STATE OF WISCONSIN CIRCUIT COURT DOUGLAS COUNTY

Douglas County,

Petitioner,

vs.

Wisconsin Employee Relations Commission,

Respondent.

MEMORANDUM DECISION
Case No.: 2009-CV-605

Decision No. 6182-A

The petitioner brought this action challenging the Wisconsin Employee Relations Commission's (WERC) decision that the Douglas County Highway Department's Administrative Assistant is not a confidential employee covered under sec. 111.70(1)(i), Stats. and that the current employee in that position is a municipal employee included in the local bargaining unit.

SCOPE OF REVIEW

According to the relevant part of sec. 227.57, Stats., the court can review the following areas:

> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
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> (6) If the agency's action depends on any particular fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.
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> (7) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

STANDARD OF REVIEW

Before looking at the merits of the petitioner's claim, the first issue that the court needs to address is what level of deference must the court give to WERC's findings and decision. There are three levels of deference given to agencies in their decisions. *Jicha v. DILHR*, 169 Wis. 2d 284, 290, 285 N.W.2d 256 (1992). The first level of deference to be given to an administrative agency is "great weight." An agency's decision is entitled to great weight when "the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute." *Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 244, 493 N.W.2d 68 (1992). The second level or midlevel of deference that an agency's decision is granted is "due weight." An agency's decision is given due weight when the agency's decision is very nearly one of first impression where the agency does not have very much experience in the particular area. *Id.* The third level of deference is actually no deference whatsoever or de novo review. When the decision encompasses only an issue of first impression and there is no level of expertise by the agency, the decision is reviewed without any deference. *Id.*

Douglas County's position is that the decision of WERC is entitled at best to the midlevel standard, but believes that WERC's decision is unreasonable regardless. (Petitioner's brief at page 4) WERC's position is that its decision is entitled to great weight. (Respondent's brief at page 14) It is clear to the court that WERC's determination of whether an employee is considered as confidential is entitled to great weight. This issue was squarely addressed in *Mineral Point Unified School District v. WERC*, 2002 WI App 48, 251 Wis. 2d 325, 641 N.W.2d 701. The court needs to look no further than the *Mineral Point* case to address this issue.

REASONABLENESS OF WERC'S INTERPRETATION

"The burden of proof to show that the agency's interpretation is unreasonable is on the party seeking to overturn the agency's decision; the agency does not have to justify its interpretation." *Id.* at ¶ 25. "A decision is unreasonable if it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without rational basis." *Id.* WERC determined that the Administrative Assistant was not a confidential employee. WERC's determination is entitled to great weight and it is Douglas County's burden to show that WERC's determination was unreasonable. This court cannot just substitute its judgment for that of WERC, but determine whether Douglas County has shown that WERC's decision was unreasonable.

Information is considered confidential and, therefore, an employee is considered to be confidential if the information the employee has sufficient access to is: (1) information relating to an employer's strategy or position as it pertains to collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining unit and the employer; and (2) information which is not available to the bargaining representative or its agents. *Id.* at ¶ 19. A *de minimis* exposure to confidential information is not sufficient to exclude an employee from the bargaining unit unless the employee is the only one able to perform the confidential work. *Id.*

The County contends that the Administrative Assistant should be considered a confidential employee because of the significant labor relations that Highway Commissioner Halverson is involved in. The County misses the point. Just because the Administrative Assistant's supervisor has significant labor relations responsibilities does not by itself equate to the Administrative Assistant having similar significant labor relations responsibilities. WERC found that "the Administrative Assistant's confidential

labor relations work will take a minimal amount time and said work can be performed by other county employees without undue disruption to the county." (WERC findings of fact #10)

Further, the employer in this case is Douglas County, not specifically the Highway Commissioner. While Mr. Halverson is involved in contract negotiations, the main actor in these negotiations is the Human Resources Department and not that of Mr. Halverson. There is no reason that the Administrative Assistant needs to be involved in any communication between any strategy sessions with Mr. Halverson and Human Resources.

WERC's finding that the confidential labor relations work is *de minimis* is not unreasonable. Looking at the essential duties of the Administrative Assistant, out of 27 essential job duties the vast majority of the essential job duties are clearly not confidential. The evidence supporting WERC's finding includes, but is not limited by the facts that there have only been six grievance and interest arbitration hearings in the last ten years, that there have only been three employee terminations over the last ten years out of 37 employees, that memos drafted by Mr. Armstrong are edited by Mr. Halverson and there is no indication that will discontinue, that there are only two closed meetings per year where confidential labor relations are discussed, and that Mr. Halverson's emails while he is out may not contain any confidential labor relations issues. Other facts supporting WERC's decision are: that out of all of the documents the County introduced, not one of the documents included Mr. Halverson's thoughts or impressions regarding collective bargaining and that there was no reasonable explanation as to why Mr. Halverson could not continue to take minutes during closed sessions as he currently does. Mr. Halverson is certainly involved in those confidential meetings and

should be able to continue in that capacity two times per year. Minutes are not verbatim of the entirety of the meeting, but just a summary of the meeting.

Also supporting WERC's finding of the *de minimis* nature of the confidential information that the Administrative Assistant may be exposed to includes the fact that there has only been eight pieces of correspondence from either Mr. Armstrong or Mr. Halverson to the union business agent over the last two years. Further, any drafting of language proposals during contract negotiations by the Administrative Assistant does not appear to be confidential information, but just language proposals without strategy or reasoning behind the changes. The amount of confidential information is *de minimis* based upon the fact that other departments in the county also do not have confidential employees even though they have more employees, e.g. Sheriff's Department with 86.

The County also attempts to use the distance between the Highway Department's physical location and the main office of the County as a reason for categorizing the Administrative Assistant as confidential. However, with electronic communication including email, smart phones, fax machines, etc. physical distance has become less relevant than in the past. In fact, a confidential employee at another location could clearly take on the confidential work by the Highway Commissioner forwarding email or drafts of correspondence to that person. The Highway Commissioner could also dictate his letters and then send the electronic audio file through email to a confidential employee anywhere.

This court also finds that WERC is not willfully ignoring its precedent. The cases cited by the County in its brief are consistent with this case and one another. *Mineral Point* puts it best when the Court of Appeals stated "We do not agree that these cases show that WERC's decisions are inconsistent. WERC has utilized the same analytical framework in its decisions related to confidential employees and the different results are

explained by the different factual situations." *Id.* at ¶ 21. The cases cited by the County illustrate fact specific determinations that WERC reviews on a case by case situation applying well settled precedent.

Looking at each case cited by the County, they are distinguishable based upon their separate factual scenarios. *Menomonee Falls Joint School District #1*, Dec. No. 11669 (WERC, 3/8/73), involved two secretaries who spent 50% of their time on confidential labor relations. There was no evidence presented as to how much time Mr. Halverson's Administrative Assistant would be spending on confidential labor relations issues. In the *Menomonee Falls* case, it would be impossible to find the secretaries only involved in *de minimis* labor relations activities when 50% of their time was spent on confidential labor relations work.

The *Eau Claire County*, Dec. No. 6183-A (WERC, 4/23/87) decision is distinguishable because the department the administrative secretary was working for employed 163 employees and that secretary had more than *de minimis* confidential labor relations work. Mr. Halverson's Administrative Assistant would be for an employee group of less than 40 and where WERC found there was only *de minimis* confidential labor relations work.

The *City of Menomonie*, Dec. No. 32066 (WERC, 4/6/07), decision involved an administrative assistant having *de minimis* confidential labor relations work that would be unreasonable to transfer to the only other confidential employee. There are three confidential employees that WERC found could do the *de minimis* confidential labor relations work required by the newly created position.

In both *St. Croix County*, Dec. No. 12271-C (WERC, 5/4/99) and *Green Lake County*, Dec. No. 16050-I (WERC, 5/24/99), the employees were the only persons who could perform the confidential labor relations work and were deemed confidential

employees. In this case, WERC determined that there were three other confidential employees who could perform the *de minimis* confidential labor relations work. Similarly in *Village of Saukville*, Dec. No. 26170 (WERC, 9/21/89), the employee was found to be a confidential employee because the employee was the only employee who could perform the confidential labor relations work.

The County cited *Rock County*, Dec. No. 8243-K (WERC, 9/18/91), and *Portage County*, Dec. No. 6478-D (WERC, 1/6/90) for their proposition that WERC is not following their precedent. In the *Rock County*, and *Portage County* cases, WERC found that the confidential labor relations work was not *de minimis*. In contrast, WERC has found that the confidential labor relations work here was *de minimis*.

In *Door County*, Dec. No. 24016-A (WERC, 3/17/88), WERC found that the confidential employees had more than *de minimis* confidential labor relations work or there were no other employees able to complete the confidential work. WERC in this case found that the work was *de minimis* and there were three other employees able complete the confidential employee relations work.

In *Wonewoc-Center School District*, Dec. No. 22684 (WERC, 5/28/85), WERC found that one employee was confidential because WERC did not find the employee was exposed to a *de minimis* amount of confidential labor relations work and there was no one else to complete the confidential work, but that the employee's back up was not a confidential employee because the back up employee was not exposed to more than a *de minimis* amount of confidential labor relations work. This ruling is not inconsistent in that Mr. Halverson's Administrative Assistant functions more like the back up employee in the *Wonewoc-Center School District* case. Both the back up employee and the Administrative Assistant would be expected to be filling in for the confidential employee

on occasion and the Administrative Assistant would only be exposed to a *de mininmus* amount of confidential labor relations work.

The *Milwaukee County*, Dec. No. 7135-S (WERC, 5/15/85) case involved one employee being found as confidential because of the more than *de minimis* amount of confidential labor relations work they were responsible for and another employee was found to not be a confidential employee because they were only exposed to a *de minimis* amount of confidential labor relations work.

In sum, the cases cited by Douglas County are not examples of WERC willfully ignoring its precedent, but examples of WERC being consistent with its rulings on whether an employee is confidential or not and applying those principles to this case.

CONCLUSION

It is clear from the review of the record that Mr. Halverson should have an administrative assistant. Even if this court would have come to a different conclusion based upon the facts presented to WERC, it is not the province of this court to substitute its judgment for that of WERC. WERC's decision should and has been given great weight. The County has not met its burden in showing that WERC's determination was unreasonable and, therefore, WERC's decision and findings are affirmed. WERC's decision is consistent with its prior decisions, supported by substantial evidence and is reasonable. The Administrative Assistant is not a confidential employee and, therefore, is a municipal employee under sec. 111.70(1)(i), Stats.

Dated this 12th day of August, 2010.

BY THE COURT:

Kelly J. Thimm
Circuit Court Judge

This order is the final order of the court for appeal purposes.