

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
IRON COUNTY PUBLIC EMPLOYEES LOCAL 728

Involving Certain Employees of

IRON COUNTY

Case 74
No. 67669
ME(u/c)-1234

Decision No. 30291-A

Appearances:

Michael K. Pope, Dean & Pope, P.C., 204 North Harrison Street, Ironwood, Michigan 49938, appearing on behalf of Iron County

John Spiegelhoff, Staff Representative, AFSCME Wisconsin Council 40, 1105 East Ninth Street, Merrill, Wisconsin 54452, appearing on behalf of Iron County Public Employees Local 728.

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

On January 14, 2008, the Iron County Public Employees Local 728, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission seeking to include the Assistant Forest Administrator position into a bargaining unit of Iron County employees that Local 728 represents for the purposes of collective bargaining. The County opposes the petition, asserting that the incumbent cannot be included in the Local 728 bargaining unit because he is a supervisor, a confidential employee, and a managerial employee.

A hearing on the petition was held in Hurley, Wisconsin on April 10, 2008 before Commissioner Susan J.M. Bauman, serving as hearing examiner. A transcript was filed on May 13, 2008. The parties filed written arguments with the Commission, the last of which was received on July 3, 2008.

Dec. No. 30291-A

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

FINDINGS OF FACT

1. The Iron County Public Employees Local 728, AFSCME, AFL-CIO, hereafter the Union, is a labor organization that serves as the exclusive collective bargaining representative of employees in a bargaining unit described in the 2008-2010 bargaining agreement between the Union and the Iron County Board of Supervisors as:

...all its regular full-time employees and regular part-time employees in the Highway Department, Highway Office Personnel, and Forestry Department, but excluding elected or appointed officials, supervisors, and confidential employees for purposes of collective bargaining with respect to wages, hours, and working conditions and other conditions of employment which are mandatory subjects of bargaining.

2. Iron County, hereafter the County, is a municipal employer providing services to the citizens of the County through its employees.

3. The County's Forestry Department, hereafter the Department, is generally responsible for the stewardship of the County's public forests, which includes overseeing the responsible logging of certain areas of the forest by private logging companies and maintaining public facilities such as roads and recreational areas.

4. Joseph Vairus is the incumbent Forest Administrator. He has held the position since February 2007. The Forest Administrator serves as the Department head and reports to the Forestry Committee, a subcommittee of the full Iron County Board of Supervisors.

5. Charles Zinsmaster is the incumbent Assistant Forest Administrator. He has held the position since October of 2006. Zinsmaster previously held the position of Forest Administrator from February 2002 to September 2006.

6. In addition to Vairus and Zinsmaster, the Department currently consists of five other employees: one Trail Coordinator/Office Manager, one Forester II, one Crewman (Recreational), one Cruiser, and one GIS Forester. Four additional vacant positions are also included in the Department's organizational chart: one Administrative Assistant, one Secretary, one Crewman (Mechanical), and one Forester I.

7. The Position Description for Assistant Forest Administrator provides a generally accurate statement of Zinsmaster's duties and responsibilities and reads in relevant part as follows:

Purpose of Position:

The Assistant Forest Administrator acts under the direct supervision of the Forest Administrator and regularly exercises independent judgment and discretion in making decisions. The position assumes full department responsibility in the absence of the Forest Administrator. The position assists in the forest management program utilizing even and all aged silviculture (sic) techniques, and performs general forester duties. The position assists, as needed, with all aspects of department administration including, but not limited to, public relations, employee relations, meeting attendance, training, timber sale administration and monitoring, recreation, and planning.

Essential Duties and Responsibilities:

The following duties are normal for this position but are not exclusive or all-inclusive. Other duties may be required and assigned. All duties shall be performed under the auspices of the Iron County Forest 15 year plan and the direction of the Forest Administrator.

Forest Management - 60%

- Prepare timber tracts for advertisement and sale on assigned County Forest lands. Work includes, but is not limited to, selecting potential timber sale sites, cruising timber sale sites, and preparing timber sales for harvest using even aged and all aged silviculture (sic) techniques.
- Locate, paint, and map timber sale boundaries on assigned sales.
- Identify forest stands needing harvest on assigned sales.
- Appraise timber and estimate harvest volumes on assigned sales using standards outlined in the Iron County Forest 15 year plan.
- Complete County and State DNR forms and maps required for timber sale establishment and approvals.
- Manage timber sale contracts on assigned lands. Work includes, but is not limited to, preparing contract documents, inspecting timber sale operations for contract compliance, and scaling harvested products using standards outlined in the Iron County Forest 15 year plan, and reporting findings to the Forest Administrator.
- Identify access roads and routes and determine need for and best location for new roads on assigned timber sales.
- Cruise timber to determine age, volume, and growth of stands to properly prescribe and apply the correct silvicultural (sic) systems and update compartment reconnaissance as necessary and/or appropriate.
- Assist other county and DNR foresters as needed.
- Assist in the planning, layout, and supervision of programs such as site preparation, forest regeneration, tree planting, post aspen treatment, road construction and maintenance, firebreaks, and trail mowing.
- Cooperate with and assist the DNR with forest fire suppression work on County Forest Lands during periods of high fire danger when authorized by the Forest Administrator.

- Assist in developing annual sustainable timber harvest schedules for the county forest in cooperation with the DNR Liaison Forester.
- Maintain and operate county equipment and vehicles, including but not limited to, pickup trucks, heavy trucks, snowmobiles, ATV's, and a variety of power hand tools.
- Be aware of potential problems (e.g. theft, trespass, insects and diseases, road and trail maintenance needs, contract violations) and report them.
- Assist Iron County Recreational Enforcement Officer in investigation of timber thefts, maintain confidentiality, and provide court testimony as appropriate.
- Enforce Iron County Forest and Parks ordinances.
- Maintain a professional attitude and keep current on the latest technologies and innovations in forest management and logging. Attend training sessions and professional meetings as approved by the Forest Administrator.
- Cooperate with various agencies and groups to achieve program objectives.
- Prepare maps, forms, reports, and maintain accurate records of daily activities.
- Perform other duties as assigned.

Administration - 20%

- Assume the role of supervisor in the absence of the Forest Administrator.
- Assist in supervisory responsibilities as assigned by the Forest Administrator.
- Assist with monitoring and maintaining overall compliance with federal, state, county, and third party certification regulations.
- Coordinate training opportunities for Iron County Forestry Staff.
- Attend meetings, as assigned by the Forest Administrator, with WCFA and other entities as needed. Attend educational opportunities. Report to and educate Iron County Forestry Staff upon completion of meetings and/or training.
- Assist in planning, maintenance, and administration of county recreational facilities.
- Train temporary staff sufficiently enough for them to carry out day to day tasks on the Iron County Forest.
- Maintain excellent public relations and look to build further public relations.

Other - 20%

- Take on special projects on the county forest (e.g. growth and yield modeling, ski trail coordination, wildlife projects, etc.) as assigned by the Forest Administrator.
- Assist in managing county dams and gravel pits.
- Prepare and present educational programs to schools and other organizations.
- Assist with other department projects when additional personnel are temporarily needed to complete them.

As reflected in the Position Description, when the Administrator is absent (approximately 3 weeks a year), Zinsmaster assumes the Administrator's duties.

Zinsmaster spends the majority of his time performing work similar to that of other Forestry Department employees. This work consists primarily of marking timber, administering timber sales, and collecting data on the current condition of Iron County forests.

Because Department employees generally know the work they are to perform on an ongoing basis pursuant to the Department's Annual Plan, they do not receive work assignments on a daily basis. However, as needed, Zinsmaster has the authority to direct the work of other Department employees,

8. During the tenure of the current Forest Administrator, the Forestry Department employees have not undergone formal performance evaluations. Between 2002 and 2006, when Zinsmaster was the Forest Administrator, he conducted employee evaluations himself.

9. As Assistant Forest Administrator, Zinsmaster does not receive or adjust grievances, receive or approve vacation requests, approve schedule changes, or sign timecards from Department employees. Zinsmaster has no role as to transfers, layoffs or promotions.

10. Zinsmaster does not have independent authority to discipline Department employees, nor does he effectively recommend discipline. Decisions regarding employee discipline are made by the Administrator in conjunction with the Forestry Committee.

During the time he has served as Assistant Forest Administrator, Zinsmaster reported one incident of what he believed to be a violation of a timber contract to the Forest Administrator. Administrator Vairus, local law enforcement and the Department of Natural Resources investigated the circumstances of the contract violation, which involved the improper harvesting of timber from County forests. Zinsmaster did not undertake his own investigation of the incident. While considering his disciplinary options, the Administrator did ask for Zinsmaster for his thoughts on the appropriate level of discipline. The County Corporation Counsel also asked Zinsmaster to verify the accuracy of his report on the matter. The Administrator elected to impose a 5 day suspension on the employee with the approval of the Forestry Committee. At the request of the Forestry Committee, Zinsmaster was present at the committee meeting when they discussed the level of discipline to be imposed.

Aside from this disciplinary episode, Zinsmaster has not been privy to any confidential labor relations matters. Zinsmaster does not play any role in collective bargaining on behalf of the County.

11. Zinsmaster does not have the effective authority to hire employees. Hiring decisions are made by the Administrator in conjunction with the Forestry Committee.

During the time Zinsmaster has been the Assistant Forest Administrator, the Forestry Department has not hired a regular full-time or part-time bargaining unit employee, but has hired seasonal employees. As Assistant Forest Administrator, Zinsmaster participates in the interviews of seasonal employee applicants along with the Administrator and the members of the County Forestry Committee. Zinsmaster reviews the list of prepared questions written by the Administrator and the Forestry Committee and takes his turn posing one or two of the questions from this list to the applicant. Afterward, Zinsmaster completes a subjective scorecard and answers any questions from the Administrator or Committee members about his impressions of the applicant, including whom he would prefer to work with. The Forest Administrator and the Committee confer to select a candidate. Zinsmaster's recommendations are not given greater weight than those of the Administrator.

12. Zinsmaster is paid an annual salary and is not paid for any overtime. His salary is equal to the annual wages of the highest paid Department employee in the bargaining unit

13. During the time that Zinsmaster has been Assistant Forest Administrator, the Department began a project in Shaumburg Park to improve the plumbing and electrical facilities at a campsite it is responsible for maintaining. Zinsmaster was part of a group of Department employees that planned and is implementing the project.

14. While Zinsmaster was the Forest Administrator, he prepared an application for a sustainable forestry practices grant from the Wisconsin Department of Natural Resources, which was subsequently awarded. The grant at least partially funded the hiring of a seasonal employee. As Assistant Forest Administrator, Zinsmaster retrieved the grant application from his computer's hard drive, updated it, and submitted it as a "mirror grant" for continued funding. Vairus, the current Forest Administrator, verbally told Zinsmaster that he could hire a seasonal employee for the project if the grant was awarded. The mirror grant was not awarded. However, even as to seasonal employees, hiring decisions involve both the Administrator and the Forestry Committee as decision-makers.

15. As Assistant Forest Administrator, Zinsmaster contributes to the Department's annual work plan prepared by the Administrator.

16. Zinsmaster does not regularly attend Forestry Committee meetings.

17. The Forest Vegetation Simulator (FVS) is a computer program designed by the US Forestry Service for forest planning and management. The program analyzes data about the previous and current conditions of the trees in a defined area to make predictions about future growth. Zinsmaster directs the work of Department employees in obtaining data for FVS. Zinsmaster uses this program and evaluates its effectiveness. As of now, the Department has not adopted a policy regarding its use.

18. Departmental policy regarding the type and level of services to be provided is formulated and determined by the Forestry Committee, sometimes in consultation with the Forest Administrator.

19. As Assistant Forest Administrator, Zinsmaster provides the Administrator with input as to the development of the Department's proposed budget.

20. The Assistant Forest Administrator does not possess supervisory authority in sufficient combination and degree to be a supervisor.

21. The Assistant Forest Administrator does not sufficiently participate in the formulation, determination and implementation of management policy or have sufficient authority to commit the County's resources to be a managerial employee.

22. The Assistant Forest Administrator does not have sufficient access to or knowledge of confidential labor relations information to be a confidential employee.

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

CONCLUSION OF LAW

Assistant Forest Administrator Zinsmaster is not a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats., or 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.

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

ORDER CLARIFYING BARGAINING UNIT

Assistant Forest Administrator Zinsmaster shall be included in the bargaining unit described in Finding of Fact 1, above.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of August, 2008.

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

IRON COUNTY

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

The Assistant Forest Administrator is a regular full-time position within the Iron County Forestry Department. The County has advanced three arguments for why the position should continue to be excluded from the bargaining unit: that the incumbent in the position is a supervisor; a managerial employee; and a confidential employee. We address each of these arguments in turn.

Supervisory Status

The County argues that the Assistant Forest Administrator is a supervisor who, along with the Forest Administrator, exercises “joint command” over the Department’s employees.

A supervisor is defined in Sec. 111.70(1)(o)(1) Stats. as follows:

. . .any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances or effectively to recommend such action, 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.

When evaluating a claim of supervisory status under Sec. 111.70(1)(o)1, Stats., we consider the following factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
2. The authority to direct and assign the work force;
3. The number of employees supervised, and the number of persons exercising greater, similar or lesser authority over the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his/her skills or for his/her supervision of employees;
5. Whether the supervisor is supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and

7. The amount of independent judgment exercised in the supervision of employees. CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97).

Not all of the above-quoted factors need to reflect supervisory status for us to find an individual to be a supervisor. Our task is to determine whether the factors are present in sufficient combination and degree to warrant finding an employee to be a supervisor. WALWORTH COUNTY, DEC. NO. 29378 (WERC, 5/98).

In ROYALL SCHOOL DISTRICT, DEC. NO. 27147-B, (WERC 12/03), we cited MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 17009-F (WERC, 4/01) to further explain the supervisory standard:

Section 111.70(1)(o)1, Stats., speaks in terms of the “authority” of an individual to act or effectively recommend action. The statute does not require the actual exercise of authority to be established before an employee can qualify as a supervisor. Thus, our analysis focuses on whether an individual has the authority to take or effectively recommend action. Clearly, evidence as to the actual exercise of that authority provides conclusive support for the existence of the authority itself. Similarly, where the authority is not exercised in a relevant fact situation, the asserted existence of the authority is substantially if not critically undermined. However, where there has been no occasion to exercise the authority in question, it does not follow that the authority does not exist. Rather, in the absence of factual scenarios in which the existence of authority can definitively be tested, we evaluate the existing evidence presented as to the authority of the individuals in question and make a determination. CITY OF MILWAUKEE, DEC. NO. 17741-B (WERC, 1/91); TOWN OF MADISON, DEC. NO. 27784-B (WERC, 8/97). If a fact situation subsequently arises that calls into question whether the authority exists, the matter can be raised again by a party.

As to Factor 1, Zinsmaster’s testimony, along with that of Administrator Vairus, and Edward Wiita, a member of the County Forestry Committee, persuade us that while Zinsmaster plays a significant role in the hiring of seasonal employees, this role does not rise to the level of effective recommendation. Zinsmaster participates in the hiring process and has successfully made recommendations as to whom to hire. However, from the testimony of Wiita and Vairus, it is clear that Zinsmaster’s recommendations do not carry determinative weight, and thus fall short of being “effective” recommendations.

We do acknowledge that Administrator Vairus testified that he has generally told Zinsmaster that Zinsmaster has the authority to hire and that he specifically told Zinsmaster that he would have the ability to hire a seasonal employee if the sustainable forestry grant were awarded. However, in light of the specific testimony discussed above as to the weight given Zinsmaster’s hiring recommendations, Vairus’ testimony does not provide a persuasive basis for concluding that Zinsmaster can effectively recommend the hiring of employees. We further

note in this regard that even as to the hiring of the grant-related seasonal employee, Vairus' testimony went on to confirm that he and the Forestry Committee would likely also be involved in the hiring decision.

We also conclude that the Administrator and the County Board's Forestry Committee retain effective control over disciplinary matters. We acknowledge that in the one disciplinary situation to occur while he has been Assistant Administrator, Zinsmaster reported the problem to the Administrator and gave the Administrator advice and recommendations on disciplinary options. However, the record makes clear that the decision of what disciplinary action to impose was up to the Administrator and the Forestry Board. It is also noteworthy that the Administrator conducted the Department's investigation into the matter after Zinsmaster's initial report. Thus, while Zinsmaster played a role in the disciplinary decision, that role fell short of an "effective" recommendation.

Zinsmaster plays no role as to any layoff, transfer or promotions that may occur with the Department. While the Administrator testified that there was the potential for Zinsmaster to evaluate employees in the future, that testimony was obviously less than definitive and thus we cannot rely on same.

As to Factor 2, the record indicates that Zinsmaster has the general authority to direct the work of other Department employees in a manner consistent with the Department's Annual Plan and particularly when Vairus is gone and an emergency arises or in the context of Zinsmaster's FVS project. However, as a general matter, employees know their day to day assignments without receiving any specific direction.

As to Factor 3, Zinsmaster has the authority to direct the work of four other regular employees (excluding the Office Manager) and one or two seasonal employees. The Forest Administrator exercises supervisory authority over these same individuals.

As to Factor 4, Zinsmaster is paid at the same rate as the highest paid bargaining unit employee. Thus, his compensation level does not demonstrate supervisory status but rather reflects Zinsmaster's extensive forestry expertise.

As to Factor 5, when Zinsmaster does direct the workforce, he primarily directs their work rather than supervising employees. He does not meet with employees on a regular basis, does not evaluate their work, and lacks independent disciplinary authority over them.

As to Factor 6, Zinsmaster spends the majority of his time performing work similar to that of other Forestry Department employees.

As to Factor 7, Zinsmaster exercises some independent judgment on those occasions when he directs the work of other Forestry employees

Considering all of these factors, we conclude that Zinsmaster is not a supervisor within the meaning of Sec. 111.70(1)(o)1, Stats. Aside from his significant role in the hiring process and his limited direction of other employees, there is little else to support a conclusion that he is a supervisor. He has no independent disciplinary authority and does not effectively recommend discipline, does not evaluate employees, only occasionally directs the work of a small number of employees, and has no authority to adjust grievances. In reaching this decision, we acknowledge that hiring authority is a crucial element in the determination of supervisory status and that an employee may be classified as a supervisor even in the absence of the ability to effectively recommend candidates for hire. However, in such circumstances, other significant support for supervisory status must be present. In SHEBOYGAN COUNTY, DEC. NO. 8256-L (WERC, 4/08) we held the Deputy Register of Deeds to be a supervisor even though her significant involvement in the hiring process fell short of effective recommendation. However, although it was a close case, we determined that the Deputy was a supervisor because, in addition to her role in hiring, the Deputy had significant independent disciplinary authority, did not spend a significant portion of her day engaged in the same activities as the employees she supervised, and was paid considerably more than any of those employees. None of these additional factors is present in Zinsmaster's case.

In reaching our conclusion, we acknowledge that Zinsmaster assumes the duties of the Forest Administrator for approximately three weeks of the year when Vairus is on vacation or otherwise absent. The Commission has previously held that the occasional assumption of supervisory duties does not warrant an exclusion from the bargaining unit. MARINETTE COUNTY, DEC. NO. 26154-B (WERC, 3/92). *See also*, CITY OF NEW BERLIN, DEC. NO. 13173-B (WERC 8/83); CITY OF LACROSSE, DEC. NO. 14019 (WERC, 10/75); CITY OF FRANKLIN, DEC. NO. 6147 (WERC, 10/62). In this regard, we particularly note the active role that the Forestry Committee plays in significant Department decisions even when Vairus is present.

For all of the forgoing reasons, we conclude that Zinsmaster is not a supervisor.

Managerial Status

The County contends that the Assistant Forest Administrator is a managerial employee because of his roles in writing grants, drafting the annual work plan and the 15-year forestry plan, choosing an engineer to perform utility upgrades, cancelling logging contracts, determining how many employees to assign to a task, and in developing the Department budget.

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 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.

We now examine Zinsmaster's work activities as they relate to each of the two foregoing tests for establishing managerial status.

Policymaking Authority

The County asserts Zinsmaster's roles in the FVS program, the annual work plan, and the 15 year forest plan, all demonstrate managerial policymaking authority. Even in combination, however, these activities fall far short of establishing that the Assistant Forest Administrator is a managerial employee. None of these activities comprises a large portion of Zinsmaster's work, but more importantly each of them are examples of implementing policy without the requisite participation in making it.

The Commission illustrated the difference between policymaking and policy implementation in WISCONSIN INDIANHEAD TECHNICAL COLLEGE, DEC. NO. 31947 (WERC 12/06). In WISCONSIN INDIANHEAD, the college's Disability Specialists were not managerial employees because although they decided all aspects of how to evaluate, identify, and provide specific accommodation to disabled students, they were implementing the larger policy of accommodation made by others. To be managerial employees, they would have to be significantly involved in formulating that larger policy.

Like the accommodation plans in WISCONSIN INDIANHEAD, the 15 year forest plan is also a strategy for implementing policy. Zinsmaster testified that it is the Forest Committee, along with the full County Board, that sets the policy of practicing silviculture because of the benefits it provides to the County.¹ Even if we were to assume that the 15 year plan itself is a policy statement, the record makes clear that Zinsmaster played a role in the creation of the existing plan when he was Administrator and that authority for making any changes to this document rests with the Forestry Committee and the Iron County Board of Supervisors. Zinsmaster's current role would be advisory, which falls far short of establishing managerial status. CITY OF WHITEWATER, DEC. NO. 24354 (WERC, 3/87).

Even more than the 15 year forest plan, the Department's annual work plan implements Department policy and does not create it. Although Zinsmaster has taken the initiative as to the FVS program and oversees its implementation, this strategic choice does not constitute policymaking when viewed in the scope of his overall job duties.

Given all of the foregoing, we conclude that the record does not support the contention that Zinsmaster is a managerial employee based on his policy role.

¹ Regarding silviculture, the cultivation of forest trees, Mr. Zinsmaster testified as follows: "Well, ultimately, the County determines policy, all policy. They tend to respect the Administrator and his staff as to specifically what needs to be harvested, because we're professional foresters. Another aspect that comes into play is the Department of Natural Resources. They may or may not approve a specific stand for one reason or another. So you've got the Committee saying we want you guys to practice silviculture because we know silviculture is A, good for revenue, B, good for our timber type, and C, good for wildlife. We take that direction and say, all right, we can practice silviculture."

Resource Authority

The remaining managerial activities alleged by the County include the Assistant Forest Administrator's role in budgeting, canceling logging contracts, selecting a contract engineer, and determining how many Department employees to assign to particular jobs. These activities potentially involve the ability of the position to commit the County's resources.

The Forest Administrator seeks input on budget matters from Zinsmaster, but creates the proposed Department budget himself and presents it to the Forestry Committee. There is no persuasive evidence in the record that Zinsmaster's budget input produces any significant resource allocations within the Department. The Commission has previously held this kind of budget involvement is not a persuasive basis for finding a managerial exclusion. SHAWANO COUNTY, DEC. NO. 15257 (WERC, 3/77).

Regarding logging contracts, Zinsmaster does not sign logging contracts on behalf of the County. Instead, contracts are signed by the Forest Administrator, the chairman of the Forestry Committee, and the private logger. Zinsmaster testified that even when he thinks a contract should be terminated, he submits the cancellation paperwork to the Administrator. Lastly, even where a contract is terminated, it is generally performance related and does not reflect any significant resource allocation by the County.

As to the County's argument for a managerial exclusion based on Zinsmaster's recommendation of an engineer for the Shaumburg Park utility upgrades, this simply is not a managerial judgment as to resource allocation. Selecting one engineer over another is no more than a choice as to competency and cost. Thus, even assuming that the County is correct that Zinsmaster made this decision, the only managerial resource allocation choice potentially presented by the Shaumburg matter would be the general decision to proceed with the project. Obviously, Zinsmaster did not make that decision.

Regarding the County's argument about committing Department employees to projects, we note that deciding how many employees the Department should have—which would indeed be indicative of managerial authority—is not the equivalent of deciding how many current Department employees should be working on a particular project. The former involves decisions as to the scope of services that the employer will engage in and therefore the ability to commit the resources of the employer. KEWAUNEE COUNTY at 355. Zinsmaster's involvement in the latter is an issue of implementation only and therefore does not involve managerial decisions in the context of bargaining unit exclusions.

Finally, with regard to grant writing, we begin by noting again that Zinsmaster has written only one grant application as Assistant Forest Administrator and that he undertook this task at the direction of the Forest Administrator because he had written an application for the same grant while he was Administrator. More importantly, although receiving the grant would have increased the amount of resources available to the County, it is the decision to pursue such grants that is arguably managerial, not the grant writing itself. Thus, we find that this activity falls far short of demonstrating managerial status.

Given the forgoing, we conclude that Zinsmaster does not have the ability to commit the County's resources in such a way so as to make him a managerial employee.

Confidential Status

When determining whether an individual is a confidential employee, we apply the 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):

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.)

There is no indication in the record that Zinsmaster engages in collective bargaining activity on behalf of the County. Further, Zinsmaster and Vairus both testified that Zinsmaster does not handle any grievances. The County nonetheless asserts that the Assistant Forest Administrator is a confidential employee because he had confidential conversations with the Forest Administrator and Corporation Counsel regarding the discipline of a Department employee and reviewed confidential memoranda regarding the incident. The County also contends that the conversations Zinsmaster participates in regarding the Forest Administrator's future plans for the Department make Zinsmaster a confidential employee.

We acknowledge that Zinsmaster's role in the discipline of the employee gave him access to the County's decision-making process as to a confidential labor relations matter. We

also acknowledge that Zinsmaster had conversations with Corporation Counsel regarding his initial report and saw some written communication from Corporation Counsel. However, when viewed in the totality of Zinsmaster's duties and responsibilities, we conclude that this constitutes a de minimus exposure to confidential labor relations matters and thus is insufficient to warrant his exclusion from the unit as a confidential employee.

Zinsmaster also acknowledged receiving copies of letters from the Administrator to the employee regarding the investigation of the matter and the disciplinary process being pursued. These communications do not qualify as confidential material under the Commission's definition because they are documents actually received by the employee and readily available to the Union.

Finally, as to the conversations Zinsmaster had with Vairus regarding the Administrator's future plans for the Department, these kinds of private conversations may be "confidential" in the sense that they were not meant to be shared with others, but they do not take on confidential status in the context of Sec. 111.70(1)(i), Stats, unless they directly relate to confidential labor relations issues. We find that the record does not contain evidence to establish this necessary connection. Furthermore, we have consistently held that use of an employee as a "sounding board" about confidential labor relations matters does not establish confidential status. CITY OF TWO RIVERS, DEC. NO. 31519-B (WERC, 11/06).

For these reasons, we find that Zinsmaster is not a confidential employee.

Summary

We have concluded that the Assistant Forest Administrator: (1) is not a supervisor; (2) is not a managerial employee; and (3) is not a confidential employee. Accordingly, we have ordered that the position be added to the bargaining unit identified in Finding of Fact 1.

Dated at Madison, Wisconsin, this 19th day of August, 2008.

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

