

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of	:	No. 37938 ME-135
	:	Decision No. 24952
WISCONSIN COUNCIL 40,	:	
AFSCME, AFL-CIO, and	:	Case 40
POLK COUNTY ,	:	No. 38268 ME-149
	:	Decision No. 24953
Involving Certain Employees of	:	
	:	Case 41
POLK COUNTY	:	No. 38269 ME-150
	:	Decison No. 24954
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Appearances:

Mr. Richard Rettke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 68, Rice Lake, Wisconsin 54868, appearing on behalf of the Union.

Mr. Keith O. Jones, District Attorney for Polk County, and The Honorable James R. Erickson, Judge of the Circuit Court, Polk County Courthouse, Balsam Lake, Wisconsin 54810, appearing on behalf of the County.

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

Polk County Courthouse Employees Local 774-B, AFSCME, AFL-CIO having, on December 8, 1986, filed a petition with the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of employees of the Polk County Courthouse by determining whether certain positions should be included in said bargaining unit; and Polk County having, on February 3, 1987, filed two petitions with the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of employees of Polk County by determining whether certain positions should be excluded from said bargaining unit; and a hearing on each of these matters having been conducted on July 14, 1987, in Balsam Lake, Wisconsin before Examiner Jane B. Buffett, a member of the Commission's staff; and a stenographic transcript of the hearing having been prepared; and briefing by the parties having been completed on September 14, 1987; and the Commission having considered the evidence and arguments of the parties, and being fully advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. That Polk County Courthouse Employees Local 774-B, hereinafter referred to as the Union, is a labor organization having its offices at Box 68, Rice Lake, Wisconsin 54868-0068.

2. That Polk County, hereinafter referred to as the County, is a municipal employer having its offices at the Polk County Courthouse, Balsam Lake, Wisconsin 54810.

3. That the parties have been signatories to a succession of collective bargaining agreements, the most recent of which, covering the period January 1, 1985 through December 31, 1986 contains the following recognition clause:

WORKING AGREEMENT AND RECOGNITION

. . .

Section 3. The County recognizes the Union as the sole and exclusive bargaining agent for all full-time employees and regular part-time employees of Polk County, for the purpose of engaging in conferences and negotiations and establishing wages, hours and conditions of employment. Expressly excluded

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from the bargaining unit include all elected and appointed officials, superintendents, heads of departments, the Register in Probate, registered nurses, licensed practical nurses, the Administrator, secretary-bookkeeper at the Golden Age Home, dietitians, County Board secretary, Highway Department Road Superintendent, and the Assistant Road Superintendent.

4. That, on December 8, 1986, the Union petitioned the Commission to clarify the unit described in Finding of Fact 3, above to include the positions of County Tax System Computer Terminal Operator, Secretary to the District Attorney, and Secretary to the Judge; that on February 3, 1987, the County petitioned the Commission to clarify the unit described in Finding of Fact 3 above to exclude the position of Lime Quarry Foreman as supervisory, and to exclude the position of Head Laundress as supervisory.

5. That at the July 14, 1987 hearing, the Union withdrew its petition to include the position of County Tax System Computer Terminal Operator, inasmuch as said position no longer exists; that at the aforementioned hearing, the parties stipulated that the position of Secretary to the District Attorney be included in the bargaining unit 1/ and that the positions of Lime Quarry Foreman and Head Laundress at the Golden Age Manor be excluded as supervisory.

6. That Mary Tilton, the employee referred to in the Union's petition as the Judge's Secretary, is the incumbent of the position which incorporates the following three job titles: Clerk of Juvenile Court, Scheduling Clerk, and Deputy Clerk of Circuit Court; that Polk County Circuit Judge James Erickson is Tilton's supervisor; that Tilton's job duties as Clerk of Juvenile Court are to receive and file all petitions drafted by the District Attorney, schedule all hearings, draft interim and dispositional orders issued by the Judge, notify the parties of dispositions; report terminations of parental rights and order birth certificates for children adopted in Polk County; that Tilton's job duties as Scheduling Clerk are to schedule juvenile, criminal, probate, traffic and civil matters to be heard by the Judge in Polk County; that Tilton also types memorandum decisions, verdicts and correspondence for the Judge, and assists the Judge in compiling jury instructions; that Tilton also assists any visiting judges who come to Polk County; that Tilton does not participate in developing bargaining proposals, work rules, arbitration strategies, answers to grievances or settlements of grievances; and that Tilton has never performed investigations of an employee's conduct that might result in discipline.

7. That on July 1, 1987 Judge Erickson sent the following letter to the County Board Personnel Committee:

As chief executive officer of the Judicial Branch of Government for Polk County I consider it essential that I be kept fully apprised of all planning sessions, strategy sessions, and negotiating sessions that relate to the union and Judicial Branch employees.

Because this is a one-judge circuit that has a caseload requiring 1.7 judges, I do not anticipate being personally available as often as may be needed. Consequently, I am hereby appointing my confidential secretary and administrative assistant, Mary Tilton, as the liason (sic) person (for personnel and union matters) between your committee and the Judicial Branch of Government. I am asking you to honor my request that she serve as my spokesperson on personnel and union matters.

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1/ This agreement was contingent upon the parties' understanding that, one, the posting of the position would be waived for, and only for, the purpose of filling the contemporaneous vacancy and, two, said vacancy would be filled by Jonelle Anderson.

Please let me know if this liaison (sic) plan causes you any problem.

Thank you for your anticipated cooperation.

that the positions of Deputy Clerk of Court are the bargaining unit positions in the judicial branch; that between the July 1, 1987 appointment of Tilton as liaison and the July 14, 1987 hearing, the Personnel Committee met only once, on July 6, 1987; that Judge Erickson, not Tilton, attended said meeting; that Tilton had not performed any other liaison functions for Judge Erickson; that the only instance of an issue ever coming before the Personnel Committee during Tilton's tenure regarding a judicial branch employee involved Judge Erickson's request for a salary increase for the Deputy Clerk in the Traffic Court; that at the hearing, Judge Erickson, on behalf of the County, examined Tilton as follows:

Q (By Judge Erickson) Now, the questions of the examiner related to the past, Miss Tilton, as I understand her questions. In your understanding of my July 1, communication, do you intend, in the future, to attend Personnel Committee meetings on behalf of myself that relate to Court employees?

A (By Tilton) Yes, if you direct me to do so I will.

Q And would you agree that I have done so as of July 1?

A Yes

Q And at such meetings, would you intend to suggest to the Personnel Committee, on my behalf, any bargaining proposals that might be appropriate, or to take up any discussion that relates to work rules, and to assist them in developing strategies on behalf of the Chief Executive Officer of the Judicial Branch of Government?

A Yes, I would be willing to do that with your approval.

8. That the incumbent of the position described in Finding of Fact 6 above does not have sufficient access to, knowledge of, nor participation in confidential matters relating to labor relations to render her a confidential employee.

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

#### CONCLUSION OF LAW

That the incumbent of the position which incorporates the job titles of Clerk of Juvenile Court, Scheduling Clerk and Deputy Clerk of Circuit Court is not a confidential employee and therefore is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats., and is appropriately included in the unit described in Finding of Fact 3, above.

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

#### ORDER CLARIFYING BARGAINING UNIT 2/

1. That the position which incorporates the job titles of Clerk of Juvenile Court, Scheduling Clerk and Deputy Clerk of Circuit Court is included in the bargaining unit described in Finding of Fact 3, above.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

(See Footnote 2 on Page 4)

- 2/ 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.

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.

POLK COUNTY

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

POSITIONS OF THE PARTIES

The Union argues that the occupant of the disputed position is a municipal employe and is not confidential. It asserts the incumbent does not participate in confidential labor relations matters. Moreover, to the extent the County relied on Tilton's future labor relations responsibilities, as outlined in Circuit Court Judge Erickson's assignment of Personnel Committee liaison duties, any such activities would be de minimis.

The County makes two arguments: first, that the disputed position is confidential, since the incumbent was appointed to attend Personnel Committee meetings on his behalf; and second, that in order for the judicial branch of county government to maintain its independence from legislative branch, pursuant to the doctrine of separation of powers between the branches of government, it needs a confidential secretary, excluded from the unit, to represent the judiciary before the County Board.

DISCUSSION

The Commission has held that for an employe to be confidential, the employe must have access to, knowledge of, or participate in confidential matters relating to labor relations. In order for information to be confidential, the information must:

1. 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 and the employer; and
2. Is not information which is available to the bargaining representative or its agents. 3/

A review of the record, see especially Finding of Fact 6, clearly reveals that Mary Tilton, the incumbent of the position incorporating the job titles of Clerk of Juvenile Court, Scheduling Clerk, and Deputy Clerk of Circuit Court, does not perform any confidential labor relations duties.

A second line of inquiry is Tilton's prospective responsibilities as set forth in Judge Erickson's July 1, 1987 letter. That letter, which appointed her as Judge Erickson's liaison to the County Board's Personnel Committee, makes her responsible for keeping Judge Erickson apprised of the Committee's deliberations and for acting as spokesperson for Judge Erickson.

Initially, it must be noted that a finding of confidential status generally cannot be based solely on evidence regarding future responsibilities. 4/ Moreover, the letter was written only thirteen days before the hearing and Judge Erickson himself, not Tilton, attended the single hearing that occurred between the writing of the letter and the day of the hearing. This fact calls into question the extent of Tilton's liaison activities, and further undermines the

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3/ Appleton Area School District, Dec. No. 22338-B (WERC, 7/87); Menominee Falls School District Dec. No. 13492-A (WERC, 10/85); Wisconsin Heights School District, Dec. No. 17182 (WERC, 8/79).

4/ County of Kenosha, Dec. No. 15371 (WERC, 3/77).

letter as the basis for a determination of confidential status. Additionally, the one recorded instance during Tilton's employment with the County of a specific request regarding a judicial employee, a request for a salary increase for the Deputy Clerk of Traffic Court, was made by Judge Erickson himself. This incident suggests that even after appointing Tilton as liaison, Judge Erickson is likely to choose to personally attempt to persuade the Personnel Committee rather than rely on a subordinate to present his views.

As to the letter's directive to keep Judge Erickson apprised of Personnel Committee activities, there is no evidence that that communication function could not be accomplished in other commonly-used methods, such as written minutes or tape recordings. Finally, at the hearing, Judge Erickson questioned Tilton whether she would "take up discussions relating to work rules," to which she answered affirmatively. There is no evidence that such an assignment had been made prior to the hearing. A directive made for the first time at the hearing, through examination of a witness, is not dispositive evidence. In summary, the evidence regarding future liaison assignments is too speculative to support a finding that the incumbent performs confidential labor relations duties.

Lastly, we reject the County's argument that the inclusion of the disputed position would violate the separation of powers between the legislative and judiciary. The County argues judicial independence depends upon the Judge's being fully informed and consulted on labor relations matters involving judicial employees, and since the Judge has too heavy a caseload to perform such duties himself, a confidential administrative assistant is necessary. It must be noted, however, the doctrine of the separation of powers does not prohibit the legislature, here, the County Board, from acting in some ways which may affect other branches of government. Under these facts, there is no showing the inclusion of the disputed position materially impairs or practically defeats the proper functioning of the judiciary. 5/

In summary, the incumbent of the combined position of Clerk of Juvenile Court, Scheduling Clerk, and Deputy Clerk of Circuit Courts does not perform confidential labor relations duties, her appointment as liaison between the Circuit Court Judge and the County Personnel Committee does not, at this time, constitute a basis for such a finding of confidential status, and the doctrine of separation of the judicial and legislative branches of governments is not offended by the inclusion of the position in the bargaining unit. The incumbent of the position, accordingly, is found to be a municipal employee.

Dated at Madison, Wisconsin this 5th day of November, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner