

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

In the Matter of:

FAUST PUBLIC LIBRARY,
Public Employer,

MERC Case No. R09 D-053
Hearing Docket No. 12-000981

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
Labor Organization-Petitioner.

APPEARANCES:

Fausone Bohn, LLP by Michael M. McNamara, and Steven H. Schwartz & Associates, PLC by Steven H. Schwartz, for the Public Employer

Tere M. McKinney and Shawntane Williams, Staff Attorneys, for the Petitioner-Labor Organization

DECISION AND ORDER ON REMAND REGARDING ELECTION

This matter is before the Commission on remand from the Michigan Court of Appeals. In a July 23, 2015 published decision, *AFSCME Council 25 v Faust Public Library*, 311 Mich App 449 (2015), the Michigan Court of Appeals affirmed our September 16, 2013 Decision and Order Regarding Election, in part, vacated it in part, and remanded the matter for further proceedings. The Court of Appeals decision is attached hereto and incorporated by reference.

On November 13, 2015, we issued an Order on Remand referring this matter to an administrative law judge for an expedited evidentiary hearing. On March 16, 2016, a hearing was held before Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearings System, acting on our behalf. Based upon the entire record, including the transcript of the evidentiary hearing and briefs filed by the parties, both in this proceeding and in the prior one, the Commission finds as follows:

The Prior Proceedings and Remand:

The issue before us in the prior proceeding and now on remand stems from a representation petition originally filed in April of 2009 by Michigan AFSCME Council 25, AFL-CIO (the Union). The Union sought to represent a unit of approximately thirty-nine employees of the Faust Public Library of Westland. A consent election was held for the proposed bargaining unit, which would include “all librarians, library assistants, pages, administrative assistants, technology coordinator and maintenance,” and exclude the “director, secretary to the director, head of adult services, head

of children services, head of circulation, and all other employees.” The election was conducted on August 27, 2009. The Union was rejected by a majority vote of those employees voting.

The Union then filed an unfair labor practice charge, Case No. C09 H-145, wherein it alleged the Employer’s lay-off or termination of three individuals during the lead up to the August 27, 2009 election was retaliatory and, along with other conduct, had interfered with employee free choice. That matter was heard by Administrative Law Judge (ALJ) Doyle O’Connor.

Following a hearing before ALJ O’Connor, the library director employed during the period of the dispute left that position. The three employees previously laid-off or terminated were reinstated. The parties were able to reach a settlement in Case No. C09 H-145 that included an agreement to hold a new election in which the Employer promised to remain neutral. That agreement further provided that the employees in the positions of secretary to the director, head of adult services, head of children’s services, and head of circulation would vote on challenged ballots and that “MERC shall determine their eligibility to vote, if necessary.” It was understood that subject to the Commission’s decision on the challenged ballots, the unit was to include the positions listed in the parties’ 2009 consent election agreement.

The second election was conducted on May 23, 2012. Twenty-nine employees cast ballots, which included three challenged ballots cast by Marilyn Kwik, a librarian and head of adult services; Diane Mehl, a non-librarian and head of circulation; and Lisa Hausman, a librarian and head of children’s services. The non-challenged ballots were evenly split between those selecting the Union and those opposing representation by the Union. The Employer asserted that the three department heads were supervisors and, therefore, properly excluded from the unit. The Union conceded that both Kwik and Mehl were, in fact, supervisors and properly excluded from the unit. The matter was referred to hearing before an ALJ for an evidentiary hearing on whether the position held by Hausman was supervisory.

Prior to the hearing, the Employer, while maintaining that the three above-mentioned positions were supervisory, attempted to assert, in the alternative, that if any of the three were found not to be statutory supervisors, then all three must necessarily be held to not be supervisors.

ALJ O’Connor advised the parties, before the hearing, that the alternative argument set forth by the Employer did not appear to raise a triable factual issue as to the supervisory status of the positions held by Kwik and Mehl. He pointed out that both parties had previously concurred that those positions performed duties that established that the positions were supervisors as the Commission has defined that term.

At the onset of the hearing, ALJ O’Connor repeated his prior statements regarding the alternative argument proffered by the Employer. In response, the Employer argued that the three department heads possessed the same “managerial function” such that either all three would be found to be supervisors as defined by the Commission or none of them would be.

The hearing consisted of testimony of librarian and head of children’s services Lisa Hausman and of the newly hired library director, Dr. Sheila Collins. Following the witness statements, the Employer made an offer of proof with respect to the duties and responsibilities of the positions held by Kwik and Mehl, claiming that both positions operated with the same level of

authority and decision making as that of Hausman's position. The Union did not counter the Employer's offer of proof. Evidence was not taken as to the two positions.

On September 16, 2013, we issued our Decision and Order Regarding Election finding that the position held by Hausman, as head of children's services, did not qualify as a supervisor and that, therefore, the challenged ballot cast by Hausman should be opened and counted with the results of the election that was conducted on May 23, 2012. We made no findings of fact with respect to the positions held by Kwik and Mehl for the reasons set forth above. We noted that no evidence was introduced, or offered, by either party to contradict the statements by both parties that the heads of adult services and circulation, Kwik and Mehl's positions, were supervisors.

The July 23, 2015, decision of the Court of Appeals affirmed our Decision and Order with respect to our finding that the position of head of children's services held by Hausman did not qualify as a supervisor. However, the Court concluded that our failure to allow the Employer to put forth its alternative argument was a material and substantial error of law. The Court also found that by failing to consider the Employer's alternative argument, we neglected to fulfil our statutory duty under Section 13 of PERA, whereby we are charged with determining the appropriate bargaining unit for collective bargaining.

The Court's remand order held that we must first consider whether Kwik's and Mehl's ballots would be determinative of the election in light of Hausman's vote. It is clear that because the initial eligible votes were evenly split, the votes by Kwik and Mehl, regardless of the outcome of Hausman's vote, could determine the outcome of the election. If the votes would be determinative, we must allow the parties to present evidence concerning the duties and authority of Kwik and Mehl to determine whether the positions of head of circulation and head of adult services are nonsupervisory, and, in accordance with those determinations whether, either or both positions should be included within the bargaining unit, such that their ballots should be opened and counted.

Findings of Fact:

In addition to the factual findings made pursuant to the evidentiary hearing held on March 16, 2016, we adopt the findings of fact as set forth in our prior Decision and Order Regarding Election issued on September 16, 2013, and we will not repeat them here, except as necessary.

Dr. Sheila Collins, the only witness to offer testimony at the March 16, 2016 hearing, has served as the Library's Director since September 2011. Since at least 2011, the Library has operated with three main departments, Children's Services, Adult Services, and Circulation. There is also an Information Technology department (IT) which has never employed more than two people at one time.

As established in our prior decision and order in this matter it is clear that the job descriptions for the department head positions held by Hausman, Kwik, and Mehl are practically identical in nature and provide that each position "supervises assigned areas" of the library; "performs complex and technical professional library work"; and "supervises the department."¹

¹ Department head job descriptions at Section XI of the William P. Faust, Public Library of Westland Employee Handbook, Exhibit 2, August 9, 2012 hearing.

The department head description was last updated in March of 2012 and remains unchanged through the present proceedings as testified to by Collins. As we noted previously, the job description for department heads does not include hiring, firing, disciplining, or effectively recommending such action within the position's responsibilities or authority although it does provide that a department head "trains and evaluates department staff."

Presently the Library operates on a 72-hour work week with the Child's Services Department, Circulation Department and the Adult Services Department open that entire time. Weekend and evening hours are rotated evenly among the Library staff over the course of the year.

The last time layoffs were deemed necessary by the Library Board was sometime prior to 2012. The Board decided, without the input of Collins or any other library employee that the layoffs would be conducted by seniority, with the least senior employees laid off first.

Following a millage passage in 2012, the Board authorized the recall of some, but not all of the laid off employees. Collins, in her sole discretion, determined which positions needed to be filled and which employees to offer recall. Neither Kwik nor Mehl played a role in these decisions.

A total of five new employees have been hired in the departments headed by Kwik and Mehl during Collins' tenure as Director; two in Adult Services and three in the Circulation Department. In those hiring situations, the respective department head participated with a committee of other employees in the department to interview candidates. The committee then made a hiring recommendation to the Director. Collins is not bound to follow the recommendation. With respect to promotions or transfers, while Collins might consider a recommendation to take such action she was not bound by the recommendation and could choose to disregard it.

Since Collins became Director, only two employees have been terminated; one was involved with IT and the other was from the Circulation Department. Collins testified that in both instances she made the decision to terminate those employees on her own. Collins further testified that if Kwik or Mehl wished to have an employee terminated or disciplined, they could make a recommendation, but that she, Collins, would consider and make the final decision. Collins stressed she is not bound to follow any such recommendation. No Adult Services Department employee has been terminated or suspended while Collins has served as Director.

Following a recommendation by Mehl that a maintenance employee be placed on a performance improvement plan, Collins independently reviewed the recommendation and ultimately approved the plan. No Adult Services Department employee has been placed on a performance improvement plan while Collins has served as Director. Collins testified that if Kwik or Mehl recommended that an employee within their department be placed on a performance improvement plan, she would consider and make the final decision.

Library employees are evaluated annually using a standard evaluation form. Department heads fill out performance evaluations for employees in their departments. However these evaluations are not used for determining any raises, bonuses or other compensation for employees. Collins testified that she reviews every performance evaluation, and if she disagrees with a

performance evaluation, she writes a comment and sends it back to the department head and the employee.

Discussion and Conclusions of Law:

A supervisor is an employee who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment. *MEA v Clare-Gladwin ISD*, 153 Mich App 792, 796-798 (1986); *City of Holland*, 2002 MERC Lab Op 40, 41; *Village of Paw Paw*, 2000 MERC Lab Op 370. To meet the criteria to be a supervisor under PERA, an individual's exercise of authority in the foregoing functions must involve the use of independent judgment, including effective authority in personnel matters, with the power to evaluate employees and recommend discipline. *Butman Twp*, 2000 MERC Lab Op 13, 16-17. Effective authority in personnel matters means that the employee's superiors generally accept his or her recommendation without an independent investigation. *Id.* at 16. See also *Village of Port Austin*, 1991 MERC Lab Op 346, 348. A finding of supervisory status requires that an individual or classification exercise independent judgment and be identified or aligned with management in the performance of assigned duties. *Michigan Cmty Services, Inc*, 1994 MERC Lab Op 1055, 1060. See also *City of Lansing*, 1985 MERC Lab Op 93, 101.

The record clearly establishes that neither Kwik nor Mehl possesses any "effective authority" in personnel matters. While in the past, both may have made personnel matter recommendations to the Director, Collins was unequivocal in her contention that such recommendations were just that, mere recommendations. Collins was very clear in her testimony that she was the decision maker who would independently investigate recommendations made to her and would not just accept the recommendations of her Department Heads. As we previously held with respect to Hausman, we find that neither Kwik nor Mehl possess the authority or responsibilities necessary to classify them as supervisors under PERA.

In a footnote contained within the original Decision and Order of Election issued by us in this matter, we alluded to a possible issue that if it were determined that Mehl, as a "non-librarian," was not a supervisor, she nonetheless would not be included in the proposed bargaining unit as defined by the consent election agreement. The Court of Appeals noted in its decision remanding the proceeding to us that the Employer argued that we erred by ruling Mehl could not be in the unit for the aforementioned reason. The Court found that this issue was "not the focus of the proceedings" and by its inclusion by means of a footnote, we had not actually rendered any decision as to it. Regardless of our previous statement, made as dicta, it is our opinion and conclusion that Mehl should be included in the proposed bargaining unit, the consent election agreement notwithstanding.

As we have consistently held, the primary objective of this Commission is to constitute the largest unit which, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law and which includes within a single unit all employees sharing a community of interest. *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952). We determine whether a community of interest exists by examining a number of factors, including: similarities in duties, skills, and working conditions; similarities in wages and employee benefits;

amount of interchange or transfer between groups of employees; centralization of the employer's administrative and managerial functions; degree of central control of labor relations; common promotion ladders; and common supervision. See e.g. *Covert Pub Sch*, 1997 MERC Lab Op 594, 601; *Grand Rapids Pub Sch*, 1997 MERC Lab Op 98, 106. Part of our rationale in applying the long-standing principle of *Hotel Olds*, to constitute the largest unit of employees sharing a community of interest, is to minimize the fragmentation of units and prevents units based on the extent of organization. *Bay Area Transportation Auth*, 1995 MERC Lab Op 154, 158. Additionally, the *Hotel Olds* policy also serves to maximize the size of the unit and avoid multiplicity of bargaining units. *Port Huron Sch Dist*, 1995 MERC Lab Op 314.

As we restated in *Wayne Co Cmty Coll Dist*, 19 MPER 72 (2006), it is our policy, whenever possible, to avoid leaving positions unrepresented, especially isolated ones. *Charlotte Pub Sch*, 1999 MERC Lab Op 68; *City of Muskegon*, 1996 MERC Lab Op 64, 70. Accordingly, when a position shares a community of interest with a unit that seeks to include it, we will accrete the position to the existing unit rather than leave it with a residual group of unrepresented employees. *Lake Superior State Univ*, 17 MPER 9 (2004); *Saginaw Valley State Coll*, 1988 MERC Lab Op 533, 538.

We conclude that Mehl, Kwik, and Hausman's positions are similar in nature, the only differences occurring as a result of the specialized nature of their departments. All three work under the direction of the Director and perform essentially the same function with respect to heading their individual departments. Based on the above, we find no basis to hold that Mehl should not be included within the proposed unit, thereby leaving her position unrepresented, while both Kwik and Hausman are represented.

ORDER

We conclude that the position held by Marilyn Kwik, as head of Adult Services, and Diane Mehl, as head of Circulation, do not qualify as statutory supervisors and that, therefore, the challenged ballots cast by Kwik and Mehl, respectively, along with the ballot cast by Hausman, should be opened and counted with the election results then certified.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: September 19, 2016