

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
SOUTH WEST EDUCATION ASSOCIATION
Involving Certain Employees of
COOPERATIVE EDUCATIONAL SERVICE AGENCY #3

Case 5
No. 59887
ME-3823

Decision No. 30257-B

Appearances:

Attorney Chris Galinat, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the South West Education Association.

Attorney Robert W. Butler and **Attorney Lisa Soronen**, Staff Counsel, Wisconsin Association of School Boards, Inc., 122 West Washington Avenue, Suite 400, Madison, Wisconsin 53703, appearing on behalf of the Cooperative Educational Service Agency #3.

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

On April 3, 2002, South West Education Association filed a unit clarification petition with the Wisconsin Employment Relations Commission seeking to include the Secretary to the Director of Special Education and the Compensation Specialist in an existing support staff bargaining unit of Cooperative Educational Service Agency #3 (CESA) employees that it represents. CESA opposed the petition because it believes the employees holding those two positions are confidential employees. On August 9, 2002, the Association withdrew its request to include the position of Compensation Specialist in the bargaining unit.

No. 30257-B

Hearing as to the Secretary to the Director of Special Education was held in Fennimore, Wisconsin, on August 13, 2002, before Examiner Raleigh Jones. The parties filed post-hearing briefs and reply briefs, the last of which was received on October 17, 2002.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

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

FINDINGS OF FACT

1. Cooperative Educational Service Agency #3, hereinafter referred to as CESA, is a municipal employer and has its offices at 1300 Industrial Drive, Fennimore, Wisconsin 53809.

2. South West Education Association, WEAC, hereinafter referred to as the Association, is a labor organization and has its offices at 960 North Washington Street, P.O. Box 722, Platteville, Wisconsin 53818-0722. It is the bargaining representative for CESA's professional and support staff employees. These employees are in separate bargaining units. There are currently 24 employees in the professional unit and 15 employees in the support staff unit.

3. CESA's administrator is Gary Rooney. Among other matters, Rooney has primary responsibility for bargaining and administering labor agreements on CESA's behalf. Rooney's Administrative Assistant (currently Marianne Krogen) is excluded from the support staff unit as a confidential employee.

Rooney reports to a Board of Control. Four department directors, in turn, report to Rooney. The four are the Director of Special Education, the Director of Instructional Technology and Support Services, the Director of Instructional Services and the Director of Business Services. The directors are responsible for everything that occurs in their department.

The Director of Special Education, Tom Stuckey, runs CESA's largest department. He is responsible for about 50 employees, half of whom are in the professional bargaining unit. He directly supervises four employees. Three of the employees that he supervises are department secretaries Sue McLimans (the position/individual in dispute) and Kate Hennessy and department bookkeeper Loretta Reimenapp.

The Director of Instructional Technology and Support Services, Terri Iverson, supervises eight employees. One of the employees that she supervises is her secretary, Joni Udelhofen. The Director of Instructional Services, Jeanetta Kirkpatrick, supervises ten employees. One of the employees that she supervises is her secretary, Diane Alm.

The Director of Business Services, Connie Shemak, does not have a secretary. One of the employees that Shemak supervises is Compensation Specialist Courtney Rounds, who is excluded from the support staff unit as a confidential employee.

Department secretaries Hennessey, Udelhofen and Alm and bookkeeper Reimenapp are all included in the Association support staff unit. McLimans is currently excluded from the support staff unit as a confidential employee and, if her exclusion continues, will perform all confidential labor relations work previously performed by Hennessey, Udelhofen, Alm and Reimenapp.

4. CESA provides and staffs a number of different programs which local school districts may participate in. These programs are funded by a variety of sources. Among the sources are grants, contracts with school districts and the State and federal government. These grants and contracts are a matter of public record. Each program must have enough consumers interested in participating in the program and must receive enough revenue to fund the program to keep it operating.

The amount of money CESA receives to operate its programs is “soft” because the money may not be available the following year. For example, a grant available one year may not exist the next year. Some funding sources restrict how CESA can spend the money. For example, some of the grants specify that only a certain percent of the grant can be used for staffing and administration costs.

Each of CESA’s programs must run without using the funds of the other programs. The amount of money received for each program affects how many people can be employed in each program for how many days. Each director determines what amount of money will be received from each funding source to operate a particular program. The director then determines how the money can be spent. As part of this process, the director determines how many people can be employed in the program and for how many days (i.e. percent of full time equivalency (FTE)).

All three directors have historically relied on their secretary and/or the bookkeeper to assist them with the determination of how many people can be employed and for how long. Based on available or anticipated grant money, and available or anticipated salary and fringe benefit costs, the secretary and/or bookkeeper would perform calculations to determine how long an individual employee could be funded. Sometimes, a variety of employment scenarios

were configured using the same amount of grant money. For example, under one scenario one employee would be laid off entirely, while in another scenario a number of employees would be partially laid off. The various scenarios which were calculated were not shared with the affected employee(s) or union(s).

5. None of the department directors currently has any direct collective bargaining responsibilities. Stuckey used to serve on CESA's bargaining team, but has not done so for the six years that Rooney has been administrator.

No grievances have been filed in the professional bargaining unit in the six years that Rooney has been administrator. Thus, since Stuckey oversees CESA's professional employees in that bargaining unit, he has not had to respond to any grievances in that time period. Consequently, his secretaries have not performed any duties in the last six years with respect to grievances.

Historically, when an employee is to be fired or laid off, that decision, and the corresponding paperwork, has originated from the administrator's office. The last time an employee in the Special Education Department was discharged was in the Spring of 2002. In that instance, the discharge came from Rooney – not Stuckey. Prior to that, the last instance involving formal discipline in the Special Education Department occurred four or five years earlier. Stuckey has also issued corrective plans of assistance to employees who were not meeting performance expectations. When he did this, he had either McLimans or Hennessy type up these documents (and any drafts thereof) for him.

Neither Iverson (who has been with CESA for 16 years) nor Kirkpatrick (who has been with CESA for 1 year) have issued formal discipline beyond verbal warnings and corrective plans of assistance. When this happened, none of the three department secretaries typed anything related thereto. A probationary employee who worked under Business Manager Shemak was recently "non-renewed". When this happened, none of the three department secretaries typed anything related thereto.

Although Stuckey oversees CESA's professional employees, he does not evaluate them. CESA uses a retired school district administrator evaluate CESA's professional employees. After that person drafts the evaluations, he gives the drafts to Hennessy who types them and proofreads them. As of the date of the hearing, Kirkpatrick had not done any staff evaluations. Thus, her secretary, Alm, had not typed any employee evaluations for Kirkpatrick. Iverson has evaluated the employees that she supervises. When she did this, she stored the evaluations in a folder and updated them herself.

Stuckey has issued preliminary layoff notices to employees. When he did this, he had either McLimans or Hennessy type up these documents for him.

6. McLimans has held the position of Secretary to the Director of Special Education for 22 years. She is the senior secretary in that department. Her job responsibilities include general secretarial duties such as processing the requisitions for the special education department. She also handles the telephones for any incoming calls to her department. Additionally, she takes care of the inventory for her department and makes travel arrangements for conferences.

As of the day of the hearing, McLimans had not participated in the development of bargaining proposals. She currently does not have access to files relating to collective bargaining negotiations. She has never typed or prepared bargaining proposals or documents that pertain to collective bargaining. She has never costed any proposals for CESA to use in collective bargaining negotiations. She has never attended an executive session in which labor relations matters were discussed. She has not been involved in an investigation of any other employee's behavior that might result in discipline. She does not currently type employee evaluations. She did type employee evaluations years ago. She has never developed an answer to an employee grievance or typed a response to same. She has never taken part in any litigation preparation for a labor relations case. She has never taken part in the development of a work rule. She has typed corrective plans of assistance for employees and layoff notices that Stuckey wrote.

7. As reflected in her job description, Courtney Rounds, the confidential Compensation Specialist, is to "coordinate the identification of various employee compensation groups as well as to determine various costing and projections for each group." She is also responsible for preparing and submitting to the Administrative team, "recommendations concerning department/program salaries and benefits and concerns which will assist in the development of individual department and Agency directions." She also serves as an "advisor to the Administrative Team on all compensation matters, including employee negotiations for the Board of Control." Rounds performs secretarial duties when needed. When Administrative Assistant Krogen is on vacation, Rooney has used Rounds to perform secretarial duties.

8. Susan McLimans does not have and will not have sufficient access to, knowledge of, or participation in confidential matters relating to labor relations to be a confidential employee, and CESA's confidential labor relations work can be performed by Rounds and Krogen without undue disruption of CESA's operations.

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

CONCLUSION OF LAW

Susan McLimans, the incumbent Secretary to the Director of Special Education, is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., but instead is 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 makes and issues the following

ORDER CLARIFYING BARGAINING UNIT

The Secretary to the Director of Special Education position currently held by Susan McLimans is included in the support staff bargaining unit referenced in Finding of Fact 2.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of March, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

COOPERATIVE EDUCATIONAL SERVICE AGENCY #3

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

POSITIONS OF THE PARTIES

Association

The Association seeks to include the Secretary to the Director of Special Education position currently held by Susan McLimans in the support staff bargaining unit. The Association disagrees with CESA's contention that McLimans' position is confidential. In its view, the record evidence establishes that McLimans does not perform duties that are considered confidential under the Municipal Employment Relations Act (MERA). It elaborates as follows.

The Association begins its argument by emphasizing the following basic point: As of the date of the hearing, McLimans had not yet been assigned, or performed, any job duties which could be considered confidential under MERA. First, she has never typed or prepared documents related to collective bargaining, nor has she ever costed bargaining proposals. Second, she has never attended a meeting where labor relations matters were discussed. Third, she has never investigated any other employee's behavior that might result in discipline. Fourth, she has never typed or prepared answers to grievances. Fifth, while she does type student educational evaluations, she does not currently type employee evaluations. Based on the foregoing, the Association believes McLimans has no current exposure to confidential matters.

The Association concedes that the Commission has historically excluded employees as confidential when the employee's supervisor has substantial labor relations responsibilities. The Association submits that here, though, that is not the case. According to the Association, McLimans' supervisor, Stuckey, currently has no collective bargaining responsibilities and limited labor-relations responsibilities. That being so, it is the Association's position that McLimans cannot be excluded from the unit on that basis.

Next, the Association addresses CESA's plans to transfer other employees' confidential job duties to McLimans in the future. First, it asserts that in the three-month period that elapsed between the parties' election stipulation and the filing of the instant unit clarification petition, CESA did not take any preliminary steps to transfer other employees' confidential work duties to McLimans. Second, it maintains that neither McLimans nor Stuckey was privy to this plan. To support that contention, it notes that Rooney drafted a new job description for McLimans in the month prior to the hearing without either McLimans' or Stuckey's input and

never shared this job description with McLimans. Additionally, it avers that McLimans was never told she would be receiving additional job responsibilities. The inference which the Association draws from the foregoing is that CESA's plan to transfer additional job duties to McLimans arises from a desire to exclude her from the bargaining unit rather than from a need to have an employee who can perform a significant amount of confidential work. Third, the Association argues that Rooney's claim that he did not transfer any confidential duties because he did not know he could do so rings false because he had the benefit of his attorney's counsel at the January hearing. As the Association sees it, if there was a need for a confidential employee to help with the budgets and any labor relations matters, it would be reasonable to expect Rooney to seek clarification from counsel at that point rather than waiting for direct examination at the hearing. Fourth, the Association argues that the cases that CESA relies on for the proposition that anticipated duties are a basis for finding an employee confidential are readily distinguishable from the instant factual situation. That being so, the Association believes those cases should not apply here. Finally, the Association asserts that in an attempt to establish that there would be a significant amount of confidential work for McLimans in the future, CESA relied on vague general speculations by the department directors rather than concrete examples, and misunderstandings over what is actually considered confidential under MERA.

Next, the Association addresses CESA's argument that McLimans' impending budget responsibilities render her position confidential. The Association disputes that assertion. It avers that even if CESA transfers budget responsibilities to McLimans, and she performs them for all three directors, those duties are not confidential duties under MERA. The Association contends those duties do not involve sensitive information with respect to labor relations between CESA and the two collective bargaining units. Instead, the budget duties involve crunching numbers in a spreadsheet to determine, based upon money available from grants and contracts with school districts, the number of available contract hours. The Association maintains this is not confidential work because that information is available to the Association. To support that premise, it notes that the grants the agency receives and CESA's contracts with school districts are public records which are available to the union. Additionally, the Association notes that it would also have access to employee wage and benefit information. Aside from that, the Association submits that it is unclear how even preliminary knowledge of a department's budget would assist the Association in collective bargaining or in administering the contract which, it points out, are the requisite standards for determining confidential status. Building on the foregoing point, the Association contends that McLimans' purported new budget job responsibilities would not give her access to budget information that would indicate what CESA was prepared to offer in bargaining or information that would give CESA any advantage in administering a contract.

The Association also argues that the Employer should not be allowed to spread confidential work around in an effort to keep McLimans out of the bargaining unit. For

background purposes, it notes that CESA has only two bargaining units consisting of 39 employees, and it already has two confidential employees who can perform any confidential work: Rounds and Krogen. According to the Association, CESA does not need a third confidential employee. In their view, the labor relations work performed at CESA is not sufficient to require a third confidential employee. The Association contends that Rounds and Krogen can handle the relatively small volume/*de minimis* confidential work that is generated by the two existing bargaining units.

As the Association sees it, it would not be an undue burden to shift any confidential duties to those two confidential employees. First, the Association opines that the increased confidential work which will be generated from the new support staff bargaining unit would most likely be related to bargaining a contract for that new unit. It notes that Rounds existing job responsibilities involve costing for collective bargaining. Second, the Association maintains that since CESA has not had any grievances with the teacher unit in six years and has had few disciplinary issues with the entire workforce, it seems unreasonable for CESA to suggest that given the advent of another collective bargaining agreement, there will be a sudden upsurge in disciplinary matters. Building on that premise, the Association avers that it would be unreasonable to assume that there will be a significant increase in confidential work due to the new, small unit. Third, the Commission has routinely considered the availability of other confidential employees when determining confidential status. It notes that here, McLimans is not the only one available to perform confidential duties. Rooney's secretary is available (Krogen) as is the Compensation Specialist (Rounds). Both have secretarial skills and therefore can perform secretarial duties when needed. Accordingly, the Association asks that McLimans' position be included in the bargaining unit.

CESA

CESA contends that the Special Education Secretary is a confidential employee and therefore should continue to be excluded from the support staff bargaining unit. It makes the following arguments to support this contention.

CESA acknowledges that as of the time of the hearing, McLimans had not yet been assigned, or performed, many confidential duties. CESA avers that if the Commission finds her position to be confidential, she will then be assigned many confidential duties. CESA cites three reasons why she has not yet been assigned such confidential duties. First, CESA believes that it was not practical to transfer all of the contemplated labor relations duties to the new position immediately due to the Association's filing of the unit clarification petition. Second, CESA asserts that a substantial amount of training will need to be done in order to orient the Special Education Secretary to her new job responsibilities. Third, it relies on Rooney's testimony that he was not aware that the Special Education Secretary could be assigned these new duties during the period of time between the filing of the unit clarification petition and the

issuance of a decision by the Commission. It also notes that Rooney testified that if he had known he could assign all the confidential labor relations duties to the Special Education Secretary prior to the WERC ruling, he would have done so.

CESA maintains that the most significant confidential job duty that the Special Education Secretary will take over is assisting all three directors with budgeting. According to CESA, much of the budgeting work is confidential because it involves (1) determining how many bargaining unit employees can be employed (based on the money CESA is expected to receive to fund each program) and (2) for what amount of time on a program by program basis. CESA asserts that estimates of who may be employed for what amount of time must be made over and over again because its sources of funds and the amount of funds is "fluid". Due to the number of potential permutations and changes which can be made, these estimates are not shared with affected employees until a final decision is made. CESA asserts the amount of budgetary work the Special Education Secretary will be performing is not going to be *de minimis* because she will be assisting all three directors with this work.

Turning now to the labor relations work, CESA claims that in the past, all three department secretaries were involved, to varying extent, with labor relations matters. According to CESA, they drafted and typed evaluations, layoff notices, disciplinary notices and notices of performance expectations. CESA contends that after the instant unit clarification petition was filed, the directors stopped assigning this work to them and started doing it themselves. CESA argues that McLimans will be typing letters concerning employee discipline, employee evaluations, layoff notices, answers to grievances, and misconduct investigations. It notes in this regard that McLimans' job description has been changed to reflect that. CESA acknowledges that merely typing evaluations, responses to grievances, layoff notices, disciplinary notices, and notices of performance expectations may not be enough to deem the labor relations work confidential if the affected employee or the Union receives a copy of the relevant document. However, it avers that if a secretary is working on drafts of these documents which the affected employee(s) and the Union may not see, then the work is considered confidential. According to CESA, that is exactly what is going to occur here.

To support that assertion, CESA relies on the testimony of the three department directors. First, it cites Kirkpatrick's testimony that she expects her secretary to write up communications involving discipline, investigate employee misconduct, draft employee evaluations and develop answers to grievances. It also cites Kirkpatrick's testimony that while she did not involve her secretary (Alm) in recent instances where she disciplined an employee and clarified her performance expectations for another employee, the reason she did not involve Alm in either situation was because she was informed that Alm was now a bargaining unit employee. Second, it cites Iverson's testimony that she also expects secretarial assistance in processing grievances and writing drafts of employee evaluations. Third, it cites Stuckey's testimony that he also expects his secretary to type discipline notices and notices of

performance expectations, and to assist in writing drafts of layoff notices and performance evaluations which may not be shared with employees.

CESA maintains that its plan to transfer confidential duties to McLimans is not simply an attempt to spread the confidential work around and exclude one more person from the bargaining unit. It notes in this regard that all three directors expressed distress at the compromise which was reached on January 9, 2002, that only one confidential secretary would exist for them to share; each wanted their own secretary excluded as confidential because they have relied on their secretary and/or bookkeeper to assist them with the budget process and labor relations functions in the past. CESA claims that each director is overwhelmed at the idea of having to do that work without assistance and is likewise overwhelmed at the idea of having to train the Special Education Secretary to do the work. CESA believes that the budget and labor relations work just identified, plus whatever amount of labor relations work comes from the support staff unionizing, is too much for the directors to do without assistance, and cannot be considered *de minimis*.

Aside from the contentions just noted, CESA also addresses various other arguments raised by the Association. In CESA's view, none of them pass muster.

First, in response to the Association's contention that McLimans' immediate supervisor, Stuckey, does not have significant labor relations responsibility, CESA simply notes that it is not arguing that the Special Education Secretary should be excluded from the bargaining unit because Stuckey has significant labor relations responsibility.

Second, CESA responds to the Association's assertion that Rooney changed McLimans' job description without McLimans' and Stuckey's input and without telling either McLimans or Stuckey. CESA argues that even if these assertions are true, they are not relevant to determining whether the Special Education Secretary is a confidential employee.

Third, CESA addresses the Association's contention that Rounds could be assigned the budgeting and labor relations work rather than McLimans. CESA acknowledges that based on Rounds' job description, she may indeed have the skills necessary to perform that work. However, even if she does, CESA's position is that she does not have the time to do it. To support that premise, CESA notes that Rounds was not called as a witness at the hearing. CESA submits that since she was not called as a witness, there is no record evidence concerning how much time she has available for additional job responsibilities. That being so, it is CESA's position that the Association cannot now claim without any proof of Rounds' workload that she can take on the added responsibility of assisting all three directors with budgeting and labor relations work.

Fourth, CESA responds to the Association's contention that Krogen (Rooney's secretary) could be assigned the budgeting and labor relations work rather than McLimans. It disputes that assertion. CESA calls attention to the fact that like Rounds, Krogen was not called as a witness at the hearing. CESA submits that since Krogen was not called as a witness, there is no record evidence that establishes that she has the time to perform these additional job duties. If it is held that she does have the time to perform these duties, CESA maintains that finding would ignore and conflict with Rooney's testimony to the contrary.

In conclusion, CESA avers that if the Commission finds the Special Education Secretary confidential, she will then be assigned the work of assisting all three directors with their labor relations and budgeting functions. With regard to the former (i.e. labor relations functions) CESA asserts that she will be responding to employee grievances, drafting employee discipline letters and letters clarifying performance expectations, drafting evaluations, drafting layoff notices and investigating employee misconduct. According to CESA, the Special Education Secretary will not just type up these documents; rather, she may be required to participate in the initial drafting of these documents that are not subsequently shared with the affected employee or the Association. With regard to the latter (i.e. budgeting functions), CESA avers that the Special Education Secretary will also be assisting all three department directors in determining on an on-going basis how many bargaining unit members each department will employ and for how many days (percentage of FTE). In CESA's view, the amount of budgeting and labor relations work which McLimans is going to perform is not *de minimis*. Additionally, CESA believes that this work cannot easily be assigned to either Rounds or Krogen. Accordingly, CESA asks that McLimans be found to be a confidential employee.

DISCUSSION

Section 111.70(1)(i), Stats., defines a municipal employee in pertinent part as:

. . . any individual employed by a municipal employer other than an independent contractor, supervisor, or **confidential**, managerial or executive employee. (Emphasis added.)

The statutory term "confidential . . . employee" is not statutorily defined. With judicial approval (See MINERAL POINT UNIFIED SCHOOL DISTRICT v. WERC, 251 Wis.2d 325 (CT. APP. 2002)), we have defined a confidential employee as one having sufficient 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. 1/

1/ *DANE COUNTY, DEC. NO. 22796-C (WERC, 9/88).*

While a *de minimis* exposure to confidential labor relations matters is generally insufficient grounds for exclusion of an employee from a bargaining unit, 2/ 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. 3/ 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, 4/ 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. 5/ In reviewing an allegation of confidential status, the Commission is mindful of the need to balance the statutory right of employees to engage in concerted activity with the right of employers to conduct labor relations through employees whose interests are aligned with management. 6/ In striking this balance, we look to, among other things, the amount of confidential work, and the degree of disruption that would be caused to the employer's operation if confidential work is reassigned. 7/

2/ *BOULDER JUNCTION JOINT SCHOOL DISTRICT, DEC. NO. 24982 (WERC, 11/87).*

3/ *CESA AGENCY No.9, DEC. NO. 23863, (WERC, 12/86).*

4/ *TOWN OF GRAND CHUTE, DEC. NO. 22934 (WERC, 9/85).*

5/ *HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88).*

6/ *CITY OF SEYMOUR, DEC. NO. 28112 (WERC, 7/94).*

7/ *CITY OF SEYMOUR, SUPRA.; CITY OF GREENFIELD, DEC. NO. 26423 (WERC, 4/90).*

Applying these general principles to this case, we find that the Secretary to the Director of Special Education is not a confidential employee and therefore is included in the support staff bargaining unit. Our analysis follows.

It is noted at the outset that as of the date of the hearing, McLimans has not performed many confidential labor relations duties. She has not participated in the development of bargaining proposals or attended meetings where they were discussed, has not typed or prepared bargaining proposals or documents that pertain to collective bargaining, does not have access to files relating to collective bargaining and has not costed any bargaining proposals for negotiations. She has not attended meetings where personnel matters were discussed, has never been involved in a disciplinary investigation, has never developed or typed an answer to an employee grievance, and has never helped prepare for labor relations litigation. While she typed employee evaluations years ago, she does not currently do so.

She has typed corrective plans of assistance and preliminary layoff notices.

Recognizing that McLimans has not yet been assigned or performed many confidential duties, CESA's theory herein rests primarily on the proposition that if we find her to be a confidential employee, then she will be assigned sufficient confidential duties to establish her confidential status. We have previously found that anticipated duties can be a basis for excluding an employee as confidential. See, for example, *MANITOWOC COUNTY, DEC. NO. 8152-J (WERC, 11/90)*. Accordingly, the fact that McLimans is not currently performing any significant confidential work is not the end of our analysis. Similarly, the fact that as of the date of the hearing, CESA had not taken any steps to transfer the confidential work duties to McLimans is of no legal consequence because from the record as a whole we do not doubt CESA's intentions. The same is true of the fact that when Rooney revised McLimans' job description, he did not get her input on same or tell her she would be receiving additional job duties. Again, from the record as a whole, we are satisfied that CESA fully intends to transfer those duties to McLimans and Rooney was not obligated to discuss the matter with her.

That said, our focus turns to an analysis of the confidential labor relations duties which CESA plans to assign to McLimans that are currently performed by secretaries Alm, Udelhofen and Hennessy and bookkeeper Reimenapp.

Our initial focus of inquiry is on what CESA characterizes as the most significant confidential job duty that McLimans will perform in the future: budget work. We begin our discussion by noting at the outset that for any budget work to be considered confidential, it must relate to CESA's strategy in collective bargaining or administering the contract. As noted in Finding of Fact 4, the budget work is as follows: after each director determines how much money will be received from each funding source (i.e. grants and contracts with school districts) to operate a particular program, the director will have McLimans "crunch the numbers" and make preliminary estimates concerning how many employees can be employed in that program for what full-time equivalent (FTE) status. Historically, these calculations have to be done again and again using different scenarios because of uncertainty over how much money CESA will receive for that program.

Most of the information used in this budget process is available to the union(s) because the grants CESA receives and CESA's contracts with school districts are public records and because the union(s) have access to existing employee wage and benefit information. However, the union(s) do not have access to the various preliminary budget estimates derived from the publicly available data or to any assumptions CESA used as to possible increases in salary and fringe benefit costs. Thus, we are satisfied that there may be limited circumstances in which knowledge of this budget scenario information would be relevant to CESA's bargaining strategy or manner of administering the contract. Thus, to this limited extent, the budget work McLimans will be asked to perform is confidential labor relations work.

CESA also plans to have McLimans type what it calls all "union issues" for all three directors including: employee disciplinary notices, employee evaluations, layoff notices, answers to grievances and misconduct investigations. We accept CESA's plans at face value because McLimans' job description was recently changed to specify that she would be doing that work and Rooney and the three directors credibly so testified. While the final versions of these documents are not confidential because the affected employee(s)/union(s) receive them, drafts of the documents (and the resultant knowledge of the action the employer contemplates taking) do expose the typist to confidential labor relations information. GREEN BAY SCHOOL DISTRICT, DEC. NO. 17706-B (WERC, 1/00).

However, given the number of bargaining units (2), the number of represented employees (39) and the evidence of labor relations activity with the professional employee unit, we are satisfied that the amount of such work will be very limited. While all three directors do have responsibilities administering the existing professional employee bargaining agreement, their duties in that regard have produced little confidential work. Iverson and Kirkpatrick have never responded to a formal grievance. While Stuckey oversees the professional employees in the professional bargaining unit, there have not been any grievances in that unit in the last six years. Consequently, Stuckey has not had to respond to any grievances in that time period. There are just a few instances documented in the record where CESA imposed formal discipline on employees. In the one recent instance where a probationary employee was "non-renewed", that employee was not supervised by any of the three directors involved herein (i.e. Stuckey, Iverson and Kirkpatrick). In the only discharge referenced in the record, the decision to discharge and the corresponding paperwork came from the agency administrator (Rooney) – not the director. Aside from that discharge and an instance involving formal discipline which occurred in the Special Education Department about four or five years ago, all the other instances of discipline referenced in the record involve verbal warnings and corrective plans of assistance for employees who were not meeting performance expectations. We do acknowledge that typing evaluations and layoff notices to employees will generate a limited amount of ongoing confidential work for McLimans.

Having identified and considered the type and amount of confidential work McLimans will perform, the question is whether that work justifies McLimans' exclusion from the bargaining unit as a confidential employee. We find it does not for the following reasons. First, as previously noted, CESA has just two bargaining units consisting of 39 employees: 24 in the professional unit and 15 in the support staff unit. With respect to administering the professional contract, CESA has not had any grievances in that unit in the last six years and has had few disciplinary instances with its entire workforce. Even if the new support staff unit generates substantially more confidential work, the overall amount generated by the three directors will remain minimal. Second, in deciding whether to exclude an individual as a confidential employee, we have routinely considered the availability of other confidential employees to perform the work. CITY OF RHINELANDER, DEC. NO. 24518-C (WERC, 11/02); MARATHON COUNTY, DEC. NO. 17083-B (WERC, 2/92). In this case, Rooney's Administrative Assistant (Krogen) and the Compensation Specialist (Rounds) have secretarial skills and we conclude that can perform the directors' confidential secretarial work without undue disruption of CESA's operations. CITY OF RHINELANDER, *supra*; MANITOWOC SCHOOLS, DEC. NO. 29777-C (WERC, 7/01); BARRON SCHOOLS, DEC. NO. 29687 (WERC, 8/91). As to their availability, we acknowledge Rooney's testimony that Krogen does not have the time to perform any additional work and the absence of direct evidence as to Rounds' work load. However, the existing evidence as to the very limited amount of confidential labor relations work in question persuades us that between the workloads of Krogen and Rounds, sufficient time is available to perform the confidential work.

Given all of the foregoing, we conclude that the Secretary to the Director of Special Education is not a confidential employee. We have therefore included that position in the support staff bargaining unit.

Dated at Madison, Wisconsin, this 25th day of March, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

gjc
30257-B