

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

In the Matter of:

HOWELL AREA FIRE DEPARTMENT,
Public Employer,

Case No. R18 H-065

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Petitioner.

APPEARANCES:

Gentry Nalley PLC, by Kevin S. Gentry, for the Public Employer

Pierce, Farrell, Tafelski & Wells, PLC, by M. Catherine Farrell, for the Petitioner

DECISION AND DIRECTION OF ELECTION

On August 20, 2018, the Michigan Association of Fire Fighters filed the above petition for a representation election with the Michigan Employment Relations Commission (the Commission) pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212. Petitioner seeks an election in a bargaining unit consisting of all regular part-time firefighters employed by the Howell Area Fire Department. The petition was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.¹ Based on the record of the evidentiary hearing held on November 8, 2018, and on the arguments made in the position statements filed by both parties before the hearing, the Commission finds as follows.

The Petition and Positions of the Parties:

As noted above, Petitioner seeks to represent a unit consisting of all regular part-time firefighters employed by the Employer Howell Area Fire Department but excluding all full-time and paid on-call firefighters. The parties have agreed to exclude the Employer's six full-time employees from the unit. These employees are the fire chief, the deputy chief, the fire marshal/battalion chief, the fire inspector who has the rank of captain, and two firefighters with the rank of lieutenant. One of these lieutenants serves as the training officer. According to Petitioner, the approximately eleven part-time firefighters it seeks to represent work regularly scheduled daytime shifts on weekdays. Petitioner asserts that these employees constitute a

¹ MAHS Hearing Docket 18-018827

distinct group that does not share a community of interest with the much larger group of on-call firefighters who respond to fire calls but do not have regularly scheduled hours.

The Employer maintains that it has only two categories of employees, full-time and part-time, and that the latter encompasses all employees who work less than forty hours per week. It asserts that the group of part-time firefighters assigned to regular shifts is fluid and that the majority of all part-time on-call firefighters work some scheduled shifts within the course of a year. The Employer also points out that part-time firefighters assigned to regular shifts and those that are not so assigned nevertheless regularly work together at the same fire scenes performing the same type of work. This is because: (1) part-time firefighters assigned to regular shifts may also respond to call-outs for incidents occurring outside their scheduled shifts; and (2) part-time firefighters not assigned to regular shifts may fill in for scheduled part-time firefighters when they are absent. The Employer maintains that a unit consisting of only the part-time firefighters working regularly scheduled shifts is not appropriate, and that the only appropriate unit in this case includes all part-time firefighters, including those who work a regularly scheduled shift and those who only work on call, but excluding only full-time firefighters and the assistant chiefs who are part-time.

Petitioner stated at the beginning of the hearing that it was not seeking to include the assistant chiefs because assistant chief is a paid on-call position. Testimony at the hearing established that there are four part-time firefighters with the rank of assistant chief, two of whom work a scheduled shift. However, one of these firefighters testified that he has the command authority of an assistant chief only when he responds to a call-out and not while responding to incidents during his shift. The Employer's position is that the assistant chiefs should be excluded from any unit because they are command staff.

Findings of Fact:

The Employer is a public authority providing fire and emergency medical services to individuals in the townships of Howell, Osceola, Marion, and Cohoctah, and in the City of Howell. The Employer was created in about 2004; before that time the City of Howell Fire Department provided services to the City and some surrounding townships. The Employer has a main fire station and three auxiliary stations. In addition to its six full-time employees, the Employer employs approximately sixty part-time firefighters, including probationary firefighters. On weekdays, Monday through Friday, two part-time firefighters work regularly scheduled ten-hour shifts, beginning at 7 a.m. and ending at 5 p.m., at each of the four stations. Approximately eleven part-time firefighters are each assigned either two or three regularly scheduled ten-hour shifts per week, usually on the same days each week. Scheduled firefighters typically rotate stations about every month.² Unless their absence is excused, the scheduled firefighters are expected to work their scheduled shifts and be on time; in the summer of 2018, the Employer removed one scheduled firefighter from the schedule and returned him to working only on call when he failed to consistently show up on time for his shift. The scheduled part-time firefighters wear the same uniform as the full-time firefighters; on-call firefighters do not wear uniforms.

² In this decision, these part-time firefighters are referred to as "scheduled" firefighters to distinguish them from "on-call" part-time firefighters who are not assigned to regularly scheduled shifts.

The deputy chief is responsible for preparing the monthly schedule in advance and ensuring that all shifts are covered. If the deputy chief knows in advance that scheduled part-time firefighters will be absent, he attempts to arrange the monthly schedule so that they work each other's shifts and that none of them loses a day of work. If another scheduled firefighter cannot fill in, there are seven or eight on-call firefighters who are usually available to fill in for absent firefighters on these weekday daytime shifts. On-call firefighters can turn down an offered shift without penalty. If no part-time firefighter can be found, a full-time employee will work the shift at the station. During the thirty-day period between July 20 and August 20, 2018, five on-call firefighters worked one or more weekday shifts, in addition to the eleven firefighters regularly scheduled to work. Except for Grant Cleary, who worked four shifts in one week in August, none of the five worked more than three weekday shifts per month.

Part-time firefighters are paid \$20.63 per hour for shift work, regardless of their rank within the department and regardless of whether they are scheduled part-timers or on-call firefighters filling in on the schedule. Part-time firefighters are paid bi-weekly for shift work hours. None of the Employer's part-time firefighters receive paid sick leave or vacation time. Any part-time firefighter, scheduled or on-call, who wishes to participate in the Employer's MERS deferred compensation retirement plan will have their contribution matched by the Employer up to five percent of their wages. The Employer does not provide health insurance to any of its part-time firefighters, but those who work a regular schedule and elect to purchase insurance through the Aflac company may have their payments deducted from their paychecks. Scheduled part-time firefighters receive a paid \$30,000 life insurance policy.

In order to be eligible for a scheduled shift, part-time firefighters must have a minimum of three years of experience with the Employer, Michigan Fire Fighter Level I and Level II certification, a Michigan Medical First Responder (basic level EMT) license, and a hazardous material certification. When a regular shift becomes vacant, the deputy chief asks around to see if any part-time firefighter is interested. If more than one part-time firefighter expresses interest, the position is posted. If more than one qualified part-time firefighter applies for the vacant position, the deputy chief usually selects the most senior applicant. He testified that he has never had a vacancy that he could not fill with a firefighter already on the Employer's part-time firefighter roster. Once part-time firefighters are assigned to regular shifts, they generally continue working these shifts until they themselves decide to work only on call or until they leave the department.

Part-time firefighters with the rank of firefighter are paid \$22.83 per hour for the hours they work on call. Part-time firefighters who have the rank of lieutenant, captain or assistant chief are paid higher hourly rates for the hours they work on call. Part-time firefighters are paid monthly for their on-call hours. Part-time firefighters are paid separately and receive separate pay statements for their shift and on-call hours. Part-time firefighters who do not work regularly scheduled hours cannot have Aflac payments deducted from their checks because their earnings generally vary so much from month to month.

From early May through the end of September each year, the Employer schedules additional ten-hour daytime shifts on both Saturdays and Sundays. Two part-time firefighters work each shift. Before the summer begins, the Employer posts a schedule covering the entire season. Part-time firefighters sign up for the specific dates that they wish to work. The Employer does not require any part-time firefighter to sign up for a weekend shift. During the summer of 2018, about eighteen different firefighters signed up to work one or more weekend shifts. This group included part-time firefighters who had regularly assigned weekday shifts, part-time on-call firefighters who filled in during those weekday shifts, and a few part-time firefighters who worked shifts only in the summer. Firefighters working summer shifts are paid the shift rate for time worked.

When an incident occurs during hours when part-time firefighters are scheduled to work, the part-time firefighters working that shift are normally dispatched first to the scene. Only the part-time firefighters at the closest staffed station are typically dispatched for minor incidents like a small brush fire, car fire, downed wire or a medical emergency. When a structure fire occurs, the Employer typically dispatches the scheduled firefighters from all four stations, along with the fire marshal and the chief and/or deputy chief if they are available. All the Employer's firefighters carry pagers, and if additional assistance is needed, a call-out will be sent to part-time firefighters, including off-duty regularly scheduled part-time firefighters and on-call firefighters. Call outs are also issued for all incidents occurring outside regular shift hours.

According to the Employer's procedures, a full-time firefighter, if one is at the scene, takes command. In the absence of a full-time firefighter, command is assumed by an assistant chief responding on call, a captain responding on call, or a lieutenant responding on call in that order. One of the regularly scheduled firefighters testified that he acts as an assistant chief when working on call. He explained that when dispatched to a scene during his scheduled working hours, he reports to the highest-ranking full-time officer, if one is present. If not, despite his assistant chief rank, he reports to the highest-ranking command officer responding on call.

The part-time firefighters who work scheduled shifts can, and all of them do, respond to call outs during hours they are not scheduled to work. Part-time firefighters have no obligation to respond to any call-out outside their scheduled hours. At one time the Employer required on-call firefighters to respond to twenty percent of all call outs. Currently, there is no fixed required response rate. However, the deputy chief keeps track of each firefighter's response rate, particularly their rates of response to calls near their homes. An on-call firefighter may be removed from the roster for failing to attend mandatory training and/or maintain a reasonable response rate.

Discussion and Conclusions of Law:

We have long held that regular part-time employees who perform bargaining unit work are appropriately included in bargaining units with full-time employees. *Wayne Co Cmty Coll Dist*, 20 MPER 4 (2007); *L'Anse Creuse Pub Schs*, 1996 MERC Lab Op 613, 616; *City of Southfield*, 1989 MERC Lab Op 684, 690; *Bedford Pub Schs*, 1982 MERC Lab Op 692. Regular part-time employees have been defined as employees who perform work within the unit on a

regular basis for a sufficient period during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in their employment. *Airport Cmty Schs*, 1999 MERC Lab Op 233; *Holland Pub Schs*, 1989 MERC Lab Op 584, 588, citing *Farmers Insurance Group*, 143 NLRB 240 (1963). We do not include in bargaining units those employees whom we find are temporary, casual, or irregular part-time due to the lack of regularity in their employment. *Chelsea Sch Dist*, 1994 MERC Lab Op 268; *Holland Pub Schs*, 1989 MERC Lab Op 584, 588. Whether substitutes or employees who work only on-call are regular part-time or casual employees is a determination to be made on a case by case basis. See *Southfield Pub Schs*, 1984 MERC Lab Op 162, aff'd by *MESPA v Southfield Pub Schs*, 148 Mich App 714 (1985). In that case, the Court of Appeals affirmed our conclusion that a group of substitute custodians, half of whom averaged as many hours per week as full-time custodians and all of whom averaged at least twenty-eight hours per week, were regular part-time employees even though they had the right to refuse assignments. However, see *Mt Morris Consol Schs*, 1993 MERC Lab Op 24, and *Lansing Pub Schs*, 1993 MERC Lab Op 18, where we found daily substitute teachers who worked on call to be casual employees, and *Chelsea Sch Dist*, where we found on-call substitute bus drivers and monitors to be casual.

We find that the part-time firefighters here who work regularly scheduled weekday shifts of twenty or thirty hours per week on a continuous basis are regular part-time employees and, therefore, are entitled to organize. As is characteristic of regular employees, part-time scheduled firefighters must work their scheduled shifts unless excused by the Employer. Once selected for weekday shifts, part-time firefighters have a reasonable expectation that they will continue to work their shifts indefinitely if their performance remains satisfactory. This group of firefighters, we find, has a sufficiently substantial and continuing interest in their employment to justify their inclusion in a collective bargaining unit.

The Employer asserts that the group of firefighters working regularly scheduled shifts is too fluid to constitute an appropriate unit. We conclude, however, that the record does not support this assertion. As noted above, regularly scheduled part-time firefighters generally work the same shifts consistently. They work part-time on a regular basis and have a reasonable expectation of continued employment.

The on-call firefighters sometimes work daytime shifts, but only as substitutes for regularly scheduled employees. The same seven or eight on-call firefighters usually fill in for absent scheduled firefighters on weekday shifts. However, on-call firefighters are not required to accept an offered shift, and the Employer's schedule indicates that, at least in the summer of 2018, no on-call firefighter consistently worked even one weekday shift per week. During the summer months, the Employer schedules additional shifts on Saturdays and Sundays. However, no part-time firefighters are regularly scheduled to work these weekend shifts. Instead, part-time firefighters sign up to work on individual dates on a purely voluntary basis. We find that neither volunteering to work one or more individual shifts on summer weekends or filling in, on an irregular basis, for absent regularly scheduled part-time employees working weekday shifts constitutes "regular part-time employment."

The Employer argues in this case that all regularly scheduled part-time firefighters and on-call firefighters share a community of interest because they regularly work together at the

same fire scenes performing the same work. However, as noted above, we do not, unless the parties agree, include casual or irregular part-time employees in the same unit with regular part-time or full-time employees. In this case, the Employer maintains a roster of more than sixty part-time firefighters. According to the schedules provided by the Employer, during the summer of 2018, two-thirds of these part-time firefighters apparently worked only on call.³ No evidence was presented by the Employer regarding the number of hours worked by these part-time firefighters during this period, the regularity with which they worked, or the continuity of their employment. We conclude that the record does not support a finding that the Employer's part-time firefighters, other than those regularly scheduled to work on weekdays, are regular part-time employees. We find that part-time firefighters who work regularly scheduled shifts on weekdays make up a distinct group of employees who do not share a community of interest with the Employer's other part-time employees, and that a unit consisting only of these regularly scheduled part-time employees constitutes an appropriate unit for collective bargaining.

As we are directing an election in a unit limited to the part-time firefighters regularly scheduled to work on weekdays, the two assistant chiefs who work regular schedules would be included in the unit. We find no reason to exclude these two firefighters from the unit. Section 9e of the Labor Relations and Mediation Act, MCL 423.9e, prohibits us from including supervisors in the same bargaining unit with their subordinates. *School Dist of City of Dearborn v Labor Mediation Bd*, 22 Mich App 222, (1970). However, § 13 of PERA provides an exception to § 9e in the case of firefighters. *Labor Council, Michigan Fraternal Order of Police v Emmett Twp*, 182 Mich App 516, 518 (1990). Section 13 of PERA, which covers the authority of the Commission to determine appropriate units, includes this proviso:

Provided, that in any fire department, or any department in whole or part engaged in, or having the responsibility of, fire fighting, no person subordinate to a fire commission, fire commissioner, safety director, or other similar administrative agency or administrator, shall be deemed to be a supervisor.

In enacting § 13, it is clear that the Legislature's intent is to prevent those employees who are subordinate to a safety director or other similar fire department administrator from being excluded from a collective bargaining unit simply because those employees have some supervisory authority. *Police Officers Ass'n of Michigan v City of Grosse Pointe Farms*, 197 Mich App 730, 734 (1992). As noted above, the Employer's position is that the assistant chiefs should be excluded from any bargaining unit because they are command staff. Here, the Employer is clearly a fire department within the meaning of § 13 and the assistant chiefs are subordinate to the Employer's fire chief and deputy chief. We are, therefore, precluded from finding the assistant chiefs in this case to be supervisors and cannot exclude them from the bargaining unit on the basis asserted by the Employer.

³ In addition to the eleven part-time firefighters with regularly scheduled weekday shifts, the names of nine other part-time firefighters appear on the weekday schedule as substitutes for scheduled firefighters and/or on the sign-up list for weekend shifts.

We have carefully examined all other issues raised by the parties and find they would not change the result. In accord with the findings of fact and conclusions of law set forth above, we direct an election as follows:

ORDER DIRECTING ELECTION

We conclude that a question concerning representation exists within the meaning of Section 12 of PERA. Accordingly, we hereby direct an election among employees in the following bargaining unit which we find to be an appropriate unit within the meaning of Section 13 of the Act.

All regular part-time firefighters employed by the Howell Area Fire Department but excluding all full-time firefighters, part-time on-call firefighters, other part-time firefighters who are not assigned to regular shifts, and all other employees.

Pursuant to the attached Direction of Election, the above employees will vote on whether they wish to be represented for purposes of collective bargaining by the Michigan Association of Fire Fighters.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 22, 2019