

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of :
WEAC UNISERV COUNCIL NO. 18 :
Involving Certain Employees of : Case 1
COOPERATIVE EDUCATIONAL : No. 36880 ME-2571
SERVICE AGENCY NO. 9 : Decision No. 23863-A

Appearances:

Mr. Gene Degner, Executive Director, WEAC UniServ Council #18, 25 East Rives Street, Rhinelander, WI 54501, appearing on behalf of the Association; and Mr. William S. Sample, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, WI 53708, appearing on the brief.
Mulcahy & Wherry, S.C., Attorneys at Law, 408 Third Street, P.O. Box 1004, Wausau, WI 54401-1004, by Mr. Ronald J. Rutlin, appearing on behalf of the CESA No. 9.

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER CLARIFYING BARGAINING UNIT 1/

WEAC UniServ Council No. 18, hereinafter referred to as the Petitioner, having, on April 24, 1986, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to conduct an election, pursuant to Sec. 111.70(4)(d) of the Municipal Employment Relations Act, among certain employees of the Cooperative Educational Services Agency No. 9, hereinafter referred to as the Municipal Employer or CESA #9, to determine whether a majority of said employees desired to be represented by said labor organization for the purposes of collective bargaining; and a hearing having been conducted on said petition on June 17, 1986 at Tomahawk, Wisconsin before Daniel J. Nielsen, an examiner of the Commission's staff; and the parties having stipulated on the record that the only issue presented by the petition was the status of Deonn Fisher, a clerk typist who performed some duties for the Wisconsin Association of School Boards, a tenant of CESA #9's; and the parties having presented evidence on that issue and having stipulated to the conduct of an election prior to the determination of Fisher's status, said election having been conducted on September 4, 1986, with the results having been certified by the Commission on September 12, 1986; and a record having been made of the hearing, a transcript of which was received by the Examiner on July 25, 1986; and the parties having submitted written arguments, which were received by the Examiner on September 15, 1986; and the Commission having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. That WEAC UniServ Council No. 18 (hereinafter "Petitioner") a labor organization maintaining its offices at 25 East Rives Street, Rhinelander WI 54501; and that Gene Degner is the Executive Director of the Petitioner.

2. That Cooperative Educational Services Agency No. 9 (hereinafter CESA #9) is a municipal employer with offices located at 328 North 4th Street, Tomahawk, WI 54487; that LeRoy Merlak is the Coordinator of CESA #9; that Patricia Beals is

1/ The instant proceeding was initiated by a petition for election. At the hearing, the parties stipulated to the appropriate unit, and to the conduct of an election. The sole remaining question was the alleged confidential status of Deonn Fisher. Under the circumstances, the Commission treats this as a request for unit clarification.

employed by CESA #9 as a bookkeeper; that Sandra Hoffman is employed by CESA #9 as a accounting clerk; that Sandra Schiltz and Deonn Fisher are employed by CESA #9 as clerk-typists; that Nancy Kairis is employed by CESA #9 as a secretary; that Richard Fish is employed by CESA #9 as a van driver; and that Dianne Majewski is employed by CESA #9 as an executive secretary.

3. That the Wisconsin Association of School Boards (hereafter WASB) is an organization offering services for a fee to school boards throughout the state of Wisconsin; that among the services provided by WASB is representation in labor relations matters, including negotiating contracts, representation in interest arbitration proceedings and assistance in contract administration, including the processing of grievances and representation in grievance arbitrations; that these services are delivered by WASB membership consultants; that these membership consultants work out of various WASB offices located around the state of Wisconsin; and that Steve Holzhausen is a membership consultant employed by WASB.

4. That, on October 1, 1985, WASB opened an office in Tomahawk, Wisconsin; that the WASB office is located in the offices of CESA #9; that Steven Holzhausen is the membership consultant assigned to the Tomahawk office; that Holzhausen represents school districts in northern Wisconsin in labor negotiations and contract administration; that, by June of 1986, Holzhausen represented in excess of a dozen school districts, and was entering into a contract to coordinate bargaining strategy for the Marawood Athletic Conference, comprised of an additional eight districts; that CESA #9 is comprised of twenty-two constituent school districts; that three of the districts represented by Holzhausen are constituent districts of CESA #9; that all of the districts represented by Holzhausen have bargaining units represented by the Wisconsin Education Association Council; that CESA #9's professional employees are members of a bargaining unit represented by the Petitioner; that the last two contract settlements between CESA #9 and the Petitioner in the professionals unit called for salary increases based upon the average increase for teachers in the constituent districts; and that Holzhausen does not represent CESA #9 in labor negotiations.

5. That WASB and CESA #9 are parties to a verbal agreement concerning rental of office space and services for WASB's Tomahawk office; that the terms of the agreement are consistent with a written proposal which reads as follows:

WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC.

Winneconne, Wisconsin 54986

September 30, 1985

1. The Wisconsin Association of School Boards agrees to rent from CESA #9 office space for a WASB employee serving school boards in Northern Wisconsin.
2. The CESA 9 will rent to WASB an office room of 9' x 11' located in its Tomahawk Office at a rental of \$100.00 per month.

This rental includes:

- The office room.
- Free parking for the staff and visitors coming to the WASB office.
- Use of CESA Office Conference Room for school board/administrator functions.
- Use of a CESA office desk, files, office chair, two (2) visitor chairs.
- The Telephone Service to the WASB Room on a separate telephone line, the cost of which is paid by WASB.
- The CESA will provide the heat, light, air conditioning and janitorial services as a part of the and included in the monthly rental fee.

3. The CESA will allow WASB to have secretarial services for its needs done by CESA staff at the rate of \$4.00 per hour, plus fringes for a total estimated cost of \$6.00 per hour..
4. WASB estimates they may use the equivalent of one-half time of a secretary.
5. CESA will allow WASB to use office machines, such as photo copier, printing press, etc. by paying a fee for copy, etc.
6. CESA will collect from WASB the cost of supplies used by WASB for WASB programs.
7. CESA will give the WASB staff person a key and unrestricted access to the facility for business purpose.

NOTE: CESA will assume the secretarial or reproduction costs for programs for its "WASB School Board Services" contract with WASB.

This agreement becomes effective October 1, 1985 and extends for 12 months.

This agreement may be modified by mutual agreement of the parties.

6. That Deonn Fisher is employed by CESA #9 as a clerk-typist; that Fisher has been employed by CESA #9 since June of 1985; that Fisher has been assigned as the clerical employe for Holzhausen since October of 1985; that Fisher types Holzhausen's correspondence and briefs; that Fisher assists in the preparation of exhibits for arbitration hearings; that Fisher types bargaining proposals prepared by Holzhausen for client school districts; that when Holzhausen is absent from the office, Fisher opens his correspondence and relays the contents of correspondence and telephone messages to him; that Fisher also performs clerical services for employes of CESA #9; and that in excess of 75% of Fisher's time is spent performing services for CESA #9, rather than WASB; and that Fisher does not perform any work directly related to the labor relations of CESA #9.

7. That WASB, as of the time of the hearing in this matter, had only received one bill from CESA #9 for Fisher's services; that the bill covered the first two months of the lease period; and that the bill reflected reimbursement by WASB for 25% of Fisher's time.

8. That the instant proceeding was initiated by the filing of a petition for election by the Petitioner on April 24, 1986; that, at the hearing in this matter, the parties stipulated to the appropriateness of a unit described as:

"All non-professional employees employed by CESA #9, excluding supervisory, managerial, and confidential employes."

that the parties further stipulated to the inclusion in said unit of all of the employes described in Finding of Fact 2, supra, with the exception of Merlak, who as coordinator was excluded; Dianne Majewski, who was stipulated to be a confidential employe, and Fisher; that, with respect to Fisher, the municipal employer contends that she is a confidential employe based upon her services for WASB, while the Petitioner contends that she is a municipal employe who should be included in the bargaining unit; that the parties stipulated to the conduct of an election prior to the outcome of this decision, allowing Fisher to vote by challenged ballot; that said election was conducted on September 4, 1986; that Fisher's ballot was not challenged; and that the petitioner was certified as the exclusive bargaining representative on September 12, 1986.

9. That neither Fisher nor Holzhausen performs any confidential labor relations work for CESA #9; that Fisher is not employed or jointly-employed by WASB, nor does WASB possess any right of control over Fisher as an employe; that Fisher does perform confidential labor relations work for Holzhausen; and that Holzhausen is not an employe of any municipal employer.

Based upon the above and foregoing Findings of Fact, the Commission makes the following Conclusion of Law:

CONCLUSION OF LAW

That the incumbent of the clerk-typist position assigned by CESA #9 to perform clerical services for WASB, Deonn Fisher, is not a "confidential employee" within the meaning of Sec. 111.70(1)(i), Stats., and is therefore a "municipal employee" within the meaning of said Section.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following Order Clarifying Bargaining Unit.

ORDER 2/

That the position of clerk-typist occupied by Deonn Fisher is included in the appropriate bargaining unit consisting of all non-professional employees employed by CESA #9, excluding supervisory, managerial and confidential employees.

Given under our hands and seal at the City of
Madison, Wisconsin this 29th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

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

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

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- 2/ 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 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

(Footnote 2 continued on Page 5.)

(Footnote 2 continued from Page 4.)

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,
CONCLUSIONS OF LAW AND ORDER
CLARIFYING BARGAINING UNIT

BACKGROUND

The facts are essentially undisputed. The Wisconsin Association of School Boards (WASB) is an organization which provides various services to school districts throughout the state. Among the services provided is assistance in collective bargaining, including formulation of bargaining strategy and proposals, provision of information relating to bargaining, assistance of a professional negotiator and the preparation and presentation of grievance and interest arbitration cases. These services are provided for a fee through regional offices maintained by WASB.

In 1984, the WASB opened an office in Tomahawk. Office space was rented in the headquarters of CESA #9. As part of the rental arrangement, WASB is entitled to the use of one of CESA #9's clerical employees for up to 50% of the clerical employee's time. The clerical employee designated to work with WASB is Deonn Fisher, a clerk typist. Fisher is employed full-time by CESA #9, and WASB is billed for the time she spends on WASB projects. Fisher provides a full range of secretarial services for WASB, including typing bargaining proposals, briefs, and general correspondence. She also opens and reviews mail for the regional representative of WASB, Steve Halzhausen, when he is out of the office. Fisher performs no work of a confidential nature related to CESA #9's labor relations.

On April 24, 1986, the Wisconsin Education Association Council filed a petition seeking to represent support staff employees of CESA #9. There is no dispute between the parties as to any aspect of the petition, excepting the status of Fisher.

The Employer maintains that Fisher is a confidential employee because of the work she performs for Holzhausen. While acknowledging that her confidential work is not directly related to CESA #9's labor relations, the Employer points to the peculiarities of interest arbitration as creating an irreconcilable conflict of interest for this employee. Since she has access to information relating to labor relations in districts among CESA #9's comparables 3/ and since WEAC represents most of those comparable districts, as well as CESA #9's professional and non-professional bargaining units, Fisher is in a position to adversely affect CESA's interests if she is allowed to participate in the WEAC bargaining unit.

The Association, contrary to the Employer, asserts that well-established case law principles under both the National Labor Relations Act and the Municipal Employment Relations Act preclude the exclusion of an employee as confidential on any basis other than access to confidential labor relations matters of the direct employer. The Association notes that the work performed in this instance is not even confidential work of a municipal employer, but rather that of a private organization, WASB. Thus there could be no exclusion under the terms of MERA. Finally, the Association argues that the amount of truly confidential work performed by Fisher is less than 10% of her work time, and thus represents a de minimis degree of involvement in confidential labor relations matters. For all of these reasons, the Association contends that Fisher should not be excluded as confidential.

DISCUSSION

Confidential status goes to the type of work performed for the municipal employer, rather than the relationship of the employee's work to a particular bargaining unit. 5/ Thus a clerical employee who performs confidential work related to a blue collar unit of highway employees is excluded from a separate white collar unit of clerical employees, notwithstanding the fact that her work does not involve that particular bargaining unit. The exclusion on grounds of confidentiality is rooted the right of a municipal employer to conduct its labor relations through employees aligned with the interests of management. This avoids the obvious risks to management in having confidential information regarding bargaining and litigation strategy handled through an individual who may have conflicting loyalties, or who may be subjected to pressures from fellow bargaining unit members.

The central question in this case is whether confidential work performed by a municipal employee on a contract basis for a third party may justify that employee's exclusion from the bargaining unit. Contrary to the Association's assertions, there is no question but that the nature and amount of work performed by Fisher would, if performed for her municipal employer, suffice to exclude her. Fisher functions as the personal secretary to Holzhausen. The essence of Holzhausen's job is the performance of confidential labor relations work, and his secretary does and will have access to virtually all of the information relating to his work. The record shows that she prepares bargaining proposals, exhibits and briefs, including initial drafts which may not be shared with the Union, prepares his private correspondence, conveys his telephone messages and opens his mail. While much of this information may eventually be shared with the Association, premature disclosure of the contents of a brief or a settlement proposal would be obviously prejudicial to an employer's interests. Moreover, Holzhausen's correspondence with clients and his telephone messages would not generally be available to the Association. In sum, Fisher's duties will inevitably involve handling confidential information.

Having concluded that the type of work performed by Fisher is confidential as regards Holzhausen, we turn to the de minimis argument raised by the Association. While it is true that Fisher was spending at most 25% of her time performing work for WASB, the municipal employer correctly notes that the Tomahawk office is relatively new, and is an expanding operation. As such, it is reasonable to assume that the secretary's exposure to confidential information will increase with the office's workload. Under these circumstances, we cannot agree with the Association's characterization of her workload as a de minimis exposure to confidential matters.

As noted above, Fisher has no involvement in any confidential labor relations work performed for CESA #9, her municipal employer. Her confidential work is limited to tasks performed when assigned to the WASB representative under the terms of his rental agreement. No argument is raised -- nor on this record, could an argument be raised -- that WASB functions as a joint employer of Fisher or has any status as an "employer" of this employee.

In City of Milwaukee, Dec. No. 8100 (WERB, 7/67), one issue addressed was whether assistant city attorneys who were required by statute to perform labor relations work for other municipal employers should be excluded from a City of Milwaukee attorneys bargaining unit as confidential employees. In determining that these employees should not be excluded, the majority held:

"Although the Assistant City Attorneys do act in a confidential capacity with respect to the determination and implementation of management policies in the field of labor relations, the information available to these attorneys is not directly related to the relationship between the City and their representative. Employees who have access to confidential labor relations information of other employers, unrelated to the relationship between the employer and the employees included in the unit in question ..." (are not) "... 'confidential employees.'" City of Milwaukee, supra, at 5.

5/ County of Columbia, Dec. No. 12218 (WERC, 10/73).

While there are factual distinctions between Milwaukee and this case, we believe that the quotation accurately reflects the state of the law and is consistent with the policies underlying the confidential exclusion.

The exclusion of employees as confidential protects the integrity of the municipal employer's labor relations function. The inclusion of Fisher in a bargaining unit of clerical employees will have no effect whatsoever on CESA #9's ability to effectively bargain contracts with its employees and to administer those contracts. We have considered and rejected the contention that the comparability criteria of Sec. 111.70(4)(cm)7.d. Stats., should render this employee confidential. Although she is privy to information related to the labor relations of districts which may be comparable to CESA in negotiations, the most useful information relating to comparables, final settlements and/or final offers, is public information and well known to the Association, which is at the table in those other districts. In any case, the relationship between this employee's possible knowledge of negotiations in other districts and the CESA's own negotiations is so attenuated that it cannot be said to directly involve her in the labor relations of her employer.

Section 111.70, Stats., grants to all municipal employees the right to engage in collective bargaining with their municipal employer. It also protects the municipal employer's right to conduct its labor relations through persons without divided loyalties, by excluding those persons from the definition of "municipal employee." The employee at issue in this case has no involvement in the municipal employer's labor relations and is a "municipal employee" entitled to representation in the bargaining unit.

Dated at Madison, Wisconsin this 29th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

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

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner