STATE OF MICHIGAN

COURT OF APPEALS

CITY OF GRAND RAPIDS, Respondent-Appellant,	UNPUBLISHED July 1, 2008
v	No. 274188 MERC
GRAND RAPIDS EMPLOYEES INDEPENDENT UNION, Charging Party-Appellee.	MERC Nos. C 03 C-053 and C 03 C-054

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION, Petitioner,	
v	No. 284392
CITY OF GRAND RAPIDS, Respondent.	

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Respondent, City of Grand Rapids (city), appeals a decision and order entered by the Michigan Employment Relations Commission (MERC) in favor of the charging party Grand Rapids Employees Independent Union (GREIU). We affirm.

I. Background

This case concerns the job classification status of two city employees, Ruth Haner and Christine Barfuss, and the city's unilateral decision to reclassify them as "supervisory" employees, which removed them from the bargaining unit for "nonsupervisory" employees that

is represented by GREIU. The bargaining unit excludes all supervisors.[1] GREIU filed unfair labor practice charges with MERC, alleging that the city's actions violated the public employment relations act (PERA), MCL 423.201 *et seq.*, and specifically MCL 423.210(1)(e). Pursuant to § 10(1)(e), "It shall be unlawful for a public employer or an officer or agent of a public employer . . . to refuse to bargain collectively with the representatives of its public employees . . . ." After three days of hearings, the administrative law judge (ALJ) issued a decision and recommended order, finding that the city failed to bargain in good faith by unilaterally removing the positions from the bargaining unit represented by GREIU. The ALJ, however, concluded that the disputed positions now held by Haner (formerly office assistant III, now personnel assistant) and Barfuss (formerly right-of-way agent, now administrative analyst I) did possess supervisory authority; therefore, it was not recommended that the two employees be returned to the bargaining unit. Exceptions and cross-exceptions to the ALJ's ruling were filed, and the matter was presented to MERC for resolution.

In its decision and order, MERC ruled that PERA prohibits supervisors from being included in a nonsupervisory bargaining unit with employees they supervise, that an employer acts at its own peril when it moves a position that it contends is supervisory from a nonsupervisory bargaining unit without first obtaining consent of the union or an order from MERC, that the city indeed acted unilaterally, that the city thereby violated its duty to bargain in good faith under § 10(1)(e), and that the evidence was insufficient to find that Haner and Barfuss possessed supervisory authority under MERC precedent. MERC ordered the city to return the contested positions to the bargaining unit represented by GREIU without reduction in compensation currently paid for each position, to bargain with GREIU, upon demand, over the terms and conditions of employment for each position, and to make GREIU whole for the loss of dues and fees occasioned by the city's unlawful removal of the positions from the bargaining unit. The city appeals.

II. Analysis

A. Overview of the City's Arguments

The city presents three arguments. First, the city contends that it did not commit unfair labor practices when it correctly determined that the individuals in the nonsupervisory collective bargaining unit were supervisors and unilaterally removed them from the unit without the agreement of GREIU or a MERC order. Second, the city maintains that MERC committed a substantial and material error of law because it abandoned the disjunctive test for the existence of supervisory authority and applied definitions of supervisor that were inconsistent with *Oakwood Healthcare, Inc*, 348 NLRB No 37 (2006). Third, and finally, the city argues that the record as a whole does not contain competent, material, and substantial evidence to support MERC's findings that Haner and Barfuss are not supervisors; the ALJ correctly assessed that they were both supervisory employees. On all arguments presented, we disagree.

---

[1] The Association of Public Administrators of Grand Rapids (APAGR) is the exclusive representative for supervisory city employees.

B. Standards of Review and General Principles Governing MERC Litigation

Decisions rendered by MERC are reviewed on appeal pursuant to Const 1963, art 6, § 28 and MCL 423.216(e). *Grandville Muni Executive Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996); *Oak Park Public Safety Officers Ass'n v City of Oak Park*, 277 Mich App 317, 323; 745 NW2d 527 (2007). MCL 423.216(e) provides that "[t]he findings of the commission with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive." Const 1963, art 6, § 28 provides in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . . .

The evidentiary standard equates to the amount of evidence that a reasonable mind would accept as being sufficient to support a particular conclusion. *St Clair Co Ed Ass'n v St Clair Co Intermediate School Dist*, 245 Mich App 498, 512; 630 NW2d 909 (2001). It is more than a scintilla of evidence, but can be substantially less than a preponderance of evidence. *Id.* at 512-513. While MERC's legal determinations may not be disturbed unless they violate statutory or constitutional provisions or are based on substantial and material errors of law, its legal rulings are afforded a lesser degree of deference than its factual findings because review of legal questions remains de novo. *Branch Co Bd of Comm'rs v Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 260 Mich App 189, 193; 677 NW2d 333 (2003).

"Where a statutory construction by the MERC has endured for a long time, it should be accorded significant weight by a reviewing court. *Grandville Muni, supra* at 437. This Court must hesitate to substitute a judicial judgment for MERC's determination of the appropriate bargaining unit, and we do so reluctantly and only upon a clear showing of error. *Id.* With regard to interpreting PERA, our Supreme Court frequently looks to the construction of analogous provisions of the National Labor Relations Act (NLRA), 29 USC 151 *et seq.*, by the federal courts. *Id.* at 436. Further, opinions by the United States Supreme Court accord great deference to the National Labor Relations Board's (NLRB's) construction of the NLRA, and this Court extends similar consideration to interpretations of PERA by MERC. *Id.*

In *Ranta v Eaton Rapids Pub Schools Bd of Ed*, 271 Mich App 261, 265-266; 721 NW2d 806 (2006), this Court made the following observations regarding PERA:

> Our Supreme Court has held that PERA is "the dominant law regulating public employee labor relations." PERA "imposes a duty of collective bargaining on public employers, unions, and their agents." "Violations of § 10 of the PERA are deemed unfair labor practices under MCL 423.216 . . . remediable by the

> [MERC]." Section 16 of PERA vests MERC with exclusive jurisdiction over unfair labor practices. [Citations omitted; omission and alteration in original.]

Pursuant to MCL 423.215, an employer and the representative of the employees are mandated to bargain for wages, hours, and other terms and conditions of employment, which constitute mandatory subjects of collective bargaining. *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 550-551; 581 NW2d 707 (1998).

C. Discussion

As indicated above, MCL 423.210(1)(e) provides that "[i]t shall be unlawful for a public employer or an officer or agent of a public employer . . . to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of section 11." MCL 423.211 provides in part:

> Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer[.]

With respect to the city's argument that it was proper to unilaterally remove the positions from the bargaining unit without the consent of GREIU or an order from MERC, the city claims that, in 2003, it was faced with a situation in which the positions held by Haner and Barfuss had been delegated supervisory authority. The city contends that it had three options: (1) secure the agreement of GREIU to remove Haner and Barfuss on the basis of their supervisory status, (2) file a petition with MERC to have the status reviewed and obtain an order allowing removal from the bargaining unit, or (3) take unilateral action as was done here. The city argues that the first option was not possible because "GREIU was not agreeing to anything in 2003 and was more concerned about maintaining the size of its dues paying membership than it was about supervisory status." The second option was not practical, according to the city, because the process before MERC would take more than a year. Moreover, the city asserts that, while it is legally accurate to say that an employer violates its duty to bargain in good faith if it removes a position from the bargaining unit without the union's agreement or an order from the commission, this proposition only applies when there is a transfer of a nonsupervisory position from one nonsupervisory bargaining unit to another nonsupervisory unit. And the city contends that it would be unlawfully restraining and coercing its employees in violation of § 10(1)(a) of PERA if it allowed Haner and Barfuss to remain in the GREIU nonsupervisory bargaining unit.

Under MCL 423.213, "The commission shall decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining . . . ." MERC "has repeatedly taken the position that bargaining unit placement is neither a mandatory subject of bargaining nor a matter of managerial prerogative but a matter reserved to [MERC] by [MCL 423.213]." *City of Warren*, 8 MPER 26,002 (1994), citing *Detroit Fire Fighters Ass'n, Local 344, IAFF v Detroit*, 96 Mich App 543, 546; 294 NW2d 842 (1980)("if defendant believes that the above-mentioned positions should be deleted from the

bargaining unit, it may present its reasons therefore to MERC under the authority of MCL 423.213"); *Northern Michigan Univ*, 1989 MERC Lab Op 139; *Michigan State Univ*, 1993 MERC Lab Op 345; *Ingham Co & Ingham Co Bd of Comm'rs*, 1993 MERC Lab Op 808; see also *Wayne Co*, 15 MPER 33,009 (2001). Further, MERC has "consistently held that an employer may not alter bargaining unit placement unilaterally or after bargaining to impasse, but must either obtain the Union's agreement to changes on bargaining unit composition or obtain an order from [MERC] by filing an unfair labor practice charge, or if appropriate, a unit clarification petition." *City of Warren, supra*, citing *Michigan State Univ, supra*, and *Michigan State Univ*, 1992 MERC Lab Op 120. In *Clerical-Technical Union of Michigan State Univ v Michigan State Univ Bd of Trustees*, 214 Mich App 42; 542 NW2d 303 (1995), this Court reversed MERC's issuance of a cease-and-desist order that was based on MERC's conclusion that the university had unlawfully removed positions from the bargaining unit represented by the union, but our Supreme Court, 455 Mich 863 (1997), reversed this Court, ruling that "the Court of Appeals exceeded the scope of its power of review and substituted its own judgment for that of the MERC."

On the basis of the authority, it is quite evident that, because the city here took unilateral action in giving Haner and Barfuss supervisory status and removing their two positions from the bargaining unit without agreement from GREIU or an order from MERC, its actions constituted unfair labor practices. The city's arguments regarding the consumption of time in pursuing an order from MERC and regarding GREIU's alleged inclinations in 2003 with respect to forging agreements and collecting dues are unavailing. There is no basis in law to use these "excuses" to avoid the requirements of PERA, nor does the city cite any supporting authority.

We also reject the city's argument that the prohibition against unilateral action discussed above applies only when there is a transfer of a nonsupervisory position from one nonsupervisory bargaining unit to another nonsupervisory unit. We further reject the city's accompanying argument that it would be unlawfully restraining and coercing its employees in violation of PERA if it allowed Haner and Barfuss to remain in the GREIU nonsupervisory unit; therefore, unilateral action was permissible. Both of these arguments are predicated on *Macomb Co*, 10 MPER 28,036 (1997), in which MERC found that the county had committed an unfair labor practice when it interfered with the protected rights of employees by bargaining with an intervening union for three illegal bargaining units, given that they contained both supervisors and nonsupervisors. The county was a party to collective bargaining agreements with 22 employee bargaining units, and the Macomb County Employees Association (MCEA)(intervening union) was the exclusive representative for three units (Locals I, II, and III), two of which units were previously represented by the charging party, the American Federation of State, County, and Municipal Employees (AFSCME). All three units had contained supervisors and nonsupervisors at one time. MERC, adopting most of the recommendation and order issued by the ALJ, found that all three bargaining units were inappropriate units under PERA, that the county's inclusion of supervisors and nonsupervisors in the same bargaining units and bargaining with its own supervisors on behalf of nonsupervisors constituted employer assistance and interference with the administration of a labor organization

in violation of § 10(1)(b),[2] and that the county, therefore, had interfered with, coerced, and restrained employees in the exercise of their collective bargaining rights in violation of § 10(1)(a).[3]

Here, we acknowledge that it would be problematic for the city to allow both supervisory and nonsupervisory employees to remain in the bargaining unit represented by GREIU; however, this did not mean that the city was free to address the situation unilaterally, without approaching and bargaining with GREIU on the matter or without pursuing the matter with MERC. And *Macomb Co* does not stand for such a proposition. As stated by MERC in the case at bar, "At the time [the city] decided that the positions would be given supervisory authority, [the city] had the option of bargaining over the matter with [GREIU] or filing a unit clarification petition with [MERC]." Furthermore, *Macomb Co* does not provide any support for the proposition that the rule against unilateral action applies solely when there is movement between two nonsupervisory bargaining units, nor do the cases by us in support of application of the rule suggest that they are so limited.[4]

Next, we address the issues concerning whether MERC applied the proper test in determining supervisory authority and whether there was competent, material, and substantial evidence to support MERC's conclusion that the city failed to establish that Haner and Barfuss were supervisors. Highlighting the language from the MERC opinion challenged by the city, we set forth the following recitation by MERC of the principles concerning the determination of whether an employee is a supervisor:

> A supervisor is one who possesses authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to effectively recommend such action. To qualify as a supervisor under PERA, *an individual's responsibility to exercise authority in the foregoing functions must involve the use of independent judgment, including effective authority in personnel matters, with the power to evaluate employees* ***and*** *recommend discipline.* Effective authority in personnel matters means that the employee's superiors generally accept his or her recommendation without an independent investigation. A finding of supervisory status requires that an individual or classification exercise independent judgment and be identified or aligned with management in the performance of assigned duties.

---

[2] MCL 423.210(1)(b) provides that "[i]t shall be unlawful for a public employer or an officer or agent of a public employer . . . to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization . . . ."

[3] MCL 423.210(1)(a) provides that "[i]t shall be unlawful for a public employer or an officer or agent of a public employer to interfere with, restrain or coerce public employees in the exercise of their rights . . . ."

[4] We would also note that it would appear that Haner and Barfuss, once reclassified and removed from the bargaining unit represented by GREIU, would have been moved to APAGR, the exclusive representative for supervisory city employees.

> An individual whose authority is limited to the routine direction of the daily work of other employees and/or making work assignments of a routine nature is not a supervisor under PERA. *Similarly, an individual in charge of a particular project or function who determines how the work will be completed, decides which employees will do it, and insures that it is completed properly, is not a supervisor unless the employee has an effective role in discipline* ***and*** *personnel matters.* Where higher management makes the effective personnel decisions, the fact that an individual evaluates the performances of other employees is not sufficient to qualify that individual as a supervisor. Responsibilities such as maintaining time cards and granting time off are insufficient to establish supervisory status. Also the absence of authority to approve vacation and sick leave requests indicates an absence of supervisory authority. The fact that an employee has input into or makes recommendations concerning personnel decisions does not mean that the employee has effective authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees and is insufficient to establish supervisory authority. [Citations omitted; emphasis added.]

The city argues that by using the conjunction "and," as emphasized above, MERC unlawfully abandoned the disjunctive test for determining supervisory authority.

We first note the following pertinent language in MCL 423.9e, which concerns the determination and adoption of bargaining units:

> The commission, after consultation with the parties, shall determine such a bargaining unit as will best secure to the employees their right of collective bargaining. The unit shall be either the employees of 1 employer employed in 1 plant or business enterprise within this state, *not holding executive or supervisory positions*, or a craft unit, or a plant unit, or a subdivision of any of the foregoing units. [Emphasis added.]

This Court has directly addressed the issue posed to us in *Michigan Ed Ass'n v Clare-Gladwin Intermediate School Dist*, 153 Mich App 792; 396 NW2d 538 (1986), wherein MERC found that the position of Coordinator/Consultant for the Gifted and Talented Education Program of the school district was a supervisory position. MERC concluded that the coordinator was supervisory in nature because supervisory responsibilities had in fact been delegated to the coordinator, although the responsibilities had not been exercised or come to fruition. *Id.* at 795. This Court, after first recognizing and quoting MCL 423.9e, stated:

> The term "supervisor" has not been defined under the Michigan labor mediation act nor is the term defined under the public employment relations act. Neither this Court nor our Supreme Court has imposed a judicial definition of "supervisor" or "supervisory" on the MERC or discussed the rationale behind segregating the bargaining units of supervisors from the bargaining units of other employees. Nonetheless, we need not address the MERC's ruling in a vacuum. When this Court encounters a void of Michigan precedent on a labor subject, it finds persuasive federal labor relations law.

> The Congress recognized a need to segregate supervisors from other personnel because of its concern about unrestricted unionization of supervisors. Congress was concerned that fraternal union feelings would impair a supervisor's ability to apply his employer's policy to subordinates according to the employer's best interest. It withdrew certain protections from "supervisory" employees in order to give employers more freedom to prevent a pro-union bias from interfering with the independent judgment of employees holding supervisory positions.
>
> "Supervisors" are defined in the Labor Management Relations Act, 29 USC 152(11):
>
> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[5]
>
> The federal courts have consistently held that 29 USC 152(11) is to be *read in the disjunctive with the existence of any one of the statutory powers, regardless of the frequency of its exercise, being sufficient to confer supervisory status on the employee, as long as the existence of the power is real rather than theoretic.* Said another way, it is not the exercise of authority, but the delegation of authority, which is indicative of the attributes of a "supervisor." [*Michigan Ed Ass'n, supra* at 796-797 (citations omitted; emphasis added).][6]

This Court held that MERC's decision had ample support in the record, where the coordinator had been delegated authority to recommend the hiring of certain individuals and to direct any members of her staff; the coordinator's powers were real, not theoretic. *Id.* at 797-798.

The United States Supreme Court in *Nat'l Labor Relations Bd v Kentucky River Community Care, Inc*, 532 US 706, 710; 121 S Ct 1861; 149 L Ed 2d 939 (2001), relied on the statutory definition of "supervisor" found in 29 USC 152(11), and stated that it encompasses the following three-part test for determining supervisory status:

> Employees are statutory supervisors if (1) they hold the authority *to engage in any 1 of the 12 listed supervisory functions,* (2) their "exercise of such

---

[5] Although the decision in *Michigan Ed Ass'n* is 22 years old, the language of 29 USC 152(11) is unchanged to this day.

[6] See also *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm Co Lodge No 149 (Montcalm Sheriff Dep't Div)*, 235 Mich App 580, 588-589; 599 NW2d 504 (1999) (quoting same passage from *Michigan Ed Ass'n*), and *Oakwood Healthcare, supra*.

> authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." [Citation omitted; emphasis added.]

Here, we disagree with and reject the city's contention that MERC abandoned the disjunctive test. First, MERC stated, consistent with 29 USC 152(11), *Kentucky River Community*, *Michigan Ed Ass'n*, and *Oakwood Healthcare, supra*, that a "supervisor is one who possesses authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, *or* discipline other employees, or to effectively recommend such action." (Emphasis added.) This language is in disjunctive form, recognizing that the existence of any one of the powers is sufficient to confer supervisory status on an employee. While MERC also spoke of the "power to evaluate *and* recommend discipline" and the role of employees in "discipline *and* personnel matters" in the context of setting forth general principles, MERC applied the disjunctive test to both Haner and Barfuss, regardless of whether MERC made any misstatement of law in its recitation of principles.[7] MERC assessed, individually, whether Haner has the authority to evaluate work performance *and* whether she has the authority to assign work to other employees. As to Barfuss, MERC assessed, individually, whether she has the authority to recommend discipline *and* whether she has the authority to assign work to other employees. Accordingly, we conclude that MERC did not abandon the disjunctive test.

The city next maintains that MERC employed an overly strict concept of "independent judgment," defining out of existence the assignment of work as a supervisory function. Citing *Oakwood Healthcare, supra*, the city takes issue with the following passage in the MERC decision and order, quoted once before in this opinion, which the city contends is inconsistent with the standards in *Oakwood Healthcare*:

> An individual whose authority is limited to the routine direction of the daily work of other employees and/or making work assignments of a routine nature is not a supervisor under PERA. Similarly, an individual in charge of a particular project or function who determines how the work will be completed, decides which employees will do it, and insures that it is completed properly, is not a supervisor unless the employee has an effective role in discipline and personnel matters.

The city relies on the definitions of "assign," "responsibility to direct," and "independent judgment," enunciated in *Oakwood Healthcare.* In that case, the NLRB first stated that the terms "assign" and "responsibility to direct" were not intended to be synonymous and must be accorded separate meanings. The NLRB proceeded to define "assign" as referring to "the act of

---

[7] We do not believe that there was any misstatement of law. MERC appeared to tie the power to evaluate and to engage in personnel matters to the power to discipline, and 29 USC 152(11) does not reference, as separate powers, the authority to evaluate and the authority to generally engage in personnel matters, which further defeats the city's argument that MERC abandoned the disjunctive test. Also, part of the challenged language was confined to a discussion of the independent judgment element, not the enumerated supervisory functions.

designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment."[8] *Id.*

According to the NLRB in *Oakwood Healthcare*, the phrase "responsibility to direct" was not intended to include minor supervisory functions performed by set-up men, lead employees, or straw bosses; rather, it encompasses those persons who exercise basic supervision but lack the authority to carry out any of the other statutory supervisory functions. It is not limited to department heads, but can include a person on the shop floor who has men under him or her if the person decides what jobs will be undertaken and who will do it, provided the direction is both responsible and carried out with independent judgment. The NLRB ruled that to be responsible means the putative supervisor must be answerable, accountable, or responsible for the performance and work product of the employees being directed, "such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee[s] are not performed properly." *Id.*

Finally, in *Oakwood Healthcare*, the NLRB discussed the proper interpretation of the term "independent judgment." Minimally, independent judgment means that a person must "act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." But it must still rise above being merely routine or clerical in nature. Supervisory status is not conferred by the exercise of some supervisory authority in a manner that is simply routine, clerical, perfunctory, or sporadic. "If there is only one obvious and self-evident choice . . ., or if [an] assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of control of others and involves forming an opinion or evaluation by discerning and comparing data." "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." However, the mere existence of company policies does not detract from a finding that a person exercises independent judgment if the policies allow for discretionary choices. *Id.*

Returning to the case at bar and the challenged passage from the MERC opinion, which is part of a general recitation of legal principles, there does appear to be some inconsistency with *Oakwood Healthcare.* However, our focus is ultimately on the application of law that is relevant to the particular facts regarding the two positions at issue, so we shall shift our focus to the city's argument that there was a lack of competent, material, and substantial facts to support MERC's finding that Haner and Barfuss are not supervisors under the law cited above.

---

[8] The NLRB stated that "[t]he assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as 'assign' within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'"

With respect to Haner, MERC found that, despite the city's claim that she has authority to evaluate work performance, she had not yet evaluated any employees in the year on the job, nor was it known what effect any evaluation might actually have on an employee. MERC further found that, despite the city's claim that Haner has the authority to make work assignments, she had not yet dispensed any discipline, she was not told by the city that she had disciplinary authority before the hearing, and there was no explanation regarding the parameters of any disciplinary authority. Thus, MERC could not conclude that she has any true authority to discipline or effectively recommend formal discipline. MERC found insufficient to establish supervisory authority the fact that Haner approves the office assistant II's time and leave requests and oversees her daily work.

With respect to Barfuss, despite the city's contention that she has the ability to recommend discipline, MERC found that she was never told of this authority before the hearing and that it was not established that Barfuss could effectively recommend discipline. MERC found that Barfuss's supposed supervisory role is in conjunction with the design services supervisor, with whom Barfuss would have to consult before making any disciplinary recommendation. And even then Barfuss would first have to take the disciplinary recommendation to a mutual supervisor, the assistant director, and the assistant director could not even authorize the discipline, but had to take Barfuss's recommendation to the next level. MERC stated, "Barfuss does not know who has the authority to ultimately authorize discipline, nor does the record establish the degree of inquiry to which any such recommendation would be subjected by the assistant director or any decision makers above him." MERC concluded, therefore, that there was insufficient evidence to show that Barfuss effectively had authority to recommend discipline.

In regard to the city's assertion that Barfuss has authority to make work assignments, MERC observed:

> Although Barfuss has the authority to assign some of the work performed by the engineering assistant, that authority is limited to routine assignments related to right-of-way activities. Barfuss does not even have the authority to approve the engineering assistant's leave requests. Barfuss'[s] responsibility for oversight and routine assignment of some of the day-to-day activities of a single employee is insufficient to establish supervisory authority.

In sum, MERC ruled that the positions held by Haner and Barfuss do not possess sufficient indicia of supervisory authority such that there removal from GREIU's bargaining unit by the city was justified.[9]

---

[9] MERC noted that it is reluctant to move positions from one bargaining unit to another, or to unrepresented status, unless there is a significant change in the characteristics and nature of the position, and that the duties added to the two positions did not destroy their community of interest with the bargaining unit represented by GREIU, which includes many skilled positions with specialized training.

On our review of the record, there was evidence that Barfuss was reclassified as an administrative analyst I in 2003 and that the job description for the position simply stated that "[t]he employees may supervise support staff." Barfuss began to work on larger projects with the change in job title. When she was reclassified, Barfuss was told by city engineer Bill Cole that she would be supervising Eric LaPointe, an engineering assistant I, although Barfuss was never told anything about any disciplinary steps that she could take with respect to LaPointe. However, Barfuss testified that she considered herself responsible for disciplining LaPointe. But Barfuss continued by explaining that if LaPointe was to fail to do some work properly or per her instructions, she "would discuss it probably with the other person who supervises him, Vaughn Umphrey [design services supervisor], and then the two of us would go to Rick DeVries [the assistant city engineer for design services]." Barfuss believed that she would not just be reporting the incident but would be making a recommendation as to disciplinary action. Barfuss has never actually disciplined LaPointe. She was unsure whether she had any authority to grant final approval for his vacations or sick leave, and as a matter of practice that was done by Umphrey. Barfuss was one of the persons who evaluated LaPointe and could discuss whether she thought he was entitled to a merit increase with the other evaluators; however, she lacked the authority to determine whether he actually received a raise.

After the reclassification, Barfuss was told, in the context of being informed that she would be supervising LaPointe, that "before I assigned anything to him I'd make sure he knew what was expected of him and how to find that information." City engineer Cole testified that he recommended that Barfuss be reclassified to administrative analyst I because the "management supervisory responsibility aspects of the position" had changed. He further testified that when he told Barfuss of the reclassification, he explained to her "that she now has some assistance within the department and that she can go directly to that person and coordinate and assign work."

We find that MERC's conclusion that the city failed to show that Barfuss holds supervisory authority is supported by competent, material, and substantial evidence on the record considered as a whole. We do, however, first note that, as to Barfuss as well as Haner, MERC committed legal error if it lent any improper weight to the fact that these employees may not have actually engaged in one of the particular supervisory functions enumerated in 29 USC 152(11) or the fact that these employees may not have been aware of their powers. In *Michigan Ed Ass'n, supra* at 797, this Court emphasized that "it is not the exercise of authority, but the delegation of authority, which is indicative of the attributes of a 'supervisor.'" And the High Court in *Kentucky River Community, supra* at 710, stated that the first question posed is whether employees "hold the authority to engage in any 1 of the 12 listed supervisory functions," and nowhere in the three-part test need it be shown that an employee must be fully aware of his or her authority. The critical inquiry is whether the putative supervisor actually holds or has supervisory authority. While MERC cannot find that an employee has nonsupervisory status simply because the employee has never exercised supervisory authority that has been delegated to him or her or because the employee has not received communications regarding the nature of any authority, we do believe that such facts can be considered in the context of determining whether authority has actually been delegated or exists and the extent of the authority. For example, if there is an allegation that authority to discipline, on the basis of independent judgment and in the interest of the employer, was delegated to an employee, but there is evidence that in ten years of supposedly wielding that authority the putative supervisor has never exercised it despite clear rule infractions by alleged subordinate employees, such a fact could properly lend

support to a finding that the putative supervisor was never actually delegated supervisory (disciplinary) authority, which is the ultimate question. Here, we cannot discern that MERC improperly considered the evidence at issue, but we caution MERC for future reference that such evidence must be contemplated appropriately.

We now return to examination of Barfuss's status. Regarding disciplinary authority, or the authority to effectively recommend discipline, by use of independent judgment, we agree with MERC that the evidence was simply to tenuous, vague, and undeveloped on this matter relative to Barfuss. While Barfuss considered herself responsible for disciplining LaPointe, she spoke only about discussing the issue with Umphrey, at which point those two would go to DeVries for action, if LaPointe had engaged in conduct calling for discipline. No parameters concerning Barfuss's disciplinary authority, or her authority to effectively recommend discipline, was elicited at trial. "Effectively recommend" means that an employee's superior will generally accept a recommendation without conducting an independent investigation. *City of Grand Rapids (Police Dep't) & Command Officers Ass'n of Michigan*, 17 MPER 56 (2004). It was not established that a recommendation on discipline by Barfuss would generally be accepted without further investigation. Giving MERC the required deference in relation to fact-finding, we do not find error with its finding that it was not established that Barfuss could effectively recommend discipline. Further, there was no evidence that Barfuss had any authority with respect to vacations and sick leave approvals. Although Barfuss was one of the persons who evaluated LaPointe, there was no evidence that she could act, or effectively recommend action, on the evaluation by way of, for example, a reward, promotion, or suspension (enumerated powers), and the power to evaluate, in and of itself, is not an enumerated power or supervisory function in 29 USC 152(11). In regard to the power to assign and the separate power to responsibly direct, we conclude that the evidence did not establish that this alleged delegation of supervisory authority went beyond tasks that are routine or clerical in nature, such that independent judgment is exercised, or beyond minor supervisory functions typically performed by set-up men, lead employees, or straw bosses. In sum, we hold that there existed competent, material, and substantial evidence on the record considered as a whole to support MERC's opinion relative to Barfuss.

With respect to Haner, she was reclassified to the position of personnel assistant I, and the city's position is that she is a supervisor premised on her relation to one particular employee, Patricia Mills, an office assistant II. Mills inputs some of the data into a new software system called Vista, and Haner testified that Mills reports to her. Haner stated that she assigns data entry and record keeping tasks to Mills and that she has never disciplined Mills or issued her any written reprimands. Haner testified that she had never been given any direction about how to reprimand, "but I would find my answer if necessary." Haner further testified that she has never evaluated Mills, but then observed, "I have that coming up April 3rd." Haner was informed by David Etheridge, the city's director of human resources, that she was Mills' supervisor and that she was the one who would sign Mills' sick leave forms. Haner also has the authority to grant leave when Mills requests it.

During Haner's testimony, the following colloquy between the ALJ and Haner occurred:

Q. I have a question that kind of needs to be clarified.

> On the issue of your authority to discipline Mrs. Mills, have you ever been told by Mr. Etheridge or anybody what the scope of your authority is? Has anybody ever talked to you about whether or not you have the right to issue formal discipline?
>
> *A.* No. I know the job classifications. Mr. Etheridge did talk to me and did tell me I had the right to deny, I had the right to sign and was to sign all of her – to perform her evaluations, sign her requests for time off, her time sheets, her sick forms.
>
> *Q.* So Mr. Etheridge went through those items with you, just – he didn't discuss the issue of discipline?
>
> *A.* No. If I – if it had come up, I would question him on or I would talk to Mr. Etheridge regarding disciplinary actions.

Etheridge testified that Haner supervises one person – Mills. Etheridge stated that Haner has the authority to discipline, to evaluate performance, and to authorize any leave requests. When Haner was reclassified, Etheridge informed Mills that Haner was her new supervisor, that she was to assist Haner with any payroll functions or other duties related to her assignment, and that her job was to support Haner's function. Etheridge additionally informed Mills that Haner would be responsible for approving any leave requests and for conducting performance evaluations. Although Etheridge did not recall whether he spoke to Mills about the issue of discipline, it was a known fact that all supervisors had the authority to discipline.

The city's labor relations manager, Mari Beth Jelks, testified to her belief that Haner was a supervisor and not a "lead worker." Jelks stated that a supervisor has the direct authority to approve or deny leave requests and the authority to discipline, including being involved in the hiring and firing of an employee. A lead worker, according to Jelks, handles all of a subordinate employee's daily assignments and makes sure that the employee is where he or she needs to be in order to carry out daily functions, but lead workers are not supervisors. Jelks was unaware whether Haner had ever taken disciplinary measures, which officially would include a letter of warning and suspension or discharge.[10]

With respect to Haner, we cannot conclude that MERC's factual findings were not based on competent, material, and substantial evidence on the record considered as a whole.

In regard to the supervisory power to assign and the power to responsibly direct Mills, although Haner testified that she assigns data entry and record keeping tasks to Mills, it was not

---

[10] There was evidence, via the testimony of Haner and Jelks, that Haner had once "verbally counseled" Mills after a misunderstanding regarding a situation in which Haner went through Mills' desk looking for some documents. Mills "went to labor relations" over the matter, and Haner testified that she spoke to Mills about the need for Haner to have quick access to necessary documents.

established that these tasks involved Haner's use of independent judgment, rather than being routine or clerical in nature. As to discipline, or recommending discipline, the record was too undeveloped and vague concerning the contours, nature, characteristics, or parameters of any disciplinary authority held by Haner. We acknowledge that Jelks testified about authority to hire, suspend, fire, warn, and reprimand, but this was in the context of generally describing a supervisor's authority. The fact that Haner has never reprimanded Mills, despite an incident between the two, nor was ever given any direction regarding disciplinary authority, lends support to a conclusion that disciplinary authority was never actually delegated to or held by Haner, although such factors cannot stand alone to support MERC's ruling for the reasons stated above. The evidence was also lacking on the issue of the use of independent judgment relative to disciplinary authority.

There was evidence that Haner had been delegated the power to evaluate Mills, but, again, the authority to evaluate is not enumerated in 29 USC 152(11), and there was a lack of evidence showing that Haner had the authority to take any actions based on an evaluation that might fall under 29 USC 152(11), e.g., to promote, reward, or discharge Mills, let alone that any actions would involve independent judgment. Regarding approval of sick leave, time sheets, or leave time in general, these matters do not fall under the auspices of 29 USC 152(11), nor was there evidence to establish that independent judgment is to be used in handling such matters. They would appear routine and clerical in nature. In *Village of Ortonville & Teamsters Local 214*, 17 MPER 46 (2004), MERC observed that "responsibilities such as maintaining time cards, and granting time off, are insufficient to establish supervisory status."

In sum, we hold that there exists competent, material, and substantial evidence on the record considered as a whole to support MERC's opinion relative to Haner.

III. Conclusion

We find legally sound MERC's determinations that the city could not unilaterally alter and remove the bargaining unit placements concerning the positions held by Haner and Barfuss and that the city was required to either obtain GREIU's agreement to changes on bargaining unit composition or obtain an order from MERC by filing an unfair labor practice charge or a unit clarification petition. Further, we disagree with and reject the city's contention that MERC abandoned the disjunctive test for determining supervisory status. Next, although MERC may have arguably made a misstatement of law in its general recitation of legal principles, it ultimately and properly applied law that is relevant to the particular facts regarding the two positions at issue. And there is competent, material, and substantial evidence on the record as a whole to support MERC's conclusion that the city did not establish that Haner and Barfuss are supervisors under the authorities discussed in this opinion.

With respect to the enforcement action filed by GREIU under MCL 423.216(d), MERC's decision and order are to be enforced for the reasons stated in this opinion, and the city is hereby ordered to fully comply with the decision and order. In responding to GREIU's petition, the city asserts that events transpiring subsequent to MERC's ruling require us to deny GREIU's petition to enforce the ruling. The city relies on the affidavits of Barfuss and Emilie Oxender, who stepped into the position once held by Haner, which make averments to new facts. However, the city never applied to this Court "for leave to present additional evidence" as required by MCL 423.216(d). Moreover, assuming that the evidence could be considered, it still fails,

because of a lack of detail as to parameters and other relevant matters, to support a holding contrary to our conclusion in this opinion. Finally, we reject the city's contention that MERC's award of lost union dues and fees should not be enforced. Contrary to the city's arguments, the award of lost dues and fees was not punitive and does indeed effectuate PERA policies.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy