

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

---

IN THE MATTER OF:

COLO-NESCO COMMUNITY SCHOOL  
DISTRICT,  
Public Employer,

and

COLO-NESCO EDUCATION ASSOCIATION,  
Certified Employee  
Organization/Petitioner.

---

CASE NO. 100000

PROPOSED DECISION AND ORDER

This is an amendment of bargaining unit proceeding commenced by the Colo-Nesco Education Association (the Association) pursuant to PERB rule 621—4.6(20). The Association seeks to amend a bargaining unit of professional employees of the Colo-Nesco Community School District (the District) which it has been previously certified to represent, to include the position of technology director (which the parties have also at times referred to as the director of information technology).

The District resists the petition, asserting that the position is excluded from the coverage of Iowa Code chapter 20 because it is a representative of the public employer within the meaning of section 20.4(2) or a confidential employee within the meaning of section 20.4(3). The District also argues that even if the technology director is not excluded from chapter 20's coverage, its inclusion within the existing unit is not appropriate because it does not share a community of interest with the employees in that unit.

Pursuant to notice, an evidentiary hearing on the petition was held before me in Des Moines, Iowa on January 13, 2015. The Association was represented

by its attorney, Christy Hickman, and the District by its attorneys, Andrew Bracken and Ann Smisek. Both parties submitted post-hearing briefs, the last of which was filed January 27, 2015.

Based upon the entirety of the record, and having considered the parties' respective arguments and cited authorities, I conclude that the technology director is a managerial employee excluded from chapter 20 coverage and thus cannot be added to the existing unit.

#### FINDINGS OF FACT

The District is a public employer within the meaning of Iowa Code section 20.3(10) and the Association is an employee organization within the meaning of section 20.3(4).

The District is the product of the consolidation of the Colo and Nesco Community School Districts. Prior to the consolidation, "certified" employees of both districts were organized for purposes of collective bargaining under chapter 20. In 1991, following the consolidation, the Association was certified as the bargaining representative of the current unit of Colo-Nesco professional employees, which is described as:

**INCLUDED:** All regular full-time and part-time teachers, librarians, counselors and nurse.

**EXCLUDED:** All other employees of the District, superintendent, principals, athletic director, substitute teachers, confidential and supervisory personnel, custodians, secretaries, bus drivers, cooks and all other persons excluded by section 4 of the Act.

This unit includes 43 of the District's approximately 80 employees. Bargaining-eligible employees of the District not included within this unit are not represented

for purposes of collective bargaining under chapter 20, nor has any bargaining unit of nonprofessional employees been determined by PERB.

Colo-Nesco is a small district with attendance centers in three locations in Story County: Colo (grades 5-12); Zearing (grades K-4) and McCallsburg (daycare and preschool). Its administrative offices are at the Colo location. During the 2014-15 school year 525 students were enrolled. Graduating classes are typically fewer than 40 students.

The District's chief administrator is Superintendent Jim Verlengia, a part-time superintendent who began at the District in early 2011 but who is technically an employee of Heartland Area Education Agency 11. Pursuant to a contract between the District and Heartland, Verlengia divides his time between part-time duties as Heartland's director of leadership support and his role as the District's superintendent.

When Verlengia began work at the District, its technology support and assistance were being provided by an outside company which maintained the District's servers, repaired its computers and maintained the systems which were then in place. At least in part as a result of a technology assessment by Heartland, the District passed a physical plant and equipment levy, one-third of the proceeds of which were designated for technology. Eventually, the District's board of directors decided to follow Verlengia's recommendation to dispense with the services of the third-party technology support provider and to create an in-house technology "leadership" position.

Although the precise sequence and timing of the events is not clear from the record, at some point in 2012 the District hired its first dedicated technology employee, then referred to as the “technology coordinator,” and initiated a “one-to-one computing” program, where each student in grades 7-12 was provided with a tablet or laptop computer. The initiation of one-to-one computing prompted the development, with the assistance of Heartland, of the District’s initial “technology plan.”

Reporting directly to the superintendent are employees the District refers to as the “administrative team” or “superintendent’s cabinet,” which is subdivided into “operational” and “academic” groups. The academic side of the cabinet is composed of the elementary and intermediate principals, the middle and high school principal/athletic director, the preschool director and the instructional coach & TLC coordinator. The “operational” side of the cabinet is the business manager/board secretary/board treasurer (hereinafter the business manager), transportation director, maintenance/building & grounds director, nutrition director and, since its creation, the position now referred to as the technology director.

The superintendent holds regular Wednesday meetings with the “academic” branch of the cabinet/administrative team. On the second Wednesday of each month they are joined by the “operational” side for a full cabinet meeting, following which the meeting continues with only the operational side of the cabinet.

Of the members of the cabinet, only the instructional coach & TLC coordinator (a contracted teacher) is a bargaining unit employee. She is excused from the weekly academic-side meetings when the group's conversation "moves to another level," although the record does not reflect what subjects are discussed in her absence. With the exception of the instructional coach & TLC coordinator, the superintendent and the school board consider the cabinet/administrative team to be part of the District's managerial hierarchy.

The terms and conditions of employment of the cabinet/administrative team are identical or similar to those of bargaining unit employees in some respects, but different in others.

With the exception of the instructional coach & TLC coordinator, cabinet members are employed pursuant to individual one-year contracts commencing July 1. For all except the nutrition director, these contracts contemplate a 12-month work year of 260 days. Bargaining unit employees, on the other hand, are employed pursuant to shorter school-year-only contracts of 187 days, which are issued pursuant to Iowa Code section 279.13 and which, unlike those of cabinet members, automatically continue for the ensuing year unless terminated in accordance with Iowa Code sections 279.15 - 279.19. Bargaining unit employees report to the principal of the attendance center to which they are assigned, while the technology director and others in the cabinet report directly to the superintendent. Although reporting directly to him, the technology director does not frequently interact with the superintendent, their direct contact usually

limited to the monthly meetings the technology director attends with others on the “operational” side of the cabinet.

A number of the benefits received by cabinet members are identical or similar to those received by bargaining unit employees pursuant to the collective bargaining agreement between the Association and District. Both groups receive long term disability and accidental death and dismemberment insurance, \$25,000 in life insurance coverage, five family illness days and a \$120 contribution toward employee dental insurance. Both groups receive a cash payment if an employee declines health insurance (approximately \$4,500 for cabinet members versus approximately \$1,230 for unit employees); personal leave (three days for cabinet members versus two for unit employees), and sick leave (cabinet members receive 15 days while new unit employees receive only 10 days of sick leave, increasing to 15 over time).

Although the contract salaries of all cabinet members are not of record, those which are range (for FY15) from the technology director at \$43,680 to the 7-12 principal/athletic director at \$81,640 for their 260 days of service. The salary schedule for teachers (187 days) ranges from approximately \$36,000 to approximately \$55,000. Cabinet employees, unlike those in the bargaining unit, receive 20 paid vacation days, and some receive a cell phone allowance.

Bargaining unit employees enjoy a number of negotiated terms and conditions of employment not applicable to those in the cabinet, such as access to a grievance procedure, specific health-and-safety, staff reduction and transfer provisions, scheduled salary increases, as well as supplemental pay, longevity

and travel reimbursement provisions. Unit employees are subject to specific hours provisions concerning the work day, after-school meetings, lunch periods, preparation time and in-service days, while cabinet members have no formally-established hours.

The District's superintendent and business manager are central players in its budgeting functions. Once the District's available funds (largely determined by its student count and tax base) are established, the superintendent and business manager determine what amounts must be earmarked for fixed costs — largely salaries and benefits for the District's employees — and for known upcoming expenses.

Each of the District's "directors," including the technology director, then submits what the parties have referred to as their "wish lists" for the use of the remaining "discretionary" funds, and discusses with management their department's needs and priorities, including contingency funds should unexpected needs arise. The superintendent and business manager, subject to the approval of the District's board of directors, ultimately allocate a sum of money to each department, whose director is responsible for the administration and use of their department's allocation. There is no evidence which reveals the size of the information technology department's budget allocation in comparison to other departments or as a percentage of the District' total budget.

The District's first technology director (then referred to as the technology coordinator) was Tom Hehli, who left the District's employ early in the 2013-14

school year. Hehli was replaced by Scott Bauer, who began his employment as the District's technology director on October 22, 2013.

During Hehli's tenure, he made recommendations for the District's purchase of computer hardware and software, oversaw the installation of cabling, insured that connectivity was achieved and maintained, and provided the District's overall technology support. He also determined that a list of all user passwords would be maintained, and personally maintained that list. On at least one occasion, Hehli examined student computer histories as part of a District investigation into an incident where a student of students appeared to have obtained others' passwords to various databases and to have made unauthorized changes.

Hehli worked with the District's business manager to select software, enter raw data, and set up programs or spreadsheets for the business manager's use in costing actual or potential collective bargaining proposals, and worked with her on how to run costing scenarios. Hehli was also involved in the installation and maintenance of a District time clock, and generally served as the advisor and resource of first resort concerning technology-based issues or problems confronting administrators, staff or students.

Although a written job description for the technology director was created at some point, the superintendent thought it and descriptions for other positions did not accurately depict what the positions actually did and what the District needed them to do. Consequently, the superintendent began to update job descriptions sometime in the spring of 2014.

The job description for the technology director position which was in place when Bauer assumed the position was not offered into evidence, although the working draft of a revised description, described as a “work in progress,” was offered and admitted. This job description, representing the superintendent’s vision of what he would like to see the technology director position become, is aspirational and not an accurate reflection of the functions actually being performed by the technology director.

For instance, the draft description indicates that the technology director is responsible for implementing, reviewing, evaluating and updating the District’s technology plan, for preparing universal fund (e-rate) applications and documentation, and for supervising technology interns. But as of the date of hearing, Bauer had never seen the District’s technology plan, had been told that e-rates were handled by an outside third party, and had never supervised a technology intern because no intern program had been implemented.

At least during Bauer’s tenure, the technology director has been primarily involved with managing the District’s computer network (including the installation or modification of cabling and equipment), planning and performing preventive maintenance on equipment, and providing users with service typical of an IT “help desk.” During the school year, approximately 60 per cent of the technology director’s workday is devoted to providing users with service of a help desk nature. This portion of the technology director’s time is divided approximately equally between assisting students and staff. Approximately 80 per cent of the time spent assisting staff is devoted to teachers, with only 20 per

cent involving the District's support staff and administrators. The technology director typically receives approximately 50 questions or requests each day from staff or students by email, phone, text message or in-person visits to the help desk counter at his office. The remaining 40 per cent of his time is typically devoted to maintaining the District's network, computers, wi-fi networks in the three schools, and its telephone system.

Most of the technology director's work is technical in nature — making sure hardware and software are working properly and solving technical problems or answering technical questions posed by staff and students, including providing users with one-on-one training and advice in the course of resolving the issue or problem they have presented.

As indicated above, a relatively small percentage of the technology director's time is devoted to assisting "front office" administrative employees, such as the business manager, with technology issues. Bauer has not performed any functions related to collective bargaining, and has never received any indication from management that he would actually be asked or required to analyze/process actual or contemplated bargaining proposals. He is aware that a costing program exists and anticipates that he would be called upon for assistance should the program not perform properly, as is the case with other programs used by the District. But there is no evidence that either Bauer or his predecessor has ever been exposed to contemplated bargaining proposals in advance of their being made to the Association.

The technology director performs other technology-related functions on an as-needed basis. For example, the technology director on occasion requests or recommends that equipment or software he has investigated and priced be acquired, and has informally recommended things the District could do to enhance staff's technology skills.

The technology director has been tasked with special technology related projects at times, such as researching copiers for possible acquisition, discussing the equipment with vendors and negotiating prices before making an acquisition recommendation to the superintendent and placing the appropriate order(s) when a decision is relayed back to him. As of the date of hearing, the technology director had also been tasked with investigating available security camera systems and making acquisition recommendations.

Bauer has the ability to monitor, in real time, what any user accessing the District's network in a district building is doing on their computer, be it email usage, word processing, internet browsing, or any other function. Although capable of doing so he does not, however, monitor employees' live computer activities, but would at the request of a principal or the superintendent.

Both Bauer and his predecessor have been directed to and have investigated potential student misuse of District technology by examining files on computers issued to students. Although not a forensic scientist, Bauer has the ability to access material on student machines, which have weaker security protections than those used by staff. Neither Bauer nor his predecessor have been involved in an investigation of other employees, although Bauer has the

ability to access employee email history, at least to some limited extent. Bauer acknowledges, however, that he would be the person asked to collect what information he could from an employee's computer should management initiate an investigation of an employee which might involve employee computer use or where an employee's computer might contain evidence relevant to the investigation.

Bauer has access to data contained in some, but not all, of the District's various programs and systems. He has no access to the District's accounting system, which is maintained off-site, and no log-in to the time clock or the District's servers, which are not maintained on the District's premises.

Both Bauer and his predecessor have been directly involved in the formulation of certain District policies relating to computer usage. The initial technology director established and implemented the previously mentioned password policy whereby the technology director maintained a listing of all user passwords. One of Bauer's earliest actions following his employment was to dispense with the maintenance of such a list, which he viewed as contrary to accepted information technology practices. Bauer substituted a "change your password" feature so that a user could replace a lost or forgotten password, and possesses the ability to utilize that system to change a user's password and use it himself, although the user would receive built-in notification that their password had been changed.

Bauer also conceived and implemented the District's "three strikes" policy concerning student misuse of District-issued computers. The testimony

concerning the sanctions imposed should a student receive a third strike is not wholly consistent, but it appears the computer is either deactivated or physically taken from the offending student for an undisclosed period of time.

## CONCLUSIONS OF LAW

The District asserts that the technology director cannot properly be included in the Association-represented unit because the position is excluded from chapter 20's coverage as a "confidential employee" and a "representative of a public employer." The District also maintains that even if the position is not excluded from the statute's coverage, its inclusion in the unit is not appropriate because it shares an insufficient community of interest with the bargaining unit employees. The Association disagrees on all counts.

### I. EXCLUSION FROM CHAPTER 20 COVERAGE

Iowa Code section 20.4 excludes certain employees from the coverage of the chapter, and provides in relevant part:

#### **20.4 Exclusions.**

The following public employees shall be excluded from the provisions of this chapter:

2. Representatives of a public employer including the administrative officer, director or chief executive officer of a public employer or major division thereof as well as the officer's or director's deputy, first assistant, and any supervisory employees....

3. Confidential employees.

Section 20.3(3) defines the term "confidential employee":

3. "*Confidential employee*" means any public employee who works in the personnel offices of a public employer or who has access to information subject to use by the public

employer in negotiating or who works in a close continuing working relationship with public officers or representatives associated with negotiating on behalf of the public employer....

A. A confidential employee?

The District's confidential employee argument is based primarily upon the technology director's purported access to information subject to use by the District in negotiating and the position's allegedly close continuing working relationship with those associated with negotiating on the District's behalf.

1. Access to information.

It is well established that the intent of the "access to information" aspect of the confidential employee exclusion was not to exclude all employees who have access to raw data or information which might be used or considered by the employer in its collective bargaining activities. *See, e.g., Council Bluffs Comm. School Dist.*, 03 PERB 6514, 6516 & 6536, *citing Mediapolis Comm. School Dist.*, 00 PERB 5927; *City of Osceola*, 87 PERB 3279; *Clayton Cty.*, 99 HO 6061. Even assuming that the technology director can access certain raw data which might be used by the employer in collective bargaining, this would not bring the position within the confidential employee exclusion.

Confidential employee status under the "access to information" aspect of the exclusion centers on the employee's relationship to the collective bargaining process, rather than to his or her access to non-public or "confidential" information generally. *Id.* *See also Mediapolis Comm. School Dist.*, 00 PERB 5927; *Polk Cty.*, 75 PERB 120; *Clayton Cty.*, 99 HO 6061; *Henry Cty.*, 99 HO 6035. "Access to information" does not exclude an employee from chapter 20

coverage unless such access would afford an employee organization an undue advantage during bargaining by providing advance knowledge of either the employer's bargaining strategy or confidential information relating to the employer's bargaining policy. *Council Bluffs Comm. School Dist.*, 03 PERB 6514, 6516 & 6536, *citing Mediapolis Comm. School Dist.*, 00 PERB 5927; *City of Osceola*, 87 PERB 3279; *State of Iowa* 78 HO 1240.

The District argues that the technology director has a relationship to the collective bargaining process which renders the position confidential because Bauer's predecessor "helped the District's business official prepare proposals for collective bargaining by assisting her in running reports for different costing scenarios," and that the technology director's access to this information could give the Association an advantage at the bargaining table.

While an employee's access to the employer's bargaining strategy, its contemplated or possible bargaining proposals, the limits of the bargaining authority imposed upon negotiators by the employer's governing body, or other "inside" bargaining information would thus bring the employee within the confidential exclusion, the record here does not establish the technology director's access to such information.

The District's business manager testified that she works closely with the superintendent on collective bargaining matters, putting together proposals and other documents deemed necessary. In 2013, prior to Bauer's retention as technology director, the business manager worked with his predecessor on selecting computer software for use in bargaining, entering data, and

understanding how to run costing scenarios. There is nothing, however, which would warrant a finding that Bauer's predecessor was involved in the preparation of contemplated bargaining proposals, advance knowledge of which would have provided the Association with an undue bargaining advantage. Bauer, although not having been employed during a period when the District was engaged in collective bargaining, acknowledged that he would be called upon for assistance should an issue about the functioning or entry of data into the District's costing program arise. But the record reflects that such a role would be limited to getting the program running correctly, rather than actually processing the data and running potential bargaining scenarios. There is no evidence that either Bauer or his predecessor has been involved in collective bargaining in such a way as to be exposed to the type of inside bargaining information which would render the position confidential. Instead, the record leaves one with the impression that the technology director's role with the District's computerized scenario costing was initially to consult and instruct on its operation, and has not been shown to be more than one of problem-solving should technical difficulties arise. Neither of these functions would necessarily expose the technology director to the employer's confidential bargaining information or strategies, any more than a mechanic's repair of an automobile would reveal the owner's future travel plans.

2. Close continuing working relationship with those associated with collective bargaining.

Although not strenuously argued by the District, it does maintain that the technology director should be excluded as a confidential employee because the position works in a close continuing working relationship with public officers or

representatives associated with negotiating on behalf of the public employer — presumably the superintendent and business manager (although not specifically identified by the District).

On this record, I cannot conclude that such disqualifying relationships have been established. Although “working relationships” surely exist between the technology director and the superintendent and the business manager, such is also the case between the technology director and seemingly every member of the staff or student body who operate a District-owned computer. Even if the technology director’s contact with the superintendent and business manager is more frequent than with others (a matter not established by the record) there is nothing which demonstrates that these contacts amount to “close” working relationships which are in any way related to the superintendent or business manager’s role in collective bargaining.

B. A representative of the public employer?

The District also argues that the technology director is excluded as a representative of the public employer on two grounds: That the technology director is the administrative officer, director or chief executive officer of a major division of the District, and that the technology director is a “managerial” employee as the concept has been developed by PERB caselaw.

1. Administrative officer, director, or chief executive officer of a major division of the District.

The technology director is the only employee in the District’s information technology “department.” Assuming that the position is thus the administrative officer, director or chief executive officer of the department, the question remains

whether the department is a “major division” of the District, thus excluding the technology director from chapter 20 coverage.

The issue of what constitutes a “major division” of a public employer was most recently discussed by the Board in *Council Bluffs Comm. School Dist.*, 03 PERB 6514, 6516 & 6536:

The statute does not define the term “major division,” and the Board has utilized a case-by-case approach in identifying major divisions of employers. However, the Board has long held that the term “major division” means an organizational component larger than each individual school in a school district. *Johnston Comm. School Dist.*, 76 PERB 500; *Mediapolis Comm. School Dist.*, 00 PERB 5927. The Board has generally considered only the largest divisions of large public employers to be “major divisions” within the meaning of the statute. For example, in *City of Dubuque*, 82 PERB 2209, the ALJ concluded that the City’s water division was a “major division” where it was the second largest division in a city with ten other divisions and an additional ten departments.

*Id.* at 27.

The Board also cited, with apparent approval, *Davenport Comm. School Dist.*, 96 HO 5436 & 5467, where the ALJ determined that the six divisions of the employer whose directors were members of the “superintendent’s team” which met weekly to make policy and management decisions, were the major divisions of the employer. Finding that the Council Bluffs district’s “executive cabinet” was the equivalent of Davenport’s “superintendent’s team” was it met regularly to discuss and formulate policy and management decisions, and because the four organizational components represented on the cabinet were large and had

distinct operational functions, the Board concluded that they constituted the employer's major divisions.

The technology director does certainly share at least two characteristics with the division directors in both *Davenport Comm. School Dist.* and *Council Bluffs Comm. School Dist.* He is a member of the Colo-Nesco District's "administrative team" or "superintendent's cabinet," and reports directly to the superintendent. But it is far from clear that the technology director, who attends cabinet meetings only monthly, is actively involved in the making of management decisions or that the information technology "division" or "department" is large in comparison to other operational units in the District's organizational structure. There is no evidence revealing the relative size of the District's overall budget which is allocated to the information technology department, and it is clear that only the technology director is employed in that operation – both considerations which appear to have been given substantial weight in the *Davenport* decision. And it seems clear that in neither *Council Bluffs* nor *Davenport* was any organizational component which was the smallest operational unit of the employer, as is the case here, found to constitute one of its major divisions.

Although it plays a significant role in the District's operations, one which might reasonably be expected to expand with the continuing development and implementation of workplace technology, I cannot conclude that the technology director's "one-man band" constitutes a major division of the District, and that the technology director is excluded from chapter 20's coverage on that basis.

## 2. “Managerial” employee

The District further argues that the technology director is excluded as a representative of the public employer because the position is that of a “managerial” employee. PERB has long recognized that certain employees are excluded as “representatives of a public employer” within the meaning of section 20.4(2) on the basis of their so-called “managerial” status. *See, e.g., Davenport Comm. School Dist.*, 75 PERB 72; *Council Bluffs Comm. School Dist.*, 03 PERB 6514, 6516 & 6536; *Dickinson Cty. Mem. Hosp.*, 85 PERB 2759; *City of Eagle Grove*, 12 PERB 8459.

Although “managerial employees” are not specifically listed in section 20.4, PERB has found these types of employees are excluded as representatives of a public employer because they are significantly involved in the promulgation and implementation of policy and their responsibilities so align them with management that they have a potential conflict of interest with bargaining unit employees. *See, e.g., City of Eagle Grove*, 12 PERB 8459; *City of Waterloo*, 08 PERB 7377; *Dickinson Cty. Mem. Hosp.*, 85 PERB 2759; *City of Onawa*, 12 HO 8505. PERB has generally followed the NLRB’s conjunctive test to determine managerial status of an employee:

1. Whether the employee is so closely related to or aligned with management as to place the employee in a position of potential conflict of interest between his employer on the one hand and his fellow workers on the other, and
2. Whether the employee is formulating, determining and effectuating his employer’s policies or has discretion, independent of an employer’s

established policy, in the performance of his duties.

*Black Hawk Cty.*, 05 PERB 6702; *City of Farley*, 95 PERB 5220; *Davenport Comm. School Dist.*, 75 PERB 72. Each case requires an evaluation of the totality of facts and circumstances. *Davenport Comm. School Dist.*, 75 PERB 72.

a. Potential conflict due to relationship with management.

The majority of the technology director's time is devoted to the performance of what has been referred to as typical "IT help desk" functions and to maintaining the District's networks and computers, tasks which do not inherently identify the position with management. The District argues, however, that a number of the technology director's job duties and responsibilities have a significant potential impact on employment matters which would create a potential conflict of interest for the technology director between bargaining unit employees and the District.

A position's significant involvement in the employer's strategic collective bargaining decisions, involvement in the employer's budgeting which is significant enough to have the potential for adverse effects on the bargaining unit, or its ability to meaningfully influence District decisions concerning curriculum, teacher training and the introduction of new classroom methods could, in a given case, all form the basis for a conclusion that the potential exists for divided loyalty between the employer and the position's fellow workers should it be included within the bargaining unit.

I think it unnecessary to dissect these parts of the District's argument here because another aspect of the position's acknowledged responsibility, and of management's expectations about it, reveal a relationship between the technology director and management in one identifiable area which places the technology director in a position of potential conflict of interest between the District and bargaining unit employees.

The technology director is the person who has the ability to and who would access information the District would logically be interested in obtaining were it to deem it necessary to investigate suspected misuse of its computer systems by bargaining unit staff or should it seek evidence of other employee misconduct which might be contained in District computers.

The technology director has the ability to monitor the activity of any District computer using the District's network, live at any time, including the computers of bargaining unit employees. The technology director also has the ability to access the history of a bargaining unit member's emails routed through the District's servers, at least for as far back as the existing system allows. Although Bauer does not routinely monitor staff's live computer activity and has never been directed to conduct or assist in an investigation involving a bargaining unit employee, both he and the District agree that he would be the individual who would be directed to access and deliver live monitoring or email history information to the administration should the need arise. Such a request would, at a minimum, convey the existence of an employee investigation to the technology director. Revealing that information to those involved could certainly

interfere with management's legitimate goal of ascertaining the facts surrounding suspected misconduct by causing a person to alter an ongoing behavior under investigation or to seek to destroy, hide or alter relevant evidence, whether in digital or some other form.

Should the person or persons whose computer use or email is being monitored or retrieved be within a bargaining unit which includes the technology director, the technology director would be confronted with a division of loyalty between the fellow unit employee(s) and the District. I accordingly conclude that the technology director's relationship with management as the first source for investigative computer information places the technology director in a position of potential conflict of interest between the District and bargaining unit employees.

b. Policy involvement/discretion.

The District argues that the technology director's job duties and responsibilities also fulfill the second prong of the managerial employee analysis because the position is significantly involved in formulating and effectuating District policy in a number of ways, and because the technology director has discretion, independent of established policy, in the performance of the positions' duties.

It is not necessary to decide whether the discretion exercised by the technology director rises to the level of that necessary to warrant a finding of managerial status, or whether the technology director's involvement in cabinet meetings, making of budget "recommendations" and advising on technology purchases warrant such a finding, because it seems clear that the position is

significantly involved in the promulgation and implementation of District computer policies.

Three concrete examples are contained in the record. Bauer's predecessor established and implemented a policy that the technology director record and retain all user passwords for District computers. Bauer, deeming such a practice to be unsound, altered the District-wide password policy by eliminating the list of user passwords and implementing a "change your password" process where only the user knew his or her passwords and no password lists were maintained by the District. Perhaps even more indicative of the position's role in formulating and effectuating policy, Bauer (seemingly unilaterally) conceived and implemented the District's "three strikes" policy concerning student misuse of District-issued computers.

Accordingly, because the technology director's relationship with management flowing from the position's role in the monitoring and retrieval of computer usage and data puts it in a position of potential conflict of interest, and because the technology director formulates, determines and effectuates (at least some of) the District's computer policies, I conclude the technology director is a managerial employee and thus a "representative of a public employer" excluded from chapter 20's coverage by section 20.4(2). It thus cannot be included within any bargaining unit.

## II. THE SECTION 20.13 "APPROPRIATENESS" ISSUE

Having concluded that the technology director is excluded from chapter 20 coverage as a representative of a public employer, it is unnecessary to address

the District's argument that even if the position is bargaining eligible, its inclusion in the existing unit is inappropriate under the criteria specified in section 20.13 which provides, in relevant part:

**20.13 Bargaining unit determination.**

2. . . . In defining the unit, the board shall take into consideration, along with other relevant factors, the principles of efficient administration of government, the existence of a community of interest among public employees, the history and extent of public employee organization, geographical location, and the recommendations of the parties involved.

However, for the Board's benefit should this proposed decision be reviewed, I note that if the technology director was not excluded as a representative of the public employer, I would conclude that the position would be appropriately included within the Association-represented bargaining unit.

The District's section 20.13 argument is based primarily on what it views as an insufficient community of interest between the technology director and the employees in the bargaining unit. While it is clear that distinct differences do exist between the skills, training and supervision of the technology director and other unit employees, all of which are relevant to a consideration of the section 20.13 "community of interest" criterion, these differences are not so significant as to preclude the position's inclusion in the existing unit.

I would give little weight to the differences between the compensation methods and benefits of the technology director and the unit employees where, as here, those differences are primarily due to the District's (albeit previously unquestioned) treatment of the technology director as a member of management,

rather than to some significant disparity in the actual value of the services rendered, as measured by the technology director's compensation as compared to that of bargaining unit employees. The community of interest shared by employees in a unit is only complete or perfect when the unit is composed of employees in a single job classification who perform identical work. The community of interest shared by the employees in the existing unit is thus far from complete – the librarians, counselors and nurses have different skills and training than do the teachers – but this less-than-perfect community of interest did not render the existing all-professional unit from being an appropriate one in section 20.13 terms.

The principles of efficient administration of government and the history and extent of the employee organization would weigh heavily in favor of the technology director's inclusion in the unit, were the position not excluded by section 20.3(3). The parties seemingly do not dispute the idea that the technology director is a professional employee of an employer where all other bargaining-eligible professionals are included within a single unit. If the technology director was deemed inappropriate for inclusion in the existing unit, the result would be to isolate a bargaining-eligible professional entitled to exercise the collective bargaining rights granted by chapter 20 on a virtual island, where those rights could not be exercised through a bargaining unit of one employee and where the only other possibility of engaging in collective bargaining would be the position's inclusion in a yet-to-be-determined unit of non-professionals, who could effectively veto the technology director's inclusion in

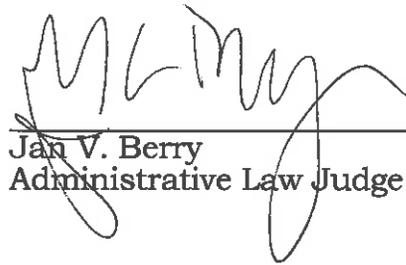
such a unit due to the section 20.13(4) requirement that professional and non-professional employees not be included in the same unit unless a majority of both agree.

I propose the entry of the following:

**ORDER**

The technology director position is a representative of the public employer and is excluded from the scope of chapter 20. Because the position thus cannot be included in a bargaining unit, the Association's petition is **DISMISSED**.

Dated at Des Moines, Iowa, this 18th day of December, 2015.



Jan V. Berry  
Administrative Law Judge

Parties served via eFlex.  
Electronically filed.