

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

In the Matter of:

CITY OF ANN ARBOR,
Respondent-Public Employer

- and -

Case No. C01 H-158
UC01 H-024

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, LOCAL 214,
Charging Party/Petitioner-Labor Organization.

APPEARANCES:

David E. Kempner, Esq, for the Respondent

Wayne A. Rudell, Esq, for the Charging Party/Petitioner

DECISION AND ORDER

On October 29, 2002, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above-entitled matter finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended. Subsequently, the Commission granted two extensions of time to the parties who asserted they were in the midst of settlement.

On February 5, 2003, the Commission received a letter from Charging Party stating that the parties had resolved the matter in accordance with the terms of a negotiated Settlement. The letter did not request withdrawal of the charges or the petition, and no such request to withdraw the charges has been received. Accordingly, since the parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding, it is our opinion that the Recommended Order of the Administrative Law Judge must be adopted.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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APPEARANCES:

Denyce E. Elftman, Asst City Atty, and David A. Shand, Esq, for the Public Employer

Wayne A. Rudell, Esq, for the Charging Party/Petitioner Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 12 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.210, MCL 412.212, this matter came on for hearing at Detroit, Michigan, on October 31, 2001, and March 15, 2002, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including briefs filed on or before May 14, 2002, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge and Petition:

The unfair labor practice charge and the unit clarification petition were filed by Teamsters Local 214 on August 3, 2001. Both seek a determination of the bargaining unit status of a position designated customer service superintendent. The Union charges that the Employer unilaterally eliminated the bargaining unit position of customer service supervisor and replaced it with the superintendent position without any substantial change of job content. The Employer maintains that

the customer service superintendent is an executive position not properly included in the Teamsters Local 214 bargaining unit.

Facts:

Teamsters Local 214 represents a bargaining unit of civilian supervisory employees of the City of Ann Arbor. The Union and the Employer are parties to a collective bargaining agreement which covers the period of July 1, 1998 to June 30, 2001.

The position at issue, the customer service superintendent, is assigned to the City's Utilities Department. The Utilities Department employs 134 full-time employees and has a budget of \$31 million. Susan McCormick became the Director of the department in January of 2001. The department consists of the following five divisions: wastewater treatment; water treatment; field services; administrative; and customer service. The first three divisions have historically been headed by superintendents, positions not included in the Teamsters' supervisory bargaining unit. The superintendents report to and are under the supervision of the Utilities Director. The customer service division was historically headed by a customer service supervisor, a position which was represented by Teamsters 214. The divisions of the Utilities Department are discussed separately below.

Administrative division

This division serves all divisions of the utility, and primarily supports the director in matters such as budget administration and analysis, cross-utility issues, and generating new revenue. The administrative division includes the assistant to the director, a senior secretary, an information specialist, and an environmental outreach and customer engagement coordinator. These positions report directly to the Director and are not included in the Teamsters' bargaining unit.

Wastewater treatment division

The primary responsibility of the wastewater treatment division is to assure the safe treatment of wastewater from the City of Ann Arbor, and to make sure that the City is in compliance with all regulatory requirements. The division consists of 46 employees, and has a budget of \$6-7 million. The division is headed by a wastewater plant superintendent, a position excluded from the Teamsters' bargaining unit. The superintendent manages and coordinates the operation, maintenance, laboratory, plant engineering and administration of the plant; directs staff and consulting engineers; investigates the use of new materials and methods; prepares budget estimates, and monitors and manages the approved budget. Other positions in the division include assistant superintendents, a water quality manager, a utilities engineer, laboratory technicians, and maintenance mechanics.

Water treatment division

The water treatment division is responsible for the operation of the water treatment plant and the remote facilities. It also manages the recreational and hydropower dams for the City. There are 31 employees in this division; the budget is approximately \$5.8 million. The division is headed by a water plant superintendent, a non-bargaining unit position. The superintendent supervises the operation, maintenance, and repair of water production equipment and facilities; provides technical assistance and consultation to subordinates; investigates new materials and methods; and assists in developing budget estimates for the division. Teamsters' positions in the division include five operator IIIs and a maintenance supervisor. Other positions, such as the account clerk II and the laboratory technicians, are represented by the American Federation of State, County, and Municipal Employees (AFSCME).

Field services division

The field services division is responsible for all out-plant facilities. The division manages distribution and collection systems for the major utilities, including water, wastewater, and storm water. Approximately 24 employees work in the division, reporting to a field superintendent, a non-bargaining unit position. The field superintendent is responsible for assuring adequate water distribution and sewer collection operations; establishes standards, plans improvements, and develops preventative maintenance programs; trains employees; and prepares annual operating and capital budgets for the division. The division budget runs between six and seven million dollars a year. Employees in this division represented by the Teamsters include a field maintenance supervisor, an administrative assistant, and four utilities maintenance forepersons.

Customer services division

The customer service division is responsible for billing, servicing accounts, and inspections. It also manages the call center, one of the primary interfaces with customers. There are 13 employees in the division: five billing clerks, two meter readers, five service personnel, and a cross-connections inspector. The division was headed by a customer service supervisor for over 40 years, until approximately 1999, when the Employer began to reorganize the division. The customer service supervisor had been included in the Teamsters' bargaining unit since 1972.

Elizabeth Fanta held the position of customer service supervisor for four and one half years beginning in November of 1990. Fanta has been employed with the Utilities Department for over 19 years; the majority of the time she has held supervisory positions represented by the Teamsters. At the time Fanta assumed the job, the job description for the position indicated that, under the general direction of the Director of Utilities, the customer service supervisor was responsible for coordinating the account keeping, billing, meter reading and general clerical operation of the Utilities

Department through the supervision of a moderate sized staff of accounting clerks and meter readers. Examples of work included maintaining records and accounts, responding to complaints, assisting in hiring and orienting new employees, preparing the customer services annual budget, meeting with vendors, and ordering and paying for all materials and supplies used in the division. Fanta was responsible for hiring, disciplining, and evaluating employees; she also participated in the grievance procedure for AFSCME employees and developed the budget for the division. Although the job description reflected that desirable education and experience included graduation from high school and six years of related experience, Fanta has a bachelor's degree and recalled that the posting listed the degree as a requirement.

After Fanta left the position in 1995, another individual filled the customer service supervisor position from 1995 until 1999. In 1999, a position entitled customer service manager was created and this position was posted along with the vacated position of customer service supervisor. Just prior to the postings, customer service was moved from Utilities into the Finance Department. The new position of customer service manager was to serve primarily as an accountant. Requirements included a bachelor's degree with major coursework in accounting, economics, or related field, five years of accounting experience and two years of supervisory experience. The customer services manager was responsible for directing the work of the customer services division by assigning work, evaluating performance, and developing and implementing policies and procedures and internal controls to ensure accurate and timely billings, as well as responding to customer service problems, complaints, and requests for information. The position was listed as being under the executive/professional pay plan. The customer service manager position was held by Jennifer Fike for less than one year and was not subsequently filled.

In 1999 there was also a posting for the position of customer service supervisor. The posting indicated that the position required an associate's degree in business administration or related field and four years of experience in utility service or similar customer service area. The job summary reflected that the individual would supervise the work of customer service personnel, responding to requests for meter repair or replacement or other utility service problems, as well as customer requests for information regarding permits, inventories, licenses, or other utility services. It was listed as a Teamsters' position.

The position of customer service supervisor was filled by Sharon Applewhite. Applewhite was placed on a performance improvement plan due to unsatisfactory performance and some of her duties were reassigned. In March of 2001, the Utilities Director notified the Teamsters' steward that the Employer intended to eliminate the customer service supervisor at the end of the fiscal year and would be upgrading the [vacant] customer service manager's position to that of a superintendent. Subsequently Utilities Director McCormick sent a memo to Applewhite summarizing a meeting held earlier in the month. She stated the following:

Unfortunately, the meeting discussions focused upon the elimination of your position as the Supervisor, Customer Service which would become effective (July

1, 2001) with the start of the City's upcoming Fiscal Year 2001/02. As I indicated, the major reason behind this decision was based upon the need to reorganize the Utilities Department; so that, the three (3) Divisions within the Department could more effectively work together, and timely address and provide creative solutions to the various operational challenges.

The new job description for the position of customer service superintendent stated that the role of the position was to manage the function of the division, ensuring effective and efficient operation, maintain performance objectives, audit revenue stream, perform general administrative duties, respond to staff and customer needs, and perform general supervisory and training duties. Candidates were required to have a bachelor's degree in business administration, finance, management, or related field, with three years experience supervising others.

On May 7, 2001, Teamsters Local 214 filed a grievance protesting the elimination of the customer service supervisor position and the reassignment of job duties. On July 3, 2001, at a third step hearing on the grievance, the Teamsters' representatives asserted that the job duties of the customer service superintendent were substantially the same as those of the customer service supervisor. The parties were unable to resolve their differences and Teamsters Local 214 subsequently filed the unfair labor practice charge and the unit clarification petition. The position of customer service superintendent was posted in September of 2001. At the time of hearing, the job had not been filled.

Discussion and Conclusions:

In order to provide employees the opportunity to be represented by a labor organization and participate in a collective bargaining relationship, the Commission has a long-standing policy of limiting exclusions from bargaining units. Executives are exempt from participating in collective bargaining as a matter of public policy, however employees excluded as executives must meet specific criteria. In *City of Grandville*, 1997 MERC Lab Op 140, 146, on remand from *Grandville Municipal Executive Assoc v City of Grandville*, 453 Mich 428 (1996), the Commission indicated that it would continue to apply the definition of executive set forth in *City of Detroit Police Dept*, 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 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.

Other factors considered by the Commission include the number of executive positions relative to the size of the organization, the extent of budget responsibilities, and participation in the formulation of collective bargaining policy. Examining the position of customer service superintendent against these criteria, it is evident that the position does not rise to the level of an executive.

The position of customer service superintendent was created by the new Utilities Director in an attempt to “reorganize” the customer service division and create a superintendent’s position parallel to the superintendents in the other three divisions. However, based on the record, including the testimony of McCormick and former customer service supervisor Fanta, and the job descriptions for the various titles which have evolved with respect to supervision of the division, there appears to be no substantial difference in the job responsibilities. Although no one is currently in the position, the customer service superintendent will continue to be responsible for the supervision of a small staff of approximately 13 employees. The position will report to, and be subordinate to, the Utilities Director. There is no evidence that the customer service superintendent will be expected to establish policies on major issues on an employer-wide basis or will play a significant role in formulating collective bargaining policies. Budget responsibilities likewise will be limited to the division. There is simply no basis to find that the customer service superintendent will have the extensive authority and discretion necessary to qualify as an executive as the Commission applies that term. Rather, despite the name change, the superintendent’s assigned duties and responsibilities reflect that the position functions as a supervisor. *Johannesburg-Lewiston Area Sch*, 2000 MERC Lab Op 221; *City of Fenton*, 1999 MERC Lab Op 189; *Lake County Sheriff*, 1999 MERC Lab Op 107; *Shelby Twp*, 1997 MERC Lab Op 469. I find, therefore, that the customer service superintendent is properly placed in the Teamsters Local 214 supervisory bargaining unit.

The Employer asserts that the customer service superintendent shares a community of interest with the other superintendents, rather than with the supervisors represented by the Teamsters. The Commission has never recognized a category of employees termed “managers,” or high level supervisors, as having a separate community of interest, but includes all levels of supervision in the same bargaining unit. *Ogemaw County & Ogemaw County Sheriff*, 1997 MERC Lab Op 58, 61-62; *Birmingham Sch Dist*, 1970 MERC Lab Op 422. The other superintendents have apparently been excluded from the supervisory bargaining unit by agreement of the parties, rather than by any determination by the Commission. It is contrary to Commission policy to remove a position from a bargaining unit with which it shares a community of interest in order to become part of a non-represented residual unit. *City of Muskegon*, 1996 MERC Lab Op 64, 70.

The Employer also argues that it has the right to direct the workforce, and the creation of the new superintendent position falls within this authority. However, as the Commission found in

Ingham County, 1993 MERC Lab Op 808, 812, the reclassification and removal of positions from a bargaining unit without a substantial change in job duties is not within the scope of a public employer's management prerogative. *Livonia Pub Sch*, 1996 MERC Lab Op 479, 481. It is not a question of the Employer's authority to assign work, but one of unit placement. Absent agreement of the parties on unit placement, the Commission must resolve the matter.

Based on the above discussion, I conclude that the position of customer service superintendent is appropriately placed in the Teamsters Local 214 supervisory bargaining unit, and the petition for unit clarification should be granted. I further find that the Employer violated PERA by removing the reclassified customer service superintendent from the Charging Party's bargaining unit without its agreement. To remedy this violation it is recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

The City of Ann Arbor, its officers and agents, are hereby ordered to:

1. Return to Charging Party's bargaining unit the position currently titled customer service superintendent.
2. Upon request, bargain with Charging Party over the wages, hours, and working conditions of the customer service superintendent position.
3. Post the attached notice to employees in conspicuous places on the Respondent's premises for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

DATED: _____

NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION AFTER A PUBLIC HEARING IN WHICH IT WAS FOUND THAT THE CITY OF ANN ARBOR HAD COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL return to the Teamsters Local 214 bargaining unit the position of customer service superintendent.

WE WILL bargain upon request with Teamsters Local 214 over the wages, hours, and working conditions of the customer service superintendent.

City of Ann Arbor

By: _____

Dated: _____

(This notice shall remain posted for a period of thirty (30) consecutive days and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988, (313) 456-3510)