

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP720

Cir. Ct. No. 2005CV43

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BAYFIELD COUNTY HIGHWAY DEPARTMENT,

PETITIONER-RESPONDENT,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

RESPONDENT-APPELLANT,

TEAMSTERS LOCAL 346,

CO-APPELLANT.

APPEAL from an order of the circuit court for Bayfield County:
JOHN P. ANDERSON, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Wisconsin Employment Relations Commission appeals an order reversing its determination that Susan Butterfield, a Bayfield County Highway Department employee, was not a confidential employee or supervisor within the meaning of WIS. STAT. § 111.70(1)(i) and (1)(o).¹ The Commission argues that Butterfield is a “municipal employee,” within the meaning of the Municipal Employment Relations Act, and should consequently be included in a collective bargaining unit of Highway Department employees represented by Teamsters Local 346. We agree and, therefore, reverse the circuit court’s order.

BACKGROUND

¶2 From July 1995 to April 2004, the County employed Butterfield as an account clerk in the Highway Department. Upon the acting office manager’s April 2004 retirement, Butterfield was named interim office manager and on May 26, 2004, was employed in the newly created position of confidential secretary/office supervisor. According to the job description, the purpose of the position is to assist the highway commissioner in carrying out day-to-day duties, supervise the clerical and accounting functions of the department and maintain the department’s financial accounts and records. To that end, the following “examples of duties” were listed:

- (1) Plan and supervise office activities and work projects;
- (2) Maintain the Department’s personnel records and related confidential files;
- (3) Draft and/or prepare correspondence, including confidential correspondence and disciplinary letters, on behalf of the Highway Commissioner;
- (4) Correspond with the Union at the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

direction of the Highway Commissioner or Patrol Superintendent; (5) Compile and distribute meeting notices, agendas and minutes of Highway Committee including executive sessions; (6) New employee briefing on office issues, Union Contract, benefits, Highway Department Policies, drug and alcohol testing; (7) Supervise and evaluate office clerical staff and recommend disciplinary action as necessary; (8) Screen, interview and effectively recommend the hiring of new clerical personnel; (9) Review and act on leave request from clerical personnel; (10) Review and recommend action on grievances filed by clerical staff; (11) Regular meetings and communication with the Clerk's office on accounting and related bookkeeping issues; (12) Maintain the department's financial accounts and records; (13) Open, stamp, sort and distribute incoming mail and packages; (14) Responsible for payroll and accounts payable processing; (15) Maintain department equipment files for use with state reimbursements; (16) Assist the Highway Commissioner in the formulation and development of the Department's budget, with primary responsibility for the development and administration of the budget for the Highway Office; (17) Assist Commissioner with ... highway programs; (18) Prepare the annual report required by State Statutes; and (19) Other related tasks as may be assigned.

¶3 In July 2004, the Union filed a petition to clarify whether the confidential secretary/office supervisor position should be included in the Highway Department collective bargaining unit. The Union alleged that the “position has neither access to, knowledge of, or participation in confidential matters relating to labor relations” and that the “position also does not have sufficient supervisory authority to qualify as a supervisor.” After a hearing, the Commission concluded that Butterfield was neither a confidential employee nor supervisor within the meaning of WIS. STAT. § 111.70(1)(i) and (1)(o)1 but, rather, a “municipal employee” that should be included in the collective bargaining unit represented by the Union. The County then filed suit in circuit court seeking certiorari review of the Commission's decision. The circuit court reversed the Commission's decision and this appeal follows.

DISCUSSION

¶4 In deciding an appeal from a circuit court’s order affirming or reversing an administrative agency’s decision, we review the decision of the agency, not that of the circuit court. *Barnes v. DNR*, 178 Wis. 2d 290, 302, 506 N.W.2d 155 (Ct. App. 1993). The Commission’s findings of fact must be affirmed if they are supported by substantial evidence. See *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. ILHR Dept.*, 62 Wis. 2d 392, 396, 215 N.W.2d 443 (1974). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Gateway City Transfer Co. v. PSC*, 253 Wis. 397, 405-06, 34 N.W.2d 238 (1948). The weight and credibility of the evidence are matters for the agency to evaluate. WIS. STAT. § 227.57(6); see also *Bucyrus-Erie Co. v. ILHR Dept.*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. *Hamilton v. ILHR Dept.*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). In fact, when more than one inference reasonably can be drawn, the finding of the agency is conclusive. See *Vocational Tech. & Adult Ed. Dist. 13 v. ILHR Dept.*, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977).

¶5 On review, a court may not make an independent determination of the facts. See *Hixon v. PSC*, 32 Wis. 2d 608, 629, 146 N.W.2d 577 (1966). The court is “confined to the determination of whether there was ... [substantial evidence] to sustain the findings that were in fact made.” *E.F. Brewer Co. v. ILHR Dept.*, 82 Wis. 2d 634, 636, 264 N.W.2d 222 (1978). A court may not second guess the proper exercise of the agency’s fact-finding function even though, if viewing the case ab initio, it would come to another result. See *Briggs & Stratton Corp. v. ILHR Dept.*, 43 Wis. 2d 398, 409, 168 N.W.2d 817 (1969). The reviewing court must search the record to locate substantial evidence that

supports the agency's decision. See *Vande Zande v. ILHR Dept.*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶6 Turning to the present case, the term “municipal employee” includes “any individual employed by a municipal employer” and specifically exempts “an independent contractor, supervisor, or confidential, managerial or executive employee.” See WIS. STAT. § 111.70(1)(i). The term “supervisor” is expressly defined to include:

Any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, 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.

WIS. STAT. § 111.70(1)(o)1.

¶7 Although the Commission asserts that its interpretation of WIS. STAT. § 111.70(1)(i) is entitled to “great weight” deference, see *Mineral Point Unified Sch. Dist. v. WERC*, 2002 WI App 48, ¶25, 251 Wis. 2d 325, 641 N.W.2d 701, the County contends that the Commission is not entitled to such deference because it erroneously interpreted the statute and departed from prior agency rules or practices. We are not persuaded by the County's arguments.

¶8 In *City Firefighters Union v. City of Madison*, 48 Wis. 2d 262, 179 N.W.2d 800 (1970), our supreme court approved the following seven-part test used by the Commission for deciding whether an employee is a “supervisor” within the meaning of the Municipal Employment Relations Act. The Commission considers:

(1) whether the employee has the authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees; (2) whether the employee has the authority to direct and assign the workforce; (3) the number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees; (4) the level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees; (5) whether the supervisor is primarily supervising an activity or is primarily supervising employees; (6) whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and (7) the amount of independent judgment and discretion exercised in the supervision of employees.

Id. at 270-71.

¶9 Noting that a position description is only helpful if it accurately describes the duties performed by the employee, the Commission contends it looked to those duties actually performed by Butterfield during her then-six-month tenure as the confidential secretary/office supervisor. With respect to the first factor, the Commission reviewed the one occasion that Butterfield was involved in the hiring of new clerical personnel—specifically, the hiring of account clerk Linda Ovaska. County Administrator Mark Abeles-Allison, Highway Commissioner Dale Brevak, and Butterfield met to review the job applications and selected six applicants to be interviewed. These applicants were interviewed by Abeles-Allison, Brevak and Butterfield and three finalists were chosen. It is undisputed that Butterfield had an equal say as to which applicants would be interviewed and which three were finalists. Abeles-Allison ultimately checked the finalists' references and chose Ovaska for the position, without further consultation with Butterfield.

¶10 The Commission acknowledged there was conflicting testimony regarding whether the three finalists were ranked by the interview panel, but

concluded that Butterfield's testimony that no ranking occurred was more definitive than that of Abeles-Allison. The Commission ultimately determined that although Butterfield played a significant role in the hiring process, that role fell short of effectively recommending Ovaska's hiring.

¶11 Although there had been no discipline of Ovaska, the Commission acknowledged that if Butterfield believed discipline was appropriate, she would make a recommendation to Brevak, who would then independently determine whether and how to proceed. Although Butterfield's job description indicates that she "effectively recommends disciplinary action," Butterfield testified that "[i]f there was going to be any discipline imposed by anyone in this unit, Dale Brevak would be the one to impose it." Based on this record, the Commission thus reasonably concluded that Butterfield had no independent disciplinary authority.

¶12 With respect to the second factor, the Commission noted that Butterfield had the authority to assign work and prioritize work flow. However, both Brevak and patrol superintendent Keith Larson assigned work directly to Ovaska without necessarily going first through Butterfield. Likewise, regarding the third factor, the Commission concluded that although Butterfield was assigned to supervise Ovaska, both Larson and Brevak had greater authority over Ovaska. Turning to the fourth factor, the Commission, noting that Butterfield earned \$1.72 per hour more than Ovaska, acknowledged that this wage differential is "at least somewhat supportive of supervisory status." As to the fifth and sixth factors, the Commission noted that Butterfield spent the majority of her time performing clerical work and the record established that it was Butterfield's intent to cross-train Ovaska so all tasks could be done by either of them. The Commission therefore concluded that "to the extent [Butterfield] directs Ovaska's work, she is directing the activity rather than the employee." Finally, regarding the seventh

factor, the Commission concluded that Butterfield's judgment on any matters of consequence, including leave requests, were subject to independent review and approval by Brevek or Abeles-Allison. Ultimately, based on the record before it, the Commission concluded:

[T]he Confidential Secretary/Office Supervisor is a leadworker, but not a supervisor. Although she played a significant role in Ovaska's hire, that role fell short of an effective hiring recommendation. She has no significant disciplinary authority and directs the work of only one employee. While the record is not definitive as to the amount of time that neither the Commissioner nor the Patrol Superintendent are present in the Highway Department office, we are not persuaded that the periods of their mutual absence are so substantial that Ovaska is effectively left without supervision.

¶13 The County nevertheless argues that the Commission erroneously interpreted the statute by requiring that a supervisor have actual or independent authority to hire, evaluate or discipline a subordinate employee. As the Commission acknowledges, however, the statute defines the term "supervisor" to include two groups. First, "any individual who has authority, in the interest of the municipal employer, to hire, transfer, suspend, pay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances." WIS. STAT. § 111.70(1)(o)1. This first group therefore includes those who have "independent authority" to take the enumerated employment actions. The second group includes any individual who has authority "effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." *Id.* The second group therefore includes individuals who do not have "independent authority" to take the enumerated employment actions, but who can "effectively recommend" that the enumerated employment actions be taken.

¶14 Here, the Commission determined that Butterfield had neither “independent authority” nor the authority to “effectively recommend” hiring, disciplining or evaluating Ovaska. It appears the County’s actual complaint is with the facts the Commission found in rejecting the existence of both criteria. Although the County’s construction of the evidence and inferences therefrom is reasonable, so is that of the Commission. When more than one inference reasonably can be drawn, the finding of the agency is conclusive. *See VTAE Dist. 13*, 76 Wis. 2d at 240.

¶15 The County additionally asserts that the Commission’s determination is inconsistent with its prior decisions in JACKSON COUNTY, WERC Dec. No. 17828-G (Nov. 11, 1996) and CHIPPEWA COUNTY, WERC Dec. No. 10497-A (Aug. 22, 1997). We are not persuaded. In each of those cases, the Commission concluded that the subject positions were supervisory. The County thus emphasizes various facts within each case to argue that Butterfield’s position is at least as supervisory as the positions in JACKSON COUNTY and CHIPPEWA COUNTY. With respect to JACKSON COUNTY, the Commission concluded that the office manager there, unlike Butterfield, had very significant independent disciplinary authority. Acknowledging that the administrative assistant in CHIPPEWA COUNTY was “a closer question,” the Commission nevertheless concluded that the assistant supervised at least five employees and her authority in hiring and probationary determinations exceeded that of Butterfield. Ultimately, the Commission “utilized the same analytical framework in its decisions ... and the different results are explained by the different factual situations.” *See Mineral Point*, 251 Wis. 2d 325, ¶21. Given the reasonable inferences drawn from the record in this case, we conclude the supervisory positions found in JACKSON COUNTY and CHIPPEWA COUNTY are distinguishable from the present case.

¶16 Turning to the confidential employee issue, the Commission has stated the following test for determining “confidential” status:

[F]or an employee to be held confidential, the employee must have sufficient access to, knowledge of or participation in confidential matters relating to labor relations. For information to be confidential in the labor relations context, it must: (a) deal with the employer’s strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents.

While a *de minimis* exposure to confidential matters is generally insufficient grounds for exclusion of an employee from a bargaining unit, we have also sought to protect an employer’s right to conduct its labor relations through employees whose interests are aligned with those of management. Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, and similarly, where a management employee has significant labor relations responsibility, the clerical employee assigned as his or her secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employee without undue disruption of the employer’s organization.

Mineral Point, 251 Wis. 2d 325, ¶19.

¶17 Here, the County claims that the following facts support the conclusion that Butterfield is a confidential employee: (1) Butterfield prepares the minutes of closed sessions of the highway committee; (2) Butterfield has been present during closed session discussions about the instant unit clarification proceeding and associated grievances; (3) Brevak does not have a computer and Butterfield prints out Brevak’s e-mails, including those that contain confidential

labor relations information; (4) Butterfield has responsibility for preparing any confidential correspondence for Brevak relating to labor relations matters, including grievances and negotiations issues; (5) Butterfield will be consulted regarding any contractual issues relating to the clerical position held by Ovaska in preparation for negotiating a successor labor agreement; and (6) Butterfield may be asked by Abels-Allison to prepare and provide data for potential use by the county when preparing for or responding to bargaining proposals.

¶18 The Commission determined, however, that Butterfield was not a confidential employee within the meaning of WIS. STAT. § 111.70(1)(i) because she had only a de minimis exposure to confidential labor relations matters. Based on the record, the Commission concluded that Brevak was not actively involved in collective bargaining or contract administration and, therefore, his labor relations responsibilities did not generate sufficient confidential work to warrant confidential status for Butterfield. Further, the Commission concluded that any confidential work related to typing confidential labor relations documents or taking minutes at closed highway committee meetings could be performed by other county employees without undue disruption. Citing *CHIPPEWA COUNTY, supra*, the Commission also determined that access to personnel files is generally not sufficient to confer confidential status and providing information for use by the County in collective bargaining, absent knowledge of the employer's bargaining strategy, does not generally render a position confidential. Although the County again attempts to compare the facts of this case to past Commission decisions in which confidential status was found, the cases cited are distinguishable on their facts. As with the "supervisor" discussion, the County's construction of the evidence is reasonable, but so is that of the Commission. The agency's finding is therefore conclusive. *See VTAE Dist. 13*, 76 Wis. 2d at 240.

¶19 The County nevertheless asserts that the Commission’s decision is inconsistent with past decisions that an employer is entitled to at least one confidential employee per collective bargaining unit. Although the Commission concedes it has held that an employer may be entitled to at least one “confidential” employee, it claims the County cites no past Commission decision that stands for the proposition that an employer is entitled to at least one confidential employee per bargaining unit.

¶20 The County additionally argues that the determination of whether an individual is a confidential employee must be done on a bargaining unit basis. The determination whether an employee should be excluded from a bargaining unit as a “confidential” employee, however, does not preclude the Commission from considering whether other, non-bargaining unit “confidential” employees are available to perform the confidential work. *See e.g.* WOOD COUNTY, WERC Dec. No. 9140-D (Sept. 13, 2001).

¶21 Finally, the County contends that this case represents the first time the Commission has failed to exclude an employee as a “supervisor,” where the employee formally evaluates another bargaining unit employee. Even were we to assume this claim is true, the County cites no authority for the proposition that it is per se inappropriate for a lead worker in a bargaining unit to evaluate the performance of other bargaining unit employees that he or she leads. To the extent the County claims that the Commission has failed to cite other Commission decisions that are consistent with its decision in this case, the burden is not on the agency to justify its action but, rather, on the party seeking to overturn the agency action. *See City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984). The County failed to meet this burden.

¶22 Based on the record before it, the Commission reasonably concluded that Butterfield was not a confidential employee or supervisor within the meaning of WIS. STAT. §§ 111.70(1)(i) and (1)(o)(1). Butterfield is, therefore, properly included as a municipal employee in the collective bargaining unit represented by the Union.

By the Court.—Order reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

