offices located at 104 South Franklin Street, Oconto Falls, Wisconsin 54154.

3. The Commission, in Decision No. 29401-A, issued on September 16, 1998, certified the Union as the exclusive collective bargaining representative of a bargaining unit described thus:

(A)ll regular full-time and regular part-time employes of the City of Oconto Falls, excluding law enforcement personnel with the power of arrest and supervisory, managerial, confidential, temporary, seasonal, and casual personnel
. . .

The certification reflected the results of an election conducted by the Commission on July 20, 1998. Since the Union's certification, the City and the Union have been negotiating for an initial collective bargaining agreement.

The City has one bargaining unit in addition to the unit represented by the Union. That unit consists of roughly six employes of the City's Police Department. The unit represented by the Union consists of roughly thirteen employes. The employes of the law enforcement bargaining unit are covered by the terms of a three year labor agreement which expires at the end of 1999. Bargaining on that agreement took from October of 1996 until April of 1997.

4. Section 62.09(9)(f), Stats., states:

The treasurer may in writing, filed in the office of the clerk, appoint a deputy who shall act under the treasurer's direction and in the treasurer's absence or disability, or in case of a vacancy shall perform the treasurer's duties. The deputy shall receive such compensation as the council shall provide. The acts of such deputy shall be covered by official bond as the council shall direct.

Section 62.09(11)(i), Stats., states:

The clerk may in writing filed in the clerk's office appoint a deputy, who shall act under the clerk's direction, and in the clerk's absence or disability or in case of a vacancy shall perform the clerk's duties, and shall have power to administer oaths and affirmations. The deputy shall receive such compensation as the council shall provide. The clerk and the clerk's sureties shall be liable on the clerk's official bond for the acts of such deputy.

Section 5.02B of the City's ordinances states:

- (1) GENERAL. The following officials shall be appointed at a regular Council meeting on the third Tuesday of April and shall commence their term of office on May 1st.

<u>Official</u>	<u>How Appointed</u>	<u>Term</u>
. . .		
(d) Deputy Clerk	Administrator, subject to confirmation by Common Council	Annual Appointment
(e) Deputy Treasurer	Administrator, subject to confirmation by Common Council	Annual Appointment

. . .

5. The Mayor and the City Council are the elected officials ultimately responsible for the administration of the City. The City employs a full-time City Administrator/Utility Manager, Peter Mann. The three positions at issue here report to Mann, who in turn reports to the Mayor, City Council, and Utility Commission.

At all times relevant here, the Deputy Treasurer has been Mary Reidinger; the Deputy Clerk has been Georgeann Roberts, and the Administrative Assistant has been Mary Beth Rice.

The City maintains a City Hall at 104 South Franklin Street for conducting its business. The City Hall includes Council chambers, a police department, a garage and office space for the employees noted above. The public entrance to City Hall opens onto a hallway. The Council Chambers and an office/receptionist area are the first offices opening onto that hallway. Rice and Roberts have a work station in the rear of the office/receptionist area. Adjacent to Roberts' work station is a vault in which the City stores certain records. The desks at which Rice and Roberts spend the bulk of their work time are adjacent to each other. Those desks are separated from each other and from the receptionist area by a divider which is roughly six and one-half feet tall. Mann's office is adjacent to the Council chambers, which is on the opposite side of the hallway from the office/receptionist area. Reidinger spends the bulk of her work time at a desk in an office, which is located roughly twenty-five feet down the hallway from the office/receptionist area and Mann's office. Her office has a door, and no other employee occupies that office as a regular function of their work.

6. The City's Position Description for the Deputy Treasurer states:

GENERAL SUMMARY

The Deputy Treasurer is responsible for the overall maintenance of the City's (including utilities) financial accounting and reporting system including, but not limited to, tax roll recording and settlement, general ledger, payroll, cash receipts, accounts payable, accounts receivable, utility billing, inventory and budget preparation. In addition, this position is responsible for City cash and investment management. The position requires a technical background in accounting and computers. The Deputy Treasurer communicates with all departments to ensure that all required accounting information is being completed appropriately and on a timely basis. The Deputy Treasurer is expected to meet City and position objectives. This position is appointed by the City Administrator according to Wisconsin Statutes 62.09(11).

I. Objectives

- A. To coordinate and complete all City accounting functions accurately and on a timely basis.
- B. To prepare financial reports for City management and elected officials and effectively communicate financial information. Also to provide financial information to department heads.

- C. To effectively communicate with vendors and City residents in order to solve problems and answer questions and concerns.
- D. To prepare accurate reports for regulatory agencies as required.
- E. To effectively handle financial management in the City Administrator's absence.
- F. To provide adequate safeguards and controls over City financial assets and records.
- G. To effectively communicate with independent auditors and coordinate year-end accounting closing and financial reporting activities.
- H. To effectively handle risk management activities including involvement with health insurance claims, workers compensation reports and general insurance policies.

III. Experience Requirements

- A. High school education.
- B. Associate degree in accounting or equivalent experience.
- C. Experience with computers including word processing and accounting software.
- D. Advanced computer experience including program updating and trouble-shooting.
- E. Two to three years of accounting experience (preferably in a municipal government).

. . .

Reidinger has served as Deputy Treasurer for roughly ten years, and at the time of hearing worked from 8:00 a.m. until 2:00 p.m. Monday through Friday. She has, in the past, worked an eight hour day for the City.

Reidinger is responsible for the City's accounting functions, including the Utility Commission. To carry out this role, Reidinger has access to all of the City's financial records. To perform her duties, Reidinger uses spreadsheet and accounting software, which is installed on the hard disk drive of her personally assigned computer, and is not available to other employees on the City's computer network. Mann also uses spread sheet software installed on the hard disk drive of his personally assigned computer.

Reidinger serves as an Administrator of the City's computer network. The Deputy Clerk works solely on the network, while the Administrative Assistant works both on the

network and on a hard disk drive of her personally assigned computer. In her capacity as network administrator,

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Reidinger can gain access to the work performed by any employee on the network, including Mann, because she has the authority to change employee passwords. If, however, she changed a password to gain access to another employee's data, the employee would be aware of the action because the password would have been changed.

Reidinger serves as the benefits administrator for the City. The City provides health insurance through Humana Insurance. To keep the premium cost as low as possible, the City purchased a plan with a high deductible, and self-insured the deductible. The City maintains a benefit booklet, which details what employee expenses it will reimburse. Reidinger serves as the administrator of this process, receiving employee claims and determining if the benefit booklet dictates City reimbursement of the claim. She receives from an employee an explanation of benefits from the City's commercial insurer. She reviews that form in conjunction with a form she developed to determine if there has been employee payment of an expense covered by the City's Benefit Booklet. She then determines if the employee has totaled sufficient payments to satisfy the employee share of the deductible. She does this through spread sheets she maintains. After an employee has satisfied the deductible, she submits her records, with a reimbursement request form prepared by Mann, to the Personnel Committee for its approval. When this approval has been given, she issues the employee a reimbursement check. She has played no role in the creation of the benefit booklet or in its periodic revisions.

The City, at the time of hearing, was seeking bids from commercial insurers to provide health insurance. From time to time in the past the City has done this in an effort to contain costs. Prior to the current bid, the City last bid its insurance in 1996. Reidinger has served during that process as the initial City employee contact for interested insurers, and for the independently contracted consultant which oversaw the bidding process. She did provide various data to interested bidders. She did not, however, play any role in determining the bidding process, creating the specifications of the coverage to be bid or reviewing the bids submitted to the City. The City has not sought her recommendations concerning potential insurance savings.

Reidinger also serves as the in-house administrator for Worker's Compensation claims and the City's disability insurance. Minnesota Mutual Life provides the City's life insurance benefits. Reidinger serves as a conduit for the transmission of employee applications and information to Minnesota Mutual. The City's disability insurance is provided through the Wisconsin Retirement System.

Reidinger maintains records regarding employee use of vacation, sick leave, funeral leave and holidays. She maintains those records in accordance with an employee manual. She played no role in the creation of that manual or in any of its revisions. The City provides compensatory time, which is accounted for by City department heads. Reidinger will calculate

separation benefits to be paid to City employees upon certain terminations of employment, and will submit her calculation to Mann for his approval. Reidinger maintains records relating to employee monetary benefits in her office. Mann maintains files concerning non-financial matters concerning individual employees.

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Reidinger requested to be part of a City committee to address “Y2K” computer issues. Mann is the coordinator of the committee, which also includes the Police Chief and the Street Supervisor. At the time of hearing, the committee was still in the formative stage.

The City has, in the past, used a private law firm to assist it during collective bargaining with its police unit. Reidinger has provided financial data to Mann and to the City’s bargaining representative for the City’s use in bargaining and she has cost City bargaining proposals.

Mann evaluates employees. He has, in the past, prepared the written evaluation document by himself. The City vests the formal authority to discipline in the Chief of Police for law enforcement employees and in the Mayor for non-law enforcement employees.

Reidinger transfers money between budget accounts, and between the City and financial institutions. She posts City bills, and will advise supervisors or department heads on which account a bill should be applied to. She has not, in the past, recommended specific capital expenditures.

She played a less significant role in the preparation of the City’s most recent budget than she had in past budgets. Her role in the budget was most extensive in the transition from the prior to the present City Administrator. For its most recent budget, Mann assembled employee requests for expenditures, valued those requests he deemed worthy of consideration, assembled actual and projected City revenue, and then created from this the City’s line by line budget. He relied on Reidinger for verifying the accuracy of data, for valuing various budget requests and for costing the implications of various projections. Mann did not, however, seek Reidinger’s independent evaluation of the desirability of specific budget requests. At all times relevant here, once a draft budget is prepared, it is presented to the City Council’s Finance Committee and then to the Council itself before being presented as a budget for a public hearing. At present, employees or department heads who wish to advocate that the City make a capital expenditure need to secure Mann’s approval to have the item included in the draft budget.

7. The City’s position description for Deputy Clerk states:

GENERAL SUMMARY

The Deputy Clerk is responsible for a variety of administrative and financial functions of the City and Utilities including, but not limited to, utility billing, collecting money, issuing licenses, meeting agendas and minutes, and

coordinating elections. This position shares some secretarial and office duties with the Administrative Assistant. The Deputy Clerk works closely with the Deputy Treasurer, Administrative Assistant and City Administrator to ensure smooth running city office operations. It is essential that the Deputy Clerk interact with the public in a professional and pleasant manner. Through performance of the work

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requirements, the Deputy Clerk is expected to meet City and position objectives. This position is appointed by the City Administrator according to Wisconsin Statutes Section 62.09(11).

I. Objectives

- A. To effectively plan and coordinate elections.
- B. To issue and record City licenses based on knowledge of local ordinances and state statutes.
- C. To attend regular and special City Council and Utility Commission meetings and record meeting minutes.
- D. To update the City Ordinance book as directed.
- E. To complete utility billing procedures including monthly data entry and reports, customer notices and disconnection procedures.
- F. To provide quality City service through direct contact with the public.
- G. To assist other co-workers when needed.
- H. To perform administrative duties as directed by the City Administrator.

II. Reporting Relationships

- A. Reports to: City Administrator

III. Experience Requirements

- A. High school education.
- B. Experience with computers including word processing and accounting software.
- C. Familiarity and understanding of state statutes and ordinances.
- D. Basic knowledge of general accounting principles.
- E. Two to three years of related experience.

. . .

The City hired Roberts as its Deputy Clerk on September 1, 1995. She works from 8:00 a.m. until 4:30 p.m. Monday through Friday. Roberts functions as the primary clerical support to Mann and to the City Council. For example, Mann prepares the agenda for City Council meetings and Roberts types them. Roberts will handle changes to the agenda made by the Mayor or by Council members. She types the agenda for both closed and open sessions. She also prepares meeting notices for the Council and its committees. She attends all regularly scheduled meetings of the City

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Council and attends some special meetings, including closed session meetings. She has prepared closed session minutes for four City Council meetings. None involved personnel issues. She prepares correspondence for the Council and for the Mayor, and can play a role in relaying messages from the public and City officials to Mann.

She has not been asked to attend collective bargaining sessions, to prepare correspondence concerning collective bargaining or to prepare correspondence concerning employee evaluation or discipline. The City has not, however, confronted litigation concerning employee discipline during Roberts' tenure. She does not maintain employee personnel files, and is not directly involved in City fiscal procedures.

8. The City's position description for Administrative Assistant states:

GENERAL SUMMARY

The Administrative Assistant is responsible for diverse job duties including, but not limited to, ambulance service accounting, processing uncollectible accounts, medicare reporting and direct contact with the public. This position is also very involved in utility billing, customer charges, and is knowledgeable in payroll preparation. This position shares some secretarial and office duties with the Deputy Clerk. The Administrative Assistant is a position whose specific job duties may vary depending on workload, staff availability, and time constraints. The Administrative Assistant works closely with the Deputy Treasurer, Deputy Clerk and City Administrator to ensure smooth running city office operations. It is essential that the Administrative Assistant interact with the public in a professional and pleasant manner. The Administrative Assistant is expected to meet position and City objectives.

I. Objectives

- A. To provide professional and pleasant direct communications with the public.
- B. To accurately and efficiently provide various administrative services.

- C. To coordinate and maintain all accounting related to the City's ambulance service.
- D. To complete utility billing procedures including monthly data entry and reports, customer notices and disconnection procedures.
- E. Monitor and follow up on receivable collections including small claims court collection procedures.
- F. Serve as payroll preparation and processing backup person in the Deputy Treasurer's absence.

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- G. To assist other co-workers when needed.
- H. To effectively perform other duties as required by the City Administrator.

II. Reporting Relationships

- A. Reports to: City Administrator

III. Experience Requirements

- A. High school education.
- B. General office skills including typing, filing and receptionist skills and one year of related experience.
- C. Experience with computers including word processing and accounting software.
- D. Basic knowledge of accounting principles.

. . .

Rice works from 8:00 a.m. until 4:30 p.m. Monday through Friday. Rice has not played any role in City collective bargaining or in the administration of the City's labor agreement with its law enforcement unit. Rice processes the City payroll, on an alternating basis, with Reidinger. She has access to the City's financial records. She also may take incoming messages for Mann.

9. Rice, Roberts and Reidinger will back each other up. When one is not available to work, the others will assume duties as necessary to cover the absence. Rice is expected to fill in for Reidinger when Reidinger is not available to work. She filled in for Reidinger when Reidinger took a six week family leave of absence in 1995.

10. The Deputy Treasurer has sufficient access to, knowledge of, and participation in confidential matters relating to labor relations to be a confidential employee. The Deputy Clerk and Administrative Assistant do not have sufficient access to, knowledge of, or participation in confidential matters relating to labor relations to be confidential employees.

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

CONCLUSIONS OF LAW

1. The Deputy Treasurer and the Deputy Clerk are not, under the terms of Chapter 62, Stats., excluded as a matter of law from being municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

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2. The occupant of the position of Deputy Treasurer, Mary Reidinger, is a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

3. The occupant of the position of Deputy Clerk, Georgeann Roberts, and the occupant of the position of Administrative Assistant, Mary Beth Rice, are not confidential employees within the meaning of Sec. 111.70(1)(i), Stats., and therefore are each a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT

1. The occupant of the position of Deputy Treasurer, Mary Reidinger, is hereby excluded from the bargaining unit described in Finding of Fact 3.

2. The occupant of the position of Deputy Clerk, Georgeann Roberts, and the occupant of the position of Administrative Assistant, Mary Beth Rice, are hereby included in the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 4th day of May, 1999.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

CITY OF OCONTO FALLS

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

POSITIONS OF THE PARTIES

The Union's Brief

After a review of the evidence and relevant Commission case law, the Union argues that employees in appointed positions “are not automatically excluded from enjoying the exercise of rights of municipal employees at 111.70(2) Wis. Stats.” Applied to this proceeding, the Union argues that “neither the statutes or City ordinance(s) prohibit the accretion requested by the Petitioner.” Assuming the appointed positions are not managerial or confidential, the Union argues that any statute or ordinance providing for their appointment must be harmonized with the MERA. The Union contends that the Commission has declined to find that statutes providing for appointment of deputies, standing alone, can justify excluding a position from the unit.

Commission case law requires determining employee status “on the basis of existing duties and . . . not on the basis of future potential changes.” This is significant here, since “the City of Oconto Falls has history of collective bargaining with its police department employees and has not used any of three (3) positions in question as confidential employees.” None of those positions, according to the Union, “had performed even *de minimis* confidential duties.”

Turning to an evidentiary dispute, the Union argues that the unit clarification “is an extension of the representation process.” Since an employer cannot poll employees prior to an election without interfering with their protected rights, it should follow that an employer cannot question an employee concerning their desire to be included in the bargaining unit during a unit clarification. The allegation of bias by an employer should not be permitted to create “an obvious ‘chilling effect’ to the exercise of protected rights where the Employer can make unnecessary inquiry as to employee preference.” That the unit clarification process is non-adversarial underscores this conclusion.

The Union concludes that “the record supports a finding that the three (3) positions are municipal employees whose rights as municipal employees are not abridged by other statutes or ordinances or by the self-serving testimony as to how the City of Oconto Falls anticipates future operations.”

The City's Brief

The City argues initially that the “Deputy Clerk and Deputy Treasurer positions should be excluded from the bargaining unit” as “a matter of law.” Section 62.09(9), Stats., governs the Treasurer’s appointment of a deputy, and Sec. 62.09(11)(i), Stats., governs the Clerk’s appointment of a deputy. The standards set in those sections require duties which demand “knowledge of and access to the management data and resources of the City.” WINNEBAGO COUNTY V. COURTHOUSE EMPLOYEES ASSOCIATION, 196 WIS.2D 733 (1995) and COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223, 190 WIS.2D 298 (1994) make the deputy positions here analogous to “a chief deputy position which has implicitly been held excluded as a matter of law.” Since the deputies must assume the duties of the Treasurer or Clerk in their absence, the analogy is, according to the City, applicable.

Even if the positions should not be excluded as a matter of law, the City asserts application of Commission case law warrants their exclusion. The Deputy Treasurer’s job description “alone clearly shows the duties and responsibilities . . . consistent with the requirements of the WERC in classifying a position confidential and managerial.” Beyond this, the City contends the position has access to all of its financial data and accounting functions. The role of the incumbent in administering the City’s computer network underscores the need to keep the position out of the unit. Beyond this, her confidential/managerial functions will be expanded if she is excluded from the unit. That the City uses labor consultants cannot obscure that as a practical matter and as a function of Commission case law, it is entitled to have a position in-house “to conduct its labor relations through an employee whose interests are aligned with those of management.”

The Deputy Clerk must be considered confidential. The position “is the primary clerical support for the Administrator,” and “attends regular and special City Council and Utility Commission meetings . . . both open and closed.” Beyond this, the incumbent “has access to the vault which contains all of the City’s vital important documents and records as well as the City’s money resources.” She also handles “incoming messages” to the City Administrator. These duties could not be reassigned to the Deputy Treasurer “without unduly disrupting the City’s operations.” The exclusion of a position responsible for financial functions and a position responsible for clerical functions will permit the City to rationalize its labor relations duties.

The Administrative Assistant backs up both of these positions, and thus should be excluded from the unit. Beyond this, the structure of City Hall requires these three positions to “work in a very small, confined area.” It is impossible for these employees not to overhear each other’s work. The City concludes: “The ability of the confidential employees to maintain confidentiality would be put seriously into question by any unit presence in the central office.” The close confines of the office preclude any of the employees holding a private telephone conversation. Commission case law recognizes that these considerations can warrant excluding

a position from the unit. That the City integrates the work of the three positions further underscores the need for their exclusion from the unit.

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Because the Union's certification doubled the number of City bargaining units, it is safe to assume the City's need for confidential responsibilities will increase. The City concludes that as a matter of MERA or non-MERA law, the three positions should be excluded from the unit.

The Union's Reply Brief

The City's position that the deputy positions must be excluded as a matter of law is contradicted by ONEIDA COUNTY, DEC. NO. 24844-F (WERC, 1/99). Beyond this, Commission case law establishes that "(t)he physical facilities of the Oconto Falls City Hall are not a valid excuse, real or imagined, to exclude" the three positions. Even if such case law did not exist, "the situation at the Oconto Falls City Hall is such that proximity is not a legitimate issue."

If the Commission believed the City needs a confidential position, the Deputy Treasurer would be "the obvious candidate for the confidential designation" since "(s)he . . . is qualified to handle both the financial and clerical responsibilities." Nor can the City's dire predictions of administrative disruption be credited. If "each clerical is in fact able to fill-in for the other clerical employees there is then every reason to believe that one (1) exemption at the utmost should suffice." That the City has functioned without assigning confidential duties to them to this point underscores this conclusion. That the Deputy Treasurer used to work eight hour days, but now works six hour days establishes that the City has the means to consolidate its confidential duties in a single position.

The evidence will not, according to the Union, establish that the Deputy Treasurer is a managerial employee. Her involvement in policy decisions is attenuated and ministerial in nature. Her budgetary duties are those of a bookkeeper, not a manager. Nor can speculation concerning future duties fill this void. The evidence establishes that the incumbent of each of the three positions is a municipal employee.

The City's Reply Brief

The City notes that the Union discussed a number of Commission cases. The Union failed, however, "to associate that authority to the specific facts and testimony in this record." A detailed review of those cases underscores that the City has persuasively asserted that the three positions should be excluded from the unit. Contrary to the Union's review of its own precedent, Commission cases establish that the physical proximity, close integration of job duties and level of independent authority presented in this record amply support the exclusion of each position.

Nor can the Union's position that "future changes are irrelevant in determining whether an employee is deemed confidential" be accepted. Prior cases highlight that where, as here, changes in job duties are currently being planned, those changes can be considered in assessing unit status. In this case, the Mayor testified that changes in duties have already been ordered. This cannot be

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dismissed as mere speculation. Nor is it mere speculation that the City's labor relations responsibilities must inevitably expand in response to the certification of the Union.

Nor can the Union's citation of ONEIDA COUNTY be considered to establish that the deputy positions should not be excluded as a matter of law. The assessment of County rights cannot be considered to determine the "statutorily defined role of City deputies" under Chapter 62, whose provisions "expressly require performance of the respective duties of the Treasurer or Clerk by the deputies." The assumption of the authority of the appointing official establishes why the WINNEBAGO and EAU CLAIRE courts did "not require the application of the traditional managerial or supervisory analysis to chief deputies."

Even if ONEIDA COUNTY is applied to this case, the City has proven that the Deputy Treasurer is a managerial employee:

She transfers monies between budget accounts, posts benefit items within those accounts, is responsible for the overall maintenance of the City's financial accounting, inventory and budget preparation . . . Furthermore (she) reviews the accuracy of the figures and suggests whether certain budgetary items should be cut or modified. As testimony supports, her role in budget preparation in going to expand in the near future.

ONEIDA COUNTY should be distinguished from this case, but even if it is applied, the Deputy Treasurer must be excluded as a managerial employee.

Nor can the City be faulted for questioning the Deputy Treasurer concerning her desire to be included in the unit. The question addresses bias, which "is one of the traditional areas of impeachment that is available in assessing any witness' credibility." Questions related to bias do not encroach upon protected rights. Any conceivable encroachment can be remedied through prohibited practice litigation. That employee preference is not a determinative factor in unit placement has no bearing here, since the City sought evidence not to prove exclusion, but evidence to prove bias. To adopt the Union's view violates the fact-finding nature of the unit clarification process.

The City concludes that as a matter of judicial or Commission case law, the three positions must be excluded from the unit.

DISCUSSION

Exclusion of Chief Deputies As a Matter of Law

The City contends that the assumption of the statutory duties of an appointed Chief Deputy warrant, as a matter of law, the exclusion of the position of Deputy Treasurer and Deputy Clerk.

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The City cites COUNTY OF EAU CLAIRE v. AFSCME LOCAL 2223, 190 WIS. 2D 298 (Ct.App. 1994) and WINNEBAGO COUNTY v. COURTHOUSE EMPLOYEES ASSOCIATION, 196 WIS.2D 733 (Ct. App. 1995) in support of its contention.

In ONEIDA COUNTY, DEC. NO. 24844-F (WERC, 1/99) and OZAUKEE COUNTY, DEC. NO. 22667-F (WERC, 1/99), the Commission considered and rejected the City's reading of EAU CLAIRE and WINNEBAGO. In those decisions, we stated:

When responding to the County's argument that under EAU CLAIRE and WINNEBAGO, one deputy for each elected official is to be automatically excluded from the bargaining unit, it is useful to review the evolution of the relevant judicial precedent. (ONEIDA AT 15; OZAUKEE AT 23).

. . .

(T)he evolution of judicial precedent does not yield a conclusion that a "chief deputy" for each elected official is automatically exempted from the bargaining unit. While a "chief deputy" is not entitled to enforce certain provisions of a contract (i.e., those which cannot be harmonized with the appointment and removal power the elected official), their inclusion or exclusion from a bargaining unit still turns on the question of whether they are supervisors within the meaning of Sec. 111.70(1)(o)1, Stats., or managerial employees within the meaning of Sec. 111.70(1)(i), Stats. (ONEIDA AT 21-22; OZAUKEE AT 30).

Our reading of relevant judicial precedent has not changed, and we continue to read the law to require the case by case application of the standards of Sec. 111.70(1)(i), Stats.

Differences between the legal background relevant to the City positions at issue here, and the County positions at issue in the cases cited above, afford, if anything, less support for excluding the positions as a matter of law. The positions of Clerk of Court and Register of Deeds have constitutional roots, unlike the positions of City Clerk or City Treasurer. Beyond this, the positions of Clerk of Court and Register of Deeds are elective. The elective nature of positions with constitutional roots has given a separation of powers dimension to litigation concerning the appointment of the deputies of these officials, see KEWAUNEE COUNTY, 142

wis.2d 347 (Ct. App. 1987). The public policy issues surrounding the litigation of the County positions is not posed here. Under state statutes and City ordinances, Mann exercises the power to appoint a Deputy Treasurer and a Deputy Clerk. Mann is a salaried employe of the City. Thus, the appointments at issue here do not pose issues concerning the relationship of an elected official with staff statutorily linked to the appointment authority of that official.

Beyond this, the authority granted the City under Chapter 62, Stats., must be distinguished from that granted County officials under Chapter 58, Stats. The IOWA COUNTY court considered the following grant of authority, under (then) Sec. 59.38(1), Stats:

Clerk of court; deputies; chief deputy . . . Every clerk of the circuit court shall appoint one or more deputies and the appointments shall be approved by the majority of circuit judges for the county, but shall be revocable by the clerk at pleasure . . .

The IOWA COUNTY court also considered the following grant of authority under (then) Sec. 59.50, Stats.:

Every register of deeds shall appoint one or more deputies, who shall hold office at the register's pleasure. . . .

In contrast, the statutes authorizing the appointments at issue here state that a city treasurer or clerk "may . . . appoint a deputy," and do not address the clerk or treasurer's removal of the appointee. This difference in the underlying grant of authority to appoint cannot be ignored. The use of "may" instead of "shall" and the absence of express language of removal weakens the assertion that the legislature intended that the deputy positions posed here should be considered outside the grant of rights under Sec. 111.70(2), Stats.

In sum, the exclusion of each of the deputy positions at issue here must be assessed under the standards of Sec. 111.70(1)(i), Stats.

We turn to a consideration of those standards.

Confidential Employees

For an employee to be held confidential under the statute, the employee 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/or grievance handling between the Employer and the employees' bargaining representative; and (b) be information which is not ordinarily available to the bargaining representative or its agents. CLARK COUNTY, DEC. NO. 19744-G (WERC, 10/97) and cases cited therein; DANE COUNTY, DEC. NO. 22796-C (WERC, 9/88). Information which is available either to the union or to employees is not considered to be confidential. DEPERE SCHOOL DISTRICT, DEC. NO. 25712-A (WERC, 10/90). Having access to information and records concerning employee pay levels, health and life insurance benefits, unemployment compensation, leaves of absence and retirement, for example, does not exclude an employee as

confidential unless the employee with access to this information is

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actually privy to the decisions of the employer with respect to personnel and labor relations policies. OUTAGAMIE COUNTY, DEC. NO. 14062 (WERC, 10/75); MARATHON COUNTY (HEALTH DEPARTMENT), ET.. AL., DEC. NOS. 17083-B, 20999-D, 9674-D and 13130-G (WERC, 2/92).

Furthermore a *de minimis* exposure to confidential materials is generally insufficient grounds for exclusion of an employee from a bargaining unit. BOULDER JUNCTION JOINT SCHOOL DISTRICT, DEC. NO. 24982 (WERC, 11/87). But an employee may be found to be confidential despite the amount of actual confidential work performed, where the employee is the only one available to perform the legitimate confidential work of the employer. TOWN OF GRAND CHUTE, DEC. NO. 22934 (WERC, 9/85). Where a management employee has significant labor relations responsibility, the clerical employee assigned to perform his or her clerical work may be found to be confidential, even if the actual amount of clerical work performed is not significant unless the clerical 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). However, we have not allowed employers to exclude an inordinately large number of employees as confidential by spreading the confidential work among such employees or giving them occasional tasks of a confidential nature. MARSHFIELD JT. SCHOOL DISTRICT NO. 1, DEC. NO. 14575-A (WERC, 7/76); HOWARD-SUAMICO SCHOOL DISTRICT, supra. The fact that possible future confidential duties may be combined with current exposure to confidential matters may warrant the exclusion of a particular position as confidential under the facts of the case, MANITOWOC COUNTY, DEC. NO. 8152-J (WERC, 11/90), unless the future duties and responsibilities are too speculative or *de minimis* to warrant exclusion from the unit as confidential. WAUKESHA JT. SCHOOL DISTRICT NO. 1, DEC. NO. 10823-A (WERC, 3/81).

Deputy Treasurer

We conclude the Deputy Treasurer is a confidential employee.

She has been and will continue to be the person to whom the City turns when it needs to cost its bargaining proposals or have other such confidential fiscal work performed. In addition, should the City have the need to have confidential clerical work performed, she has the word processing skills to perform such duties.

Although the City argues that the Deputy Treasurer does not have the time to perform such additional clerical duties, this claim is not persuasive. Given the small size and small number of the City bargaining units, there is no reason to believe such clerical work will be substantial.

Lastly, we note that the Deputy Treasurer has a separate office which will facilitate the performance of her confidential fiscal and clerical responsibilities.

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Deputy Clerk

From our review of the record, we are satisfied that the Deputy Clerk is not a confidential employee.

Roberts handles the word processing duties for the Mayor, Council and Mann. She does have access to City records, and her work station is adjacent to the vault housing some of the City's records. Her testimony establishes, however, that she closes the vault less in response to confidentiality concerns than to temperature conditions. She has taken notes of closed sessions of the City Council, but none of those sessions involved labor relations. That she has performed no collective bargaining duties regarding the law enforcement unit is noteworthy, even given her relatively short tenure with the City. Mann plays a limited role in employee discipline issues, and the City has not been compelled to address many disciplinary incidents.

The City contends that the certification of the Union will pose a greater need for Roberts' word processing as to confidential labor relations issues. We are satisfied that any such increased need for clerical support can be handled by Deputy Treasurer Reidinger and thus does not warrant Roberts' exclusion as a confidential employee.

Against this background, the Commission has concluded Roberts is a municipal employee who must be included in the bargaining unit.

Administrative Assistant

Rice does backup Reidinger, and has fiscal responsibilities. Those responsibilities do not, however, involve data not available to the Union or to the public generally. She has access to City financial data, but that access does not provide a sufficient basis for concluding she is a confidential employee.

Like Roberts, she has no demonstrated role in the City's bargaining with its law enforcement unit. Given Reidinger's availability, there is no reason to believe there will be any increased need for her services to perform confidential work – even with the addition of the second bargaining unit.

Against this background, the Commission has concluded Rice is a municipal employee

who must be included in the bargaining unit.

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The Parties' Evidentiary Dispute

At hearing, the parties disputed whether the City could appropriately question employee witnesses as to whether they wished to be included in the unit. The City contended this is a legitimate means to explore potential issues of bias as to employee testimony. The Union contended employee support or lack thereof for inclusion in a unit is an exercise of Sec. 111.70(2), Stats., rights, and that questioning employees on their choice in that regard is an improper polling of the employees. Both parties correctly agree that that an employee's preference is not a relevant consideration when the Commission determines an employee's unit status. CITY OF DELAVAN, DEC. NO. 12185-A (WERC, 8/88).

We acknowledge that an employee (or a supervisor for that matter) may shade his or her testimony in an effort to enhance the desired result in a unit clarification proceeding. Nonetheless, we are persuaded that the prejudice to the employee's exercise (or choice not to exercise) rights under Sec. 111.70(2), Stats., warrants a conclusion that questions as to an employee's unit preferences should not be asked and, if asked, should not be answered. We also note that the non-adversarial fact-finding nature of a unit clarification/election proceeding maximizes the opportunity and likelihood that any such "shading" will be exposed through the testimony of other witnesses and documentary evidence.

Dated at the City of Madison, Wisconsin, this 4th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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