

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

ST. CROIX COUNTY

Involving Certain Employees of

ST. CROIX COUNTY

Case 13
No. 55972
ME-924

Decision No. 12271-C

Appearances:

Weld, Riley, Prens & Ricci, S.C., by **Attorney Victoria L. Seltun**, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County.

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 369, Menomonie, Wisconsin 54751, appearing on behalf of Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO.

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

On December 15, 1997, St. Croix County filed with the Wisconsin Employment Relations Commission a petition by which it sought to clarify an existing Health Center bargaining unit by excluding the Administrative Secretary as a confidential employee. Wisconsin Council of County and Municipal Employees, AFSCME, the certified exclusive bargaining representative of the unit, opposed the petition.

Hearing in the matter was held on July 29, 1998, in Hudson, Wisconsin before Examiner Stuart Levitan, a member of the Commission's staff; a stenographic transcript was

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made available to the parties by August 13, 1998. The County submitted written argument on October 7, 1998; the Union submitted a letter brief on February 9, 1999. On February 22, 1999, the parties waived the filing of reply briefs.

The Commission, being fully advised in the premises, now makes and issues the following

FINDINGS OF FACT

1. St. Croix County, herein the County, is a municipal employer with offices at 1101 Carmichael Road, Hudson, Wisconsin. Debra Kathan has served as the County's Personnel Director since 1991; she has an Assistant Director, but no other support staff. The County retains the law firm of Weld, Riley, Penn and Ricci as outside counsel for labor relations.

2. Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, herein the Union, is a labor organization with offices at Box 364, Menomonie, Wisconsin. As reflected in a Joint Labor Agreement, the Union represents five bargaining units comprised of County employees - Highway Department, Health and Human Services (in separate professional and non-professional units), General Government Support Services, and Health Center Nursing Home. One Office Manager/Secretary with split responsibilities between Human Services and the Health Center is excluded from any bargaining unit on the grounds of confidential and supervisory status. The Office Managers at the Highway Department and Sheriff's Department (whose municipal employees are represented by the Labor Association of Wisconsin, Inc.) are excluded from any bargaining unit on confidential status. There are no positions assigned exclusively to Health Center who are excluded from any bargaining unit solely on the grounds of confidential status.

3. Among its myriad responsibilities, the County operates and maintains a Health Center. At all times material hereto, the Union has been the certified exclusive representative for collective bargaining for all regular full-time and regular part-time employees of that Center, excluding all professional, temporary, confidential and supervisory employees. There are approximately 65 Certified Nursing Assistants (CNA's) and about 12 Licensed Practical Nurses (LPN's) who are covered by this collective bargaining agreement, and approximately 15 Registered Nurses (RN's) who are unrepresented.

4. Effective October, 1996, there has been a position within the Health Center non-professional unit identified as Administrative Secretary, with the following job description:

JOB DESCRIPTION

ADMINISTRATIVE SECRETARY

GENERAL STATEMENT OF DUTIES: Under the supervision of Director of Nursing performs duties for administrative staff to meet the needs of the facility in accordance with current regulations (State, Federal, and local).

ESSENTIAL JOB TASKS:

- prepare for staffing schedules of CNAs to cover sick leaves, vacation requests, workman's comp. etc. and verify against time cards every two weeks;
- develop, implement, and maintain an adequate personnel filing system that meets the needs of the facility and complies with current employment practices;
- maintain confidentiality of all pertinent personnel, payroll and resident information;
- meet with new nursing staff regarding their schedule, informing them of certain procedures of payroll, attendance, etc.;
- assist the Administrator and Director of Nursing in the planning, developing, organizing, and evaluating of scheduling/staffing needs, make recommendations to them concerning ideas and adjustments;
- type, file, prepare, and distribute confidential reports and correspondence;
- provide assistance to the Administrator/Director of Nursing in special assigned projects;
- verify employees with work and personnel records as necessary;
- assist nursing staff in obtaining information concerning their payroll check, overtime, etc. as necessary;
- verify PTO/LOA usage, let Director of Nursing know of staff using LOA/abusing sick time, etc.;

- attend inservice meetings of facility, (i.e. computer, OBRA, OSHA training);
- record appropriate resident identification data on medical records, wristbands, etc.
- enter new admission information into the computer;
- perform tasks requested by Inservice Director/Head Nurses/Payroll/Bookkeeping;
- report complaints to Administrator/Director of Nursing;
- keep unit paperwork up-to-date as admits/deaths/discharges/room changes occur;
- follow appropriate steps needed for job vacancies in nursing home and post in designated areas;
- enter full and quarterly MDS into the computer and oversee special computer projects as assigned (i.e. annual survey, electronic transmission as required by the State and Federal agencies);
- perform related duties as assigned.

5. Lori Cloutier has served in an administrative support capacity in the Nursing Department at the St. Croix Health Center since November, 1989. Prior to the collective bargaining which resulted in the 1997-1999 collective bargaining agreement, she was classified as the Nursing Home Secretary/Ward Clerk, a position at pay grade 4; during that bargaining, she received the Administrative Secretary job title and duties referenced in Finding of Fact 4, and a wage upgrade to pay grade 6.

Cloutier schedules the CNA's who are in the bargaining unit, plus approximately six on-call aides. She reviews requests for vacation on a daily basis, and occasionally denies such requests due to staffing shortages. She monitors the staff's usage of paid time off (PTO), and denies vacation if an employe has insufficient PTO available. She receives calls regarding the need for sick leave. She administers a memorandum of agreement between the Union and the County concerning staffing practices on weekend shifts.

As an experienced scheduler, she helped the administration plan staff cuts to address revenue shortfall due to lower-than-expected resident populations. Due to her need to plan for coverage, she receives from the administration advance notice of disciplinary suspensions/terminations. Some aides will ask what she knows about upcoming discipline, a situation which has caused tension and discomfort. Cloutier resigned her position as Union president because of what she felt was a conflict in representing a disciplined employe.

Cloutier and the Director of Nursing have had discussions over discipline which have not been reduced to writing and given to the affected employe. Shortly before the hearing in this matter, she had offered her opinion on the appropriate length of suspension for an employe receiving discipline. If she sees staff idle, she will report to the Director and suggest cutting hours, which has been done.

Cloutier processes the time cards every two weeks for the aides, making changes to ensure their use of overtime is proper, and their pay levels are correct. On her own authority, she disallows overtime if it is not properly authorized, and has done so frequently over last two years, at the cost of many hours of overtime to employes.

The Director of Nursing consults with her on evaluations, especially regarding probationary employes. She has discussed with the Nursing Director whether individual employes should pass probation, have their probation extended, or be terminated.

She monitors the use of worker's compensation, providing information to the County Risk Manager, documenting conversations with staff, and reporting abuses. As a subpoenaed witness, she has testified for the County in worker's compensation cases.

Shortly before the County filed the petition in the instant matter, it assigned Cloutier the duty of maintaining copies of employe personnel files, both unit and non-unit, the full and original files of which are maintained in the County personnel office in Hudson.

The improper use of sick leave is a recurring problem, and Cloutier discusses individual concerns with the Director of Nursing on a regular basis. The County has set a policy under which employes with more than three occurrences of sick leave are to provide medical documentation of further use; Cloutier is responsible for ensuring compliance with this policy.

Cloutier has no role in collective bargaining, and had no access to bargaining strategy during most recent negotiations. She never sees or prepares correspondence to or from the personnel department and outside labor counsel concerning collective bargaining or contract administration.

On October 13, 1997, Cloutier sent Personnel Director Kathan the following memo:

TO: Debra Kathan
Personnel

FROM: Lori Cloutier
Administrative Secretary

DATE: October 13, 1997

RE: Administrative Secretary Position

I am sending you a copy of my job description also.

Some specific duties I am responsible for:

- Day-to-day, around the clock staffing of CNA's.
- Copy and maintain personnel files for CNA's and nurses for our facility.
- Monitor all sick/call in usage of CNA's. Confer with Director of Nursing regarding staff abusing PTO time, being tardy, etc.
- Monitor new staff that are on probation. Keep Director of nursing up-to-date with complaints/problems with new staff.
- Keep track of all workman's comp/incident reports for CNA's. Change their schedule to meet light duty restrictions, etc., as MD requests.
- Type confidential correspondence such as memos to staff, letters of termination, etc.
- Meet with Director of Nursing anytime that there is a staffing change to occur on the floors. (Whether it be due to someone not getting along on floor, family complaint, staff suspension, etc.)

Deb, if you have any questions regarding this position, please contact Kristie Tellijohn at 246-8229.

Thank you for your time in this matter!

6. Kristie Tellijohn is the Health Center Nursing Home's Director of Nursing, and is Cloutier's supervisor. She did not directly participate in the most recent negotiations for a collective bargaining agreement, but had some input into the County offer. She discusses staffing levels with Cloutier as they seek how best to provide service, but she did not share with Cloutier decisions regarding staffing levels. Tellijohn routinely uses pre-printed forms on which she adds handwritten notes and checks boxes for disciplinary notices, up to and including for discharge. When hiring, Tellijohn does interviews, makes reference checks, and makes the hiring decision. She is also the final disciplinary stage. Tellijohn conducts about 8-15 annual employe evaluations each month, with Cloutier responsible for photocopying reports and other personnel file documents.

7. Melva Berg, a veteran full-time employe, is Office Manager for the Human Services Department (60% FTE) and Secretary for the Health Center (40% FTE), and is supervised by the Nursing Home Administrator and the Director of Human Services. She spends the majority of her time supervising the front office staff and taking dictation for doctors who provide medical services at the Nursing Home.

8. Lori Cloutier, the incumbent Administrative Secretary at the St. Croix Health Center Nursing Home, has sufficient access to, knowledge of or participation in confidential matters relating to labor relations to be deemed a confidential employe.

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

CONCLUSION OF LAW

The Administrative Secretary, Health Care Center, is a confidential employe within the meaning of Sec. 111.70(1)(i), Stats., and therefore is not a municipal 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 issues the following

ORDER CLARIFYING BARGAINING UNIT

The Administrative Secretary, Health Care Center, is hereby excluded from the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

ST. CROIX COUNTY

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

POSITIONS OF THE PARTIES

The County

In support of its position that the Administrative Secretary is a confidential employe and should be excluded from the bargaining unit, the County contends the incumbent has sufficient knowledge of and participation in contract administration and labor relations to warrant such a finding. Specifically, the incumbent has unrestricted access to personnel files (including records of their usage of paid time off, reference letters, results of criminal investigations and material relating to workers compensation and other claims) of Union and non-union staff maintained at the Health Center.

The incumbent also has knowledge of, and participates in, disciplinary issues that come before the Director of Nursing. The month prior to the hearing, the incumbent was involved in eight to ten such incidents; she was privy to the employer's strategy in meting out the discipline, and copied and distributed the disciplinary notices to the affected employes. She has also been aware of, and participated in, eight to fifteen employe evaluations each month.

The incumbent has active involvement in the County's worker's compensation program, including receiving call-ins and reporting suspicious behavior to management. She has testified on the County's behalf in worker's compensation hearings. She is responsible for changing schedules of certified nursing assistants to meet medical restrictions.

The incumbent is the "gatekeeper" or enforcer with regard to the use or abuse of paid time off, reporting questions or concerns about time cards to the Director of Nursing. She receives vacation requests, and has authority to approve or deny such requests. She participated with management in devising a way to address weekend scheduling concerns.

She has knowledge of grievances, and management often asks her for information and input. The Director of Nursing relies on the incumbent to flag issues relating to abuse of the paid leave system, a gate-keeping function that warrants her exclusion from the bargaining unit as a confidential employe. Also supporting this conclusion is the fact that the incumbent recommends and participates in discipline of unit members, and has recommended the reduction in hours or layoff of unit members. At least one employe has been terminated for performance reasons, with the incumbent's input.

She also has knowledge of and participates in decisions regarding staff cuts or changes prior to the time the Union is notified. If she sees staff being idle, she recommends that hours be cut. Her recommendations have frequently been implemented over the past few years. Her interests are aligned with management.

The incumbent resigned her position as a Union officer after she became caught in the middle between Union and the County by participating in disciplinary proceedings on behalf of an employe after she had participated in the decision to impose the discipline.

Continued placement of the position in the bargaining unit would deprive the County of a key component in its program of contract administration and personnel activities.

The Administrative Secretary is the only support for the Director of Nursing, who is directly responsible for labor relations in the Nursing Home. While collective bargaining negotiations are handled by other managers, the Director of Nursing and Nursing Home Administrator do have input into the Nursing Home contract appendix, giving the Administrative Secretary confidential job duties that are substantial and not *de minimus*.

The County has not excluded an inordinate number of confidential employes, with each bargaining unit/department having an exempt confidential and/or supervisory position.

Because the Administrative Secretary has extensive knowledge of, access to and participation in contract administration and labor relations matters not generally available to the bargaining representative, and because her duties are substantial and not *de minimus*, and because the number of confidential employes retained by the County is not unreasonable, the subject position should be excluded from the bargaining unit as a confidential employe.

The Union

In support of its position that the Administrative Secretary is a municipal employe and should remain in the bargaining unit, the Union contends there is a troublesome odor created by the relationship between the County's petition and recent collective bargaining which resulted in a classification upgrade to the position. In those negotiations, the County presented the position's new job description to the Union without asserting that the position was confidential; now, less than three months after concluding negotiations which gave the position a substantial upgrade based on the new job description, and with no intervening change in duties, the County seeks to remove the position from the bargaining unit.

Also troublesome to the Union is the County's confusion between information which is properly kept confidential from employes without a need to know and information which is confidential in the labor relations nexus. The duties in this case are comprised of the former and little, if any, of the latter.

The record evidence clearly demonstrated the incumbent's utter lack of input into collective bargaining. Regarding the reporting of time off abuses, the incumbent's duties are ministerial and nothing more; moreover, the Union is just as opposed to abuses as is the County, and thus the interests of the County and the Union are not in conflict.

Nor is there any conflict over the proper administration of the worker's compensation law. Nor does the Union have any collective bargaining interest in resumes and letters of reference. There are no personnel files kept at the facility. The incumbent's ability to approve or deny sick leave is ministerial in nature and more relative to supervisory issues than confidential status. That the incumbent may be asked how best to accomplish staffing adjustments during a low patient census simply means that she is the scheduler, not that she is privy to the employer's strategy.

The County's view of the incumbent as the "gatekeeper" is not persuasive. Simply because an employe has access to or provides records to others who make decisions does not make the employe confidential.

Accordingly, the Administrative Secretary should continue to have the benefits of the statutory protections of representation for purposes of collective bargaining.

DISCUSSION

It is well-settled that for an employe to be confidential, the employe must have access to, knowledge of, or participation in confidential matters related to labor relations. Information is confidential when it: (1) deals with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations or grievance handling between the bargaining representative and the employer; and (2) is not information which is available to the bargaining representative or its agents. See, e.g., CITY OF GREENFIELD, DEC. NO. 26423 (WERC, 4/90), and PORTAGE COUNTY, DEC. NO. 6478-D (WERC, 1/90).

While a *de minimis* exposure to confidential materials is insufficient grounds for exclusion of an employe from a bargaining unit, the purpose of the exclusion is to protect a municipal employer's right to conduct its labor relations confidentially through employes 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. HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88).

Thus, notwithstanding the actual amount of confidential work performed, 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. See, CITY OF GREENFIELD, SUPRA and PORTAGE COUNTY, SUPRA. However, an employer will not be allowed to exclude an inordinately large number of employees by spreading the confidential work among employees or giving them occasional tasks of a confidential nature. See, HOWARD-SUAMICO SCHOOL DISTRICT, SUPRA.

If the Administrative Secretary's duties were limited to a "gatekeeper" function of reporting employee leave usage to management for appropriate action, she would not be a confidential employee. We have long held that where the monitoring role primarily involves fact-finding as opposed to decision-making, a finding of confidential status is not warranted. PRICE COUNTY, DEC. NO. 11317-B (WERC, 9/89); MILWAUKEE COUNTY, DEC. NO. 22519 (WERC, 4/85); CITY OF MANITOWOC, DEC. NO. 20696 (WERC, 5/83); WALWORTH COUNTY, DEC. NO. 18846 (WERC, 7/81); CITY OF MILWAUKEE, DEC. NO. 16987 (WERC, 4/79).

Here, it is clear that the Administrative Secretary has significant participation in and knowledge of the County's decision-making process and strategy as to a variety of contract administration matters. For instance, the incumbent participates in the decision-making process as to employee discipline and evaluation – including the issue of whether employees should pass probation. Through her participation in and knowledge of the County's decision-making in such matters, she is privy to matters as to which the Union does not have access and which clearly align her interests with those of management. Therefore, we find the Administrative Secretary to be a confidential employee and have ordered her exclusion from the bargaining unit.

Dated at Madison, Wisconsin this 4th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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