

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

In the Matter of:

VAN BUREN TOWNSHIP,
Public Employer,

MERC Case No. UC15 B-004
Hearing Docket No. 15-021100

-and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Petitioner.

APPEARANCES:

Cummings, McClorey, Davis & Acho, P.L.C., by Ethan Vinson, for the Public Employer

Brendan J. Canfield, Attorney for Police Officers Labor Council, for the Labor Organization-Petitioner

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

On February 17, 2015, the Police Officers Labor Council (Petitioner or POLC), 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 August 18, 2015, in Detroit, Michigan, before Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System. Based on the entire record, including the post-hearing briefs filed by the parties on or before October 19, 2015, we find as follows:

The Petition:

The POLC filed the present petition seeking to clarify its bargaining unit to include the newly created position of Deputy Director for the Police Division of the Van Buren Public Safety Department (Police Deputy Director).¹ Petitioner contends that the Police Deputy Director position is akin to either a police captain or police lieutenant, both of which have been historically included in its bargaining unit. The Employer argues that not only is there no community of interest between the Police Deputy Director and the command officer's unit, but also that the position is rightfully excluded from the bargaining unit by nature of it being "in essence an executive level position." In the alternative, the Employer argues that the position should be

¹ While POLC's petition and initial position statement identified the position at issue as "deputy chief" the Employer has indicated that the position's actual title is that of Deputy Director of the Police Division.

deemed a confidential employee because of its direct involvement in collective bargaining. On that basis, the Employer contends that the position should be excluded from the bargaining unit.

Findings of Fact:

Petitioner is the exclusive bargaining representative of a unit comprised of all command officers within the Van Buren Township Public Safety Department (Department). The Department consists of several divisions including police, fire, dispatch, animal control, and ordinance. Currently, the Department is headed by Greg Laurain, the Director of Public Safety.

The current command structure of the police division begins with the position of Police Deputy Director, then the command officers, and then the detectives and patrol officers. The fire division's chain of command is very similar, beginning with another Deputy Director followed by the fire command officers and then firefighters. Both Deputy Directors report directly to Director Laurain. According to testimony provided at the hearing, the Township considers both the Deputy Director of the Fire Division as well as the Director's administrative assistant to be confidential positions and, therefore, has excluded them from their respective bargaining units.

At the time of the hearing, the Police Division of the Department consisted of the Chief Deputy Director, ten members of Petitioner's command unit, approximately 32 officers and nine dispatchers in a patrol unit represented by another division of the Police Officers Labor Council, and three employees that are part of a Township-wide unit represented by AFSCME. Of the latter group, the administrative assistant to the Director of Public Safety and the administrative assistant to the Township Supervisor are each excluded from the AFSCME unit as confidential. Additionally, the Township benefits coordinator is excluded from representation as a confidential employee. In sum, the Township employs approximately 176 people in various positions.

Since approximately 2005, the Police Division has contained the position of Captain, although that position has not been continuously filled. The position has been historically a part of Petitioner's unit. Initially, the two captain positions were held by Captain Ken Brooks, who oversaw the patrol division, and Laurain, who oversaw the special services division. Captain Brooks was responsible for overseeing the day-to-day operations of road patrol, hiring procedures, staffing decisions, patrol policy and procedure, training, equipment, patrol vehicles, the condition of the station, lockup, prisoners, computer systems, and report writing. During his time as Captain of special services, Laurain oversaw the non-patrol related operations of the Police Division, such as the detective bureau, the special investigations unit, the canine officer, the marine division, the dive rescue team, the records department, communications, and the traffic division.

Sometime in 2010 or 2011, Captain Brooks retired, and the Township chose not to fill the vacancy and instead allowed his duties to pass to Captain Laurain. Laurain then delegated some of his duties to another officer below him, Lieutenant Ken Floro. Lt. Floro took control of the special services division and was responsible for hiring and screening new employees. In 2013, the Township named Laurain the Interim Director of Public Safety. The Captain position previously held by Laurain, like the one held by Brooks, has not been filled. Laurain, upon assuming the position of Interim Director, delegated the remaining duties he held as Captain to three more lieutenants, such duties including staffing and development of policies and procedures

and personnel issues. Sometime in 2014, the Township named Laurain the permanent Director of Public Safety.

In July of 2014, the Township approved the creation of and posting for the position of “Deputy Director of Police Operations.” Lt. Floro was offered the position but declined upon learning that the position would be unrepresented. On October 21, 2014, the Township approved the hiring of Jason Wright, former Chief of Police for the City of Wayne, as the new Police Deputy Director. Wright began serving in that position on November 10, 2014.

Like command officers, the Police Deputy Director must be MCOLES certified, possess a valid driver’s license and attend command school or new chief school. Additionally, the Police Deputy Director has arrest powers, carries a firearm, and wears the same uniform and badge as the command officers. Because of the cross-training needed between the Police and Fire divisions, Wright was required to attend “fire school,” just as some command officers had been required to do. Wright’s present normal work schedule of Monday through Friday from 7:30 am to 4:30 pm is identical to that of some members of Petitioner’s unit. Wright’s office is adjacent to an office shared by two members of Petitioner’s unit. Other similarities between some, if not all, of the members of Petitioner’s unit and Wright’s position include the right to a take-home vehicle as well as the same health care, dental, and optical benefits. However, the Police Deputy Director receives a salary, rather than an hourly wage and is part of a different pension program from the current members of Petitioner’s bargaining unit.

Wright’s position is tasked with filling in for Director Laurain when he is absent; both the previous captain positions and Lt. Floro had performed the same duty prior to Wright. Lieutenants still assume control of the Police Division when both the Director and Deputy Director are absent. At the hearing, Director Laurain testified that Wright’s position possesses the same authority as that of the Director in his absence, while command officers, i.e., lieutenants do not. Because of the chain of command structure present within the Police Division, all command officers have supervisory responsibilities with each rank supervising the positions below it in the chain. Along with supervisory responsibilities, both command officers and the Deputy Director have conducted internal investigations and may impose discipline; command officers may issue discipline in the form of reprimands and counseling memoranda while the Police Deputy Director has issued discipline up to and including suspension.

Presently, the Township’s bargaining team is comprised of the Township Treasurer, the Township Clerk, the Township’s attorney, Director Laurain, and the Police Deputy Director. Wright has participated in a number of negotiation sessions with Petitioner’s unit on behalf of the Township. Laurain testified that Wright’s presence at those sessions was to provide input on operational issues within the collective bargaining agreement. However, he acknowledged that he and Wright have the same general expertise in terms of input on contract language

Discussion and Conclusions of Law:

A unit clarification petition is appropriate to determine the bargaining unit status of a newly created position or a position that has undergone recent significant changes. *City of Detroit*, 1997 MERC Lab Op 454, 455; *City of Battle Creek*, 1994 MERC Lab Op 440, 447; *Genesee Co*, 1978 MERC Lab Op 552, 556. Here, despite the similarity between the duties of this position with the

presently unfilled Captain position, we find that the Police Deputy Director position is a newly created position and, therefore, properly addressed within the confines of this unit clarification petition.

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 to be represented for purposes of collective bargaining to a public employee covered by PERA. 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 & Lake Co Sheriff*, 1999 MERC Lab Op 107, 12 MPER 30028; *Antrim Kalkaska Cmty Mental Health*, 1998 MERC Lab Op 11, 15.

The Township argues that this position is executive in nature and, therefore, properly excluded from any bargaining unit. Alternatively, the Township contends that the position is confidential by virtue of its direct participation in the collective bargaining process. For the reasons set forth more fully below, we find that there exists a community of interest between the position at issue and Petitioner's unit. Furthermore, we find that the Employer has not put forth facts sufficient for us to conclude that the position should be excluded from the unit based upon either executive or confidential status.

The Township asserts that the Police Deputy Director position sought by Petitioner does not share a community of interest with other members of Petitioner's unit. It has been our approach when dealing with supervisory units to consider those units all-inclusive and to include all levels of supervision up to the employer's executive position. See *Lake Co & Lake Co Sheriff*. The presumptive appropriateness of an all-inclusive unit of supervisory employees under PERA aside, the record clearly establishes that there is a strong community of interest between the Police Deputy Director and the other supervisory positions presently within Petitioner's unit. Such communal interests include, but are not limited to, both possessing arrest powers, similar training with respect to the "fire school," and supervisory authority over other employees within the Police Division. Accordingly, we reject the Employer's argument that community of interest does not exist.

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, enfd 24 Mich App 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.

Presently, the Employer's sole executive position for the Public Safety Department is the Director. The Employer has also claimed two other positions within the Department as confidential, the Deputy Director of the Fire Department as well as the Director's administrative assistant.

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 (Sheriff's Dep't)*, 186 Mich App 365 (1990); *Detroit v DOT Foreman's Ass'n*, 109 Mich App 141 (1981); *Arenac Co*, 2001 MERC Lab Op 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*, 1999 MERC Lab Op 107, 12 MPER 30028; *Ingham Co Rd Comm*, 1995 MERC Lab Op 306, 312; *Monroe Co Probate Ct*, 1990 MERC Lab Op 880, 884.

The Police Deputy Director position sought by Petitioner is not derived from statute or charter, nor does it have direct access to the Township's governing body. Furthermore, the position is not the policy making head of the Department, and the number of employees working within the Township does not come close to the 1,000 employee threshold. While there was testimony that the Police Deputy Director could enact policies, it is clear that said policies would not be Employer-wide or even Department-wide; rather, said policies would apply to the Police Division of the Public Safety Department only. As such, the Police Deputy Director does not fit within our established definition of executive; nor has the Township provided us with compelling evidence or argument in which to expand this definition or make an exception with respect thereto.²

² Additionally, our prior treatment of assistant chief or deputy chief positions, precludes a finding of executive status on the part of the Deputy Director position. See *Lake Co & Lake Co Sheriff*, 1999 MERC Lab Op 107, 12 MPER 30028 (chief deputy in command of department in absence of sheriff and undersheriff not excludable from supervisory unit as an executive); *Ann Arbor (Police Dep't)*, 1988 MERC Lab Op 649 (three deputies not executives in department

In the same vein as the executive exclusion, we apply caution when confronted with a request to exclude a position from collective bargaining on the basis of the confidential designation. In considering confidential status, we must balance the employer's need for a confidential employee against the employee's right to representation. *City of Hazel Park*, 21 MPER 40 (2008). In so doing, we must remain cognizant of PERA's purpose of providing public employees with an opportunity to be represented and bargain collectively.

A confidential employee is an employee who assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations. *Riverview Cmty Sch*, 1968 MERC Lab Op 419; *Sanilac Co*, 22 MPER 73 (2009). Our longstanding policy permits a public employer to designate one clerical employee as confidential and exclude that employee from the bargaining unit so the employer may have available an employee who can directly assist in the preparation and handling of bargaining proposals during negotiations. *33rd Dist Ct*, 19 MPER 75 (2006). However, the confidential exclusion is not limited to clerical employees, but can extend to other employees who have regular access to information that is relevant to collective bargaining and not made available to the union. *Oakland Cmty Coll*, 2000 MERC Lab Op 77, 79.

An employer seeking to extend the confidential exclusions to an additional employee, regardless of its size, bears the burden of showing justification for such, and administrative convenience alone cannot justify their exclusion. *Shelby Twp*, 2001 MERC Lab Op 84, 85; 14 MPER 32033; *Williamston Sch*, 1994 MERC Lab Op 1062, 1064; *City of Riverview*, 1983 MERC Lab Op 400, 402. In such situations, we have required that the additional individual have actually performed confidential labor relations work and the employer must show that such work cannot feasibly be reassigned to minimize the total number of confidential exclusions. *Monroe Co Probate Ct*, 1990 MERC Lab Op 880. However, the mere fact that an employee has been delegated certain confidential functions does not, by itself, meet the employer's burden of showing that it needs another confidential exclusion from the bargaining unit. *City of Hazel Park*, 21 MPER 40 (2008); *Lake Co & Lake Co Sheriff*, 1999 MERC Lab Op 107, 12 MPER 30028; *Wyandotte Pub Sch*, 1990 MERC Lab Op 425, *aff'd* unpublished opinion of the Court of Appeals, issued December 2, 1992 (Docket No 130022). We have held that employees should not be precluded from participating in collective bargaining merely because they have access to information not available to the general public or to employees, in general. *Lapeer Co & 40th Judicial Circuit Ct*, 1998 MERC Lab Op 611; 12 MPER 30001; *Huron Intermediate Sch Dist*, 1980 MERC Lab Op 85, 88. We will not assume that an employee who is a member of a bargaining unit will misuse sensitive information or otherwise breach his or her employer's confidence. *City of Hazel Park*; *Lapeer Co & 40th Judicial Circuit Ct*; *City of Riverview*, 1983 MERC Lab Op 400, 403. Spreading executive or confidential duties among a number of employees will not have the effect of increasing the number of excluded employees. *Lake Co & Lake Co Sheriff*. Instead, to meet its burden of justifying an additional confidential employee, a public employer must show that the amount of confidential work to be done cannot feasibly be reassigned to minimize the number of employees excluded from union representation. *City of Hazel Park*; *City of Monroe*, 20 MPER 115 (2007);

of 181 employees); *Wyoming Police Dep't*, 1985 MERC Lab Op 84 (third-level captain position included in a supervisory unit in a department comprised of 72 sworn police officers); *Saline Police Dep't*, 1982 MERC Lab Op 1699 (second-in-command lieutenant in small department not an executive).

Shelby Charter Twp, 2001 MERC Lab Op 84, 14 MPER 32033; Lapeer Co & 40th Judicial Circuit Ct.

In its post-hearing brief, the Employer asserts that “there are only two excluded positions in the Public Safety Department.” The Employer indicates that one of those positions is the administrative assistant to the Director of the Public Safety Department and the other is the Deputy Director of Fire. However, the issue here is not the number of excluded positions within the Public Safety Department; the issue is the total number of positions that have been excluded as confidential by the Employer. The testimony in the record establishes that the administrative assistant to the Township supervisor has been excluded by the Employer as a confidential employee. Therefore, the Township has already claimed at least three positions, in addition to the Police Deputy Director, as confidential. The Employer bears the burden of showing the justification for additional confidential exclusions, and the Township’s administrative convenience alone is not sufficient to meet this burden. *Lapeer Co & 40th Judicial Circuit Ct, 1998 MERC Lab Op 611; 12 MPER 30001.* In light of the small size of the Employer and the limited amount of confidential labor relations work that would be performed by the Police Deputy Director, we find the Employer has not met its burden in this case.

We have considered all other arguments put forth by the parties and hold that such does not warrant any change in our conclusions. In accord with our findings, we issue the following order:

ORDER

Petitioner's request to clarify its bargaining unit to include the position of Deputy Director of the Police Division is hereby granted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 25, 2016