

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

In the Matter of:

CHESTERFIELD TOWNSHIP,  
Public Employer-Petitioner,

MERC Case No. UC17 I-010

-and-

AFSCME COUNCIL 25 AFL-CIO AND LOCAL 1917,  
Labor Organization-Incumbent.

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APPEARANCES:

Shifman Fournier, by Howard L. Shifman, for the Public Employer

Katherine L. DeLong, Staff Attorney, for the Labor Organization

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

On September 27, 2017, Chesterfield Township (Petitioner or Employer) filed this petition for unit clarification with the Michigan Employment Relations Commission (Commission). Pursuant to Section 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, an evidentiary hearing was held on March 23, 2018, in Detroit, Michigan, before Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System, acting on behalf of the Commission.<sup>1</sup> Based on the entire record, including the post-hearing briefs filed by the parties on June 6, 2018, we find as follows:

The Petition:

The Employer filed the present petition seeking to clarify the bargaining unit represented by AFSCME Council 25, AFL-CIO, and its affiliated Local 1917 (Incumbent or Union) to exclude the position of Finance Director. The Employer contends that the Finance Director, while historically represented by the Union as part of a department heads' bargaining unit, should nonetheless be excluded as the position is an executive and/or confidential. The Union first argues that the present unit clarification petition is inappropriate as the Finance Director position has not

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<sup>1</sup> MAHS Docket No. 17-025522.

undergone any “significant changes.” The preceding notwithstanding, the Union also claims that the position of Finance Director does not rise to the level of executive status and that the Employer already has multiple confidential positions and has not established the necessity for an additional confidential exclusion.

#### Findings of Fact:

At the time of hearing, the Employer’s workforce included approximately 160 full-time employees as well as part-time and seasonal employees. Of the 160 full-time employees, only two or three positions are excluded from representation for collective bargaining purposes because they are either executive or confidential. Testimony reveals that the Director of Public Safety is excluded as an executive position and the Human Resource Director is excluded as confidential. There was also testimony that a second position, Human Resources Manager, might also be excluded as confidential. The remaining employees are organized and divided among eight separate bargaining units, one of which is Incumbent’s unit comprised of various department heads including the Finance Director. In addition to Incumbent’s unit, AFSCME Council 25 also represents one other bargaining unit. The Township does not employ a chief administrative officer.

Incumbent’s bargaining unit has been in existence since January of 1996 and has included, since its establishment, the position of Finance Director. For more than 12 years, Victoria Bauer has held the position of Finance Director. At the time of the hearing, Bauer also held the position of Union Secretary and was a member of the Union’s bargaining team. Under the Township’s organizational structure, Bauer reports directly to the Township Supervisor, an elected position and member of the Township’s Board of Trustees (Board). Bauer has three direct reports who are members of a separate bargaining unit.

In 2017, the Township hired Eric Herppich as its first Human Resource Director. Herppich, who previously worked for more than twenty years with Macomb County before retiring as the County’s Director of Human Resources and Labor Relations, testified that his purpose upon taking the position with the Township was to “basically create, develop and professionalize the human resources and labor relations functions within the Township government.” As stated above, Herppich’s position is excluded as confidential. Sometime around the time that Herppich was hired the position of benefits coordinator, which had been a part of Incumbent’s bargaining unit, was retitled Human Resources Manager and designated as a confidential position and removed from the unit.<sup>2</sup>

According to Herppich, each of the Township’s collective bargaining units had contracts that were set to expire on December 31, 2017. Accordingly, in addition to the above, Herppich was also charged with negotiating with each of these units in order to settle successor agreements. Herppich testified that one of the most critical issues faced by the Township as part of those

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<sup>2</sup> The record is sparse as to the situation surrounding the revision of this position and its purported removal from the unit.

negotiations was the cost of employee health care. According to Herppich, the estimated cost of providing family health coverage to Township employees was around \$35,000.00 a year, an amount “shocking” to Herppich.<sup>3</sup> Herppich claimed it was the Board’s position that, given Bauer’s placement in the unit and seat at the bargaining table, it could not have her “cost out from a management perspective [the] various proposals and the impact of those proposals on collective bargaining.” Moreover, according to Herppich, the Board had to rely upon him or the Township’s benefit broker to cost out various proposals not just for Incumbent’s unit but also with respect to the Township’s other bargaining units, a fact that Herppich stated was not “optimum.” Herppich claimed that, given the circumstances surrounding the negotiations, there was a “lack of confidence” as to the impact on the Township’s budget of what was bargained. It was for this reason that the Township, according to Herppich, chose to only enter into two-year contracts as opposed to contracts with longer terms. Herppich also revealed that there were discussions with Incumbent regarding the Finance Director’s placement at the bargaining table and of possibly excluding her from that role. However, in the Human Resource Director’s opinion, that “didn’t really solve the problem” since there still existed the “conflict that needed to be remedied.”

Cindy Berry, the Township’s Clerk since 2012, described the process by which the Board is presented with a proposed budget for its adoption. According to Berry, after Finance Director Bauer initially works with the various Township departments, she would then bring the budget to the Board for approval. Berry stated that at least two or three times between 2012 and 2016, the Board adopted the proposed budget without any changes. The other times the changes were “very minor.” Berry went on to explain and describe other situations in which the Board adopted or followed recommendations presented by the Finance Director on issues including: 1) the decision whether to fund infrastructure projects and future legacy employee costs, such as Other Post Employee Benefits (OPEB), through the Township’s general fund or through bonds; 2) a recommendation to raise water and sewer rates; 3) a recommendation to amend a Township ordinance to adjust how funds were allocated between restricted and unrestricted status for use for infrastructure improvements; and 4) a recommendation to seek a millage increase to address a budget shortfall within the Police Department. Berry also described situations where proposals and/or recommendations by the Finance Director were not adopted by the Board. These included a second millage increase for the Police Department as well as a recommendation that the Township continue charging a one percent administrative fee on tax bills. According to the Clerk, the Board, while deciding not to seek the millage increase and to cease collecting the administrative fee, nonetheless did consider the Finance Director’s recommendations before making its decisions.

Bauer, in describing her duties as the Finance Director, claimed that, while there had been recent restructuring within the Township, her role and position remained unchanged. Bauer, while initially denying being involved in Township policy decisions, nonetheless admitted that she is called upon to provide her opinion to the Board regarding financial matters. In testimony

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<sup>3</sup> For comparison purposes, the benefit limit for family coverage under the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561-15.569, for 2018 as set by the State’s Treasurer was \$17,304.02.

consistent with Berry's, Bauer stated that the Board does not always accept her recommendations or proposals.

Bauer, in discussing her role on the Union's bargaining team and describing the method by which Incumbent's unit approached bargaining, testified that the unit members would meet and discuss requests and/or changes, after which the bargaining team would present them to Respondent's bargaining team. Bauer testified that, after the initial meeting of the unit members, there is no further communication between them and the bargaining team.

Bauer initially testified that her subordinates within the department have the same access to financial information and data that she does. However, on cross-examination, she clarified that those other employees have the same level of access as she does with respect to public information, but that they do not have access to information requested of her by the Board or the information she prepares in response, thereto.

#### Discussion:

Typically, 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. *City of Detroit*, 1997 MERC Lab Op 454, 455; *City of Battle Creek*, 1994 MERC Lab Op 440, 447, *Genesee County*, 1978 MERC Lab Op 552, 556. Unit clarification is not appropriate for upsetting an agreement of a union and employer or an established practice of such parties concerning unit placement. *Genesee Co*, 1978 MERC Lab Op 552, 556.

While a representation matter is treated as a non-adversarial proceeding, to the extent that there is a burden of proof, it falls upon the party that is attempting to deny the right of a public employee to be represented for purposes of collective bargaining. It is up to that party, in this case the Employer, to present evidence that inclusion of the position would be improper under the Act. *Lake Co and Lake Co Sheriff*, 12 MPER 30028 (1999); *Antrim Kalkaska Cmty Mental Health*, 1998 MERC Lab Op 11, 15.

The Township argues that this position is executive in nature and therefore should properly be excluded from all bargaining units. Alternatively, the Township contends that the position is a confidential employee by virtue of its direct participation in the collective bargaining process. For the reasons set forth more fully below, we conclude the position is executive, as we define that term, and, therefore, its inclusion in the Incumbent's bargaining unit or any bargaining unit for that matter is inappropriate.

While we have long recognized the right of supervisors to organize, we also understand that there is a "level at which organization must end." See *Hillsdale Cmty Sch*, 1968 MERC Lab Op 859, enf'd 24 Mich 36 (1970). In affirmation of that understanding, the Michigan Supreme Court, in *Grandville Mun Exec Ass'n v Grandville*, 453 Mich 428, 439-440 (1996), 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, as follows:

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.

In deciding whether to designate a position as executive, we are concerned with the scope of its responsibilities, the extent of its authority, and the interchangeability of its functions with other executives. *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 (Sheriffs 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.

We apply the executive exclusion 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. It is well established that simply delegating executive level duties among various employees will not mandate that we find additional exclusions from a bargaining unit to be justified. *Lake Co & Lake Co Sheriff*, supra; *Ingham Co Rd Comm*, 1995 MERC Lab Op 306, 312; *Monroe Co Probate Ct*, 1990 MERC Lab Op 880, 884.

We have repeatedly found to be executives those individuals who have an overall responsibility for a public employer's financial affairs, especially when they have a significant role in formulating collective bargaining policy. See, *City of St. Clair Shores*, 1987 MERC Lab Op 426, (finance director), *Howell Pub Schs*, 1983 MERC Lab Op 277, (director of business/comptroller), and *Muskegon Heights Schs*, 1977 MERC Lab Op 807 (business manager

of a school district). Applying the definition of an executive described in *City of Detroit*, supra, we found the county's finance director to be an executive in *Bay County*, 1997 MERC Lab Op 327. In that case, we found that the finance director managed systems through which the county budget was formulated and monitored, managed the county's revenue disbursement system, and had a significant role in determining the county's overall final budget and bargaining policies. Moreover, we found significant the fact that the county board of commissioners relied on the director's judgment in making financial policy decisions. Accordingly, we concluded that the finance department was a major department of the county and that the finance director made policy.

Here, we find the Finance Director to be an executive. The position has the primary responsibility for developing the Township's overall budget. Moreover, under the Township's organizational structure, the position has direct access to the Board and directly reports to the Township Supervisor. Perhaps most important, the record clearly indicates that Bauer plays an important role in policy making decisions regarding the Township's financial strategy which have a significant impact on an employer-wide basis as shown by the multitude of examples where the Board has adopted her recommendations as well as those times when it had not.

The Union appears to argue that the Township has not suffered any harm from the inclusion of the Finance Director in the bargaining unit or her placement on the Union's bargaining team. Even if we were to accept the premise that the Board's inability to rely on its Finance Director to cost out bargaining proposals and/or a general lack of confidence in the financial impact of what was bargained constitutes harm, as we stated in *Carman-Ainsworth*, supra, actual harm to the employer is not a factor in a determination of executive status.

The Union also argues that because there is no indication that the position of Finance Director has undergone any changes and the fact that the position has been included in its unit since the unit's inception, removal is inappropriate. We do not agree. In *City of Flint*, 1983 MERC Lab Op 566, we held that executives are excluded entirely from the protections of PERA and are not entitled to collective bargaining rights under that statute, and a bargaining unit including executives is per se inappropriate. As such, executive determinations should be made regardless of bargaining history or an existing contract covering the position. *Carman-Ainsworth Cmty Sch*, supra. For this reason, we will exclude a position found to be executive from a bargaining unit of supervisory employees, despite bargaining history or an existing contract covering the position. *Village of Chesaning*, 1988 MERC Lab Op 1063.

Based on the above findings of fact, discussion and conclusions of law, we find the Finance Director's position to be an executive position. Accordingly, we see no reason to address Petitioner's alternative argument that the position should also be excluded as confidential.

**ORDER**

Petitioner's request to clarify its bargaining unit to exclude the position of Finance Director as an executive is hereby granted.

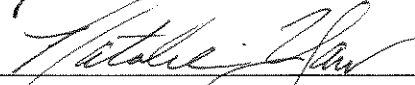
MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Edward D. Callaghan, Commission Chair



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Natalie P. Yaw, Commission Member

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