BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 9, AFL-CIO-CLC (Union)

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL NO. 73A, AFL-CIO (Employer)

Case 1
No. 58664
A-5829

(Class Action Work Assignment Grievance dated 12-2-99)

Appearances:

Mr. Gary R. Nuber, OPEIU International Representative, 704 Hillcrest Avenue Nekoosa, WI 54457, appearing on behalf of the Union.

Mr. William Haus, Haus, Resnick & Roman LLP, 148 East Wilson Street, Madison, WI 53703-3423, appearing on behalf of the Employer.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as Arbitrator to hear and decide a dispute concerning the above-noted grievance under parties' April 1, 1998 — April 7, 2001 Agreement (Agreement).

Pursuant to notice, the grievance dispute was heard at the Employer's Milwaukee office on April 27, 2000. The proceedings were not transcribed, but the parties authorized the Arbitrator to maintain an audio tape of the hearing for the Arbitrator's exclusive use in an award preparation. The parties' post-hearing briefs were exchanged on July 20, 2000, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to formulate a statement of the issues in dispute with the benefit of their respective proposed formulations. At the hearing and in its brief, the Union proposed that the issues be framed as follows:

1. Did the Employer violate the Agreement when it excluded the position held by Susanne Gavran from the bargaining unit?

2. If so, what is the appropriate remedy?

At the hearing, the Employer objected to the Union's proposed formulation on the grounds that the National Labor Relations Board has jurisdiction to determine whether a particular employee is a confidential employee within the meaning of the National Labor Relations Act, and that the Arbitrator does not. The Employer proposed at the hearing that the issues be framed as follows:

1. Did the Employer's assignment of work duties to Susanne Gavran violate any provision of the Agreement?

2. If so, what is the appropriate remedy?

In its brief, the Employer framed the issues as follows:

1. Does the Arbitrator have jurisdiction to determine whether a particular employee is a confidential employee within the meaning of the National Labor Relations Act or is such determination within the proper jurisdiction of the National Labor Relations Board?

2. Does the Agreement contain a work assignment clause that precludes the Employer from assigning work that has been performed by members of the bargaining unit to an employee that is "confidential" and therefore excluded from the bargaining unit? Or did the Employer violate the terms of the Agreement when it assigned work otherwise performed by bargaining unit members to an employee excluded from the bargaining unit by virtue of her confidential duties?

The Arbitrator frames the issue in dispute as follows:

What shall be the disposition of the class action work assignment grievance dated 12-2-99?

PORTIONS OF THE AGREEMENT

ARTICLE I — DEFINITIONS

. . .

Section 3. The term "employee/s" as used herein means all office employees coming under the jurisdiction of the Union.

. . .

ARTICLE II — RECOGNITION — UNION SECURITY

. . .

Section 1. The Employer agrees to recognize and hereby does recognize the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, hours and all other terms and conditions of employment for the appropriate bargaining unit herein established and described as follows.

Section 2. All regular full time and regular part-time employees of the Employer's Milwaukee and Oshkosh, Wisconsin area offices excluding professional employees, confidential employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

Section 3. All employees coming under the terms of this agreement shall become members of the Union after the thirty-first (31st) day following the date of employment and shall remain members in good standing as a condition of employment.

Section 4. The Employer agrees to deduct union dues and initiation fees from the wages of employees in the bargaining unit who provided the Employer with a voluntary written authorization which shall not be irrevocable for a period of more than one (1) year or beyond the termination date of this Agreement, whichever occurs sooner.

Section 5. The management of the business in all its phases and details shall remain vested in the Employer. Rights of the Employer, the Union and the employees shall be respected and the provisions of this Agreement for the orderly settlement of all questions regarding such rights shall be observed.

. . .

ARTICLE XIV — WAGES

Section 1. Effective March 29, 1998, all employees on the payroll shall receive an increase of fifty cents ($0.50) per hour.

Section 2. Effective April 4, 1999, all employees on the payroll shall receive an increase of fifty-five cents ($0.55) per hour.

Section 3. Effective April 2, 2000, all employees on the payroll shall receive an increase of fifty cents (0.50) per hour.

Section 4. The minimum weekly wage rates shall be set forth in Exhibit "A" attached to this Agreement and included as a part hereof.

Section 5. The minimum wage rates provided in Exhibit "A" shall not operate to reduce the wages of employees receiving higher wages than are provided for in this Agreement.

. . .

ARTICLE XVI — SEPARABILITY

Section 1. In the event that any provision of this Agreement shall at any time be declared invalid by any court of competent jurisdiction or through government regulation or decree, such decision shall not invalidate the entire Agreement, it being the express intention of the parties hereto that all other provisions not declared invalid shall remain in full force and effect.

. . .

EXHIBIT "A" — WAGES

Section 1. For the duration of this Agreement the wage structure for the respective classifications for new employees hired April 1, 1998 or later shall be as follows:

April 1, 1998

[There follows a rate schedule listing the "Minimum Starting Rate" and "Minimum Rate" for 6-12 months, 12-18 months, 18-24 months and 24-36 months for classifications II through V.]

Section 2. The following pay scale is for new hires in the Part-Time classification. The new rate for the Part-Time position would only affect new employees. The employer would not reclassify any current employees to this pay plan.

[There follows a rate schedule listing rates for 0-9 months, 9-18 months, 18-27 months, 27-36 months and over 36 months.]

Section 3. (A) All employees hired on and after April 3, 1995 [sic] shall progress within their respective classifications in accordance with the foregoing schedule.

(B) Employees who are transferred to a higher classification shall, on the effective date of such classification, be paid no less than the starting rate for such classification and shall progress to the minimum of the classification in accordance with the foregoing schedule.

. . .

EXHIBIT "C" — JOB DESCRIPTIONS

Section 1. The Employer is obligated to properly classify its employees pursuant to the job descriptions which are a part of this Agreement.

I - SUPERVISOR - BOOKKEEPER

Develops and coordinates clerical procedures of Local 73A. Provides confidential services to Local 73A with regards to Labor Relations matters. May be a lead office employee that serves as supervisor of the office staff, and perform managerial responsibilities. May be responsible for hiring and training all office personnel. May keep some book original records and personnel records, standardize operation procedures. May be responsible for purchasing equipment and supplies. Responsible for Employer's books and records, including cashiering, posting, compiling international reports, bookkeeping, keeping membership records. Prepares payroll, federal reports to the Bureau of Internal Revenue, the National Labor Relations board and similar agencies, with only occasional supervision from the Employer. Operates appropriate office equipment and machinery. Responsible for the accuracy of the records, compilation of summary statements, direction and training of assistants as [well] as being responsible for her/his own work.

II - SECRETARY

Performs general office work, relieving the business representative/s and/or officers of minor duties. May take and transcribe dictation, using shorthand or a stenotype machine. Makes appointments for the business representative/s and/or officers. Interviews people coming into the office. Answers and makes phone calls. Handles general and confidential correspondence. Operates appropriate office equipment and machinery. May supervise other employees. Frequently called upon to exercise considerable amount of independent judgment. Keeps records under the supervision of the office supervisor. Prepares statements, vouchers, posts, compile summary statements, assume responsibility for the whole set of records or for seeing that the proper reports are filed on time. File records and reports.

III - STENOGRAPHER - BOOKKEEPER

Qualified to perform the duties of clerks and typists with little or no supervision. Performs such work as taking and transcribing dictation involving the technical language and terms used by the Employer. Operates appropriate office equipment and machinery. May be called upon to supervise the work of Clerks and Typists. May maintain files, keep records, etc. Keeps records under the supervision of the Office Director or Bookkeeper. Prepares statements, vouchers, posts, but is not required to make closing entries, compile summary statements, assume responsibility for the whole set of records or for seeing that the proper reports are filed on time. May prepare payroll.

IV - STENOGRAPHER - CLERK

Performs routine stenographic duties and related clerical work. Takes and transcribes, with limited speed and accuracy, routine dictation involving standard business terminology and requiring moderate skill. Prepares and maintains minor records, reports or other relatively routine clerical tasks. Operate appropriate office equipment and machinery.

V - CLERK-TYPIST

Performs general clerical work not requiring special schooling or training other than high school. Under immediate supervision and instruction. Typewrites letters, reports, contracts and other matter from rough draft or corrected copy. Files records and reports. Answers the telephone and performs other clerical work of a routine nature. Operates appropriate office equipment and machinery.

Section 2. In the event the Employer creates a new position which differs from the classifications which are a part of this Agreement, the description and rate of pay shall be subject to negotiation.

. . .

BACKGROUND

The Employer is a labor organization serving some 6,500 members covered by approximately 100 collective bargaining agreements. The Employer maintains its main office in Milwaukee, a satellite office in Oshkosh and has one Business Representative working from home in Fort Atkinson. For many years, the Union has represented a bargaining unit consisting of the Employer's office employees. The Union and Employer have been parties to a series of collective bargaining agreements, the latest of which is the Agreement at issue in this case. A second, separate collective bargaining unit employees of the Employer exists, consisting of the Employer's approximately seven business representatives.

Although the Agreement recognition clause explicitly excludes "confidential employees" as defined by the National Labor Relations Act, as amended, no one was excluded as such for many years, if ever.

In 1997, the Employer filed a unit clarification petition seeking to have Classification I incumbent Gloria Cooper's position excluded from the unit on the basis of her performance of duties allegedly sufficient to make her position that of a confidential employee under the National Labor Relations Act. After several days of hearing, the parties ultimately agreed in December, 1997, that the Employer would withdraw its petition on the basis that the parties agreed to disagree regarding the propriety of the continued inclusion of Cooper's position in the bargaining unit, and reserved their rights to make future filings as they may deem necessary with regard to the disputed position in the future.

In or about early 1998, William White became President of the Employer after having served the Employer for many years in other capacities.

Early in White's tenure as President, he and the Union negotiated about and settled on the terms now consisting of the Agreement, which bears an execution date of May 14, 1998. During those negotiations, the parties revised the Exhibit "C" job descriptions in various respects. One of those revisions, made at White's request, was to expand the reference to confidential duties contained in the Classification I job description to its current form.

At various times since White became President, the Employer employed five office employees, four at its Milwaukee headquarters office, one at the Oshkosh office, and all five in the bargaining unit. At some point in May or June of 1998, apparently after the Agreement

was settled, a Milwaukee office employee, Pat Brunker (last name spelled phonetically), resigned. That prompted White to discuss with Union President and Business Manager, Tony Vanderbloemen, White's interest in hiring a new a confidential office worker for a position outside the bargaining unit. When Vanderbloemen responded that the Union did not want to lose its fifth bargaining unit position, White proposed, instead, that a new position be created within the bargaining unit, to be filled by a newly-hired employee, and to perform, among other duties, the confidential office duties related to the Employer's labor relations.

On September 28, 1999, the parties met to discuss White's proposal to create a new position within the bargaining unit. During that meeting, White stated that the new position would enable the Employer to relieve Cooper of some of her functions and duties. The Employer proposed that the position be placed in Agreement Classification III, for which the Agreement provides a set of minimum rates for new employees at various lengths of service that are lower than the respective minimum rates specified for Classification II. The Agreement contains no minimum or other rates for new employees in Classification I; and it contains no minimum or other rates for existing employees, only the wage increase provisions and other wage related language contained in Article XIV and Exhibit A.

On October 12, 1999, White told Vanderbloemen by phone that White saw no need to have further meetings regarding the new position and that if the new position's creation turned out to be a "hassle," White would create the position outside of the bargaining unit instead. Later that day, White wrote Vanderbloemen describing the duties and functions of the proposed bargaining unit position to be titled "Bookkeeper-Secretary" as follows:

> Bookkeeper-Secretary
>
> Performs general office work, relieving the Business Representative/s and/or Officers of minor duties. Make appointments for the Business Representative/s and/or Officers. Interview people coming into the office. Answers and makes phone calls. May be responsible for purchasing equipment and supplies. Responsible for Employer's books and records, including cashiering, posting, compiling international reports, bookkeeping, keeping membership records. Prepares payroll, Federal reports to the Bureau of Internal Revenue, the National Labor Relations Board and similar agencies, with only occasional supervision from the Employer. Responsible for the accuracy of the records, completion of summary statements, as well as being responsible for her/his own work. Prepares statements, vouchers, post, compile summary statements, assume responsibility for the whole set of records or for seeing that the proper reports are filed on time. File records and reports. Operates appropriate office equipment and machinery. Handles general and confidential correspondence. May supervise other employees.

On October 14, 1999, Vanderbloemen wrote White expressing concern that Classification III may not be appropriate given the duties of the new position and stating that it was the Union's understanding that Cooper's rate of pay would be red-circled and that she would continue to receive all across-the-board increases for the term of her employment.

White responded by letter on October 15, 1999, disagreeing with Vanderbloemen's October 14 letter, withdrawing his request to establish a new job classification in the unit, and asking Vanderbloemen to contact him to discuss the matter.

On October 18, 1999, Vanderbloemen contacted White by phone. According to Vanderbloemen's testimony, White stated that he was angry, unwilling to red-circle Cooper, and that he may take back any raises already given to Cooper which are not specified in the Agreement. According to Vanderbloemen, White further stated that he wanted a smooth transition of duties to the new job or he would change the title to Administrative Assistant and take it out of the bargaining unit. White testified that he did not recall threatening to take back any raises already given to Cooper.

Vanderbloemen and White met on October 26, 1999. At that time, White stated that he wanted the new job titled "Administrative Assistant" with an $11.00 starting rate, wanted Cooper's Classification I job retitled "Supervisor-Secretary," and wanted Cooper to continue to oversee the office and to receive contractual raises. The $11.00 starting rate was in excess of the contractual Minimum Starting Rates for newly-hired employees in Classifications II - V, which ranged from $9.78 to $8.67.

Vanderbloemen then wrote White on October 27, 1999, as follows:

> During our discussion on October 26, 1999 regarding your intent to establish a new bookkeeping position at the Local 73-A Milwaukee office, you indicated that the new position would be titled as Administrative Assistant and that the position would be placed in Classification III. Many of the duties of the Administrative Assistant position are similar to the duties contained in the Stenographer-Bookkeeper Classification III, the Secretary Classification II and the Supervisor-Bookkeeper Classification I position currently occupied by Gloria Cooper.
>
> During our discussion on September 28, October 12 and October 26, you indicated that it was not your intent to remove Gloria Cooper from her position of Supervisor-Bookkeeper Classification I at Local 763-A through the establishment of the new position. It is also our understanding that Ms. Cooper's rate of pay would not be reduced and that she will continue to receive all across the board contractual pay increases.
>
> If there are any questions regarding this issue, please let us know . . . .

White responded by letter on November 8, 1999, stating that he disagreed with parts of White's October 27 letter, and that ". . . after some current events that have happened in the office I am withdrawing my request to establish a new job classification with the union."

Vanderbloemen responded by letter on November 23, 1999, noting that the Employer had hired Suzanne Gavran and asking to which job classification Gavran will be assigned.

The parties' next interaction of record on the subject was Vanderbloemen's filing of the grievance giving rise to this arbitration. The grievance is dated December 2, 1999, though the cover letter transmitting it was dated December 3, 1999. It reads in pertinent part as follows:

> EMPLOYEE: Class Action
>
> PLACE OF EMPLOYMENT: UFCW LOCAL No. 73A
>
> CONTRACT ARTICLE/S INVOLVED: Article I-Definitions, Article II-Recognition — Union Security, and Exhibit "C" — Job Descriptions
>
> STATEMENT OF GRIEVANCE: On November 10, 1999 we received a letter from Local 73A President, Bill White indicating that Local 73A was withdrawing a request to establish a new job classification with the union. As a result, bargaining unit duties of bookkeeping, accounts and general typing among other bargaining unit duties have been assigned to an employee outside the bargaining unit.
>
> These duties are outlined in Job Classification I, II and III of the Contract, properly belong within the jurisdiction of the bargaining unit and have been performed by members of the bargaining unit [at] UFCW Local 73A for more than thirty years. These duties were assigned to bargaining unit employee Gloria Cooper prior to November 8, 1999.
>
> PROPOSED REMEDY: That the duties assigned to non-bargaining unit employees be returned to the bargaining unit. That Gloria Cooper be made whole for all hours of bargaining unit work performed by [Suzanne] Gavran or other non-bargaining unit employees from November 8, 1999.

During the processing of the grievance, Vanderbloemen wrote White on March 21, 2000 requesting "the complete rationale as to why you feel [bookkeeping duties] does not belong in the bargaining unit." White responded on March 23, 2000, as follows:

> The reason why Local 73A believes that the disputed position should not be included in the bargaining unit is that the individual in the position assists and

> acts in a confidential capacity to persons that formulate, determine and effectuate management policies for Local 73A in the field of labor relations. This means that the individual is a confidential employee under the law and may be excluded from the collective bargaining unit.

The grievance remained unresolved and was ultimately submitted for arbitration as noted above. At the hearing, the Union presented testimony from Vanderbloemen and Cooper. The Employer presented testimony by White.

Additional factual background is set forth in the positions of the parties and in the discussion, below.

POSITIONS OF THE PARTIES

The Union

The Arbitrator is not authorized by the Agreement or otherwise to determine whether Suzanne Gavran is "confidential" under the National Labor Relations Act. The Arbitrator must confine his function in this case to interpreting and applying the Agreement, not external law.

If the Arbitrator finds it appropriate to determine whether Gavran is confidential under the National Labor Relations Act, he should conclude that she is not confidential because she does not play a role in any labor relations strategy sessions between management personnel; she is not involved in the investigation of grievances; she has no input as to how the Employer will respond to any grievance; she has no ability to effectively recommend any grievance resolutions; and she lacks any specific information relative to the Employer's "bottom line" position in contract negotiations.

The general Agreement recognition clause exclusion of "confidential employees" from the unit, is modified, altered and restricted by the more specific and more recently modified language of Exhibit "C" providing that bargaining unit positions "[p]rovides confidential services to Local 73A with regards to labor relations matters" and "[h]andles general and confidential correspondence" and "[p]repares payroll, federal reports, to the Bureau of Internal Revenue, the National Labor Relations Board and similar agencies. . . ." Indeed, it was the Employer that proposed inclusion of language added to the Exhibit "C" job descriptions which more broadly and clearly reflected that they included confidential duties. The Employer negotiated the job functions contained in Exhibit "C" of the Agreement and cannot now be allowed to unilaterally remove that same work from the unit. To conclude otherwise would inappropriately render the quoted provisions of Exhibit "C" meaningless. The law does not prohibit the Employer from voluntarily agreeing to include confidential employees in the bargaining unit as the Employer has done in this case.

Significantly, all of the job duties listed in the Employer's October 12, 1999 letter are contained in at least one of the bargaining unit jobs described in Exhibit "C". To allow the Employer to remove jobs from the bargaining unit simply by rearranging their bargaining unit duties creates license for the total elimination of the Union and the Agreement itself. Citing, LOCKHEED ADVANCED DEVELOPMENT CO., 109 LA 622 (CALHOUN, 1997) (the parties' listing of a job in the agreement defines the bargaining unit and limits employer's right to assign duties of that job to non-bargaining unit workers).

The Employer's withdrawal of the new classification from the bargaining unit is particularly inappropriate, coming as it did in a bad faith response in retribution for the Union's protected and concerted activities during negotiations about the new position. Every time the Union did not automatically accept the Employer's conditions regarding the new position, the Employer threatened to withdraw and ultimately did withdraw the position from the bargaining unit, in violation of Secs. 8(a)1, 3 and 5 of the National Labor Relations Act.

Any contention by the Employer that Classification I Supervisor - Bookkeeper position is not a bargaining unit position must be rejected. The description for that position appears in Exhibit "C" of the Agreement. The incumbent in that position, Gloria Cooper, is a Union member whose dues are being forwarded to the Union by the Employer. The Employer has accepted and processed grievances from Cooper in accordance with the Agreement, and the Employer has never previously suggested that persons in Classification I are not in the bargaining unit represented by the Union.

In its brief, the Union states its remedy request as follows:

> . . . the grievance should be sustained. The "Administrative Assistant" position occupied by Suzanne Gavran should be recognized as a Bargaining Unit position. Any and all occupants of said position should be required to abide by the Agreement, specifically Article II (Recognition-Union Security). Suzanne Gavran should be ordered to become and remain a member of OPEIU, Local #9 in good standing from the date of the decision.

The Employer

Clearly, the duties performed in the newly created position occupied by Suzanne Gavran include confidential duties. Confidential employees, even when that function does not consume the majority of the employee's time, are not included in the bargaining unit under the recognition clause of the Agreement or under NLRB law regarding composition of appropriate bargaining units. The Agreement, the law and common sense do not require that the Employer share its confidential labor relations information with a bargaining unit member represented by the Union. It is impractical to limit an employee's work to the relatively small percentage of

work that involves confidential matters, and there is no legal or contractual requirement to do so. The integrity of the collective bargaining process demands that supervisors and confidential employees be excluded from the bargaining unit.

While Exhibit "C" contains several job descriptions, it contains no expressed or implied commitment that the work described in the job descriptions is exclusively reserved to bargaining unit members. Indeed, the language of Exhibit "C" clearly implies the contrary. For instance, the "Supervisor - Bookkeeper" description expressly includes confidential, supervisory and managerial responsibilities. Clearly, such a position would not be deemed appropriate for inclusion in a bargaining unit. Given the inclusion of such obviously inappropriate functions in the Exhibit "C" job descriptions, it must be concluded that the parties did not intend for the job descriptions to constitute a description of bargaining unit work or for the job descriptions to restrict the assignment of functions described therein exclusively to bargaining unit members. It cannot be seriously argued that performance of supervisory and managerial functions constitute bargaining unit work and are functions that are to be exclusively performed by members of the bargaining unit. If performing supervisory functions is bargaining unit work and restricted to members of the bargaining unit, the entire collective bargaining relationship would be dysfunctional. Arbitrators have viewed the assignment of bargaining unit work to non-unit employees in varying ways; however, the lack of any contractual prohibition with regard to such assignments generally supports the propriety of such assignments. Citing Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 758 and cases cited therein.

Confidential employees are well defined in the law and are generally excluded from bargaining units, including the unit described in the Agreement recognition clause. The record reflects that Gavran prepares disciplinary correspondence, participates in discussions related to labor relations matters, will be expected to type collective bargaining proposals and maintains personnel files and all other confidential records related to labor relations in a locked cabinet near her desk to which she has access.

The disputed work assignments in this case have had no substantial effect on the bargaining unit. A new job classification was created that would perform confidential duties among other responsibilities. That position was created outside the bargaining unit on the basis of the confidential duties performed by the employee. A new employee was hired to fill the position. No bargaining unit employees were laid off. No bargaining unit position has been lost. Thus, there is no evidence that the Employer's assignment of duties to the confidential new hire was intended to have or has had the effect of harming job security for any member(s) of the bargaining unit, or the effect of diluting or diminishing the bargaining unit. The Employer had a limited and valid purpose for establishing the confidential position outside of the bargaining unit and for assigning appropriate duties to that position so that there was an efficient use of the employee's time. The Employer acted in response to what had been an ongoing concern regarding the appropriate handling of confidential matters. There has been no showing of bad faith on the part of the Employer. The Employer's actions in this case are

consistent with outcomes approved by arbitrators in published awards. Citing, DANIEL SCHARLIN & ASSOCIATES, 69 LA 394, 398-99 (LUCAS, 1977) (employer's good faith assignment of confidential duties to bargaining unit position and exclusion of that position from unit as confidential did not violate agreement) and BUCKEYE CELLULOSE CORP., 76 LA 889 (IPAVEC, 1981) (employer's good faith transfer of supervisory functions of bargaining unit "crew leader" classification to non-unit supervisor and elimination of crew leader positions did not violate agreement. Assignment of supervisory, non-bargaining unit work to a member of the bargaining unit does not forever expand the scope of bargaining unit work where supervisors are excluded from recognition clause unit description.)

Finally, the confidential status of an employee performing the confidential duties of the disputed position is an issue to be determined by the NLRB and not by the Arbitrator. The parties' previous unit clarification proceeding reserved their rights to make future filings with regard to that issue. The Employer did not disturb the bargaining unit inclusion status of the position of the incumbent at issue in that unit clarification proceeding. With the hiring of the new employee and the reassignment of the confidential responsibilities, this matter should either be deemed resolved or should be resolved through the NLRB's unit clarification process. The Employer reserves its right to proceed to an NLRB unit clarification if necessary.

For those reasons, the grievance should be denied in all respects.

DISCUSSION

While the Employer correctly asserts that no bargaining unit employee has been laid off or reduced in pay as a consequence of the disputed assignments of work to an employee outside the bargaining unit, those assignments have resulted in the bargaining unit's size being effectively decreased by one position. In the context of the small unit involved, that amounts to a 20% reduction in unit size, compared with the size of the unit (5 positions) prior to Brunker's resignation. Indeed, after Brunker's resignation, it was the Union's expressed concerns about losing its fifth bargaining unit position that prompted White's ultimately unsuccessful efforts to negotiate a mutually satisfactory resolution whereby a newly hired employee in a newly created position within the bargaining unit would perform the Employer's confidential office work.

The grievance asserts that the Employer violated the Agreement by assigning "bargaining unit duties of bookkeeping, accounts and general typing among other bargaining unit duties . . . to an employee outside the bargaining unit." The record clearly establishes that the Employer has assigned various duties — confidential and non-confidential — previously performed exclusively by bargaining unit personnel, to an employee outside the bargaining unit.

The central question in this case is whether, in all of the circumstances, the Agreement affords the Employer the right to make those assignments to an employee outside the bargaining unit.

The recognition clause expressly excludes confidential employees from the bargaining unit. On the other hand, the parties have a long history of having confidential office duties being performed by bargaining unit personnel or by the Local's officers, and not by an office employee outside the bargaining unit. That history alone cannot and does not negate the express exclusion of confidential employees from the bargaining unit. However, it does provide a factual background for understanding the implications of the language of Exhibit "C".

Section 1 of Exhibit "C" contains job descriptions that have been negotiated by the parties and included in their collective bargaining agreement. Section 1 also obligates the Employer "to properly classify its employees pursuant to the job descriptions which are a part of this Agreement." The "job descriptions which are a part of this Agreement" include those for all five of the classifications numbered I through V.

Some of those negotiated job descriptions in Section 1 specifically include references to confidential duties. Thus, reference is made to "[h]andles . . . general and confidential correspondence" in the "II - Secretary" description, and reference is made to "[p]rovides confidential services to Local 73A with regards to Labor Relations matters" in the "I Supervisor - Bookkeeper" job description. Those references do not appear to have been carelessly incorporated in the Agreement, given the evidence that the descriptions were variously revised by the parties in the latest round of bargaining including, at the Employer's request, a broadening of the confidential duties description in the Classification I job description.

Section 2 of Exhibit "C" requires that "[i]n the event the Employer creates a new position which differs from the classifications which are a part of this Agreement," both the "description" as well as the "rate of pay" "shall be subject to negotiation" with the Union. That language appears clearly intended to limit the Employer's rights to assign work in a manner that differs from the negotiated and agreed-upon descriptions of the classifications that are a part of the Agreement. The limitation is that the Employer is required to bargain with the Union as to both the rate of pay and the description for a new position which differs from the classifications that are a part of the Agreement. Without Section 2, Exhibit "C" would not provide a persuasive basis for limiting the employer's right, for legitimate purposes, to unilaterally create a new position which differs from the classifications which are a part of the Agreement, without bargaining with the Union about the description. However, with Section 2, the Employer is expressly required to negotiate not only about the rate, but also about the description of the job, as well.

However, when read together with the clear and unequivocal recognition clause exclusion of "confidential employees . . . as defined in the National Labor Relations Act" from

the bargaining unit, the above limitation on Employer rights contained in Exhibit "C" Section 2 must be interpreted as applicable only to "a new position not otherwise excluded from the bargaining unit by the recognition clause which differs from the classifications which are a part of this Agreement." To do otherwise would inappropriately render the recognition clause exclusion of confidential employees entirely meaningless. In contrast, the interpretation adopted by the Arbitrator herein gives at least some effect to all provisions of the Agreement, with Exhibit "C" Section 2 limited to new positions not excluded from the bargaining unit by the recognition clause and with the possibility that some of the duties described in Exhibit "C" descriptions would not be applicable if, but only if, the Employer were to create a true confidential employee position outside the bargaining unit -- something the Employer has not previously done in this unit for many years, if ever. If the parties intended that the Employer was required to bargain with the Union about the description and rate of pay for a newly created position that is expressly excluded from the bargaining unit by the recognition clause, the language of the Agreement to that effect would need to say so in clearer terms than appear in Exhibit "C".

Interpreting Exhibit "C" Section 2 in that way, the phrase "new position which differs from classifications which are a part of this Agreement" in Exhibit "C" Section 2 does not include new positions occupied by confidential employees as defined by the National Labor Relations Act.

Hence, if the newly created Administrative Assistant position is in fact occupied by a confidential employee as defined in the National Labor Relations Act, then the requirements of Exhibit "C" Section 2 would not apply in this case and the grievance would be without merit. In that regard, it is significant that the Employer's actions at issue were taken in pursuit of longstanding and legitimate operational objectives of the Employer relating to the integrity of the Employer's internal labor relations, and that they have not resulted in the layoff of any bargaining unit employee and have not affected the rate of pay of any bargaining unit employe. The Employer's actions, both combining its confidential labor relations office functions in a single employee outside the bargaining unit and assigning that employee additional non-confidential office duties to avoid the inefficiencies of operations that would result from limiting that position to performance only of confidential duties, constitute a conventional management response to the circumstances the Employer faced in this case. The Employer's initial efforts, to find a mutually acceptable way to include the newly hired employee and the newly created position in the bargaining unit, undercut the Union's contentions that, overall, the Employer's actions in this case were taken in bad faith.

However, if the newly created Administrative Assistant position is not in fact occupied by a confidential employee as defined by the National Labor Relations Act, then that position would be a "new position which differs from the classifications which are a part of this Agreement" within the meaning of that phrase in Exhibit "C" Section 2. In that event, Employer's actions at issue in this case would amount to a transfer of work from one or more bargaining unit classifications to a new bargaining unit position which differs from the

classifications which are a part of the Agreement, without having negotiated with the Union regarding the applicable rate of pay or the description. As such, those actions would be in excess of the limitation on Employer rights contained in Exhibit "C" Section 2 and hence violative of the Agreement. The relief requested in the Union's brief would be the appropriate remedy, to wit, requiring the Employer, effective upon the issuance of a determination that the Administrative Assistant position is occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, to immediately: (a) treat the newly-created Administrative Assistant position as a bargaining unit position covered by the Agreement; and (b) treat Suzanne Gavran and any other incumbent Administrative Assistant as a bargaining unit employee covered by the Agreement including the union security requirements of Article II Section 3.

There remains, of course, the parties' dispute as to whether the Administrative Assistant position occupied by Suzanne Gavran is a position occupied by a confidential employee as defined by the National Labor Relations Act, as amended.

Inasmuch as both parties have clearly argued that such a determination is properly for the National Labor Relations Board and not for the Arbitrator to make, the Arbitrator accepts the parties mutual agreement in that regard and does not make any determination on that question.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the issue submitted that:

> The disposition of the class action work assignment grievance dated 12-2-99 shall be as follows.
>
> 1. If the Employer's transfer of duties included in the job descriptions in Agreement Exhibit "C" to a new unilaterally-created Administrative Assistant position outside the bargaining unit created a position occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, then the Employer did not thereby violate the Agreement.
>
> 2. If the Employer's transfer of duties included in the job descriptions in Agreement Exhibit "C" to a new unilaterally-created Administrative Assistant position outside the bargaining unit did not create a position occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, then the Employer did thereby violate the Agreement. In that event, the appropriate remedy would be that the Employer, its officers and agents, shall, effective upon the issuance of a determination that the

Administrative Assistant position is occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, immediately: (a) treat the newly-created Administrative Assistant position as a bargaining unit position covered by the Agreement; and (b) treat Suzanne Gavran and any other incumbent Administrative Assistant as a bargaining unit employee covered by the Agreement including the union security requirements of Article II Section 3.

3. Because the parties agree that it is for the National Labor Relations Board rather than the Arbitrator to determine whether the Administrative Assistant position is occupied by a confidential employee within the meaning of the National Labor Relations Act, as amended, the Arbitrator makes no determination on that question in this Award.

4. In rendering this Award, the Arbitrator has interpreted and applied only the Agreement and not the National Labor Relations Act.

Dated at Shorewood, Wisconsin, this 17th day of October, 2000.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator

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