

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**GATEWAY TECHNICAL COLLEGE**  
  
Involving Certain Employees of  
**GATEWAY TECHNICAL COLLEGE**

Case 61  
No. 59678  
ME(u/c)-1026

**Decision No. 30206**

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**Appearances:**

Michael, Best & Friedrich, LLP, by **Attorney Ronald S. Stadler**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Gateway Technical College.

**Attorney Teresa M. Elguezabal**, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Gateway Technical Education Association, WEAC, NEA.

**ORDER DENYING MOTION**

Gateway Technical College (herein the College) filed a unit clarification petition with the Wisconsin Employment Relations Commission (herein the Commission) on February 12, 2001. The petition requested the Commission to exclude from a bargaining unit of employees represented by Gateway Technical Education Association, WEAC, NEA (herein the Association) the position of Learning Resource Center Manager (herein the LRC Manager) because “it is professional, supervisory and/or managerial.” In a letter filed with the Commission on April 12, 2001, the Association stated that it had filed a grievance regarding the “posting and filling” of the position, and requested that “this petition to clarify the bargaining unit be postponed pending the outcome of the grievance that is in process.” The College responded in a letter filed with the Commission on May 7, 2001, in which the College stated the “two issues are separate and distinct and there is no need to hold this matter in abeyance pending the grievance arbitration.” The parties agreed to submit briefs on the Association motion – the last of which was filed with the Commission on July 16, 2001.

Dec. No. 30206

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

**ORDER**

The Association's motion is denied.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of August, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

**Gateway Technical College**

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION**

**BACKGROUND**

Included with the Association's initial brief was the affidavit of Leigh Barker, "which provides the procedural and factual information necessary . . . to decide the case." The College filed a response to this brief, and the Association completed the briefing schedule with a response to the College's.

Barker's affidavit, filed on June 19, 2001, states the following:

. . .

3. The professional employees of the Gateway Technical College ("the College") are subject to a collective bargaining agreement between the Association and the College, which agreement covers the period from July 1, 1998 to June 30, 2001. A copy of three relevant parts of that agreement are attached as Exhibit A: Article I - Recognition and Scope, Article IV - Grievance Procedure, and Appendix J - Stipulation of Agreement.

. . .

5. On November 28, 2000, the College posted an opening for a position titled Learning Resource Center Manager, a position which the College classified as managerial and outside the collective bargaining unit.

6. A copy of the position description for the LRC Manager is attached as Exhibit B and is incorporated herein.

7. On December 14, 2000, the Association filed a grievance at Step 3 with the College, alleging that the LRC Manager posting violated the collective bargaining agreement's recognition and stipulation of agreement

clauses because the posting information and job description contained the same work performed by bargaining unit librarians. A copy of that grievance is attached as Exhibit C and incorporated herein.

8. A copy of the position summary for the librarian position is attached as Exhibit D and incorporated herein.

9. The only duty assigned to the LRC Manager position, as it was described in the initial posting, that is not assigned to the Librarian position, is to evaluate LRC staff and student workers; however, the LRC has no other staff, except for student workers.

10. On January 1, 2001, after the Association filed its grievance, the College issued a job description for the LRC Manager position which differs from that in the original job posting and job description. Specifically, the description provides the LRC Manager with the responsibility to not only supervise and evaluate LRC staff and student employees, but also to hire, discipline and promote them. A copy of the job description is attached as Exhibit E and incorporated herein.

. . .

12. On February 12, 2001, the College denied the Association's grievance. See attached Exhibit G, incorporated herein.

13. The Association appealed the grievance to Step 4, to the College's Board of Education. See attached Exhibit H incorporated herein.

14. In response to the Association's appeal the Board of Education elected its right to decline to hear the matter and the parties proceeded to arbitration. See attached Exhibits I and J incorporated herein. The parties have selected an arbitrator and the grievance is scheduled to be heard on August 29, 2001.

15. The College has never challenged the Association's right to pursue its grievance over the Learning Center Resource Manager/Librarian position.

. . .

Section 1 of Article I, noted at Paragraph 3 of the affidavit, states:

The Board recognizes the Association as the exclusive bargaining representative of all employees in the following bargaining unit employed in the Gateway Technical College District:

All full-time and regular part-time professional personnel working 50% or more of a regular schedule for their positions including teachers, counselors, advisors, librarians, school nurses, AODA specialists, certified teaching assistants, A-T lab assistants, aviation teaching assistants, instructional specialists, program chairpersons, but excluding supervisory, managerial and confidential employees, custodial employees and clerical employees, and all other employees. (Pursuant to stipulation of Agreement dated August 16, 1984 attached hereto as Appendix J of this Agreement.)

