

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

In the Matter of:

CHARTER TOWNSHIP OF DELTA,
Public Employer,

Case No. UC08 J-026

-and-

FIREFIGHTERS ASSOCIATION OF MICHIGAN,
Labor Organization-Petitioner.

APPEARANCES:

Sherry Katz-Crank, Delta Township, for the Public Employer

George J. Mertz, Assistant General Counsel, Firefighters Association of Michigan, for the Petitioner

**DECISION AND ORDER
ON PETITION FOR UNIT CLARIFICATION**

Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, this case was heard at Lansing, Michigan on July 22, 2009, by David M. Peltz, Administrative Law Judge for the State Office of Administrative Hearings and Rules, acting on behalf of the Michigan Employment Relations Commission. Based on the entire record, including post-hearing briefs filed on or before October 20, 2009, we find as follows:

The Petition and Positions of the Parties:

The Firefighters Association of Michigan filed this unit clarification petition on October 17, 2008 seeking to include the newly created position of fire inspector within its bargaining unit of employees of the Delta Township fire department. The Township argues that placement of the position in Petitioner's unit would be inappropriate because the fire inspector lacks a community of interest with the positions within Petitioner's unit, and because the parties agreed to the exclusion of the fire inspector by way of a memorandum of understanding executed in 2008. In addition, the Employer asserts that the fire inspector should be excluded from Petitioner's unit because the position qualifies as an executive as the Commission has defined that term.

Findings of Fact:

Petitioner represents a bargaining unit consisting of all regular full-time employees of the Delta Township fire department, including paramedic/firefighters, engineers, lieutenants and captains. Pursuant to the terms of the most recent collective bargaining agreement between the parties, the following positions are excluded from the unit: fire chief, assistant fire chief, deputy fire chiefs, clerical employees, all appointed or elected officials, part-time firefighters, all employees under contract with another labor organization, and all other employees employed in and through the Charter Township of Delta. Petitioner's bargaining unit is the only group of organized employees of the Township. Unit members receive benefits under the Michigan Employment Retirement System (MERS), while exempt employees are eligible for participation in the Township's defined contribution plan.

Prior to the creation of the disputed fire inspector position, the Township never had a position dedicated solely to performing fire inspection duties. Initially, the Township used the fire marshal, a now defunct position, to do the fire inspection work. Later, the fire inspection duties were reassigned to two deputy fire chiefs, who performed those functions in addition to their normal responsibilities as command officers. When both of the deputy chiefs retired, there arose an immediate need for someone to take over the fire inspection duties. In response, the Employer created the position of fire inspector, which it asserted was an administrative position excluded from the bargaining unit.

At the time the fire inspector position was created, Dawn O'Brien, then a paramedic/firefighter and bargaining unit member, was the only Township employee who possessed fire inspector certification. The Employer decided to transfer O'Brien to the new position on a temporary basis while it decided whether to make the position permanent or assign the fire inspection work back to the deputy fire chief position once that position was filled. At the time, O'Brien's retirement benefits under MERS had not yet vested. In order to protect O'Brien's pension while she worked as a fire inspector, the parties entered into a memorandum of understanding dated March 19, 2008, which provides, in pertinent part:

The Township has an immediate need to fill the position of Fire Inspector. The Fire Inspector position is an hourly non-union position and nothing contained in this Agreement shall be construed to change the status of the Fire Inspector position as a non-union position. On a temporary basis (defined as a 6 month period or less) Dawn O'Brien ("Employee") shall be transferred from her position as firefighter/paramedic to the position of Fire Inspector (the "Temporary Assignment").

During this Temporary Assignment Employee shall continue to be a member of the Union and shall continue to accrue benefits and pension as if she was still assigned the position of firefighter/paramedic.

On or about September 18, 2008, the Township issued a job description for the fire inspector position. According to that document, the fire inspector position requires: an

associate's degree or equivalent in fire science or a closely related field; State of Michigan certification as both a fire inspector and an arson investigator; operational level hazardous materials certification; and a minimum of eight years experience in fire and/or emergency medical services or equivalent education and experience. In addition, the job description provides that the fire inspector must maintain, at a minimum, a State of Michigan EMT-Basic license and have a "[t]horough knowledge of modern fire suppression and prevention including the Incident Command System (ICS), Accountability, Safety, etc. . . ."

The job description lists in detail the duties and responsibilities for the fire inspector position, which include: review site plans and construction blueprints to insure compliance with applicable codes and standards; conduct fire inspections of new and existing structures, explain code requirements and provide other information to the general public; develop and maintain inspection files, investigation reports, and other documentation; research and propose modifications to the existing fire code; prepare reports to the fire chief; assist in establishing fire department policies and procedures; develop community fire education programs; respond to alarms and assist at the scene of emergencies as required, including investigations to determine the origin and cause of fires. The fire inspector may also be assigned various responsibilities and tasks in conjunction with emergency management and disaster response operations, and may be required to supervise department personnel during fire prevention programs, company inspections, and investigations at emergencies.

The job description identifies the working conditions of the fire inspector position as follows:

Work is performed primarily in an office, vehicle, or outdoor settings, in all weather conditions including temperature extremes and during day and night shifts. Work is often performed in emergency and stressful situations. The employee is exposed to audible alarms and hazards associated with fighting fires and rendering emergency medical assistance including smoke, noxious odors, fumes, chemicals, liquid chemicals, solvents, oils, and other hazardous materials.

The employee occasionally works near moving mechanical parts in high, precarious places, and is occasionally exposed to wet or humid conditions, fumes, airborne particles, toxic or caustic chemicals, vibration, and the risk of electric shock.

In addition to inspecting buildings and other structures, the fire inspector is required to respond to alarms and assist at the scene of a fire or other emergency. Generally, the fire inspector acts in a supportive capacity during a fire by performing one of three functions: safety officer, staging officer or accountability officer. A safety officer is responsible for the overall welfare of the firefighters and other emergency personnel by monitoring the scene for potential hazards such as electrical wires or swimming pools. A staging officer coordinates the various outside departments who may appear at the scene pursuant to mutual aid pacts. An accountability officer is responsible for tracking personnel moving in and out of the hazard zone.

The fire inspector is also responsible for investigating the cause and origin of a structure fire. After the fire has been suppressed and the air is breathable without a self-contained breathing apparatus (SCBA), command authority over the scene is transferred to the fire inspector and she enters the structure to begin the investigation. Firefighters may be ordered to assist with the investigation, which could continue beyond the date of the initial incident. In the event that arson is suspected, the fire inspector collects evidence and transfers it to the crime lab.

Although the fire inspector is not normally expected to enter the potential hazard zone during a fire, she could be required to do so if there was imminent danger and no other personnel is available to take such action. While working as a paramedic/firefighter, O'Brien was assigned protective turnout gear and a SCBA. She has not been ordered by the department to return that gear since her transfer to the fire inspector position. O'Brien has Firefighter I and II certification, neither of which requires additional training or recertification. Although O'Brien is certified as a paramedic, she will not be required by the Employer to retain her paramedic certification. O'Brien has, however, responded to an ambulance call on one occasion since she was transferred to fire inspector position. That incident occurred shortly after she became fire inspector at a time when all other departmental employees were unavailable due to a fire at a school.

Many of the fire inspector's duties, as described above, are also performed by other employees of the fire department, including positions within Petitioner's bargaining unit. For example, firefighters routinely conduct inspections of buildings within the Township for compliance with the fire code. During these inspections, the firefighters complete a checklist which is later submitted to the fire inspector for possible follow-up. In fact, Michael Roman, a lieutenant with the fire department, testified that he conducted a building inspection approximately three weeks prior to the hearing in this matter. With respect to fire investigations, captains and lieutenants are assigned the task of establishing the cause and origin of fires involving up to \$5,000 in damage. The duties of safety officer, staging officer and accountability officer are also not exclusive to the fire inspector position.

The fire inspector works out of the fire department's central station and reports directly to the fire chief. She has a different schedule than members of Petitioner's bargaining unit, who typically work 56 hours per week on 24-hour shifts. The fire inspector's normal work hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday. However, her schedule is somewhat flexible. For example, O'Brien may be required to inspect commercial buildings at night, during the early morning hours or on the weekend so as not to interfere with the operation of businesses in the Township. In such instances, O'Brien receives overtime pay or is permitted to take compensatory time. The fire inspector is paid at Grade 8 of the Township's exempt salary schedule. Effective July 1, 2009, the wage scale for an employee at Grade 8 ranged from \$50,660.09 to \$65,857.95. The wage scale for members of Petitioner's unit during the period July 1, 2009 to June 30, 2010 ranged from \$39,858.22 to \$61,500.62.

Discussion and Conclusions of Law:

A primary objective of the Commission is to constitute the largest unit that, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law, and that includes, within a single unit, all employees sharing a community of interest. *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952). 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. See e.g. *Covert Pub Sch*, 1997 MERC Lab Op 594, 601. In making a unit placement determination, we are not required to find the "optimum" or "most" appropriate bargaining unit, but rather only a unit appropriate for collective bargaining based upon the facts of each particular case. *City of Lansing, Bd of Water and Light*, 2001 MERC Lab Op 13; *City of Zeeland*, 1995 MERC Lab Op 652.

The Township contends that the fire inspector is a newly created, administrative position that does not share a community of interest with the employees in Petitioner's bargaining unit. We disagree. The record establishes that the fire inspector works in close proximity to the paramedic/firefighters, lieutenants and other employees who make up the bargaining unit and that her job function in ensuring the public safety is integrated with that of the unit. The fire inspector responds to alarms and supports firefighters and other employees at the scene of a fire by acting as a safety officer, staging officer or accountability officer, duties that help to ensure the safety and well-being of the unit members engaged in fire fighting. Furthermore, the employees within Petitioner's unit perform many of the same job functions as the fire inspector. Like the fire inspector, unit members routinely conduct building inspections. Additionally, unit members, specifically captains and lieutenants, conduct investigations into the cause and origin of certain fires. The fire inspector works out of the Township's central fire station and she reports directly to the fire chief, who is at the top of the command structure for employees within Petitioner's unit.

It is true that Dawn O'Brien works a different schedule than the members of Petitioner's bargaining unit, has a different benefits package and earns more as a fire inspector than she did when working for the Township as a paramedic/dispatcher. However, we do not find these factors establish a sufficient basis for denying the petition and leaving the fire inspector position unrepresented. When newly created positions share a community of interest with the unit that seeks to include them, it is appropriate to accrete them to the existing unit rather than permit them to remain with a residual group of excluded employees. *Saginaw Valley State Coll*, 1988 MERC Lab Op 533; *Chelsea Sch Dist*, 1994 MERC Lab Op 268, 276. Given that there is no other labor organization seeking to represent the fire inspector, and because denying the petition would leave the position unrepresented, it is in accordance with well-established Commission policy to include the fire inspector in Petitioner's bargaining unit. See e.g. *Charlotte Pub Sch*, 1999 MERC Lab Op 68, 73; *City of Muskegon*, 1996 MERC Lab Op 64, 70.

The Township contends that the fire inspector cannot be accreted to Petitioner's unit because the position is ineligible for Act 312 compulsory arbitration, while all of the positions

in Petitioner's unit are Act 312 eligible. We disagree and conclude that the fire inspector position is a critical service employee covered by Act 312.

Act 312 created a procedure to resolve labor disputes in municipal police and fire departments. Section 2 of the Act defines public police and fire departments to mean: “any department of a city, county, village, or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department.” In *Metro Council 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299 (1980), the Supreme Court delineated a two-part test for determining eligibility for arbitration under Act 312. First, the Court held that the position must be subject to the hazards of police or fire fighting work. Secondly, the employer must be a critical service department engaging such employees and having as its principal function the promotion of the public safety, order and welfare so that a work stoppage in that department would threaten community safety. See also *Capital City Lodge No 141, FOP v Ingham Co Bd of Comm'rs*, 155 Mich App 116, (1986). A bargaining unit including all fire department positions covered by Act 312 is a presumptively appropriate unit. *Berrien Co*, 1984 MERC Lab Op 1072.¹

We have previously found the position of fire inspector to be covered by Act 312 compulsory arbitration. See e.g. *City of Grandville*, 1991 MERC Lab Op 489; *Orion Charter Twp*, 1994 MERC Lab Op 87. In the instant case, the record indicates that the fire inspector is responsible for enforcement of the Township’s fire code. The position requires certification in fire inspection, arson investigation and operational level hazardous materials. She is required to respond to alarms and assist at the scene of structure fires and other emergencies. Although the fire inspector does not normally enter the hazard zone at a fire scene, she may be required to do so in the event of an emergency situation. In fact, the job description for the fire inspector states that the work of the position “is often performed in emergency and stressful situations” and that she is “exposed to audible alarms and the hazards associated with fighting fires and rendering emergency medical assistance.” Notably, the Employer has not asked O’Brien to return the protective gear it assigned to her when she was working as a paramedic/firefighter. The fire inspector also performs an investigatory function pursuant to which she may be required to enter a structure immediately after the fire has been suppressed in order to determine the cause and origin of the fire. Based upon the above facts, we find that the fire inspector is subject to the hazards of firefighting and that a work stoppage by the fire inspector would endanger community safety. Accordingly, we conclude that the position is covered by Act 312.

¹ In *City of Dearborn Heights*, 1984 MERC Lab Op 1079, and its companion case, *City of Fenton*, 1984 MERC Lab Op 1086, we recognized that availability of Act 312 interest arbitration was such a significant factor in labor relations that, for policy reasons, we would no longer certify mixed bargaining units of Act 312 eligible employees and non-eligible employees. However, we have held that a mixed unit is not illegal or even per se inappropriate. *Wayne Co Airport Police Dep't*, 2001 MERC Lab Op 163, affirmed sub nom *Wayne Co Police Ass'n v Wayne Co*, unpublished memorandum opinion of the Court of Appeals, issued February 24, 2003 (Docket No. 235669). See also *City of Detroit (Fire Dep't)*, 18 MPER 43 (2005), in which we accreted the existing position of supervising medical case manager, which was not Act 312 eligible, to a mixed bargaining unit. Cf. *Orion Charter Twp*, 1994 MERC Lab Op 87.

Next, the Employer asserts that the petition should be dismissed because the Union agreed to exclude the fire inspector from the bargaining unit when it entered into the March 19, 2008 memorandum of understanding. It is true that unit clarification is generally not appropriate for upsetting an express agreement between the parties. *Grosse Pointe Pub Library*, 19 MPER 32 (2006); *Jackson Pub Sch*, 1997 MERC Lab Op 290, 298-299. However, the agreement relied upon by the Township in the instant case merely constitutes a temporary accommodation which served the interest of both parties, allowing the Employer to immediately fill the position while protecting the benefits of the bargaining unit member selected to perform the work. In so holding, we note that at the time the memorandum of understanding was entered into, the Township had not yet decided whether to make the fire inspector a permanent position or reassign the work to a deputy fire chief. Under such circumstances, we find no reasonable basis for interpreting the memorandum of understanding as a waiver by Petitioner of its right to seek to include a permanent fire inspector position in its bargaining unit at a future date.

We also find no merit to the Employer's assertion that the fire inspector should be excluded from the bargaining unit as an executive. An executive means an employee who (1) is a policy making head of a major department of a public employer; or (2) in the case of employers with 1,000 or more employees, is a chief deputy to a department head, or is the head of a section or division of a major department who reports directly to a chief deputy and who exercises substantial discretion in formulating, determining, and effectuating management policy; or (3) pursuant to statutory or charter provision, exercises a substantial degree of autonomy in carrying out his or her public services and who has direct access to or direct influence upon the governing body of a public employer in a policy making role; or (4) formulates, determines and effectuates management policy on an employer-wide basis. *City of Detroit (Police Dep't)*, 1996 MERC Lab Op 84, 106. In determining executive status, we look at factors such as the number of executive positions relative to the size of the organization, the extent of budget responsibilities, responsibility for preparation of departmental rules and regulations, the degree of interchangeability of functions between the employee and her immediate supervisor, and the degree of participation in labor relations or the formulation of collective bargaining policy. *Id.* See also *Arenac Co*, 2001 MERC Lab 208. As with the exclusion of confidential positions, the executive exclusion is applied cautiously so as to fulfill PERA's purpose of providing employees with an opportunity to be represented and bargain collectively. See e.g. *Pontiac Sch Dist*, 1997 MERC Lab Op 173; *City of Saginaw (City Attorney)*, 1991 MERC Lab Op 253.

In the instant case, the Township contends that the fire inspector is an executive for purposes of the Act because she is responsible for administering the Township's fire code. We disagree. The administration of the fire code is a specific responsibility relating to the regulation of Township residents and business owners which has no bearing on significant matters of management policy. The fire inspector does not derive her authority from statute or city charter, and there is nothing in the record to suggest that her responsibilities extend to other Township departments. The fire inspector is not the policy making head of a major department or the chief deputy thereof; rather, the record indicates that she is subordinate to the fire chief. The fire inspector is not expected to establish policies on major issues on an employer-wide

basis and she plays no role in labor relations or the formulation of collective bargaining policy. There is no evidence suggesting that the fire inspector has any significant budget responsibilities or authority over the expenditure of Township funds. Based upon these facts, we conclude that the fire inspector does not have the wide-ranging authority and discretion to formulate management policy required to establish executive status. Therefore, we find that the position should be included in the bargaining unit represented by Petitioner and issue the following order:

ORDER

Based upon the findings of fact and conclusions of law set forth above, the collective bargaining unit represented by the Firefighters Association of Michigan is hereby clarified to include the position of fire inspector.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____