

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

In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY
& MUNICIPAL EMPLOYEES, COUNCIL 25
AND ITS AFFILIATED LOCAL 1518,
Incumbent-Labor Organization,

MERC Case No. UC15 L-023
Hearing Docket No. 16-005063

-and-

HURON COUNTY,
Petitioner-Public Employer.

APPEARANCES:

Kenneth J. Bailey, Staff Attorney, for the Labor Organization

Stephen J. Allen, Corporation Counsel, for the Public Employer

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

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC). Based on the entire record, including the transcript, exhibits and post-hearing briefs, the Commission finds as follows:

The Petition and Positions of the Parties:

On November 23, 2015, Huron County filed this petition seeking clarification of the bargaining unit status of the Probate Court Register/Court Administrator, a position currently included in a bargaining unit of non-supervisory employees represented by the American Federation of State, County and Municipal Employees (AFSCME) Council 25 and its affiliated Local 1518. In support of the petition, the County argues that inclusion of the Probate Court Register/Court Administrator in the AFSCME bargaining unit is inappropriate because the position has the authority to hire, layoff, assign, reward, or discipline other employees and, therefore, is a supervisor as the Commission has defined that term. The Union asserts that the Probate Court Register/Court Administrator should

remain in the bargaining unit, because her duties are those of a lead worker, not a supervisor.

Findings of Fact:

Petitioner Huron County has three separate courts: (1) Circuit Court, which includes the Family Division; (2) District Court; and (3) Probate Court. Although the courts are all housed in the same building, each court has its own judge and administrator. David L. Clabuesch has been Probate Court Judge since May of 1987. Krisie Fritz is the Probate Court Register/Court Administrator, the position which is the subject of this dispute. Fritz has worked for the County for 32 years and was promoted to the Probate Court administrator position in July of 2000. In addition to Judge Clabuesch and Fritz, there are two other full-time employees assigned to the Probate Court: Karen Rutkowski is employed as Chief Deputy Register of Deeds, and Renee Krueger works as Deputy Register of Probate. There are also two regular part-time Deputy Registers: Laura Trost and Margaret Callender.

All full-time and regular part-time employees of the Probate Court, including Fritz, are members of AFSCME Council 25, Local 1518, which the parties refer to as AFSCME Unit II. Fritz's position has been included within Unit II since the bargaining unit was organized in 2000. The Probate Court Register/Court Administrator position is explicitly referenced in the recognition clause of the collective bargaining agreement between the parties which covers the period January 1, 2013, to December 31, 2017. Neither of the other two court administrators is represented for purposes of collective bargaining.

At the time of the hearing, Petitioner was in the process of undergoing a reorganization of its court system. Following a judicial resources evaluation, it was determined that Huron County needs only two judges. Since Clabuesch is the most senior of the three judges, it is expected that he will retire once the changes become fully implemented. When that occurs, the three courts will be merged into a single trial court with the two remaining judges handling all case types. However, the County will still employ three separate court administrators – one for each primary function. According to Judge Clabuesch, the administrators will each serve as advocates for the amount of resources needed for their particular subject matter areas.

Judge Clabuesch testified that while his name is “on the door” of the Probate Court, Fritz has assumed the “lead position” overseeing the court's day to day operations. Fritz has the authority to ensure that the Probate Court is properly staffed within its budget and to assign work to the court's four employees. When a job comes in, Fritz looks to see which employee is the least busy and assigns the task to that individual, with consideration given to the employee's competency to perform the job. Although the County's Board of Commissioners has mandated that overtime be kept to an absolute minimum, Fritz has the authority to determine whether to assign Probate Court employees to work after regular hours to service members of the public who show up shortly before closing. As Probate Court judge, Clabuesch has established protocols for

how his employees are to handle all of the various case types which come before the court, including involuntary commitments, guardianships and conservatorships. In Judge Clabuesch's absence, it is the responsibility of the Probate Court Register/Court Administrator to ensure that these protocols are enforced.

