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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN : SHEBOYGAN COUNTY : CIRCUIT COURT BRANCH II

SHEBOYGAN COUNTY,

Petitioner,

DECISION

vs.

Case No. 88 CV 188

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

Decision No. 7671-A

This is a review of a decision of the Wisconsin Employment Relations Commission under the Municipal Employment Relations Act, Secs. 111.70-111.77, Stats. Briefs have been submitted by Sheboygan County Corporation Counsel Alexander Hopp in behalf of the petitioner, Sheboygan County; by Assistant Attorney General David C. Rice in behalf of the respondent, Wisconsin Employment Relations Commission; and by Attorney Bruce F. Ehlke, in behalf of Local 2427, AFSME, AFL-CIO.

The Commission decided that four employees holding the positions of bookkeeper and three employees holding the positions of staffing coordinator were "municipal employees" within the meaning of sec. 111.70(1)(i), Stats. Therefore the Commission ordered that these employees be included in the bargaining unit represented by the Sheboygan County Employees Union Local. The County has sought a review of that decision.

Sec. 111.70(1)(i) provides, "'Municipal employe' means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe."

Different facts relate to the bookkeepers and the staffing coordinator positions. Bookkeepers were specifically

excluded from the bargaining unit by the 1981-82 collective bargaining agreement between the County and the Union. At that time there were two "confidential bookkeepers." In addition there were four more bookkeepers holding the position of "Assistant Bookkeeper" who were included in the bargaining unit. In 1985 the County eliminated the positions of assistant bookkeepers and the four who had held those positions were given the title of bookkeepers which the County then excluded from the bargaining unit.

In addition the County created the positions of Staffing Coordinator, one for each of the three County institutions. The County also excluded these positions from the bargaining unit.

The Union then petitioned the Commission to include the four bookkeepers and the three staffing coordinators in the Union. The Commission did so and the County sought this review. The County contends, and did contend before the Commission, that the bookkeeper positions are barred by the 1981-82 agreement of the parties or, in the alternative, that they should be excluded because they are supervisory or confidential employees. The County also contends the positions of staffing coordinator should be excluded because the duties are sufficiently confidential so that they are part of management.

The Commission disagreed. It found that the assistant bookkeepers who had become bookkeepers were not barred by the 1981-2 agreement and that they were neither confidential employees nor supervisors. The Commission also found that the staffing coordinators were neither supervisors nor managerial employees. The Commission then ordered that all seven of the persons holding those positions should be included in the bargaining unit represented by the Union.

Sec. 111.70(1)(o) defines the word "Supervisor" as follows:

> "1. As to other than municipal and county fire fighters, any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employes, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The standards for reviewing an agency's findings are set forth in Kewaunee County v. WERC, 141 Wis.2d 347, 356-7, as follows: "Review is confined to the record. . . An agency's finding of fact will not be disturbed if supported by substantial evidence. . . Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. . . If more than one inference can be reasonably drawn from the evidence, the agency's determination is conclusive." (citations omitted) The scope of review is also set forth in detail in Sec. 227.57 Stats.

In Eau Claire County v. WERC, 122 Wis.2d 363 the court emphasizes that deference should be given to the Commission's application of the Municipal Employment Relations Act, sec. 111.70 because of the commission's expertise in applying the statute to the facts in the case.

In the Eau Claire County case, 366, the court said,

> "Under MERA, municipal employees are given an opportunity to bargain collectively with their municipal employer. Section 111.70(6), Stats. The definition of municipal employee excludes a managerial employee. Section 111.70(1)(b), Stats. In City of Milwaukee v. WERC, 71 Wis.2d 709, 716-17, 239 N.W.2d 63, 67 (1976), the supreme court approved the commission's definition of managerial personnel as those employees who participate in the formulation, determination, and implementation of management policy or who possess

effective authority to commit the employer's resources. Since City of Milwaukee, the commission has refined its interpretation. The commission interpreted the power 'to commit the employer's resources' to mean the authority to establish an original budget or to allocate funds for differing program purposes from such an original budget. The authority to make ministerial expenditures, such as the authority to spend money from a certain account for a specified purpose, was excluded."

In City Firefighters Union v. Madison, 48 Wis.2d 262, the court held that the criteria used by WERC are applicable to a circuit court in determining whether an employee serves in a supervisory and/or confidential capacity. The criteria are set forth in the Firefighters case, 270-1, as follows:

"The criteria which the WERC uses for deciding whether supervisory and/or confidential capacity exists are as follows:

(1) The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
(2) The authority to direct and assign the work force;
(3) The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees;
(4) The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees;
(5) Whether the supervisor is primarily supervising an activity or is primarily supervising employees;
(6) Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
(7) The amount of independent judgment and discretion exercised in the supervision of employees."

Thus the criteria for determining whether a person is a supervisor or confidential, managerial employee have been established.

Another case deals with the meaning of the phrase

"substantial evidence." In Robertson Transport Co. v. Public Serv. Comm., 39 Wis.2d 653, 658 the court stated, "Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept."

The County's contract theory is that in the 1981-2 contract "bookkeepers" were specifically excluded from the bargaining unit and therefore anyone thereafter holding the position of "bookkeeper" is automatically excluded. However, at the time of that contract there were only two bookkeepers and they were the subject of that part of the agreement, not six. Apparently there were four assistant bookkeepers at that time and the County has simply changed the title of their positions to "bookkeeper," striking the word "assistant." It does not appear that their functions changed, but only their title. A reasonable interpretation of the contract is that the exclusion of bookkeepers was intended by the parties to exclude two persons who held that position at the time of the contract. The finding of the Commission in this regard is supported by substantial evidence.

The next question raised is whether the four additional bookkeepers are excludable because they are confidential employees.

The Commission in Appleton Area School District, Dec. No. 22338 (WERC, 7/87) has decided that "confidential employee" as that term is used in sec. 111.70, Stats., is an employee who has access to, knowledge of, or participation in confidential matters relating to labor relations. Information is confidential if it deals with the employer's strategy or position in collective bargaining, contract administration, or other

similar matters relating to labor relations, and is not available to the bargaining representative or its agents. This is a narrow definition of the word "confidential" in that it relates only to confidentiality in regard to labor relations. It does not mean simply that the employee deals with matters not generally available to the public.

It appears that each of the three County institutions has two bookkeepers, one serving as the payroll bookkeeper and the other as the accounts receivable bookkeeper. There no longer are persons employed as assistant bookkeepers. The one in charge of the payroll does keep track of absences from work and tardiness by the employees which she reports to her supervisor, but it is the supervisor who determines whether to discipline an employee for absenteeism or tardiness.

A payroll bookkeeper may answer her supervisor's questions regarding payroll grievances, but she does not answer or settle the grievances. She has access to personnel files but these are also available to the employee and to the union, with the employee's permission. Three of the four bookkeepers in question handle payroll work. An accounts receivable bookkeeper would not have anything to do with labor relations.

There was testimony that occasionally a bookkeeper may do some typing relating to grievances and arbitrations, but that work can be done by the original two excluded bookkeepers who were originally referred to as "confidential bookkeepers."

Again there is substantial evidence to support the Commission's finding that the four bookkeepers in question are not confidential employees.

The staffing coordinators apparently are relatively new positions. Their function is to see that each facility is fully staffed with registered nurses, licensed practical nurses

and attendants 24 hours a day, seven days a week. They are required to follow state codes, meet internal budgets and must consider the needs of the facility's residents. They schedule days or weekends off. They make the vacation schedules.

While the majority of the staff at each institution are full-time employees, all of them have a large number of part-time workers. At two of the facilities the staffing coordinator schedules supervisors' hours as well as other employees. The coordinators follow certain procedures and practices in fulfilling their duties. Hours of work are assigned first to full-time personnel and then to part-time ones. When there is an emergency shortage of personnel the coordinator first calls employees from a voluntary sign-up list and then under a process called mandating, notifies employees to report for work in reverse order of seniority. However, a particular worker may be excused despite the procedure. Vacation decisions are made on the basis of seniority if requested before March 1 and after that is on a first come, first serve basis.

They keep track of absences and tardiness of employees and apparently like the payroll bookkeeper, report the same to their superiors. They may recommend disciplinary action, but do not impose the discipline. They have nothing to do with the hiring practice and do not evaluate employees' performance or recommend promotions.

They can make budgetary recommendations, but do not have budget-making authority. They must operate within the established budget.

The County points out that the work of the staffing coordinators may put them in conflict with some union members when, for example, they turn down vacation or holiday requests, but a policy is followed in those areas. Counsel for respondents

contend that staffing coordinators have little participation in formulating and determing management policy. They can only make suggestions concerning the same. Counsel contend that the staffing coordinators "are not inevitably imbued with interests significantly at variance from those of other employees.

The Commission found that the position of staffing coordinator is not managerial in nature. It stated that "the occupants of the staffing coordinator positions do not participate in the formulation, determination and implementation of public policy and do not possess the effective authority to commit the employer's resources." This is the language of the court in the Eau Claire County case, supra, 366. That case emphasized the budgetary authority as being paramount in distinguishing managerial personnel from other employees. Managers have the authority to establish an original budget and to allocate funds from the budget for different program purposes. The court said that the authority to make ministerial expenditures, such as to spend money from a certain account for a specified purpose is not a managerial function.

With that established criteria there is substantial evidence to support the Commission's findings in regard to the staff coordinators.

It appears that under MERA as applied by the Commission and the courts very few employees fall into the managerial or supervisory catagory. This court's view may differ from that of the Commission, but this court is constrained from weighing the evidence independently. If the Commission's determination is reasonable, it must be affirmed, and it is.

Counsel for the County raised an objection prior to the taking of any testimony in regard to the functions of the staffing coordinators. The examiner ruled that the testimony of

the staffing coordinator with the longest tenure and her administrator would be taken first and that the other staffing coordinators would be permitted to testify only in regard to the aspects of their jobs which might differ from those of the first staffing coordinator called to testify.

It is perfectly proper to limit testimony so that it is not repetitious or a waste of time. Testimony which is merely cumulative is a waste of time.

Section 904.03 Stats., provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis supplied)

It would seem that calling the most senior employee holding the position first would also be the most practical method of proceeding. Presumably she would have the most complete knowledge of the position.

Counsel for the County also takes exception to "several ex parte conferences between the Union and the examiner in the absence of the County and vice versa between the County and the examiner and the Union." While ex parte conferences are generally improper, counsel does not state what occurred at the conferences other than to say, "It is obvious, based on these off the record processes, the examiner determined how the record was to be made." He is referring to the order of the witnesses and the fact that he felt that the County was prohibited from presenting its case in the manner that it deemed appropriate.

Generally counsel for both sides have the right to present their cases in the manner they see fit subject to the rules of procedure, but, as stated above, a court can control what

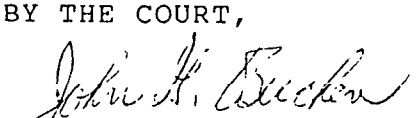
relevant evidence may be presented to avoid wasting time and the presentation of cumulative evidence.

This court does not condone ex parte conferences between an examiner and one party outside the presence of the other party, but if all that was accomplished was to determine what order witnesses would be testifying, the conferences did not result in a denial of due process.

For the reasons stated above the findings of the Commission are affirmed.

Dated December 12, 1988.

BY THE COURT,



John G. Buchen
Judge