

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :
  
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ROCK COUNTY : Case 28
  
: No. 44608 ME-446
  
: Decision No. 8243-K
  
Involving Certain Employes of :
  
:
  
ROCK COUNTY :
  
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Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME,  
Mr. Steven D. Meyer, Assistant Corporation Counsel, 51 South Main Street,  
Janesville, Wisconsin, on behalf of the County.

AFL-CIO

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER CLARIFYING BARGAINING UNIT

On September 26, 1990, Rock County filed a petition with the Wisconsin Employment Relations Commission to clarify an existing collective bargaining unit of employes at its Health Care Center. By its petition, the County sought the exclusion from the unit of the Administrative Assistant to the Associate Administrator for Nursing Services, contending she is a confidential employe. Hearing in the matter was held in Janesville, Wisconsin, on March 20, 1991, with a stenographic transcript being provided to the parties by April 5, 1991. The parties filed briefs by April 30, 1991. On May 10, 1991, the County submitted a reply brief and on May 13, 1991, the Union waived its right to do the same. The Commission, being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Rock County, hereafter the County, is a municipal employer with offices at 51 South Main Street, Janesville, Wisconsin.
2. Local 1258, AFSCME, AFL-CIO, hereafter the Union, is a labor organization with offices at 1734 Arrowhead Drive, Beloit, Wisconsin.
3. On June 21, 1974, the Wisconsin Employment Relations Commission certified the Union as the exclusive bargaining agent of a unit defined as:

All regular full-time and regular part-time employes of the Rock County Health Care Center, and 51.42 Program, the Developmental Disabilities Board, Rock County Farm, and the Rock County Health Department, but excluding administrators, supervisory, confidential, craft, professional and temporary employes.
4. Pursuant to state and federal mandates, the County provides certain health care services through its Health Care Center, for which Terry Sciessinski is the Administrator, with overall administrative responsibility; Lucille Vickerman is the Associate Administrator for Treatment Services; and Ronald Link is the Associate Administrator for Technical and Support Services. Sciessinski has an executive secretary who is excluded from the bargaining unit as a confidential employe and who is the only non-bargaining unit full-time clerical in the Health Care Center. Throughout the County operations, outside of the Personnel Department, nobody under the level of departmental

head has non-unit support staff. There is a Personnel Department office in the Health Care Center staffed each morning by a non-unit clerical employe and two days a week by a non-unit personnel analyst. Vickerman does not take work to these Personnel Department employes. The clerical employe in the Personnel Department office maintains the Health Care Center master personnel files.

5. Vickerman manages nursing services, social services, occupational and recreational therapy, activities, psychology, volunteer services, and coordinates physical and speech therapy, and other clinical services, with the medical services; her primary responsibility is long-range planning, developing and managing the operating budget for her services. She is also responsible for daily operating policies and procedures. In the services which Vickerman manages are 246 employes who are in the unit described in Finding of Fact 3, filling such positions as licensed practical nurses, therapy aides, nursing assistants, unit clerk coordinators, and clerical; approximately 70 members of a bargaining unit represented by the Association of Mental Health Specialists, in such positions as registered nurses, social workers, occupational therapists, and psychologists; and 12 non-represented employes in positions such as head nurse, nursing supervisor, director of nursing and program service chief. The subject position, Administrative Assistant, is currently included in the AFSCME unit.

6. Janet Sessler has been Administrative Assistant to Vickerman since 1982. With the addition of such duties as managing the vacation plan, and assisting Vickerman with her duties related to collective bargaining and budget preparation, the following is an accurate description of her position:

ADMINISTRATIVE ASSISTANT

JOB RELATIONSHIP

Position: Administrative Assistant  
Department: Nursing Services, Materials Department, 51.42  
Programs, Ancillary  
Location: Health Care Center Complex/51.42 Program  
Locations  
Supervised By: Nursing Services Administrator, Materials  
Manager, Ancillary  
Administrators and 51.42  
Program Supervisors  
Workers Supervised: None

SUMMARY: Perform responsible administrative work under limited supervision in organizing and carrying out one or more phases of a department program.

- TASKS:
1. Inventory and requisition supplies.
  2. Maintain departmental schedules.
  3. Assist the department head in routine office administration.
  4. Type correspondence and other materials from dictating machine, copy or shorthand notes and may take minutes of meetings and prepare draft of the proceedings. May take and transcribe dictation.
  5. Compose letters, memoranda and other correspondence.
  6. Prepare and maintain files, records, reports, financial statements and vouchers of a technical nature.
  7. May review the work of others.
  8. Provide general and technical information regarding departmental policies, procedures and regulations of varying complexity.

9. May make reviews of reports to determine accuracy and compliance with applicable laws and regulations relative to departmental functions.
10. Process incoming and outgoing correspondence.
11. Participate in fire drills.
12. Participate in disaster evacuations when circumstances arise.
13. Use materials and supplies resourcefully. Participate in the maintenance of equipment.
14. Perform related work as required.

#### MACHINES, TOOLS, EQUIPMENT AND WORK AIDS

Operate a variety of office machines including typewriter, transcriber, computer terminal, calculator, files and forms etc.

#### REQUIREMENTS OF WORK

Graduation from high school or its equivalent, supplemented with pertinent commercial coursework at a business college or vocational school; five or more years responsible office experience, or any equivalent combination of training and experience which provides the following knowledge, abilities and skills:

1. Knowledge of departmental functions, procedures, organization, governing laws and regulations.
2. Knowledge of office management and recordkeeping.
3. Knowledge of business English and spelling.
4. Knowledge of current office methods and procedures.
5. Ability to exercise judgment and discretion in and interpretation of departmental policies and regulations.
6. Ability to maintain accurate and complete records and prepare clear and detailed reports.
7. Ability to type from plain copy at a rate of 50 wpm.
8. Ability to establish and maintain effective public and working relationships.
9. Ability to understand and effectively carry out oral and written instructions.
10. Ability to perform routine arithmetic functions with speed and accuracy.
11. Previous computer data entry or word processor experience preferred.

Sessler works across the hall from Vickerman, in an office she shares with the office timekeeper. Vickerman spends approximately 40 percent of her time away from the office, during which times Sessler is the primary contact on her behalf at the office.

7. Each day, Sessler opens, reads and sets in priority order all of Vickerman's 75 - 100 pieces of incoming mail, including any mail marked "confidential", except for that mail marked "personal". Sessler also receives the shift report which each nursing supervisor completes, which reports may contain confidential matters relating to personnel misconduct. These reports are copied for distribution to at least four other supervisory employees. Sessler receives from supervisors the evaluations of their employees; employees receive a copy, with the original kept in their personnel file. Since at least 1985, Sessler has kept track of leave and tardiness files, informing Vickerman

where an employe is on the discipline track for abuse of same. Discipline for tardiness or abuse of leave is set by policy, and is not discretionary with Sessler or Vickerman. The timekeeper with whom Sessler shares an office performs the same review and monitoring function regarding absenteeism. When the County closed its laundry operation and subcontracted the service, Sessler was aware of all information which came to Vickerman's attention. While the employes who worked at the laundry were not within Vickerman's jurisdiction, the consumers of its services were, and Vickerman participated in the gathering of information relating to quality assurances.

8. Vickerman is the first step on a four-step grievance process; Link handles Step 2 grievances. For presentation to Personnel Director Bryant at Step 3, Link and Vickerman decide who is to be there to present the case. If the original matter arose within Link's program area, Vickerman is generally not there; but if the grievance comes from Vickerman's area, Link may be there. At Step 1, Sessler types Vickerman response, a copy of which is given to the Union. To assist Vickerman, Sessler may investigate past County responses to issues which arise in the grievance process.

9. As to employe misconduct, Vickerman determines what incidents involving employes under her direction will be investigated, and in what manner; she also determines what incidents will be referred for discipline, and what, if any, corrective action will occur. Informal preliminary investigations of possible employe misconduct are not necessarily reported to the Union; Sessler's involvement in such informal investigations is clerical, receiving and typing reports for Vickerman. Vickerman keeps in her office personnel files for each investigation and discipline; access is limited to Vickerman, managers, and Sessler. When Vickerman conducts the investigation, she takes notes which Sessler later types; in complex investigations, Sessler will be present to take the notes herself, which she then later types. It is Link who actually imposes discipline, regardless of job location and duties; if the worker to be disciplined is from Vickerman's area, such discipline is generally only on the basis of Vickerman's investigation and presentation. Sessler's involvement in a recent disciplinary investigation, representative of her general level of involvement, was as follows: she learned about the investigation from reviewing a supervisor's report, with further information gleaned from a report from the head nurse, who had taken and forwarded statements from witnesses; and she was involved in the scheduling of interviews which are part of the County's investigation. She did not sit in on interviews, but did type up Vickerman's handwritten notes. She typed Vickerman's request for disciplinary action (termination), which was delivered to Link. There were Union representatives at the interviews. The Union was not then privy to the head nurse's notes, or aware of what other supervisory staff had written. About 24 hours passed between initial reports and Union knowledge of the investigation.

10. Vickerman's involvement in collective bargaining consists of submitting a set of proposals to the Administrator, generally about 10-12, for the County to pursue. To prepare her submission, Vickerman, relying on Sessler and the County's Personnel Department, investigates practices and policies in other counties, the results of which investigation are known only to Personnel, Sessler and Vickerman. Vickerman then prepares the recommended proposals, with a cover letter, for submission to Sciessinski, who then, after further review and possible modification, submits them to the County Personnel Director. The relative priority of such proposals is determined by Sciessinski and Bryant; some of Vickerman's proposals have been offered in negotiations, while others have been dropped. At no time in this process is the material accessible to the Union. Vickerman has participated in bargaining sessions to an extent determined by Sciessinski; when she does, Sessler has access to, and knowledge of, materials prepared for such activity.

11. As part of the County's budget process, Vickerman makes recommendations about personnel changes, such as upgrades, deletions, reclassifications, reassignments, reallocations; her recommendations go then to the Administrator; then, after further internal review, to the County Administrator and finally the County Board. In this budget review process, Sessler's role is forwarding budget preparation materials to department heads, gathering and compiling the returned data and information, costing proposed personnel changes, and assisting in the preparation of Vickerman's final recommendation. The initial budget recommendations made by Vickerman to the Administrator and the County Administrator are not accessible by the Union. When the status of a position under Vickerman's authority changes, Sessler does the payroll entry. Sessler is not responsible for scheduling staff.

12. The Administrative Assistant to the Associate Administrator for Treatment Services does have sufficient access to, knowledge of, and involvement in, confidential matters relating to labor relations to render her a confidential employe.

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

CONCLUSION OF LAW

That the incumbent in the position of Administrative Assistant to the Associate Administrator for Treatment Services, Janet Sessler, is a confidential employe within the meaning of Sec. 111.70(1)(i), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issue the following

ORDER CLARIFYING BARGAINING UNIT 1/

The position of Administrative Assistant to the Associate Administrator for Treatment Services shall be, and hereby is, excluded from the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of  
Madison, Wisconsin this 18th day of September,  
1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

William K. Strycker /s/  
William K. Strycker, Commissioner

(Footnote 1/ appears on page 7.)

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(Footnote 1/ continues on page 8.)

(Footnote 1/ continued from page 7.)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that

the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

ROCK COUNTY (HEALTH CARE CENTER)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its petition that the subject position is confidential, the County asserts and avers as follows:

The Commission has previously held the position of Administrative Assistant for the County's 51.42 Board to be confidential and thus outside the definition of municipal employe. Rock County, Dec. No. 8243-J (WERC, 2/88). Given that the subject positions in the two proceedings are nearly identical and in the same bargaining unit, the same reasoning which the Commission applied therein should apply here as well. The only difference in the cases is the rank of the official to whom the assistant reports; while there are no county managers of lower than Department Head level who have confidential staff, the record shows that Vickerman's "division" does have an "department-like" nature.

Vickerman is responsible for the management and supervision of 316 union positions, with duties which include discipline, submission of initial proposals for collective bargaining and budgeting. Sessler is privy to every piece of information in every confidential phase of Vickerman's management. Indeed, Sessler has total access to all of Vickerman's professional correspondence.

The Union's anticipated argument raising concerns over the purported opening of the floodgates to more and more confidential exclusions once the department-level barrier is breached is flawed. Nowhere in the record is there anything about the nature of this position to distinguish it from the above-cited precedent.

Accordingly, the position should be held confidential.

In support of its position that the subject position is not confidential, the Union asserts and avers as follows:

The central issue is to what extent the County can be allowed to exclude employes from the bargaining unit. The County controls the assignment of work; the Union does not have the opportunity to screen whether or not the assigned tasks could subsequently result in the employes being considered as confidential.

Here, a supervisor is seeking to convert a unit member into a confidential employe by simply assigning certain tasks; if this is allowed, chaos will surely result, as other supervisors, seeking either relief from their responsibilities or the status of having a "private secretary," will create mischief.



Sessler's testimony concerning the amount of her time spent on confidential matters is somewhat incredulous. Under cross-examination, she was unable to substantiate her claims; certainly, some of the tasks she described as confidential were not so.

Moreover, there are clear alternatives to making Sessler confidential -- the use of the Administrator's secretary for such tasks, or the use of the part-time clerical from the personnel office. Inasmuch as that position is only part-time, it is clear that the County is not utilizing its current complement of confidential employees to the extent available.

The County has not shown it is not feasible to use existing personnel to perform confidential tasks; instead, Vickerman testified she didn't know if the personnel clerical would be available, and so assigned the tasks to Sessler.

Employers should not be allowed to carve out added positions from a bargaining unit absent a showing that existing confidential positions are being fully utilized. Further, disruption could result from establishing confidential clerical positions for supervisors below the rank of department head.

Accordingly, the position should be maintained as a municipal employe.

In reply, the County posits further as follows:

The Union's argument, challenging the way in which Sessler was assigned her duties but not the actual nature of the duties, implicitly acknowledges that Sessler's existing duties are indeed confidential.

The Union's contentions that Vickerman tried to carve Sessler's position out of the Union, and that other confidential employees were available to do this work have no support at all in the record. The Union offered neither testimony as to the purported availability of other employees, nor about grievances, if any, as to Sessler working out of class. If the Union's theory is that the County should have used someone else to perform the confidential tasks performed by this administrative assistant, it was the Union's burden to establish some basis for such a theory. Instead, the Union offers not one iota of evidence in support of its theory, and then argues implications from the lack of evidence it has created.

Accordingly, the subject position should be held confidential.

The Union waived its right to file a reply brief.

#### DISCUSSION

The statutory and case law definitions of confidential employe are clear

and well-established. We have concluded that the record evidence as to the subject employe satisfies those definitions.

It is well-settled that, for an employe to be held confidential, such employe must have access to, knowledge of, or participation in confidential matters relating to labor relations; for information to be confidential, it must: (a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents. 2/

While a de minimis exposure to confidential materials is generally insufficient grounds for exclusion of an employe from a bargaining unit, 3/ we have also sought to protect an employer's right to conduct its labor relations through employes whose interests are aligned with those of management. 4/ Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employe may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, 5/ and, similarly, where a management employe has significant labor relations responsibility, the clerical employe assigned as her or his 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 employe without undue disruption of the employer's organization. 6/

The record here supports a finding that Sessler has significant access to confidential information that relates to negotiation strategy and contract administration. Sessler is privy to all aspects of Vickerman's labor relations responsibilities. Sessler assembles data for bargaining proposals, assists in the investigation of grievances, does preparatory work on investigations which may lead to discipline, opens mail relating to confidential labor relations matters, and types all of Vickerman's confidential labor relations correspondence.

While we agree with the Union that Sessler's testimony may well overstate the percentage of her typical work day which is spent performing confidential work, we are satisfied that her confidential duties occupy more than a de

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2/ Dane County, Dec. No. 22796-C (WERC, 9/88).

3/ Boulder Junction Joint School District, Dec. No. 24982 (WERC, 11/87).

4/ CESA Agency No. 9, Dec. No. 23863-A (WERC, 12/86).

5/ Town of Grand Chute, Dec. No. 22934 (WERC, 9/85).

6/ Howard-Suamico School District, Dec. No. 22731-A (WERC, 9/88).

minimis portion of her workday.

As to the Union argument that Sessler's confidential work can be reassigned to the Administrator's secretary and the Personnel Department clerical, the record satisfies us that Sessler's confidential work is of sufficient volume and so closely tied to her daily interaction with Vickerman that it could not be reassigned without undue disruption of the employer's organization. Further, we have no basis in the record for concluding that either the Administrator's secretary or the Personnel Department clerical would have the time to perform Sessler's confidential work.

Given the foregoing, we conclude Sessler is a confidential employe.

Dated at Madison, Wisconsin this 18th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/  
A. Henry Hempe, Chairperson

Herman Torosian /s/  
Herman Torosian, Commissioner

William K. Strycker /s/  
William K. Strycker, Commissioner