

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
WISCONSIN COUNCIL 40, AFSCME
Involving Certain Employees of
LAFAYETTE COUNTY (HOUSING AUTHORITY)

Case 70
No. 55357
ME-3608

Decision No. 29333

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, 1734 Arrowhead Drive, Beloit, Wisconsin, 53511, for Wisconsin Council 40, AFSCME.

Brennan, Steil, Basting & MacDougall, S.C., by **Attorney Howard Goldberg**, 433 West Washington Avenue, Suite 100, Madison, Wisconsin 53701-0990, for Lafayette County Housing Authority.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DIRECTION OF ELECTION**

On July 15, 1997, Wisconsin Council 40, AFSCME, filed with the Wisconsin Employment Relations Commission a Petition For Election in a claimed appropriate bargaining unit of Lafayette County Housing Authority 1/ employees defined as "all regular full-time and regular part-time employees, excluding managerial, supervisory, and executive employees." The parties could not agree on whether the Authority's Administrative Assistant is a confidential employee.

Hearing in the matter was held on November 17, 1997, before Examiner Stuart Levitan, a member of the Commission's staff. A stenographic transcript was available to the parties by December 11, 1997. The parties submitted written arguments on January 7, 1998, and on January 23, 1998, waived right to file reply briefs.

No. 29333

The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, herein the Union, is a labor organization with offices at 1734 Arrowhead Drive, Beloit, Wisconsin.

2. Lafayette County Housing Authority, herein the Authority, is a municipal employer with offices at 626 Main Street, Darlington, Wisconsin. The Authority is a public agency that maintains and operates 52 rental residential apartments for income-eligible senior citizens, partially subsidized by the federal Department of Housing and Urban Development.

3. The Union has filed a Petition For Election in a claimed appropriate bargaining unit of the Authority's employees described as:

all regular full-time and regular part-time employees, excluding managerial, supervisory and executive employees.

4. Lafayette County is a separate municipal employer, also with offices at 626 Main Street, Darlington, Wisconsin, responsible for a variety of general government services distinct from those which the Authority provides. There are six units of County employees represented for purposes of collective bargaining, for which purpose the County has a committee which also functions as its bargaining team. The County retains outside counsel to assist it in collective bargaining and contract administration. The County provides certain administrative services to the Authority, including the preparation and processing of the payroll, for which it bills the Authority.

5. The Authority is governed by a policy-making citizen Board, which meets monthly. The Authority employs an Executive Director, Mary Ann Kowalski, who, at time of the hearing, had held such position for approximately seven (7) years; an Administrative Assistant; and a maintenance employee. The Authority asserts, and the Union does not dispute, that the position of Executive Director is excluded from the claimed bargaining unit on statutory grounds, and that the maintenance position is a non-craft municipal employee.

The Authority Board sets Kowalski's salary. Based on Kowalski's recommendations, and its understanding of what other County employees are receiving, the Authority Board also sets the wages for the other two positions. Kowalski sets other matters relating to hours and conditions of employment for the two other employees.

Kowalski prepares and maintains personnel files, mostly handwritten, the typing and maintenance of which would be assigned to the Administrative Assistant in the event the position were found confidential by the Commission. At the time of hearing, Kowalski kept the personnel files in a locked cabinet in her inner office, to which the Administrative Assistant did not have access. As of the time of hearing, Kowalski was of the practice of occasionally leaving the office to receive or place telephone calls which she did not want the Administrative Assistant to overhear. At the time of hearing, the Authority Board had not addressed the issue of duties and responsibilities for bargaining in the event the eligible voting group chose to be collectively represented. As of the time of hearing, the Administrative Assistant had not attended or participated in any meetings at which the Authority Board has gone into closed session for personnel-related matters, or in any other meetings relating to the provisions of wages and benefits for employees other than herself. The Administrative Assistant has never performed any duties relating to the determination or the implementation of wages, hours and conditions of employment for the maintenance position. When Kowalski issued a disciplinary letter to the maintenance employee, Kowalski herself typed the correspondence. When Kowalski decided to prepare and issue a document listing the Authority's policies and procedures, she did the typing herself at home. Kowalski frequently uses a pre-printed form for correspondence with Authority tenants and Board members, almost always writing her messages by hand without involvement of the Administrative Assistant. Kowalski would prefer to have the position of Administrative Assistant be deemed confidential, to allow for increased assignment of personnel-related duties.

6. The Authority is housed in an office suite in the County Courthouse, which the County provides at no charge. The Authority does not have the authority to make physical changes to its offices, although it could request such changes of the County. The main office is approximately 14 feet by 25 feet, featuring work space for the Administrative Assistant with a variety of modern office equipment. There is a doorway between the main office and the Executive Director's office, with an aged wood door which closes tightly but for a gap at the floor of approximately 1.5 inches. The distance between the Director's desk area and the Administrative Assistant's desk is about 15 feet, on an angle due to the placement of walls between their desks. The Director's office also opens on a storage area for files, with one-half a French door in place. The door for the doorway between the file area and the main office area has been removed with the hinges still in place. The current placement of file cabinets in the storage room would impede the installation and operation of a door between the storage area and the main office area. The office walls are floor to ceiling structured walls of standard interior construction.

7. The Administrative Assistant does not have sufficient involvement with or access to confidential matters relating to labor relations to be deemed a confidential employee.

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

CONCLUSIONS OF LAW

1. A question concerning representation exists within the following collective bargaining unit deemed appropriate within the meaning of Sec. 111.70(4)(d)2.a., Stats.

All regular full-time and regular part-time non-professional employes of the Lafayette County Housing Authority excluding supervisors and confidential, managerial or executive employes.

2. The Administrative Assistant, Lafayette County Housing Authority, is not a confidential employe within the meaning of Sec. 111.70(1)(i), Stats. and therefore is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., appropriately included in the proposed collective bargaining unit described in Conclusion of Law 1.

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

DIRECTION OF ELECTION

An election by secret ballot be conducted under the direction of the Wisconsin Employment Relations Commission within forty-five (45) days from the date of this Direction in the voting group consisting of all regular full-time and regular part-time non-professional employes of the Lafayette County Housing Authority, excluding supervisors and confidential, managerial, or executive employes, who were employed on March 12, 1998, excluding such employes as may prior to the election quit their employ or be discharged for cause, for the purpose of determining whether a majority of such employes voting desire to be represented by Wisconsin Council 40, AFSCME, for the purpose of collective bargaining with the Lafayette County Housing Authority, or whether such employes desire not to be so represented by said labor organization.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

LAFAYETTE COUNTY (HOUSING AUTHORITY)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DIRECTION OF ELECTION**

POSITIONS OF THE PARTIES

The Union

In support of its contention that the position of Administrative Assistant is a municipal employe rather than a confidential employe, the Union asserts that the record evidence clearly shows that the subject position has not been utilized in any capacity which would lead to a determination that the position is confidential. It is the Authority Executive Director who performs the duties considered as confidential, including maintaining the personnel files, meeting with the Authority's Board regarding personnel issues, and handling disciplinary matters. The subject position has not been involved in any of those functions.

The Authority is relying solely on the proximity of the Administrative Assistant's workstation to the office of the Executive Director, an argument not relevant to Commission precedent. Minor interior renovation and restoration could easily address the conductivity of sound. The Director also has available the other Courthouse facilities to use for confidential matters as she has done in the past.

The Authority has clearly assigned its confidential duties to the Director. There is no basis to conclude that the change of status of the Authority's employes from non-represented to represented would make any difference in how confidential duties would be allocated. While the Director may have a support role in future collective bargaining in coordination with outside counsel, such a role would be similar to her current role handling existing confidential matters.

The Assistant does not have access to confidential labor relations material and information as a substantial portion of her duties, and no record evidence shows that the position would have any involvement in collective bargaining strategy, contract administration, litigation or similar matters. It is unreasonable to conclude that in a two-person bargaining unit, it is necessary for one person to be excluded as a confidential employe.

Accordingly, the Commission should find the subject position to be a municipal employe eligible to vote in the election and to engage in mutual aid and protection through collective bargaining.

The Authority

In support of its position that the Administrative Assistant is a confidential employe, the Authority argues that while there has been little or no need for a confidential employe at the Housing Authority, and the supervisory/subordinate relationship has been informal, all that would change if the Union wins the election. Currently, wage rates are based on increases which the County gives its employes; any other fringes, to the extent elective, are set by the Authority Board based on the recommendations of the Executive Director, and hours and other conditions of employment are set by the Director without Board involvement. Collective bargaining will require management and Board approval of wages, hours and conditions of employment, and will greatly change the informal atmosphere that currently exists. Under such a changed circumstance, it is vitally important that the Director be able to deal with such issues without being forced to leave the office and seek privacy every time a sensitive issue is raised.

The Authority's physical layout does not lend itself to privacy, as sound travels easily between the main office and the Director's office. The kind of modifications needed to address this problem are not routinely granted by the County, which controls the Courthouse where the Authority is located. The Director would find it very inconvenient and disruptive of her ability to perform her job if she were forced to leave her office every time she needed to deal with confidential matters.

Currently, the Director has had to leave her office and prepare documents at home and make phone calls after hours when she wants to maintain her privacy. Union representation of the employes will cause a great increase in the need for her to hold confidential discussions with the Board and legal counsel. It is not reasonable to require the Director to leave her office each time such discussions need to be held, nor to require the Administrative Assistant to stand in the hallway when privacy is required. Nor is it appropriate to require the Authority to relocate into space where more privacy is available, given that the current space is provided without charge.

Accordingly, the Commission should deem the position to be confidential and excluded from any bargaining unit that may be certified.

DISCUSSION

It is well-established that, for an employe to be held confidential, such employe must have access to, knowledge of, or participation in confidential matters relating to labor relations. 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 and the employer; and (b) be information which is not available to the bargaining representative or its agents. DANE COUNTY, DEC. NO. 22796-C (WERC, 9/88). While a *de minimis* exposure to confidential

materials is generally insufficient grounds for exclusion of an employe 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 employes whose interests are aligned with those of management. CESA AGENCY 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 employe 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 employe has significant labor relations responsibility, the clerical employe assigned as her or his secretary may be found to be confidential, even if the actual amount of confidential work is not significant, unless the confidential work can be assigned to another employe without undue disruption of the employer's organization. HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88). However, an employer clearly cannot be allowed to exclude an inordinately large number of employes by spreading the work of a confidential nature among such employes or giving them occasional tasks of a confidential nature. MARSHFIELD JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 14575-A (WERC, 7/76). To do so would be to allow the employer to deprive said employes of their status as "employes" under the law. MENOMONEE FALLS JT. SCHOOL DISTRICT NO. 1, DEC. NO. 11669 (WERC, 3/73).

Information available to either the union or the employe is not considered to be confidential. DEPERE SCHOOL DISTRICT, DEC. NO. 25712-A (WERC, 10/90). For example, access to personnel files is not typically sufficient to confer confidential status because the information contained therein is typically accessible to employes or their union, APPLETON AREA SCHOOL DISTRICT, DEC. NO. 22338-B (WERC, 7/87), and because the employer can limit access if it chooses. OREGON SCHOOL DISTRICT, DEC. NO. 28110-C (WERC, 4/96). Likewise, access to the information and records concerning employes' pay levels, health and life insurance benefits, unemployment compensation, leave, retirement, etc. does not exclude an employe as confidential unless such employe is privy to decisions of the employer with respect to personnel and labor relations policies. OUTAGAMIE COUNTY, DEC. NO. 14062 (WERC, 10/75). In addition, providing information for use by the employer in collective bargaining or in responding to grievances, absent knowledge of the employer's grievance or bargaining strategy, generally does not render a position confidential within the meaning of the law. CITY OF CUDAHY, DEC. NO. 21887 (WERC, 8/84). Finally, possible future confidential duties combined with current exposure to confidential matters may warrant a position's exclusion as confidential, MANITOWOC COUNTY, DEC. NO. 8152-J (WERC, 11/90), or such future duties and responsibilities may be too speculative or *de minimis* to warrant exclusion from the bargaining unit as confidential. WAUKESHA JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 10823-A (WERC, 3/81).

The Commission has held that, "the physical proximity of confidential and non-confidential employees or the effect of finding a confidential status or a non-confidential status on the sociometry of the work place are not appropriate considerations in making a determination of whether employees are confidential employees." MARSHFIELD JOINT SCHOOL DISTRICT NO. 1, DEC. NO. 14575-A (WERC, 7/76), cited in WEST SALEM SCHOOL DISTRICT, DEC. NO. 22514-A (WERC, 8/89).

The Authority argues that if the Administrative Assistant is included in the potential bargaining unit and its employees elect to be represented by the Union, the physical layout of the Authority's office will not allow the Executive Director to carry out her confidential labor relations duties without a significant and unacceptable risk that a bargaining unit employee (i.e. the Administrative Assistant) will be able to overhear confidential labor relations telephonic or face to face conversations or review confidential written material.

The Authority's privacy concerns are legitimate. In DUNN COUNTY, DEC. NO. 8170-A (WERC, 10/91), a Commission majority (Commissioners Hempe and Strycker) found such a concern to be "significant when combined with the difficulty of rearranging the work load in a logical manner and the significant labor relations responsibility which the Administrative Coordinator holds." However, the Administrative Coordinator in DUNN COUNTY had complete labor relations responsibility for over 425 employees while the Authority's Executive Director will potentially have responsibility for 2 employees and the precise extent of her labor relations authority has yet to be determined. Furthermore, unlike DUNN COUNTY, we are persuaded the privacy concerns can be logically addressed without undue disruption of the Employer's operation. As to written confidential labor relations work, we conclude the structure of the Executive Director's office provides sufficient privacy during the Director's creation or review of such material. As to confidential labor relations telephone calls and face to face conversations, we concede that use of the Authority's office space is not likely to provide the appropriate level of privacy when the Administrative Assistant is present. However, use of options such as continuation of the Director's existing practice of having such conversations in her office when the Administrative Assistant is not present (i.e. breaks, lunch periods, or after the end of the Assistant's work day) and/or simply using a different site in the Courthouse for such conversations, while perhaps less than maximally convenient, do not appear to create undue disruption of the Authority's operation or cause an illogical rearrangement of existing work loads.

Given all of the foregoing, we conclude that there is no persuasive basis for concluding that the Administrative Assistant should be excluded from the potential unit as a confidential employee.

Dated at Madison, Wisconsin this 12th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

ENDNOTES

1/ As the parties noted at hearing, this case should properly reflect that the Lafayette County Housing Authority is the municipal employer - not Lafayette County. Following issuance of this Direction, we will adjust our files to reflect this understanding.

