

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

In the Matter of:

DETROIT TRANSPORTATION CORPORATION,
Public Employer,

Case No. UC15 C-007
Docket No. 15-032515-MERC

-and-

MICHIGAN FRATERNAL ORDER OF POLICE
LABOR COUNCIL,
Labor Organization-Petitioner.

APPEARANCES:

Pepper Hamilton PC, by Robert C. Ludolph, for the Employer

Mark A. Porter, for the Petitioner

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

On March 27, 2015, the Michigan Fraternal Order of Police Labor Council filed a petition for unit clarification with the Michigan Employment Relations Commission (the Commission) pursuant to § 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213. A hearing was conducted for the Commission on the petition on June 12, 2015, by Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System. Based on the entire record, including post-hearing briefs filed on July 17, 2015, the Commission finds as follows.

The Petition and Positions of the Parties:

Since July 2014, Petitioner Michigan Fraternal Order of Police Labor Council has represented a bargaining unit of nonsupervisory transit police officers employed by the Detroit Transportation Corporation (DTC). The Employer owns and operates the Detroit People Mover, a light rail transit system operating within the City of Detroit. Transit police officers provide security on this system and at the Rosa Parks Transit Center operated by the City of Detroit Transportation Department (DDOT). Under an agreement between the Employer and the City of Detroit executed in May 2014, transit police officers employed by the Employer also provide security on certain bus lines operated by DDOT.

The petition was filed after the Employer prepared a job description for and posted a new position with the title of investigator. A transit police officer and member of the unit had been performing the duties of the investigator for approximately six months before the position was posted and continued to perform these duties on the date of the hearing. Petitioner seeks an order excluding the position from its unit on the basis that it is confidential and/or supervisory. According to Petitioner, the position has duties that create a conflict of interest precluding its inclusion in the unit. These duties include: conducting internal investigations into complaints of transit officer misconduct; submitting reports to the Employer's executive sergeant, deputy chief and chief that include recommendations on whether criminal or other misconduct has occurred; and engaging in confidential discussions with supervisors about the investigations. The Employer asserts that the work performed by the investigator is work that transit officers have traditionally performed and that the investigator shares a community of interest with Petitioner's bargaining unit. According to the Employer, the position is neither supervisory nor confidential as the Commission defines those terms. It maintains that placement of the position in Petitioner's unit is appropriate.

Findings of Fact:

Duties of Transit Police Officers

By a letter of understanding executed by the Employer and the Detroit Police Department (DPD) in 2011, transit police officers are commissioned by the DPD as special police officers. As such, they have the authority to make felony and misdemeanor arrests and issue tickets, under the circumstances set out in the letter of understanding. The special police authority of transit police officers is limited by the letter of understanding to the People Mover, the Transit Center, the buses to which transit police officers are assigned, and areas adjoining these locations. The special police powers of transit police officers can be exercised only when they are on duty. Transit police officers carry firearms on duty and are responsible for abiding by the firearms regulations and procedures established by the DPD and applicable to DPD officers. Before being commissioned as a special police officer, a transit police officer must complete a 164.5 hour training course at the Detroit Police Academy. Many transit police officers employed by the Employer formerly held positions as certified police officers.

Transit police officers report to a sergeant employed by the DTC. Their job description describes their duties and responsibilities as follows:

1. Patrols facilities (trains and/or buses) to ensure order and prevent the commission of crime.
2. Investigates crimes or incidents, preserves evidence, identifies witnesses and protects the crime scene pending the arrival of investigating officer(s) and supervising official(s).

3. Responds to calls for police service within the jurisdiction.
4. Provides assistance to transit patrons to include routing information and emergency first aid, including cardiopulmonary resuscitation.
5. Performs revenue protection duties with the DTC and DDOT systems, on armored truck/train, on the revenue collection loading docks and within the revenue collection facility.
6. Performs rescue functions at accidents, emergencies and disasters.
7. Transports and escorts detainees and mental patients, using handcuffs and other appropriate restraints.
8. Breaks up physical altercations.

Transit police officers typically conduct what Employer Deputy Chief Dwayne Love characterized as “street” investigations at incident scenes. This may involve interviewing witnesses. Transit officers write incident reports which they turn in to their supervisors. As set out above, transit police officers may also arrest or issue tickets to civilians at the scene when appropriate.

The 2011 letter of understanding between the DPD and the Employer includes this paragraph:

The Detroit Transportation Corporation will cooperate fully with the Detroit Police Department and all reported crimes, arrests, and allegations or complaints of official misconduct received or made by Detroit Transportation Corporation Transit Officers shall be reported to the Detroit Police Department. The Detroit Police Department shall have the authority to investigate any matter at its discretion, including but not limited to the use of force and use of firearms.

It appears from the record that until 2014, all incidents that required further investigation of possible criminal conduct, whether by a transit officer or a citizen, were turned over to the Detroit Police Department after submission of the incident report by the transit officer. After the Employer agreed to begin providing security on DDOT buses in early 2014, it hired more transit officers. The Employer and the DPD then orally agreed that, because of the strained resources of the DPD, if an incident needed further investigation to determine if a citizen had engaged in criminal activity, the Employer would do the investigation. Per that agreement, only if the Employer’s investigation indicated criminal conduct would the matter be handed over to the DPD.

According to Love, however, the Employer’s policy is to turn over to the DPD all complaints of possible criminal misconduct by transit police officers, and the Employer’s oral agreement with the DPD did not alter this policy. Love also testified that no such

complaints have been filed since the Employer began providing DDOT security in 2014.

Origin of the Investigator Position

Love testified that by the date of the hearing, the DDOT bus lines were responsible for ninety percent of incident reports filed by transit police officers. In addition to hiring more transit officers, in the early fall of 2014, the Employer began assigning two transit police officers, George Moore and John Coleman, to conduct more complex investigations. As Love described it, the Employer wanted someone to do investigations that involved some legwork and that would formerly have been conducted by the DPD. Both Moore and Coleman are former police officers with investigation experience. Moore and Coleman were relieved of regular patrolling duties and assigned to do investigations on a full-time basis. It was understood at the time that Moore and Coleman would investigate complaints filed against transit officers if these complaints did not allege criminal misconduct.

At a bargaining session for a new collective bargaining agreement in October 2014, the Employer gave Petitioner an organizational chart that included a “G. Moore” and a “J. Coleman” in a box titled “Internal Investigations.” The chart showed them reporting directly to Love. Sometime after that date, Coleman went back to performing the duties of a regular transit police officer.

In January 2015, Petitioner sent an email inquiring about the “internal investigations” positions and received a reply stating that no such position existed. However, on or about March 17, 2015, the Employer posted a position titled “investigator” as a new position open to members of Petitioner’s bargaining unit. The March 17, 2015, posting did not indicate whether or not the investigator position was a bargaining unit position. On March 27, 2015, Petitioner filed this unit clarification petition seeking clarification of whether the position was in its unit and asserting that it should be excluded as confidential.

In April 2015, while the petition was being processed, Moore was assigned to investigate non-criminal misconduct complaints filed against two transit officers. These were the first, and as of the date of the hearing, the only complaints involving other transit officers that he had been assigned to investigate. The complaints arose from an encounter between a transgender person and two transit officers and alleged that the transit officers had been disrespectful and unprofessional.

At a conference held on the petition in May 2015, the Employer stated that it had taken down the posting for the position. However, it was clear at the hearing that the Employer intended to continue to use Moore or some other transit officer to conduct investigations and that these investigations would include at least some misconduct complaints filed against other transit officers.

Moore described his actual job duties as follows. He receives his assignments

directly from the Employer's Chief or Deputy Chief Love. He has investigated acts of vandalism on Employer property, and complaints of larceny by DDOT drivers. He has assisted the State Police and the DPD in investigating homicides and fatal accidents involving buses. Moore confirmed Love's testimony that he was assigned to investigations requiring additional legwork, and testified that he is not normally called to the scene of an incident or crime, but does his investigations later. Moore interviews witnesses and has them sign written statements. He also reviews video evidence if it is available. He sometimes interviews transit officers if they have knowledge of the incident that he is investigating, e.g., if he is investigating a bus accident and a transit officer was on the bus. He then prepares reports that contain, at a minimum, factual findings based on the evidence he has discovered. Moore attaches all the witness statements he has obtained to his report. Moore then submits his report to Employer Executive Staff Sergeant Kristy Cross.

In investigating the two complaints filed in April 2015 against the transit officers, Moore first contacted the complainant and took a statement. He then attempted to interview the two transit officers who were the subject of the complaint. The officers asked to talk to a union representative. Moore brought the situation to the attention of Cross, who drafted a set of written interview questions in the form of a questionnaire for the two officers and incorporated them into a memo stating that the officers were to return their answers to Moore. Moore then delivered the memo to the two officers. The two officers filled out the questionnaire and gave it instead to a Petitioner representative. The Petitioner representative gave the questionnaire to Human Resources Director Parnell Williams and told him that it was not appropriate for Moore to investigate transit officer misconduct.

According to the Employer, it does not contemplate giving the investigator the authority to compel transit officers to answer the investigator's questions. Presumably, if a transit officer does not agree to be interviewed by the investigator, the staff sergeant will use his or her authority to compel the transit officer to answer questions and then turn the answers over to the investigator, as was done in the above case.

In cases involving complaints of officer misconduct, Moore's report includes both factual findings and a discussion and recommendation as to whether the transit officer has violated work rules or internal policies. The report does not include a recommendation for discipline. As with other types of reports, Moore attaches all witness statements. Moore submits his report to Staff Sergeant Cross. Cross then makes a recommendation and forwards it to Love, who makes his own recommendation and forwards the report to the Chief. After Moore has submitted his report, he may be called upon to answer questions from his supervisors regarding the details of the investigation. Moore is required to keep the contents of his report and his conversations with Cross, Love and the Chief confidential until the investigation is complete and action has been taken. The Chief, in consultation with Love, eventually issues a written decision on whether work rules have been violated and what, if any, discipline should be issued. At the time of the hearing, the Chief had not yet made a decision on the two complaints of alleged officer misconduct investigated by Moore.

Discussion and Conclusions of Law:

Petitioner argues that the investigator should be excluded from its bargaining unit as a confidential employee. We have defined a confidential employee as one who formulates, determines, and effectuates management policy with regard to labor relations, or who assists in a confidential capacity to such a person. *City of Monroe*, 20 MPER 115 (2007); *City of Hazel Park*, 21 MPER 40 (2008).

In *City of Muskegon Heights*, 1979 MERC Lab Op 1047, 1050, the employer asserted that the secretary to the police chief should be excluded from a clerical bargaining unit as confidential based on her access to documents involving ongoing disciplinary investigations of police officers. In that case, the same union represented both the clerical unit and a unit of the employer's police officers. We explicitly rejected the employer's argument that the definition of a confidential employee should be extended to employees with access to sensitive information not involving labor relations, like the disciplinary investigation reports in that case. In *City of Grand Rapids*, 1979 MERC Lab Op 198, we rejected the employer's argument that a police captain's responsibility for investigating internal complaints against police officers, including complaints against other supervisory officers, created a conflict of interest that justified his exclusion from a unit of police supervisors as a confidential employee. We have also consistently held that the fact that an employee has access to confidential information not generally accessible to other employees or the union, such as personnel files or financial data, is not sufficient to establish confidential status under our definition. *Saginaw ISD*, 1992 MERC Lab Op 3; *Saginaw Co Rd Comm*, 1993 MERC Lab Op 227; *Lapeer Co and 40th Judicial Circuit Court*, 1998 MERC Lab Op 611, 620-621. Here, the investigator has no involvement with collective bargaining or labor relations. We conclude that the fact that the investigator is privy to information regarding ongoing disciplinary investigations that is not available to other unit members or to Petitioner, does not make the position confidential under our definition of that term or justify its exclusion from the bargaining unit.

Petitioner also argues that the investigator is a supervisor. A supervisor, as we define that term, is an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or adjust their grievances, or effectively recommend such action. See, e.g., *City of Warren*, 26 MPER 38 (2013). The fact that an employee has input into or makes recommendations concerning personnel decisions does not mean that the employee has effective authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees and is insufficient to establish supervisory authority. *City of Grand Rapids*, 19 MPER 69 (2006). Rather, effective authority in personnel matters means that the employee's supervisors generally accept his or her recommendations without an independent investigation or independent consideration. *Bronson Methodist Hospital*, 1973 MERC Lab Op 946, 951-952; *Village of Paw Paw*, 2000 MERC Lab Op 370, 373.

The investigator has no subordinates. We have, however, found employees who

do not regularly direct or oversee subordinates to be supervisors when they have the power to discipline or effectively recommend discipline. In *Livonia Pub Schs*, 1991 MERC Lab Op 517, we held that asbestos inspectors who had the authority to effectively recommend discipline for employees who violated safety regulations or jeopardized the employer's ongoing asbestos inspection and abatement process were supervisors. In *Fairview Medical Care Facility*, 1981 MERC Lab Op 677, we concluded that infection control officers who had the authority to direct other employees in infection control and to discipline them for infection control violations were supervisors. In both *City of Grand Rapids*, 1979 MERC Lab Op 1175 and *Macomb County Road Comm'n*, 1978 MERC Lab Op 848, we held that safety officers with the authority to directly issue discipline for safety violations were supervisors within our definition. But see *City of Detroit*, 1997 MERC Lab Op 346, in which we concluded that a public works district relations coordinator was not a supervisor. The employee in that case had the authority to direct employees involved in remediating environmental hazards, but lacked authority to effectively recommend that they be disciplined.

The investigator in this case investigates the facts surrounding allegations of employee misconduct and makes recommendations as to whether rule or policy violations have occurred. However, he does not make a recommendation concerning discipline and he attaches copies of all witness statements upon which his factual findings are based to his report to be reviewed by his supervisors. We find no evidence that the investigator has, or will in the future, effectively recommend that an employee be found guilty of a rule or policy violation or be disciplined. We also note that investigating complaints against other employees is a very small part of the investigator's job, and the investigator has no other involvement in personnel matters. We conclude that the investigator does not qualify as a supervisor under our definition of that term and should not be excluded from Petitioner's unit on that basis.

Petitioner also argues that the investigator should be excluded from its unit because, in the internal affairs section of the DPD, investigations into police officer misconduct are carried out only by supervisors with the rank of sergeant or above. We note that the DPD is the largest municipal police agency in the State of Michigan, and that its officers have broader responsibilities than the Employer's transit police officers. Even if the situations were comparable, however, we are not bound to consider the voluntary practices of other police agencies in making unit determinations. Petitioner also argues that the Employer is violating the letter of understanding between the Employer and the DPD by assigning its employees to investigate alleged misconduct by its transit officers. However, this has no bearing on the question before us, which is whether a position assigned the duties which the Employer proposes to assign to the investigator is appropriately included in Petitioner's bargaining unit.

We conclude, in accord with the findings above, that the investigator position is neither confidential nor supervisory. We find no basis for excluding the position from Petitioner's unit of nonsupervisory transit police officers, and we issue the following order.

ORDER

Petitioner's request to clarify its bargaining unit of nonsupervisory transit police officers to exclude the position of investigator is denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward A. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 15, 2016