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her disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, she shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1597, APPELLEE, V. BILL SACK, HOWARD COUNTY COMMISSIONER, ET AL., APPELLANTS.

793 N.W.2d 147

Filed December 3, 2010. No. S-09-1245.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations has authority to decide industrial disputes.
3. **Labor and Labor Relations.** Industrial disputes include not just those disputes involving wages, terms, and conditions of employment, but also any controversy concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.
4. **Commission of Industrial Relations: Jurisdiction: Pleadings.** In order to invoke the jurisdiction of the Commission of Industrial Relations with regard to an industrial dispute, any employer, employee, or labor organization must file a petition with the commission.
5. **Labor and Labor Relations: Public Officers and Employees.** Under the Industrial Relations Act, public employers are authorized to recognize employee organizations for the purpose of negotiating collectively in the determination

of and administration of grievances arising under the terms and conditions of employment of their public employees as provided in the act.

6. **Commission of Industrial Relations: Labor and Labor Relations: Employer and Employee.** The Commission of Industrial Relations, as well as the National Labor Relations Board and the federal courts, has excluded from bargaining units so-called confidential employees.
7. **Labor and Labor Relations: Employer and Employee: Words and Phrases.** Under the "labor-nexus" test adopted by the National Labor Relations Board and the U.S. Supreme Court, an employee is confidential if he or she has access to confidential labor relations information of the employer.
8. **Labor and Labor Relations: Federal Acts: Statutes.** Federal case law regarding the National Labor Relations Act is relevant in deciding issues under Nebraska's Industrial Relations Act.
9. **Employer and Employee: Words and Phrases: Appeal and Error.** An appellate court should utilize a 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 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.

Appeal from the Commission of Industrial Relations. Affirmed in part, and in part reversed.

Vincent Valentino for appellants.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

The Commission of Industrial Relations (CIR) certified a bargaining unit as proposed by the appellee, International Brotherhood of Electrical Workers, Local Union No. 1597 (IBEW). The appellants, Howard County, Nebraska; the individual members of the Howard County Board of Commissioners; and the Howard County assessor, clerk, treasurer, and sheriff (collectively the County), appeal. We affirm in part, and in part reverse.

II. FACTUAL BACKGROUND

IBEW filed a petition with the CIR on March 26, 2009, seeking a CIR order requiring an election among certain employees

of Howard County. The purpose of the election was to determine whether those employees desired to have IBEW exclusively represent them as a collective bargaining agent.

The County filed an answer to IBEW's amended petition. In that answer, the County objected to the bargaining unit's inclusion of the secretary to the county sheriff and the office manager for the county extension office, as well as the deputy county assessor, the deputy county clerk, the deputy county treasurer, and the clerk employees of those offices. The County's view was that all the employees at issue except the office manager for the county extension office were "confidential" employees, and thus excluded on that basis. The County also alleged that the office manager and deputy employees were statutory supervisors and excludable for that reason.

Following the hearing, the CIR entered an order concluding that all disputed positions should be included in the bargaining unit and ordered that an election be held. In so doing, the CIR concluded that none of the positions were "confidential" and that the office manager and deputy employees were not statutory supervisors. Balloting was held, and the bargaining unit was approved in a 13-to-0 vote. The unit was certified by the CIR on December 4, 2009. The County appeals.

III. ASSIGNMENTS OF ERROR

On appeal, the County assigns, restated, that the CIR erred in (1) finding that the office manager for the county extension office and the deputy employees in the offices of the county assessor, clerk, and treasurer were not statutory supervisors; (2) finding that the secretary to the county sheriff and the deputy and clerical employees in the offices of the county assessor, clerk, and treasurer were not "confidential" employees; and (3) assigning to the County the burden of proof to show that the positions in question were supervisory and/or "confidential."

IV. STANDARD OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by

fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[1]

V. ANALYSIS

1. Relevant Law

[2-4] The CIR has authority to decide industrial disputes.[2] Industrial disputes include not just those disputes involving wages, terms, and conditions of employment, but also "any controversy . . . concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment."[3] In order to invoke the CIR's jurisdiction with regard to an industrial dispute, any employer, employee, or labor organization must file a petition with the CIR.[4]

[5] Under the Industrial Relations Act, "public employers are hereby authorized to recognize employee organizations for the purpose of negotiating collectively in the determination of and administration of grievances arising under the terms and conditions of employment of their public employees as provided in the . . . [a]ct."[5] However, "a supervisor shall not be included in a single bargaining unit with any other employee who is not a supervisor."[6] A supervisor is defined as

> any employee having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

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[1] Neb. Rev. Stat. § 48-825(4) (Reissue 2004).

[2] Neb. Rev. Stat. § 48-819.01 (Reissue 2004).

[3] Neb. Rev. Stat. § 48-801(7) (Cum. Supp. 2010).

[4] Neb. Rev. Stat. § 48-811 (Reissue 2004).

[5] Neb. Rev. Stat. § 48-816(2) (Reissue 2004).

[6] § 48-816(3)(a).

> authority is not a merely routine or clerical nature, but requires the use of independent judgment.[7]

[6,7] In addition, the CIR, as well as the National Labor Relations Board and the federal courts, has excluded from bargaining units so-called confidential employees. The U.S. Supreme Court set forth the definition of such employees in *NLRB v. Hendricks Cty. Rural Electric Corp.*[8] According to *Hendricks Cty. Rural Electric Corp.*,

> "management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters."[9]

The Court approved the National Labor Relations Board's longstanding practice of employing a "labor-nexus" test in excluding "the narrow group of employees with access to confidential, labor-relations information of the employer."[10] The CIR has adopted this position, and although the CIR has been considering whether employees were "confidential" since 1982,[11] this court has not previously considered this issue.

The issues presented by this appeal are (1) whether the deputy employees in the offices of the county assessor, clerk, and treasurer and the office manager for the county extension office are statutory "supervisors" under § 48-816(3), and (2) whether the deputy employees in the offices of the county assessor, clerk, and treasurer; the clerk employees of those offices; and the secretary to the sheriff are "confidential" employees.

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[7] § 48-801(10).

[8] *NLRB v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 102 S. Ct. 216, 70 L. Ed. 2d 323 (1981).

[9] *Id.*, 454 U.S. at 179.

[10] *Id.*, 454 U.S. at 177-78.

[11] See *Civilian Management, Professional and Technical Employees Council of the City of Omaha, Inc. v. City of Omaha,* 6 C.I.R. 187 (1982).

2. Deputy Employees Are Statutory Supervisors

On appeal, the County contends that because deputies have the authority to perform the duties of the elected officeholder[12] and the elected officeholder is a supervisor, a deputy should also be considered a supervisor.

[8,9] The definition of "supervisor" in Nebraska's Industrial Relations Act is substantially identical to that of "supervisor" under the National Labor Relations Act.[13] And we have indicated that federal case law regarding the National Labor Relations Act is relevant in deciding issues under Nebraska's Industrial Relations Act.[14] The federal courts utilize a 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 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."[15]

(a) Deputy Employees Granted Supervisory Authority by Statute

The record indicates that none of the deputy employees at issue actually exercise supervisory authority. However, the Eighth Circuit has noted that "the actual exercise of the enumerated power is irrelevant so long as the authority to do so is present."[16] And we conclude that the authority is present with respect to these deputies.

Nebraska statutes authorize the appointment of deputies by elected officials and further provide those deputies with

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[12] Neb. Rev. Stat. §§ 23-1301.01 (county clerk) and 23-1601.02 (county treasurer) (Reissue 2007). See, also, Neb. Rev. Stat. §§ 23-1115 (Reissue 2007) and 25-2219 (Reissue 2008).

[13] Compare § 48-801(10) with 29 U.S.C. § 152(11) (2006).

[14] *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

[15] *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713, 121 S. Ct. 1861, 149 L. Ed. 2d 939 (2001).

[16] *Beverly Enterprises v. N.L.R.B.*, 148 F.3d 1042, 1045 (8th Cir. 1998).

the authority to act in the absence of the elected official.[17] In particular, § 25-2219 provides that "[a]ny duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." And under Neb. Rev. Stat. § 23-1111 (Reissue 2007), which provides that "county officers in all counties shall have the necessary clerks and assistants," an elected official has the power to set the terms and conditions of employment in his or her office.[18]

Providing more support for the County's position is the fact that at least with respect to the deputy employees in the offices of the county clerk and treasurer, those deputies are required under state law to take the same oath as the elected official.[19] Moreover, any person holding the title of deputy can be removed from his or her deputy position without cause,[20] something that can be inconsistent with the grievance procedures often accompanying membership in a union.

For these reasons, we conclude that the deputies are authorized under Nebraska law to exercise supervisory authority.

(b) Deputy Employees Exercise Independent Judgment

We further conclude that when exercising these powers in the absence of the elected official, a deputy is exercising independent judgment, just as the elected official would. We caution, however, that the elected official is still in ultimate control of his or her office, and nothing in this opinion should be read to limit the power of the elected official with respect to his or her office.

(c) Deputy Employees Act in Interest of Their Employers

Finally, we note that there is no dispute that the deputy employees act in the interest of the County and of their particular elected officials.

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[17] See §§ 23-1301.01, 23-1601.02, 23-1115, and 25-2219.

[18] See *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985).

[19] See §§ 23-1301.01 and 23-1601.02.

[20] Neb. Rev. Stat. § 23-2514 (Reissue 2007).

Because we conclude that the deputy assessor, deputy clerk, and deputy treasurer are authorized as statutory supervisors, those positions cannot be included in the same bargaining unit as nonsupervisory positions. We therefore find merit to the County's assignment of error as to the deputies and reverse the CIR's decision certifying the bargaining unit as contrary to law.

3. County Extension Office Manager Is Not Statutory Supervisor

Though the deputy positions are supervisory positions, we do not find the same to be true for the office manager for the county extension office. Unlike the employees in the deputy positions, there are no statutes authorizing any powers, supervisory or otherwise, to any employees of the county extension office. And the record is clear that the person holding this position does not exercise any supervisory powers. In fact, in this case, this position is currently a part-time position and its occupant is the sole county employee in the office. Any other extension employee is a University of Nebraska employee, over whom the office manager has no authority. We therefore conclude that this position is not a supervisory position and that the CIR's order including it in the bargaining unit should be affirmed. This portion of the County's first assignment of error is without merit.

4. Clerk Employees and Secretary to County Sheriff Are Not "Confidential" Employees

Finally, we turn to the question of whether particular employees are "confidential" employees. Because we have already concluded that the deputy positions should be excluded from the bargaining unit, we need not address whether those employees are "confidential." And the County does not argue that the office manager of the county extension office is a confidential employee. Thus, we must determine only whether the clerk employees of the assessor, clerk, and treasurer, as well as the secretary to the sheriff, are "confidential" employees. In examining the record, we conclude that none of these employees are "confidential."

In determining whether an employee is "confidential," we adopt and apply the "labor-nexus" test utilized by the U.S. Supreme Court in *Hendricks Cty. Rural Electric Corp.*[21] Under this test, those individuals in the "narrow group of employees with access to confidential labor relations information of the employer"[22] are considered "confidential" employees. Because of this knowledge, such "confidential" employees are properly excluded from a bargaining unit.

On appeal, the County contends that the sheriff's secretary and the clerk employees all work in a confidential capacity with respect to their particular elected official and have "potential access to confidential information that is labor-related and may not be known to [IBEW]."[23] As was noted above, the U.S. Supreme Court has indicated that "'management should not be required to handle labor relations matters through employees who are represented by the union . . . who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to . . . labor relations matters.'"[24] An examination of the record does not support the County's assertion.

Rather, according to all of the evidence in the record, only the elected official has access to confidential labor-related information. All three clerk employees, as well as the sheriff's secretary and the deputies in each office, testified that only the elected official had such information and that such information was kept locked when not being utilized by the official. In addition, the county assessor and sheriff also testified that their respective employees did not have access to any labor-related materials. There was no testimony presented suggesting that the clerk employees or the secretary to the sheriff had access to such labor-related materials.

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[21] See *NLRB v. Hendricks Cty. Rural Electric Corp., supra* note 8.

[22] *Id.*, 454 U.S. at 178.

[23] Brief for appellant at 34.

[24] *NLRB v. Hendricks Cty. Rural Electric Corp., supra* note 8, 454 U.S. at 179.

We therefore affirm the decision of the CIR that none of these employees are "confidential." The County's second assignment of error is without merit.

5. Burden of Proof

Finally, the County argues that in its order certifying IBEW's proposed bargaining unit, the CIR impermissibly shifted the burden of proof when it noted, with respect to whether the employees were confidential, that the County had failed to meet its burden to show that the positions were confidential.

We agree that the CIR has traditionally placed the burden of proof on the *union* in cases where the employer seeks to exclude certain positions from a bargaining unit.[25] And we agree that in this case, the CIR noted in its order that the *County* had failed to meet its burden to show that the employees were "confidential."

To the extent that this was error, however, it was harmless. The CIR specifically noted that there was no evidence in the record to show that the positions were confidential. Thus, regardless of whether the burden was placed on IBEW to show that the positions were not confidential or on the County to show that the positions were confidential, the result would be the same.

The County's third assignment of error is without merit.

VI. CONCLUSION

We conclude that the deputy employees are considered statutory supervisors. We therefore reverse the CIR's decision with respect to the deputies and otherwise affirm the decision of the CIR.

Affirmed in part, and in part reversed.

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[25] *Metro. Technical Community College Educ. Assoc. v. Metropolitan Technical Community College*, 3 C.I.R. 141 (1976).