Article IV establishes a grievance procedure, which, at Section 3, Step 5c, provides for “final and binding” arbitration. Appendix J states:

Side Bar – With regard to the current G.T.E.A. Unit and any separate unit which may be created as a result of the election stipulated in August, 1984:

- 1) The parties agree that all employees working 50% or more in bargaining unit positions are members of the bargaining unit;
- 2) The administration agrees that, consistent with administrative feasibility, the District will not structure positions so as to avoid membership in the bargaining unit;
- 3) The members of the bargaining unit who supervise work by others will not refuse to perform such supervision by virtue of their membership in the bargaining unit.

The grievance form noted at Paragraph 7 of Barker’s affidavit alleges that the College’s actions regarding the LRC Manager violate Article I, Section 1 and Paragraph 2 of Appendix J.

### **THE PARTIES’ POSITIONS**

#### **The Association’s Initial Brief**

After a review of the procedural and factual background, the Association argues that the Commission “should defer jurisdiction to the dispute resolution mechanism bargained by the parties, namely the arbitration process.” Citing MILWAUKEE BOARD OF SCHOOL DIRECTORS,

DEC. NO. 25143 (WERC, 2/88), the Association concludes that it “is well established that the WERC does not preempt the field when disputes arise as to how a unit agreement should be applied to a disputed position.” WINNEBAGO COUNTY, DEC. NO. 27669 (WERC, 5/93) delineates the factors that should guide the exercise of the Commission’s discretion to hear a unit placement issue that can also be determined by a grievance arbitrator.

The considerations that guided the Commission in WINNEBAGO COUNTY should guide the Commission in this case. More specifically, the Association contends that the dispute posed here is contractual in nature, and is fully addressed by an interpretation of Article I and Appendix J. Thus, no legal issue of statewide importance is posed. Beyond this, the Association contends that the exercise of Commission jurisdiction “would encourage parties to circumvent their agreed upon procedures for dispute resolution.”

Since the issue before an arbitrator or the Commission is the same, to permit two proceedings imposes unneeded litigation costs on the parties and risks potentially conflicting decisions “one by the WERC and one by an arbitrator.” To the extent the dispute poses statutory issues, the better result would be for the Commission to “assert its jurisdiction after the arbitration is complete.” The Association concludes that the “WERC should let the grievance arbitration process run its course and not interfere with it or dilute that process by undertaking to decide identical issues.”

### **The College’s Responsive Brief**

The College asserts that “there is no basis for delaying the Commission’s decision on the unit clarification petition” and that “it makes more sense to hold the grievance in abeyance pending the outcome of the unit clarification.”

The College notes that the facts submitted by the Association are “largely not contested by the College.” The labor agreement does place librarians within the scope of the bargaining unit. Whether the LRC Manager is actually a librarian position poses the parties’ dispute. Under the College’s view, the position is new, reflecting “the growth of the Elkorn campus and its distance from the other campuses.” Thus, the College challenges the Association’s assertion “that the only distinction between the two positions is that the LRC Manager evaluates LRC student employees.” More specifically, the College asserts that Barker’s affidavit mischaracterizes the facts by treating the summary description of the position in the November 28, 2000 job posting as if it was a complete position description.

From this, the College contends that the contractual and legal issues posed cannot be considered the same. Supervisory and Managerial positions are by law and by contract excluded from the unit, and “the College has a right to a ruling on its unit clarification

request.” This proposition is established in Commission case law such as MANITOWOC SCHOOL DISTRICT, DEC. NO. 29771-B (WERC, 7/00). WINNEBAGO COUNTY is inapplicable in this case, since “(t)he unit clarification petition is not advisory, nor is it discretionary.” WINNEBAGO COUNTY, if applicable, supports denial of the Association’s motion, since the Commission concluded that “if there was a statutory dispute over the appropriate bargaining unit it would resolve that dispute through a unit clarification proceeding.”

The grievance questions whether Article I or Appendix J demands that the LRC Manager be considered a Librarian position that must be included in the unit. Since “(b)oth of those issues can be resolved on their own merits, regardless of the outcome of the unit clarification,” the College concludes that the processing of the grievances has no evident bearing on the processing of the unit clarification. Since “no outcome of the grievance arbitration” can result in the unit inclusion of a supervisory or managerial employee, it follows that there is no basis to delay the processing of the unit clarification. Thus, “the Union’s Motion to ‘Defer’ the Unit Clarification Petition must be denied.”

### **The Association’s Reply Brief**

The Association contends that “(w)hether the LRC Manager position is a librarian position covered by the recognition clause and whether the position is managerial or supervisory are two sides of the same coin.” If the arbitrator finds that the LRC Manager position “is a librarian position covered by the recognition clause, then, it follows that the position is not managerial or supervisory.” It is no less true that if the arbitrator reaches the opposite conclusion, then “it follows that the position is managerial or supervisory.”

The College’s assertion that the unit clarification should take precedence over the grievance undercuts the Commission’s preference for grievance arbitration. Beyond this, the Association urges that WINNEBAGO COUNTY is relevant here since “(w)hether the WERC holds in abeyance a petition for unit clarification pending the outcome of a grievance arbitration is indeed discretionary.”

Nor can it be said that the Association seeks to block the College’s access to a statutory forum for no practical purpose. The issues before an arbitrator and the Commission are the same, and the Association seeks to avoid “double-litigation over the same issue – an inefficient use of resources.”

## DISCUSSION

Our Order denies the Association's motion.

As the Association argues, the basis for our ruling can be drawn from MILWAUKEE PUBLIC SCHOOLS, SUPRA. In that decision (DEC. NO. 25143 AT 16), the Commission stated the following as to the interplay between grievance arbitration and unit clarification proceedings regarding bargaining unit issues:

. . . the Commission does not generally find it appropriate to preempt the field regarding the interpretation of a contract, or contracts, granting voluntary recognition, **unless statutory issues are presented.** (emphasis added)

The final quoted clause is determinative here, since, as noted in MILWAUKEE PUBLIC SCHOOLS, "the ultimate determination of the statutory propriety of a unit's scope or composition is reserved to the Commission." DEC. NO. 25143 AT 17-18.

The Association contends that the parties voluntarily defined the scope of the bargaining unit, and expressly included "librarians" within it. The Association argues that since the LRC Manager is actually a Librarian position, it falls within the scope of Article I, Section 1 and may violate Appendix J. Under this view, the parties' definition of the scope of the unit points toward grievance arbitration as an appropriate method of dispute resolution.

The Association's argument, however, ignores the statutory dimensions of the College's position. The College asserts that the LRC Manager position is a new, supervisory or a managerial position distinguishable from a librarian. Thus, this dispute cannot be reduced to the interpretation of the term "librarians" in Article I, Section 1. Rather, resolution of the dispute requires a determination of whether the LRC Manager is a supervisor under Sec. 111.70(1)(o), Stats., or a managerial employee under Sec. 111.70(1)(i), Stats. The statutory dimensions of this dispute make it inappropriate to hold this matter in abeyance. The Commission has consistently reserved to itself the function of determining the statutory dimension of unit placement issues.

This should not be read to imply that the College's assertion that the LRC Manager is a supervisor or managerial employee can be taken as a given. Rather, the denial of the motion means only that the merit of the College's position should be determined through the unit clarification process. This should not derogate the arbitration process, since the issues for the Commission and for the arbitrator are distinguishable. The Commission's focus is whether the position is held by a supervisor or a managerial employee. Whether or not the position is a "librarian" is a contractual issue that can be decided by the contractual dispute resolution process.



WINNEBAGO COUNTY does not undercut the conclusions reached above. First, it is noteworthy that WINNEBAGO COUNTY was a Sec. 227.41, Stats., declaratory ruling proceeding in which the threshold question was whether to exercise jurisdiction over the dispute. Further, in that declaratory ruling proceeding, the petitioner did not question that municipal employees, within the meaning of Sec. 111.70(1)(i), Stats., occupied the disputed positions. Rather, the dispute was whether placement of non-sworn municipal employees within the jail division of a sheriff's department into a unit of courthouse employees violated the subcontracting clause of a labor agreement covering sworn, sheriff's department employees. The Commission's statement that "(i)nterpretation of the parties' contract is at the core of the contractual dispute" (DEC. NO. 27669 AT 5) has no persuasive bearing in this case. In this unit clarification, the issue is whether the disputed position is occupied by a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

Whether the arbitration process proceeds is left to the parties. However, the processing of the grievance does not bar the ongoing processing of the unit clarification petition. cf. SAUK COUNTY, DEC. NO. 18565 (WERC, 3/81).

Dated at Madison, Wisconsin this 29th day of August, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner