

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
HOWARD-SUAMICO OFFICE SUPPORT
AND AIDES ASSOCIATION/WEAC
Involving Certain Employes of
HOWARD-SUAMICO SCHOOL DISTRICT

Case 16
No. 39548 ME-221
Decision No. 22731-B

Appearances:

Ms. Melissa A. Cherney, Staff Counsel, and Ms. Donna A. Weikert,
Law Clerk, Wisconsin Education Association Council, 101 West Beltline
Highway, P. O. Box 8003, Madison, Wisconsin 53708, appearing on behalf
of the Petitioner.
Mulcahy & Wherry, S.C., Attorneys at Law, 414 East Walnut Street,
P. O. Box 1103, Green Bay, Wisconsin 54305-1103, by Mr. Robert W.
Burns, appearing on behalf of the Howard-Suamico School District.

ORDER DENYING PETITION FOR REHEARING

The Wisconsin Employment Relations Commission having, on September 14, 1988, issued Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit in the above-entitled matter wherein the Commission inter alia concluded that the incumbent in the position of secretary/accounts payable clerk for the Howard-Suamico School District was not a confidential employee and should be included in the bargaining unit represented by the Howard-Suamico Office Support and Aides Association/WEAC; and the District having, on October 4, 1988, filed a petition for rehearing pursuant to Sec. 227.49, Stats., alleging that the Commission's decision contained material errors of law and fact and further that the District had discovered new evidence pertinent to the resolution of the dispute; and the Association having, on October 14, 1988, submitted its written response to the petition; and the Commission having considered the matter and being satisfied that the petition should be denied, makes and issues the following

ORDER 1/

That the petition for rehearing is denied.

Given under our hands and seal at the City of
Madison, Wisconsin this 2nd day of November, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman
Herman Torosian
Herman Torosian, Commissioner
A. Henry Hempe
A. Henry Hempe, Commissioner

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- 1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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.

HOWARD-SUAMICO SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER DENYING PETITION FOR REHEARING

BACKGROUND

In our Memorandum, we stated the following with respect to the issue of whether Blake, the secretary/accounts payable clerk, was a confidential employee:

As to Blake and Hornick, the Association correctly notes that neither employee had done any significant amount of confidential work at the time of the hearing. The amount of confidential work performed is reflective of both the recent nature of Keller's assumption of bargaining and contract administration responsibilities as well as of the fact that Keller is only responsible for two small units which will be unlikely to generate large amounts of confidential work. However, where, as here, the employer has made a good faith decision to restructure the manner in which bargaining responsibilities have previously been allocated and where, as here, the result of that change has to our satisfaction given significant bargaining responsibility to a management employee, the clerical employee assigned to that management employee as his or her secretary will be found to be confidential even where the actual amount of confidential work is not significant unless the confidential work can be assigned to another confidential employee without undue disruption of the employer's organization. 9/ Here, application of the foregoing would warrant excluding Blake, Keller's secretary, as confidential unless the confidential work Keller's responsibilities produce could be readily performed by another confidential employee. As noted earlier, the District Administrator's secretary has been excluded by agreement of the parties as a confidential employee. Although the District Administrator testified that his secretary does not have enough time to perform Keller's confidential work, we note that she performed said work before Keller assumed his responsibilities (Tr. 98). We also note that Zimdars, the controller, has the skills (Tr. 123-124) and the formal responsibility (Tr. 66, Emp. Ex. 5) to provide back up clerical assistance to Blake and Hornick. Lastly, the record establishes that all the individuals in question work in close physical proximity to each other. Therefore, under these circumstances, we are persuaded that it would not be unduly disruptive for the District to have Rehn and/or Zimdars perform Keller's confidential work. 10/ Therefore, we are persuaded that Blake and Hornick are not confidential employees as neither has performed any significant amount of confidential work and as the confidential work in question which Keller will generate in the future can readily be performed by other confidential employees of the District.

9/ LaCrosse School District, Dec. No. 15710-A (WERC, 5/79); See also City of Greenfield, Dec. No. 25646 (WERC, 8/88), (WERC, 12/86).

10/ See School District of Bruce, Dec. No. 19318-A (WERC, 5/83); Wausaukee Schools, Dec. No. 15620-A (WERC, 6/83); City of Port Washington, Dec. No. 21205-A (WERC, 11/84).

THE PARTIES' POSITIONS

The District

In its petition, the District asserts that the Commission's conclusion with respect to the secretary/accounts payable clerk position held by employee Blake is not in accord with the record or other findings and conclusions made by the Commission. In this regard, the District asserts that the fact that the District Administrator's secretary previously performed the confidential work in question prior to the management restructuring does not support a conclusion that said work can - or should - be performed by the District Administrator's secretary under current circumstances. The District asserts that the recognized need for confidential clerical support for the Director of Business Services since the restructuring goes unanswered by the Commission's order. The District argues that the restructuring which the Commission has recognized as legitimate will be undermined and the normal workflow of the District will be inhibited if the District is compelled to continue to use the District Administrator's secretary to perform the confidential work in question. The District emphasizes that the prior performance of such work by the District Administrator's secretary is not probative in light of the bona fide realignment of responsibilities which took place after the time she had been performing such a function. The District contends that the Commission's order forces the District to "undo" the very restructuring which the Commission has found to be legitimate.

As to the possibility suggested by the Commission's decision that controller/computer coordinator could perform some confidential work, the District asserts that the controller has significant responsibilities which can not and are not handled by anyone else in the District. Thus, the District asserts that only in a emergency situation could the controller reasonably be expected to perform confidential duties. If the controller were required to perform a significant amount of confidential work, the District asserts that such a requirement, which may be imposed by the Commission's decision herein, would constitute an undue inhibition on District operations.

The District further asserts that rehearing is appropriate to allow introduction of evidence with respect to a potential third bargaining unit which will be the responsibility of the Director of Business Services. This information could not have been provided at hearing, the District asserts, because the District had not yet been served with the election petition which is currently pending before the Commission. Should the election result in the certification of another bargaining unit, the District asserts that the quantity of confidential work generated by the Director of Business Services will increase further and the difficulty caused by having those duties performed by the District Administrator's secretary or the controller/computer coordinator will be heightened.

Given the foregoing, the District respectfully requests that the petition for rehearing be granted or, alternatively, that an order be issued excluding the secretary/accounts payable position from the unit based on the incumbent's confidential responsibilities.

The Association

The Association responds to the District's petition by asserting that the District is attempting to relitigate issues already carefully considered and decided by the Commission in its decision. The Association asserts that the Commission's decision is consistent with prior precedent and that the record fully supports the Commission's conclusion that the minimal amount of confidential work performed by the secretary/accounts payable clerk could still be performed by other confidential employees without undue disruption. The Association also contends that the filing of a petition for election regarding 13 employees does not warrant granting the petition for rehearing. The Association asserts the District's arguments as to said election petition are highly speculative inasmuch as no election has been held and, even if the employees choose union representation, the Association contends that it is unlikely that the addition of the small bargaining unit would generate an increase in confidential work sufficient to justify exclusion of an additional position from the unit as confidential.

Based upon the above, the Association respectfully requests that the petition for rehearing be denied.

DISCUSSION

As to the District's assertion that rehearing should be granted because our decision contained errors of law and fact, the Association correctly notes that our decision has already considered and rejected the arguments made by the District. We continue to be satisfied that our analysis of the record and the law was sound.

However, to the extent that the District appears to misunderstand the LaCrosse School District analysis we applied in this case, some additional comment seems appropriate. As our decision indicates, the amount of confidential work generated by Director of Business Services is not significant. Indeed, it could reasonably be concluded that performance of that work would take a de minimus amount of time for any employee to perform. Despite the fact that de minimus exposure to confidential work is generally not a basis for finding an employee to be confidential, the Commission has recognized that legitimate organizational needs may require exclusion of an employee as confidential if, despite the de minimus nature of the confidential work, it would be unduly disruptive to have said work performed by another confidential employee. Here, there are presently two other confidential employees who work in close physical proximity to the Director of Business Services. Both employees have the needed skills and one employee has performed the work in question in the past. Under these circumstances and given the small amount of confidential work in question, no finding of undue disruption can reasonably be made.

As to the District's contention regarding the availability of new evidence, the filing of an election petition which could lead to presence of additional bargaining unit is not evidence which would change the result we have already reached. 2/ If, in the future, an additional unit becomes the responsibility of the Director of Business and the District believes the additional confidential work generated by the new unit is sufficient to warrant exclusion of another confidential employee, the District is free to file a unit clarification petition.

Dated at Madison, Wisconsin this 2nd day of November, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hempe
A. Henry Hempe, Commissioner

2/ Section 227.49(3)(c), Stats. specifies that as to the discovery of new evidence, rehearing will be granted only if inter alia the new evidence is sufficiently strong to reverse or modify the order in question.