

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN STATE UNIVERSITY,

Respondent-Appellant,

v

MICHIGAN STATE UNIVERSITY
ADMINISTRATIVE PROFESSIONAL
SUPERVISORS ASSOCIATION,

Charging Party-Appellee.

UNPUBLISHED

April 23, 2019

No. 343317

MERC

LC No. 16-026438

Before: BORRELLO, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Respondent, Michigan State University (MSU), appeals as of right an order issued by the Michigan Employment Relations Commission (MERC). That order granted the Michigan State University Administrative Professional Supervisors Association's (APSA) unit clarification petition and ordered that the APSA bargaining unit include the position of neighborhood director, which was borne out of the now-defunct position of engagement center manager that was included in the APSA bargaining unit. We affirm.

I. BACKGROUND

Like many large research universities, MSU's organizational structure distinguishes between academic and support (or administrative) staff. The academic staff is headed by the Provost, while the administrative staff is overseen by the Executive Vice President for Administration. Consistent with this division, MSU has two human resources offices. Of the ten collective bargaining units at MSU, eight, including APSA, represent support staff. APSA generally represents all supervisory administrative and professional employees throughout MSU.

The neighborhood director positions at issue are part of the Neighborhood Student Success Collaborative, commonly called the Neighborhoods, which were created in 2010 to bring support services to students. The original purpose of the Neighborhoods was to bring resources closer to students to create a safety net for students and they evolved to focus on academic success, specifically, increasing graduation rates, lowering the number of students on

academic probation, and addressing the graduation gap between white students and students of color. At that time, academic advisors maintained offices and worked both in the Neighborhoods and in their home academic departments, although they were organizationally housed in their home academic units.

Dr. Kristen Renn, a professor in the Department of Educational Administration whose research interest was student success and learning, assumed supervision of the Neighborhoods in August 2013. Dr. Renn was concerned that the academic side of the university viewed the engagement center managers as “glorified house mothers,” so she changed the name to neighborhood engagement directors. Around this time, the directors became involved in a program called Focus 500, which was designed to devise interventions for students who were low-income and first-generation (meaning the first in their families to attend college) based on research showing that these students had a lower likelihood of success. The directors gradually received increasing access to student academic records. One of the neighborhood directors testified that the position additionally evolved to increase support for students on academic probation.

In September 2015, Dr. Renn attempted to incorporate advising into the engagement centers. Academic advisors for undeclared students and academic advisors in the Learning Resources Center were already physically located in the Neighborhoods, and they were organizationally moved into the Neighborhoods as well and placed under the Associate Provost for Undergraduate Education, who also oversaw the neighborhood engagement directors. Dissatisfied with the division of the academic and administrative silos and the obstacles posed to the Neighborhoods’ purpose of providing holistic support to students, Dr. Renn devised the neighborhood director position and prepared a job description for the position in April or May of 2016. When the neighborhood engagement director position was eliminated, the four individuals who filled those roles ultimately were waived into four of the five “new” positions.

The 2016 job description for the neighborhood director position had five main categories of job duties and the percentage assigned to each: ensuring the delivery of student success services (35%), leading campus-wide initiatives focused on student success (35%), managing the Neighborhood functions (15%), leading one of five Neighborhood pillars (8%), and outreach (7%).

Beneath the first category, ensuring the delivery of student success services, were seven components: supervising the advising director, accessing and analyzing student academic records, overseeing student success teams, collaborating with Neighborhood staff at staff meetings, building partnerships within the Neighborhoods and with academic colleges and departments, conducting assessment, and supervising the engagement center assistant. All witnesses agreed that supervising the advising directors was a change. Each Neighborhood had an advising director, who supervised the two or three academic advisors located in each Neighborhood. The Neighborhood advisors were the primary advisors for undeclared students, while upperclassmen with a declared major saw an advisor in their academic colleges. One task of the advising director was to make decisions about the standing of students whose grade point average (GPA) fell below a 2.0. The neighborhood directors were not involved in the advising directors’ initial standing decisions but were expected to hear appeals from these decisions.

The neighborhoods directors each continued to supervise an engagement center assistant. That assistant, who was part of the clerical technical bargaining unit, worked full-time and helped supervise students. The job description listed leadership of the Neighborhood core team, resolution of competing space requests, assessment of the physical space, management of the budget, and the preparation of reports underneath this job category. The leadership of the core teams involved meeting with Neighborhood staff, including the advising director, advising staff, and student workers, to coordinate services and resolve problems. The engagement center managers coordinated space for meetings, tutoring, and other activities, but directors spent less time resolving requests for space because residential services took over part of this function and other staff were getting used to how the Neighborhoods worked. Managing the budget and preparing assessment reports remained largely unchanged. As noted, one job requirement was to lead one of the five neighborhood pillars, which were academic, health and wellness, intercultural, purpose and development, and residential.¹

The directors conducted outreach to educate other stakeholders about the function and work of the Neighborhoods and gave presentations to prospective students and parents as well as regional and national presentations about the work of the Neighborhoods.

It was determined by an MSU official that 70% of the neighborhood directors' work related to academic advising and the position was classified as an academic specialist. They supervised and were responsible for academic advisors and decisions about academic probation, presented research about academic outcomes, built partnerships across campus, led campus-wide initiatives to promote student success, monitored student success in furtherance of increasing graduation rates, and oversaw student success teams.

Academic specialists paid about \$1,500 annually for health insurance, while APSA members did not pay into their health care benefits, although academic staff had access to dental insurance that support staff did not. APSA members accrued two vacation days per month and 24 hours of personal time per year, while academic specialists got 22 vacation days per year and no personal time. APSA members could carry over and accrue their vacation time, while academic specialists could not. Academic specialists did not receive longevity pay. The neighborhood directors lost their sick time, which could be accrued up to 1,400 hours, because academic specialists did not have sick time. APSA members could also use sick time for family care under the FMLA² and be compensated for half of any unused sick time at the time of retirement or separation after a certain amount of years of service. Professional development funds differed for academic specialists and APSA members. Academic specialists had a three-year probationary period, while APSA members only had six months, and the directors started a

¹ These pillars were committees whose purpose was to talk about academic success through the lens of each pillar's focus. The neighborhood directors recommended to their supervisor what their goal was for the pillar and who should belong to the committee to effectuate that goal best. According to one director, the directors held meetings and communicated what each pillar did, the data collected, and the initiatives started.

² Family and Medical Leave Act, 29 USC 2601 *et seq.*

new probationary period. To compensate for the lost benefits, the directors' current service, and the increase in responsibility, they were offered a 10% salary increase. The directors were also paid out their accumulated vacation time.

APSA filed a unit clarification petition with MERC, asking MERC to order the five neighborhood director positions to be included in the APSA bargaining unit. APSA argued that the position retained its supervisory function and a community of interest with other positions in the APSA bargaining unit, which was not invalidated by the designation of the position as an academic specialist. MSU contended the neighborhood director position was a new academic position with no supervisory function. Because the position was academic in nature and because the terms and conditions of employment changed, MSU argued, the neighborhood director position did not share a community of interest with other positions in the APSA bargaining unit. MERC agreed with APSA and accreted the neighborhood director position to the APSA bargaining unit. This appeal followed.

II. STANDARD OF REVIEW

“We review MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e).” *Calhoun Intermediate Sch Dist v Calhoun Intermediate Ed Ass’n*, 314 Mich App 41, 46; 885 NW2d 310 (2016) (quotation marks omitted). MERC’s findings of fact “are considered conclusive if supported by competent, material, and substantial evidence on the whole record.” *Detroit v Detroit Fire Fighters Ass’n, Local 344, IAFF*, 204 Mich App 541, 552; 517 NW2d 240 (1994). “Th[e] evidentiary standard [for factual findings] is equal 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.” *Taylor Sch Dist v Rhatigan*, 318 Mich App 617, 625; 900 NW2d 699 (2016) (quotation marks omitted; alteration in original). “Further, [r]eview of factual findings of the commission must be undertaken with sensitivity, and due deference must be accorded to administrative expertise. Reviewing courts should not invade the exclusive fact-finding province of administrative agencies by displacing an agency’s choice between two reasonably differing views of the evidence.” *Id.* (quotation marks omitted; alteration in original). “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.” *Van Buren Co Ed Ass’n v Decatur Pub Sch*, 309 Mich App 630, 639; 872 NW2d 710 (2015) (quotation marks omitted).

III. ANALYSIS

MSU challenges MERC’s ruling accreting the neighborhood director positions to the APSA bargaining unit. MSU argues that the position is substantially different from the engagement center manager position, that the neighborhood director position does not share a community of interest with APSA because it is now academic focused, and academic positions are historically excluded from APSA. We disagree.

MERC has the statutory authority to designate an appropriate bargaining unit. MCL 423.213. “The touchstone of an appropriate bargaining unit is a common interest of all its members in the terms and conditions of their employment that warrants inclusion in a single bargaining unit and the choosing of a bargaining agent.” *Muskegon Co Prof Command Ass’n v*

Muskegon Co, 186 Mich App 365, 373; 464 NW2d 908 (1990). “A community of interests includes . . . similarities in duties, skills, working conditions, job classifications, employee benefits, and the amount of interchange or transfer of employees.” *Police Officers Ass’n of Mich v Grosse Pointe Farms*, 197 Mich App 730, 736; 496 NW2d 794 (1993). It is not necessary for all employees in a bargaining unit to “have similar duties, skills, or educational qualifications” to maintain a community of interest. *Mich Ed Ass’n v Alpena Community College*, 457 Mich 300, 306; 577 NW2d 457 (1998) (quotation marks and citation omitted). MERC will not move a position out of an established bargaining unit unless a community of interest no longer exists, and a change in job duties is not sufficient to destroy the community of interest when the position retains job duties that share a community of interest with the other positions in the bargaining unit. *Kalamazoo v Kalamazoo Muni Employees Ass’n*, 1983 MERC Lab Op 249, 254-255.

MSU first argues that MERC clearly erred in finding that the neighborhood director position is a continuation of the engagement center manager position. Given our deference to MERC’s factual findings and the support in the record for MERC’s decision, we disagree. The record shows that the previous engagement center managers were waived into the neighborhood director position because they had demonstrated that they were qualified for the position. The neighborhood directors did not receive additional training about how to perform the job. Further, many aspects of the job remained the same before and after the change. The responsibilities of overseeing the student success teams, collaborating with other staff in the Neighborhoods, building partnerships with other stakeholders on campus, some level of assessment, supervising the engagement center assistant, leading the focus areas, participating in strategic planning, managing the functions of the engagement centers, leading the pillars, and conducting outreach were generally unchanged or expanded versions of the original functions. In short, the continuation of the same employees and many of the existing job duties in the neighborhood director position demonstrates that the neighborhood director position was not a new position. In sum, the record contained adequate evidence that a “reasonable mind would accept as sufficient to support [MERC’s] conclusion” that the position was not new. *Taylor Sch Dist*, 318 Mich App at 625.

Because the engagement center managers were represented by APSA, in order to disturb the existing bargaining unit and MERC’s decision, MSU was required to show this Court that there was not “competent, material, and substantial evidence on the whole record” that the position had not changed so substantially from administrative to academic as to destroy the community of interest. See *Detroit*, 204 Mich App at 552. The central dispute is whether the position has become primarily academic in nature because of added job duties, particularly the neighborhood directors’ supervision of advising directors and access to and use of student academic data.³ Whether the position became so highly focused on academics as to destroy the community of interest with the APSA bargaining unit turns on added job duties as well as the degree to which the existing job duties changed.

³ MSU did not dispute that the neighborhood director position had a supervisory component, as required for inclusion in the APSA bargaining unit.

The parties agreed that the supervision of the advising directors is a new task added to the neighborhood director position that is focused on academics. However, there also was evidence presented that the Neighborhood director position still consisted largely of administrative duties. The neighborhood directors did not themselves advise students or make decisions about probation and students' status. Reviewing appeals from the advising directors' decisions about probation and status was one component of the supervision of advising directors, and it arose infrequently. There also was testimony establishing that the Neighborhood directors, who were then engagement center managers, had access to student data long before the position change.

MSU's reliance on the different benefits and evaluation systems is not helpful to the community of interest analysis because those benefits and terms of employment arose from the classification of the position as an academic specialist. When the benefits and conditions of employment are the result of the position's bargaining history, those conditions are less relevant to determining a bargaining unit. *Lansing Sch Dist v Mich Employment Relations Comm*, 117 Mich App 486, 492; 324 NW2d 62 (1982). Therefore, the academic specialist classification and the effects of that classification have little bearing on whether the position has changed so substantially as to destroy the community of interest.

In sum, evidence established that the neighborhood director position contains a blend of academic and administrative responsibilities, as did the engagement center manager position. In light of that evidence and our deference to MERC's factual findings, substantial record evidence supports MERC's rulings that the neighborhood director position was not substantially changed from the engagement center manager position and that the community of interest with the APSA bargaining unit was not destroyed. See *Taylor Sch Dist*, 318 Mich App at 625.

MSU argues that academic specialists have historically been excluded from APSA. Although academic specialists who supervised support staff were not represented by APSA, the classification of the neighborhood director position as an academic specialist was based only on the job description, not the directors' job duties or a comparison of the neighborhood directors' job duties with those of the engagement center managers. The continuation of numerous job duties from the prior position shows that the new academic specialist designation is not determinative of the proper bargaining unit. Further, the neighborhood directors' supervision of the advising directors is one step removed from academic advising itself. The neighborhood directors, and the engagement center managers before them, made student academic success their goal. The academic specialist classification alone is insufficient to show that the neighborhood director position is the type of position that has historically been excluded from the APSA bargaining unit. MSU's argument that academic specialists are historically excluded does not account for the hybrid nature of the neighborhood director position, an administrative position with the goal of enhancing student academic success. Because the position retains both administrative and supervisory qualities, despite the academic component, it is not the type of position historically excluded from APSA. Therefore, substantial evidence supports MERC's accretion of the neighborhood director position to the APSA bargaining unit. See *id.*

MSU lastly argues that MERC violated its precedent distinguishing between academic and nonacademic positions. However, whether certain positions are administrative or academic and what effect that characterization has on the bargaining unit are not controlled by precedent, but by the facts of the case. As has been discussed, the record contains sufficient evidence, given

our deference to MERC's factual findings, that a "reasonable mind would accept as sufficient to support [MERC's] conclusion" that the position was properly accreted to APSA. See *id.*

Affirmed.

/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan