

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
MINERAL POINT EDUCATIONAL SUPPORT PERSONNEL
Involving Certain Employees of
MINERAL POINT SCHOOL DISTRICT

Case 25
No. 56836
ME-960

Decision No. 22284-C

Appearances:

Attorney Mary E. Pitassi, Legal Counsel, Wisconsin Education Association, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Mineral Point Educational Support Personnel.

Kramer, Brownlee & Infield, L.L.C., by **Attorney Eileen A. Brownlee**, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of the Mineral Point School District.

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

Mineral Point Educational Support Personnel filed a petition on September 9, 1998, with the Wisconsin Employment Relations Commission to clarify an existing bargaining unit of employees of the Mineral Point School District by including the Labs Technician. Karen J. Mawhinney, a member of the Commission's staff conducted a hearing on the matter on January 15, 1999, in Mineral Point, Wisconsin. The parties submitted briefs by January 30, 1999. The District, contrary to the Union, contended the Labs Technician is a confidential employee who should not be included in the bargaining unit. The parties stipulated that in the event the employee is not held to be confidential, she should be added to the bargaining unit.

Dec. No. 22284-C

The Commission issued Findings of Fact, Conclusions of Law and Order Clarifying Bargaining Unit on March 11, 1999, (Dec. No. 22284-A), determining that the Labs Technician was not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., and that the employee was therefore included in the bargaining unit.

The District petitioned the Circuit Court of Iowa County for review. On November 1, 1999, the Circuit Court, in Case No. 99-CV-38, remanded the matter to the Commission for purpose of further hearing on the scope and extent of duties of the Labs Technician. The Commission accepted the remand and additional hearing was held on March 31, 2000, in Mineral Point, Wisconsin, before Examiner Mawhinney. The parties completed filing briefs by May 17, 2000.

The Commission having reviewed the record and being advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order Clarifying Bargaining Unit.

FINDINGS OF FACT

1. The Mineral Point School District, herein the District, is a municipal employer with offices at 705 Ross Street, Mineral Point, Wisconsin 53565.

There are two bargaining units of District employees – the professional employee unit and the support staff unit.

2. Mineral Point Educational Support Personnel, herein the Union, is a labor organization functioning as the collective bargaining representative of the District support staff unit with offices located at 960 North Washington Street, Platteville, Wisconsin 53816.

3. The Union and the District are parties to a 1996-98 collective bargaining agreement which contains the following recognition clause:

The Board of Education of the Mineral Point Unified School District hereinafter referred to as the “Board” hereby recognizes the Mineral Point Educational Support Personnel, affiliated with the South West Education Association, hereinafter referred to as the “Association”, as the legally recognized sole and exclusive negotiating agent for all regular full-time and regular part-time educational support staff employees of the Mineral Point School District, excluding administrative, supervisory, managerial, confidential, professional employees, casual employees, substitutes and seasonal employees. The excluded positions are the secretary to the Superintendent and the district Bookkeeper. This is pursuant to the provisions of Sec. 111.70 of the Municipal Employment Relations Act. If the position of district Bookkeeper is eliminated

or changed while the incumbent is still employed, said employee shall have the right to bump back into this bargaining unit based upon years of seniority earned while a bargaining unit member.

The District has two confidential employees who both parties agree are appropriately excluded from the support staff bargaining unit — the Bookkeeper, Marsha Kjelland, and the Administrative Secretary, Jean Flanagan.

4. In early 1998, the District created a position entitled Labs Technician, which would be responsible for setup, maintenance, overseeing and training related to the District's computer systems. In August of 1998, Cindy Schaaf was hired to fill this position. Her individual contract indicates that she is not subject to the support staff unit collective bargaining agreement. Her job description is as follows:

JOB TITLE: LABS TECHNICIAN

QUALIFICATIONS:

Education: High School Diploma

Training: On the job and classwork to keep current with technology.

Skills: Ability to keep technology and programs operational. Ability to take equipment apart and reassemble.

Licenses:

Certifications:

Other: Be flexible and able to work with staff and students. Must be willing and able to learn new ways of support and accept changes. Must have a workable knowledge of machinery.

REPORTS TO: Building Principal.

SUPERVISES: Computers Labs and A/V work area.

JOB GOALS:

1. To stay proficient so as to assist staff and facilitate programming.
2. To manage technology and A/V in such a manner that it is accessible to meet the needs of teachers/and students.

ESSENTIAL FUNCTIONS:

1. Possess current knowledge of network products, services, applications and operations at a level sufficient to select, install and help train users on an efficient LAN/WAN.

2. Experience which demonstrates a broad knowledge of technologies, mainframe, local area networks and their associated software, support and maintenance.
3. Possess experience maintaining, set-up and supporting computer stations, including diagnostics and problem solving. Also experience using file server monitoring and control tools.
4. Assist in the development of the computer education program of the MS/HS.
5. Cooperate with IMC director and staff to determine the appropriate use of technology for instruction in the MS/HS.
6. Work with the Curriculum committees to determine appropriate use of technology for instruction. Preview and recommend to staff software programs to meet instructional objectives.
7. Ensure compliance with software licensing and report any unauthorized software on district computers to the building principal.
8. Maintain and troubleshoot hardware/software to keep computer labs operational.
9. Provide and maintain TV system, AV equipment, photo copiers and fax machines.
10. Maintain an accurate and up-to-date inventory of technological inventory, the districts AV machines and software.
11. Help staff operate and understand AV equipment.
12. Order appropriate materials and supplies.

REQUIREMENTS OF ESSENTIAL FUNCTIONS:

SIT; Occasionally

STAND: Constantly

WALK OR MOVE THROUGHOUT WORKSITE: Constantly

DRIVE: Occasionally

TALKING: Yes

SEEING: Yes

HEARING: Yes

FEELING: Yes

TASTING/SMELLING:

5. The Labs Technician's duties include setting up, maintaining and supporting the District's computer systems and audio-visual equipment, training and assisting District staff in the use of computer and A-V equipment and maintaining the District news channel. Schaaf works in two buildings – the elementary school and the middle/high school. She also has duties to supervise a study hall and lunchroom. Schaaf takes care of the e-mail server and assists other staff members who have trouble with their e-mail.

If the computer server is overloaded, Schaaf goes into all District employee files and checks for big files, bad graphic files or material downloaded from the Internet. She transfers outdated files to a disk for staff or teachers. Schaaf can assign passwords to employees or they can choose their own passwords. Schaaf can go into the computers without a password or user name for others. She has a list of passwords that are issued to the staff members for a program that has grades and attendance records.

Schaaf is the only employee in the District who has access to all computer files. Her job has evolved over time to working on the network portion or server, rather than building and fixing individual computers. She purchases computers, parts, software or the licensing, the servers and the programs that go on them. She updates programs for grades, attendance, student records and food service. Schaaf works independently and her hours vary depending on the District's needs. She may work on a weekend if necessary. She does not have a key to the vault where the servers are kept, but if she is going to be working alone at night or on the weekend, she is given a key. She is familiar with software licensing agreements and she makes sure that the District complies with those agreements. She keeps records on the licensing for software.

6. Schaaf has never participated in preparing collective bargaining proposals, done any costing of collective bargaining proposals for the District, nor sat in on management meetings or closed meetings of the Board of Education where confidential labor relations matters were discussed. She has never reviewed the content of any computer files dealing with collective bargaining, employee discipline or any other labor relations matters. She has not participated on behalf of the District in the grievance procedure nor participated in preparing cases for arbitration or for other labor relations matters. She has not been asked to work with the District's other confidential employees or administrators to prepare materials used in collective bargaining.

While she has access to computer files involving confidential labor relations matters, her duties do not require her to review the content of the files.

7. When the District Superintendent, Vincent Smith, began his District employment, he used the computer folder and drive of the former superintendent. In 1999, Schaaf worked with Smith to go through all the files of the former superintendent, open them to determine which ones were to be copied into Smith's own folder and drive and transfer or delete them. Schaaf was present when Smith reviewed the contents of the files or documents in the files, but she did not read them. Smith did not know how to delete them, so Schaaf helped him. Schaaf saw one document that had the word "union" on the top of the page and assumed that the document pertained to union matters, but she did not know what it contained. Schaaf also helped Smith recover some files that had been deleted by an employee who left the District.

Smith participates in collective bargaining for both the teachers and support staff bargaining units and supplies information to the Board's negotiation committees. Smith keeps everything he has written to Board members on the computer, including matters about bargaining strategy and the status of negotiations. The Bookkeeper assists Smith in bargaining by preparing financial information and cost projections. The District Secretary handles Smith's correspondence.

Smith evaluates employees and keeps evaluations on the computer, along with a copy in the personnel file. Smith keeps material on investigations into grievances and investigations into allegations of employee misconduct on the computer. Smith does not want Schaaf to read his computer files regarding employee misconduct or bargaining materials.

Smith trusts Schaaf to act with integrity in performing her job. He has never asked her to assist in collective bargaining or read any documents pertaining to collective bargaining.

8. Schaaf was aware that someone gained access to the Bookkeeper's computer and destroyed some files. The Bookkeeper called Skyward, a company that has bookkeeping software, to fix the problem. Schaaf was gone that day or she would have helped the Bookkeeper. Schaaf is not aware of any other person gaining unauthorized access to the District's files.

9. The Middle School/High School Principal is Ted Evans. He is also Schaaf's supervisor. Evans has asked Schaaf to check on Internet usage or abuse. If Schaaf discovers misconduct, she gives the employee's name to Evans, and he imposes any discipline. Schaaf has found inappropriate materials that were downloaded from the Internet and gave the materials to Evans. Evans has never asked Schaaf to read documents pertaining to collective bargaining, grievance investigations, employee evaluations or employee misconduct.

10. Steve Gorder is a consultant for technology with the District, and his position is funded through a grant. He has been developing the District's web site. Gorder works in the elementary school building. Gorder could have access to the District's files at the middle and high school if he were using a computer in that building. The computers in the elementary building use an Apple format, while the computers in the middle and high school use Microsoft Windows format. Gorder has the expertise to check Internet usage or abuse by employees.

11. The incumbent in the Labs Technician position does not have sufficient access to, knowledge of or participation in confidential matters relating to labor relations 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 Labs Technician is not a confidential employee within the meaning of Sec. 111.70(1)(i), Stats., and, therefore, is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

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

ORDER CLARIFYING BARGAINING UNIT

The Labs Technician shall be included in the bargaining unit represented by the Union.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

1 dissent.

James R. Meier /s/

James R. Meier, Chairperson

MINERAL POINT SCHOOL DISTRICT

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

BACKGROUND

In April 1998, the Mineral Point School District posted the position of Labs Technician. The person occupying this position would be responsible for setup, maintenance and training regarding the District's computer systems. In August 1998, Cindy Schaaf was hired by the District to fill this position. The Union is seeking to have the Labs Technician added to the bargaining unit, but the District maintains that the position is held by a confidential employee and, therefore, should be excluded from the unit. On remand, the parties stipulated that the only issue is whether or not the Labs Technician is a confidential employee.

POSITIONS OF THE PARTIES

The District

There is no real dispute that the person filling the position at issue has access to confidential information including collective bargaining information, personnel evaluations, grievance data and all other information of a confidential nature that is put on the District's computers. Her access to this information is greater than for any other employee in the District. This access makes the Labs Technician a confidential employee.

The District takes issue with the determination that Schaaf never used this access. Her testimony at the first hearing was that she had in fact assisted District administrative personnel in accessing such information on a couple of occasions. Her testimony at the second hearing was that she accessed confidential information when assisting Superintendent Smith transfer and/or delete files belonging to the former Superintendent. The fact that she has not accessed other confidential information is not because she is unable to do so or unauthorized to do so, but it is because she has a level of personal honesty and integrity that does not permit her to do so. Thus, the District submits that the evidence contradicts the Commission's previous finding that Schaaf had not accessed confidential information.

The District notes that under prior decisions of the Commission, even *de minimis* access or exposure to confidential materials has been sufficient grounds to excluding employees from bargaining units. If the employee in question is the only one available to perform legitimate confidential work and the employer exercises good faith in establishing the position,

the employee will be found to be confidential. Schaaf is the only person who has access to confidential information who is not already classified as a confidential employee. The Commission has a number of decisions in which *de minimis* access to confidential information has created confidential status, and an equal number of cases in which it has been insufficient to create such status. Because of this lack of uniformity in the Commission's decisions, the District states that the time is ripe for the Commission to recognize the need for the employer to employ staff who can access that computer network technology without restriction. Employees holding technology coordination positions should be deemed confidential.

The District also contends that there is an ambiguous requirement that an employee's access to confidential information must rise to a certain level. In some cases, no such requirement exists while obviously more has been required in other cases in which *de minimis* access is insufficient. The District contends that access is access. The Commission appears to acknowledge this reality in cases where it finds *de minimis* access sufficient to confer confidential status. Such an interpretation is consistent with the primary reason for excluding confidential employees from bargaining units. It ensures that employees with access to confidential information will not be placed in a position where their loyalties are divided, and employers have some measure of confidence that their bargaining data, planning and strategy will not be compromised. The only thing preventing access by Schaaf to this type of information is Schaaf herself. When the Commission has elected in this case and others to hold that more than *de minimis* access to confidential information is required in order for an employee to be confidential, such an interpretation is inconsistent with the purpose of the law. Access is access. Confidential information is either compromised or it is not. There is no such thing as "nominally compromised."

The District submits that it is not reasonable to have a position which requires unrestricted access to all the District's records, including confidential bargaining information, while at the same time, rely on the person holding the position to put on a blindfold and not peek. Such an expectation flies in the face of the purpose of the statute and of the reality of current computer technology needs.

There is no assertion that the District acted in bad faith in creating the Labs Technician position. There is no dispute that the incumbent has access to confidential information and has accessed such information when assisting other employees. No one argues that Schaaf's duties could or should be assigned elsewhere. The District's argument that the Labs Technician position is confidential is based on the law and on the fact that developing and maintaining a computer network requires a competent individual having unrestricted access to that network.

The Union

The Union argues that the Labs Technician position is not confidential under decades of WERC decisional precedent. Based on the record that was developed in two days of hearing,

the incumbent does not participate in any meaningful way in confidential matters pertaining to labor relations. Schaaf testified regarding her lack of familiarity with the collective bargaining process. The only conclusion possible from her testimony is that she neither knows much about nor has participated in bargaining toward a labor contract. The record also shows that the Labs Technician does not participate in grievance investigation and processing, and that she has never been given a directive by either Smith or Evans to read documents pertaining to grievance investigations or employee misconduct. While Evans asked Schaaf to check Internet usage on District computers, he did this at random, rather than direct her to look at the potential abuse of any specific employee. Furthermore, Schaaf had no knowledge of confidential matters pertaining to labor relations, and she has not been required to develop any such knowledge in performing her technical support duties.

Consequently, the District's entire argument rests on only one of the three possible grounds for finding the Labs Technician to be a confidential position – access, and access alone. The Union asserts that the District is concerned that she has potential access to confidential information based on her access to all materials kept on computers in the District, and the District is claiming that she has exercised actual access to such information. Neither claim is sufficient to warrant the position's exclusion as confidential.

The Union states that the WERC has made it clear that the mere possibility of access is not sufficient to render a position confidential, and the Commission will not exclude positions from a bargaining unit based on future job duty changes or assignments, due to their speculative nature. Ten years ago, the Commission decided one of the central issues in the instant case – whether a position with potential to access information by computer, perhaps without authorization, is confidential. In WAUKESHA COUNTY, DEC. NO. 26020-A (WERC, 9/89), the Commission found the positions of Computer Operator and Network Support Technician were not confidential, where the employer had alleged that their access to the computer gave them potential access to all computer-maintained records. The Commission stated in that case that the critical question was whether a position's actual job responsibilities required sufficient access to, knowledge of or participation in confidential labor relations matters. The Commission concluded that none of the position's actual responsibilities required that the employees have actual access to specific confidential data and thus, found the employees were not confidential.

The Union contends that the WAUKESHA COUNTY case suggests the need for employee engagement with the material for the employee to be confidential. There is no evidence that the incumbent here has ever engaged the material in any meaningful way or actually read a file. The Commission was correct in its March 1999 finding that the Labs Technician's duties did not require her to review the contents of files, and that the District had never authorized her to explore confidential files. The Commission's conclusion was reasonable, based on the record and past decisional precedent, and the Commission should not reverse it now.

The Commission has also ruled on the question of whether accidental access to confidential material might render a position confidential. In BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT, DEC. NO. 16902-D (WERC, 11/92), the Commission found that a part-time Administrative Assistant to the Fiscal Manager was not a confidential employee based on the potential that the employee would overhear confidential conversations, where that likelihood was minimal at best. The Commission also correctly noted that the potential that an employee would abuse their general access to the computer system to gain actual access to confidential matters is not sufficient to find an employee to be confidential.

The Union notes that the District appears to be concerned that it must rely on the honesty of the Labs Technician not to exceed the scope of her job and authorization. The District should trust the Labs Technician to do her job just as it holds other employees to a certain level of trust. The Association argues that this scenario is no different than one involving a custodian with a set of master keys who might exceed his authorized duties. Injecting the concept of prior restraint into the field of labor relations by punishing an employee for a mere potentiality of access is neither necessary nor good labor policy.

Schaaf showed Evans how to use a different computer to get his files on one occasion, and showed Smith where all the files were when he started as Superintendent. She transferred Smith's files from one computer drive to a new drive for Smith. She appears to have seen some of the files briefly only because she was assisting Smith in completing the transfer process and he did not know how to delete computer files. She could have shown him how to delete the files or turned away when she opened them. Schaaf testified that she did not read them and has no clear idea of their contents. Such access was clearly *de minimis*, and the Commission has consistently held that such *de minimis* exposure to confidential material is insufficient to warrant exclusion from a bargaining unit. The exceptions, such as an employee working closely with another performing confidential work, or being the only employee to perform confidential work, do not apply in this case. There are three other employees who could perform portions of the Labs Technician's duties that might theoretically involve confidential documents.

The Union asserts that the rationale for conferring confidential status – that management has a right to undivided loyalties from those who help it stake out its positions – simply does not apply. Moreover, the Commission has held that employers must not exclude an inordinately large number of employees by spreading a limited quantity of confidential work among employees. An interpretation that excludes employees with *de minimis* access to confidential information from bargaining units would weaken existing units and isolate employees in computer and information service fields into groups too small to form new units or have any strength in a unit. With the burgeoning use of computers and computer networks in the workplace, and the increase of skilled professional and technical staff to service them, this interpretation could affect countless employees and bargaining units across the state.

In Reply – The District

The District responds by stating that its position in this matter is that “access is access” and any attempt to determine confidential status based on the quantity or frequency of access is an error of law. While the Union cited several cases where the Commission found potential access alone insufficient to exclude an employee from a bargaining unit, there was an implicit assumption in those decisions that access to confidential materials was unauthorized and, therefore, access was insufficient to justify an exclusion from a bargaining unit. See WAUKESHA COUNTY, DEC. NO. 26020-A (WERC, 9/89). While the Union apparently believes that because Schaaf has seldom accessed confidential computer files she is not authorized to do so, nothing in the record supports the conclusion that she is not authorized to access those files. In fact, Schaaf testified that she was authorized to access every file stored on the District’s computers and had recently been going through all of the files due to a server overload problem. Thus, this case is distinguishable from WAUKESHA COUNTY because Schaaf is authorized to access all District files. The Union’s analogy to the custodian who misuses master keys is inapposite under the facts of this case.

Although the Union argues to the contrary, the Commission has determined that *de minimis* access may be sufficient to create confidential status in cases where the position at issue consists of one employee and where there is no evidence that other employees who are already classified as confidential are available to perform the work. There was no evidence at either hearing that would support a conclusion that anyone else is capable of performing the functions that Schaaf performs.

The Union has urged the Commission to view Schaaf’s access to confidential files as only a mere possibility and argues that this mere possibility is insufficient to confer confidential status. Paradoxically, the Union argues that Schaaf could possibly set up the computer system in such a way that she would have no access to confidential information and that the District could possibly train other confidential employees to perform her job. The fact remains that Schaaf is the only person available to perform her work. The Union’s apparent solution, which would require retraining employees who have no computer expertise and require reconfiguring the computer system, inevitably would constitute a hardship on the District. The District is not required to do this. See EAU CLAIRE SCHOOL DISTRICT, DEC. NO. 17124-B (WERC, 6/95).

While the Union has asserted that the exclusion of the Labs Technician position would violate the anti-fragmentation policy established by the Commission, neither party is trying to establish a bargaining unit consisting of the Labs Technician’s position. The anti-fragmentation policy is designed to prevent an unwarranted number of bargaining units being established under one employer. The anti-fragmentation issue does not apply here. The Union uses this policy as a conduit to argue that the exclusion in this matter would violate the WERC’s prohibition against spreading confidential work among an inordinately large number of employees to prevent their inclusion in a bargaining unit. However, The District asserts

that there is no evidence in this case that the establishment of one position, the duties of which are performed by one person and cannot be performed by any other person, is an attempt to spread confidential work among an unnecessarily large number of employees. There has been no case to date in which the WERC has determined that the establishment of a single confidential position under the circumstances presented here is spreading confidential work among an inordinately large number of employees.

The District asks that the Commission reverse its decision and determine that the Labs Technician is a confidential employee.

In Reply – The Union

The Union takes issue with the District's statement that there is no dispute that the employee in the Labs Technician position has access to confidential information regarding labor relations. The Union begs to differ – the incumbent has potential, not actual, access to such information. While Schaaf has arguably had actual access on three occasions, the degree of such access is clearly *de minimis*, and the Union does not concede that she has had any actual access at all. It was not clear from her testimony that she actually opened any files to show Evans how to use a different computer to get his files or when she showed Smith where all the files were when he first started. She did not read any documents and only glanced at them for seconds. While one document had the word "union" on top, Schaaf did not know whether that document had been sent to the Union or was even confidential. Her fleeting exposure to documents, if they were confidential, does not rise to the level of actual access to them.

The District states that "access is access" and that the Commission appears to acknowledge such in decisions determining that *de minimis* access is sufficient to create confidential status. However, the Union argues the Commission has acknowledged that specifically delineated circumstances can create exceptions to the general rule precluding exclusion of an employee performing only *de minimis* confidential work. Those exceptional circumstances involve (1) employees who work closely and consistently with another employee performing confidential work, and (2) employees who are the only ones available to perform confidential work, including situations in which other employees could be assigned such work only at great hardship to the employer. Neither exception applies in this case.

The Union also responds to the District's claim that creating confidential status with only *de minimis* access is consistent with the primary reason for excluding confidential employees from bargaining units. Based on the record, there is no reason to think that the Labs Technician has been put in a position of compromised loyalties now or that she will be in the future. Contrary to the District's mantra that "access is access," potential or *de minimis* access does not constitute access for the Commission's purposes. The Labs Technician should be added to the bargaining unit.

DISCUSSION

We have held that for an employee to be held confidential, the employee must have sufficient access to, knowledge of or participation in confidential matters relating to labor relations. For information to be confidential in the labor relations context, 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 (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 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. HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88).

The Labs Technician is responsible for installing and maintaining the computer systems for the District, training staff in the use of computers and overseeing usage of the system, working with faculty and staff to develop a computer education program and determine the appropriate use of technology for instruction, and maintaining the TV system, A-V equipment, photocopiers and fax machines for the District. Her duties also include helping employees with the e-mail system, maintaining the computer network, buying computers and software, maintaining license agreements, etc. The Labs Technician is the only employee in the District who has complete access to all the files in the District's computer systems.

We previously noted that there was nothing in the job description for the position that indicated that the Labs Technician performs confidential labor relations duties. Moreover, the incumbent testified that she had not been asked to perform any such confidential tasks, nor had she ever reviewed the contents of confidential files or attended management meetings where labor relations matters were discussed. The District has never authorized the Labs Technician to explore the content of confidential files to which she has access. The Labs Technician has not been asked to assist the other two confidential employees in doing any confidential work. Should confidential employees require the Technician's aid in accessing or downloading confidential labor relations material, the Technician can provide such assistance without reading and absorbing the data herself. Thus, the question of whether the Labs Technician is a confidential employee

arises solely from the access this employee has to all the District's computer files and, thus, the possibility that confidential information detrimental to the District's interest could become available to the Union because the Labs Technician abused her access by reviewing the **content** of a confidential file.

We have held that the potential for an employee to abuse their computer access is not a sufficient basis for finding that employee to be confidential. WAUKESHA COUNTY, DEC. NO. 26020-A (WERC, 9/89); ELCHO SCHOOL DISTRICT, DEC. NO. 27640-C, (WERC, 4/97). In WAUKESHA, we said:

In our view, the critical question is whether a position's actual job responsibilities require sufficient access to, knowledge of or participation in confidential labor relations matters. Even when a position's responsibilities require access to confidential data, we have nonetheless found a position not to be confidential if performance of such responsibilities involves a de minimus amount of employer's time.^{12/} Here, none of either position's actual responsibilities require that the employees have actual access to specific confidential data. **The potential that an employee will abuse their general access to the computer to gain actual access to confidential matters is not sufficient to find these employees to be confidential.**

(Emphasis added.)

In ELCHO, we held:

We do not find persuasive that part of the District's argument relating to Guth's access to material on Schuster's computer. If Guth were a municipal employee rather than a confidential one, the District could still direct her to avoid accessing any confidential material she would otherwise have nominal access to via a shared computer, such that her disobedience of that directive would appropriately subject her to discipline. **We will not designate an otherwise municipal employee as confidential solely on the grounds that the incumbent could have unauthorized access to confidential material relating to labor relations. When we speak of knowledge of or access to such material, we mean knowledge which is authorized and intentional, not surreptitious or secret.**

(Emphasis added.)

We think that this continues to be sound law and thus again conclude that the Labs Technician is not a confidential employee.

This is not a case where the employer is attempting to conduct its labor relations through an employee of its choice. In fact, the District in this case has given the employee in dispute no

duties dealing with labor relations. We find it significant that the Superintendent testified that he hoped that Schaaf had not read his files dealing with collective bargaining or employee misconduct. This is a clear indication that the District has no intention of giving the Labs Technician confidential labor relations duties.

For the reasons set forth above, we find that the position of Labs Technician is not held by a confidential employee and, therefore, is to be added to the bargaining unit.

As noted by our dissenting colleague, the Labs Technician does have some responsibility for monitoring employee use of the District's computer system. Unlike our colleague, we do not find that responsibility to be sufficient to warrant confidential status.

Dated at Madison, Wisconsin, this 26th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Dissenting Opinion of Chairperson James R. Meier

I find the Labs Technician to be a confidential employee based on her responsibility to monitor and report improper employee use of the District's computers. Therefore, I dissent.

It is undisputed that the Lab Technician is to monitor employee use of the District's computer system and report usage she considers inappropriate to her supervisor. She is the only District employee capable of performing this function.

In this regard, the Labs Technician testified as follows at the most recent hearing:

. . . If anyone does anything wrong on the network I go in and check to find out who it is. And then I give their names to Mr. Evans, and he takes care of discipline.

Q By anyone, who are you referring to?

A Staff, students, anybody. Like if they go in and send a message to somebody and I find out who has done it - - we have had that happen - - and I just turn that over to Mr. Evans. I found stuff in files, stuff that shouldn't be in there, stuff that's been downloaded off the Internet, things that are inappropriate. I just print that off of the screen so then we have - - because it has their log name and we know who did it - - I take that to Mr. Evans, and he takes care of it as far as that goes.

(p. 33-34)

. . .

Further, the Labs Technician's supervisor testified as follows:

Q When you asked Ms. Schaaf to check on Internet usage, is that also Internet abuse?

A Yes. That's what I'm asking her to look for. It's if there are people into places that they should not be. We have a filtering system on the Internet that she updates, on the system that she updates regularly.

Q Now, does she look at everybody or do you look at specific people that - -

A I just had her look at a couple of specifics.

Q Randomly?

A Right.

(p. 56)

. . .

Existing Commission precedent holds that an employee is a confidential employee if they have a role in investigating employee misconduct that goes beyond fact-finding. Thus, in MILWAUKEE COUNTY, DEC. NO. 22519 (WERC, 4/85), the Commission found an employee to be confidential because he both investigated employee conduct and made a determination as to whether the facts constituted a violation of work rules. Even though the employee did not recommend specific discipline when he concluded misconduct had occurred, the Commission reasoned that the employee's role was so closely related to the "process that can lead to disciplinary action" that it was appropriate to exclude him from the bargaining unit.

I find the Labs Technician to have responsibilities akin to the MILWAUKEE COUNTY confidential employee. She actively monitors the computer usage of employees. Implicit in that monitoring role is the making of judgments as to whether the use she observes involves misconduct which should be reported to the District. In my view, under MILWAUKEE COUNTY, this is sufficient to make her a confidential employee.

Employees are excluded for bargaining units as confidential employees because management ought not to have to worry about the divided loyalties of employees on whom it relies when administering or bargaining a contract. In my view, management is entitled to the undivided loyalty of the employee on whom it relies to report abuse of its computer system — particularly where there are no other District employees with the skills to perform that function.

Thus, I dissent.

Dated in Madison, Wisconsin, this 26th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson