STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WATERFORD TOWNSHIP,
Respondent in Case Nos. C11 C-056 & C11 D-071
Public Employer in Case No. UC09H-026,

-and-

TEAMSTERS LOCAL 214,
Labor Organization- Charging Party in Case Nos. C11 C-056 & C11 D-071
Petitioner in Case No. UC06 I-030.
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APPEARANCES:

Stanley W. Kurzman, for the Public Employer

Wayne A. Rudell, for the Labor Organization

DECISION AND ORDER

On November 22, 2011, Administrative Law Judge Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaints. Further, the ALJ found that the position at issue should be included in Petitioner's bargaining unit and recommended that the Commission grant the unit clarification petition.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WATERFORD TOWNSHIP,
Public Employer-Respondent,

Case No. UC09 H-026
C11 C-056
C11 D-071

-and-

TEAMSTERS LOCAL 214,
Petitioner-Labor Organization-Charging Party.
_____/

APPEARANCES:

Wayne Rudell, for the Petitioner-Charging Party-Labor Organization

Stanley W. Kurzman, for the Public Employer-Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON CONSOLIDATED CASES

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, these cases were assigned to Doyle O'Connor, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings are based upon the entire record, including exhibits and the transcript of the hearing held on August 3, 2011, and closing arguments by the parties. The parties agreed that a single record would be utilized in these three consolidated cases.

The Unit Clarification Petition:

The petition filed by the Teamsters on August 24, 2009[1], sought to add to an existing unit a then newly proposed part-time clerical position assigned to the Township's police department, titled 'clerk'. Other clerical positions were already in the Teamsters' Township-wide multiple classification bargaining unit comprising approximately one hundred positions. The Employer opposed the petition, asserting that part-time positions had been expressly excluded by contractual agreement.

[1] The matter was held in abeyance for a considerable period of time at the concurrence of the parties.

The Unfair Labor Practice Charge in Case No. C11 C-056:

The Charge in Case No. C11 C-056 was filed on March 30, 2011, and asserted that the Employer acted improperly in unilaterally creating or amending a position description regarding the disputed part-time clerical position in the Township Police Department, at the point that the position was filled, and that the Employer had allegedly refused to bargain over those changes.

The Unfair Labor Practice Charge in Case No. C11 D-071:

The Charge in Case No. C11 D-071 was filed on April 14, 2011, and asserted that the actual filling of the new part-time clerical position in the Township police department constituted an improper diversion of bargaining unit work.

Findings of Fact:

It is undisputed that the part-time 'clerk' position in the police department was newly created and was timely petitioned for by the Teamsters. There had previously been in the Teamsters bargaining unit a full-time position titled 'administrative specialist' which previously performed many of the duties later assigned to the new position in the police department. There had also been a police department full-time position titled 'departmental aide', also in the Teamsters bargaining unit, and assigned to perform ordinary clerical duties. The new part-time clerk position was created as part of a restructuring of work in the police department, which included a decision to leave the administrative specialist position vacant, and with the announced intention that the individual assigned would work 24 to 32 hours per week. The position is intended to work year round. There were, previous to this position, no part-time clerical employees in the police department. It is also undisputed that the new position is assigned routine clerical work of the sort performed by positions in the bargaining unit. The Employer contends that the unit clarification is improper as part-time employees have been expressly excluded from the unit.

The Employer relies on Contract **Article 47**, which is titled "**Temporary and/or part-time employees not included in the bargaining unit**" and which provides, in pertinent part at section 47.2, that

> A. Part-time employees shall be defined as those hired on a part-time basis and shall not work more than thirty (30) hours per week. Such employees shall not work more than 1040 hours in a calendar year.
> B. The total number of part-time employees shall not exceed fifteen percent (15%) of the workforce covered by this Agreement at any one time. . .[2]

[2] The Union does not dispute the right of the Employer to create new part-time positions, within the framework of these contractual limitations.

For its part, the Union relies on Contract **Article 48**, which is titled **"Part-time employees within the bargaining unit"** and which provides, in pertinent part, that

> Part-time employees shall be defined as those employees hired on a regular basis in the Library and Parks & Recreation Department. A part-time employee shall be allowed to work more than (30) hours a week but no more than 1,664 per year.

The parties defined part-time positions under Article 48 differently than under Article 47, and agreed to include in the unit all positions filled by "regular" part-time employees and permit them to work more than 30 hours per week up to an annualized maximum hours equivalent to 32 hours per week. While the Contract does not explicitly define what the parties meant by "regular" part-time employees, a comparison of Articles 47 and 48 reveals that the parties considered any position which was intended to be a permanent position working more than half-time as a "regular" part-time employee as opposed to an individual hired on a seasonal basis or working less than half-time. Under Article 47, the parties have agreed to exclude from the unit part-time employees who are not "regular" hires, who work no more than 30 hours in any week, and who are limited to an annualized total number of hours that is the equivalent of 20 hours per week.

The unit originally did not include any part-time employees. After the Employer created permanent part-time positions in the Library, in approximately 1997, and in the Parks & Recreation Department, in approximately 2000, those positions were added to the unit by a certification election and the language in Article 48 was added to the Contract. While Article 48 by its terms only applies in the Library and the Parks & Recreation department, until this disputed position was created there were no "regular" part-timers in any other departments.[3] Temporary employees are excluded from the unit.

The Employer issued a new formal job description for the departmental aide position in the police department, with the intent of posting it in January of 2011. There were pre-existing departmental aide positions in other departments. On January 13, 2011, the Union demanded bargaining "over the newly revised job description" for departmental aide in the police department. The Employer responded on January 19, 2011, via email, indicating that it did not believe it was obliged to bargain over the position description itself. Nonetheless, the parties met on February 21, 2011, and the Union presented the Employer with its concerns regarding the new position description. The Union in particular raised a concern that the new position description appeared to assign supervisory functions to a bargaining unit position. The Employer's position was that the revised job description was merely a minor updating to better describe the duties which had in fact been performed by the prior incumbent in the position. On February 25, 2011, the Employer, again via email, reiterated its position that it was not obliged to engage in substantive bargaining regarding the new position description, but recounted

[3] There was one non-bargaining unit part-time clerical employee in the Township planning department who was apparently limited to 20 hours per week as would appear to be permitted by Article 47. The evidence reflected that the Union was not notified of the existence of that position and was otherwise unaware of its existence.

that it had heard out the Union on its concerns and had, as suggested by the Union, made a minor correction to what the Employer described as a typographical error in the position description. The existing position description for the departmental aide in the public works department was also introduced. While the two departmental aide position descriptions had differences reflective of the varying assignments in the two departments, the position descriptions provided a range of assigned duties that were substantively indistinguishable.

Discussion and Conclusions of Law:

Discussion Regarding Case No. UC09 H-026

The Employer asserts that the unit clarification petition is inappropriate because "part-time" employees have been historically excluded from the bargaining unit. The Commission has previously held that a unit clarification petition is inappropriate to accrete positions historically excluded, either by express agreement or acquiescence, unless the employer has substantially altered the duties and responsibilities or hours of work of the positions in question. *Port Huron Area Sch Dist*, 1989 MERC Lab Op 763, 766; *City of St. Clair Shores*, 1988 MERC Lab Op 485; *Portage Pub Schs*, 1979 MERC Lab Op 833, 835; *Genesee Co*, 1978 MERC Lab Op 552, 556. Such an accretion presents a question of representation and may be accomplished only through an election among the employees sought.

The Commission has, however, considered other factors, including whether the recognition language was ambiguous and how long the Union waited before making its demand for recognition, in determining whether an existing contract should serve as a bar to a unit clarification petition. For example, in *Huron Valley Schools*, 1984 MERC Lab Op 201, the parties' recognition clause referred to "full-time vocational education employees." The employer had never employed part-timers in this classification. The employer posted a new part-time position while contract negotiations were taking place. Two months after the posting, the position was filled, and one week later the union filed a petition for unit clarification. The Commission held that a unit clarification petition was proper. Cf., *Centreville Public Schools*, 1993 MERC Lab Op 799 (contract was a bar to unit clarification petition where a new position was created before contract negotiations began, and union did not make a demand to bargain over position until contract with old language had been ratified, more than 16 months later).

Here the contract has what facially could be perceived as conflicting commands in Articles 47 and 48 regarding the inclusion or exclusion of part-time employees from the unit. It is argued that all part-time positions were excluded other than those in the library and in the parks & recreation department. In fact, when read as a whole, the two contract clauses clarify that the unit was to include all then existing regular part-time positions. There were no "regular part-time" positions, as defined by the contract, which were not included in the unit. The only regular part-time positions which existed when the contract was negotiated were assigned to the library or in the parks & recreation department. There is an agreement between the parties that non-regular part-time employees and

temporary employees are excluded from the unit. Therefore, the new part-time clerk position in the police department is not expressly excluded from the unit by the contract, nor has there been any acquiescence in the exclusion of regular part-time positions from the unit.

Where there is no bar to inclusion, and where it is conceded that a position is newly created, the only question is whether the position shares a community of interest with existing positions in the unit. In *Lapeer County*, 18 MPER 70 (2005), the Commission found that a unit clarification petition is appropriate to determine the bargaining unit status of a newly created position or a position that has undergone significant changes. In *Lapeer*, the change from a part-time soil erosion and sedimentation control agent position to a full-time position was significant enough to make a unit clarification petition appropriate. See also, *Big Bay De Noc Sch Dist*, 17 MPER 81 (2004); *Jackson Cmty College*, 2001 MERC Lab Op 179, 184.; *City of Manistee*, 1990 MERC Lab Op 477, 478. Further, it is Commission policy, whenever possible, to avoid leaving positions unrepresented, especially isolated ones. *Charlotte Pub Schs*, 1999 MERC Lab Op 68; and *City of Muskegon*, 1996 MERC Lab Op 64, 70. Therefore, when a newly created position shares a community of interest with the unit that seeks to include it, the Commission will accrete the position to the existing unit rather than leave it with a residual group of unrepresented employees. *Lake Superior State Univ*, 17 MPER 9 (2004); *Saginaw Valley State College*, 1988 MERC Lab Op 533, 538.

The clerk position in the police department performs ordinary clerical functions. The Teamsters represent a broad and virtually all inclusive bargaining unit of hourly non-uniformed employees of the Township of approximately 100 employees. The Teamsters unit includes other regular part-time clerical positions. No other bargaining unit exists which does, or could, claim this otherwise isolated position. The position shares a community of interest with the other positions in the Teamsters unit and should be included.

Discussion Regarding Case No. C11 C-056

I find no violation of the duty to bargain regarding the changes to the position description regarding the police department aide position. First, the duty to bargain is limited to changes in conditions of employment. The evidence establishes that the revision of the position description was merely an updating of the document to reflect the actual duties which were being performed by the prior incumbent. There were no substantive changes in conditions of employment which would have generated a duty to renegotiate the wage rate or other terms and conditions of employment during the term of the contract. Further, the revised position description for departmental aide in the police department was functionally indistinguishable from the earlier revised and pre-existing position description for the bargaining unit departmental aide in the public works department.

While it was appropriate for the Union to be concerned about perceived changes in duties as suggested by the issuance of a new position description, it was not established that any actual substantive changes were intended or occurred.

Discussion Regarding Case No. C11 D-071

I also find no violation of the duty to bargain regarding the diversion of unit work to a newly created part-time non-unit clerk position. The Contract between the parties expressly recognizes that some work of the sort performed by unit members could properly be performed under some circumstances by temporary employees or by certain types of part-time employees. Incidental or isolated claimed violations of the contractual limitations on the use of part-time or temporary employees would be a contract dispute, not a statutory question. In the ordinary course, where the terms and conditions of employment are covered by a collective bargaining agreement, the parties are left to pursue contract remedies. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich. 309, 317-321 (1996); *St Clair Co Road Comm,* 1992 MERC Lab Op 533. Further, the clerical work in question was not exclusive to the bargaining unit, such that the assignment of it to the new non-unit part-time position was not a mandatory subject of bargaining. See, *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 176, 179 (1989).

Conclusion

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER IN CASE NO. UC09 H-026

Based upon the above findings of fact and conclusions of law, the petition for unit clarification is hereby granted and the Teamsters bargaining unit is clarified to include the clerk position in the Township police department, effective the date that the position was actually filled. I further recommend that the Employer be ordered to compensate the Teamsters Union in the amount of dues, or service fees, which would otherwise have been collected from the date the clerk position was filled and excluded from the unit, up to the date that the individual employee begins paying dues, or service fees, subsequent to this Order. The parties are obliged to negotiate over any conditions of employment that are peculiar to this position and that are not otherwise provided for in the existing contract.

RECOMMENDED ORDER IN CASE NO. C11 C-056

Based upon the above findings of fact and conclusions of law, the unfair labor practice charge alleging a refusal to bargain is dismissed in its entirety.

RECOMMENDED ORDER IN CASE NO. C11 D-071

Based upon the above findings of fact and conclusions of law, the unfair labor practice charge asserting an improper diversion of unit work is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 22, 2011