

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

In the Matter of:

ALPENA COUNTY,  
Public Employer,

Case No. 20-J-1586-UC

-and-

TECHNICAL, PROFESSIONAL AND OFFICEWORKERS  
ASSOCIATION OF MICHIGAN (TPOAM),  
Labor Organization-Petitioner.

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APPEARANCES:

Mika Meyers PLC, by Nathaniel R. Wolf and Regina M. Gilmour, for the Public Employer

Ed Jacques, TPOAM Service Director, for the Labor Organization

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

On October 8, 2020, the Technical, Professional and Officeworkers Association of Michigan (Petitioner or TPOAM), filed this petition for unit clarification with the Michigan Employment Relations Commission (Commission or MERC) 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 March 23, 2021, by Zoom video-conferencing, before Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules (MOAHR).<sup>1</sup> Based on the entire record, including the post-hearing briefs filed by the parties, we find as follows.

**The Petition:**

TPOAM filed the petition seeking to “clarify” and add the position of Network Technician to its existing bargaining unit. Alpena County (County or Employer) objects to the inclusion of the position into the TPOAM unit. The Employer asserts that the position is not newly created, has existed since 2005 or before, and has been historically excluded from the bargaining unit. The Employer further argues that due to the historical exclusion of the position, a unit clarification

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<sup>1</sup> MOAHR Docket No. 20-024762-MERC.

petition is not the mechanism to use to include the Network Technician position. Instead, a Representation petition is the appropriate means for adding the position to the existing bargaining unit.

Facts:

1. Representation History

Petitioner's unit has been represented by two different labor organizations during the bargaining unit's history. The first bargaining representative was the United Steelworkers (USW), which represented the unit from 2000 (or earlier) until 2015. The first collective bargaining agreement between the County and the USW was in effect from 2004 through 2006. That contract's recognition clause described the unit as follows:

All full time and regular part-time employees of the County of Alpena; BUT EXCLUDING all elected officials, supervisors, executives, Sheriff's Department employees, Airport Security Employees, Court Employees, Road Commission employees, Secretary to the Board of Commissioners, Central Dispatch employees, Library employees, lifeguards, temporary employees, casual employees and students.

The final contract between the USW and the Employer appears to have been in effect from 2012 through 2013 and contained that identical recognition language.

In September of 2015, TPOAM filed a representation petition seeking to become the authorized bargaining agent of the unit then represented by USW. Witness testimony indicated that a representation election was subsequently conducted by this agency. The TPOAM won the election and was certified by the Commission as the unit's exclusive bargaining representative on November 25, 2015.

TPOAM and the County executed their first collective bargaining agreement on January 28, 2016 that was effective from January 1, 2016, through December 31, 2018. The TPOAM contract's recognition clause was identical to the recognition clauses contained in the prior USW contracts as identified above.

In January of 2019, the TPOAM and County entered into a successor agreement effective from January 1, 2019, through December 31, 2021. The recognition clause of that agreement remained unchanged from the parties' first contract.

## 2. Creation of the Information Technology Department

The County created its Information Technology Department (IT Department) in 1999. The IT Department's first employee was Brad McRoberts who was hired as the IT Director. McRoberts testified that he interacted with other County employees on a daily basis, troubleshooting computer issues, answering technology questions and performing other duties.

McRoberts testified that sometime in 2004 or 2005, the County created the position of Network Technician.<sup>2</sup> Sol Orłowski was the first employee to hold the position of Network Technician. Several other individuals were identified as holding the Network Technician position since its creation, including McRoberts who after retiring in 2009, returned to the County and worked part-time in the Network Technician position from 2010 to 2012. Testimony provided by McRoberts and Tammy Bates, a long-time county employee and its Executive Manager since 2014, established that the Network Technician position has remained unchanged during its existence.

McRoberts further testified that at the time of the position's creation, he spoke with Mandy Smith, who at that time was the local USW President, about the position and its exclusion from the bargaining unit. According to McRoberts, Smith's response was that the USW was not "going to pursue anything."

Smith, who was the local USW President from 2000 through 2009 or 2010, was unable to recall the above-referenced conversation with McRoberts. Smith did however testify that while she could not recall when Orłowski was hired, she did recall working with the Network Technician and that she was aware he was not part of the USW bargaining unit. Smith further testified that Orłowski had been in his position "for a while" before local union executive members had discussions internally about pursuing the position's inclusion in their unit. Smith asserted that she and other local officers "spoke a bit" about the issue but that "it never went any further", and the discussion was "shut down". Smith testified that she also spoke with a USW sub-district administrator, who happened to be her father, about the position around the same time, and that while he expressed interest in including the position in the unit, she was unaware of whether anyone with the USW ever approached the Employer about including the position in the unit.

Catherine Murphy joined the unit represented by the USW sometime in 2000. She succeeded Smith as USW President in 2009 or 2010. Murphy testified that she was aware of both Orłowski's hiring in 2004 or 2005 and that his position was not included in the USW unit. In addition, Smith testified that Murphy was present during internal union discussions concerning the possible pursuit of action to gain the inclusion of the position in the bargaining unit. Murphy also testified that she was a member of the USW bargaining team that negotiated the 2004-2006 and 2012-2013 contracts. Significantly, Murphy also testified that she was involved in the unit's move from USW to TPOAM in 2015, and was the unit's president and a member of the bargaining team

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<sup>2</sup> This position is also referred to interchangeably as IT Technician.

that negotiated TPOAM's first contract with the County, as well as the parties' current contract. Murphy's testimony established that as far back as 2004 or 2005 she had knowledge of the Network Technician position and its exclusion from the union's bargaining unit. She conceded that she never attempted, under the USW or TPOAM, to seek the position's inclusion in the unit. Murphy remained the local TPOAM president until sometime in 2020.

### 3. TPOAM Representation

As noted above, TPOAM filed a petition to represent the unit in September of 2015. As part of the representation case process, in two separate emails sent on September 24, 2015, and October 8, 2015, the County provided the Commission's Elections Officer and USW and TPOAM representatives a voter eligibility list. The Network Technician position does not appear on either of those lists.

Paul Postal served as the TPOAM business agent from 2015 through 2018. He testified that he was unaware of the Network Technician during that time and that at no time did the Employer or anyone from within the unit bring the position to his attention. In 2018, Doug Wortley succeeded Postal as TPOAM business agent. He also testified that he was unaware of the Network Technician position and that no one from the unit ever brought the position to his attention. Michael Gerald, who serves as the current TPOAM business agent for the unit, testified that he was unaware of the Network Technician position until fall of 2020 when the unit's current president asked him about it.<sup>3</sup> It is undisputed, however, since the time when TPOAM assumed representation of the unit, neither of the negotiated collective bargaining agreements have included the IT Department in the list of departments covered by the agreement.

#### Discussion and Conclusions of Law:

The issue in this case is whether unit clarification is proper to determine the unit placement of the Network Technician position. A unit clarification petition is appropriate for resolving ambiguities in unit placement caused by the creation of a new position or by recent substantial changes in the job duties of existing classifications. *Tuscola Co Rd Comm*, 27 MPER 57 (2014); *Big Bay De Noc Sch Dist*, 17 MPER 81 (2004); *Genesee Co*, 1978 MERC Lab Op 552. A unit clarification petition is not appropriate to accrete positions historically excluded from the bargaining unit, whether that exclusion was by express agreement or acquiescence, unless the employer substantially changed the duties and responsibilities or hours of work of the position in question. *Grosse Pointe Pub Library*, 19 MPER 32 (2006); *Port Huron Area Sch Dist*, 1989 MERC Lab Op 763, 766; *City of St Clair Shores*, 1988 MERC Lab Op 485.

This Commission has long relied on the holding of the National Labor Relations Board in *Union Electric Co*, 217 NLRB 666, 667; 89 LRRM 1535 (1975), which we adopted in *Genesee Co*, 1978 MERC Lab Op 552, 556:

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<sup>3</sup> The record does not identify the current unit president, but the record established that this is someone other than Murphy as she left the position of president sometime prior.

Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

In the matter before us, the Employer contends that the position of Network Technician has been historically excluded from the bargaining unit.

Testimony provided by Smith, the local president at the time that the position was created, is critical to our analysis as it establishes that the USW, the bargaining agent at the time, knew about the position's creation and did nothing to pursue its inclusion into the unit. Murphy, who would succeed Smith as the local president in 2010, also admitted to having knowledge of the position and its exclusion from the unit. Significantly, Smith recounted conversations she had with other local union officials, as well as conversations with a USW sub-district administrator about the position and its exclusion from the unit and yet at no time did the union seek the position's inclusion in the unit. Accordingly, we find that the USW acquiesced to the position's exclusion. The question that remains is whether the TPOAM likewise acquiesced to the position's exclusion from the unit following its certification as exclusive bargaining representative of the unit?

In *City of Novi*, 30 MPER 41 (2016), the Commission was presented with a similar factual scenario. In that matter, the union sought to accrete a technical position which had duties related to the mapping of sewer and water lines. Sometime between the position's creation and the filing of the petition, a change in the authorized bargaining representative had occurred. The employer argued that accretion was inappropriate because the position had existed prior to the change in bargaining representative and the previous bargaining representative had acquiesced to the position's exclusion from the unit. In that case, however, the record established that while the position in question had been filled during the tenure of the prior bargaining representative, it had fallen vacant and remained unfilled for several years, including coincident with the change in bargaining representative. Relying on the extensive period of time during which the position had remained vacant, we held that the successor bargaining representative could not have acquiesced because it had no basis upon which to have gained awareness of the position's existence until such time as the employer sought to fill it again. Accordingly, because we determined that the other factors necessary to justify accretion of a position existed, and that the union had not acquiesced to the position's exclusion from the unit, we found unit clarification appropriate and ordered that the position be accreted into the unit.

The circumstances in the present case are markedly different from those in *City of Novi*. Here, the record indicates that Murphy, local Union president from 2009 or 2010 through 2020, knew that the position had been excluded from the unit as far back as 2004 or 2005. Murphy also was involved in the unit's transition from the USW to TPOAM, and continued as president of the

TPOAM for several years. During these periods, she never attempted to accrete the position into the unit.

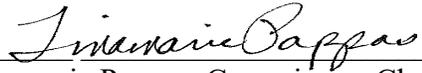
Admittedly, two prior TPOAM business representatives testified that they were unaware of the position during their periods of service, and the current TPOAM business manager noted that he recently learned of the position's exclusion in 2020. However, the fact remains that other TPOAM representatives had long been aware of the position's existence and exclusion from the bargaining unit. As such, the most recent president's desire to include the position in the unit does not alter or nullify the former officials' acquiescence to the exclusion of the position. Accordingly, we find that Petitioner TPOAM has failed to present sufficient grounds to change the position's historical exclusion from the unit.<sup>4</sup>

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

The petition filed by the Technical, Professional and Officeworkers Association of Michigan's to clarify its existing bargaining unit to include the position of Network Technician is hereby denied.

#### MICHIGAN EMPLOYMENT RELATIONS COMMISSION

  
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Tinamarie Pappas, Commission Chair

  
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William F. Young, Commission Member

Issued: December 17, 2021

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<sup>4</sup> Because we have concluded that the position has been historically excluded from the unit, and the Petitioner has not argued that the position has undergone any significant changes. In fact, testimony establishes the position has remained unchanged. It is not necessary for us to consider the issue of community of interest or any other factors relevant to an accretion analysis.