

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF GRAND HAVEN,
Public Employer,

Case No: R07 E-054

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU),
LOCAL 517M,
Labor Organization-Petitioner.

APPEARANCES:

Nantz, Litowich, Smith, Girard & Hamilton, by Steven K. Girard, Esq., for the City and the Grand Haven-Spring Lake Sewer Authority

Terry Van Eyck, Labor Relations Specialist, SEIU Local 517M, for the Petitioner

DECISION AND DIRECTION OF SELF-DETERMINATION ELECTION

On May 25, 2007, the Service Employees International Union (SEIU), Local 517M filed a petition for a self-determination election pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.213. The case was assigned for hearing to Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. On October 9, 2007, Petitioner and the City of Grand Haven (the City) filed a stipulated statement of facts in lieu of a hearing. Based on the parties' stipulation, and briefs filed by both parties on or before December 17, 2007, we find as follows:

The Petition and Positions of the Parties:

Petitioner represents a bargaining unit of nonsupervisory employees of the City of Grand Haven in its department of public works (DPW), excluding engineers, other professional employees, guards, and office clerical employees. It also represents a unit of six nonsupervisory operator-mechanics working at the Grand Haven-Spring Lake Wastewater Treatment Plant (the plant). On November 28, 2006, Petitioner notified the City that employees of both bargaining units had voted unanimously to combine their units and asked to be recognized as the bargaining agent for the new unit. On May 17, 2007, the City and the Grand Haven-Spring Lake Sewer Authority (the Authority), through their joint legal counsel, rejected Petitioner's request. Petitioner then filed this petition asking the Commission to conduct a self-determination election

to determine whether the units should be merged.

Petitioner maintains that both groups of employees are employed by the City of Grand Haven. It asserts that these employees share a community of interest and that they should be permitted to merge their units. The City maintains that the operator-mechanics are employed by the Authority, either solely or jointly with the City. It argues that a combined unit of DPW employees and operator-mechanics would not be appropriate because these employees are not employed by a single employer and because the two groups lack a community of interest.

Facts:

The Authority and its Contract with the City

Pursuant to the Municipal Sewage Disposal Act, 1955 PA 233, MCL 124.281 et seq, the Authority was incorporated as a separate entity in 1973 by the City of Grand Haven, the Village of Spring Lake, the City of Ferrysburg, Grand Haven Township, and the Township of Spring Lake (hereinafter the constituent municipalities) to acquire, own, and operate a sewage disposal system. The Authority's board consists of nine trustees: two appointed by the City of Grand Haven, two appointed by the Village of Spring Lake, one appointed by the Township of Spring Lake, one appointed by the City of Ferrysburg, one appointed by Grand Haven Township, one appointed by the Ottawa County Road Commission, and one "at-large" trustee elected by a majority vote of the other trustees.

The Authority owns three facilities – a wastewater treatment plant and pumping station located in Grand Haven, another pumping station in Grand Haven, and a third pumping station in Spring Lake – in addition to the pipes and equipment constituting the system. The Authority's articles of incorporation give it the power to "hire and discharge all necessary employees to carry out the functions of the authority," fix their compensation, and establish a pension fund or make arrangements for its employees to be included under any pension fund operated by any of its constituent municipalities. The Authority receives its funds from its constituent municipalities, who bill their residents for its services.

Since September 18, 1973, the Authority and the City of Grand Haven have had a written contract providing that the City is to "manage, operate, and maintain the system's facilities." The agreement was redrafted in 1998, and this version of the contract was in effect at the time the petition was filed. Each contract is for a term of one year, but renews automatically if neither party serves notice to terminate. The services provided under the contract are divided into two categories. The first, administrative services, includes labor relations, accounting, payroll and personnel, cash management (including daily processing of accounts receivable and depositing of funds to bank accounts), grounds and building maintenance, and custodial services. The Authority pays the City a fixed annual amount for these services, and the Authority has no contractual control over the employees who provide them.

The second category of services under the contract is operations and maintenance (O & M). The City pays all the operational costs of the system, including equipment and supplies and the wages and other employment costs of the workers who run and maintain the facilities. Under

the terms of the contract between the Authority and the City, the City passes all of its actual out-of-pocket costs along to the Authority. The Authority then bills its constituent municipalities monthly for operating expenses based on their percentage of the flow through the sewer treatment plant.

Under its bylaws, the Authority must prepare, adopt, and submit to its constituent municipalities an annual budget covering its proposed expenditures and the necessary funds required from each constituent municipality on or before March 15 of each year. The budget specifies the number of employees to be employed at the plant. The plant superintendent is responsible for preparing the plant operations and maintenance budget. The City provides the Authority with assistance in preparing its budget under the administrative services section of the contract.

Section 1(b) of the contract between the Authority and the City of Grand Haven is entitled "O & M Services." It reads as follows:

(1) Employees Provided by City. The City shall provide the employees needed to operate, maintain and repair the Plant and other Facilities in accordance with applicable laws, rules and regulations and with generally recognized standards for such services. The employees performing such services (the "Plant Staff") shall have as their sole duties as city employees the performance of services for the Authority and they shall not, without the Authority's prior consent perform any other services for the City. The City shall not add or eliminate Plant Staff positions without the Authority's prior consent. To make it clear what positions are currently provided, a list of the current Plant Staff and the positions of each member of the Plant staff is attached as Exhibit A. The City shall obtain and maintain workers' disability compensation insurance and unemployment compensation insurance as may be required by applicable laws, rules and regulations.

(2) Authority. The City Manager shall have full responsibility and discretion for day-to-day operations of the Plant and other facilities, including the authority to hire and fire employees (with the exception of the Plant's superintendent and other managerial staff) and all other authority and responsibilities needed for the efficient management, operation and maintenance of the facilities. Except as otherwise provided in this Agreement, employment of Plant Staff shall be subject to the City's current policies and practices regarding city manager supervision of the City's own employees. However, the City Manager's authority over the Plant Superintendent and the management, operation and maintenance of the Facilities shall be subject to the discretionary review and approval of the Authority Board. For example, decisions regarding the hiring and firing of, and salary and benefits for the plant's managerial (non-bargaining unit) staff shall be subject to the discretionary review and approval, disapproval or modification by the Authority Board.

Hiring, Firing, and Discipline of Plant Employees

The plant staff consists of the plant superintendent, an operations supervisor, an environmental compliance supervisor, and the six operator-mechanics represented by Petitioner. The superintendent and two supervisors are not represented by a union. From time to time, the Authority has reduced or added plant staff positions by adding or subtracting positions from its budget. For example, in 2000, the Authority decided to switch to a partially unattended operation and reduced the number of operator-mechanic positions from nine to the current six.

The operator-mechanics report directly to the two supervisors, who in turn report to the superintendent. The superintendent has a City job description that states that he reports to the Authority's board of trustees, which prepares his annual written performance evaluation. According to his job description, the superintendent is responsible for planning, organizing, directing, and evaluating the operations and maintenance functions of the wastewater treatment plant and pump stations. He also "interviews, hires, trains and cross-trains, evaluates, and disciplines departmental personnel." The superintendent keeps the personnel files of all plant staff. He also handles scheduling, including call-ins, vacation requests, and sick leave approval.

The City posts openings for plant staff throughout the City, and job postings for other City positions are posted at the sewage treatment plant. However, applications for operator-mechanic positions are collected at the sewage treatment plant rather than at City Hall. The superintendent and the two supervisors together review the applications and interview the applicants. The superintendent has the effective authority to decide whom to hire, although the city manager must be notified of his decision. The record does not indicate that the Authority board has any direct role in hiring operator-mechanics. The superintendent has the authority to discipline all plant employees, including the operator-mechanics. Termination of an operator-mechanic requires the approval of both the plant superintendent and the city manager. The record does not indicate that the Authority board has any direct role in discharging or disciplining operator-mechanics.

The Collective Bargaining Agreement Covering Operator-Mechanics

The most recent collective bargaining agreement covering the operator-mechanics expired in June 2007. The collective bargaining agreement does not list the Authority as a party, and there is no evidence that the Authority board approves it. Article II, Sections 1 and 3 of the agreement read as follows:

Section 1. Bargaining Unit Description. The Employer hereby recognizes the Union as the exclusive representative for purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other terms and conditions of employment of the following Employees:

All regular full-time and regular part-time operator-mechanics employed by the Employer at the Grand Haven-Spring Lake Wastewater Treatment Plant, but excluding office clerical, engineers, engineering aides, other professional employees, temporary or seasonal or substitute Employees,

supervisors, guards and all other Employees.

Section 3. Wastewater Treatment Plant Agreement. Notwithstanding the provisions of Section 1, above, and notwithstanding any other terms or provisions of this Agreement, it is understood and agreed that the City of Grand Haven's status as Employer of the Employees in the above-described bargaining unit exists solely and exclusively by virtue of a certain Wastewater Treatment Plant Agreement, dated on or about September 18, 1973, between the Grand Haven-Spring Lake Sewer Authority, a Michigan Authority, of Ottawa County, Michigan, whose principal plant (the "Wastewater Treatment Plant") is located at 1525 Washington Street, Grand Haven, Michigan, and the City of Grand Haven, pursuant to which Wastewater Treatment Plant Agreement the City of Grand Haven manages, operates and maintains said plant and facility. It is further understood that the City of Grand Haven's rights and obligations under said Wastewater Treatment Plant Agreement are subject to termination and/or change, and that upon any such termination and/or change, the City of Grand Haven's obligation pursuant to this agreement shall cease and terminate and this Agreement shall thereafter have no further force or effect.

Article XII of the collective bargaining agreement begins with the following sentence, "Regular, full-time employees shall be eligible to participate in a group hospital-medical insurance program provided through the Employer with an insurance carrier selected by the Employer." Prior to 1996, all plant staff participated in health insurance plans available to other City employees and for which the City is self-insured. In 1996, the Authority began purchasing health insurance through a separate agent, and the operator-mechanics now have different plans than other City employees with different co-pays and different deductibles. It is not clear from the stipulated facts whether the City's name is on the policy covering the operator-mechanics or whether it actually selected the carrier as stated in Article XII.

The first sentence of Article XIII of the collective bargaining agreement reads, "The Employer shall participate in the Municipal Employees' Retirement System (MERS) . . ." The rest of the article describes the particular MERS plan available to the operator-mechanics. The operator-mechanics have a different MERS plan than DPW employees and are grouped separately from other City employees for purposes of determining rates, assets, and liabilities.

Under the grievance procedure in the collective bargaining agreement, the plant superintendent answers grievances at the second step. If the grievance is not settled at step two, it may be appealed to the city manager, who must provide a written answer. The city manager has the choice of meeting with the grievant before answering the grievance or answering without a meeting. If the city manager decides to meet with the grievant, the grievant has the option of being accompanied by the union negotiating committee. The fourth step of the grievance procedure is mediation by a Commission-appointed mediator.

The collective bargaining agreement does not provide operator-mechanics with any right to transfer or be promoted into other City positions.

Discussion and Conclusions of Law:

When a union representing two or more bargaining units of employees of the same employer files a petition to merge these units, we will direct a self-determination election if we find that the proposed combined unit would also constitute an appropriate unit under Section 13 of PERA. *St Clair Co ISD*, 2001 MERC Lab Op 169; *Clarkston Cmty Sch*, 1993 MERC Lab Op 29; *Bangor Twp Cmty Sch*, 1993 MERC Lab Op 216. We have held, however, that the presumptively appropriate unit under PERA includes only employees of a single employer. Absent a history of bargaining for a broader unit, we will not order an election in a unit consisting of employees of more than one employer without the consent of all parties. *Pub Safety Acad*, 20 MPER 12 (2007), citing *Common Pleas Court of the City of Detroit*, 1974 MERC Lab Op 83 and *Wayne Co Airport Auth*, 17 MPER 85 (2004). Therefore, we must first resolve the question of whether the operator-mechanics are employees of more than one employer.

The City asserts that the operator-mechanics are employees of the Authority, not the City. The general characteristics of employers under PERA are: (1) they select and engage the employee; (2) they pay the wages; (3) they have the power of dismissal; and (4) they have power and control over the employee's conduct. *Saginaw Stage Employees, Local 35, IATSE v City of Saginaw*, 150 Mich App 132, 134-135, (1986). In this case, the Authority is a governmental entity with authority under the law and its articles of incorporation to employ its own employees. The City argues that the Authority, therefore, has the "ultimate" authority over hiring, firing, and compensation of employees. However, since 1973, the Authority has had a contract with the City under which the City has assumed responsibility for the maintenance and operation of the Authority's facilities; that includes responsibility for the employees who do the work. As Article 1, Section 3 of Petitioner's collective bargaining agreement with the City recognizes, Petitioner's status as representative of the operator-mechanics is premised on the City continuing to provide services to the Authority under that contract. The fact that the Authority has the power to terminate or renegotiate its contract with the City is irrelevant to the question of whether a unit of operator-mechanics and City DPW employees is an appropriate bargaining unit at this time.

The City also argues that the Authority is at least a joint employer of the operator-mechanics because it shares control over them with the City under their contract. A joint employer relationship may arise where the powers of an employer are, by statute, shared among two or more governmental entities. *St Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204 (1986). A joint employer relationship, however, can also exist between parties whose relationship is purely contractual. See *Michigan Council 25, AFSCME v Louisiana Homes, Inc*, 192 Mich App 187, 190 (1991). In this case, the wages and benefits of the operator-mechanics are paid from Authority funds. However, wages and benefits for the operator-mechanics, including their pension and health insurance benefits, are negotiated between the City and the Petitioner, without formal approval by the Authority. Whatever role the Authority board played in the decision to purchase separate health insurance for plant staff, the City's agreement was clearly necessary to effectuate this change.

The right to hire and fire non-managerial plant staff is explicitly given to the City in the contract between the Authority and the City. In practice, the plant superintendent has the

effective authority to make all personnel decisions affecting operator-mechanics, including hiring, discipline, and discharge. Although there is no evidence that the Authority board exercises any direct control over these matters, the City argues that the Authority exercises the powers of an employer through the plant superintendent, since his employment and compensation is controlled by the Authority. The superintendent, however, is not by contract an employee or agent of the Authority. Section 3(1) of the contract between the City and the Authority states that the City shall provide all "plant staff." There is no exception for the superintendent, even though the contract gives the Authority board "discretionary review and approval" of City decisions regarding the position, including employee selection and compensation. Moreover, it is the city manager, and not the Authority board, who has the formal authority to overturn a personnel decision made by the superintendent. The plant superintendent and the city manager, and not the Authority board, must approve the termination of an operator-mechanic. Under the contractual grievance procedure, grievances over decisions made by the superintendent are heard by the city manager, and not the Authority board. We find that the plant superintendent exercises his supervisory authority over the operator-mechanics as an agent of the City, not as an agent of the Authority. In sum, we conclude that the City determines the compensation of the operator-mechanics, hires them, fires them, and controls their conduct. Accordingly, the City, and not the Authority, is their employer for purposes of the Act.

The City also argues that a combined unit of City DPW employees and plant operator-mechanics is not appropriate under traditional community of interest factors. Community of interest is determined by examining a number of factors, including similarities in duties, skills and working conditions; similarities in wages and employee benefits; amount of interchange or transfer between groups of employees; centralization of the employer's administrative and managerial functions; degree of central control of labor relations; common promotion ladders and common supervision. *Covert Pub Sch*, 1997 MERC Lab Op 594, 601; *Grand Rapids Pub Sch*, 1997 MERC Lab Op 98, 106; *City of Warren*, 1966 MERC Lab Op 25, 28. In this case, the operator-mechanics and DPW employees work in different locations and have different supervisors. In part because they have been in different bargaining units, the two groups have somewhat different benefits, and employees do not have the right to transfer or be promoted to a position in the other unit. The DPW employees and the operator-mechanics are also paid by different funding sources, with the latter's compensation paid by the Authority pursuant to its contract with the City. There is no dispute, however, that the two groups of employees have generally similar duties and skills. We have held that the mere presence of separate funding sources does not destroy community of interest. See *Hesperia Cmty Sch*, 1994 MERC Lab Op 972, 977-978; *Beecher Cmty Sch*, 1989 MERC Lab Op 311, 317; *City of Detroit, Health Dep't*, 1985 MERC Lab Op 920, 924. We conclude that the operator-mechanics at the sewage treatment plant and the DPW employees share a community of interest and that a combined unit including both these groups would constitute an appropriate unit under Section 13 of PERA.

In accord with the findings of fact and conclusions of law set forth above, we direct an election as follows:

ORDER DIRECTING ELECTION

We hereby direct a self-determination election in the following units:

1. All regular employees of the public works department of the City of Grand Haven, including crew leaders and regular part-time employees, but excluding office clerical employees, engineers and engineering aides, other professional employees, guards, supervisory personnel, and temporary employees.

2. All regular full-time and regular part-time operator-mechanics employed by the City of Grand Haven at the Grand Haven-Spring Lake Wastewater Treatment Plant, but excluding office clerical, engineers, engineering aides, other professional employees, temporary or seasonal or substitute employees, supervisors, guards, and all other employees.

Pursuant to the attached direction of election, employees in both units shall vote separately to determine whether they wish to become part of a merged unit represented by Petitioner SEIU Local 517. If a majority of voters in both units vote for merger, the units shall be combined into a single bargaining unit, and a certificate of representation shall issue defining the new bargaining unit. If a majority of voters in either unit fails to vote for merger, the units will remain separate units represented by Petitioner.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____