

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

AFSCME, COUNCIL 40

Involving Certain Employees of

CITY OF STEVENS POINT

Case 127
No. 62697
ME-1080

Decision No. 30941

Appearances:

Jerry Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, WI 54467-0035, appearing on behalf of Stevens Point City Employees, Local 309, AFSCME, AFL-CIO and Stevens Point City Employees, Local 348, AFSCME, AFL-CIO

Louis J. Molepski, City Attorney, 1525 Church Street, Stevens Point, WI 54481-3515, appearing on behalf of the City of Stevens Point.

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

On September 8, 2003, Wisconsin Council 40, AFSCME, AFL-CIO, filed a petition with the Wisconsin Employment Relations Commission by which it sought to clarify an existing bargaining unit of City of Stevens Point Department of Public Works and Department of Parks, Recreation and Forestry employees (herein Local 309) by the inclusion therein of two positions described as Production Specialist.

On October 10, 2003, Wisconsin Council 40 filed an amended petition to also clarify an existing bargaining unit of City of Stevens Point clerical and related occupations employees (herein Local 348) by including in that unit or alternatively in the Local 309 unit a Riverfront Arts Council position .

The City opposed the original and the amended petition.

Dec. No. 30941

A hearing concerning all three positions/employees was held on October 28, 2003 in Stevens Point, Wisconsin, before Paul Gordon, Commissioner. At the hearing, the parties agreed that the position titles of the employees at issue are Production Specialist, Production Assistant and Facilities Support Specialist.

By agreement of the parties, additional exhibits were admitted into the record on November 7, 2003. Locals 309 and 348 did not file a brief. The City filed a brief on March 17, 2004.

The Commission requested additional post-hearing evidence which was received on June 16, 2004.

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

FINDINGS OF FACT

1. City of Stevens Point, herein the City, is a municipal employer with offices at 1515 Strong Avenue, Stevens Point, Wisconsin, and maintains a Parks, Recreation and Forestry Department as well as the Riverfront Arts Center.

2. Stevens Point City Employees, Local 309, AFSCME, AFL-CIO, herein Local 309, is an affiliate of Wisconsin Council 40, AFSCME, AFL-CIO, with offices located at Plover, Wisconsin. The City and Local 309 are parties to a 2001-2002 collective bargaining agreement which contains the following recognition clause:

The Employer recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time employees of the Department of Public Works and Department of Parks, Recreation and Forestry, except the Director of Public Works, Street Supervisor, Director of Parks, Recreation and Forestry, Assistant Street Supervisor, Park Supervisor, Recreation Facilities Supervisor, clerical and administrative aides, summer, seasonal and temporary employees.

There are no professional employees in the Local 309 unit.

3. Stevens Point City Employees, Local 348, AFSCME, AFL-CIO, herein Local 348, is an affiliate of Wisconsin Council 40, AFSCME, AFL-CIO, with offices located at Plover, Wisconsin. The City and Local 348 are parties to a 2001-2002 collective bargaining agreement which contains the following recognition clause:

The City recognizes the Union as the exclusive collective bargaining representative for all regular full-time and regular part-time employees of the City engaged in clerical and related occupations for the purposes of conferences and negotiations with the City, or its authorized representatives, on questions of wages, hours, and conditions of employment. Specifically excluded from the bargaining unit are systems specialist, elected officials, supervisors, managerial employees, confidential employees, police officers, part time employees (working less than twenty (20) hours per week), temporary employees (hired for less than ninety (90) calendar days) and employees covered by other collective bargaining agreements. During this contract, 2001-2002, temporary employees hired in the Engineering Department may work up to 1,040 hours per year.

There are no professional employees in the Local 348 bargaining unit.

4. The City operates a community access television channel using the local cable television system. The channel is locally referred to as CA3. The City has its CA3 office, studio and equipment at the Parks and Recreation Department building on Sims Avenue. Some of the equipment, including cameras, is portable so that programming can originate in various locations. Taped programs can also be brought to the CA3 office for further production and cablecast over the system. A regular part of CA3 programming covers the City Council meetings, Plan Commission meetings, and other City committee meetings. County Board meetings are also covered. Closed sessions of City and County meetings are not covered. Sometimes the meetings are presented live; other times videotapes of the meetings are cablecast at a later time. CA3 also remotely originates coverage of some seasonal or special events in the City as well as some school plays. These are taped and cablecast over the system.

CA3 has a Telecommunications Coordinator, John Quirk, who is also referred to as the Director and who supervises the Production Specialist and Production Assistant at issue in this proceeding.

The Director, Production Specialist and Production Assistant are not in the Department of Public Works or the Department of Parks, Recreation and Forestry.

5. The position description for the Production Specialist reads in pertinent part as follows:

Title of Position: Production Specialist
Work Unit Administrative Services/Telecommunications
Immediate Supervisor: Telecommunications Coordinator
Revised 2/00

Section A

Distinguishing Features of the Class

Employee takes part in all aspects of the production of government and Public Access Television Programs including, but not limited to, live and/or videotaped coverage of governmental meetings; performs various television and video production duties in the Telecommunications Department's studio editing facility, office, and occasionally, at other locations. Employee programs and operates the video tape playback system and updates the Community Bulletin Board, supervises the work of Production Assistants, and performs all duties of the Telecommunications Coordinator in the Coordinator's absence.

Section B

Essential Knowledge and Skills

Knowledge of the principles, theory, and philosophy of government and public access channel use, television program production, and community interest programming.

Trustworthiness and the ability to work well with little or no supervision.

Ability to supervise and direct the work of others.

Ability to delegate tasks appropriately.

Knowledge of maintenance and operation of a television studio and related cablecasting facilities, familiarity and comfort with audio and visual equipment of all kinds.

Ability to train individuals and groups in all aspects of television production process.

Ability to communicate effectively both orally and in writing with co-workers, elected officials, and members of the general public.

Ability to work various shifts with minimal notice.

Familiarity and comfort with computers and software of all kinds.

Strong attention to detail and a strong desire to do the best job possible.

Section C

Special Qualifications Required

Graduation from high school or equivalent. Any combination of training and experience which provides the required knowledge, skills, and abilities.

Section D

Tasks Routinely Performed

In the absence of the Access Coordinator, performs all the duties of the Access Coordinator, as well as own duties, but may delegate duties to other staff members.

Takes part in the production of Government and Public Access programs including, but not limited to, live and videotaped coverage of government meetings.

Transports, sets up, and operates the necessary equipment, performing the duties of Director, Audio Engineer, VTR Operator, Camera Operator, etc.

Maintains the Telecommunications Department's studio, editing facility, and office.

Programs and operates the department's video tape playback system and updates the Community Bulletin Board.

Teaches classes, provides hand-on training, and assists Public Access Producers and Volunteers.

Performs clerical duties in the office.

Performs other duties as assigned.

6. The current Production Specialist is Stewart Hayes who is a student at the University of Wisconsin-Stevens Point. He performs many, but not all, of the features and tasks set out in the position description.

Hayes has been in that position for approximately three years. His predecessor was in the position for two years. Both were referred to the position by the Communications Department at the University of Wisconsin-Stevens Point. Persons hired into the Production Specialist position are usually college level juniors or seniors seeking a degree in communications.

Hayes' current wage is \$10.55 per hour and he does not receive any fringe benefits. Hayes works an average of 20 hours per week. The Director budgets 20 to 30 hours per week for the position.

Hayes works in both the office and remote locations. His work schedule includes taping regularly scheduled meetings of the City Council, City Plan Commission, other City committees and the County Board meetings. The meetings are usually the first, third and fourth Mondays of the month, starting between 3:00 p.m. and 7:00 p.m., depending on the meeting. The times he works in the office or studio are self-determined.

Work at CA3 by the Production Specialists has qualified as a three credit summer internship for the Communications Department at the University of Wisconsin-Stevens Point, with the addition of University related reports and documentation.

7. The Production Specialist is engaged in work that is not predominantly intellectual in character, can be standardized as to output, and 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.

8 The Production Assistant position description reads in pertinent part as follows:

Title of Position:	Production Assistant
Work Unit:	Administrative Services/Telecommunications
Immediate Supervisor:	Production Specialist Telecommunications Coordinator

Revised 2/00

Section A

Distinguishing Features of the Class

Employee takes part in all aspects of the production of Government and Public Access Television programs including, but not limited to, live and/or videotaped coverage of government meetings; performs various television and video production duties in the Telecommunications department's studio, editing facility, office, and occasionally, at other locations.

Section B

Essential Knowledge and Skills

Experience, familiarity, and comfort with video cameras and videotaping.
Familiarity and comfort with audio and video equipment of all kinds.
Trustworthiness and ability to work well with little or no supervision.

Ability to assist individuals and groups in all aspects of the television production process.

Ability to communicate effectively with co-workers, elected officials, and members of the general public.

Ability to work various shifts with minimal notice.

Strong attention to detail and a strong desire to do the best job possible.

Section C

Special Qualifications Required

Any combination of training and experience which provides the required knowledge, skills, and abilities.

Section D

Tasks Routinely Performed

Takes part in the production of the City of Stevens Point Government Access programs including, but not limited to, live and videotaped coverage of government meetings.

Transports, sets up, and operates the necessary equipment, performing the duties of Graphics Engineer, Audio Engineer, VTR Operator, Camera Operator, etc.

Maintains the Telecommunications Department's studio, editing facility, and office.

Operates the video tape playback system.

Provides hands-on training and assistance to Public access users.

Performs clerical duties in the office.

Performs other duties as assigned.

9. The current Production Assistant performs many but not all of the features and tasks set out in the position description. The incumbent Production Assistant is also a substitute teacher. She works three days per month, two to four hours per day for the City. The Director budgets 144 hours per year for the position.

10. The City operates the Riverfront Arts Center, herein RAC, as part of the Parks, Recreation and Forestry Department. The RAC is in a separate building located on Green Circle near a park and the Wisconsin River. It is a community gallery which has various artistic visual, musical and literary displays and events. There is one person employed by the City at the RAC who is the Facility Support Specialist. The Facility Support Specialist is responsible for the overall management of the RAC, is supervised by the Director of Parks and Recreation, and reports to the Stevens Point Arts Council. The Stevens Point Arts Council is

an appointed body which provides City funds and other support for art events and supports the work of the RAC.

11. The position description for the Facility Support Specialist is contained in the Position Announcement and reads in pertinent part as follows:

POSITION ANNOUNCEMENT

Title: Facility Support Specialist
Department: Parks & Recreation
Reports to: Director of Parks & Recreation
Salary: Hourly

Distinguishing Features of the Position

Employee is responsible for the overall management of the Riverfront Arts Center (RAC). This individual is supervised by the Director of Parks and Recreation, and reports to the Chairperson of the Stevens Point Arts Council.

Knowledge, Skills and Abilities

- Knowledge of the process involved in managing an arts center space including terminology, tools and materials used in an arts center.
- Ability to plan, supervise and motivate the work of others.
- Ability to promote and market various Art Center uses.
- Ability to maintain effective working relationships with subordinates, user groups and patrons of the center and to maintain high morale and enthusiasm.
- Possession of a valid motor operator's license issued by the State of Wisconsin.
- Basic knowledge of computer operations.

Essential Functions

The successful applicant will:

- Recruit, train and manage a volunteer force who will maintain the front desk during the hours of operation.
- Be responsible for ensuring the facility is open an average of forty hours per week.
- Interact on a regular basis with the visual art exhibition committee, assisting them in setting up and scheduling of exhibits.
- Schedule various Council approved events (such as poetry reading or small music and dramatic performances) in the RAC.

- Attend various meetings of the Arts Council during the year.
- Process mail and phone requests for information about the RAC and the Council
- Handle other duties as assigned.

Qualifications

Applicant will have a working knowledge and interest in the visual arts, enjoy working with people, be a self starter and be a responsible individual who is willing to assist the RAC in promoting the arts to the Stevens Point community.

Salary

Salary dependent on qualifications and experience. Beginning rate is \$10.00 per hour.

12. The current Facility Support Specialist, Brenda Gingles, performs all the features and essential functions listed in the position description/position announcement. Gingles is paid \$12.97 per hour and the City makes retirement contributions on her behalf. She records the hours she works and turns her time card into the Director, but does not work regularly scheduled hours. She is at the RAC 26.7 hours per week on average, but the hours range from 50 to 4 depending on what has to be done. She does not have regularly scheduled office hours and can be contacted at home. She has her own private art studio, a four-year degree in Fine Arts, and was Interim Director of an art gallery at the University of Wisconsin-Sevens Point for a short time. She arranges exhibits in the RAC makes judgments as to what artists or art to display, using aesthetic care. She determines how the art will be displayed and helps install exhibits.

13. The Facilities Support Specialist is engaged in work that is: (1) predominantly intellectual and varied in character; (2) involves the consistent exercise of discretion and judgment in its performance; (3) of a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (4) 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.

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

CONCLUSIONS OF LAW

1. Because the Production Specialist and Production Assistant are not employees of the Department of Public Works or the Department of Parks, Recreation and Forestry, they cannot appropriately be included in the Local 309 bargaining unit described in Finding of Fact 2.

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

3. The Production Specialist is not a casual or temporary employee but is a “regular part-time employee” of the City performing “clerical and related occupations” as those terms are defined in the portion of the Local 348 labor agreement quoted in Finding of Fact 3.

4. Because the Production Specialist is a regular part-time non-professional employee engaged in “clerical and related occupations”, the Production Specialist is appropriately included in the Local 348 bargaining unit described in Finding of Fact 3.

5. Because the Production Assistant works less than 20 hours per week, the Production Assistant is not a “regular part-time employee” of the City as that term is defined in the portion of the Local 348 labor agreement quoted in Finding of Fact 3.

6. Because the Production Assistant is not a “regular part-time employee”, the Production Assistant is not appropriately included in the Local 348 bargaining unit described in Finding of Fact 3.

7. Because the Facilities Support Specialist is an employee of the Department of Parks, Recreation and Forestry, the Specialist cannot be appropriately included in the Local 348 “clerical and related occupations” bargaining unit described in Finding of Fact 3.

8. The Facilities Support Specialist is a professional employee within the meaning of Sec. 111.70(1)(L), Stats.

9. Because the Facilities Support Specialist is a professional employee, the Facilities Support Specialist it is not appropriately included in the non-professional employee Local 309 bargaining unit described in Finding of Fact 2.

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

ORDER CLARIFYING BARGAINING UNIT

1. The Production Specialist is included in Local 348 bargaining unit identified in Finding of Fact 3.

2. The Production Assistant shall continue to be excluded from the Local 348 bargaining unit identified in Finding of Fact 3.

3. The Facilities Support Specialist shall continue to be excluded from the Local 309 bargaining unit identified in Finding of Fact 2.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of June, 2004.

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

City of Stevens Point

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

POSITIONS OF THE PARTIES

Locals 309 and 348

In support of its position that the Production Specialist, Production Assistant and Facility Support Specialist should be included in one of the two bargaining units, the Locals' petition and amended petition contend that these positions are not held by supervisory, managerial or confidential employees. At the hearing in this matter, the Locals argued that all three positions are held by employees who are eligible to be included in one or the other bargaining units.

The City

The City opposes the petition and amended petition.

The City argues that the Facility Support Specialist is a professional employee responsible for the overall management of the Riverfront Arts Center. Notwithstanding the position description, the City contends that work of the position actually requires knowledge typically acquired through a degree or extensive training in art. The incumbent has a bachelors degree in Fine Arts and correctly describes her work as "intellectual". Her work involves the consistent exercise of artistic judgment and is of a character such that the result accomplished cannot be standardized. Therefore, the Specialist is a professional employee. Because the Specialist is a professional employee and neither bargaining unit includes professional employees, she cannot be included in either bargaining unit.

The City contends that the Production Assistant, working four hours per day, three days per month, has no expectation that the job will be permanent and lacks an expectation of permanent employment. There is no position within either of the bargaining units with hours or work duties similar to Production Assistant's, and the Assistant has no community of interest with bargaining unit employees based on hours, wages or conditions of employment.

The City asserts that the Production Specialist holds a unique university student-occupied position who sets his own hours (other than regularly scheduled meetings twice a month) and gets three course credits. It is understood the position is not permanent in nature, but in effect an internship for students. The position is held by a combination half-time, casual temporary employee with no community of interest with regular full-time bargaining unit employees.

The City also argues that the Production Specialist is a professional employee because the position requires special skills to operate the broadcast system and the incumbent has completed a prolonged course of specialized instruction. As a professional employee, the Specialist cannot be included in either bargaining unit.

DISCUSSION

Production Specialist

While the City conceded nothing during the hearing, its position was refined in its post-hearing brief to arguments that the Specialist cannot be included in a bargaining unit because he is a casual or temporary employee who lacks a community of interest with other unit employees and, in the alternative, because he is a professional employee.

We begin with the question of whether the Production Specialist is a casual employee. A casual employee is one who works irregularly and sporadically, because of the on-call nature of his or her work or the rejection of offered assignments. VILLAGE OF BAYSIDE, Dec. No. 27056 (WERC, 10/91). The Production Specialist does not work irregularly or sporadically. He has regular work assignments, particularly covering government meetings, and works an average of 20 hours per week. Clearly, the Production Specialist is not a casual employee. 1/

1/ To the extent the City argues that the incumbent's student status renders him ineligible for unit inclusion, we also find that argument unpersuasive. In CITY OF BELOIT, DEC. NO. 15112-D (WERC, 11/94), the Commission found that, although a police cadet position may have been created as a career path into law enforcement, student status did not in itself preclude the cadets from having a community of interest with other unit members.

As to the question of whether the Production Specialist is a temporary employee, the Local 348 contract defines a temporary employee as an employee "hired for less than 90 days." The incumbent Production Specialist has been employed for three years. Thus, it is clear that the Specialist is not a temporary employee.

To a large extent, the City's "lack of community of interest" argument is premised on the Specialist's alleged casual or temporary status. Having rejected those contentions and concluded that the Specialist is a regular part-time employee, we have to a large extent also rejected the "lack of community of interest" argument. However, to the extent the City's argument also encompasses the contention that there are no employees in the existing Local

348 unit performing work similar to the Specialist, we note that the Local 348 unit does include employees performing technical work (i.e. Technical Assessment Technician (real estate assessment); Engineering Technician I; Engineering Designer/Technician II) similar to the technical work of the Specialist. Thus, we are satisfied that the Production Specialist is performing the “clerical and related occupations” work typical of Local 348 employees and therefore reject this component of the City’s argument as well.

Lastly, we consider the City’s argument that the Production Specialist is a professional employee under Sec. 111.70(1)(L), Stats. who therefore cannot be included in the non-professional employee Local 348 unit.

Section 111.70(1)(L), Stats. defines a “professional employee” as follows:

1. An 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. An 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.

In applying these criteria to the Production Specialist, we conclude that he is not a professional employee because his work does not meet the “predominantly intellectual” requirement of Sec. 111.70(1)(L)1.a., Stats. Much of his work involves the “routine mental, manual, mechanical and physical work” of moving equipment, making copies of tapes, and

adding a count down or disclaimer to a tape. In addition, the Specialist's work fails to meet the requirement of Sec. 111.70(1)(L)1.c., Stats., because "the output produced or result accomplished" at CA3 can be standardized in relation to a given period of time. Lastly, the work in question does not meet the knowledge requirements of Sec. 111.70(1)(L)1.d. Stats. The position description contains the special qualifications required, i.e., graduation from high school or equivalent; any combination of training and experience which provides the required knowledge, skills and abilities. The essential "knowledge and skills" include, among other things, public access channel use, television program production, maintenance and operation of a television studio and related cablecasting facilities, comfort with audio and video equipment of all kinds, and comfort with computers and software of all kinds. While we acknowledge that the position has typically been filled by a junior or senior Communications student from the University of Wisconsin-Stevens Point, we find it significant that Director Quirk testified that an untrained person "could learn to do it pretty quickly, but to do it well would take quit a bit -- take lots of time" (tr. pp. 83-84). Given all of the foregoing, we conclude that the knowledge needed to perform this work is not typically acquired through a four year specialized degree.

To the extent the City is asserting professional status based on Sec. 111.70(1)(L) 2., Stats., we also find that argument unpersuasive. The Specialist position does not require completion of a four year specialized degree program and the incumbent Specialist had not received his specialized degree. Further, the Specialist is not working under the type of direct supervision contemplated by Sec. 111.70(1)(L)2.b., Stats., as a prerequisite for professional status.

Given all of the foregoing, we conclude that the Production Specialist is not a professional employee and is appropriately placed in the Local348 unit.

Production Assistant

Like the Production Specialist, the Production Assistant is not employed in the Department of Public Works or Department of Parks, Recreation and Forestry. Thus, she is thereby ineligible for inclusion in the Local 309 DPW/Parks unit.

As reflected in Finding of Fact 3, the Local 348 "clerical and related occupations" unit excludes "part-time employees(working less than twenty(20) hours per week)." Because the Production Assistant does not work 20 hours per week, it is not appropriate to include her in that unit.

Facilities Support Specialist

The Facilities Support Specialist is an employee of the Department of Parks, Recreation and Forestry and thus it is the Local 309 non-professional employee unit into which she would be placed if she eligible for unit inclusion. The City contends that she is ineligible for inclusion because she is a professional employee. We agree for the following reasons.

From the record, we are satisfied that the work of the Support Specialist meets all of the statutory criteria contained in Sec. 111.70(1)(L)1, Stats., set forth above at p. 14. In effect, the Specialist is running an art gallery and her artistic judgments are clearly predominantly intellectual, involve the consistent exercise of discretion, and are of a non-standardized character. As to the Sec. 111.70(1)(L) 1. d., Stats., criterion, we note that the Specialist has a four year specialized degree and we are satisfied from her testimony that such a degree is the customary source of the knowledge needed to perform her work.

Because the Specialist is a professional employee, she is ineligible for inclusion in the non-professional employee Local 309 unit. Given this conclusion, we need not and do not resolve the City contention that the Specialist is also a managerial employee.

Dated at Madison, Wisconsin, this 29th day of June, 2004.

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

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