

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
AFSCME COUNCIL 40, LOCAL 3148

Involving Certain Employees of

SAUK COUNTY

Case 146
No. 62803
ME-1087

Decision No. 17882-C

Appearances:

William Moberly, Staff Representative, Wisconsin Council 40, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Sauk County Health Care Center Employees' Union, Local 3148, Wisconsin Council 40, AFSCME, AFL-CIO.

Chad A. Hendee, Assistant Corporation Counsel, Sauk County West Square Building, 505 Broadway, Baraboo, Wisconsin 53913, appearing on behalf of Sauk County.

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

On October 3, 2003, Sauk County Health Care Center Employees' Union, Local 3148, Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission by which it sought to clarify an existing bargaining unit of Sauk County Health Care Center employees that it represents for the purposes of collective bargaining by the inclusion therein of the "Ward Clerk position currently occupied (sic) Kelly Driese". The County opposed the petition because it contends that the incumbent is a confidential employee.

A hearing on the petition was held on December 18, 2003 in Baraboo, Wisconsin, before Paul Gordon, Commissioner. At the hearing, the position at issue was identified as "Nursing Administrative Assistant". The parties filed their briefs on April 5, 2004, and on April 14, 2004 both parties declined to file responsive briefs.

Dec. No. 17882-C

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

FINDINGS OF FACT

1. Sauk County, herein the County, is a municipal employer with offices at 505 Broadway, Baraboo, Wisconsin and maintains a Health Care Center (SCHCC) at Reedsburg, Wisconsin.

The SCHCC employs 279 individuals and has a management staff that includes the Administrator, the Personnel Manager and the Director of Nursing. The Administrator has a clerical Administrative Secretary and the Personnel Manager has two Personnel Clerks (1.5 FTE), who are excluded from any bargaining unit as confidential employees.

2. Sauk County Health Care Center Employees' Union, Local 3148, Wisconsin Council 40, AFSCME, AFL-CIO, herein the Union, is a labor organization with offices at 8033 Excelsior Drive, Madison, Wisconsin. The Union serves as the collective bargaining representative of certain County employees at the SCHCC.

3. The Nursing Administrative Assistant position in dispute was created by County Board Resolution dated April 15, 2003 entitled "AUTHORIZATION TO ELIMINATE ONE (1) FULL TIME WARD CLERK POSTION AND CREATE ONE (1) FULL TIME ADMINSTRATIVE ASSISTANT POSITION." The text of the Resolution stated in pertinent part:

WHEREAS, the Sauk County Health Care Center Nursing Department is in need of a position to provide confidential, administrative support as well as create work schedules for the certified nursing assistants, and

WHEREAS, there have been ongoing difficulties with completion of staff scheduling and confidential Nursing Administrative type duties; and

WHEREAS, improving the scheduling processes of the Certified Nursing Assistants and related tasks has been an ongoing goal of the Health Care Center Nursing Department; and

WHEREAS, two (2) full-time ward clerks retired in 2003 and one position has since been filled, leaving one (1) full-time vacancy; and

WHEREAS, replacing one (1) full time equivalent (FTE) ward clerk position with one (1) full time equivalent (FTE) Nursing Administrative Assistant will allow the Nursing Department to appropriately delegate confidential employee duties and responsibilities and will allow the remaining Ward Clerk to avoid conflict of interest situations in the future; . . .

Historically, scheduling of the Certified Nursing Assistants (CNAs) at the SCHCC had been performed by a single confidential employee in the SCHCC Personnel Department. In the mid to late 1990's, owing to budgetary issues, the scheduling work was transferred to bargaining unit Ward Clerks in the SCHCC Nursing Department. Because the Ward Clerks have many other responsibilities and scheduling is complex, the retirement of several Ward Clerks prompted the Director of Nursing to successfully recommend creating the separate Nursing Administrative Assistant position, so scheduling responsibilities could be returned to one non-Ward Clerk position. The SCHCC Administrator supported the Director's recommendation because scheduling decisions have historically generated grievances and she felt it would avoid the potential for conflicting loyalties if a non-bargaining unit employee made the scheduling decisions. Other County departments/organizations that schedule employees typically have a managerial (non-bargaining unit) employee performing the scheduling work.

4. Incumbent Nursing Administrative Assistant Kelli Driese is the first person to fill this position. She works 8:00 a.m. to 4:30 p.m. Monday through Friday and reports to the SCHCC Director of Nursing. Her primary responsibility (75%) is preparation and administration of a monthly master schedule and a daily schedule which determine when the 50 to 75 CNA's will work. The remainder of her work time (25%) is spent inventorying and ordering supplies for the Nursing Department.

Driese prepares the master and daily schedules in consultation with the Director of Nursing using known staffing needs, staffing availability, and applicable statutes, administrative rules, County policies and contractual provisions. When a scheduled CNA seeks approval to be absent due to vacation, scheduled doctor's appointment, etc., Driese reviews the request and approves or denies it based on the availability of replacement staff from a pool of on-call employees. When scheduled CNA's are absent due to illness, etc., they contact Driese who notes the reason for absence and then calls in a replacement. On the shifts and for the times that Driese is not working, the Night Shift Supervisors and Ward Clerks administer the master schedule by taking calls from CNAs who will be absent and finding replacement employees.

CNAs who are unhappy with their work schedule seek to informally resolve their concerns with the Director of Nursing at the first step of the contractual grievance procedure. If the grievance is not resolved at the first step, the matter is reduced to writing and is presented to the SCHCC Administrator at the second grievance step.

When consulting on a daily basis with the Director of Nursing regarding the preparation/administration of the master and daily schedules, Driese: (1) becomes aware of upcoming yet to be imposed CNA suspensions or terminations that will affect scheduling; (2) advises the Director about employees who Driese believes are violating the SCHCC policy regarding maintaining on-call availability; and (3) advises the Director about scheduled employees who will be absent. Driese also discusses concerns regarding violations of the on-call availability policy with the SCHCC Personnel Manager and provides the Manager with documentation as to possible policy violations.

As to reported possible violations of the on-call availability policy, the Director or Personnel Manager determines whether the policy violation warrants a disciplinary response. As to absences by scheduled employees, the Personnel Manager's staff routinely tracks employee attendance and advises the Manager and Director when discipline should be imposed under the no-fault policy. It is anticipated that Driese will assume this responsibility once she has mastered the scheduling process. It is also anticipated that Driese will type, deliver and explain/answer questions regarding the Director's disciplinary form letters advising employees of discipline they will receive under the no-fault attendance policy. The confidential secretary of the SCHCC Administrator or the Personnel Manager's confidential staff currently type these form letters.

If discipline imposed by the Director of Nursing is grieved, the grievance is discussed with the Director at the first step of the contractual grievance procedure. If there is a dispute as to attendance records upon which the grievance was based, Driese may be called upon to assemble the attendance records for the Director or Personnel Manager to review. If such a grievance proceeds further in the contractual process and if the Director is involved in such processing, Driese will type any of the Director's grievance related correspondence and might potentially be called as a witness in an arbitration proceeding as to attendance records.

The Director of Nursing is not part of the County's bargaining team when the labor agreement between the County and the Union bargained. The Director of Nursing may be consulted by the County prior to the commencement of bargaining as to concerns she would like to see addressed by the County at the bargaining. Driese may be consulted by the Director of Nursing as to any scheduling concerns that should be so addressed.

It is anticipated that Driese will transcribe handwritten complaints alleging abuse of a resident by any individual including an SCHCC employee.

5. The confidential labor relations responsibilities of the Nursing Administrative Assistant can be performed by the three existing confidential SCHCC employees without undue disruption.

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

CONCLUSION OF LAW

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

Based upon the above and forgoing Findings of Fact and Conclusion of Law, the Commission makes and hereby issues the following

ORDER

That the Nursing Administrative Assistant is included in the bargaining unit identified in Finding of Fact 2.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of July, 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

Sauk County

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

DISCUSSION

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 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)

Here, the County makes the following four arguments in support of the alleged confidential status of the Nursing Administrative Assistant: (1) the creation and administration of the CNA work schedule is part of management's administration of the labor agreement with the Union and thus inclusion of the Assistant in the Union bargaining unit would create an unacceptable conflict of interest/potential for conflicting loyalties; (2) the Assistant's reporting and discussion of employee attendance issues that may lead to discipline/knowledge of discipline that has yet to be imposed creates an unacceptable conflict of interest with unit inclusion; (3) the Assistant's confidential labor relations duties will increase with time and training; and (4) the Assistant is the clerical employee assigned to a management employee (the Director of Nursing) with significant labor relations responsibilities.

As to argument (1), the County is correct that a conflict of interest between unit status and employee duties can be sufficient to warrant exclusion from the unit as a confidential employee. CITY OF GREENFIELD, DEC. NO. 18304-C (WERC, 3/82). However, because the scheduling parameters within which the Assistant works are so highly regulated by applicable law, rule, policy and contract provisions, we do not find sufficient danger of conflict of interest present to warrant confidential status. (See also SHEBOYGAN COUNTY DEC. NO. 7671-A (WERC, 1/88) where the Commission concluded that the heavily regulated nature of scheduling duties did not create a sufficient conflict to warrant supervisory status.) Further, we note that the scheduling work occurs under the daily supervision/direction of the Director of Nursing and yields a schedule that is accessible to both management and employees. Thus, the realities of the workplace provide additional protection to the County from any potential for abuse that unit inclusion might arguably produce.

Regarding argument (2), the County is again correct that, if there is a sufficiently close relationship between employee duties and discipline, confidential status is established. CITY OF MILWAUKEE, DEC. NO. 16987 (WERC, 4/27); WALWORTH COUNTY, DEC. NO. 18446 (WERC, 7/81); WALWORTH COUNTY, DEC. NO. 16031-A (WERC, 7/85). While it presents a close question, we are again persuaded that the evidence here does not warrant a conclusion that the Assistant is a confidential employee. The no-fault nature of the attendance policy and involvement of the Personnel Manager's staff effectively eliminates any discretion by the Assistant as to reporting/disciplinary consequences regarding the attendance policy. Although she does exercise discretion when determining whether the on-call policy has been violated by an employee and participates in discussions as to what if any discipline should result, it is clear that the Director of Nursing and Personnel Manager make the disciplinary decision. Hence we find the potential for the Assistant to abuse her discretion insufficient to warrant confidential status.

Turning to arguments (3) and (4), we have no reason to doubt that there will be an expansion of the Assistant's duties as her scheduling proficiency improves and the time needed to perform those duties decreases. We also acknowledge that, as noted in the above-quoted language from the MINERAL POINT decision,

. . . 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.

However, we do not find these arguments sufficiently persuasive to warrant granting confidential status to the Assistant.

We begin by noting that not all of the additional duties the Assistant may assume will expose her to confidential labor relations information. For instance, the additional duty of tracking absences under a no-fault attendance policy does not expose an individual to

confidential labor relations information, because the information is accessible by the affected employee/union. More importantly, the combination of the Assistant's current and future labor relations responsibilities are not sufficient to warrant confidential status because such duties can be assigned to the three other confidential SCHCC employees without undue disruption.

In reaching this conclusion, it is important to note that the Director of Nursing has somewhat limited labor relations responsibilities. She is not a member of the County bargaining team. Her role in grievance processing is limited to responding at the first step (before the grievance is even reduced to writing), when she is the supervisor of the affected employee. While she might be called as a witness in a grievance arbitration proceeding/other related litigation, this has not occurred to date. This limited labor relations role/limited exposure to County labor relations strategy in turn limits the amount of confidential labor relations support the Assistant might be called upon to provide, which in turn warrants a conclusion that such duties could be performed by the three existing confidential employees. Equally important to our conclusion is the fact that the additional confidential labor relations responsibilities the Assistant may be called upon to perform are almost all 1/ currently being performed by the other three confidential support SCHCC employees. The record does not persuade us that the continued performance of this confidential work by these three employees will unduly disrupt the County's operation.

1/ As held in WALWORTH COUNTY, DEC. NO. 16031-A (WERC, 7/85) transcription of patient abuse statements can expose an employee to confidential labor relations information and this is a proposed duty not currently being performed by others. However, the amount of such work is too speculative for us to conclude that it provides a persuasive basis for a confidential exclusion.

Given all of the foregoing, we conclude that the Assistant is not a confidential employee and therefore have ordered that the Assistant be included in the Union bargaining unit.

Dated at Madison, Wisconsin, this 19th day of July, 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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