STATE OF WISCONSIN
CIRCUIT COURT
IOWA COUNTY

MINERAL POINT UNIFIED SCHOOL DISTRICT,

Plaintiff,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and
MINERAL POINT EDUCATIONAL SUPPORT PERSONNEL,

Defendants.

Case No. 00-CV-126
[Decision No. 22284-D]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

ORDER

On September 9, 1998, the Mineral Point Educational Support Personnel (Union) (MPESP) filed a petition with the Wisconsin Employment Relations Commission (WERC) to clarify an existing bargaining unit of the employees of the District. The union requested the inclusion of the Labs Technician in the bargaining unit. The commission found that the employee who is employed by the District as a Labs Technician is not a "confidential" employee and granted the Union's unit clarification petition thereby placing the position within the bargaining unit represented by the Union.

On April 6, 1999, the Mineral Point Unified School 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 the purpose of further hearing on the scope and extent of the duties of the Labs Technician. The Commission accepted the remand and additional hearing was held on March 31, 2000, in Mineral Point, Wisconsin. The parties submitted briefs to the Commission and on September 26, 2000, the Commission held that the

Labs Technician is not a confidential position within the meaning of Wis. Stat. Sec. 111.70(1)(i), and, therefore, is a municipal employee within the meaning of Sec. 111.70(1)(i).

DISCUSSION

On review, a court may not make an independent determination of the facts. Hixon v. Public Service Commission, 32 Wis.2d 608, 629, 146 N.W.2d 577 (1966). The court is "confined to the determination of whether there was... [substantial evidence] to sustain the findings that were in fact made." E.F. Brewer Co. v. ILHR Department, 82 Wis.2d 634, 636, 264 N.W.2d 222 (1978).

A court may not "second guess" the proper exercise of the agency's fact-finding function even though, if viewing the case *ab initio*, it would come to another result. Briggs & Stratton Corp. v. ILHR Department, 43 Wis.2d 398, 409, 168 N.W.2d 817 (1969). The court must search the record to locate substantial evidence that supports the agency's decision. Vande Zande v. ILHR Department, 70 Wis.2d 1086, 1097, 236 N.W.2d 255 (1975).

In summary, as the court stated in Hamilton, 94 Wis.2d at 618:

> [T]he agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.

The Commission alleges that the Commission's view of the facts is reasonable, supported as it is by a record of substantial evidence and thoughtfully considered precedent. The Commission believes its findings are supported by substantial evidence and merit affirmation. The Commission also argued that its conclusions of law are reasonable and must be upheld.

However, both the Commission and MPESP seem to concur that: when the question on

appeal is whether a statutory concept embraces a particular set of factual circumstances, the reviewing court is generally presented with a mixed question of fact and law. Pabst Brewing Co. v. Milwaukee, 125 Wis.2d 437, 444, 373 N.W.2d 680, 684 (Ct. App. 1985).

It is argued that this Court is not bound by an agency's conclusions of law in the same manner as it is by the factual findings. Local 60, Am. Fed. of Mun. Employees v. WERC, 217 Wis.2d 602 at 607 (Ct. App. 1998), citing West Bend Educ. Ass'n v. WERC, 121 Wis.2d 1, 11 357 N.W.2d 534, 539 (1984).

The Commission claims that the ultimate determination in this proceeding turned on the underlying facts, and its ultimate conclusion that the Labs Technician does not meet the criteria that determines confidential status presents a mixed question of fact and law. The Commission argues that the ultimate conclusion that the Labs Technician is not a confidential employee, and therefore is a municipal employee who properly belongs in the bargaining unit, is reasonable.

Courts apply three levels of deference to agency conclusions of law. The MPESP contends that the highest degree of deference, "great weight," is appropriate to this proceeding. The District argues that the second-highest degree of deference, due weight, is applicable to this case. The lowest degree of deference, *de novo* review, applies 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. Jicha v. DILHR, 169 Wis.2d 284, 290-91, 485 N.W.2d 256, 258-59 (1992).

This Court will assign a due weight standard to this case because of a continuing lack of consistency, uniformity and clarity in decisions involving the confidential employee status. To some extent it appears that each case is being evaluated on its characteristics and its merits.

While this Court means no criticism of a "case by case" standard, it does nevertheless see that characteristic peeping through the framework of the confidential employee decisions and perhaps that is what is appropriate, i.e. that each is addressed on its own merit. Certainly the characteristics are substantially different. In some instances, there is more than one employee and it may be shown the characteristics of their job descriptions and duties differ.

The District argues in essence that the technological changes compel recognition that we live in a "networked environment." There can be no serious dispute that employers need to employ individuals who are capable of managing and maintaining the computer network and that this necessitates access to the network as a whole. "Rather than recognizing the reality that access is, in fact, access, the Commission is doggedly asserting that it is possible to quantify access and that, unless the level of access rises above a certain undefined level, the fact that an employee has access to confidential information is unimportant. The District maintains that this position is wholly contrary to the intent of the law."

In support of its position the District claims there is no dispute that the person holding this position has access to confidential information and has, in fact, accessed such information as assisted other employees of the District to access the information. The District has no employees other than the Labs Technician who perform the duties of the Labs Technician or who have the breadth of access to information that the Labs Technician has. This "Labs Technician", as she is unfortunately described, is in reality regularly performing management functions. She has the highest information clearance in the district and it is she who assigns the passwords to all other users. She, in fact, can access all other computers in the district.

"But I don't need password; I can go in without a password or user name for

anybody." T 1 at 11.

Without repetition the record supports the conclusion that she possesses the highest clearance; is the only full time computer information systems employee in the district and has assisted the superintendent and others in managing files. It is also shown that she has exercised discretion in performance of her duties. The application of details of the Labs Technician's job duties and the circumstances under which she is called to exercise them presents a mixed question. The application of a particular set of facts to a legal standard is itself a question of law. Nottelson, 94 Wis.2d 106, 115-116, 287 N.W.2d 763 (1980).

It is at this point where the Court feels compelled to weigh the Commission's conclusions of law.

MPESP thoughtfully and helpfully points to two decisions which assist in weighing the factors providing exceptions. For an employee to be confidential, he or she must have significant 1) access to, 2) knowledge of, or 3) participation in confidential matters pertaining to labor relations. Clark County, Dec. 19744-G (WERC 10/97); see also Portage County, Dec. No. 6478-D (WERC, 1/90); Price County, Dec. No. 11317-B (WERC, 9/89).

The Commission has found a position confidential when it determined that there was a "reasonable likelihood" that it would be assigned additional duties which, when combined with its current duties, would render it confidential. Village of Hales Corners, Dec. No. 27605-A (WERC, 11/93). The exclusion of an employee from the bargaining unit on the grounds of confidentiality is rooted in the right of a municipal employer to conduct its labor relations through employees aligned with the interests of management. CESA No. 9, Dec. No. 23863-A (WERC, 12/86). Another purpose of this practice is to avoid conflicts of interests for the

employees themselves, who might otherwise be subjected to pressure from fellow bargaining unit members. Eau Claire School District, Dec. No. 17124-B (WERC, 6/95).

Balancing the work to be performed, the number of existing and available confidential employees and the degree of disruption that would be caused to the employer's operation if confidential work were to be rerouted to other staff must be factored in this equation.

In Village of East Troy, Dec. No. 26553 (WERC, 7/90), the Commission stated that it normally will not exclude positions from a bargaining unit based on future job duty changes or assignments, due to their speculative nature. At the same time is it rational or realistic to ask this employee, the only employee in the district to access files of whatever content and still be unaware of the content? Is it rational to expect that the only employee with top user password clearance not have job assignments requiring access to classified and confidential files? The changing nature of administrative duties, management functions and information systems compels a longer horizon than that circumscribed by the current access definitions.

In the Waukesha Decision (Dec. No. 26020-A, WERC, 9/89), the positions were held not confidential, which under those facts and circumstances was reasonable but in this case there is but one employee in the entire district who holds the key to all the computer access, processes licenses, reviews contracts, assists in curriculum, repairs and builds computers and assists all persons from superintendent to secretary (and students) with use of the information technology surrounding our reliance on computers.

The emphasis in Wisconsin Council 40 on "specific involvement" with and "actual access" to the confidential material strongly suggests the reality of employee access and contact with the files that a typical Technician might not obtain in a multi-employee system. In the

Mineral Point District with one employee, the access is dictated by reality and necessity and to ask the employee to look but don't ask and don't tell is a practical monstrosity.

Wis. Stat. Sec. 111.70(4)(d)2.a., provides:

> The commission shall determine the appropriate collective bargaining unit for the purpose of collective bargaining and shall whenever possible... avoid fragmentation by maintaining as few collective bargaining units as practicable in keeping with the size of the total municipal work force. In making such a determination, the commission may decide whether, in a particular case, the municipal employees in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a collective bargaining unit.

The state of Wisconsin has enjoyed a long tradition ensuring that as many employees as can fit in an appropriate bargaining unit with which they share a community of interest be permitted to do so. Since the 1971 revisions of MERA,

> The Commission has been given the power to determine the appropriate bargaining unit, however, whenever possible it is to avoid fragmentation by maintaining as few units as practical in keeping with the size of the total work force and, in making such a determination, the Commission may decide whether employees in the same or several departments... constitute an appropriate unit [citation omitted.]

Waukesha Dist. 8, Bd. of VTAE, Dec. No. 10489-A (WERC, 11/72) Slip Op. at 6: see also Sec. 111.70(4)(d)2.a., Wis. Stats.

What is the "community of interest" that is sought in this case. There is no showing that the "Labs Technician" is part of a group of persons of similar skills, crafts, interests or aspirations.

It appears to this Court, and there is no showing to the contrary, that she is alone among all district employees in her unique job description and assignments.

This Court feels compelled to ask how the objective of Sec. 111.70(4)(d)2.a. is served by placing the Labs Technician among other unrelated municipal occupational groupings. The

Commission has interpreted Sec. 111.70(4)(d)2.a. to mean that bargaining units must permit employees the right to be represented in workable units by organization of their own choosing, which may be reasonably expected to share the unique interests and aspirations of the employees in these bargaining units. City of Madison, Dec. No. 14463-A (WERC, 7/76). With regard to confidential employees in particular, the Commission has held that employers must not exclude an inordinately large number of employees from an otherwise appropriate bargaining unit by spreading a limited quantity of confidential work among employees, since to do so would deprive those so excluded of the status of "employees" under the law. City of Manitowoc (Police Department, Dec. No. 20696 (WERC, 5/83). There is no showing that there is an inordinate number nor spreading of limited quantities of work among employees to broaden an excluded status.

Mineral Point has one Labs Technician who does the work of manager to maintenance.

To argue she is not confidential because she has not been used as a confidential employee is no more reasonable than saying she is not confidential because the district may hire others who will be so employed. This is one employee in one small district.

This Court declines to share the interpretation of compliance with Sec. 111.70(4)(d)2.a. which is urged upon it as compelling or adding support for the decision of the Commission.

The application of facts to this case seem to meet two of the four criteria for "confidential" which is defined in the contract. "Confidential" is not defined by statute, so we look to the contract as our primary source.

The contract language provides as follow:

> 3. "Confidential Employee" is an 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.

There are four factors involved. They are:

A) Access to confidential correspondence and files, involved in preparation for the bargaining process and grievance procedure;

B) Has substantial contact with the employer's sensitive labor relations information;

C) Participates in the employers bargaining strategy planning and participates in such employer functions other than clerical in nature; and

D) To which, the union does not have access (Confidential correspondence and files)

The employee has access. The union does not have access.

The position subject to this dispute appears to this Court to meet two of the criteria. Nevertheless, the Commission concludes that it's view of the trail left by the facts surrounding the other two of the four criteria overcame the first, i.e. "access" and last, i.e. "to which the union does not have access."

All parties concur that among considerations to be weighed is "access". The District says "access is access" and it is sufficient to overcome accretion. MPESP and the Commission's brief says access is not enough. Reading the contract language "access to confidential correspondence and files... to which the union does not have access," appears designed to protect confidentiality and may reasonably be seen to be the purpose of the definition.

If the protection is the objective and participation a qualifier, we still have an agreed duty of maintaining the integrity of confidential files to which the union does not have access. Reading the objective in light of the exercise of the technician's duty as a member of the unit could put the lab technician in a position of divided loyalty which the parties agree would be

unwise.

The two criteria solely relied upon by the Commission, i.e. contact with sensitive information and participation in strategy, etc., diminish the other two factors of access to confidential information not available to the bargaining unit.

The Court further notes that the cases cited in support of accretion do not appear to fit precisely within the frame of this set of facts, i.e. a sole employee with the highest security clearance who is the sole occupant of that particular department or division of the employers work force. Other cases relating to a legal assistant or a secretary or two technicians, a part time assistant to a fiscal manager or which are primarily staff positions without top clearance do not appear to fit this unique set of facts.

To suggest that the employer may rely on a disciplinary process to protect the integrity of its files against breech implies an oppressive watch dog look-over-the-shoulder environment that not even the F.B.I. or C.I.A. have obtained.

In the opening paragraph of the Commission's discussion, it makes the same analysis of the definition of confidentiality that this Court used above, i.e. access (to classified information) which is not available to the bargaining unit.

The Commission then retreats from that analysis by weighing job description and the employees performance of assigned tasks. The Commission limits the question of whether the Labs Technician is a confidential employee to contact with files and past performance of her duties. The access this employee has to all the District's computer files appears to be overcome by the Commission's reliance upon the middle criteria. 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 need not be addressed if the position is not accreted.

This Court does not share the Commission's pursuit of the possibility factor embraced by hypothesizing about "could become available." One need not postulate whether breeches or violations could or would occur. One need not anticipate disciplinary action. We need not consider a potential for abuse.

This Court is denied the opportunity by rules applicable to a reviewing Court from weighing the evidence and making a decision in conflict with that of the Commission, but the question is a mixed one of fact and law and this Court is not able to concur with the Commission's conclusion of law.

Quoting from the decision of the Commission,

> "…we have also sought to protect the employer's rights 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, 9/95) 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 the only employee in the District who has complete access to all the files in the District's computer systems."

In light of the above, the conflicting precedent of earlier decisions and the uncertainty created by such inhibits the Court's view of the situation.

As viewed by the District in its brief, Wisconsin Statutes sec. 111.70(1)(i) excludes certain employees from the definition of "municipal employee." Among the exclusions are

supervisory, managerial and confidential employees. Wisconsin Statute sec. 111.70(1) includes a number of definitions including a definition of "supervisor." *See* Wis. Stat. sec. 111.70(1)(o). The Commission's definition of "Managerial" has been honed over time and reviewed by the courts on several occasions. See, e.g., Kewaunee County v. WERC, 141 Wis.2d 347, 415 N.W.2d 839 (Ct. App. 1987); Eau Claire County v. WERC, 122 Wis.2d 363, 362 N.W.2d 429 (Ct. App. 1984).

Courts have not had a similar opportunity to review the Commission's definition of "confidential employee."

The Court cannot concur in the Commission's conclusion of law. If this question were to be decided solely on findings of fact, this Court would be compelled to confirm the decision of the Commission. But the Court cannot conclude as a matter of law that it must, despite due weight assigned to the Commission's determination, confirm the conclusion of law. By definitions applicable to this fact situation, the Lab Technician has access to confidential information to which the unit does not, she exercised discretion in performance of her duties and is a confidential employee.

The Court sets aside the decision of the Commission. The Court orders that the Labs Technician be excluded as a confidential employee.

DATED: 3-23-01

BY THE COURT:

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