

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

In the Matter of:

LEELANAU COUNTY and LEELANAU COUNTY SHERIFF,
Public Employer,

Case No. UC09 D-011

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Petitioner.

APPEARANCES:

Cohl, Stoker, Toskey, & McGlinchey P.C., by John R. McGlinchey, for the Public Employer

Patrick Spidell, Business Agent, 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 October 12, 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 by the parties on or before December 28, 2009, we find as follows:

The Petition and Positions of the Parties:

The Command Officers Association of Michigan filed this petition on April 20, 2009, seeking to clarify its bargaining unit of supervisory employees of the Leelanau County Sheriff's Department to include the newly created position of law enforcement commander. The Union contends that placement of the position in its unit is appropriate because the law enforcement commander is a third-level supervisory employee. The Employer argues that the law enforcement commander cannot properly be placed in any bargaining unit because the position is an executive as the Commission has defined that term.

Findings of Fact:

Petitioner represents a bargaining unit consisting of all regular full-time law enforcement sergeants in the Sheriff's Department, excluding the sheriff and the undersheriff. The Sheriff's Department is comprised of two divisions: the law enforcement division and the corrections division. The jail commander oversees the corrections division, which is staffed by four sergeants and fourteen deputies. The law enforcement division is comprised of two sergeants and fourteen deputies. The sheriff is an elected position, while the undersheriff and jail commander are at-will employees.

On April 1, 2009, the sheriff, Michael Oltersdorf, sent a confidential memo to the Leelanau County Commission concerning supervision of the law enforcement division. In the memo, Oltersdorf detailed the "adversarial relationship" that existed between management and the two sergeants assigned to the law enforcement division. Due to what Oltersdorf described as an "internal conflict" resulting from "multiple grievances and lawsuits" filed by the sergeants against the County, the sheriff recommended against promoting one of the sergeants to oversee the division. Instead, the sheriff requested that the commission create a new position, law enforcement commander, to run the division. The sheriff opined that the new position would "work closely" with the sergeants and also serve as "shift commander (like 3rd Sergeant would)." The County Commission accepted the sheriff's recommendation and the law enforcement commander position was established effective May 1, 2009. The position was not created pursuant to any statute or charter provision.

The law enforcement commander supervises the sergeants and deputies working in the law enforcement division. He has the authority to assign work, although the daily schedule for road patrol deputies is prepared by one of the sergeants under his command. The law enforcement commander assists in the resolution of employee disputes, but does not specifically play a role in the contractual grievance procedure. He has the authority to discipline the sergeants and deputies under his command up to the point of suspension without pay. He also conducts internal investigations of departmental employees, including positions within Petitioner's bargaining unit. He is responsible for the establishment of policies and procedures applicable to the department, although the sheriff has the authority to overrule any of the policy decisions made by the law enforcement commander.

The law enforcement commander plays a role in the hiring and firing of employees of the law enforcement division. He has terminated a probationary employee and participated in the hiring of two deputies. With respect to one of the newly hired deputies, the sheriff participated in the interview process with the law enforcement commander and then instructed the commander to hire the "right person" for the job. As for the other new deputy, the sheriff, the undersheriff and the law enforcement commander jointly agreed upon which candidate should be offered the position. However, the signature of the law enforcement commander is not included on the written offer of employment proffered to job candidates. Rather, only the sheriff and the undersheriff signed the job offer.

The law enforcement commander is the third highest-ranking employee of the department, subordinate only to the sheriff and the undersheriff, and assumes command of the department when the sheriff and undersheriff are unavailable. In the event of a conflict between the law enforcement commander and the jail commander, the dispute would be resolved by the sheriff or, in his absence, the undersheriff. During contract negotiations, the law enforcement commander will be part of the Employer's bargaining team and will be expected to provide assistance on issues relating to the day-to-day operation of the law enforcement division. The law enforcement commander has no budgetary responsibilities and must seek the approval of the undersheriff before making purchases on behalf of the department. The law enforcement commander does not represent the department at meetings of the county commission.

The law enforcement commander is a uniformed patrol officer and serves as "shift commander" for the sergeants and deputies assigned to the law enforcement division. Unlike the sheriff and undersheriff, the law enforcement commander works a set schedule and must be available to provide advice to others within the department while off-duty.

Discussion and Conclusions of Law:

In *Hillsdale Cmty Sch*, 1968 MERC Lab Op 859, enf'd 24 Mich 36 (1970), we held that supervisors have a right to organize under PERA. At the same time, however, we noted that there is a "level at which organization must end." In *Grandville Mun Exec Ass'n v Grandville*, 453 Mich 428, 439-440 (1996), the Supreme Court approved our longstanding policy of excluding from collective bargaining as "executives" those managerial employees in the public sector whose responsibilities are so intrinsically connected to the determination of their employer's policies that including them in collective bargaining units would impede, rather than further, the purposes of PERA. On remand, in *City of Grandville*, 1997 MERC Lab Op 140, we reaffirmed the definition of an executive which we initially set forth in *City of Detroit (Police Dep't)*, 1996 MERC Lab Op 84, 106:

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 a 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.

The most significant factors in determining whether a position is an executive are the scope of its responsibilities, the extent of its authority, and the interchangeability of its functions with other executives. *UAW v Sterling Heights*, 163 Mich App 8 (1987); *City of Burton*, 19 MPER 55 (2006); *Carman-Ainsworth Cmty Sch*, 16 MPER 28 (2003). Within these categories, we consider 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 his or her immediate supervisor, and the degree of participation in labor relations or the formulation of collective bargaining policy. *Muskegon Co Prof'l Command Ass'n v Muskegon Co (Sheriff's Dep't)*, 186 Mich App 365 (1990); *Detroit v Foreman's Ass'n*, 109 Mich App 141 (1981); *Arenac Co*, 2001 MERC Lab 208; *City of Detroit (Police Dep't)*, 1996 MERC Lab Op 84.

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. *Lansing Cmty Coll*, 2000 MERC Lab Op 99, 103. See also *Pontiac Sch Dist*, 1997 MERC Lab Op 173; *City of Saginaw (City Attorney)*, 1991 MERC Lab Op 253. If there is any burden to allocate in a nonadversarial, information gathering proceeding such as this unit clarification matter, it must fall upon the party, in this case, the Employer, that is attempting to deny the right to be represented for purposes of collective bargaining to a public employee covered by PERA. *Lake Co & Lake Co Sheriff*, 1999 MERC Lab Op 107; *Antrim Kalkaska Cmty Mental Health*, 1998 MERC Lab Op 11, 15. See also *City of Detroit*, 23 MPER 94 (2010), in which we recognized that PERA, as adopted, did not codify the rights of employers or labor unions, but rather placed restrictions on their conduct in furtherance of the paramount statutory right of employees to collectively designate an exclusive bargaining agent. It is well established that simply delegating executive level duties among various employees will not mandate that this Commission find additional exclusions from a bargaining unit to be justified. *Lake Co & Lake Co Sheriff*, 1999 MERC Lab Op 107; 12 MPER 30028 (1999); *Ingham Co Rd Comm*, 1995 MERC Lab Op 306, 312; *Monroe Co Probate Ct*, 1990 MERC Lab Op 880, 884.

In the instant case, the Sheriff's Department employs six sergeants, twenty-eight deputies and an unidentified number of civilian support personnel. The law enforcement commander is third-in-command of this relatively small department. He is subordinate to both the sheriff and the undersheriff. Although the law enforcement commander is responsible for the overall operation of the department in the absence of the sheriff and undersheriff, the record indicates that his day-to-day responsibilities are limited to the law enforcement division to which he is assigned. The position has no responsibility for developing the Employer's overall budget. In fact, the law enforcement commander must obtain the permission of the undersheriff before making any purchases on the department's behalf. The law enforcement commander has no direct access to the Leelanau County Commission. His authority is not derived from statute or charter. Although the law enforcement commander will be expected to participate in collective bargaining, his role will be limited to issues relating to the day-to-day operation of the law enforcement division as opposed to the department as a whole.

There was some evidence indicating that the law enforcement commander is involved in creating departmental policy. However, the record indicates that such decisions are subject to the ultimate approval of the sheriff. Moreover, the perfunctory and conclusory testimony of the sheriff concerning the policy-making responsibilities of the law enforcement commander does not support a determination that the position has the necessary autonomy and discretion to formulate, determine, and effectuate policy on major issues affecting the department as a whole.¹ We have previously held that the policy making aspect of the definition of an executive does not apply to chief deputies or assistants to department heads, but rather relates to positions formulating, determining and effectuating policy on an employer-wide basis. *Shelby Twp*, 1997 MERC Lab Op 469. See also *Lake Co & Lake Co Sheriff*, 1999 MERC Lab Op 107 (chief deputy in command of department in absence of sheriff and undersheriff not excludable from supervisory unit as an executive); *Ann Arbor (Police Dep't)*, 1988 MERC Lab Op 649 (three deputies not executives in department of 181 employees); *Wyoming Police Dep't*, 1985 MERC Lab Op 84 (third-level captain position included in a supervisory unit in a department comprised of 72 sworn police officers); *Saline Police Dep't*, 1982 MERC Lab Op 1699 (second-in-command lieutenant in small department not an executive).

The Employer contends that the law enforcement commander should be excluded as an executive because he conducts internal investigations of other employees, including members of Petitioner's bargaining unit. We have previously held, however, that employees who investigate the activities of their coworkers will not be excluded from collective bargaining as either executives or confidential employees. *Lapeer Co Cmty Mental Health Agency*, 15 MPER 33 (2002); *City of Detroit*, 1980 MERC Lab Op 182. Similarly, the myriad of supervisory-type duties performed by the law enforcement commander, including hiring and firing employees and assigning and directing the work of Petitioner's members, do not justify exclusion of the position from Petitioner's command bargaining unit. We have long held that a unit that includes all levels of supervision is presumptively appropriate, even though some members of the unit exercise supervisory authority over other members of the unit, and that upper level supervisors will not be denied rights under PERA. See e.g. *Livingston Co (Emergency Medical Services)*, 18 MPER 24 (2005); *Johannesburg-Lewiston Area Sch*, 2000 MERC Lab Op 221; *City of Fenton*, 1999 MERC Lab Op 189; *Lake Co & Lake Co Sheriff*; *Shelby Twp*; *Ogemaw Co & Ogemaw Co Sheriff*, 1997 MERC Lab Op 58; *Birmingham Sch Dist*, 1970 MERC Lab Op 422. Thus, there is no merit to the Employer's assertion that the law enforcement commander has no community of interest with the other supervisory employees of the department as a result of his supervisory responsibilities. Consequently, we hold that the law enforcement commander should be included in Petitioner's bargaining unit.

¹ With respect to the policymaking duties of the law enforcement commander, the proofs consisted solely of the following exchange between the Employer's attorney and the sheriff:

Q: [Does the law enforcement commander] [e]stablish policies and procedures?

A: Yes, he does.

We have carefully considered the remaining arguments of the parties, including the Employer's assertion that we should apply a different standard with respect to the executive status of upper management employees in a paramilitary setting, and conclude that they do not warrant a change in the result.

ORDER

Based upon the findings of fact and conclusions of law set forth above, the collective bargaining unit represented by the Command Officers Association of Michigan is hereby clarified to include the position of law enforcement commander.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Christine A. Derdarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____