

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of

CITY OF MADISON

Involving Certain Employees of

CITY OF MADISON

Case ID: 256.0023

Case Type: UC\_ME

DECISION NO. 39476

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**Appearances:**

Greg Leifer, Employee and Labor Relations Manager, City of Madison, 215 Martin Luther King Boulevard, Room 261, Madison, Wisconsin, appearing on behalf of the City of Madison.

Kyle A. McCoy, Attorney, Soldon McCoy LLC, 5502 Upland Trail, Middleton, Wisconsin, appearing on behalf of the International Brotherhood of Teamsters, Local 695.

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

On January 11, 2022, the City of Madison filed a petition with the Wisconsin Employment Relations Commission requesting that a collective bargaining unit of City employees represented by the International Brotherhood of Teamsters, Local 695 be clarified by removal of four positions allegedly held by confidential employees.

A hearing was held in the matter on March 23, 2022 in Madison, Wisconsin before Examiner Peter G. Davis, a member of the Commission's staff. The parties filed briefs by April 29, 2022.

The Commission, having reviewed the evidence and arguments and being fully advised in the premises, makes and issues the following:

**FINDINGS OF FACT**

1. The City of Madison, herein the City, is a municipal employer whose offices are located at 215 Martin Luther King Boulevard, Madison, Wisconsin

2. The International Brotherhood of Teamsters Local 695, herein Teamsters, is a labor organization that serves as the collective bargaining representative of certain employees of the City.

3. On January 11, 2022, the City filed a unit clarification petition with the Commission wherein it sought the exclusion of the positions of Transit Office Coordinator, Account Technician III, Account Clerk III, and Account Clerk II, as allegedly held by confidential employees.

4. Riva McFarland holds the position of Transit Office Coordinator. She does have sufficient access to, knowledge of or participation in confidential matters relating to labor relations to be a confidential employee.

5. Andrew Sernatinger holds the position of Account Technician III. He does not have sufficient access to, knowledge of or participation in confidential matters relating to labor relations to be a confidential employee.

6. Lisa Gehrke holds the position of Account Clerk III. She does not have sufficient access to, knowledge of or participation in confidential matters relating to labor relations to be a confidential employee.

7. Trina Protz holds the position of Account Clerk II. She does not have sufficient access to, knowledge of or participation in confidential matters relating to labor relations to be a confidential employee.

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

#### **CONCLUSIONS OF LAW**

1. The Transit Office Coordinator is a confidential employee within the meaning of Wis. Stat. § 111.70(1)(i), and, therefore, is not a municipal employee within the meaning of Wis. Stat. § 111.70(1)(i).

2. The Account Technician III, Account Clerk III, and Account Clerk II are not confidential employees within the meaning of Wis. Stat. § 111.70(1)(i), and, therefore, are municipal employee within the meaning of Wis. Stat. § 111.70(1)(i).

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

#### **ORDER CLARIFYING BARGAINING UNIT**

1. The position of Transit Office Coordinator shall be excluded from the bargaining unit represented by the International Brotherhood of Teamsters, Local 695.

2. The positions of Account Technician III, Account Clerk III, and Account Clerk II shall remain in the bargaining unit represented by the International Brotherhood of Teamsters, Local 695.

Issued at the City of Madison, Wisconsin this 25<sup>th</sup> day of August, 2022.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

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

Wisconsin Stat. § 111.70(1)(i) defines a municipal employee as “any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee.”

As the City correctly points out, the Commission held in *Eau Claire School District*, Dec. No. 17124-B (WERC, 6/95), p. 15-16, that:

[T]he confidential exclusion protects a municipal employer's right to conduct its labor relations through employees whose interests are aligned with those of management, rather than risk having confidential information handled by people with conflicting loyalties who may be subjected to pressure from fellow bargaining unit members.

The term “confidential employee” is not statutorily defined. However, in *Mineral Point School District v. WERC*, 251 Wis. 2d 325, 337-338 (Ct. App. 2002), the Court affirmed and applied the following definition the Commission had long used.

We have held that for an employee to be held confidential, the employee must have sufficient access to, knowledge of or participation in confidential matters relating to labor relations. For information to be confidential in the labor relations context, it must: (a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents.

While a de minimis exposure to confidential matters is generally insufficient grounds for exclusion of an employee from a bargaining unit, 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. 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, and similarly, 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.

### **Transit Operations Office Coordinator**

The record supports a finding that Transit Operations Office Coordinator Riva McFarland is a confidential employee. She is privy to discussions amongst supervisors/managers about how to conduct investigations into possible employee misconduct, how to reply to grievances, and whether and to what extent discipline may be imposed. Because her knowledge of such matters is derived from her role as the “note taker” in those discussions, there is a strong argument to be made that this confidential labor relations function is not essential or could be performed by others in the meeting. Thus, if that were her only responsibility related to confidential labor relations matters, she would not be found to be a confidential employee. However, the record reflects that she is also responsible for gathering documents used by the City in various types of employment-related litigation. While the Teamsters correctly argue that these documents are ultimately available to the impacted employee and/or Teamsters, her knowledge of what is being sought by the City in the first instance makes her potentially privy to strategic information the City is entitled to keep confidential. On balance, the combination of her two confidential labor relations duties is sufficient to warrant her exclusion from the unit.

### **Account Technician III, Account Clerk III and Account Clerk II**

Each of the three employees holding these positions has substantial responsibility entering data into a computer system as to payroll, employee absences, Worker’s Compensation and/or the Family Medical Leave Act. The record satisfies the Commission that none of them exercise any meaningful labor relations discretion when doing so. All discretionary judgments are made by other employees who are not in the bargaining unit. None of the employees in dispute play any role on the collective bargaining process.

Given the foregoing, the City’s contention that they are confidential employees rests on the concern that they may modify, fail to enter, or delete data to the detriment of the City and to the advantage of bargaining unit employees. There is no evidence that any of the three employees have done so. As Teamsters notes, if they did so, they would presumably be discharged. While the City has a legitimate interest in maintaining the integrity of its personnel systems, the Commission has held and now continues to hold that the potential for employee misconduct is not a basis for finding an employee to be confidential employee. *See Waukesha County*, Dec. No. 26020-A (WERC, 9/89); *Elcho School District*, Dec. No. 27640-C, (WERC, 4/97). Therefore, the Commission concludes that these three employees are not confidential employees.<sup>1</sup>

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<sup>1</sup> The City also points to employee access to HIPPA-protected information. While such information is “confidential” in a general sense, it is not confidential labor relations information as it has no utility as to or bearing on the City’s conduct of confidential labor relations matters. The City’s concern about unnecessary exposure to such information (which appears to be infrequent) is certainly valid, and the record suggests it can be remedied by a change in procedure.

Issued at the City of Madison, Wisconsin this 25<sup>th</sup> day of August, 2022.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman