

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**WAUSHARA COUNTY COURTHOUSE EMPLOYEES,  
LOCAL 1824, AFSCME, AFL-CIO**

Involving Certain Employees of  
**WAUSHARA COUNTY**

Case 88  
No. 68827  
ME(u/c)-1276

**Decision No. 30222-B**

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**Appearances:**

**James R. Macy** and **Edward J. Williams**, Davis & Kuelthau, S.C. Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Waushara County

**Michael J. Wilson**, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, and **David Dorn**, Staff Representative, Wisconsin Council 40, 336 Doty Street, Fond du Lac, Wisconsin, 54935, appearing on behalf of Waushara County Courthouse Employees Union, Local 1824, AFSCME, AFL-CIO

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

On April 24, 2009, the Waushara County Courthouse Employees Union, Local 1824, AFSCME, AFL-CIO (Union) filed a petition seeking to add the positions of Highway Clerk, Victim Witness Coordinator, Child Support Deputy, and Paralegal (three incumbents) to the bargaining unit of employees of Waushara County (County) that the Union currently represents. In preliminary proceedings, the parties agreed to include the Highway Clerk in the

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bargaining unit and to continue to exclude the Victim Witness Coordinator and Child Support Deputy.<sup>1</sup>

As to the position that remains in dispute, i.e., the Paralegals, a hearing before Commission Chair Judith Neumann was held in Wautoma, Wisconsin on June 24, 2009. The proceedings were transcribed and both parties filed post-hearing briefs. The record was closed on September 21, 2009, when the Union indicated it did not intend to file a reply brief.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

### **FINDINGS OF FACT**

1. Waushara County, herein the County, is a municipal employer that provides a variety of services to its citizens.

2. Since November 2001, as a result of a stipulated election, Waushara County Courthouse Employees Union, Local 1824, AFSCME, AFL-CIO, herein the Union, has been certified to represent a bargaining unit described in the parties' 2009-2010 collective bargaining agreement as follows:

. . . all regular full-time and regular part-time non-represented employees of the Waushara County Courthouse excluding elected officials, supervisory, confidential, managerial, casual, and professional employees and employees who work less than 600 hours per year . . .

3. At all material times and for several years prior to the 2001 election referenced above, the County has employed three full-time individuals as Paralegals, all of whom work in the office in the courthouse that also houses the District Attorney and the Corporation Counsel. For budget purposes, the District Attorney and the Corporation Counsel are each assigned 1.5 FTE Paralegals. All three Paralegals perform work for both the District Attorney and the Corporation Counsel regardless of budgetary allocation.

4. The parties agreed to exclude the position of Paralegal in the Corporation Counsel's office from the bargaining unit at the time of the November 2001 election. The Stipulation for Election signed by both the Union and the County included a list of employees,

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<sup>1</sup> The Union stated on the record that its basis for agreeing to exclude the Victim Witness Coordinator was that the position appeared to be professional within the meaning of Sec. 111.70(1)(L), Stats. The County did not agree to characterize the position as "professional," but had no objection to the Union withdrawing its petition to accrete the position. The parties agreed that the Child Support Deputy position will be in the bargaining unit at such time as the current incumbent leaves the position and the County fills the position.

one portion of which was entitled “Exclusions” and contained, *inter alia*, the names of two employees identified as “Paralegal – Corp. Counsel Office – confidential.”<sup>2</sup>

5. The County employs approximately 450 employees, of whom about 300 are included in the County’s six collective bargaining units. Most if not all of the remaining approximately 150 employees are managerial, supervisory, confidential, part-time or casual employees.

6. The County’s labor relations, collective bargaining, and personnel work is handled by the Administrative Coordinator, currently Debra Behringer. For legal advice pertaining to personnel issues, including collective bargaining and labor relations, the County relies primarily upon Corporation Counsel Ruth Ann Zouski. Behringer and Zouski are members of the County bargaining team for all bargaining units. Administrative Coordinator Behringer responds to grievances at the third step of each respective contractual grievance procedure. While occasionally a County employee or family member may be the subject or witness in a criminal investigation for work-related activity, the District Attorney has no significant role in the County’s personnel relations.

7. In addition to the three presently excluded Paralegal positions, the County employs four confidential employees in the office of the Administrative Coordinator, including a full-time Assistant to the Coordinator, and also employs one confidential employee in the Highway Department, and one confidential employee in the Sheriff’s Department.

8. Corporation Counsel Zouski is frequently out of the office for court appearances and other work-related activity and does not have voice mail. She relies upon the Paralegals, interchangeably, to act as conduits for receiving and sending detailed messages regarding County legal work. One aspect of Zouski’s legal work is to provide advice to Behringer on personnel-related issues. Behringer’s questions to Zouski have included how to respond to grievances, how to handle issues related to the Family and Medical Leave Act (FMLA), loss of a Commercial Driver’s License (CDL), and employee disability, and which County Board subcommittee would be appropriate to respond to a particular employment concern. Behringer calls Zouski’s office an average of about once per day. At times, Zouski’s advice, to which the Paralegals have been privy, has led to the filing of grievances.

9. In addition to giving advice to Behringer, Zouski may give legal advice directly to Departments Heads regarding employment matters, such as possible workers’ compensation liability and whether/when to have an employee tested for drugs or alcohol. Zouski and/or Behringer may also be involved in investigating and/or processing grievances on behalf of

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<sup>2</sup> The testimony indicates that the County employed three Paralegals at the time of the 2001 election and that the deployment of the three individuals has remained unchanged since well before that election. The Stipulation for Election contains only two names identified as “Paralegals.” The record does not explain this discrepancy. Since both parties agree that three Paralegal positions have existed at all material times, have performed similar duties, and have been excluded from the unit, we conclude that the same denomination of “confidential” applied to the third but unlisted Paralegal.

Department Heads and, depending on the nature of their previous involvement in any particular matter, may also advise the County Board's personnel committee on how to respond to a grievance. The Paralegals provide clerical and to a lesser extent investigative support for Zouski in carrying out these duties, including the occasional typing of grievance responses prior to those responses being conveyed to the respective union. Recently Department Heads have been consulting with Zouski about possible downsizing and layoffs, and the Paralegals are likely to be conduits for information pertaining to such decisions prior to any involvement of a collective bargaining representative.

10 Zouski would represent the County in any grievance arbitration arising out of County bargaining units, but it has been many years since a matter has gone to arbitration. If this were to occur, the Paralegals would have some litigation-support duties associated with such arbitration. On at least one occasion, a Paralegal assembled litigation materials for outside counsel in a labor relations matter that did not ultimately go to hearing.

11. When a Human Services Department employee was experiencing certain performance problems associated with a mental health issue, Zouski was out of the office when the situation came to a crisis and one or more of the Paralegals was involved in relaying information between/among Behringer, the Department Head, and Zouski.

12. The Paralegals from time to time act as conduits to Zouski and/or Behringer regarding citizen complaints about County employees. On one occasion, a Paralegal received and forwarded information from a citizen who was unhappy with the way the Sheriff's Department responded to a "9-1-1" call at his home.

13. Paralegals occasionally have transcribed interviews with employees and witnesses regarding allegations of misconduct, usually in the Sheriff's Department. Often, but not always, a Union representative was present during these interviews. The investigations related to such interviews at times have resulted in discipline being imposed upon the subject employee.

14. The office where the Paralegals work is configured so that there is one counter and one telephone, which accommodates three outside lines. The Paralegals share the same space and also share responsibility for attending to the counter traffic, answering the telephone and open mail. There is some division of labor among the Paralegals, such that one of them concentrates more on the juvenile court matters and therefore works more frequently with social workers, while the other two more frequently work on felony matters and personnel issues from the Sheriff's Department. Similarly, the County tries to avoid having the Paralegal who works with the social workers become involved in social worker personnel issues. Although there is thus some differentiation among the Paralegals as to work duties, any of the three Paralegals interchangeably may and do perform confidential labor relations work associated with Zouski's duties as Corporation Counsel.

15. With some initial adjustments and inconvenience, but without undue disruption to the County's operations, the confidential labor relations work associated with the Paralegal function within the Corporation Counsel's office could be assigned on a regular basis to one designated Paralegal position rather than all three. The Paralegal so assigned will have sufficient access to, knowledge of, or participation in confidential matters relating to labor relations to be a confidential employee. The other two Paralegals will not have sufficient access to, knowledge of, or participation in confidential matters relating to labor relations to be confidential employees.

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

### CONCLUSIONS OF LAW

1. One incumbent in a Paralegal position employed by the County 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.

2. Two incumbents in Paralegal positions employed by the County are not confidential employees within the meaning of Sec. 111.70(1)(i), Stats., and therefore are municipal employees within the meaning of Sec. 111.70 (1)(i), Stats.

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

**ORDER**

Two Paralegal positions employed by the County shall be included in the bargaining unit described in Finding of Fact 2 represented by Waushara County Courthouse Employees Union, Local 1824, AFSCME, AFL-CIO.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of March, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**WAUSHARA COUNTY**

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

The Union acknowledges that some portion of the work presently performed by the three Paralegals on an interchangeable basis is confidential within the meaning of the Municipal Employment Relations Act (MERA) – most of it in the form of relaying telephone messages. However, the Union contends that the amount of that work is minimal when spread among three positions and could be handled by just one Paralegal without unduly disrupting the County’s business. Therefore, according to the Union, the Commission should balance the County’s needs against the statutory rights of the Paralegals as “employees” within the meaning of MERA and include two of the positions in the bargaining unit.

The County raises two principal contentions. First, it argues that the Commission should not reach the merits of the Union’s petition, based upon the Commission’s “deal is a deal” doctrine. Here the Union voluntarily agreed to exclude these positions at the time the unit was certified in November 2001, and, according to the County, the record does not establish that the parties mutually agreed that the employees were confidential within the meaning of MERA. Second, as to the merits, the County contends that it has long maintained a good-faith practice, predating collective bargaining, such that the three Paralegals are utilized interchangeably in the Corporation Counsel’s office; and that they and their work are fully integrated functionally and in terms of office layout. Hence, according to the County, the Commission would be unduly interfering with the County’s right to manage its enterprise if the Commission were to require the County to segregate confidential work and assign it to only one position.

1. **“Deal is a Deal”**

The Commission for many years has followed a policy such that it will not entertain petitions seeking to alter the composition of voluntarily agreed-upon bargaining units, absent certain conditions. The history and purpose of that policy are discussed at length in the Commission’s decision in NORTHERN OZAUKEE SCHOOL DISTRICT, DEC. No. 14211-C (WERC, 9/05). The Commission recognizes four exceptions to the policy: (1) where the disputed position did not exist at the time of the agreement; (2) where the basis for including or excluding was statutory, i.e., the position was supervisory, confidential, managerial, professional, or craft; (3) where changed circumstances have materially affected the unit status of the positions; or (4) where the agreed-upon unit status is repugnant to MERA. ID., and cases cited therein.

Here, both parties agree that the Paralegal position existed at the time of the stipulated unit determination, that nothing has changed since then, and that the exclusion is not repugnant to MERA. The Union contends, however, that the second of the foregoing exceptions applies, in that the Paralegals were excluded because they were deemed confidential and thus not

“employees” under MERA. The County argues to the contrary that “there is no express agreement between the County and the Union” as to the confidential status of the Paralegals and hence the exception does not apply.

Here, the record contains evidence of an express agreement between the parties at the time of the election to exclude the Paralegals as confidential employees. As noted in Finding of Fact 4, above, the parties each signed a Stipulation regarding the composition of the bargaining unit that, for purposes of determining eligibility to vote, incorporated an appendix designating the Paralegals as “confidential.” Given the clear language of this agreement on its face, the record does not require extrinsic evidence about the mutual intent of the parties, such as the negotiations history that the County contends is lacking here. Where both parties sign a document that indicates employees are being excluded from a bargaining unit because they are “confidential”, their intent is apparent. Thus, we are satisfied that the parties excluded the Paralegals on the ground of their alleged statutory status as “confidential” employees. Therefore, we conclude the second exception to the “deal is a deal” rule is present here and we proceed therefore to determine the unit status of the Paralegal positions.

## 2. Confidential Duties and the Undue Disruption Issue

Much of the work performed by the Paralegals in the Corporation Counsel/District Attorney’s office is not confidential labor relations work. The District Attorney’s duties are virtually devoid of labor relations work and the Corporation Counsel has a myriad of duties that are unrelated to the County’s labor relations or personnel work. The Paralegals assist the Corporation Counsel and District Attorney in all of their civil and criminal legal work for the County and therefore carry out non-confidential duties to a degree that would correspond to the non-labor relations work of the office.

It is well-settled that confidential labor relations work:

. . . must: (a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents.

MINERAL POINT UNIFIED SCHOOL DISTRICT, DEC. NO. 22284-C (WERC, 9/00), AFF’D SUB NOM. MINERAL POINT UNIFIED SCHOOL DISTRICT V. WERC, 251 WIS.2D 325, 337-38 (2002) (citations omitted).

Both parties acknowledge that the Paralegals traditionally have performed a cognizable amount of confidential labor relations work.<sup>3</sup> The principal component of this work is the

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<sup>3</sup> It can well be argued that information the Paralegals may obtain about an employee’s FMLA status, mental health issues, domestic abuse allegations, loss of a CDL license, and so forth, while confidential in the conventional sense that the Paralegals would be expected to adhere to some measure of privacy regarding the



taking and relaying of detailed messages between County Administrator Behringer (and to a lesser extent other Department Heads) and Corporation Counsel Zouski regarding about how to respond to various incidents of misconduct or illness and/or how to respond to grievances or negotiations proposals.<sup>4</sup> Behringer estimates that she calls Zouski about personnel matters perhaps once per day and that most of these calls require a Paralegal to relay detailed information to or from Zouski. Even assuming for the sake of discussion that every one of these calls involved information of a confidential labor relations nature, within the meaning of MERA, and even assuming that other Department Heads in the aggregate also convey/receive confidential information over the telephone and through the Paralegals an average of once per day,<sup>5</sup> these messages clearly comprise a small, though not insignificant, portion of the Paralegals' work. As to bargaining proposals, it appears on this record that Zouski generally uses e-mail or direct telephone calls to transmit her input regarding such proposals and does not involve the Paralegals. As to standard preparation of negotiations materials, formal grievance responses, routine communications between the County and its various unions, and general clerical support to the labor relations enterprise, we note that Behringer's office is the County's primary locus of labor relations work and that office has four excluded confidential employees. Like the Sheriff's Department, the Highway Department also has an excluded confidential employee.

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dissemination of that information, is not in and of itself the type of information that must be withheld from the union for strategic reasons having to do with labor-management relations. Such information is akin to knowledge of employee evaluations, payroll records, leave records, medical records, unemployment and workers' compensation records that the Commission has long held do not "result in adequate exposure to an employer's strategy to justify an employee's confidential status." CITY OF TWO RIVERS, DEC. NO. 31519-B (WERC, 11/06), at 6, and cases cited therein; SHEBOYGAN AREA SCHOOL DISTRICT, DEC. NO. 10488-B (WERC, 8/02). To be sure the County ultimately may respond to these various situations in a disciplinary manner, or the Union may respond by filing a grievance. Preliminary discussion among managers about how to respond are likely confidential in a labor relations sense. However, information that certain incidents or allegations have occurred is not inherently strategic or unavailable to the Union.

As to transcribing investigatory interviews, the record indicates that on occasion Paralegals transcribe interviews in potential disciplinary situations when a union representative is not present. Viewing the record as a whole, we are satisfied that a union representative generally participates in the disciplinary interviews which, of course, ipso facto removes them from the ambit of confidentiality.

<sup>4</sup> The record indicates that the Paralegals occasionally access Zouski's e-mail and bargaining notes, upon her request, to find communications that occasionally relate to confidential labor relations matters. This work is functionally the same as the telephone work, although it appears to occur far less frequently.

<sup>5</sup> This assumption is probably generous to the County, since most Department Heads presumably direct their labor relations inquiries through Behringer's office initially.

Thus even in the aggregate the amount of time the Paralegals perform confidential labor relations work is small. The amount any one Paralegal performs is perforce de minimus. The Commission traditionally has been reluctant to deprive employees of the statutory right to bargaining unit membership based upon a de minimus amount of confidential work. MINERAL POINT SCHOOL DISTRICT, SUPRA. We have historically rejected attempts by employers to acquire more confidential employees than needed by spreading confidential work among various employees. MARSHFIELD JT. SCHOOL DISTRICT NO. 1, DEC. NO. 14575-A (WERC, 7/76). On the other hand, the Commission is sensitive to the needs of municipal managers to conduct their business “through employees whose interests are aligned with those of management,” and, “where a management employee has significant labor relations responsibility, the clerical employee assigned as his or her secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employee without undue disruption of the employer’s organization.” MINERAL POINT SCHOOL DISTRICT, SUPRA.

Here, Zouski clearly has significant labor relations responsibilities and relies upon the Paralegals to provide clerical assistance (largely telephone support) in pursuit of those responsibilities. She has chosen to utilize all three Paralegals interchangeably for all purposes, including those related to confidential work. This is partly a result of the office configuration, where all three employees work in the same undivided space and respond to the telephone and counter traffic as available. Behringer and the other Department Heads have become accustomed to this manner of Paralegal deployment. The arrangement has allowed Zouski to function without voice mail, for example, despite being away from her desk for long stretches of time. It has also facilitated prompt attention to time-sensitive legal matters.

We do not doubt that Zouski, Behringer, and to a lesser extent other County managers, would encounter some disruption if one Paralegal position were designated as the principal confidential employee. Notification of the change and a period of retraining and adjustment would be required. There may be some initial problems flowing from the close physical proximity among the Paralegals and Zouski. However, physical proximity and the resulting inconvenience in terms of conversation and other practical adjustments is not a basis for extending confidential status beyond what is reasonably necessary, as long as the requisite privacy is available by, for example, communicating sensitive information by e-mail rather than orally or going into Zouski’s office and closing the door. VILLAGE OF ASHWAUBENON, DEC. NO. 23746-C (WERC, 8/02). As to impeding the handling of time-sensitive legal matters if the designated Paralegal is unavailable to take or convey messages, the record does not indicate that the routine confidential work flowing through the office is so frequently urgent that it cannot be routed through a designated individual on a regular basis. We believe that the County can find ways to work around temporary or ad hoc unavailability of the designated Paralegal, including the occasional substituting of one or the other bargaining unit Paralegals. Such occasional or substitute performance of confidential work does not require exclusion from the bargaining unit. It is the regular performance of confidential duties, even if small in quantity, that determines unit status. OCONTO FALLS PUBLIC SCHOOLS, DEC. NO. 26815-B (WERC, 5/04); WEST SALEM SCHOOL DISTRICT, DEC. NO. 22514-A (WERC, 8/89).

For these reasons we conclude that the disruption occasioned by designating one of the three Paralegals to handle confidential work would not unduly disrupt County operations. We therefore hold that one Paralegal position should continue to be excluded from the Union's bargaining unit as a confidential employee and the other two positions should be included in the unit.

Dated at Madison, Wisconsin, this 16th day of March, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner