

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

**LAPEER COUNTY and
40TH JUDICIAL CIRCUIT COURT(FRIEND OF THE COURT),
Public Employers**

Case No.UC96 G-27

-and-

**TEAMSTERS STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 214
Labor Organization-Petitioner**

APPEARANCES:

For the Public Employers: Justus C. Scott, Esq., Lapeer County Prosecuting Attorney

For the Petitioner: J. Sawicki, Esq., Legal Counsel

DECISION AND ORDER

This case was heard at Detroit, Michigan on February 25,1998, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, MSA 17.455(13), and based on the record, including briefs filed by the parties on or before July 28,1998, the Commission finds as follows:

The Petition and Positions of the Parties:

The petition was filed on July 9, 1996 by Teamsters State, County, and Municipal Workers, Local 214. Petitioner currently represents a bargaining unit consisting of all permanent full-time employees employed in the Office of the Lapeer County Friend of the Court (FOC) and all court referee/enforcement secretaries employed in the Lapeer County Prosecutor's Office, excluding the FOC, Deputy FOC, and attorney referees. This unit will be referred to herein as the FOC unit. Petitioner seeks to add a new position to this unit, administrative secretary to the FOC.

The Employers assert that the disputed position should be excluded from the FOC unit as a confidential employee. According to the Employers, since the FOC and the County are separate

employers, each should be entitled to one confidential exclusion. The Employers also assert that the administrative secretary to the FOC does in fact perform confidential duties on a regular basis. Petitioner argues that the administrative secretary to the FOC shares a community of interest with its unit. Petitioner also argues that the Employers' do not need another confidential clerical employee. Petitioner points out that there are two clerical positions excluded from the county wide general unit as confidential, both in the county commissioners' office, and that the position of deputy FOC is excluded from the FOC unit. Moreover, according to Petitioner, the secretary to the Chief Judge of the Circuit Court is also available to perform confidential labor relations duties.

Facts:

By statute, an FOC office is part of a circuit court. MCL 552.503; MSA 25.176(3). In this case the circuit court is the 40th Judicial District Circuit Court, covering all of Lapeer County. Therefore the 40th Judicial District Court is an employer in this matter.

The 40th Judicial Circuit Court, the FOC's office, the offices of the Lapeer County Commission, and the office of the Lapeer County Administrator are in the same office building. The FOC is on the first floor, the judges' courtrooms are on the second floor, and the County Commission's and County Administrator's offices are on the third floor. At the time of the hearing there were about 22 employees in the office of the FOC.

According to Commission records, on April 21, 1975 Petitioner was certified as the bargaining representative for three separate units: a unit of employees of the Lapeer County Probate Court, a unit of employees of the District Court, and a broad unit of county employees which included employees in the offices of the FOC and the Prosecuting Attorney. Employees of the 40th Judicial Circuit Court, with the exception of those in the office of the FOC, are not organized. In addition to Petitioner's unit, the County also has one or two bargaining units represented by AFSCME, and one or two units of Sheriff's Department employees.

Petitioner and the County originally agreed to exclude two confidential employees from the broad county unit. In their 1987-89 contract, and in and subsequent collective bargaining agreements including the agreement which expired on December 31, 1997, they specified that the chief deputy county clerk would be excluded and that one employee from the Lapeer County Board of Commissioners' Office would be designated as the second excluded confidential employee.

In 1990, Petitioner, the County, the Chief Judge of the 40th Circuit Court, and the FOC agreed to create a separate bargaining unit consisting of all full-time permanent employees of the FOC and all court referee/enforcement secretaries employed in the Prosecuting Attorney's office. All of the employees in the FOC unit had previously been included in the general county unit. The first contract covering this unit ran from January 1, 1990 through December 31, 1992. The FOC and the Chief Judge negotiated the tentative agreement for this contract without the participation of the County Administrator. The tentative agreement was then ratified by the County Board of Commissioners and entered into as an agreement between Petitioner and the County. The recognition agreement in this contract excluded the FOC, the Deputy FOC, and all attorney referees, but did not specifically

provide for a confidential exclusion. Les Barrett, a business agent for Petitioner, participated in the negotiations for this contract. He testified without contradiction that the negotiating parties deliberately did not put in a confidential exclusion because they agreed that one confidential secretary was sufficient for both this unit and the general unit. He also testified without contradiction that confidential secretarial work during the negotiations for the 1990-92 contract was performed by the secretary to the Chief Judge.

Between 1990 and 1992 the County created a new position, administrative assistant, in the County Commissioners' office. The former confidential secretary in that office was promoted to administrative assistant, and another employee was hired to fill the position of confidential secretary in the Commissioners' office. The administrative assistant continued to attend bargaining sessions and perform most of the confidential clerical duties. Neither of these positions is currently included in a bargaining unit.

The County Administrator was the chief spokesman for the Employers in the negotiations for a collective bargaining agreement to replace the 1990-1992 FOC unit contract. The FOC was also part of the bargaining team, along with several County commissioners. The administrative assistant from the County Commissioners' office attended some of these bargaining sessions. According to Barrett's uncontradicted testimony, Employer proposals presented to the Petitioner were typed in the Commissioners' office. In April 1995, a new agreement was reached for the term January 1, 1993 through December 31, 1997. The parties to the new agreement were the Petitioner and both Lapeer County and the Lapeer County 40th Circuit Court.

A new FOC was hired in October 1995. The new FOC made some changes in the operation of the office, including reorganizing work assignments to reduce the amount of clerical work performed by the professional staff. For example, data entry work being performed by the deputy FOC was reassigned to clerical employees, clerical employees were assigned to help the referee prepare petitions, recommendations and orders, and clerical employees were assigned to type reports for case workers. In connection with these changes, the FOC proposed the creation of several new positions, including one part-time clerical position and the position in dispute, administrative secretary. The job description for the administrative secretary included the following general summary of duties:

Performs highly complex, responsible, and difficult secretarial tasks which are confidential in nature; performs clerical job duties involving negotiations, grievances, and/or other labor relations matters; directs staff; acts as a support staff to the Friend of the Court; work is performed under little or no direct supervision; work involves a high degree of judgment and accuracy; performs related work as required.

Included among the principal duties and responsibilities of the job was, "types reports of a confidential nature including negotiations and other labor relations matters."

The new position was created by the FOC in December 1995, was approved by the County

Board of Commissioners, and was filed in January 1996. In that same month Petitioner demanded that the County and the FOC recognize it as the bargaining representative of this position. The FOC refused this demand. After attempting without success to negotiate an agreement to include the new position in its unit, Petitioner filed this unit clarification petition in June 1996.

The current administrative secretary to the FOC is Beverly Brittain. Brittain types correspondence and reports for the FOC. These have included flow charts and memos to employees concerning office procedures. They have also included, on occasion, memos to the County Administrator or the Chief Judge regarding labor relations issues. Brittain types employee performance evaluations. She types disciplinary notices. Brittain also types the FOC's personal notes on meetings he has had with employees, including both staff meetings and meetings related to discipline. These are notes for the FOC's personal use, and are not made part of the employee's personnel file. Brittain is occasionally included in discussions between the FOC and the deputy FOC regarding discipline, performance evaluations, and office procedures. The FOC has asked her for her input on these matters on occasion. Brittain types grievance answers for the FOC. She prepares budget documents, including doing some of the calculations. She answers the phone. Brittain orders supplies for the FOC office. Brittain maintains daily calendars and screens calls for both the FOC and the deputy FOC. She also keeps track of who is in the office and who is out, and can approve time off if neither the FOC nor the deputy FOC is there. Formal personnel files for FOC employees are kept in the County Commissioners' office, but the FOC maintains reference files on employees, and Brittain has access to these files.

Negotiations for an economic reopener to the FOC contract took place in 1996. At that time, the current Chief Judge appointed the FOC as the representative of the Circuit Court for any and all labor relations matters involving FOC employees. The County Administrator served as the chief negotiator for the Employers. Brittain did not attend any of these negotiation sessions, and there was no indication in the record that she typed any material for those negotiations.

In about the fall of 1997, the County Administrator gave the FOC a copy of the last contract on computer disk. The FOC prepared, and Brittain typed, a copy indicating all deletions, additions and language changes which the FOC wanted to see negotiated into the new contract. Brittain also typed documents and correspondence directed to the County Board of Commissioners relative to these recommendations, including discussion of areas which the FOC would like to see addressed in the contract but for which he had no specific language proposals.

At the time of the hearing in February 1998, the most recent collective bargaining agreement for the FOC unit had expired. The parties had scheduled their first negotiation session. The Chief Judge had again appointed the FOC to serve as his representative in bargaining. The FOC indicated that both he and the deputy FOC would be attending negotiating sessions. There were no plans to have Brittain attend negotiating sessions. It appeared that the County Administrator would once again be the chief negotiator, and that several county commissioners might also serve on the Employers' bargaining team. The County Administrator told the FOC that if the FOC wanted to submit written proposals, he should prepare these proposals himself and the two of them would then

sit down and go over them before the Employers presented their first proposals to the Petitioner. According to the uncontradicted testimony of the FOC, the Chief Judge indicated to him that he wanted no direct involvement in the negotiations, and that the Judge's staff would not be available to help with matters pertaining to the negotiations. The FOC testified, however, that he planned to give the Chief Judge reports on the progress of bargaining.

Discussion and Conclusions of Law:

As noted above, the office of the FOC is a part of the 40th Judicial Circuit Court. Under the 1997 amendments to the revised Judicature Act, Chapter 5, a county is the employer of county-paid employees of the circuit court in that county. MCL 600.591, MSA 27A.591. The statute provides that the county, in concurrence with the chief judge, has the authority to establish personnel policies and other terms and conditions of employment for employees of the court. It also provides that in the event the county and the chief judge do not agree on the exercise of their authority on these matters, the county has the authority to establish policies and procedures relating to compensation, fringe benefits, pensions, holidays, and leave, while the chief judge has the authority to establish policies and procedures relating to work schedules, discipline, grievances, personnel records, probation, hiring and termination practices, and other personnel matters. Because the ultimate authority over the terms and conditions of employment of circuit court employees is, by statute, split between the county and the chief judge, the county and the chief judge are effectively co-employers for collective bargaining purposes. See *St. Clair Prosecutor v AFSCME*, 425 Mich 204, 229-233 (1986). We note that we have previously held that a county prosecutor is the statutory co-employer with the county of all the employees in his office. *Berrien County*, 1987 MERC Lab Op 306. Since Petitioner's bargaining unit includes employees in the county prosecutor's office as well as the FOC, there are actually three co-employers with the right to participate in collective bargaining for this unit.

We have long held that a public employer, regardless of its size, is permitted to designate one clerical employee as a confidential, and to exclude that employee from participating in collective bargaining, even if that employee has never performed any confidential labor relations work. *Dickinson County Road Commission*, 1973 MERC Lab Op 745; *City of Frankfort*, 1984 MERC Lab Op 731; *Village of Kalkaska*, 1997 MERC Lab Op 481.

The Employers argue that the FOC is entitled to a confidential secretary under this rule. They argue that the FOC has been designated by the Circuit Court as the employer of the FOC employees, that he has full authority to negotiate collective bargaining agreements, interpret contracts, and handle the day-to-day operations of the FOC's office. According to the Employers, Brittain's exclusion from Petitioner's bargaining unit is appropriate because she is the only individual designated as confidential within the FOC.

In *Lapeer County*, 1978 MERC Lab Op 921, the issue was whether the county acted lawfully when it unilaterally created a new confidential position, secretary to the Board of Commissioners. A MERC administrative law judge found that the contract in effect at that time covered both the general county unit and the unit of District Court employees. He concluded that despite the fact that

the District Court had designated the County as its bargaining agent, each employer - the District Court and the County - was entitled to a confidential clerical exclusion.

The District Court and the County in that case, however, were separate employers. In *Wayne County*, 1988 MERC Lab Op 234, we held that a co-employer is not automatically entitled to a confidential exclusion. In that case, the county clerk, county treasurer, and register of deeds were found to be co-employers with the county of employees working in their respective offices. We declined, however, to permit the secretaries to these elected officials to be excluded from the unit as confidential, noting that the actual participation of these elected officials in collective bargaining was minimal. Since in this case the Chief Judge (or his representative, the FOC), is at most a co-employer with the county, he is not entitled to an automatic confidential exclusion.

Both the concept and the definition of a “confidential employee” was borrowed from the National Labor Relations Board (NLRB). A “confidential employee” is an employee who assists and acts in a confidential capacity to a person or persons who formulate, determine, and effectuate management policies with regard to labor relations. Under PERA, however, the number of confidential exclusions is to be limited to those employees necessary to perform the required confidential duties. *Swartz Creek Community Schools*, 1988 MERC Lab Op 848. An employer bears the burden of showing the justification for additional confidentials beyond the one confidential employee to whom it is entitled, and the employer’s administrative convenience alone is not sufficient to meet this burden. *City of Saginaw, City Attorney*, 1991 MERC Lab Op 253. For example, in *City of Saginaw* we found that an employer was not entitled to designate a third employee as confidential where the two excluded clerical positions had full work loads, but most of their work was not confidential. We held that the employer could feasibly reassign some of their work to nonconfidential secretaries so that they could adequately perform all the necessary confidential duties. The burden is on the employer to show its need for an additional confidential exclusion, even if the employee sought to be excluded works for a member of the employer’s bargaining committee. *City of River Rouge*, 1971 MERC Lab Op 603; *City of Riverview*, 1983 MERC Lab Op 400. In *Monroe County Probate Court*, 1990 MERC Lab Op 880, we held that in order to meet its burden, the employer must show that the positions it seeks to exclude must have actually performed confidential labor relations work, and also that such work could not feasibly be reassigned to minimize the number of confidential exclusions. See also *Detroit Central City Community Mental Health*, 1981 MERC Lab Op 620; *Williamston Schools*, 1994 MERC Lab Op 1062; *City of Mt. Clemens*, 1997 MERC Lab Op 625.

“Confidential labor relations work” is work involving information relating to the collective bargaining process to which the union should not have access. For example, a secretary who merely types answers to grievances and disciplinary notices is not performing confidential work, as we define it, because the union may eventually see these documents. *City of Saginaw*, 1984 MERC Lab Op 1167. Likewise, mere access to budget information is not sufficient to make an employee confidential, for the same reason. *L’Anse Creuse Public Schools*, 1972 MERC Lab Op 868.

The NLRB has held that access to confidential business information by employees is not enough to make them confidential in the labor relations sense. *Fairfax Family Fund, Inc.*, 195 NLRB 306. We have held that employees should not be precluded from participating in collective bargaining

because they have access to information not available to the general public or to employees in general. *Huron Intermediate School District*, 1980 MERC Lab Op 85; *New Buffalo Bd. of Ed.*, 1968 MERC Lab Op 846 (confidential student records); *Wayne-Westland Community Schools*, 1976 MERC Lab Op 847 (confidential employee information); *City of Muskegon Heights*, 1979 MERC Lab Op 1047 (knowledge of police chief's decisions on officer misconduct allegations). As we noted in *City of Muskegon Heights*, we do not assume that because an employee is included in a bargaining unit that the employee will breach his or her employer's confidence or misuse sensitive information. Likewise an employee who may have physical access to confidential labor relations information, but does not need to see it to perform his or her job, is not confidential. *Centerline Public Schools*, 1980 MERC Lab Op 795.

In this case, Brittain has performed some work which is clearly confidential. She typed a document intended for the County Administrator and County Commission in which the FOC's made suggestions for changes in the new contract. According to the record, she has also typed memos to the County Administrator and Chief Judge concerning (unspecified) labor relations issues. Access to confidential communications regarding collective bargaining is confidential work. *Benton Harbor Bd. of Ed.*, 1967 MERC Lab Op 743.

Brittain also regularly types the FOC's personal meeting notes, including notes about disciplinary meetings. This gives her access to information which might impact on a grievance. Any department head or lower-level supervisor, however, might have his or her secretary type personal notes of this sort. Were we to find this to be confidential labor relations work, the rights of a substantial percentage of all clerical employees to participate in collective bargaining might be cut off.

As noted above, the Employers must show that the confidential work performed by Brittain could not feasibly be reassigned to minimize the number of employees excluded as confidential. In this case, unlike *Wayne County, supra*, the co-employer Court, through the FOC, is taking an active role in collective bargaining for its employees. However, the County Administrator continues to serve as the Employers' chief negotiator for the FOC unit, and the record indicates that most of the confidential clerical work for these negotiations will continue to be performed by the administrative assistant in the County Commissioners' office. Moreover, there are two confidential clerical employees in the County Commissioners' office, both of whom work only two floors above the FOC. Although the County has approximately four other bargaining units, there is no indication in the record that the amount of confidential labor relations work is so large that neither of these employees could be lent to the FOC to perform an occasional confidential task. In addition, although the Chief Judge has stated that he does not want to make his staff available to the FOC for this purpose, the record suggests that there are employees of the Circuit Court on the floor above the FOC who might be able to assist him.

For the reasons set forth above, we find that the Employers have not met their burden of showing the need for an additional confidential exclusion. We find, therefore, that the position of administrative secretary to the Lapeer County Friend of the Court should not be excluded as a confidential employee from participating in collective bargaining.

Order

Petitioner's request to clarify its unit consisting of all permanent full-time employees employed in the Office of the Lapeer County Friend of the Court (FOC) and all court referee/enforcement secretaries employed in the Lapeer County Prosecutor's Office, excluding the FOC, Deputy FOC, and attorney referees, is granted. The position of administrative secretary to the Lapeer County Friend of the Court is hereby added to this unit.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____