

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

THREE RIVERS UNITED EDUCATORS

Involving Certain Employees of

WESTON SCHOOL DISTRICT

Case 39
No. 65700
ME-1173

Decision No. 29633-B

Appearances:

Edward J. Williams, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Weston School District.

Mary E. Pitassi, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, 53708-8003, appearing on behalf of the Weston Teachers Association and Weston Educational Support Staff.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On March 13, 2006, Three Rivers United Educators filed a petition with the Wisconsin Employment Relations Commission on behalf of the Weston Teachers Association and Weston Educational Support Staff seeking to include the Manager of Technology Services in either the professional employee or the non-professional employee support staff bargaining unit of Weston School District employees. The District asserts the Manager cannot be included in either unit because the incumbent is a managerial and confidential employee.

Hearing in the matter was held in Cazenovia, Wisconsin on August 29, 2006, before Commissioner Susan J.M. Bauman, serving as Hearing Examiner. A transcript was filed on September 12, 2006, and the parties filed written argument, the last of which was received on November 24, 2006, whereupon the record was closed.

No. 29633-B

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Weston School District, herein the District, is a municipal employer that provides educational services through its employees.
2. Weston Teachers Association is a labor organization that serves as the exclusive collective bargaining representative of certain professional employees of the District.
3. Weston Educational Support Staff is a labor organization that serves as the exclusive collective bargaining representative of certain non-professional employees of the District.
4. Prior to the fall of 2005, a member of the professional employee bargaining unit, Sally Strozinsky, served as the technology facilitator for the District. During Ms. Strozinsky's tenure as technology facilitator, the District hired numerous outside contractors and consultants to assist in ensuring that the District's technology needs were met. Deborah Tapp was one of those persons with whom the District previously contracted for services.
5. The position of Manager of Technology Services was created in the fall of 2005, after Sally Strozinsky resigned. Deborah Tapp was hired to fill the Manager position at a salary of \$35,000. The following position description for the Manager of Technology Services accurately summarizes the position's duties and qualifications:

This position is to be a management position of the District responsible for the managing and directing of all aspects of the District's technology, including but not limited to developing and implementing policies for use of District technology, preparing and implementing a budget for District technology, researching and purchasing technology needs on behalf of the District and maintaining all District technology.

Qualifications:

1. Interpersonal skills to deal courteously and effectively with students, teachers, administrators, external support services, and the public.
2. A minimum of 3 to 5 years work experience along with a strong working knowledge of each of the following: NOVELL, DOS, ISES, WSLs, K12-Planet, Plato, Kurzweil, Win School, Microsoft Excel, Microsoft Access, Microsoft Word, WORKS; networking, (CNE certification or its equivalent), internet, and email.

3. Broad experience with computers and other peripherals.
4. A record of successful program development and management.
5. Strong leadership, ability to collaborate, analytical creative problem solving ability, self directed decision making ability, excellent oral and written communication skills.

Reports To:

Superintendent

Responsibilities and Duties:

1. Maintain technology equipment and provide technical support for software applications.
2. Perform repair of all computers and peripherals.
3. Maintain inventory of hardware and peripherals.
4. Provide backup support and technical training to staff members.
5. Install, configure, maintain, and upgrade various software, hardware and networking components.
6. Design and maintain network infrastructure to ensure smooth, secure network operations, successful backup routines, and accommodations for expansion.
7. Work with outside consultants on technology related projects.
8. Communicate technology related issues and concerns to the curriculum committee and work as a team to resolve these issues.
9. Prepare and implement a technology budget.
10. Prepare and implement all policies regarding District technology.
11. Perform any other duties that may be assigned by the Superintendent.

Terms of Employment:

This position will be on a 220 day contract. The School Board will determine the salary and terms of employment.

Evaluation:

Performance will be evaluated by the Superintendent in accordance with the Board's policy on evaluation.

In addition to the Manager of Technology Services, the following District employees report directly to the District Administrator: the Principal, the Food Service Manager, the Building and Grounds Manager, the Business Manager, the Athletic Director, the Transportation Manager, and the Secretary to the District Administrator and Principal.

The Business Manager is excluded from any bargaining unit because she is a confidential employee and Building and Grounds and Food Service Managers are excluded from any bargaining unit because they are supervisors.

6. The District's computer system/network consists of over 200 computers, five servers, and fourteen printers. The District is dependent upon computers for all of its accounting functions, bills payable, payroll, financial reporting to the State, budget development, matters related to negotiations, student records and attendance, including grading, permanent records, test results, grant submissions, school performance reports to the State, year-end reports, and special education reporting, including individual educational programs (IEPs). The e-mail system is used as the primary means of communication. Computers are utilized to maintain personnel files and collective bargaining records.

7. The School Board sets the annual budget amount for technology, currently \$50,000. The Manager of Technology Services has discretion to determine how to expend these monies, including the purchase of equipment that needs to be replaced and licenses which need to be purchased or renewed. She determines which vendors and outside contractors to utilize. Teachers and other staff consult with her regarding purchase of new software or hardware, whether the monies are within the technology budget or another budget in the District.

8. The Manager of Technology Services has access to all information contained on the District's computer network-including confidential labor relations information. However, the Manager's duties do not require her to have knowledge of such confidential labor relations information.

The Manager of Technology Services has no knowledge of the District's strategy in collective bargaining or contract administration and has not calculated the cost of any collective bargaining proposals.

9. The Manager of Technology Services does not sufficiently participate in the formulation, determination and implementation of management policy or have sufficient authority to commit the District's resources to be a managerial employee.

10. The Manager of Technology Services does not have sufficient access to, knowledge of, or participation in confidential labor relations matters to be a confidential employee.

11. The work of the Manager of Technology Services does not require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education.

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

CONCLUSIONS OF LAW

1. The Manager of Technology Services is not a managerial or 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.

2. The Manager of Technology Services is not a professional employee within the meaning of Sec. 111.70(1)(L), Stats.

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

ORDER CLARIFYING BARGAINING UNIT

The Manager of Technology Services shall be included in the non-professional employee bargaining unit referenced in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

WESTON SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The first issue to be decided is whether Manager of Technology Services Tapp is ineligible for inclusion in either the professional or the support staff bargaining unit because she is a managerial or confidential employee. If she is not a managerial or confidential employee, the issue then becomes into which of the two existing bargaining units (professional and non-professional support staff) should she be placed. That second issue turns on whether she is or is not a professional employee.

Managerial Status

In *MILWAUKEE v. WERC*, 71 Wis. 2d 709, at 716 (1976), the Wisconsin Supreme Court affirmed the Commission's definition of managerial employees as:

. . . those who participate in the formulation, determination and implementation of management policy or possess effective authority to commit the employer's resources.

The Court went on to discuss why the policy component of the Commission's managerial definition was consistent with the Municipal Employment Relations Act. The Court stated at 717 the following:

The exclusion of management personnel, as well as certain other categories, such as supervisors and executives, indicates that not all municipal employees are to have the benefit of dispute resolution through collective bargaining. However, the ability of a certain category of employees to effectuate and implement management policy does not necessarily indicate that they should be precluded from protection by the statute. The definition that has been formulated by WERC effectively distinguishes those categories of employees whose interests are shared by persons engaged in a managerial capacity from those categories who are otherwise employed. By defining the managerial exclusion so as to encompass those who formulate and determine policy, as well as implement it, WERC formulated a definition which is consistent with the purposes of the Act and the legislatively expressed intent to exclude managerial employees.

Thus, it is clear that to be a managerial employee based on one's policy role, the employee must "formulate and determine policy, as well as implement it." Thus, for instance, applying this policy test for managerial status in *EAU CLAIRE COUNTY v. WERC*, 122 Wis. 2d 363 (1984), the Court of Appeals concluded that a register in probate was not a policy-based

managerial employee because the circuit court had final approval over all of the position's activities.

Lastly, it is important to emphasize that not all policy determinations qualify an individual as a managerial employee. Consistent with the purpose of the managerial exclusion as one which serves to distinguish individuals whose interests are distinct from those employees in the bargaining unit, policy making must be at a "relatively high level" to warrant managerial status. TAYLOR COUNTY, DEC. NO. 24261-E (WERC, 7/97).

As noted above, the second path to managerial employee status involves the effective authority to commit the employer's resources. In KEWAUNEE COUNTY V. WERC, 141 Wis. 2D 347, at 355, (1987), the Court of Appeals affirmed the Commission's determination that "effective authority to commit the employer's resources" at a managerial level means possessing:

. . . the discretionary power to determine the type and level of services to be provided and the manner and means by which those services will be delivered and involves: . . . determining the services required, the number of persons necessary to deliver those services, and the quantity and type of equipment and supplies required to provide those services.

In VERNON COUNTY, DEC. NO. 13805-J (WERC, 4/04), we were confronted with the question of whether the County's Computer Network Administrator was a managerial employee. That Network Administrator had computer-related job responsibilities remarkably similar to those of Tapp but in addition was very involved in the both the long-term and day-to-day management policy and resource decisions of the County's Human Services Department. Although we noted that it was a "close call", we concluded that "the breadth and depth of her impact on County policy and resource expenditure" made her a managerial employee. Put another way, we concluded that the Administrator's computer-related policy and resource responsibilities alone were insufficient to establish managerial status.

Like the Computer Network Administrator in VERNON COUNTY, Tapp has substantial discretion and resource authority as to all computer-related issues and purchases. Although she has not yet developed computer-related policies, it is anticipated that she will do so. However, unlike the Computer Network Administrator in VERNON COUNTY, Tapp does not have a significant role in the broader educational policy and management issues of the District. As noted above, it was this significant involvement in broader policy and resource issues that was determinative as to managerial status in VERNON COUNTY. Therefore, under the VERNON COUNTY analysis, we conclude that Tapp is not a managerial employee.

In reaching this conclusion, we acknowledge that Tapp's effective spending authority is greater than that of the Network Administrator in VERNON COUNTY. However, as noted above in KEWAUNEE COUNTY, managerial status through resource allocation is not based on the dollar value of one's authority but rather on whether one's fiscal authority reflects managerial

level discretion as to the broader service choices. Here, that broader service choice - the District's commitment to broad integration of computer technology in all facets of the District's operation - was not made by Tapp and Tapp does not have the authority to alter that commitment.

Confidential Status

The District contends that the Manager of Technology Services is a confidential employee because, at some point in time, the incumbent in the position may be asked to cost bargaining proposals and because she has access to confidential labor relations information stored in the District's computer network.

The following legal standard, set forth by the Commission in MINERAL POINT SCHOOL DISTRICT, DEC. NO. 22284-C (WERC, 9/00), and affirmed by the Court of Appeals in MINERAL POINT SCHOOL DISTRICT V. WERC, 251 Wis. 2D 325, 337-338 (Ct. App., 2002), is used when determining whether an individual is a confidential employee:

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, 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. . . .

While a *de minimis* exposure to confidential materials is generally insufficient grounds for exclusion of an employee from a bargaining unit, . . . 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. . . . 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, . . . 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 to the employer's organization. . . . (Citations omitted.)

As to costing collective bargaining proposals, the record reflects that this confidential labor relations work is currently performed by employees of the law firm that the District utilizes for the purposes of collective bargaining. The record also reflects that the District's Business Manager is excluded from any bargaining unit as a confidential employee. There is

nothing in the record that would indicate that this confidential work cannot be performed by the Business Manager. Therefore, the District's interest in having one of its employees cost bargaining proposals does not provide a persuasive basis for concluding that the Manager of Technology Services is a confidential employee.

As to the Manager's access to confidential labor relations information stored on the District's computer network, the record establishes that the Manager's duties do not require her to access the content of any of that information. The potential for her to engage in misconduct by nonetheless accessing the content of that information is not a persuasive basis for concluding that she is a confidential employee. WAUKESHA COUNTY, DEC. NO. 26020-A (WERC, 9/89); ELCHO SCHOOLS, DEC. NO. 27640-C (WERC, 4/97).

Given all of the foregoing, we conclude that the Manager of Technology Services is not a confidential employee.

Unit Placement

Because the Manager of Technology Services is neither a managerial nor a confidential employee, the question becomes one of determining into which of the two existing bargaining units should she be placed. As noted earlier, the question of unit placement turns on whether or not she is a professional employee.

Professional Status

A professional employee is defined by Sec. 111.70 (1)(L). Stats., as:

1. Any employee engaged in work:
 - a. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
 - b. Involving the consistent exercise of discretion and judgment in its performance;
 - c. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
 - d. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in

the performance of routine mental, manual or physical process;
or

2. Any employee who:
 - a. Has completed the courses of specialized intellectual instruction and study described in subd. 1. d;
 - b. Is performing related work under the supervision of a professional person to qualify to become a professional employee as defined in subd. 1.

As to Sec. 111.70(1)(L)1.d., Stats., we have held that:

. . .the statute does not require that the incumbent of a position hold a college degree for the position to be found professional. This is true because the statute defines a professional position as one that cannot be performed without knowledge of certain kind, i.e., that which is usually acquired through “a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital.” In other words, the course of study is a definition of the required knowledge which is the criterion, but is not the criterion itself.”

CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97)

There is no question that the work of the Manager of Technology Services meets the first three qualifications in the definition of professional. The work is predominantly intellectual and varied in character; it involves the consistent exercise of discretion and judgment in its performance; and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. The question to be decided is whether the work requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher education or a hospital. We conclude it does not.

Based on this record, we conclude that the knowledge needed to be a manager of technology services/network administrator is not “customarily acquired” through a “prolonged course of specialized intellectual instruction” which we have generally interpreted as meaning a four year specialized degree. The position description requires a minimum of three to five years of work experience and a working knowledge of various computer related software, including CNE certification or its equivalent. Tapp does not have a four degree in a computer field. Therefore, we conclude that she is not a professional employee. See, e.g., HARTFORD UNION HIGH SCHOOL DISTRICT, DEC. NO. 23116-C (WERC, 6/06)

Conclusion

Inasmuch as the Manager of Technology Services is not a managerial, confidential or professional employee, the Manager is hereby included in the District's non-professional support staff bargaining unit.

Dated at Madison, Wisconsin, this 14th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

