

STATE OF WISCONSIN
CIRCUIT COURT
IOWA COUNTY

MINERAL POINT UNIFIED SCHOOL DISTRICT,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION and MINERAL POINT
EDUCATIONAL SUPPORT PERSONNEL,

Respondents.

Case No. 99 CV 38

[Decision No. 22284-B]

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

DECISION

This matter comes to the Court for purposes of review provided by Section 227.52, Wis. Stats. This proceeding was commenced by Petitioner, Mineral Point Unified School District (District), on April 6, 1999, under Wis. Stat. Ch. 227 for judicial review of a decision of the Wisconsin Employment Relations Commission (Commission), under the Municipal Employment Relations Act (MERA), Wis. Stat. Chapters 111.70-111.77. The Mineral Point Educational Support Personnel (Union) initiated this proceeding on September 9, 1998, by filing a petition with the Commission to clarify an existing bargaining unit of employees of the District. The Union requested the inclusion of the Labs Technician in the bargaining unit. The Commission found that Cindy Schaaf, who is employed by the District as a Labs Technician is not a “confidential” employee and therefore, granted the Union’s unit clarification petition thereby including the position in question within the bargaining unit represented by the Union.

STANDARD OF REVIEW

This court must uphold an administrative agency's findings of fact if they are supported by relevant, credible and probative evidence upon which reasonable persons could rely; we may not substitute our own judgment in evaluating weight or credibility of evidence. *Larson v. LIRC*, 184 Wis. 2d 378, 386 n.2, 516 N.W.2d 456, 459 n.2 (Ct. App. 1994). This 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. Section 227.57(6) STATS. "Substantial evidence" necessary to support an administrative decision is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of La Crosse Police & Fire Comm'n v. LIRC*, 139 Wis. 2d 740, 765, 407 N.W.2d 510, 520 (1987). *Cadott Education Ass'n. v. WERC*, 197 Wis. 2d 45, 540 N.W.2d 21 (Ct. App. 1995).

The general rule for review of conclusions of law is that reviewing courts are not bound by the agency's conclusions of law. *West Bend Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 11, 357 N.W.2d 534, 539 (1984). Our supreme court discussed the appropriate standards of review of an agency's legal conclusions and statutory interpretation in *Jicha v. DIHLR*, 169 Wis. 2d 284, 290-91, 485 N.W.2d 256, 258-59 (1992):

This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. (Emphasis in original; citations omitted).

Here the Court believes that inconsistencies as developed later require a remand for purposes of supplementing the record.

The issue presented to the Court is whether the Commission could reasonably find that the Labs Technician position in question is not a confidential position within the meaning of MERA. The Court has the benefit of briefs filed by each of the parties to this proceeding. The analysis calls for a review of the record, and the analysis will hinge upon the factual findings of the Commission. The Court shall determine whether the findings are supported by substantial evidence in the record. If so, the findings are conclusive.

The Court will first look to the definition of the position set forth in the bargaining agreement. In the definition section of the agreement between the District and MPESP, there are three critical definitions. They are as follows:

1. “Supervising Employee” is any individual who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or, clerical nature, but requires the use of independent judgment.
2. “Managerial Employee” is any individual who participates in the formulation, determination and implementation of management policy or possesses effective authority to commit the employer’s resources.
3. “Confidential Employee” is any individual who has access to confidential correspondence and files, involved in preparation for the bargaining process and grievance procedure, has substantial contact with the employer’s sensitive labor relations information, participates in the employer’s bargaining strategy planning, and participates in such employer functions in a manner other than clerical in nature and to which the union does not have access.

The agreement also allows in Article II, an exclusion for employees meeting those

definitions. The job description for this employee is found in the record at Exhibit 2. Among other functions in the job description are the following:

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 committee 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.
10. Maintain an accurate and up-to-date inventory of technological inventory, the District's AV machines and software.

And finally, the employee also has a duty to assist in training staff in understanding and use of equipment.

In prior opinions the Commission has determined:

We have said that for an employee to be held confidential, such employee must have access to, knowledge of, or participation in confidential matters relating to labor relations. For information to be confidential, it must: (a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents. DANE COUNTY DEC. NO. 22796-C(WERC, 9/88).

The Commission relied upon 12 preliminary determinations:

1. She had never participated in developing bargaining proposals. (Transcript Page 9.)

2. She did not know what costing bargaining proposals meant. Id.
3. She had never attended any executive sessions where labor relations matters had been discussed. Id.
4. She did have access to everything on the computers, including files regarding the District strategy and collective bargaining matters. She could access files from any of the management team and, in fact, had more access than the Superintendent. (Transcript Page 10.)
5. She had “never really looked” into any files on the computer that relate to collective bargaining. Id.
6. She had never been involved in preparing any reports that would affect other bargaining unit employees for layoffs, for subcontracting, for hiring or firing, or for any personnel decision. (Transcript Page 11.)
7. She did not know how her supervisor is involved in collective bargaining. Id.
8. She had never investigated any employee’s behavior that might result in discipline. Id.
9. She had never participated in the grievance procedure. Id.
10. She had never participated in preparing an arbitration case. Id.
11. She had never participated in preparing a case involving any labor relations matter. Id.
12. No other employee has the same job duties and responsibilities that she does. Id.

The District contends that the employee is the only person with unrestricted access to every file stored on every computer in the District. “It is she who sets up the network, provides passwords to other employees enabling them to access the network and nobody else in the District performs this function.” There was no evidence presented at the hearing which would support a conclusion that anyone else is capable of performing these functions, that bargaining data is kept on non-networked computers or that such computers are either in use or available. The District also contends that the Commission overlooked the breadth of

computer systems responsibilities entrusted to the employee and asks reversal. The Union supports the decision of the Commission as correct in law and fact and that failure to accrete the Labs Technician position would needlessly fragment the bargaining unit.

It is apparent to this Court that the record lacks development of the analysis of function of the subject employee. The employee's job description appears to be met in more than one of the definitions of excluded employees. It is also apparent to this Court that the employee has a "security" clearance equal to or greater than the Superintendent of the district. It was determined that this employee is the only person with that latitude of information technology and systems. It's also apparent to this Court from the transcript of the hearing that the employee is not conversant with her job description, nor line of command.

At the time the hearing was held she had been in place for approximately six months in this job category. It was apparent from the hearing that she's the only person who the District relies upon for information technology and computer systems. The full scope of her responsibilities, as apparent from the record, the job description, the contract definitions as balanced in this proceeding, all indicate to this Court that the record is not adequate to support the findings of the Commission. The Court will note that the Commission relied upon its decision in WAUKESHA COUNTY, DEC. NO. 26020-A(WERC, 9/89). In that case it appears that the subject employees were clearly part of the technical support team. The employees designated there as going into the bargaining unit were the computer operator and network support technician. The employees had "access", but it does not appear that their jobs had any characteristics of a management function requiring confidentiality.

In MANITOWOC COUNTY, DEC. NO. 8152-J (WERC, 9/97), the Commission determined that three positions with systems programmer, information systems duties required additional hearing for determination. The Court will also look to the CITY OF MILWAUKEE, DEC. NO. 11971 (1973), wherein the superintendent of police communications position being charged, as he was, with the responsibility of goals and methods of the communications bureau served in a managerial capacity and was excluded from the bargaining unit. The Court also will rely upon a decision made by the Commission in DANE COUNTY, DEC. NO. 22796-C, wherein a clerk typist of the Public Safety Communications Department was excluded from the bargaining unit.

It appears necessary to determine how much discretionary, managerial, supervisory function that the “Labs Technician” actually performs. It appears that this “Technician” has substantial input on teaching decisions, teaching curriculum development, teacher training, software content and even provides discretionary responsibility in connection with developing program material to provide for classroom use.

It is clear that there are certain technical positions which belong within the bargaining unit and which are consistent to the positions put forth by MPESP. Quoting from the Waukesha County case, MPESP contends that the computer operator and network support technician are not confidential employees, and this Court agrees, except that by definition, technical support staff may be specifically limited to being technical support staff. If that’s the case, then it appears that the Commission’s decision may be affirmed. However, this Court is not satisfied with the record in support of that premise. For example, when an employee works closely and consistently with another employee who is undisputably

performing confidential work, the Commission has found it appropriate for the first employee to be excluded from the bargaining unit, regardless of the actual degree of confidential work that employee performs, see MANITOWOC COUNTY, DEC. NO. 7116-C (WERC, 11/91) and the APPLETON AREA SCHOOL DISTRICT, DEC. NO. 22338-B (WERC, 7/87). “And the Commission has sometimes held an employee must be excluded as confidential if he or she is the only employee available to perform confidential work, including where other employees could be assigned such work only at great hardship to the employer. See TOWN OF GRAND CHUTE SANITARY DISTRICT, Dec. No. 22934 (WERC, 9/85); EAU CLAIRE SCHOOL DISTRICT, DEC. NO. 17124-B (WERC, 6/95).” MPESP’s brief at Page 18 in the footnote observes the Commission has been somewhat inconsistent in its application of this second exception. It is this “inconsistent application” which concerns the Court at this juncture.

The Commission found a position confidential when it determined that there was a reasonable likelihood that the position would be assigned additional duties which when combined with current duties would render the position confidential, see VILLAGE OF HALES CORNERS, DEC. 27605-A (WERC, 11/93). The reasonable likelihood may include an evolution of the position, enhanced duties, and growth of responsibility. That likelihood is not ruled out because it was not addressed. As noted on Page 16 of the MPESP brief, “There is no evidence from this exchange . . . there is no evidence that she read or understood . . . there is no evidence as to exactly what those files contained . . . there is no definitive record that confidential matters . . .” It is that lack of record that concerns the Court.

The record discloses a hearing was held consisting of two witnesses in 28 minutes. The record indicates only a perfunctory reference to the job title, job description and contract language. No thorough review of the employee's duties as delineated in the job description was offered. It appears the job title was given more credence than job duties.

This was a new position still in the phase of implementing its functional uses for the district. This employee was in the position for six months and appeared to be uncertain of her line of authority and emphasized her technical support duties without relating to the job description. It appears she did not grasp or was not questioned or was unprepared for the event in her apparent inability to comprehend the focus of the questions posed to her.

The record indicates she has a distinct report line of authority only to the district superintendent and the school principals. This places her in a position of autonomy and great independence within the school's line of authority.

The District has but two other confidential employees, neither of which by job title appear to carry her discretion in functioning for the district.

In view of the inadequacies of the record of the hearing pertaining to job description, contract language and the failure to relate job function to job description and duty, the Court finds the record, slim as it is, to lack substantial evidence in support of the findings of the commission.

It appears the choice of job title is a self-limiting determination and a predicate to the decision of the examiner reflected in the decision of the commission. If the employee is a technician, she belongs in the unit. If the employee is shown to be more than a technician who functions as the job description provides, then she may properly be more than a

technician and be excluded by language of the contract itself.

The awesome growth of the information systems in all walks of life is an invitation to the commission to reevaluate the “technician” in the light of function rather than the self-limiting application chosen at a time when the management information system or information technology function was in its infancy.

It appears that the evolution of management information systems, computer technology and information technology have become a compelling, driving reality in many of our commercial and governmental functions. This district is a small to medium-sized district with one employee charged with informational technology and management information systems.

This Court is taking this opportunity to remand this case to the Commission for purpose of further hearing on the scope and extent of duties which the job description of Labs Technician belies. It appears from the contract status of the employee’s job, the job description of tasks asked of this employee and the definitions contained within the contract that this employee may have responsibilities which greatly overlap one another and which the job title mistakenly limits. The Court will note that many of the decisions relating to information systems have now been given an opportunity to age, and in the process, we may perceive a vastly enlarged area of responsibility for the informational support team. It appears in this district this person is information support team, the team leader, the team technician, the team researcher, the team trainer and team manager. This employee is the team for all of the computer-based technology in this school. With the growth of dependence upon technology, this Court asks the Commission to review its findings and remand this case

for further proceeding.

The Court realizes that the record did not rise to consideration of the contract language, i.e. excluded employees and that relationship to the employee's job description, but that failure to address these questions in the record is part of what drives this Court's decision to remand further hearings.

Section 227.57(9) says the court decision shall provide "whatever relief is appropriate irrespective of the original form of the petition if the court . . . remands the case to the agency for further proceedings..." In this instance no interlocutory order appears to be required and the Court will not offer such. In view of the analytical shortfall, the Court will determine that the record is incomplete and inadequate to support the Commission's findings. The Court is not weighing the evidence except as to sufficiency and is not thereby judging credibility nor choosing an alternative interpretation of fact. The Court is merely stating in its opinion the record is incomplete and requires further hearing. Based upon a minimal record the decision of the WERC is reasonable and merits support, but it is the minimal record which troubles the Court. The decision subject of the appeal does not in this Court's opinion assist by providing uniformity or consistency. Accordingly, this matter is remanded for further hearings.

Dated: November 1, 1999.

BY THE COURT:

William D. Dyke /s/
William D. Dyke
Circuit Judge