

STATE OF MICHIGAN
COURT OF APPEALS

BLOOMFIELD HILLS SCHOOL DISTRICT,

Respondent-Appellee,

v

BLOOMFIELD HILLS SUPPORT PERSONNEL
ASSOCIATION/MESPA,

Charging Party-Appellant.

UNPUBLISHED

August 6, 2002

No. 231709

MERC

LC No. 98-000192

Before: Fitzgerald, P.J., and Holbrook, Jr. and Griffin, JJ.

PER CURIAM.

The Bloomfield Hills Support Personnel Association/MESPA (Association) appeals as of right from an order of the Michigan Employment Relations Commission (MERC) dismissing its unfair labor practice charge against Bloomfield Hills School District (District) for its removal of a bargaining unit position. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The Association represents a bargaining unit consisting of all nonsupervisory clerical and secretarial employees of the District. The 1994-1997 collective bargaining agreement between the parties identified the position of “accounts payable specialist” (APS) as a unit position. During the negotiations for a successor contract, the parties discussed reclassification of the APS position which, at the time, was held by Diana Bennett. The parties reached a tentative agreement on a successor contract on March 4, 1998. The following month, the District notified the Association that the APS position would be renamed “accounts payable coordinator” (APC) to reflect Bennett’s increased supervisory responsibilities and removed from the bargaining unit.

The Association thereafter filed an unfair labor practice charge alleging that removal of the position from the bargaining unit without bargaining to impasse constituted a unilateral change in violation of subsection 10(1)(e) of the Public Employment Relations Act (PERA), MCL 423.210(1)(e). Hearing referee Roy L. Roulhac agreed, concluding in a decision and recommended order issued on January 20, 2000, that the APC was not a new position because the duties and responsibilities assigned to Bennett were insufficient to constitute supervisory status. Specifically, the hearing referee found that “the APC has no significant role in hiring, firing, or disciplining employees,” and thus ordered the District to recognize the Association as the bargaining representative for the APC position and, upon demand, bargain with the union concerning Bennett’s wages, hours, and other terms and conditions of employment.

The District filed exceptions to the hearing referee's decision, and on December 5, 2000, the MERC issued its decision and order finding "that the ALJ erred in concluding that the APC position has no significant role in the disciplinary process" and that "the record does not support the ALJ's determination that Bennett has no authority to effectively recommend that employees be hired." The MERC held in pertinent part that

Based on Bennett's role in the disciplinary and hiring process, as well as the fact that she has the authority to assign work and to adjust grievances at the first step, we conclude that the APC position is a supervisor as that term has been defined under PERA. Because the APC is a new supervisory classification, the Employer [the District] had no duty to negotiate with the Union concerning its creation or its placement outside the unit. The Employer's only obligation was to bargain with Charging Party [the Association] over the impact of that decision on the unit, and there is no indication in the record before us that Respondent has in any way breached that duty. . . . Accordingly, we order that the unfair labor practice charge be dismissed in its entirety.

The Association now appeals.

The decisions of the MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). The MERC's factual findings are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. *Id.*; *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 322; 550 NW2d 228 (1996); *Gogebic Community College Michigan Educational Support Personnel Ass'n v Gogebic Community College*, 246 Mich App 342, 348-349; 632 NW2d 517 (2001). This evidentiary standard is likened to the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion; while it consists of more than a scintilla of evidence, it may be substantially less than a preponderance. *St. Clair Ed Ass'n v St. Clair Co Intermediate School Dist*, 245 Mich App 498, 512; 630 NW2d 909 (2001). The MERC's legal conclusions may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. MCL 24.306(1)(a), (f); *Grandville Municipal Executive Ass'n, supra* at 436; *St. Clair Ed Ass'n, supra* at 513. In contrast to its findings of fact, the legal determinations of the MERC "are accorded a lesser degree of deference" because review of legal questions remains de novo. *Quinn v Police Officers Labor Council*, 456 Mich 478, 481; 572 NW2d 641 (1998). See also *St. Clair Ed Ass'n, supra* at 513.

The Association first contends on appeal that the MERC "has failed to take into account all that the [hearing referee] observed as the trial examiner" and that "[b]y omitting his determinations of credibility, the commission's decision [that the APC is a supervisory position] is not supported by competent, material, and substantial evidence on the record considered as a whole. . . ." We disagree.

In this case, the MERC, noting that the PERA contains no definition of the term "supervisor," utilized the definition contained in the National Labor Relations Act, 29 USC 152(11), in determining the nature of the APC position:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their duties, or effectively 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.

“[T]he existence of any one of the statutory powers, regardless of the frequency of its exercise, [is] sufficient to confer supervisory status on an employee, as long as the existence of the power is real rather than theoretic.” *Michigan Ed Ass’n v Clare-Gladwin Intermediate School Dist*, 153 Mich App 792, 797; 396 NW2d 538 (1986). In other words, “it is not the exercise of authority, but the delegation of authority, which is indicative of the attributes of a ‘supervisor.’” *Id.*

The MERC concluded that the APC was a supervisor, as defined above, based on evidence that the APC played a significant role in the disciplinary process and had the authority to effectively make hiring decisions on the employer’s behalf and to assign work and adjust grievances at the first step. The board relied on the oral testimony of record in reaching its conclusions in this regard, stating:

In concluding that the position at issue in the instant case was not a supervisor under PERA, the ALJ found that the role of the APC in the disciplinary process was limited to telling the two half-time accounts payable clerks who report to her to correct and not repeat errors. We disagree with the ALJ’s characterization of the record. Bennett testified that she has the authority to issue both verbal and written reprimands without the approval of her immediate supervisor, Diane Barnes, and Bennett’s testimony on this point was corroborated by both Barnes and assistant superintendent for personnel Christine Barnett. In fact, Bennett stated that she had the authority to take “*any* disciplinary actions that would be necessary to perform.” (Emphasis supplied.) Furthermore, assistant superintendent Barnett testified that all of the supervisors employed by the school district, including Bennett, have the authority to suspend employees whose work they are assigned to oversee. Based on this evidence, we find that the ALJ erred in concluding that the APC position has no significant role in the disciplinary process.

We also find that the record does not support the ALJ’s determination that Bennett has no authority to effectively recommend that employees be hired. To “effectively recommend” means that the individual’s recommendations are generally accepted by higher authority without independent investigation or consideration. *City of Detroit, Department of Health* [1991 MERC Lab Op 41], *supra*; *Bronson Methodist Hospital*, 1973 MERC Lab Op 946. Although no accounts payable clerks have been hired during the short period of time since the APC position came into existence, it is undisputed that Bennett has the authority to select applicants for interview and to make a recommendation to her supervisor, Diane Barnes. Barnes then consults with assistant superintendent for business services Daniel White who, in turn, discusses the matter with assistant superintendent for personnel Barnett. Although Barnett makes the final hiring

decision, both Barnes and White testified unequivocally that they would not overrule Bennett's recommendation when consulting with Barnett. Moreover, White was adamant in his contention that Bennett's input will be determinative with respect to the hiring of accounts payable clerks. At the hearing, White testified that the district "would hire the person that [Bennett] wanted to bring in." We find this evidence sufficient to establish that Bennett has the authority to effectively make hiring decisions on the Employer's behalf.

Having reviewed the whole record, we conclude that the MERC's finding that the APC is a "supervisor" within the meaning of PERA is supported by competent, material, and substantial evidence. In contrast to those cases cited by the Association in support of its argument, we do not find that the MERC's conclusions herein were based on "convoluted conjecture tantamount to speculation" or that credibility determinations were paramount because of conflicting testimony regarding the job functions of the APC. Compare *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 126; 223 NW2d 283 (1974); *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541; 517 NW2d 240 (1994). Rather, applying the definition of "supervisor" set forth in 29 USC 152(11), the supervisory nature of the APC position has ample support in the record.

The APC has been delegated authority to "effectively recommend" that certain individuals be hired and to direct the work of two employees, accounts payable clerks, by managing and prioritizing the flow of paperwork and assuring that functions are properly performed. When Bennett formally began the position of APC in May 1998, she continued to direct the day-to-day work of the accounts payable clerks and began performing new functions, including the discipline of employees. Bennett's undisputed testimony indicates that she has the authority to perform *any* necessary discipline and does not have to confer with her supervisor prior to disciplining an employee. Further, Diane Barnes, the executive manager of business services and Bennett's supervisor, corroborated Bennett's testimony that the APC, albeit not empowered to make final hiring decisions, did have the authority to "effectively recommend" hire. If there was an opening for a position under the APC's supervision, the District would advertise and post the position, and the APC would then screen the applications, select applicants for interview and make a recommendation to Barnes, who in turn would consult with the assistant superintendents for business services and personnel, the latter having the ultimate authority to hire new employees. When asked what would happen if there were two applicants and the APC preferred one and Barnes preferred the other, Barnes testified that "[w]e would go to the one that the APC preferred. She is the one who has to supervise, and has to work with this person daily." Moreover, the APC, as direct supervisor of the accounts payable clerks, also would adjust grievances on behalf of the District. Under the grievance procedure, Bennett would first attempt to resolve the grievance in an informal discussion with the union and if she were unsuccessful, would grant or deny the written grievance at the next step.

This delegation of authority is indicative of the attributes of a supervisory position, 29 USC 152(11); *Clare-Gladwin School District, supra*, and we are satisfied that the MERC's finding that the APC had supervisory status is supported by evidence that reasonable minds would accept as adequate to support a decision. *St. Clair Education Ass'n, supra*. We therefore conclude that the MERC properly determined that the APC is a "supervisor" and thus the District

had no duty to negotiate with the union concerning its creation or its placement outside the bargaining unit.

The Association next argues that the evidence used to support the commission's finding that the APC position is supervisory is inconsistent with the standard used for making a determination of "supervisor," and that the MERC erred as a matter of law in applying the incorrect standard. While acknowledging the relevance of the definition of "supervisor" contained in 29 USC 152(11) and used by the MERC in this case,¹ the Association, citing numerous MERC opinions, nonetheless maintains that the commission has ignored authority which establishes that employees who have routine authority to assign and direct work, but possess no other indicia of supervisory authority, are not supervisors.

However, the Association essentially disputes factual issues and has failed to demonstrate that the MERC's determination violated a constitutional or statutory provision or was based on a substantial and material error of law. *Grandville Municipal Executive Ass'n, supra* at 436. The cases relied on by the Association for its determination that the APC is not a supervisor are distinguishable from the present case, there being no evidence in those cases that the employees found not to be supervisors had been delegated authority to perform supervisory functions such as effectively recommending the hiring of individuals, directing staff, or disciplining employees. In this case, as we have already determined, the MERC, utilizing the proper standard, appropriately held that the APC possessed such supervisory authority. The Association's argument is therefore without merit.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin

¹ The definition of "supervisor" set forth in 29 USC 152(11) has been frequently and favorably cited by the MERC and by this Court. See, e.g., *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm Co Lodge No 149 (Montcalm Sheriff Dept Division)*, 235 Mich App 580, 588-589; 599 NW2d 504 (1999); *Mecosta Co Bd of Comm v Michigan Council 25, American Federation of State, Co & Municipal Employees, AFL-CIO*, 166 Mich App 374, 384-385; 420 NW2d 210 (1988); *Clare-Gladwin Intermediate School Dist, supra* at 797.