

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
NEW GLARUS EDUCATION SUPPORT PERSONNEL/SWEA
Involving Certain Employes of
NEW GLARUS SCHOOL DISTRICT

Case 15
No. 57027
ME-3694

Decision No. 29570-B

Appearances:

Ms. Joyce Bos and **Mr. Marvin Shipley**, Executive Directors, Southwest Education Association, 960 North Washington Street, Platteville, Wisconsin 53818, appearing on behalf of New Glarus Education Support Personnel/Southwest Education Association.

Friedman Law Firm, by **Attorney David R. Freidman**, 30 West Mifflin Street, Suite 1001, Madison, Wisconsin 53703, appearing on behalf of the New Glarus School District.

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

On May 18, 1999 the New Glarus Education Support Personnel/SWEA petitioned the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of employes of the New Glarus School District by including the Assistant Bookkeeper. The District opposed the petition alleging the Assistant Bookkeeper is a confidential employee.

Hearing was held in New Glarus, Wisconsin on August 26, 1999, before Examiner Stuart Levitan, a member of the Commission's staff. The parties filed written argument, the last of which was received on October 21, 1999.

No. 29570-B

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The New Glarus Education Support Personnel/SWEA, herein the Association, is a labor organization with offices at 960 North Washington Street, Platteville Wisconsin.

2. The New Glarus School District, herein the District, is a municipal employer with offices in New Glarus, Wisconsin. The District employs the following managerial and administrative personnel who are currently excluded from any bargaining unit: Administrator Peter Etter, who also serves as Business Manager and Principal of the building housing kindergarten through grade 5; Dwayne Schober who serves as Principal of grades 6-12; Etter's secretary Diane Elmer; Bookkeeper Sue Kempfer, and Assistant Bookkeeper/Hallway Monitor Lynne Hustad. Etter and Schober have been with the District for 21 and 24 years, respectively.

3. On May 24, 1999, the Wisconsin Employment Relations Commission issued a Certification of Representative in which it certified the Association as the exclusive collective bargaining representative on questions of wages, hours and conditions of employment for the collective bargaining unit consisting of "all regular full-time and regular part-time support staff employees of the New Glarus School District, excluding professional, confidential, supervisory and managerial employees."

4. Lynn Hustad is the incumbent Assistant Bookkeeper/Hallway Monitor, which position, also known as Office Assistant, she has held for approximately nine years. She and Bookkeeper Sue Kempfer are both year-round, full-time employees. During Hustad's employment, she and Kempfer have always had a business office location apart from other employees. They are currently housed in the elementary school, each working independently at their own desk. The office has one computer for budget and payroll. Hustad's tasks are generally budget-related (including invoices) and Kempfer's are payroll-related. The computer system is protected by a password which Administrator Etter, Kempfer and Hustad all share.

In January 1999, Hustad prepared the following position description, which reflected the duties and responsibilities she had been performing for about 18 months, and which the District adopted on January 22, 1999 as follows:

JOB DESCRIPTION
LYNNE HUSTAD
OFFICE ASSISTANT/HALLWAY SUPERVISOR
ASSIST THE BOOKKEEPER WITH HER DUTIES

Purchase Orders

- file all mailed or faxed purchase orders
- check purchase orders against packages to be sure order is correct
- check purchase orders against invoices to be sure billing is correct
- file all paid purchase orders
- make sure purchase orders are in order for the auditor

Invoices

- check all invoices for previous payment
- call for copies of missing invoices
- make sure all invoices are coded and ready for the computer
- enter invoices for payment into the computer run invoice reports
- check invoices against reports to be sure they are correct
- occasionally print checks
- stamp checks with board signatures
- correlate all invoices and check vouchers
- get all check vouchers and invoice copies ready for the board meeting
- file all check vouchers after the board meeting
- get check and invoices ready for the mail

Payroll

- add up all employee time sheets
- if time allots help with other payroll duties

Auditor

- keep asset list for the year
- fill out asset report sheets for the auditor
- run reports and collect special education transportation information
- type up special education transportation information
- at audit time/run reports, make copies and gather information that the auditors request

Mail

collect mail at the grade and high schools and deliver to the post office
pick up grade school mail at the post office
in summer/pick up grade and high school mail
sort the mail
distribute mail in mailboxes

Bus Radio

stay for afternoon bus radio
assist bus drivers with any problems or messages
call for towing assistance if necessary
make sure all busses call in at the end of their routes
if all drivers don't call in/physically count busses
make necessary calls if all drivers are not back in

In Coming Orders

open all in coming orders/packages
make sure all order items are correct
call companies if orders are incorrect
distribute packages to correct people

Main Office

cover main office when necessary
answer phones/take messages
call out with messages over the intercom
take fees, lunch and milk money
help with ill children/call parents if necessary
dispense medications to students

Other Duties

occasionally type letters for superintendent
when asked compile reports for superintendent
keep report of monthly budget totals for each teacher for superintendent
check telephone bills/charge employees for long distance phone calls and collect money

proof read the newsletter
deliver UPS packages to be sent out
pick up supplies when necessary

Operate

copy machines
typewriter
computer
electronic calculator
fax machine
paper shredder
intercom

HALLWAY SUPERVISOR

from 7:45 a.m. to 8:00 a.m. watch over children
supervise the children and report any misconduct

HELP OUT WITH ANYTHING THAT HAS BEEN ASSIGNED BY
ADMINISTRATION

Hustad's duties of running and printing invoice checks, writing receipts and entering them into a computer program, and preparing other summaries and documents for the District's School Board were formerly performed by Bookkeeper Kempfer.

Hustad has also helped respond to requests for information from the District's special counsel for labor relations, David Friedman.

As of the hearing, Hustad did not know how to calculate the cost of a salary schedule proposal, and the District had neither directed Hustad to learn how to prepare costing data for collective bargaining, nor provided any training for her to learn such skills. She has never participated on the District's behalf in any bargaining with the teachers' unit. The District has never shared any bargaining strategy or data with Hustad, nor asked her to prepare any material for its bargaining with the teachers' unit. At the time of hearing, the District had not received a request from the Association to commence bargaining or establish any bargaining dates for the initial support staff contract.

5. On January 26, 1999 the District adopted a policy resolution entitled Reassignment of Job Duties, as follows:

REASSIGNMENT OF JOB DUTIES

The Board acknowledges that as the District Administrator and Elementary Principal, Peter Etter knows information about how the District operates, District finances and the job responsibilities of employees that other employees do not. This is especially true as it concerns the non-teaching staff. When he retires, this knowledge may well be lost. In order to help prevent that possibility, the Board has decided to change, modify or reassign certain job duties to various employees. By doing this now, the Board is providing time to train the staff so that when the new District Administrator is hired, that person will have the benefit of people who are familiar with the operation of the District being able to provide assistance. Hopefully this will make the transition easier for the new administrator and provide for the continuity of services to the District.

The Board wishes to reaffirm that the District Administrator's secretary will type all communications and correspondence involving employees and negotiations, correspondence with legal counsel, correspondence with the Board and will assist the District Administrator as needed.

The District bookkeeper will be a part of the Board's teacher bargaining team and will assist the bargaining team as directed. One of the bookkeeper's duties will be to assist in costing out the board's bargaining proposals and will make sure that all confidential information is furnished to the board's bargaining team.

If the support staff becomes unionized, the assistant bookkeeper will be a member of the Board's bargaining team and assist the Board's team with, among other things, costing of the board's bargaining proposals and will make sure that all confidential information is furnished to the board's bargaining team.

It is moved by Janet Sherven and seconded by Terry Jelle to adopt the changes in duties as proposed.

Dated on this day, Tuesday, January 26, 1999 at the regular School Board meeting of the School District of New Glarus.

6. Throughout Administrator Etter's 21-year tenure, the District's teachers have been represented for purposes of collective bargaining by the South West Education Association. Etter has always served as a member of the District's bargaining team. Principal Schober has never been a member of the bargaining team. At the time of hearing, Etter was anticipating his retirement on June 30, 2000. Etter had planned to retire in June, 1999 but changed his mind after local voters passed a \$3.5 million referendum for the grade school. As part of his decision to remain another year, Etter made clear to the Board he wanted no part of bargaining with a new support staff unit should one organize. As of the date of hearing, the District had not determined how to replace Etter, either in terms of personnel or even administrative structure.

Prior to the most recent round of bargaining with the teacher unit, Etter did the costing of bargaining proposals. During the most recent negotiations, Etter brought Bookkeeper Kempfer onto the bargaining team, so he could teach her the process before he retired. Kempfer participated with the Board during the teacher negotiations, doing all the costing, sitting at the bargaining table and remaining in employer caucuses. Kempfer has provided a teacher union representative with requested financial information.

Pursuant to the resolution set forth in Finding of Fact 5, Hustad will serve on the District's bargaining team for contract negotiations with the new support staff unit, provided the Commission holds her position to be confidential. The Board declined to add this duty to Bookkeeper Kempfer's position because it felt she had already been given enough duties. Kempfer is qualified to perform any costing or other administrative services needed to serve as support staff to or member of the District's bargaining team for the negotiations with the support staff unit.

7. As a member of the District's bargaining team, Hustad will have sufficient access to and knowledge of confidential matters relating to labor relations so as to be deemed a confidential employee.

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

CONCLUSION OF LAW

The Assistant Bookkeeper is a confidential employee within the meaning of Sec. 111.70(1)(i), Stats. and therefore is not a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission hereby makes and issues that following

ORDER CLARIFYING BARGAINING UNIT

The Assistant Bookkeeper shall continue to be excluded from the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at Madison, Wisconsin this 12th day of January, 2000.

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

NEW GLARUS SCHOOL DISTRICT (SUPPORT STAFF)

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

POSITIONS OF THE PARTIES

Association's Initial Brief

In support of its position that the Assistant Bookkeeper is a municipal employee and should be added to the collective bargaining unit it represents, the Association asserts that the only possible substantiation the District has to prove its contention that the position is a confidential one is the fact that the position does give the person holding it access to potential confidential files. The District has also threatened to assign the incumbent to its bargaining team, which could make her a confidential employee, if the support staff organized. But even though the incumbent may have access to the teacher's bargaining costing information, she doesn't know where it is located on the computer and has never opened it. Certainly, this is only a de minimis exposure to these files.

The District cannot argue that this is the only person who could do this work; both the School Board President and Superintendent believe the Bookkeeper to be highly capable in the costing arena. Further, the Superintendent has always costed both the teacher and support staff packages, and is still there to cost packages. It is not unreasonable to think that the new superintendent could cost both packages. The District's excuse to make the incumbent a confidential is destroyed when they argue that the Bookkeeper is already working a full work-week and should not be given added assignments; the incumbent Assistant Bookkeeper is also working 40 hours per week. The real question is not whether to make this employee a confidential employee, but whether the District should hire a third employee in the business office. It is clear that the business office is crucially understaffed.

The Superintendent chose to punish the Association for organizing the support staff when he notified the Board that if the Association was successful in organizing the support staff, he would no longer be willing to work with the support staff bargain and thus require an employee, who had never been involved in the Board's bargaining team, to now become intimately involved. It is a self-fulfilling prophecy that the incumbent is now allegedly required to learn to cost the support staff package for the District given the successful organizing of the Association. There is no need for the Assistant Bookkeeper to become involved at this level when the Bookkeeper is capable of doing this costing and the Superintendent is also still available and capable.

Because there is no substantial basis which would lead one to believe this position should be excluded from the bargaining unit by virtue of its confidential nature, the subject position should be included in the existing bargaining unit.

District's Initial Brief

In support of its position that the Assistant Bookkeeper is a confidential employee and should continue to be excluded from the bargaining unit, the District asserts that by resolution of the School Board, which there is no reason to doubt, the Assistant Bookkeeper has been designated a member of the District's bargaining team with the support staff. As such, she will assist in the District's negotiations, cost bargaining proposals and make sure that all necessary confidential information is furnished to the District's bargaining team. Had bargaining begun, the evidence would clearly show the incumbent to be a part of the District's bargaining team, the ultimate in access to confidential labor relations information.

It is obvious that the District is going to rely primarily on the Assistant Bookkeeper as its resource in negotiations as there will be no other administrators or persons with knowledge of the costing, staff or school related issues on the bargaining team. There is no evidence that shows the District's actions to be anything other than made in good faith nor is there any evidence of animus on the part of the District toward the Association. The District recognized that the Bookkeeper had already been given a lot of work, and it determined to allocate the work between the two positions.

The Bookkeeper and Assistant Bookkeeper are in one room and share the same computer. They and the Superintendent have password access to the computer, with no way to change the password or deny access to a part of the computer. If the Assistant Bookkeeper is not a confidential employee, her presence in the room will be disruptive to the Bookkeeper's work. Either the Bookkeeper would have to wait until the Assistant was not present to perform certain work, or additional hours would have to be scheduled. Either way, this would cause an undue disruption of the District's organization.

Having access to this information and not being held a confidential employee would also be difficult for the Assistant Bookkeeper, in that there would exist the potential for people from both existing bargaining units to apply pressure on her to provide confidential information. Making the Assistant Bookkeeper a confidential employee is an appropriate means for solving this potential problem.

The Assistant Bookkeeper has been made a confidential employee because the District has the right to conduct labor relations through employees whose interests are aligned with those of management. As the record evidence establishes, the Commission should find the position to be held by a confidential employee.

Association's Reply Brief

While an excessive workload seems to be a problem at the District, that problem is completely different than the problem of deciding if the subject position should be included in the bargaining unit. If the position were part of the support staff bargaining unit, the District would probably not want the incumbent on its bargaining team. If she were not on the District's team, a de minimis exposure to confidential materials would be insufficient grounds for excluding an employee. The incumbent is not the only one available to perform the task of participating on the District's bargaining team, in that the District already has two confidential employees.

Regarding the District's contention that there is no reason to believe it will not follow through on its assignment to the incumbent, the District appears to be under the delusion that some outside force is governing its Board meetings and the decisions that come from the meetings. The Board is in charge of this runaway train and can control it at any time – if they wish.

The District errs in asserting that it will rely primarily on the Assistant Bookkeeper as its resource in negotiations because there will be no other administrators with the necessary knowledge. There are currently two administrators with the necessary knowledge; the task of costing a salary schedule is not difficult. It is also extremely unlikely that the District would hire a new superintendent who did not already know how to cost a salary schedule. Administrators do not risk their reputations by accepting without verification salary schedule costing created by a person doing it for the first time.

The District did not present any testimony on its inability to pay for another employee who could take the burden of the Bookkeeper and allow her to cost both the teacher and support staff negotiations. Instead, the District is attempting to muddy the water by taking the focus off the real problem – under staffing. There is other work which could be shared to allow the Bookkeeper to cost proposals for both units.

The District errs in asserting that the Superintendent testified that there was no way to change the password to deny access to a part of the computer. He testified that, to his knowledge, it could not be done, as did the Assistant Bookkeeper. The fact that both these employees don't know doesn't mean it can't be done, only that they don't know.

The District errs in discussing potential problems between the Bookkeeper and Assistant if the Assistant is not confidential. The District can't have it both ways. First they want to make the Assistant a confidential employee so she won't divulge information to the Bookkeeper; then, because the Bookkeeper is confidential, they say she can't be trusted to remain silent on relating confidential material to the Assistant. They can't argue both sides.

The District is also making an accusation that the Assistant is not an honest employee. This accusation is out of line, and the District owes the Assistant Bookkeeper a sincere apology.

The District has failed to express what the “undue disruption” would be by having the Bookkeeper increase her hours or adjust her duties. Could it be that the District is fearful that the employees will say that enough is enough and expect the District to hire the help it actually needs?

Further, there is no law that prohibits Board members from costing out their own proposals. And given the laundry list of things that the District does not expect its Board members to do (such as take minutes and type correspondence), one may wonder what exactly they do in that sought-after elected position.

The District errs in stating that first contracts are necessarily time consuming and contentious. That is entirely up to the District’s attorney.

Making the incumbent a confidential employee does not ensure the District has stability in the people to assist in its bargain – unless this determination binds the incumbent into indentured servitude until the completion of the bargain.

Finally, the District’s resolution on the incumbent’s job description carries no weight in whether or not she is a confidential employee. Nothing in the Assistant Bookkeeper’s job description points to her being a confidential employee.

Because the arguments made by the Association are far more reasonable than those of the District, and the District has not made a compelling argument that the Assistant Bookkeeper should be excluded from the unit, the position should be included in the support staff bargaining unit.

District’s Reply Brief

The District resents the Association’s false and malicious accusation that any of the District’s actions constituted threats against the incumbent or reflect anti-union animus. There is no evidence in the record other than that showing the District’s acts were done in good faith.

The Association further errs in claiming it would not be unreasonable to assign the incoming superintendent with costing duties, inasmuch as no decisions about future administrative structures have been made. Further, the allegation that the business office is understaffed begs the question of whether the District has the right to assign business office staff to serve on its bargaining team. Clearly, the District has the absolute right to constitute its bargaining team.

If the incumbent were not considered confidential, it would deprive the District of a member of its chosen bargaining team. As the composition of the bargaining team is central to collective bargaining, the position must be confidential.

The District made a good faith decision to place the position of Assistant Bookkeeper on its bargaining team. In order to be an effective member of that bargaining team, the position has to be confidential. Further, the incumbent is performing confidential work. The position is confidential, and thus the incumbent is properly excluded from the bargaining unit.

DISCUSSION

It is well-settled that for an employee to be held confidential, such employee 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 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. 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 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 her or his 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. HOWARD-SUAMICO SCHOOL DISTRICT, DEC. No. 22731-A (WERC, 9/88).

The District claims the Assistant Bookkeeper is a confidential employee because: (1) the Board adopted a resolution naming her to its bargaining team in the event the support staff organized; (2) inclusion of the position in the bargaining unit would cause a serious disruption of its management; and (3) the incumbent has sufficient regular confidential duties so as to be held confidential.

We do not address the issues of undue disruption or whether the Assistant Bookkeeper has sufficient regular confidential duties so as to be held confidential because we find the position's inclusion as a full member of the District's bargaining team to be determinative. By its actions and testimony, the District has committed to granting the Assistant Bookkeeper the authority to serve as a full and independent member of its bargaining team. In addition, the District has committed itself to providing the incumbent with the training and resources to cost bargaining proposals and the responsibility of so doing. It is on those sworn assurances that we find the Assistant Bookkeeper to be confidential and appropriately excluded from the bargaining unit.

The composition of a bargaining team is central to the strategic control each party must have over how it pursues a bargaining agreement. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27986-B (WERC, 4/96). Hustad will serve as a member of the District's bargaining team. As such, she must be held excluded from the support staff unit as a confidential employee.

Dated at Madison, Wisconsin this 12th day of January, 2000.

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

