



STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :  
WALWORTH COUNTY (LAKELAND :  
NURSING HOME) : Case 29  
Involving Certain Employes of : No. 21965 ME-1463  
WALWORTH COUNTY (LAKELAND : Decision No. 16031-A  
NURSING HOME) :  
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Appearances:

- Mr. Eugene J. Hayman, Lindner and Marsack, S.C., Attorneys at Law, 700 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf of the County.  
Mr. Jack S. Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.

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

Walworth County (Lakeland Nursing Home), having filed a petition on October 9, 1984, requesting the Wisconsin Employment Relations Commission to clarify a bargaining unit consisting of all regular full-time and regular part-time clerical employes of the Walworth County Lakeland Nursing Home to determine whether the position of Clerk Typist III for the Resident Care Administrator, should be excluded from said bargaining unit; and a hearing having been held in the matter on February 19, 1985, at Elkhorn, Wisconsin, before Examiner Deborah A. Ford, a member of the Commission's staff; and a stenographic transcript having been received on February 22, 1985; and the parties having filed briefs in the matter by March 25, 1985; and the Commission having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That Walworth County (Lakeland Nursing Home), hereinafter referred to as the County, is a municipal employer, having its offices at Highway NN, Elkhorn, Wisconsin.
2. That the Wisconsin Council of County and Municipal Employees, Local 1925B, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization having offices at 5 Odana Court, Madison, Wisconsin.
3. That in Walworth County (Lakeland Nursing Home), Dec. No. 16031 (WERC, 1/78) the Commission certified the Union as the exclusive collective bargaining representative of the following employes of the County:  

All regular full-time and regular part-time clerical employes of the Walworth County Lakeland Nursing Home excluding confidential, supervisory and casual clerical employes and all other employes.
4. That on October 9, 1984, the County filed a petition to clarify bargaining unit requesting the Commission to exclude the position of Clerk Typist III for the Resident Care Administrator from the above-described unit on the grounds of its alleged confidential status.

5. That in about April 1981 the Lakeland Nursing Home was reorganized to reflect a co-administrator design; that pursuant to the reorganization John Jantz became Facility Administrator responsible for non-patient care departments including the business office, food service, laundry, housekeeping, plant operations and building and grounds; that Marilyn Rantz became Resident Care Administrator responsible for patient care departments including nursing services, medical records, social services and recreational therapy; and that both Jantz and Rantz report directly to the Board of Trustees of the Lakeland Nursing Home.

6. That there are approximately 88 full-time, part-time and casual employes under the jurisdiction of the Facility Administrator including one full-time administrative assistant, Mary Fleming; that Mary Fleming, who has been and continues to be excluded from the bargaining unit as a confidential employe, is responsible for maintaining personnel files and payroll records for the Nursing Home as well as performing other clerical duties as assigned by the Facility Administrator, including, on occasion, typing transcripts of patient abuse interviews and notes from employe counseling sessions.

7. That there are about 296 full-time, part-time and casual employes under the jurisdiction of the Resident Care Administrator including an Assistant Resident Care Administrator and a Clerk Typist III, the latter position being the subject of the instant dispute; that Terri Miller occupies the position of Assistant Resident Care Administrator, reports to the Resident Care Administrator and is responsible for handling resident care problems and issues relating to the Department of Nursing; that the Clerk Typist III position is currently occupied by Linda Romenesko; that Romenesko, who has occupied that position since 1980, spends approximately 50 percent of her work time preparing and maintaining monthly work schedules for Nursing Department employes, including granting or denying requests for time off in accordance with written guidelines, 25 percent maintaining and monitoring attendance records for the Nursing Department in accordance with the written Lakeland Nursing Home attendance policy and 25 percent typing summaries and transcripts from tape-recorded interviews regarding allegations of patient abuse, other reports, correspondence and memoranda for the Resident Care Administrator and Assistant Resident Care Administrator; that Romenesko also has done some of Fleming's work; and that Romenesko's immediate supervisor is Terri Miller.

8. That according to the Lakeland Nursing Home attendance policy, employes are required to call in to report absences and to provide certain information concerning the nature of such absences; that the call is recorded and logged by whomever is on duty; that the attendance policy provides that each employe starts with eight points and that employes lose points for tardiness, counted absences and unexcused absences; that the receptionist deducts points depending on the nature of the absence, in accordance with the policy; that the policy prescribes progressive discipline depending on the number of points lost, e.g., Step 4-0 point level subjects an employe to discharge; that the policy also lists 11 types of exempt absences that are not counted for any purpose under the policy; that one such exempted absence is for "an emergency beyond control of the employe"; that Romenesko ascertains whether an employe's reason for absence fits this category, and corrects the employe's absence report accordingly subject to re-review by Rantz; that in the course of maintaining attendance records, Romenesko checks for the development of patterns of absenteeism, occasionally makes follow-up telephone calls to the homes of employes to verify absences, and occasionally requests doctors' excuses from employes, although the parties' current contract only requires that, on request, employes must furnish certificates of illness if the employes are sick for more than three workdays; that Romenesko reviews the attendance records, including logs, on a bi-weekly and weekly basis with the Resident Care Administrator and Assistant Resident Care Administrator, respectively; that the Resident Administrator determines whether an employe should be disciplined for absenteeism; that in the course of making that determination the Resident Administrator may request that Romenesko provide information from her files relative to that employe's attendance record and Rantz also discusses the matter with the employe's supervisor, all prior to deciding that discipline should be imposed in accordance with the Nursing Home attendance policy; and that according to Rantz, the Union has neither requested nor received a copy of the absence report but is provided with a copy of any disciplinary action.

9. That the County's written resident abuse policy sets forth the process for reporting and investigating patient abuse allegations; that this policy provides, inter alia, that accusers, witnesses, and the alleged victim may be

interviewed and that such interviews will be tape recorded; that Marilyn Rantz, the Resident Care Administrator, conducts these investigations and interviews; that investigations conducted pursuant to the resident abuse policy could lead to the discipline, discharge or criminal prosecution of accused employees if Rantz determines that patient abuse or work rule violations occurred; that Romenesko types transcripts or dictated summaries of tape-recorded interviews involving allegations of patient abuse; that Romenesko is not present during such interviews or discussion regarding them; that she also types the notes from counseling sessions for work rule violations, committee meeting minutes, and Nursing Department policies and procedures; that she has, on one occasion, typed a report involving sexual harassment; that Romenesko is sometimes asked to retrieve records for use in the investigation of work rule violations, but does not actually participate in the determinations of discipline; and that Romenseko does not participate in grievance handling, contract administration or negotiations.

CONCLUSION OF LAW

That the occupant of the position of Clerk Typist III is not a confidential employe, and is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

ORDER CLARIFYING BARGAINING UNIT 1/

That the position of Clerk Typist III shall remain included in the bargaining unit described above in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of July, 1985.

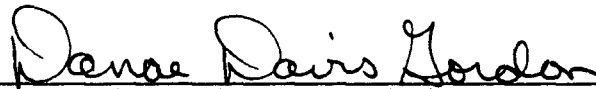
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  \_\_\_\_\_

Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

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1/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its  
(Continued on Page 4)

1/ (Continued)

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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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. 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.

(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. 227.20 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.

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

On October 19, 1984, the County filed the instant petition to clarify bargaining unit requesting that the Commission exclude the Clerk Typist III position from the unit based upon alleged confidential status.

POSITIONS OF THE PARTIES

The County contends that Romenesko, the current occupant of the position, should be excluded from the bargaining unit because her duties and responsibilities relating to the attendance program can result in discipline of bargaining unit employes and affect the level of discipline for others. The County also contends that since Romenesko types patient abuse reports and minutes of counseling sessions, she is privy to information of a highly confidential nature which the Union does not routinely have access to and which could also result in discipline of bargaining unit employes. In response to the Union, the County also argues that the fact that there is another confidential employe at the Nursing Home who has already been excluded as a confidential employe is not dispositive. Rather, the County maintains, it is the nature of the work, and not the existence of another confidential, which has been determinative in prior Commission cases on this issue. The County concludes that excluding Romenesko from the bargaining unit is consistent with a number of prior Commission cases in which employes whose activities could lead to the discipline of other employes, were excluded as confidential employes. 2/

The Union contends that Romenesko is not a confidential employe because (1) her scheduling duties, which constitute 50% of her work time, are routine and are performed in accordance with Nursing Home policies and procedures, (2) her duties with respect to the attendance policy require the routine and mechanical application of the written rules and requirements set forth in the policy, (3) she is not involved in labor relations matters such as grievances and negotiations and (4) the confidential activities she does perform are of a de minimis nature and can be performed by other confidential employes.

Discussion

The Commission has consistently held that in order for an employe to be considered a confidential employe and thereby excluded from a bargaining unit, such employe must have access to, knowledge of, or participate in confidential matters relating to labor relations. 3/ In order for information to be confidential for such purposes, it must be of the type that: (1) deals with the employer's strategy or position in collective bargaining, contract administration, litigation, or other similar matters pertaining to labor relations and (2) is not available to the bargaining representative or its agents. 4/ However, a de minimis amount of work performed pertaining to confidential labor relations matters is not sufficient grounds for exclusion, especially where there is another confidential employe available to do the work. 5/

The record reveals that the substantial majority of Romenesko's work time is spent performing tasks of a non-confidential nature such as scheduling, updating absenteeism records and typing various kinds of correspondence and reports. She

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2/ Citing, City of Milwaukee (Department of Public Works), Dec. No. 16987 (WERC, 4/79) and Walworth County, Dec. No. 18846 (WERC, 7/81).

3/ City of Port Washington (City Hall and Police Department), Dec. No. 18654-B (WERC, 4/82); Northwood School District, Dec. No. 20022 (WERC, 10/82).

4/ Ibid.

5/ Wisconsin Heights School District, Dec. No. 17182, (WERC, 8/79); Cudahy Board of Education, Dec. No. 12087 (WERC, 8/73); Milwaukee County, Dec. No. 7135-S (WERC, 2/85).

is not involved in the processing of grievances, contract administration or negotiations, except to the degree that she types notes and transcripts from employe counseling sessions for work rule violations and interviews relating to patient abuse allegations. However, the County contends that Romenesko's involvement in both the investigation of suspected patient abuse in the form of the typing of employe interviews and in her follow-up investigation of suspicious absence reports warrants her exclusion from the bargaining unit because of the potential for discipline resulting from those activities.

In the past the Commission has found that where the duties of an employe are closely related to activity which could lead to discipline of a bargaining unit employe, such employe is a confidential one and should be properly excluded from the bargaining unit. 6/ However, unlike the Fraud Investigator in Walworth County, supra, and the Sewer Repair Supervisor in City of Milwaukee (Department of Public Works), supra, cited by the County, Romenesko does not conduct in-depth investigations of fellow employes. In the case of absence reports, she simply makes follow-up calls, not visits, to the home of absent employes, alerts the employer to possible problems and occasionally requests written physicians' excuses from employes. Moreover, pursuant to the parties' 1985 contract, an employe must furnish such an excuse to a supervisor, if requested, only after the employe is sick for more than three workdays. Romenesko's duties with respect to maintaining attendance records are substantially routine and clerical in nature and require the exercise of minimal independent judgment on her part. In fact, Rantz carefully reviews Romenesko's records and may seek additional information from her prior to imposing discipline. Further, Romenesko testified that she does not participate in the making of decisions concerning what, if any, discipline should result from such absenteeism.

Thus, the only confidential work performed by Romenesko is on the 10-12 occasions annually when she types summaries or transcripts of interviews (which she does not attend) regarding alleged patient abuse which can lead to employe discipline. This activity gives the transcribing typist access to sensitive labor relations information not available or not immediately available to the Union. However, this limited work could be performed by Mary Fleming, a confidential employe. In fact, the record reveals that Fleming has typed such transcripts and summaries on occasions in the past, and Romenesko has on occasion performed some work normally performed by Fleming. While Fleming's workload may be such that she could not take on the additional work without some relief from other nonconfidential work, we are persuaded that the employer's operation would not be unduly burdened if it were to reassign the work so that Fleming did all of the summaries and transcripts.

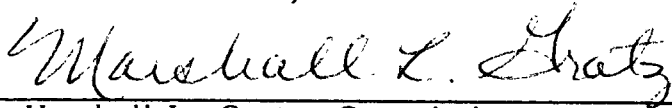
Accordingly, we conclude that Romenesko's position does not warrant exclusion on the basis of confidential employe status.

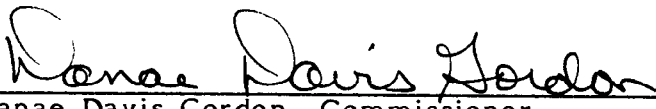
Dated at Madison, Wisconsin this 23rd day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner

6/ Milwaukee County (Sheriff's Department), Dec. No. 22519 (WERC, 4/85); Walworth County, Dec. No. 18846 (WERC, 7/81); City of Milwaukee (Department of Public Works), Dec. No. 16987 (WERC, 4/79).