

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
AFSCME, COUNCIL 40, AFL-CIO
Involving Certain Employees of
RICHLAND SCHOOL DISTRICT

Case 56
No. 68080
ME-1246

Decision No. 24683-C

Appearances:

Kirk D. Strang and **Edward J. Williams**, Davis & Kuelthau, S.C., Ten East Doty Street, Suite 600, Madison, Wisconsin 53703, appearing on behalf of Richland School District.

Michael J. Wilson and **Thor Backus**, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-2900, appearing on behalf of the Richland School District Employees, Local 2085-B, AFSCME, AFL-CIO.

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

On June 13, 2008, AFSCME, Council 40, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission on behalf of the Richland School District Employees, Local 2085-B, AFSCME, AFL-CIO to clarify an existing Local 2085-B bargaining unit of Richland School District employees by inclusion of three positions: the District Receptionist/Secretary – Maintenance & Transportation, the Business Secretary-Budgetary and Bookkeeping, and the Secretary- Special Education/Pupil Services.

A hearing on the petition was held on September 12, 2008 and continued on October 3, 2008 before Examiner Michael O'Callaghan and Commissioner Paul Gordon. The District, contrary to AFSCME, asserted that the positions are properly excluded from the bargaining unit by way of mutual agreement with the AFSCME prior to the representation election in

No. 24683-C

1987 and that the Commission should enforce this voluntary agreement by application of its “deal is a deal” doctrine. The District also asserted, contrary to AFSCME, that the positions are properly excluded from the unit because the incumbents are confidential employees within the meaning of Sec. 111.70(1)(i), Stats.

On November 8, 2008, AFSCME withdrew its petition as to the Business Secretary-Budgetary and Bookkeeping.

The parties submitted written briefs on December 12, 2008. The parties communicated to the Commission in writing on January 9, 2009 that they waived reply briefs and the record was closed.

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

FINDINGS OF FACT

1. Richland School District, herein the District, is a municipal employer that provides educational services through its employees including 122 teachers in a professional employee bargaining unit, 42 clerical/aides/food service employees in the bargaining unit represented by Richland School District Employees Local 2085-B, AFSCME, AFL-CIO, and 17 custodial/maintenance employees in another AFSCME bargaining unit.

2. Prior to the 1987 election by which AFSCME became the collective bargaining representative of the clerical/aide/food service bargaining unit of District employees, the parties negotiated over the scope of the potential bargaining unit and over who would be eligible to vote in the election and be included in the bargaining unit if AFSCME were selected as the collective bargaining representative. Among other matters, the parties agreed that all five clerical employees who worked in the District’s central office were confidential employees and thus could not vote in the election and would be excluded from the bargaining unit. Since 1987, all clerical employees working in the District’s central office have been excluded from the bargaining unit.

3. The District’s central office staff performs all of the District’s clerical confidential labor relations work and occasionally assists in preparation for labor relations litigation and the costing of collective bargaining proposals.

The central office staff consists of:

- Secretary-District Administrator (Kathy Fry)
- Business Secretary-Payroll and Fringe Benefits (Jill Sommer)
- Business Secretary-Budgetary and Bookkeeping (Lori Pizer)

- District Receptionist/Secretary-Maintenance & Transportation (Elizabeth (Ginny) Knuth)
- Secretary-Special Education/Pupil Services (Mary Sandmire)

The confidential employee status of Secretary-District Administrator Fry, Business Secretary-Payroll and Fringe Benefits Sommer and Business Secretary-Budgetary and Bookkeeping Pizer is not in question in this proceeding and they are available to continue to perform confidential labor relations work for the District.

4. A position description for District Receptionist/Secretary – Maintenance & Transportation accurately describes Elizabeth (Ginny) Knuth’s work and reads in relevant part:

SUMMARY:

Serve as secretary to Director of Operations & Maintenance and the Director of Transportation, and operate a multi-line switchboard to relay incoming, outgoing, and interoffice calls.

ESSENTIAL DUTIES and RESPONSIBILITIES: *(Other duties may be assigned.)*

RECEPTIONIST:

- Program telephones.
- Greet visitors courteously, determine their needs, check appointments and refer to proper person.
- Assist visitors in completing correct forms such as federal and state tax forms, I.N.S. form, substitute teacher forms, etc.
- Maintain a ready supply of forms.
- Respond to telephone inquiries regarding school programs and activities.
- Supply information to callers and record messages.
- Keep record of calls placed and toll charges.
- Receive, sort, and deliver all District Office incoming mail.
- Receive all outgoing District mail, affix postage on school mail, and ensure the outgoing mail is delivered to Post Office daily.
- Program and maintain fax machine in District Office.
- Maintain supplies for copy machine.
- Operate and maintain District postage meter and keep an accurate record of postage spent.
- Keep supplies on hand in break room.
- Unlock and lock entrances daily.
- Maintain an attractive and comfortable reception area.

BUSINESS OFFICE:

- Count and receipt all money deposited in District Office by rural schools.
- Collect non-sufficient funds (NSF) checks for the District.
- Receipt taxes, state wired transmittals and miscellaneous revenues in deposit book.
- Act as custodian of petty cash for District Office.
- Deposit all incoming money for District Office.
- Organize annual district-wide census.
- Collect census data and enter into District computer.
- Prepare census information for DPI Annual Report.
- Update student and family records.
- Run reports as needed for administrators.
- File purchase orders.
- File District voucher and payroll checks.
- Type and maintain Food Service Director's form letter and free/reduced meal forms.
- Maintain and update files on home schooled children.
- Act as secretary for Strategic Planning Committee.

MAINTENANCE:

- Collect time sheets and absence reports from maintenance staff.
- Prepare purchase orders.
- Organize and maintain maintenance work orders on computer spreadsheet.
- Schedule maintenance and custodial personnel.
- Prepare and type maintenance needs list, summer crew list, summer contractor projects and summer cleaning calendar.
- Type and mail quotes and bids and recaps of the same.
- Contact vendors for Director of Operations and Maintenance.
- Contact maintenance/custodial staff as needed.
- Maintain record of contractors and their insurance papers.
- Maintain and record facility usage for all buildings: Get approval for usage from appropriate buildings, type correspondence to various parties concerning usage of buildings, and maintain usage records on spreadsheet.
- Type all correspondence and memos for Director of Operations and Maintenance.
- Maintain calendar of appointments for Director of Operations and Maintenance.
- Type and maintain District vehicle records and files.
- Type and maintain minutes from meetings.

- Maintain Material Safety Data Sheets (MSDS) records.
- Type and maintain confidential records for employees, such as evaluations, reprimands, and disciplinary actions.
- Open and distribute all mail/correspondence for Director of Operations and Maintenance.
- Date and file all invoices concerning maintenance.

TRANSPORTATION:

- Organize and record employee driver license validation and automobile inspection.
- Type, mail, and maintain file for the minutes/agenda for Traffic Safety Commission.
- Type and maintain student bus conduct reports on spreadsheet
- Organize, file and record bus driver and new employee criminal records check with the state.
- Organize the annual Bus Driver Appreciation Breakfast.

5. As secretary to the District employee (Director of Maintenance Jones) who supervises the 17 employee custodial/maintenance bargaining unit, Knuth performs confidential clerical labor relations work generated by the formal evaluation of and occasional discipline of said employees. When the District was considering the option of subcontracting some food service and custodial/maintenance work, she gathered some data for the Business Manager. She has also performed some confidential labor relations work for the District Administrator.

6. A position description for the Secretary-Special Education/Pupil Services accurately describes the work of Mary Sandmire and reads in relevant part:

SUMMARY:

To assist in the orderly operation of the Special Education Office and maintain current records to facilitate the educational development of special education students.

ESSENTIAL DUTIES and RESPONSIBILITIES: *(Other duties may be assigned.)*

RECORDKEEPING/ REPORTS:

- Type FEP meeting summary reports and route files to teachers and/or administrators for required signatures. File and maintain required reports in student files. Maintain documentation that timelines have been met and parental rights have been provided.

Keep abreast of many changes in special education laws and regulations.

- Maintain accurate student information on computer in order to maintain current special education class lists and all necessary information to complete all required annual state reports and federal student data report. Complete all reports and verify accuracy of each.
- Maintain separate student files with all necessary documentation for Medicaid eligible students. Update information to billing service quarterly or as necessary. Review for accuracy and submit monthly service claims for school based services provided by District and hospital personnel. Provide all other necessary information to Medicaid billing service as required.
- Provide necessary information to bus service when transferring students to another building to provide special education programming. Also provide needed information to the bus service when adding new early childhood and/or speech only students.
- Maintain current 66:30 agreements for non-district students attending District special education programs. At the direction of the Director, update information in agreements and provide copies to Board for approval.
- Make quarterly reports (or as requested) to the Business Manager of non-resident students attending District special education programs for billing purposes.
- Report to the elementary office each month, changes in elementary non-resident and speech and language only students as required for monthly enrollment reports.
- Complete Third Friday and Second Friday reports to other districts regarding their students' attendance and enrollment in District programs.
- Maintain log of all referrals and type special education Board report of referrals processed by the District each month or as appropriate.
- Maintain inventory of all special education department test materials and check out to teachers as needed. Also maintain supply of tests and protocols as needed by teachers and psychologist and order as needed.
- Review all student transfer screening forms for students new to District.
- Forward special education records upon request when student transfers to another district. Maintain record of these requests.
- Copy and forward student records as requested by outside agencies. Maintain request for records, signed by parent(s) or 18 year old student(s). Invoice as necessary.

SCHEDULING DUTIES:

- Process special education referrals, obtain required permission from parents, schedule all TEP or other required special education meetings with psychologist, and send out appropriate notices.
- Type all correspondence for the Director of Pupil Services and School Psychologist, psychological reports, IEP reports, placement notices, minutes from pupil services and other committee meetings, concern reports, truancy letters, and other typing as required.
- Maintain three year schedule for special education teacher and pupil service staff evaluations. Arrange times for Director of Pupil Services to observe teachers in classroom. Type evaluations for all special education and pupil services staff.
- Keep track of when JEP reviews are due on all special education students. Schedule meetings as necessary.

BUDGETARY DUTIES:

- Collect special education teacher budget request forms and compile information for Director of Pupil Services to complete budgets annually.
- Type all purchase orders for entire special education department, gifted and talented coordinator, school nurse, crisis coordinator and drug free program.
- Work with Director of Pupil Services on Federal IDEAS Flow Through, Preschool Entitlement Grants, and any additional grants as necessary. Provide copies to Business Manager and complete budgets for each. Maintain copies for department.
- Complete requests for pay and workshop registrations as needed for Director of Special Education, Psychologist, and special education teachers.

OTHER or GENERAL DUTIES:

- Maintain backup tape of computer with all special education records.
- Maintain District Crisis Handbook and current phone faxes for each building and distribute these to each building.
- Collect teachers' yellow overtime cards for meetings requiring teachers to put in overtime. Complete requests for pay as needed, obtain administrative approval and submit to payroll department for payment.

- Answer the phone, take messages and schedule appointments for Psychologist and Director of Pupil Services.

7. As secretary to the District employee who oversees the District's special education services, Sandmire performs the confidential clerical labor relations work generated by the hiring, evaluation, discipline and reassignment of the approximately 22 District employees who provide such services to students. Sandmire occasionally performs confidential clerical labor relations work at the request of the District Administrator including typing reports/notes regarding alleged misconduct by employees when District administrators investigate these matters and draft memoranda of understanding resolving employment issues. She also reviews special education teacher overtime payment requests pursuant to the standards outlined in the collective bargaining agreement and determines whether or not the pay request is approved.

8. The occasional confidential labor relations work performed by District Receptionist/Secretary-Maintenance & Transportation Elizabeth Knuth and Secretary-Special Education/Pupil Services Mary Sandmire can be performed by the other three confidential District employees without undue disruption of the District's operations.

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

CONCLUSIONS OF LAW

1. The District Receptionist/Secretary – Maintenance & Transportation is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats. and therefore is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. The Secretary-Special Education/Pupil Services is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., and therefore is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The District Receptionist/Secretary – Maintenance & Transportation and the Secretary-Special Education/Pupil Services shall be included in the bargaining unit represented by Richland School District Employees Local 2085-B, AFSCME, AFL-CIO.

Given under our hands and seal at the City of Madison, Wisconsin, this 11th day of May, 2009.

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

RICHLAND SCHOOL DISTRICT

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

INTRODUCTION

In August 1987, the Wisconsin Employment Relations Commission conducted a representation election for certain Richland School District employees. Prior to the election, the District and the Union agreed that five District positions were held by confidential employees who were excluded from the election. By a margin of one vote, the election resulted in the Union being certified as the bargaining representative. The Union now seeks to clarify the status of two of the five excluded positions.

The District opposes the Union's petition to include the District Receptionist/Secretary - Maintenance & Transportation and Secretary - Special Education/Pupil Services in the bargaining unit because: (1) under the Commission's "deal is a deal" policy, the pre-election agreement between the District and the Union to exclude the positions from the unit bars the Union from now seeking to include them through a unit clarification petition; and (2) the incumbents in each position are confidential employees within the meaning of Sec. 111.70(1)(i) Stats.

POSITIONS OF THE PARTIES

District

The District characterizes this case as one of first impression: the issue being whether a voluntary agreement that certain positions are confidential should be enforced where there is evidence that the union was motivated to agree because the incumbents were likely "no" votes in an impending election and the outcome depended on their exclusion. The District argues that enforcing the agreement is required by the stated policy of the Municipal Employment Relations Act (MERA) to allow municipal employees to bargain through representatives of their own choosing. The District also argues that allowing the Union's petition will encourage multiple proceedings and waste State resources in doing so.

In the alternative, the District argues that, even if the agreement is not enforced, the incumbents in the disputed positions satisfy the statutory test for confidential employees and should be excluded from the bargaining unit. The District's five central office support staff work in close quarters with each other and District administration and inclusion of one or more of these support staff in the bargaining unit would result in an overly burdensome rearrangement of the District central office.

Union

The Union argues that the “deal” in this case was simply an agreement that the positions met the statutory definition of confidential employees. The Commission has never enforced such an agreement under its “deal is a deal” policy and a review of the actual duties performed by the incumbent employees is warranted. The positions are not confidential because any labor relations duties performed by the incumbents are *de minimis* and can be easily reassigned to one of the other three confidential support staff in the central office. Therefore, the positions should be accreted to the bargaining unit.

DISCUSSION

Deal is a Deal

This case presents the application of the Commission’s “deal is a deal” policy as a threshold issue. If the parties’ 1987 agreement should be enforced under this policy, there is no need to examine whether the disputed positions are held by “confidential” employees under Sec. 111.70(1)(i) Stats. and the petition should be denied.

In NORTHERN OZAUKEE SCHOOL DISTRICT, DEC. NO. 14211-C (WERC, 9/05), we stated the following as to the “deal is a deal” policy:

. . . the Commission for over thirty years has refused to change the scope of a voluntarily agreed-upon bargaining unit, even if the disputed positions otherwise clearly should be included, except under certain conditions. This so-called “deal is a deal” policy, first coined in CITY OF CUDAHY, DEC. NO. 12997 (WERC, 9/74), and further developed in CITY OF CUADHY, DEC. NOS. 19451-A AND 19452-A (WERC, 12/82), has both statutory and pragmatic roots: on the one hand, the laws the Commission administer are designed to foster voluntary dispute resolution; on the other hand, it is efficient for the Commission as well as the parties to encourage a practical give-and-take over the contours of a bargaining unit, as this historically has permitted elections to occur in perhaps 90% of the cases without the delay and expense that would be occasioned by a preliminary unit determination hearing and decision. While it is ultimately the Commission’s duty to foster appropriate units, and thus the scope of a bargaining unit remains a non-mandatory subject of bargaining, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 20399-A (WERC, 9/83), the pragmatic policies favoring voluntary unit composition are an entrenched, well-established, and time-tested element of the Commission’s regulatory procedures. With hindsight, a party’s agreement on any particular inclusion or exclusion may appear unwise, but presumably the agreement reflected the pragmatic conditions prevailing at the time, including the efficiencies of a quicker election.

However, to ensure that the pragmatic considerations do not interfere with the Commission's underlying statutory responsibilities, the Commission has identified four situations in which the "deal is a deal" policy will not be applied:

1. The positions in dispute did not exist at the time of the agreement.
2. The positions in dispute were voluntarily included or excluded from the unit because the parties agreed that the positions could or could not be statutorily included in the unit because the incumbents were not or were supervisors, confidential, managerial, professional, or craft employees.
3. The positions in dispute have been impacted by changed circumstances which materially affect their unit status.
4. The inclusion or exclusion of the positions is repugnant to the Municipal Employment Relations Act.

NORTHERN OZAUKEE, *supra*.

The District acknowledges in its brief (and Employer Exhibit 2 confirms) that it entered into a voluntary agreement with the Union to designate five central office support staff positions as confidential employees and therefore to exclude them from the bargaining unit. This agreement is squarely within the second exception to the "deal is a deal" policy wherein an agreement that certain positions are statutorily excluded will not bar one party from petitioning to clarify their bargaining unit status at a later date. RIB LAKE SCHOOLS, DEC. NO. 29652-B (WERC, 7/00), HARTFORD UNION HIGH SCHOOL DISTRICT, DEC. NO. 23116-C (WERC, 6/06).

We discussed the rationale for this second "deal is a deal" exception in MANITOWOC SCHOOL DISTRICT, DEC. NO. 29771-B (WERC 7/00) as follows:

For at least 25 years, the Commission has allowed unions and employers to litigate issues of "municipal employee" status in unit clarification proceedings – even where the petitioning party has previously agreed that the individuals in dispute are or are not "municipal employees." (Citations omitted). We do so because statutory rights of "municipal employees" under Sec. 111.70(2), Stats., are at stake and because we have the statutory responsibility to administer the statutes which create those rights. Thus, although we do not compel the parties to litigate such issues in an election proceeding, we are always an available forum for litigation of questions as to whether an individual is a supervisor, or a confidential, managerial or executive employee.

We also distinguished these kinds of deals from those that would be enforced under the “deal is a deal policy:

By contrast, where there are no issues regarding “municipal employee” status and parties reach an agreement on whether employees should or should not be included in a bargaining unit, we honor the parties agreement and will not rule on the merits of a unit clarification petition which seeks to “undo the deal.” We treat such agreements differently because, unlike the situation presented herein, statutory rights are not directly implicated. Thus, for instance, if the parties in this case had agreed that the now disputed employees were municipal employees but were ineligible to vote or be included in the unit, we would not allow the Union to proceed with this unit clarification petition.

MANITOWOC SCHOOL DISTRICT, Supra

Despite the foregoing precedent, the District argues that the particular circumstances of this case require the deal to be enforced and the Union to be barred from seeking the positions’ inclusion through unit clarification. The District presented evidence at hearing that the Union expected the incumbents in these positions to vote against the Union in the impending election. This, coupled with the fact that the election resulted in the Union winning by a single vote, leads the District to argue that not barring the Union’s petition would violate the Sec. 111.70(2), Stats. stated public policy to allow employees to “bargain collectively through representatives of their own choosing.” We disagree.

The “deal is a deal” policy allows but does not compel each party to an election to make voluntary agreements on bargaining unit composition/voter eligibility based on strategic interests with the knowledge that certain “deals” are subject to subsequent modification by unit clarification. Here, the record reflects that both the District and the Union believed that the central office employees were “no” votes. Both the District and the Union were free to use this belief to enhance their respective chances of winning the election. Just as the Union was free to enhance its chances of winning the election by agreeing with the District that these presumed “no” votes were confidential employees who could not vote, the District could have enhanced its election posture by seeking Union agreement that the central office clericals were eligible to vote (and then filing a unit clarification petition seeking their exclusion if the Union nonetheless won the election). As noted above, if the parties’ strategic interests mesh (as they apparently did here) and agreement is reached on unit composition and voter eligibility issues, the time and resources otherwise needed to litigate issues are not expended and the election proceeds-subject to the right of either party to revisit the agreement if one of the four above-noted exceptions is present. If the parties’ strategic interests do not mesh, we stand ready to resolve the issues on their merits before the election is conducted. MANITOWOC SCHOOL DISTRICT, supra.

Contrary to the District’s arguments regarding encouraging litigation, the “deal is a deal” policy (and its exceptions) have served all parties (including employees) well over the

years. The vast majority of elections are conducted based on parties' agreements as to unit/voter eligibility. Very few such agreements are ever revisited through unit clarification litigation, and, given the presumed informed but oppositional interests of union and employer, we believe this lack of subsequent litigation reflects that there are not many instances in which otherwise eligible employees were excluded as voters. MANITOWOC SCHOOL DISTRICT, supra.; NORTHERN OZAUKEE, supra.

Where, as here, there is subsequent unit clarification litigation and it is determined that excluded employees are not in fact confidential employees and are entitled to be represented by a union, we acknowledge that allowing the District to seek ¹ and obtain Union agreement that said employees were ineligible to vote because they were allegedly confidential employees has the effect of retroactively depriving such employees of the opportunity to participate in the initial determination of whether a majority of the voting employees wish to be represented by the Union. However, it is important to note that employees added to a bargaining unit by unit clarification have the ongoing right (as do employees already included in the unit) to seek to revisit the issue of union representation by filing a timely election petition supported by at least 30% of the unit employees. MANITOWOC SCHOOL DISTRICT, supra. Thus, the retroactive loss is only temporary.

For the above stated reasons, we reaffirm our long-standing position that parties' agreements that certain positions are statutorily ineligible for inclusion in a bargaining unit are not agreements that the Commission will enforce under our "deal is a deal" policy.

Having decided that the Union is not precluded from bringing the petition, we turn to the issue of whether the District Receptionist/Secretary – Maintenance & Transportation and Secretary- Special Education/Pupil Services are confidential employees

Confidential Status

The legal standard that applies to a determination of confidential employee status was outlined in MINERAL POINT UNIFIED 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, 337-38 (2002):

It is well-settled that for an employee to be held confidential, such employee must have sufficient access to, knowledge of, or participation in confidential matters relating to labor relations. MINERAL POINT UNIFIED SCHOOL DISTRICT V. WERC, 251 Wis.2D 325 (Ct.App. 2002). 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

¹ It bears noting that it was the District that sought the exclusion and had the "benefit" of the retroactive deprivation for more than 20 years.

and the employer; and (b) be information which is not available to the bargaining representative or its agents. DANE COUNTY, DEC. NO. 22976-C (WERC, 9/88).

While a *de minimis* exposure to confidential matters is generally insufficient grounds for exclusion of an employee from a bargaining unit, BOULDER JUNCTION JOINT SCHOOL DISTRICT, DEC. NO. 24982 (WERC, 11/87) 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. C.E.S.A. NO. 9, DEC. NO. 23863-A (WERC, 12/86). 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, TOWN OF GRAND CHUTE, DEC. NO. 22934 (WERC, 9/85) 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 of the employer's organization.

The District's arguments for confidential status as to each position can be divided into two categories: (1) arguments based on the duties performed by each employee; and (2) arguments based on organizational and office structure . We turn first to the former.

Confidential Status Based on Duties

The parties have jostled over whether clerical work related to evaluations, discipline and disciplinary investigations qualifies as confidential labor relations work. The Union correctly points out that once the final evaluation, discipline, notes of an investigation, or grievance settlement agreement are shared with a bargaining unit employee or the Union, the documents are no longer confidential. However, a clerical employee who types drafts of such documents and/or the final version of such document before receipt by the employee or Union does thereby have knowledge of confidential labor relations information. The District has also pointed to Sandmire's involvement in the hiring process. When there are internal applicants for a position, the District is correct that her knowledge of interview questions is confidential labor relations knowledge. However, typing interview questions is obviously not time consuming and can easily be performed by another employee. To the extent the District asks us to view Sandmire's general coordination of the hiring process to be confidential work, we are not persuaded. With the above-noted exception of typing interview questions in those instances involving internal applicants, her coordination does not give her confidential labor relations knowledge because said duties do not involve bargaining unit employees.

As reflected in Findings of Fact 5 and 7, District Receptionist/Secretary Knuth and Secretary – Special Education/Pupil Services Sandmire do occasionally perform clerical

confidential labor relations work. As secretary to the District employee (Director of Maintenance Jones) who supervises the 17 employee custodial maintenance bargaining unit, Knuth performs clerical confidential labor relations work generated by the formal evaluation of and occasional discipline of said employees. When the District was considering the option of subcontracting some food service and custodial maintenance work, Knuth gathered some data for the Business Manager. She has also performed some confidential labor relations work for the District Administrator. As secretary to the District employee who oversees the District's special education services, Sandmire performs the confidential clerical labor relations work generated by the hiring, evaluation, discipline and reassignment of the approximately 22 District employees who provides such services to students. Sandmire also occasionally performs confidential labor relations work at the request of the District Administrator including typing internal investigative reports/notes regarding alleged misconduct by employees and draft memoranda of understanding resolving employment issues. She also reviews special education teacher overtime payment requests pursuant to the standards outlined in the collective bargaining agreement and determines whether or not the pay request is approved.

However, as is apparent from their job description, the vast majority of both Knuth's and Sandmire's time is spent performing other duties. Given the presence of three other confidential employees in the District's offices and the limited amount of confidential labor relations work in question, we conclude that the occasional confidential labor relations work Knuth and Sandmire perform can be reassigned to any of these other three employees without undue disruption of the District's operations. We note in this regard that little of Knuth's or Sandmire's occasional confidential work is time sensitive or time consuming and thus can reasonably be absorbed into even very full workloads of other confidential employees. We also note that Knuth and Sandmire remain available to provide back up to the District Administrator's secretary (Fry) as to the non-confidential work which comprises the substantial majority of Fry's workload.

Confidential Status Based on Organizational and Office Structure

The District argues that for twenty years, it has organized its operations around the idea that all confidential tasks are performed in the central office and everyone in the central office is aligned with District management. Although having five confidential central office support staff may seem unusual for a smaller school district, the District asserts this number of confidential central office staff should be viewed in the context of no District clerical employees in any other buildings being excluded from the bargaining unit as confidential employees. Furthermore, the District argues the central office is organized such that all employees working there, administrators and support staff, are in close proximity to each other and have access to all parts of the office.

As to the District's reliance on having five confidential central office clerical employees to offset the absence of such employees in the high school or middle school, the issue before us is the confidential status of two of those five employees. The record before us reflects that all

District confidential labor relations work (including any generated by the high school or middle school) has been funneled to the central office, but that the volume of such confidential work nonetheless only requires the services of three confidential employees. Thus, based on this record, neither the absence of confidential clericals at the high school or middle school nor the loss of two of the five central office confidential employees diminishes the District's ability to meet its confidential labor relations needs. Should the District now choose to reorganize by asserting a need for confidential clerical employees in the high school and/or middle school, it will need to persuade us that the volume of confidential work has substantially increased so as to warrant additional confidential employees.

As to the District's concern about its ability to maintain the confidentiality of its labor relations functions now that two of the central office clericals have become bargaining unit employees, we have long held that concerns about the physical proximity of bargaining and non-bargaining unit employees are not a valid basis for determining whether an employee is confidential. MARSHFIELD JOINT SCHOOL DISTRICT, DEC. NO. 14575-A (WERC, 7/76); WEST SALEM SCHOOL DISTRICT, DEC. NO. 22514-A (WERC, 8/89); GILLET SCHOOL DISTRICT, DEC. NO. 30754 (WERC, 12/03). Further, by the reassignment of Knuth's and Sandmire's confidential work, use of prudence by District managers/supervisors as to how and where confidential labor relations information is communicated and how and where such information is copied and stored, and the reasonable expectation that non-bargaining unit employees will not engage in misconduct by seeking/obtaining confidential labor relations information, the District's concerns can be met.

Given all of the foregoing, we have ordered that District Receptionist/Secretary Knuth and Secretary – Special Education/Pupil Services Sandmire are included in the Local 2085-B bargaining unit.

Dated at Madison, Wisconsin, this 11th day of May, 2009.

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

gjc

24683-C