

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

In the Matter of:

INDEPENDENCE TOWNSHIP,
Public Employer,

Case No. 21-A-0108-RC

-and-

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Incumbent,

-and-

MICHIGAN ASSOCIATION OF FIRE FIGHTERS,
Labor Organization-Petitioner

APPEARANCES:

Rachel Thompson on behalf of the Public Employer

Michael L. O’Hearon, PLC, by Michael L. O’Hearon, for the Incumbent

Novara, Tesija, Catenacci, McDonald, & Baas PLLC, by Bryan W. Davis, for the Petitioner

DECISION AND ORDER
ON REPRESENTATION PETITION

On January 15, 2021, the Michigan Association of Fire Fighters (MAFF or Petitioner) filed the present petition 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, seeking to represent “All Captains of Independence Fire Department”. The International Association of Fighters (IAFF or Incumbent) is currently the certified exclusive bargaining representative for a unit which encompasses all full-time firefighters employed by Independence Township (Employer) including the fire captains at issue herein. The Incumbent opposes the petition, while the Employer takes no position.

An evidentiary hearing was held on April 14, 2021, by Zoom video-conferencing, before Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings

and Rules (MOAHR).¹ Based on the entire record, including the post-hearing briefs filed by the parties, we find as follows.

Findings of Fact:

The Independence Township Fire Department (Department) operates three fire stations located within Independence Township. The Department is comprised of three separate divisions: administration, operations, and fire prevention. The *de facto* head of the Department is the Fire Chief (Chief). After the Chief, the chain of command progresses in the following order - Fire Marshall, Fire Inspector, shift captains, lieutenants, and then the paramedics and engineers. Both the Fire Marshall and Fire Inspector are captain level positions. Additionally, the record establishes that there are currently three shift captain positions that are filled.

For several decades the IAFF has served as the bargaining representative for the Department's fire fighters. The current contract between the Employer and the IAFF defines the bargaining unit as "All full-time, full-paid employees of the Independence Township Fire Department except for those employees in clerical positions, and the Chief and (2) non-union Command Officers thereof." The record establishes that the two non-union Command Officer positions were created sometime in 2012 and have been vacant for approximately the past five years or longer. These positions were administrative in nature, with responsibilities including but not limited to tracking and coordinating mandated trainings, writing Standard Operation Guidelines (SOG) and Standard Operating Procedures (SOP), and participating in the implementation of the SOG's and SOP's.

The last person to hold a Command Officer position was the Department's current Chief. Witness testimony established that many of the Command Officer's administrative responsibilities are now reassigned among the various captain positions, including those duties related to SOG's and SOP's. However, Captain Patrick Stamper testified that he has never drafted and implemented an SOG or SOP without the express approval of the Chief. He noted that the lieutenants in the unit are also responsible for ensuring compliance with the SOG's and SOP's, although not involved to any significant degree with the writing or initial implementation of these guidelines and procedures. Captain David Bridgewater testified that since the Department's implementation of a Lexipol system about a year ago, which generates generic forms of protocols for SOG's and SOP's, the drafting of these documents by the captains has been reduced to making minor adjustments to as few as five to ten percent of the documents generated by Lexipol.

The specific qualifications necessary to obtain or advance in a bargaining unit position are identified in Article 18 of the parties' collective bargaining agreement. Although the requirements for the captain position are more numerous than those for the lieutenant and lower job classifications, the record testimony did not establish that these qualification distinctions had undergone any recent changes.

¹ MOAHR Docket No. 21-003859-MERC.

In the normal course of its firefighting operations, the Department maintains an eight-person shift overseen by a shift captain and including two lieutenants and lower personnel. These shifts are 24-hour shifts and run for three days on duty with four days off duty. The Department also maintains a “front office” staff that works rotating 10 and a half hour shifts from Monday through Friday. Included within the “front office” are the Fire Marshal, Fire Inspector, and others.

During the 24-hour shifts, the shift captain is in command followed by lieutenants. Captain Stamper testified that his job responsibility is to “run the department” for however long his assigned shift lasts, and that his number one priority is “firefighter safety.” He explained that the captain is the “command officer” for the shift. Stamper testified that his other duties as captain included “payroll, issuing overtime, scheduling, coordinate mandatory trainings” for OSHA and the like, and ensuring that all training requirements have been met, along with ensuring that all required licensures are up to date. Captain David Bridgewater echoed Stamper’s testimony. Captain Bridgewater further testified that although the captain is in command on a fire scene, directions to subordinates on the scene are given pursuant to an established “incident command structure.”

If a captain is not present during a shift, the highest-ranking lieutenant then assumes the leadership role of a captain and performs all of the duties required of the captain. Lieutenant Derek Moscovic testified that in such circumstances, the lieutenant acting as captain would receive a contractually negotiated pay stipend. Lieutenants have taken over for captains who were absent for extended periods of time due to leaves of absence and assumed all of the captain’s duties during those periods. Lieutenant Moscovic further testified that even in his position as lieutenant, his duties are similar to those of a captain in that he is responsible for making sure his subordinates are performing all of their required duties, and receiving all required training sessions, some of which he has led. His duties on a fire scene, like those of a captain, are to ensure his subordinates are operating in accordance with the Department’s SOG’s and SOP’s.

The record established that captain level positions, inclusive of the Fire Marshal and Fire Inspector, as well as lieutenants, have the authority to recommend disciplinary action and issue that discipline up to a certain point. Under the IAFF contract, bargaining unit members are subject to a progressive discipline system. Captains and lieutenants have the authority to issue coaching and counselling actions – the former is a record of a discussion regarding some issue while the latter is the first level of discipline. Any discipline above the counselling level, if recommended by a captain or lieutenant, must be authorized by the Chief who determines whether to impose the higher level discipline. Both the captains and lieutenants follow the Department SOGs and SOPs when determining whether an employee’s actions justify disciplinary action. Conversely, captains and lieutenants can be reported by subordinates for engaging in conduct not in compliance with Department guidelines, and such behavior is then evaluated by the Chief for possible disciplinary action.

The IAFF contract also sets forth a three-step grievance procedure. Under that process, the first step allows a grievant to take an issue directly to the Chief. The second step is submitted to

the Township's Supervisor and the third step is binding arbitration. While a bargaining unit member can initiate the first step meeting with the Chief, the unit's Grievance Committee decides whether to advance a grievance through the second and third steps. According to witness testimony, the Grievance Committee is comprised of the bargaining unit's three shift stewards and Vice-President. The captains can utilize the same grievance procedure as all other bargaining unit employees in the event of disciplinary action or other alleged contract violation by the Employer. At present, none of the unit employees holding a captain level position is on the Grievance Committee. There are no contractual provisions, or internal union protocols to prevent an employee in a captain level position from being elected as a shift steward or Vice-President and becoming eligible for serving on the Grievance Committee.

Discussion and Conclusions of Law:

A primary objective of the Commission is to establish the largest unit that is most compatible with the effectuation of the purposes of the Act, and which includes within that single unit those employees sharing a community of interest. *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952): Community of interest is determined 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 Schs*, 1997 MERC Lab Op 594; *Grand Rapids Pub Schs*, 1997 MERC Lab Op 98, 106. In making a unit placement determination, we are not required to find the "optimum" or "most" appropriate bargaining unit, but rather only a unit appropriate for collective bargaining based upon the facts of each particular case. *City of Lansing, Bd of Water and Light*, 2001 MERC Lab Op 13; *City of Zeeland*, 1995 MERC Lab Op 652.

In furtherance of the above principles, our longstanding policy is to encourage the stability of existing bargaining units by prohibiting employee severance or fragmentation of the unit unless there is a compelling reason. Employees are not permitted to sever from an existing bargaining unit unless they are able to prove an "extreme divergence of interest" between themselves and their existing unit. *Dearborn Public Schools*, 1990 MERC Lab Op 513. Moreover, we have consistently refused to disturb established bargaining relationships unless the historical unit violates some broader policy, even though a different unit determination may have been made had there been no bargaining history. *City of Midland*, 1978 MERC Lab Op 333, 336-337.

When considering appropriate bargaining units within fire departments we are constrained by Section 13 of PERA, which states in relevant part that no person employed in a fire department "subordinate to a fire commission, fire commissioners, safety director or similar administrative agency or administrator, shall be deemed a supervisor." MCL 423.213. Although PERA does not require the inclusion of supervisory employees in a fire department unit, the presence of such personnel in a fire department unit cannot be utilized to establish the inappropriateness of that unit. Accordingly, whether a firefighting position of "captain" or other position with authority satisfies

our established definition of “supervisor” is not an influential factor on the appropriateness of that “supervisory” position continuing to exist within an established firefighting bargaining unit such as that currently represented by IAFF.

In citing to certain aspects of the captain position that could prove to be supervisory in nature, i.e., policy creation and implementation as well as disciplinary powers, Petitioner argues that we should consider such “supervisory” authority not as dispositive of the captains’ inclusion in the unit, but as one factor to be considered in determining whether severance is appropriate. Even if we were to engage in Petitioner’s requested analysis, we find that severance is inappropriate.

The petition seeks to sever the captain positions from a bargaining unit that has existed for decades. Petitioner relies heavily on the fact that since the point at which the non-union Command Officer positions were vacated, the captains have performed the command officers’ mainly administrative duties, and that the performance of such duties renders their captains’ interests divergent from those of the remaining bargaining unit members.

The record evidence however, revealed that the captains took over such duties five or more years ago, which is far from a new development justifying severance. The record further established that the captains and lieutenants were performing some of these duties even prior to those positions becoming vacant. Moreover, the record established that in the absence of the captain, the lieutenants perform virtually all of the same former command officer duties that the captains perform, and that the performance of such duties would continue for as long as the captain is absent whether days, weeks, or even months. These facts militate against a finding of any significant recent divergence in community of interest between the captains and the remaining members of the unit, particularly the lieutenants, a group for whom severance is not sought.

Petitioner further argues that the contractual grievance procedure “creates an inherent conflict between the captain and the remainder of the bargaining unit.” For example, Petitioner argues that there could be a situation where the Grievance Committee would be forced to decide whether to advance a grievance predicated on a captain’s decision to recommend discipline.

We were faced with a similar issue in *Delhi Charter Township*, 27 MPER 28 (2013). There, we considered whether an employer’s attempt to exclude the newly created position of “recruitment and retention coordinator” from a firefighting bargaining unit was appropriate. Addressing what we deemed the “gravamen” of the employer’s objection that the position’s inclusion in the bargaining unit could pose a conflict between its loyalty to the union and its duty to the employer, we stated:

We are not unaccustomed to the issue of some members of a bargaining unit potentially having duties which could, or do, place them in conflict with the interests or views of other members of the bargaining unit. In an even sharper context of actual conflict between the interests of different members of a unit, we

have indicated that we will not exclude from bargaining units [those] employees who investigate activities of their coworkers, nor will we expand the definition of confidential or executive employee to cover such positions. [Internal citation omitted].

We went on to stress that “[i]t is the obligation of employees, while on the job, to carry out the Employer's policies, notwithstanding any possible personal disagreement as to such policy choices.”

We see no reason not to apply that same reasoning and expectation in this case. The captain positions in the bargaining unit have certain duties that are assigned to them that may or may not appear to conflict with the policies or decisions of the Union, specifically concerning the Grievance Committee. However, that actual conflict or perceived conflict is nothing new given this unit's longstanding composition, or the composition of countless other fire departments across this state in light of the statutory constraints contained with Section 13 of the Act. Furthermore, since the lieutenants also have the authority to issue discipline, any perceived conflict between the captain positions and the policies of the Union are, and have been, shared by the lieutenants as well, a group which would remain in the unit if we were to grant the Union's petition.

Accordingly, for the reasons set forth above, we conclude that the Petitioner has failed to demonstrate the existence of an extreme divergence of interest between the captains and the remaining bargaining unit members sufficient to justify the severance of those positions from the historical composition of the existing bargaining unit.²

ORDER

The Michigan Association of Fire Fighters' petition is hereby denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Tinamarie Pappas, Commission Chair



William F. Young, Commission Member

Issued: December 17, 2021

² In arriving at our decision, we have not relied on any record testimony concerning the motivation of the Union or any individual captains for seeking severance as we do not find such evidence relevant or necessary to our determination on the unit issue before us.