

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
DANE COUNTY JOINT COUNCIL
OF UNIONS, AFSCME, AFL-CIO
Involving Certain Employees of
DANE COUNTY

Case 13
No. 39911 ME(u/c)-231
Decision No. 22976-C

Appearances:

Mr. Darold Lowe, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53709, appearing on behalf of the Petitioner.

Ms. Kristi A. Gullen, Deputy Corporation Counsel, Dane County, 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin 53709, appearing on behalf of the County.

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

Dane County Joint Council of Unions, AFSCME, AFL-CIO, having on December 4, 1987, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to clarify an existing bargaining unit by including in that unit the position of Clerk-Typist I-II in the Public Safety Communications Department of Dane County; and a hearing in the matter having been conducted on April 25, 1988, in Madison, Wisconsin, before Examiner Karen J. Mawhinney, a member of the Commission's staff; and the County having filed its brief on June 21, 1988; and the Union having on July 7, 1988 advised the Examiner that it would not be filing a brief; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Dane County Joint Council of Unions, AFSCME, AFL-CIO, referred to herein as the JCU, is a labor organization with its offices at 5 Odana Court, Madison, Wisconsin 53709.

2. That Dane County, referred to herein as the County, is a municipal employer, and has its offices at 210 Martin Luther King, Jr. Blvd., Madison, Wisconsin 53709.

3. That the JCU is the exclusive bargaining representative for all employees in the County except for the following: supervisory employees, law enforcement employees of the Sheriff's Department, non-clerical employees of the Highway, Exposition Center and Airport Departments, confidential employees, professional employees as defined by Wisconsin Statutes 111.70, and craft employees so certified by the Wisconsin Employment Relations Commission.

4. That pursuant to an agreement between the County and the City of Madison, the County created a new department called the Public Safety Communications Department in order to provide an efficient and effective 911 emergency dispatch service within the County; that the new department is not expected to become fully functional until the fall of 1988; that at the time of the hearing, the department consisted of the Director of Public Safety Communications, C. D. Van Dusen, a Clerk-Typist I-II, Nancy Garde, and six supervisory employees; that the JCU seeks to include in the bargaining unit the position of Clerk-Typist I-II; that the County seeks to exclude said position from the unit because it believes the occupant is a confidential employee; that the County expects to add 42 dispatchers to the new department by transferring dispatchers from the City's police and fire departments and the County Sheriff's Department; that by a decision of the WERC, Dane County, Dec. Nos. 17278-A and 25002 (WERC, 11/87),

the JCU will represent the dispatchers as part of its overall bargaining unit of approximately 650-700 employees; that bargaining between JCU and the County is occurring for the employees of the new department; that the County expects to reach a memorandum of agreement with the JCU regarding the rights, benefits, and wages of employees of the new department if such items differ from the terms of the agreement with the overall JCU unit; that the County does not know if negotiations in the future will continue to be separate from the overall unit but that, in the past, when the County took over functions such as the zoo, the airport, lakes management, and general relief, those groups of employees negotiated with the larger JCU unit, although memoranda of agreement were drawn up to cover transitional periods.

5. That Garde, the incumbent of the Clerk-Typist I-II position in dispute, has worked for the Public Safety Communications Department for six months, although she has worked for other departments in the County for seven years; that Garde's duties include typing correspondence, answering telephones, opening and distributing mail, purchasing, monitoring accounts, keeping department files, doing the department's payroll, and attending various meetings; that the department director, Van Dusen, is participating in bargaining for the department; that Garde has participated in the collective bargaining process by reviewing various collective bargaining agreements and by drawing up original bargaining proposals with Van Dusen; that Garde also attended two bargaining strategy meetings -- one in December of 1987 and the other in January of 1988 -- where members of the County's bargaining team discussed bargaining proposals, strategies, and potential concessions; that during such meetings, long-term bargaining goals were discussed; that after such meetings, Garde and Van Dusen discussed bargaining strategy; that Garde has typed bargaining proposals and changes in those proposals; that Garde has been asked by Van Dusen for her input regarding certain proposals, and at least on one occasion, influenced Van Dusen to change his mind about a bargaining matter; that Garde has access to Van Dusen's bargaining file and periodically updates it by adding correspondence or notes to it; that Van Dusen has a list of goals for future bargaining that Garde has seen; that Garde has not been present at negotiations between the County and the JCU; that Van Dusen has briefed Garde about the negotiations as to what stand the JCU and the County have taken and whether or not any progress has been made toward a settlement of a collective bargaining agreement; that Garde has been involved in a discussion regarding discipline of a supervisory department employee and was asked for her input about a disciplinary decision; that Garde will be expected in the future, when the department becomes fully staffed, to type rough and final drafts of letters of discipline and answers to grievances; that Garde has access to personnel files and employee evaluation systems; and that Garde's salary is the same as other Clerk-Typist I-II's represented by the JCU.

6. That the County considers the Public Safety Communications Department to be a major department, in terms of the number of employees and bargaining issues; that all major County departments have a clerical position excluded from the bargaining unit, either as confidential or as supervisory; that in the past, the County has taken over a number of governmental functions from the City of Madison but nothing as complex as the consolidation of dispatching services; that when the County took over the zoo from the City, it did not create any confidential clerical employees; that when the County took over the airport from the City, it did not create any confidential clerical employees, but that there is a clerical supervisor at the airport who does confidential typing work; that when the County took over the lakes management functions, there was no transfer of employees; that when the County took over general relief from the City, some 50 new positions were created by the County but no confidential positions were created although there were clerical employees excluded from the bargaining unit; that the County has a number of confidential positions in existence, including three confidential employees in the Employee Relations Division, four or five in the Department of Administration, one in Risk Management, one in the Corporation Counsel's office, and one confidential payroll clerk; that the confidential employees in the Employee Relations Division do the confidential typing work for the Consolidated Maintenance Department but do not perform confidential work for other departments; that none of the confidential employees attend the general negotiations between the County and the JCU nor do they work near the area where negotiations are held; that confidential employees have attended grievance meetings along with the Employee Relations Manager Marc Wirig and the Personnel Committee, but that Garde has never attended such a meeting; that in creating six supervisory dispatcher

positions for the Public Safety Communications Department, the County expects those supervisors to be responsible for making recommendations on decisions to hire, fire, and discipline employees as well as to respond to grievances; that those supervisors will work all shifts but will have Garde's clerical support only during a regular day shift; and that since the bargaining unit employees had not begun work at the time of the hearing, Garde had not done any typing related to grievances or discipline.

7. That Garde has sufficient access to, knowledge of and involvement in confidential matters relating to labor relations so as to render her a confidential employee.

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

CONCLUSION OF LAW

That the occupant of the position of Clerk-Typist I-II in the Public Safety Communications Department of Dane County is a confidential employee and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT 1/

That the position of Clerk-Typist I-II in the Public Safety Communications Department of Dane County is excluded from the bargaining unit represented by the Petitioner.

Given under our hands and seal at the City of
Madison, Wisconsin this 7th day of September, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

- 1/ Pursuant to Sec. 227.48(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. 227.49 and 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.

227.49 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.

(Footnote one continued on page four)

(Footnote one continued from page three)

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 therefore 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.

DANE COUNTY

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

BACKGROUND

The only issue in this dispute is whether the position of Clerk-Typist I-II in the Dane County Public Safety Communications Department is a confidential employee. The Public Safety Communications Department is a new department created to consolidate emergency dispatching services within the County. Under an agreement between the County and the City of Madison, the County is implementing a "911" emergency service and is staffing it by transferring dispatchers from the City's police and fire departments and the County Sheriff's Department. When the Public Safety Communications Department becomes fully staffed, the County expects it to have 42 dispatchers, six supervisory dispatchers, one clerical employee, and a director. At the time of the hearing, the department consisted of the Director -- C. D. Van Dusen, the Clerk-Typist I-II -- Nancy Garde, and six supervisory dispatchers. The JCU seeks to include Garde in its large bargaining unit of about 650-700 County employees, and the County contends that Garde is a confidential employee. Pursuant to a ruling by the Commission, 2/ the JCU will represent the dispatchers as part of its overall bargaining unit. The County and the JCU are currently bargaining separately for the wages, benefits and working conditions of the dispatchers in the new department, although the dispatchers will not be a separate bargaining unit. The parties expect to reach a memorandum of agreement concerning the dispatchers as to any matters that would differ from the main collective bargaining agreement between the County and the JCU.

THE PARTIES' POSITIONS:

The JCU contends that the County has a number of confidential employees, such as those in its Employee Relations Division or its Department of Administration, who could handle any confidential duties that may come out of the Public Safety Communications Department. The County is trying to spread confidential duties around in order to justify the exclusion of Garde from the bargaining unit, the JCU asserts, and a small amount of confidential duties do not warrant a finding of a confidential employee. No letters of discipline have been handed out yet in the new department and the JCU contends that there are a number of supervisors capable of handling such work. In fact, the JCU argues that if the new department already has six supervisory dispatchers who will handle disciplinary matters, those supervisors should be capable of handling all the confidential duties of the department, including filling in during bargaining negotiations when the Director is unavailable. The JCU also notes that Garde is paid the same rate as other Clerk-Typist I-II's represented by the JCU.

The JCU further contends that there have been other mergers of governmental functions in the past where the County took over functions from the City of Madison without creating confidential employees. In particular, the JCU notes that no confidential positions were created when the County took over the zoo, the airport, lakes management, and general relief functions from the City. Finally, the JCU points out that in past mergers, the groups merged eventually bargained with the overall JCU unit, although memoranda of agreement were reached to cover transitional periods. The JCU speculates that the same process will likely happen with the group of dispatchers, and that the dispatchers will eventually bargain with the overall unit. When that happens, the Director of the new department may no longer be part of the County's bargaining team, the JCU claims, since all the department heads do not participate in bargaining.

The County argues that Garde has played a role in the bargaining process for the Public Safety Communications Department, by going over various union contracts and drawing up a list of initial bargaining proposals with Van Dusen. Additionally, the County notes that Garde was present at two bargaining strategy

2/ Dane County, Dec. Nos. 17278-A and 25002 (WERC, 11/87).

meetings where management went over proposals, strategies, possible concessions, and long-term bargaining goals. Garde's opinion was solicited during these meetings and in other discussions about bargaining, the County notes, and she was briefed by Van Dusen after meetings and negotiation sessions which she did not attend. The County asserts that Garde has access to all mail and telephone messages relating to bargaining, as well as access to Van Dusen's bargaining file which she updates. Garde has typed bargaining proposals and changes in those proposals. The County states that although the 42 dispatchers who will be members of the bargaining unit have not yet begun to work in the new department, Garde will be expected in the future to type letters of discipline and answers to grievances. Garde will also be responsible for keeping locked personnel files and employee evaluation systems, as well as a file containing citizen complaints, some of which may result in disciplinary action. The County notes that Garde has already been involved in one discussion regarding the discipline of a supervisor. The County contests the JCU's claim that other departments could handle confidential duties for the new department, asserting that each department must type its own letters of discipline and answers to grievances, with the exception of the Consolidated Maintenance Department, because the Employment Relations staff lacks sufficient resources to do so.

Further, the County points out that although it took over functions such as the zoo and the airport from the City of Madison without creating new confidential positions, there are supervisory clerical employees at the airport who perform confidential work. Also, when the County took over general relief from the City, there was no need to create a confidential position since there were several clerical positions already excluded from the bargaining unit. The Public Safety Communications Department is a major department in terms of size and bargaining issues, according to the County, and all major County departments have a clerical position excluded from the unit either as a confidential or supervisory position. Since the County does not expect that all the issues concerning the dispatchers will be resolved in the current round of bargaining, it expects Van Dusen and Garde to retain active roles in the bargaining process. Finally, the County points out that Garde has not had any chance to do any typing related to the disciplinary process because the bargaining unit members are not on board yet.

DISCUSSION

In order for an employee to be considered a confidential employee and thereby excluded from a bargaining unit, the Commission has consistently held that such an employee must have access to, knowledge of, or participate in confidential matters relating to labor relations. Information is confidential if it is 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 representatives or its agents. 3/ The Commission has also found that where the duties of the employee are closely related to activity which could lead to discipline of a bargaining unit member, such an employee is confidential. 4/ However, a de minimus exposure to confidential materials is insufficient grounds for excluding an employee from a bargaining unit. 5/ We have also noted that the confidential exclusion protects a municipal employer's right to conduct its labor relations through employees whose interests are aligned with those of management, rather than risk having confidential information handled by someone with conflicting loyalties who may be subjected to pressure from fellow bargaining unit members. 6/

Clearly, the incumbent of the position in dispute, Garde, has access to, knowledge of, and participates in confidential matters relating to labor relations. Garde has attended two meetings with members of the County's

3/ Sheboygan County, Dec. No. 7671-A (WERC, 1/88).

4/ Walworth County (Lakeland Nursing Home), Dec. No. 16031-A (WERC, 7/85).

5/ Boulder Junction Joint School District, Dec. No. 24982 (WERC, 11/87).

6/ Cooperative Educational Service Agency No. 9, Dec. No. 23863-A (WERC, 12/86).

bargaining team where bargaining proposals for the dispatchers group were discussed, as well as strategies, potential concessions, and long-range bargaining objectives. Her opinions have been sought on bargaining proposals, and at least on one occasion, her input changed the mind of her department head, Van Dusen. Her involvement with the bargaining process has risen above the level of merely typing proposals that will be handed to the JCU.

The JCU correctly asserts that the Commission has held that an employer cannot be allowed to exclude an inordinately large number of employees by spreading the confidential work among such employees or giving them occasional tasks of a confidential nature. 7/ The JCU points out that the County has in the past taken over several governmental functions from the City of Madison without creating additional confidential positions. However, the County points out that there have been clerical positions excluded as supervisory when it took over the airport and general relief. The County further notes that every major department has a clerical employee excluded from the unit as either supervisory or confidential, and that the new Public Safety Communications Department is a major department in terms of the number of employees and the bargaining issues to be resolved. Moreover, the County's Employee Relations Division and the Department of Administration do not have employees performing confidential work for the other departments, with one exception. Therefore, we do not find that the County has attempted to spread out the confidential work in a manner that would exclude Garde from the bargaining unit without actually giving her some meaningful confidential duties.

Whether Garde or Van Dusen may play a diminished role in bargaining in the future if and when the group of dispatchers bargain with the larger overall JCU unit is speculative. Should that happen and if Van Dusen no longer takes an active role in bargaining, it may be that the Clerk-Typist I-II would not have a level of confidential duties sufficient to warrant her exclusion. However, that future possibility would present a different factual setting than what we have to review on this record. Likewise, whether in the future the supervisory dispatchers will perform confidential duties relating to typing of rough and final drafts of grievance responses and disciplinary letters presents a matter of speculation only, since none of the bargaining unit dispatchers were on board at the time of this proceeding, and the new department is virtually without any experience regarding grievances and disciplinary matters.

Because we find that Garde has actively participated in confidential labor relations matters through the current bargaining process going on between the parties, we conclude that the Clerk-Typist I-II of the Public Safety Communications Department is a confidential employee to be excluded from the bargaining unit.

Dated at Madison, Wisconsin this 7th day of September, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Kempe
A. Henry Kempe, Commissioner

7/ Marshfield Joint School District No. 1, Dec. No. 14575-A (WERC, 7/76).