

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN EDUCATION ASSOCIATION,

Plaintiff-Appellant,

v

BRIMLEY AREA SCHOOLS,

Defendant-Appellee.

UNPUBLISHED
February 22, 2002

No. 227901
MERC
LC No. 99-000020

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order of the Michigan Employment Relations Commission resolving a petition for unit clarification by excluding the position of technology coordinator from the bargaining unit. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, through its affiliates, represents a broad unit of support staff of defendant school district. Plaintiff filed two petitions with the MERC seeking to include the positions of technology coordinator and central office bookkeeper in the bargaining unit. The commission found that under its long-standing practice, a public employer is entitled to designate one nonsupervisory employee as a confidential employee who may be excluded from an existing nonsupervisory bargaining unit. The commission found that the central office bookkeeper did not perform confidential duties, and that the technology coordinator may be considered the one confidential employee.

Decisions of the MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28 and MCL 423.216(e). The commission's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). The MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. *Id.*

The determination of an appropriate bargaining unit is a question of fact. *Police Officers Ass'n of Michigan v Grosse Pointe Farms*, 197 Mich App 730; 496 NW2d 794 (1993). Plaintiff concedes that the MERC has a long-standing policy allowing a public employer to designate one employee as a confidential employee, and exclude that employee from the collective bargaining unit. The concept and definition of a confidential employee was borrowed from the National

Labor Relations Board. *Lapeer County and 40th Judicial Circuit Court v Teamsters State County and Municipal Employees Local 214*, 12 MPER ¶ 3001 (1998). A confidential employee acts in a confidential capacity regarding management policies concerning labor relations. *Id.* If an employer seeks to name more than one confidential employee, it bears the burden of showing the justification for additional confidential employees beyond the one to whom it is entitled. *Id.*

Plaintiff argues that the exclusion should be limited to one employee, without regard to whether that employee has a supervisory function. However, this would negate the rationale for the exclusion. A supervisory employee would be excluded from the bargaining unit based on his or her supervisory duties, and the confidential employee exception would be unnecessary. The exception contemplates excluding an employee who would otherwise be a member of the bargaining unit.

Affirmed.

/s/ Michael R. Smolenski

/s/ Martin M. Doctoroff

/s/ Donald S. Owens