Judge Clabuesch has never had any discussions with Fritz about the extent of her disciplinary authority. However, he testified that Fritz has the "absolute discretion" to discipline part-time employees of the Probate Court, up to and including termination. However, if Fritz were to decide to terminate a part-time employee, Clabuesch would want her to notify him before making the decision, so that he would be able to respond to questions about the situation. Although Clabuesch initially testified that Fritz also has the power to discipline full-time employees, the record establishes that her authority in that regard has been limited to relatively minor offenses, such as problems with start and stop times and dealing with behavioral problems. With respect to these types of issues, Clabuesch testified that Fritz has full autonomy, such that he is usually not even made aware that discipline has been imposed.

Fritz has never issued a written notice of discipline to any employee, part-time or full-time. Rather, she has issued what she refers to as "informal" discipline at one time or another to every member of the staff other than Trost. As an example, both Fritz and Clabuesch recounted an incident which occurred a few months prior to the hearing involving an employee who showed up for work dressed inappropriately for the court reporting duties to which she had been assigned for that day. In response, Fritz decided not to allow the employee to work in the courtroom. Judge Clabuesch subsequently confronted Fritz about the employee's attire and told her to "take care of it." In response, Fritz took the employee aside and talked to her. Fritz testified that if informal discipline of a Probate Court employee proved ineffective, she would look at taking additional disciplinary action and, in such an instance, "go to my Judge as well."

More serious disciplinary issues involving full-time employees are referred to the chief judge and then brought to the attention of the judicial council. The council, which consists of the three judges, the three court administrators and the Friend of the Court, was established two years prior to the hearing in this matter.¹ Thus far, the only disciplinary referral made to the council has involved an employee of the Friend of the Court who was alleged to have engaged in inappropriate activity relating to unexcused absences. The members of the judicial council considered the allegations and discussed what kind of discipline should be imposed. No formal vote was ever taken. Rather, the members jointly came to a consensus that the employee had engaged in conduct detrimental to the court's image such that she should be relieved of her duties. According to Judge Clabuesch, Fritz and the other two administrators were each actively involved in the decision-making process. Addressing a hypothetical question posed to him at hearing, Clabuesch testified that if a disciplinary referral was made regarding an employee of the Probate Court and the judicial council was unable to reach a consensus, the council

¹ In addition to addressing disciplinary matters, the judicial council also meets on a monthly basis to make decisions on matters such as budgets, assignments and courtroom usage.

would defer to Fritz on the theory that “the person who’s closest to the fire probably has a better description of what kind of heat gets generated.”

Fritz is responsible for assessing the staffing needs of the Probate Court. If Fritz determines that additional personnel are necessary, she assists Judge Clabuesch in bringing the matter to the attention of the County’s Board of Commissioners and helping him to seek funding for the position. Fritz has complete authority to hire part-time employees and to determine their work schedules. Clabuesch does not participate in interviews for part-time vacancies and, in fact, often has to be introduced to the newly hired employee by Fritz. The most recent part-time employee hired by the Probate Court was Deputy Register Margaret Callender. In that situation, Fritz determined that another part-time employee was needed because the existing staff were getting behind in their work. She mentioned the situation to Judge Clabuesch who told her to interview candidates for the job. Clabuesch was not involved in the interview process. With respect to the hiring of Deputy Register Laura Trost, Judge Clabuesch told Fritz to “go ahead and find someone” to fill the position after Fritz alerted him to the need for another part-time staff member. Fritz hired Trost without any input from Clabuesch.

The record establishes that Judge Clabuesch takes a more active role with respect to the hiring of full-time employees. Clabuesch testified that when positions become vacant, Fritz “assists” him in interviewing candidates and then he tells her to select which candidate to hire. “[A]nd she did, and then I would approve it,” said Clabuesch. Fritz described the process of hiring full-time employees similarly. Although Judge Clabuesch conceded that he has the authority to overrule Fritz’s selection of a job candidate, he testified that he has never done so. In fact, when Clabuesch and Fritz recently disagreed with respect to which of two candidates to hire for a vacancy, Clabuesch ultimately ceded to Fritz’s judgment. Clabuesch testified that Fritz personally selected all of the Probate Court’s current full and part-time employees, while Fritz specifically referenced having made the decision to hire Callender, Krueger and Trost.² Fritz testified that she and Clabuesch worked together to hire Rutkowski and that Clabuesch relied heavily on her decision. Once the Probate Court selects a particular candidate, Clabuesch and Fritz must go to the Board of Commissioners and seek a resolution authorizing the hire.

Although Fritz has the authority to lay off employees, she has not done so since taking the position of Probate Court Register/Court Administrator. In any event, layoffs must comply with the terms set forth in the collective bargaining agreement. There have not been any grievances filed involving employees of the Probate Court in the period preceding the hearing. However, Clabuesch testified that if one were to be filed in the future, Fritz would have the authority to adjust the grievance on Petitioner’s behalf.

² AFSCME staff representative Lori Greyerbiehl asserted that prior to the filing of the petition, Fritz told her that she had no involvement with the hiring of bargaining unit members and that her hiring authority was limited to seasonal employees. However, it appears that there are no seasonal employees working for Petitioner. In fact, Fritz testified that while there are casual employees working within the County, she had never heard the term “seasonal” employee prior to the hearing in this matter.

Although the Probate Court does not conduct routine performance evaluations, Fritz reviews the work of her employees and has sent work back when corrections are necessary. Every three years, Clabuesch and Fritz evaluate the duties performed by employees of the Probate Court to ensure that each individual is at the proper grade and step. Fritz also has the authority to recommend individuals for raises and promotions, though there is no evidence that she has ever done so.

The most recent position description identifies the position held by Fritz as “Register of Probate.” The document, which was created or modified in 2000, states that the purpose of the position is to “coordinate the non-judicial functions of the Probate Court” and that employees in the position “perform non-routine clerical work.” According to the job description, the Register of Probate position is responsible for “supervising and coordinating the intake, review and disposition of cases involving estates, mental illness determination and adoption.” The job description further states that the Register of Probate supervises other administrative employees of the Probate Court by instructing, assigning, reviewing and planning the work of others and by maintaining standards and allocating personnel.

Discussion and Conclusions of Law:

A unit clarification petition is appropriate for resolving ambiguities concerning the unit placement of individuals in newly created classifications or where there is ambiguity due to recent substantial changes in existing job classifications so as to raise a question as to appropriate bargaining unit placement. *City of Grand Rapids*, 19 MPER 43 (2006); *Lapeer Co*, 1993 MERC Lab Op 649; *Washtenaw Cmty College*, 1993 MERC Lab Op 781. However, we are prohibited by Section 13 of PERA from including supervisors and non-supervisors in the same bargaining unit. For that reason, we will entertain a unit clarification petition which seeks to remove a supervisor from a non-supervisory unit, even where the supervisor has been included in the unit by agreement or longstanding practice. *Wayne County Probate Court*, 1988 MERC Lab Op 726; *Detroit Dep’t of Health, Herman Kiefer*, 1986 MERC Lab Op 485, 490-491.

A “supervisor” is an employee whose principal work is substantially different from that of her subordinates and 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); *Faust Public Library*, 27 MPER 19 (2013); *City of Grand Rapids Police Dep’t*, 2000 MERC Lab Op 384. See also *Frenchtown Acquisition Co v NLRB*, 683 F3d 298 (CA 6, 2012). To “effectively recommend” means that the supervisor's recommendations are generally accepted by her superiors without an independent investigation. *Kalkaska Co and Sheriff*, 1994 MERC Lab Op 693. An individual is not a supervisor under PERA if her authority is limited to merely directing the daily work of other employees and/or making work assignments of a routine nature. See *City of Lansing*, 2000 MERC Lab Op 380; *Whitmore Lake Pub Sch*, 1999 MERC Lab Op 117. It

is the delegation of supervisory authority, rather than the exercise thereof, which is indicative of supervisory authority. See e.g. *Village of Lawrence*, 1997 MERC Lab Op 319.

The instant case presents a close question as to whether the Probate Court Register/Court Administrator possesses real and effective supervisory authority over employees sufficient to warrant her exclusion from the bargaining unit, as many of her duties are consistent with those of a lead worker rather than a supervisor. Although Fritz oversees the work of two full-time and two part-time employees of the Probate Court on a daily basis, the exercise of her authority is mostly of a routine nature. The record establishes that Fritz assigns tasks to employees based primarily on which staff member is the least busy, with consideration given to the individual's competency. The work performed by these employees is governed by protocols which dictate the requirements for each of the case types handled by the Probate Court. Those protocols have been established by Judge Clabuesch, not by Fritz. Fritz does not evaluate the performance of Probate Court employees; rather, she and Judge Clabuesch jointly review their job duties every three years for the sole purpose of ensuring that each employee is at the proper grade and step.

We have held that the authority to issue formal discipline, or to effectively recommend such discipline, is an important indicator of supervisory authority even if that authority is rarely exercised. *Tuscola ISD*, 2000 MERC Lab Op 226, 229. In the instant case, however, there is no evidence suggesting that Fritz has such responsibility. Although Judge Clabuesch asserted that Fritz has the power to discipline both full and part-time employees, the record establishes that she has never terminated an employee or even issued a written notice of discipline. Rather, the extent of Fritz's involvement in the disciplinary process has essentially consisted of her talking to employees about relatively minor issues such as behavioral problems. In fact, Fritz herself repeatedly referred to these discussions as "informal discipline" and she conceded that she would consult with Judge Clabuesch if her actions proved ineffective. Informal discussions with employees about perceived deficiencies in their work does not constitute true disciplinary authority. See *Riverview Cmty Sch*, 16 MPER 51 (2003). Serious problems involving court employees are brought before the seven-member judicial council which attempts to reach a consensus regarding discipline. Although Clabuesch theorized that Fritz would have the authority to overrule the council's decision if it pertained to an employee of the Probate Court, that has never occurred, and Clabuesch's testimony appears to be entirely speculative in that regard.

The record does indicate, however, that the Probate Court Register/Court Administrator has the responsibility for determining whether employees of the Probate Court work overtime and the authority to lay off employees, provided that such layoffs are consistent with the terms of the collective bargaining agreement between Petitioner and AFSCME Local 1518. Although no grievances have been filed involving Probate Court employees during the period in which Fritz has held the court administrator position, Judge Clabuesch testified Fritz has the authority to adjust grievances on Petitioner's behalf. Most significantly, the record establishes that Fritz has the effective

authority to make hiring decisions on behalf of the Probate Court. With respect to part-time employees, Fritz is solely responsible for conducting job interviews with candidates and for deciding which individual to hire for a particular vacancy. Both of the current part-time employees, Margaret Callender and Laura Trost, were hired by Fritz without any input from Clabuesch. Although Clabuesch participates in interviews for vacant full-time positions and, as Probate Court judge, has the authority to decide whom to hire, the record establishes that he relies heavily on Fritz's input and that he has never overruled one of her decisions. In fact, when Clabuesch and Fritz recently disagreed over which candidate to hire for a full-time position, Clabuesch ultimately deferred to Fritz's determination. Based upon these facts, we conclude that Fritz has the authority to effectively recommend that a full-time employee be hired.

The existence of any one of the statutory powers, regardless of the frequency of its exercise, is sufficient to confer supervisory status on the employee, as long as the existence of the power is real rather than theoretic. *MEA v Clare-Gladwin ISD* at 797. In accordance with the findings of fact and discussion above, we find that the Probate Court Register/Court Administrator qualifies for exclusion from the AFSCME bargaining unit as a supervisor. Accordingly, we issue the following order:

ORDER

Based upon the above findings and conclusions, the petition filed by Huron County is hereby granted, and the bargaining unit is clarified to exclude the position of Probate Court Register/Court Administrator.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 17, 2017