

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
LOCAL 2676, DISTRICT COUNCIL 40, AFSCME, AFL-CIO
Involving Certain Employees of
CITY OF NEW BERLIN

Case 15
No. 52642
ME-3471

Decision No. 13173-I

Appearances:

Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Local 2676, District Council 40, AFSCME, AFL-CIO.

Alan E. Seneczko, Seneczko Law Offices, S.C., Attorney at Law, 1860 Executive Drive, Suite E-1, Oconomowoc, Wisconsin 53066, appearing on behalf of the City of New Berlin.

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

On March 17, 2003, Local 2676, District Council 40, AFSCME, AFL-CIO petitioned the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of City of New Berlin employees that Local 2676 represents by including seven positions. The City opposed the petition.

Commission Examiner Karen J. Mawhinney held a pre-hearing conference on June 2, 2003, during which the parties resolved the unit status of five of the seven positions and agreed to proceed to hearing on the two unresolved positions, i.e., the Payroll Supervisor in the Department of Finance and Administration and the Administrative Coordinator in the Fire Department. The City, contrary to AFSCME, contends that the two disputed positions are held by confidential employees and thus should continue to be excluded from the AFSCME bargaining unit.

Dec. No. 13173-I

Examiner Mawhinney conducted hearing on June 19, 2003, in New Berlin, Wisconsin. The parties completed filing briefs on October 10, 2003.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The City of New Berlin, herein the City, is a municipal employer and has its offices at 3805 South Casper Drive, New Berlin, Wisconsin.

2. Local 2676, AFSCME, AFL-CIO, herein AFSCME, is a labor organization and has its offices at 8033 Excelsior Drive, Suite B, Madison, Wisconsin. AFSCME represents City employees in a unit described as follows in the parties' 2001-2003 contract:

. . . all regular full-time and regular part-time office clerical, technical and related occupational positions, professional library employees and craft employees, but excluding professional engineers, elected officials, department heads, supervisors, confidential employees, managerial employees, seasonal employees, student co-op employees, temporary employees, and employees employed in previously certified bargaining units . . .

There are two other bargaining units of City employees—a law enforcement unit represented by the New Berlin Professional Police Association and a blue collar employee unit represented by Teamsters Local 200.

3. Tamara Potkay is the City's Director of Human Resources. Potkay bargains and administers the three labor agreements between the City and the labor organizations representing the three bargaining units of City employees.

4. Janet Kruse has held the position of Payroll Supervisor since January 1, 2001, when the position was created. Prior to that time, Kruse held the position of Payroll Clerk, a bargaining unit position that has not been filled since Kruse left it. In both positions, Kruse has been a part-time employee, averaging 22.5 hours per week. The bulk of Kruse's duties in both positions has involved processing payroll and maintaining payroll records, filing government-required reports and tax transmittals, verifying employee work hours and pay rates, reviewing cash receipts, and updating employee insurance coverage and premium rates. The information Kruse acquires in monitoring employee time cards can sometimes lead to docking employees' pay or other adjustments. All of the time card information is available to employees and the unions. Kruse gathers such data but does not exercise discretion about whether or how the data will be used by supervisors.

5. In addition to the duties described in Finding of Fact 4, above, as Payroll Supervisor Kruse has recently prepared spreadsheets for calculating wage and benefit increases for purposes of the City's budget preparation process and to develop the amount of money to be placed in the City's contingency fund. At Director of Human Resources Potkay's request, Kruse has used these spreadsheets to cost out potential economic proposals for the City's use during collective bargaining negotiations as well as budget preparation. Potkay has also sought Kruse's opinion on occasion (sometimes while Kruse was still in the bargaining unit position of Payroll Clerk) regarding City bargaining proposals relating to issues affecting payroll administration, such as a compensatory time proposal, a ten-hour work day proposal, the optimum effective date for a health insurance change, the costs of a provision relating to working-out-of-classification, and certain payroll difficulties in administering a protective footwear provision – all issues arising in the Teamsters' unit. Kruse also supplies payroll data from time to time to assist Potkay in preparing the City's bargaining proposals, such as a list showing the distribution of overtime among park employees.

6. Kruse's immediate supervisor is the Accounts Manager, who reports to the Director of Finance and Administration. Potkay and the Director of Finance and Administration effectively recommend the amount of money to be placed in the budget to cover increased wage and fringe benefit costs. When determining what amount of money to recommend be so placed, they use payroll data generated by Kruse. Potkay has recently asked Kruse to prepare a spreadsheet for purposes of inserting percentages that can be used to cost wage proposals and to determine the amount in the contingency fund. However, once the spreadsheet data is assembled, the Director of Finance and Administration or another managerial employee can readily use the spreadsheet to cost proposals and/or determine contingency funds. This task is a *de minimis* portion of either Kruse's or a managerial employee's time.

7. Through her work regarding the budget, Kruse became aware that certain bargaining unit positions could be eliminated. However, Kruse does not attend executive sessions where labor relations matters have been discussed, does not take minutes in any confidential or executive sessions, does not attend negotiation sessions, and does not need or generally have access to the City's strategy in collective bargaining. She has not developed answers to grievances or assisted in the preparation of the City's position in grievance arbitration.

8. The Payroll Supervisor does not have sufficient access to, knowledge of or participation in confidential matters relating to labor relations to be deemed a confidential employee.

9. Debra Delikat is the Administrative Coordinator for the City Fire Department. She provides a wide variety of administrative assistance to the Fire Chief. No employees of the Fire Department are represented for the purposes of collective bargaining and no labor organization is presently attempting to organize Fire Department employees for that purpose. The Fire Chief does not represent the City for the purposes of collective bargaining.

10. The Administrative Coordinator does not have sufficient access to, knowledge of or participation in confidential matters relating to labor relations to be a confidential employee.

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

CONCLUSIONS OF LAW

1. The Payroll Supervisor is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats, and, therefore, is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. The Administrative Coordinator in the Fire Department is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats, and, therefore, is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT

The Payroll Supervisor and the Administrative Coordinator in the Fire Department shall be included in the AFSCME bargaining unit described in Finding of Fact 2.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

CITY OF NEW BERLIN

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

The following legal standard set forth by the Commission in MINERAL POINT SCHOOL DISTRICT, DEC. NO. 22284-C (WERC, 9/00), and affirmed by the Court of Appeals in MINERAL POINT UNIFIED SCHOOL DISTRICT V. WERC, 251 Wis.2d 325, 337-338 (2002) is used when determining whether an individual is a confidential employee:

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

While a *de minimis* exposure to confidential materials is generally insufficient grounds for exclusion of an employee from a bargaining unit, . . . we have also sought to protect an employer's right to conduct its labor relations through employees whose interests are aligned with those of management. . . . Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, . . . and, similarly, where a management employee has significant labor relations responsibility, the clerical employee assigned as his or her secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employee without undue disruption to the employer's organization. . . . (Citations omitted.)

Payroll Supervisor

As reflected in our Findings of Fact, we have concluded that the Payroll Supervisor does not have sufficient access to, knowledge of or participation in the City's collective bargaining strategy to warrant the conclusion that she is a confidential employee. Our conclusion is based on her limited access to information about the City's negotiations proposals and strategies, access that, while no doubt helpful, is not only *de minimis* but largely discretionary on the part of City managers, rather than essential to the conduct of collective bargaining.

Most of the assistance Kruse provides to Director of Human Resources Potkay for purposes of collective bargaining is in the nature of gathering payroll data – both generally and for specific purposes such as overtime costs and the cost of the Teamsters’ working-above-classification provision – that is available to the employees and the unions and therefore is not confidential information under our traditional standards. SEE, E.G., APPLETON AREA SCHOOL DISTRICT, DEC. NO. 22338-B (WERC, 7/87). Further, there is no persuasive evidence that Kruse serves in a decision-making role as to use of the gathered data, and hence this duty lacks confidential status. SEE, E.G., PRICE COUNTY, DEC. NO. 11317-B (WERC, 9/89). Lastly, while the timing of a request for data can expose the employer’s strategic interests, there is no persuasive evidence in this record that Kruse’s exposure has been anything but minimal.

While Potkay occasionally consults Kruse about the effects certain contract provisions or proposals would have on handling the payroll, these consultations do not expose Kruse in any significant way to City bargaining strategy; we find that such consultations are incidental, administrative and/or in the nature of a “sounding board” and therefore insufficient for confidential status. SEE SHEBOYGAN AREA SCHOOL DISTRICT, DEC. NO. 10488-B (WERC, 8/02); MOSINEE SCHOOLS, DEC. NO. 20479-F (WERC, 5/02).

Kruse’s involvement in costing out potential economic proposals and the development of the City’s contingency fund gives rise to a closer question regarding her confidential status. The City notes that we have at times excluded employees performing similar work, citing CITY OF DEPERE, DEC. NO. 30311 (WERC, 4/02); PIERCE COUNTY, DEC. NO. 9616-G (10/92); and CITY OF WAUSAU, DEC. NO. 20916-F (WERC, 5/98). However, mindful that a conclusion excluding an employee as confidential would deprive her of rights and protection under Chapter 111.70 (MERA), we examine each fact situation carefully and of necessity find ourselves drawing lines closely. In the cases cited by the City, the employees had additional confidential duties beyond involvement in costing, such as taking minutes in executive session (WAUSAU, SUPRA), extensive access to bargaining proposals that sometimes were not conveyed to the union (DEPERE, SUPRA), or assisting management in developing its position in grievance processing (PIERCE COUNTY, SUPRA). In Kruse’s case, it does not appear that developing the spreadsheet or even using the spreadsheet to predict costs of various potential increases necessarily gives her confidential information about the City’s “bottom line” in negotiations. We have often found employees to lack confidential status where their involvement in the costing process is merely preliminary and general, and/or where the budget calculations precede the actual contract negotiations, thus yielding relatively insubstantial insight into the City’s strategy or ultimate goal. As the Commission noted in SCHOOL DISTRICT OF BRUCE, DEC. NO. 19318-A (WERC, 5/83) AT 6, “[A] specific appropriation may be readjusted after the budget has been adopted. Although [the employee] may know the amount of money that the District has allocated for salaries and fringe benefits the Commission is not persuaded that [her] budget preparation duties give her access to sensitive labor relations material since . . . she is not privy to the District’s strategy in how such money will be spent.” SEE ALSO, MATC, DEC. NO. 16346-E (WERC, 11/87); CITY OF ASHLAND, DEC. NO. 18808 (WERC, 7/81). We have been especially reluctant to exclude an employee from protection under

MERA where the costing duties are a *de minimis* portion of the employee's work load and the employer has other employees capable of performing those relatively minor tasks without unduly disrupting the organization's operations. SEE, E.G., BRUCE, SUPRA; CESA No. 4, DEC. NO. 14177-A (WERC, 7/80); CITY OF RICHLAND CENTER, DEC. NO. 17950-A (WERC, 2/96). SEE ALSO, MINERAL POINT V. WERC, 251 WIS.2D 325, 342 (2002). Here, Kruse's role, once she has developed the spreadsheet and inserted the existing payroll data, appears to be little more than plugging in a percentage or a figure and letting the computer perform the calculations. If the City believes this task reveals too much of its potential negotiations strategy, the City could assigned this task to another excluded employee without undue disruption.

Given all of the foregoing, we do not find Kruse to be a confidential employee.

Administrative Coordinator

As reflected in the legal standards quoted above at the beginning of this Memorandum, confidential status is contingent on the existence of confidential matters as to labor relations. Because no Fire Department employees are represented for the purposes of collective bargaining, no union is presently seeking to represent them for that purpose and the Fire Chief has no collective bargaining role, there are no confidential matters as to labor relations to which the Administrative Coordinator can be exposed. Therefore, she is not a confidential employee.

Dated at Madison, Wisconsin, this 12th day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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