

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

In the Matter of:

CITY OF ISHPEMING,
Public Employer-Petitioner,

Case No. UC09 I-028

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, COUNCIL 25, AND ITS
LOCAL, THE CITY OF ISHPEMING SUPERVISORY
EMPLOYEES CHAPTER OF LOCAL 1282,
Labor Organization.

APPEARANCES:

Mika Meyers Beckett & Jones, PLC, by John H. Gretzinger, for Petitioner

Kenneth J. Bailey, Jr., Staff Attorney, for the Labor Organization

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

Pursuant to §13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, this case was heard at Lansing, Michigan on January 10, 2011, by David M. Peltz, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS), 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 March 25, 2011, we find as follows:

The Petition and Positions of the Parties:

The American Federation of State, County and Municipal Employees (AFSCME) Council 25 and its local, the City of Ishpeming Supervisory Employees Chapter of Local 1282 (collectively, the Union), represent a bargaining unit consisting of all supervisory employees of the City of Ishpeming (Employer), except the city manager and excluding “administrative” and all other employees. Prior to 2009, the unit included the city assessor, the head librarian, and the public works superintendent. On August 5, 2009, the Employer eliminated the superintendent of public works position and created an arguably new classification titled public works director/city

engineer. The public works director/city engineer is responsible for certain duties formerly performed by the superintendent of public works. On September 28, 2009, the Employer filed a unit clarification petition seeking to exclude the public works director/city engineer from the bargaining unit as an executive. The Union contends that exclusion of the position from its bargaining unit would be inappropriate because the public works director/city engineer is a supervisory employee and not an executive as that term has been defined under PERA.

Findings of Fact:

The City of Ishpeming has approximately forty-three full-time employees and five part-time employees, as well as a number of seasonal employees who work as needed. With the exception of the city manager and the chief of police, all of the City's civilian employees are represented for purposes of collective bargaining in one of four bargaining units. In addition to the supervisory unit described above, AFSCME represents a clerical bargaining unit as well as a unit of non-supervisory employees working in the Department of Public Works (DPW). The Wisconsin Professional Police Association represents the City's law enforcement officers.

The city charter provides for the establishment of various positions, including city manager, city clerk, city treasurer, finance director, and city attorney. The public works director/city engineer is not listed in the charter. The City operates under a council-manager governmental structure pursuant to which the five-member city council makes policy decisions that are then implemented by the city manager, who functions as the City's chief administrative officer. Jered Ottenwess has held the position of city manager since March of 2010. In that capacity, Ottenwess directly supervises the city hall staff and his "executive team," which is comprised of the public works director/city engineer and the police chief. Ottenwess meets with the public works director/city engineer at least several times per week and with the police chief somewhat less frequently.

The DPW is comprised of the public works director/city engineer, two clerical employees and approximately eighteen non-supervisory public works employees, including a foreman, two assistant foremen, and a chief mechanic. Its budget accounts for thirty to forty percent of the City's annual budget of just under \$10 million. The public works director/city engineer position has been held by Alex Kangas since it was retitled in August of 2009.¹ The position requires a certificate of registration as a Michigan Professional Engineer and extensive knowledge of engineering design principles. Kangas has a degree in civil engineering and seven years of municipal consulting experience. As public works director/city engineer, Kangas is responsible for the overall management and day-to-day operations of the City's public works department,

¹ In 1982, we determined that the director of public works in the City of Ishpeming was properly excluded from AFSCME's supervisory unit as an executive. Although the City prevailed in that matter, the position was subsequently returned to the supervisory unit by agreement of the parties when the City hired an individual who was not a registered civil engineer to fill the position. Thereafter, the position has undergone various name changes and other permutations. For that reason, and because the 1982 decision was issued before we reformulated our definition of executive in *City of Detroit (Police Dep't)*, 1996 MERC Lab Op 84, we do not find the prior decision controlling in this matter. The issue before us today is whether the public works director/city engineer qualifies as an executive as we currently define that term and based upon the existing duties and responsibilities of the position. *Carman-Ainsworth Cmty Sch*, 16 MPER 28 (2003) (executive determinations shall be made regardless of bargaining history or an existing contract covering the position). See also *Village of Chesaning*, 1988 MERC Lab Op 1063.

including maintenance, water, cemetery, parks, and recycling. He directs the activities of all employees of the DPW, either directly or through the department's chain of command.

The public works director/city engineer has been delegated by the city council as the Michigan Department of Transportation (MDOT) street administrator for the Act 51 program. In that capacity, Kangas administers funds from the federal and state governments and ensures that they are used properly for road improvement projects. Kangas is also the superintendent for the M-28 state trunkline maintenance contract between Ishpeming and the State of Michigan pursuant to which the City maintains the M-28 business route within its confines. Kangas is responsible for requesting reimbursements from MDOT for work performed on the M-28 route and ensuring that the City stays within the budget issued by MDOT each year. As part of his duties, Kangas attends meetings with MDOT and may recommend approval for items that are outside of the budget.

The public works director/city engineer is the City liaison with the Negaunee-Ishpeming Water Authority and the N-1 Wastewater Authority, both of which are multi-jurisdictional consortiums. Kangas attends meetings of the consortiums and is responsible for answering questions regarding water quality and supply. Kangas also serves as staff representative to the four-member Ishpeming cemetery board. Kangas has the authority to implement projects requested by the cemetery board provided that no expenditures are involved. If an expenditure is required, the project must go to the city council for approval before the DPW can begin work.

According to the job description, the public works director/city engineer is expected to act as city manager whenever the city manager is on vacation, sick, or otherwise unavailable. Kangas testified that he has filled in for Ottenwess about six times since March of 2010, typically for just a day at a time. On such occasions, Kangas was not called upon to perform many functions that are usually the responsibility of the city manager. Rather, he primarily performed his normal duties as the public works director/city engineer. The most pressing issue that arose while Kanga was filling in for Ottenwess occurred when the city hall was short-staffed and a decision had to be made whether to keep the facility open to the public. Kangas delegated that decision to the city manager's secretary.

There was a six-month period after Kangas was hired during which the city manager position was vacant. During that time, Kangas was not selected to serve as interim city manager. Rather, the city council designated the police chief to perform that function during the search for a replacement city manager. At hearing, Ottenwess conceded that there was no reason that the city council could not have chosen Kangas for the interim city manager position.

Kangas has the authority to hire and discipline DPW employees consistent with overall City policies and labor contracts. Although the job description specifies that the public works director/city engineer also has the authority to terminate employees, Kangas testified that he did not have such authority in his capacity as director of the DPW. Kangas makes recommendations to other City officials concerning the resolution of grievances involving DPW employees, but he is not directly involved in answering grievances. Kangas has not taken part in any labor negotiations involving the AFSCME supervisory unit. However, the city manager testified that Kangas will be expected to participate in such negotiations if the instant dispute is resolved in the

City's favor. Kangas was part of the City's negotiating team during negotiations on a new collective bargaining agreement covering nonsupervisory DPW employees, and he has taken part in closed sessions of the city council during which labor relations matters were discussed. However, there is no evidence suggesting that Kangas has had any input into labor relations matters involving any department other than the DPW.

The public works director/city engineer will be expected to help formulate the handbook for City employees, but his role will be limited to policies affecting DPW employees. Any recommendations made by Kangas concerning new or modified employment and personnel policies for the DPW will be subject to review by the city manager and ultimately the approval of the city council. As a member of the city manager's "executive" team, Kangas may potentially be consulted on employment and personnel policies pertaining to other City departments. Kangas testified that he is in the process of developing an employee performance review policy for DPW employees and, at the request of the city council, an energy conservation policy for all vehicles, equipment and facilities. At his own initiative and direction, Kangas is also attempting to implement a plan to improve the department's documentation of maintenance activities.

The public works director/city engineer confers with the city manager and the city council regarding plans and policies for future development, including Ishpeming's capital improvement plan, which Kangas described as the City's "roadmap to the future." The plan focuses on infrastructure improvements to Ishpeming's water and sewer systems, sidewalks, government facilities, and roads that will be undertaken by the DPW over the coming years. At the time of hearing, the only action taken in furtherance of the capital improvement plan was the hiring of a consultant to assist the City. Kangas testified that in the future, he intends to meet with the consultant and prioritize the projects, ensure that proper cost estimations are prepared, and seek to determine funding sources. Generally, Kangas' responsibilities for long-range planning are limited to the DPW. However, because the capital improvement plan encompasses government facilities, Kangas' work will occasionally affect other departments. It is the expectation of the city council that the city manager will meet with Kangas to discuss the various projects on which the public works director/city engineer is working.

The city council has one regularly scheduled meeting per month, plus occasional special meetings. The public works director/city engineer is required by the city manager to attend all of the regular meetings, at which his function is, according to Ottenwess, similar to that of other "staff members." Specifically, Kangas is responsible for delivering updates on capital improvement projects and other important DPW matters, as well as issues arising from the various boards and committees on which Kangas serves. Kangas' presence is not required at special meetings unless they involve issues specifically relevant to the DPW. Kangas also prepares a monthly report for review by the city council concerning significant public works developments. However, the council receives the reports through the city manager's office as provided in the city charter, which requires the city council to deal solely through the city manager and prohibits the council and its members from giving "orders to any subordinate of the Manager either publicly or privately." *Charter of the City of Ishpeming*, Article IC, Sec 4.4 (d).

At hearing, the Employer introduced portions of the minutes from each of the city council meetings held between September of 2009 and December of 2010. During that fifteen-month period, there were two instances in which the city council specifically instructed or authorized action by Kangas.² During the September 9, 2009 meeting, the council directed the public works director/city engineer to investigate reports that the senior center restrooms had fallen into disrepair and to take the necessary steps to remedy the problems, while at the October 7, 2009 meeting, the council authorized Kangas to travel to Lansing to attend a meeting with representatives of the federal government. There were also two meetings during which the council approved proposals based on the recommendations of both Kangas and Ottenwess. Otherwise, Kangas' involvement at city council meetings was generally limited to providing updates on particular projects or issues. For example, at the September 8, 2010 meeting, Kangas informed the council about the aftermath of a water main break and his intent to solicit bids for repair work. At the December 16, 2009 meeting, Kangas asked the City residents for their patience as the DPW attempted to resolve snow plowing issues. Kangas apparently did not speak during at least six of the city council meetings; rather, the council relied entirely on the written reports that Kangas provided through the city manager's office. The evidence introduced by the City does not reflect any interaction between Kangas and the council, either by way of comments or a review of written reports, during at least four of the meetings between September of 2009 and December of 2010.

Although Kangas has a degree in civil engineering and is qualified to "seal" or certify engineering plans, he has not done so during his tenure as public works director/city engineer. Rather, the City contracts with several private sector engineering firms to perform such work. Kangas' engineering duties are comprised primarily of soliciting private contractors, providing them with an explanation of what the City expects on a particular project, verifying and reviewing plans, and coordinating the work. For example, when the Downtown Development Authority (DDA) proposed the reconstruction of parking lots, Kangas was responsible for drafting the request for proposal (RFP), soliciting bids, and conveying the City's expectations regarding the projects.

Other duties performed by Kangas in his role as public works director/city engineer include responding to citizen complaints and identifying obsolete equipment within the DPW to put up for sale. Kangas has also provided input to City officials concerning the waste management contract that was prepared by the city manager.

Kangas' role in the formulation of the DPW budget is essentially the same as that of the other department heads within the City. Each department receives a copy of a proposed budget with estimated figures for the current fiscal year. The department heads then use those estimates to make requests for specific line item budget amounts for their individual departments. Thereafter, the city manager meets individually with each department head to review the requests

² Kangas testified that on occasion, he went "directly to city council" to request approval to use previously allocated budget funds to refurbish a Vactor, which he described as "basically a large vacuum on wheels." However, he did not identify the meeting at which this request was purportedly made. In fact, the minutes of the city council's April 22, 2010 meeting reflect that a request for an expenditure to repair the City's Vactor was approved by the council at the recommendation of both Kangas and the city manager, Ottenwess.

and determine a final budget, which he will then present to the city council for approval. Although Ottenwess consults with Kangas and the other department heads, the ultimate decision-making authority with respect to the budget rests exclusively with the city manager. Ottenwess testified that the goal is to arrive at a number that he, as city manager, personally feels “comfortable” recommending to the city council. Kangas does not have authority to present his budget recommendations to the city council over the city manager’s objection, and he has no role in formulating the budgets of other City departments. However, when another department is requesting that the DPW perform work on its behalf, Kangas proposes a budget for the project to the city manager, who then makes a recommendation to the city council.

The public works director/city engineer has the discretion to make spending decisions and to contract for services as long as they are provided for in the budget and/or below \$3,000. This discretionary spending is typically comprised of minor equipment purchases and operating supplies such as road salt. He can also spend up to about \$10,000 for emergency expenses without obtaining prior approval of the city council or the city manager.³ Absent an emergency, the public works director/city engineer must submit requests for larger purchases to the city manager, who may then either provide Kangas with further direction or immediately schedule the item for city council approval. The council’s consent is required for all requests for purchases over \$3,000 and the City’s bidding requirements must also be observed. For certain engineering contracts, Kangas obtains competing bids and takes them to the DDA for approval. Such contracts then go to the city council for final approval.⁴ Even for purely discretionary spending decisions, Kangas routinely keeps the city manager informed to, in Kangas’ words, “avoid surprises.” In addition, certain purchasing decisions, such as requests for qualifications for engineering firms, must come directly from the city manager’s office rather than by way of the public works director/city manager.

At hearing, the City took the position that the public works director/city engineer should be excluded from the AFSCME bargaining unit because it is a new position with different duties and responsibilities than its immediate predecessor, which was titled public works superintendent and was part of the supervisory unit. However, other than the fact that the public works superintendent did not have a civil engineering degree, the City’s witnesses were unable to articulate substantive distinctions between the positions. Ottenwess initially asserted that the most significant job function transferred to the new position was the addition of policy-making responsibilities. However, when asked whether the public works superintendent possessed similar authority, Ottenwess admitted that he could not answer the question because he was not employed by the City at the time. Ottenwess was also not certain whether the former position made recommendations to the city council.⁵ Similarly, Kangas had little knowledge of his predecessor’s job duties and responsibilities.

³ There was no evidence introduced by the parties pertaining to the discretionary spending authority, if any, of the other department heads.

⁴ The DDA board is appointed by the city manager, subject to the approval of the city council.

⁵ In fact, the minutes of a city council meeting on March 11, 2009 indicate that Kangas’ predecessor, the public works superintendent, recommended that the City purchase a portable air compressor that costs \$16,400.

Discussion and Conclusions of Law:

In *Hillsdale Cmty Sch*, 1968 MERC Lab Op 859, enf'd 24 Mich App 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 Op 208; *City of Detroit (Police Dep't)*.

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 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; 12 MPER 30028; *Antrim Kalkaska Cmty Mental Health*, 1998 MERC Lab Op 11, 15. Accordingly, in this case, that burden must belong to the Employer. 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 require this Commission to approve additional exclusions from a bargaining unit. *Lake Co & Lake Co Sheriff; 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 authority of the public works director/city engineer does not derive from statute or a city charter, nor is the City of Ishpeming a large employer with one thousand or more employees. Accordingly, this case turns solely on the policy-making functions of the position. We have previously excluded particular public works directors from the coverage of PERA based upon a finding that the specific positions constitute policy-making heads of major departments. For example, in *Wexford Co*, 20 MPER 11 (2007), the DPW director formulated the public works department's operational procedures and oversaw contracts involving the landfill, a service that required constant attention from the County's policy-makers. The DPW director reported directly to the county board of commissioners and its board of public works and regularly discussed policy issues with them. Wexford County entered into contracts representing a significant portion of its budget based on the DPW director's effective recommendation, and the director played a critical role in the setting of landfill rates. For those reasons, we concluded that the director should be excluded from the petitioner union's supervisory bargaining unit as an executive because the position possessed policy-making authority. See also *City of St Clair Shores*, 1987 MERC Lab Op 426 (DPW director excluded from supervisory unit as an executive where the position possessed a wide range of authority, acted as the municipality's professional engineer, and was second-in-command on the city's organizational chart).

At the same time, we have found DPW director positions in other municipalities to lack meaningful policy-making authority that might otherwise warrant denying such employees the opportunity to be represented and bargain collectively under the Act. In *City of Fenton*, 1999 MERC Lab Op 189, the director of public works was responsible for managing the day-to-day operations of the department's twenty-two regular and seasonal employees and a budget of \$3.7 million, which accounted for almost half of the city's annual budget. The DPW director had the authority to hire and discipline employees and respond to grievances. He was responsible for assigning work, developing policies regarding snow removal and infrastructure improvements, and handling citizen complaints. He also attended city council meetings at the request of the city manager and worked as a liaison between the council and various boards and authorities. Although we agreed with the city that the DPW was a major department, we concluded that the director did not qualify as an executive because the position did not exercise the requisite wide-ranging authority and discretion to formulate policies on an employer-wide basis. In so holding, we noted that the DPW director did not have direct access to or direct influence on the city council and that the approval of the city manager was required for policies regarding major issues. See also *City of Burton*, 19 MPER 55 (2006) (DPW director was properly included within the supervisory unit because the position lacked autonomy and direct access to the city council, his recommendations were limited to the public works department, and the mayor's approval was required for expenditures exceeding \$500).

Having carefully reviewed the record in this matter, we conclude that the public works director/city engineer position for the City of Ishpeming does not possess the necessary autonomy and discretion to formulate, determine, and effectuate policy on major issues to qualify as an executive as we have previously defined that term. While there was some evidence indicating that Kangas is involved in effectuating policy, the record establishes that such decisions are limited to the department to which he is assigned and are generally subject to the ultimate approval of the city manager and/or the city council. The public works director/city engineer has no responsibility for developing the City's overall budget. Rather, like the other department heads, he merely makes a recommendation to the city manager regarding a proposed budget and has limited authority in determining how much funding will ultimately be allocated to the DPW department. The city manager, Ottenwess, makes the final decision regarding the proposed budget and then submits his recommendations to the city council. Similarly, Kangas may recommend personnel policies, but those policies will be confined to the DPW and are generally subject to review by the city manager and the approval of the council.

Although Kangas has the discretion to enter into some service contracts and make minor purchases, the city council's approval is required for all non-emergency purchases of over \$3,000. Kangas' involvement at city council meetings is similar to that of other staff members and consists primarily of providing updates to the governing body on ongoing issues and various construction or repair projects. The monthly reports that Kangas prepares are sent to the council via the office of the city manager. In fact, the city charter explicitly prohibits the council and its individual members from dealing directly with any City employee other than the city manager. Although Kangas participates in the collective bargaining process by offering advice on issues relating to the non-supervisory employees within the DPW, there is no indication that he plays an effective role in formulating bargaining policy pertaining to any other City department, or that he functions any differently regarding labor relations than do the other six department heads. Kangas has filled in for the city manager, but only sporadically and, on such occasions, he has essentially performed his normal, everyday tasks as public works director/city engineer. Notably, it was the police chief, not Kangas, who was appointed interim city manager when that position was temporarily vacant. Other than the few occasions when Kangas has filled in for Ottenwess, the public works director/city engineer exercises responsibilities that are distinct from the city manager.

The Employer introduced evidence establishing that the public works director/city engineer performs a myriad of supervisory duties, including hiring and disciplining employees and assigning and directing the work of AFSCME's members. These responsibilities establish routine supervisory status and do not justify exclusion of the position from the supervisory bargaining unit as an executive. 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*, 1999 MERC Lab Op 107; 12 MPER 30028; *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 public works

director/city engineer should be excluded from coverage under PERA on the basis of ordinary supervisory responsibilities.

The City of Ishpeming is a relatively small community with an elected city council and two positions, city manager and police chief, excluded from the coverage of PERA as executives. Given both the size of the Employer and the absence of meaningful policy-making authority exercised by Kangas, we find that the public works director/city engineer does not qualify for exclusion from the supervisory unit as an executive.

We have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result.

ORDER

Based on the findings of fact and conclusions of law set forth above, the petition for unit clarification filed by the City of Ishpeming is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Nino E. Green, Commission Member

Christine A. Dardarian, Commission Member

Dated: _____