

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :
: GENERAL DRIVERS, DAIRY EMPLOYEES :
AND HELPERS LOCAL UNION NO. 579, :
affiliated with the :
INTERNATIONAL BROTHERHOOD OF : Case XLI
TEAMSTERS, CHAUFFEURS, WARE- : No. 30997 ME-2174
HOUSMEN AND HELPERS OF AMERICA : Decision No. 20753
: Involving Certain Employees of :
: CITY OF JANESVILLE :
(TRANSIT SYSTEM) :
: -----

Appearances:

Mr. Matthew Robbins, Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, Milwaukee, WI 53202, appearing on behalf of General Drivers, Dairy Employees and Helpers, Local Union No. 579.
Ms. Berta S. Hoesly, City Attorney, 18 North Jackson Street, Janesville, WI 53545, appearing on behalf of the City of Janesville (Transit System).
Mr. Darold Lowe, and Mr. David Ahrens, Staff Representatives, 5 Odana Court, Madison, WI 53719, appearing on behalf of the Local 523, Wisconsin Council 40, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DIRECTION OF ELECTION

General Drivers, Dairy Employees and Helpers Local Union No. 579, having filed on January 3, 1983, a petition requesting the Wisconsin Employment Relations Commission (the Commission) to conduct an election among certain employees of the City of Janesville (Transit System), to determine whether those employees wish to be represented by that Union for the purpose of collective bargaining; and hearing in said matter having initially been scheduled for hearing on March 4, 1983 and then rescheduled for hearing on April 12, 1983 1/; that hearing in the matter having been conducted on said date by Richard B. McLaughlin, an Examiner on the Commission's staff; and Local 523, Wisconsin Council 40, AFSCME, AFL-CIO, having been permitted to intervene in the matter; and a stenographic transcript of the hearing having been prepared; and the parties having filed briefs in the matter by May 10, 1983; and the Commission having reviewed the record and briefs of the parties, and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That General Drivers, Dairy Employees and Helpers Local Union No. 579, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Teamsters, is a labor organization which has its offices located at 2214 Center Avenue, Janesville, Wisconsin 53545.
2. That Local 523, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as AFSCME, is a labor organization which has its offices located at 5 Odana Court, Madison, Wisconsin 53719.

1/ The instant matter was postponed and rescheduled due to Wisconsin Council 40's position that a pending prohibited practice case involving Council 40 and the City of Janesville served to block the instant petition for election. Said complaint was dismissed on May 3, 1983.

3. That the City of Janesville, hereinafter referred to as the City, is a municipal employer which has its offices located at 18 North Jackson Street, Janesville, Wisconsin 53545, and which, among its functions, operates Departments of Water, Streets, Parks, Forestry, and Golf Courses, which will hereinafter be collectively referred to as the DPW, and a Transit System.

4. That at all times relevant to this proceeding, AFSCME has been the voluntarily recognized exclusive bargaining representative for separate bargaining units of certain employees of the City's DPW and of the Transit System; that AFSCME and the City are parties to a collective bargaining agreement which, among its provisions, contains the following:

ARTICLE I

RECOGNITION

Section 1.

The City recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees of the Transit System, but excluding executive, supervisory, managerial, confidential employees and one (1) working foreman, in all matters relating to wages, hours and conditions of employment.

. . .

ARTICLE XIII

This Agreement shall be effective as of the first day of January, 1981, and shall remain in full force and effect through the 31st day of December, 1982. It shall be automatically renewed from year to year thereafter unless either party shall notify the other in writing on or before the 1st day of July, 1982 that it desires to modify this Agreement. In the event that such notice is given, the parties shall commence negotiations at mutually agreeable times and places in a good faith effort to reach agreement by December 31. Nothing said herein shall prevent the parties from altering or amending, at any time, any part thereof by mutual consent; however, any such modification shall be in writing and executed by the parties.

. . .

5. That on October 18, 1982, David Ahrens, an AFSCME staff representative, executed a mediation-arbitration petition on behalf of the employees composing the City's DPW bargaining unit, which was received by the Commission on October 20, 1982; that on October 28, 1982, Mr. Ahrens executed a mediation-arbitration petition on behalf of the employees composing the City's Transit System bargaining unit, which was received by the Commission on October 29, 1982; that the City filed objections to both petitions, and requested the Commission not to initiate any mediation-arbitration procedures; that after AFSCME received a copy of these objections, representatives from AFSCME and the City met to discuss the City's objections to AFSCME's mediation-arbitration petition covering DPW employees; that as a result of this meeting, representatives of the City and of AFSCME executed the following agreement:

Ammendment (sic)

It is agreed by the undersigned parties that the 1981-82 Agreement will remain in full force and effect in all its (sic) terms and conditions until a successor agreement is reached.

By the parties (sic) signatures they imply no waiver of proposals to modify said agreement.

Further, as a condition of this agreement the Union will withdraw its petitions for Mediation-Arbitration submitted on Oct. 18, 1982 and Oct. 28, 1982.

that this written agreement applied only to the City's DPW employees; that sometime after this written agreement was signed, Mr. Ahrens and Berta Hoesly, the City's Attorney, agreed, in a telephone conversation, to extend this written agreement to Transit System employees; that this oral agreement was never reduced to writing; that after this oral agreement was reached, AFSCME filed a written request with the Commission asking that its mediation-arbitration petitions of October 20, and October 29, 1982, be dismissed; that the Commission, on December 15, 1982, issued Orders of Dismissal for both petitions 2/; and that AFSCME has not filed any mediation-arbitration petition covering Transit System employees since the Commission's December 15, 1982 Orders of Dismissal.

6. That on January 3, 1983, the Commission received a petition for election involving municipal employees filed by the Teamsters, and signed by an agent of that Union on December 31, 1982; that this election petition seeks an election among those City Transit System employees composing the bargaining unit set forth in Finding of Fact No. 4 above to determine whether those employees wish to be represented for purposes of collective bargaining by the Teamsters; that AFSCME, contrary to the Teamsters, contends that the election petition was not timely filed because it was signed on December 31, 1982, which date precedes the expiration date contained in Article XIII of the collective bargaining agreement described in Finding of Fact No. 4 above, and because AFSCME and the City extended the terms of that collective bargaining agreement in a manner which bars the Commission from processing the Teamsters' petition; that the City takes no position regarding the timeliness of the Teamsters' election petition; that AFSCME, the Teamsters and the City agree that the bargaining unit description set forth in Finding of Fact No. 4 describes an appropriate bargaining unit; that the City, contrary to AFSCME, contends that Sherri Mueller, a secretary employed at the City's Transit System, is a confidential employee properly excluded from that bargaining unit; and that the Teamsters take no position regarding Mueller's disputed confidential status.

7. That Sherri Mueller is the only secretary employed at the City's Transit System, which is located about one mile from City Hall; that her immediate supervisors are the Superintendent and Assistant Superintendent of the Transit System; that the Transit Superintendent is a participating member of the bargaining team which represents the City during collective bargaining with Transit System employees; that the City Attorney and Personnel Director, who have offices at City Hall, are also members of that bargaining team; that the members of this bargaining team often communicate by use of internal office memoranda; that Mueller receives and opens those memoranda which are sent to the Transit Superintendent; that she types the written reports concerning contract negotiation strategies formulated by the Transit Superintendent, or by other supervisory personnel of the Transit System; that in the 1982 negotiations between AFSCME and the City, she spent approximately thirty hours typing approximately twenty pages of such memoranda; that Ms. Mueller may perform other duties incident to collective bargaining, as for example, when the City considered proposals regarding uniform allowance, she obtained data regarding the cost of uniforms and of uniform cleaning; that the collective bargaining agreement referred to in Finding of Fact No. 4 above contains a five step grievance procedure culminating in binding arbitration; that the Transit Superintendent and his Assistant are the employer representatives at steps one and two of that procedure; that Mueller types internal memoranda between the Transit Superintendent and his Assistant regarding whether discipline should be imposed in a given case; that in those cases that proceed through the grievance procedure, she types not only the formal responses of the Transit Superintendent and his Assistant, but also the internal memoranda exchanged between supervisory personnel of the Transit System regarding the most appropriate course of action to take; that she types all the internal correspondence between the Transit Superintendent and the City Attorney regarding the presentation of a given arbitration case; that she has spent approximately three hours typing six or seven memoranda concerning potential disciplinary actions considered by the City since January, 1983; that three of these memoranda were not made available to AFSCME; that she is, and has been throughout her tenure with the City, responsible for the typing and filing of all the internal memoranda discussed above; that the Transit System secretary has never been included in the Transit System bargaining unit represented by AFSCME; and that Transit System secretary, Sherri Mueller, is a confidential employee.

2/ See City of Janesville (Transit System), (20174) and City of Janesville, (20172).

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the petition for election involving municipal employees filed by the Teamsters and received by the Commission on January 3, 1983, was timely filed, and that a question of representation within the meaning of Sec. 111.70(4)(d) of the Municipal Employment Relations Act (MERA) presently exists among an appropriate collective bargaining unit consisting of all regular full-time and regular part-time employees of the Transit System of the City of Janesville, but excluding executive, supervisory, managerial and confidential employees and one (1) working foreman.

2. That the occupant of the position of Transit System secretary, currently Sherri Mueller, is not a municipal employee within the meaning of Sec. 111.70(1)(b) of the MERA, but rather, is a confidential employee who is excluded from the collective bargaining unit in which the election is directed herein.

Upon the basis of the above and foregoing Findings of Facts and Conclusions of Law, the Commission makes and issues the following

DIRECTION OF ELECTION

That an election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this directive in the collective bargaining unit consisting of all regular full-time and regular part-time employees of the Transit System of the City of Janesville, but excluding executive, supervisory, managerial and confidential employees and one (1) working foreman 3/ who were employed by the City of Janesville on June 17, 1983, except such employees as may, prior to the election, quit their employment, or be discharged for cause, for the purpose of determining whether a majority of said employees desire to be represented by General Drivers, Dairy Employees and Helpers, Local Union 579, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or, by Local 523, Wisconsin Council 40, AFSCME, AFL-CIO, or, by neither of said labor organizations, for the purpose of collective bargaining with the City of Janesville on wage, hours and conditions of employment.

Given under our hands and seal at the City of
Madison, Wisconsin this 17th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

3/ There is, at present, no employee occupying the position of working foreman.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DIRECTION OF ELECTION

The present matter poses two issues for decision. The first is the timeliness of the Teamsters' election petition and the second is the confidential status of the Transit System Secretary.

Chapter ERB 10 of the Commission's Administrative Rules "govern the conduct of all proceedings involving municipal employment relations before the Wisconsin Employment Relations Commission . . ." 4/ Section ERB 10.08(4) provides:

ERB 10.08 Time for filing papers other than letters.

. . .

(4) COMPLETION OF FILING. Papers required by s. 111.70, Stats., this chapter, chs. ERB 11, 5/ . . . to be filed with the commission, . . . shall be deemed filed upon actual receipt at the place specified for such receipt before the close of business.

. . .

Sec. ERB 10.09(2) provides that the "place specified for such receipt" is the Commission's office in Madison. The Teamsters' election petition was received at the Commission's office on January 3, 1983. Under the provisions of Sec. ERB 10.08(4), the fact that the Teamsters' petition was signed on December 31, 1982 is irrelevant, and thus, said petition can be considered untimely only if it is barred by the agreement between AFSCME and the City to extend their 1981-82 collective bargaining agreement "until a successor agreement is reached."

In Dunn County (Highway Department), the Commission stated:

There is no question but that the County and AFSCME Local 727 agreed, prior to the filing of the election petition herein, to extend the 1977-1979 agreement, with respect to its coverage of the County Highway Department employees, until a new agreement was reached. We conclude that such an indefinite extension does not convert the expired agreement into a bar to a present election. 6/

In the City of Sheboygan, the Commission was asked to determine whether a contractual duration proposal was permissive or mandatory. The Commission analyzed that proposal thus:

In analyzing the duration language in question, it is readily apparent that said language provides for an indefinite duration by providing that the agreement would stay in effect ". . . until a successor agreement is reached". 7/

AFSCME and the City used the precise language, "until a successor agreement is reached," addressed by the Commission in City of Sheboygan, supra. Being language of indefinite duration, that language falls under the rule expressed in Dunn County (Highway Department, supra). Therefore the contract extension between AFSCME and the City cannot be considered a bar to the Teamsters' petition for an election.

4/ Wis. Adm. Code Section ERB 10.01.

5/ See Sec. 111.70(4)(d)5 and Wis. Adm. Code Section ERB 11.02(2).

6/ Dunn County (Highway Department), (17861) 6/80, at 6.

7/ City of Sheboygan, (19421) 3/82, at 8.

The remaining issue is Ms. Mueller's disputed confidential status. The Commission has consistently held that in order for an employee to be considered a confidential employee, such an employee must have access to, have knowledge of, or participate in confidential matters relating to labor relations. In order for the information to be confidential for such purpose it must be the type of information which: 1) deals 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 2) is not information that is available to the bargaining representative or its agents. 8/

Ms. Mueller types and files memoranda not made available to AFSCME regarding the City's strategy in both contract administration and negotiations. In addition, she performs incidental duties which could reveal the City strategy in collective bargaining, such as obtaining data concerning uniform allowances. The Findings of Fact set forth a degree of involvement with confidential material sufficient to establish that her contact with such material is not de minimus. That she is the only secretary available to perform this work in the Transit System warrants some consideration here since the Transit System and City Hall are located in separate buildings.

In sum, the record demonstrates that Mueller functions as a confidential employee and whose position appropriately is excluded from the collective bargaining unit.

Dated at Madison, Wisconsin this 17th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Gary L. Covelli /s/
Gary L. Covelli, Commissioner

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

8/ Jefferson Water and Electric Department, (20511) 4/83, at 7.