

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

Clearcreek Firefighters, IAFF, Local 3798,

Employee Organization,

and

Clearcreek Township Board of Trustees, Warren County,

Employer.

Case No. 97-REP-11-0300

DIRECTIVE DISMISSING REQUEST FOR RECOGNITION
(OPINION ATTACHED)

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich: May 6, 1999.

On November 11, 1997, the Clearcreek Firefighters, IAFF, Local 3798 ("Employee Organization") filed a Request for Recognition seeking to represent certain employees of the Clearcreek Township Board of Trustees, Warren County ("Employer"). On December 2, 1997, the Employer filed Objections to the Request for Recognition, asserting that an employee in the proposed unit was a supervisor and that the proposed unit was not appropriate. On January 22, 1998, the State Employment Relations Board ("SERB" or "Board") directed this matter to hearing to determine an appropriate unit and for all other relevant issues.

An evidentiary hearing was held on March 25, 1998. On May 27, 1998, a Hearing Officer's Recommended Determination was issued. On August 6, 1998, the case was remanded to the Hearings Section to take additional evidence. The supplemental hearing was held on October 23, 1998. On January 13, 1999, the Supplemental Recommended Determination was issued. On January 25, 1999, the Employee Organization filed its exceptions to the Supplemental Recommended Determination. On February 8, 1999, the Employer filed its response to the exceptions.

The Board has reviewed the Hearing Officer's Recommended Determination, the Supplemental Recommended Determination, the exceptions filed by the Employee Organization, and the Employer's response. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Findings of Fact and Conclusions of Law in the Recommended Determination and the Supplemental Recommended

Determination. The Board finds that the Captain of Emergency Support Services is a supervisor pursuant to Ohio Revised Code § 4117.01(F)(2). Therefore, the appropriate unit in this case is:

Included: All full-time fire fighters and paramedics below the rank of Chief, including the Captain of Administration and Information Services;

Excluded: Chief, the Captain of Emergency and Support Services, and all part-time employees.

The Board also finds that the exclusion of the Captain of Emergency Support Services from the proposed unit is a substantive change to the unit. As a result, the Request for Recognition must be dismissed, pursuant to *In re City of Hilliard*, SERB 86-045 (11-20-86).

It is so directed.

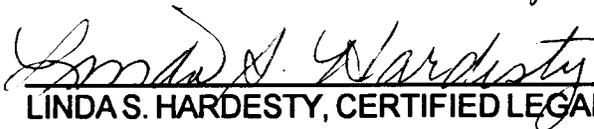
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member, concur.



SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Court of Common Pleas within fifteen (15) days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party by certified U.S. Mail, return receipt requested, on this 21st day of May, 1999.



LINDA S. HARDESTY, CERTIFIED LEGAL ASSISTANT

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OPINION

GILLMOR, Vice Chairman:

This representation case comes before the State Employment Relations Board upon the issuance of a Recommended Determination on May 27, 1998, and a Supplemental Recommended Determination on January 13, 1999, the exceptions filed by the Clearcreek Firefighters, IAFF, Local 3798 and the response filed by the Clearcreek Township Board of Trustees, Warren County. For the reasons below, we find that the Captain of Emergency Support Services is a supervisor pursuant to Ohio Revised Code ("O.R.C.") § 4117.01(F)(2) and that the Request for Recognition must be dismissed.

I. BACKGROUND

The Clearcreek Township Board of Trustees, Warren County ("Employer" or "Township") operates the Township's fire department. The present staffing at the fire department is one full-time Chief, two full-time Captains, three full-time Firefighter/Paramedics, and several dozen part-time employees including Lieutenants, Firefighters, and Paramedics. The two Captains report directly to the Chief.

On November 12, 1997, the Clearcreek Firefighters, IAFF, Local 3798 ("Union"), filed a Request for Recognition seeking to represent a bargaining unit consisting of all Firefighters and Captains employed by the Township; the proposed unit excluded the Chief, Assistant Chief, and Bureau Chiefs. On December 2, 1997, the Employer filed an Objection to Request for Recognition. The Employer contended that the proposed bargaining unit was not appropriate and that the Captain of Emergency and Support Services should be excluded from the unit as the Chief's designee pursuant to O.R.C. § 4117.01(F)(2). On January 22, 1998, the State Employment Relations Board ("Board") directed this matter to hearing to determine whether the proposed bargaining unit was appropriate and for all other relevant issues.

A. The Chief's Duties

Bernie Becker began employment as the Fire Chief on January 20, 1997. Chief Becker did not alter the basic command structure from his immediate predecessor, which had been in place since 1994. In March 1997, he realigned the Captain positions by naming Michael Miller the Captain of Emergency and Support Services ("ESS Captain") and by naming Timothy Simpson the Captain of Administration and Information Services ("AIS Captain").

Chief Becker usually works 8:00 a.m. to 5:00 p.m., Monday through Friday. His schedule changes as needed. He rotates with the two Captains and the four part-time Lieutenants as the Duty Officer on weekends. The Duty Officer is in charge of any incidents that arise. The Duty Officer sets up the command, evaluates the situation, and can supervise the incident. The Duty Officer usually does not go out on every run. A Duty Officer is not considered to be in charge of the station, as some of them report to an incident from home, but can handle personnel needs. If an employee gets sick in the middle of a shift, the employee is instructed to call the Duty Officer who, in turn, contacts the Chief or whoever is in charge in the absence of the Chief. If called by the Duty Officer,

the ESS Captain usually makes the decision himself; if called by the Duty Officer, the AIS Captain always contacts the Chief.

On Monday mornings, Chief Becker participates in a Safety Meeting with the Township's Police Chief and Assistant Administrator. They discuss recent incidents, ongoing projects, and personnel safety issues. If the Chief cannot attend this meeting, no one attends in his absence. Chief Becker is also responsible for submitting the payroll on alternate Mondays. He frequently assists the administrative assistant to make sure people are paid correctly and all accounts are accurate. In his absence, the AIS Captain handles such matters.

On Tuesdays, Chief Becker meets with both Captains for an Executive Leadership Team Meeting at 8:30 a.m. They discuss training issues, personnel issues, assignments, schedules, and assistance needed. These meetings are not held in the Chief's absence.

On alternate Tuesdays, Chief Becker prepares for the upcoming Trustees' meeting by preparing all personnel issues and purchases for the 3:00 p.m. Staff Meeting. The Staff Meeting is attended by all department heads as well as the Township's Administrator and Assistant Administrator. The participants discuss personnel matters, purchasing of items, crime prevention issues, and zoning issues. The Chief's spending limit without prior authorization is \$500; the Captains' limit is \$400. Once the ESS Captain went to the Trustees in the Chief's absence for approval of an item costing more than \$500.

Every Wednesday, Chief Becker attends all-day paramedic training. On all of those occasions, the ESS Captain is in charge if he is present.

On alternate Thursdays, Chief Becker prepares for the biweekly Trustees' Meeting that begins at 6:30 p.m. and lasts from forty-five minutes to two hours. In his preparations,

the Chief may have letters typed or perform research on a particular purchase recommendation. The ESS Captain prepares proposals for purchasing expense items such as truck tires.

Clearcreek Township emergency and police vehicles are dispatched by the City of Springboro. On alternating Fridays, Chief Becker, the Clearcreek Police Chief, the Springboro Police Chief, and the Springboro Supervisor of Communications meet to review dispatching discrepancies, errors, and issues from the Executive Leadership Meeting. If the Chief cannot attend this meeting, no one attends in his absence.

Overtime pay is authorized only by Chief Becker or the person acting in his absence. The ESS Captain has authorized overtime unilaterally in the Chief's absence once, but never when the Chief has been available to authorize it. The AIS Captain would exercise that authority only in the absence of both the Chief and the ESS Captain.

The following duties are the responsibility of Chief Becker that have not been performed by anyone in his absence: preparing and submitting the Fire Department's annual budget to the Township Trustees; making the formal recommendation to the Township Trustees to hire someone or to retain a probationary employee at the end of the probationary period; recommending to the Township Trustees to waive or add steps to the process for hiring personnel; making a recommendation to the Township Trustees to approve a parade permit; submitting Standard Operating Procedures or Rules or Regulations to the Township Trustees for approval; recommending discipline or other action on a citizen's complaint to the Township Trustees; approving temporary promotions; extending an employee's probationary period; working with the bank to determine building payoff amount and process; and redoing a time study on the fire fighters' and paramedics' response times and hours worked. The Chief develops position descriptions. The Chief has access to the personnel files secured in the secretary's office.

B. The ESS Captain's Duties

The ESS Captain has general responsibility for operations. He makes fire runs, conducts fire inspections, arranges for arson investigations, and recommends purchases. He attends investigation meetings in Montgomery County and meets with different companies or building inspectors on fire inspections. The position description states that the ESS Captain "is the Executive Officer, second in command, and may be charged, with prior approval, departmental responsibilities, in the absence of the Chief of Department."

The ESS Captain is the senior incident commander on the scene in Chief Becker's absence. On occasions when both Captains have been indicated as in charge in the Chief's absence, the ESS Captain has been designated as the primary person in charge with the AIS Captain designated as his relief. The ESS Captain has a slightly higher salary than the AIS Captain. The ESS Captain also assists the Chief in performing his responsibilities. The Chief has designated the ESS Captain as his second in command to the Warren County Fire Chiefs Association.

Only Chief Becker and the ESS Captain are recognized as able to qualify people as fire apparatus operators or pump operators for the two pieces of equipment. Only the Township Trustees can discharge someone on the recommendation of the Fire Chief. Four or five years ago, Captain Miller told an employee that he was fired and sent him home; Captain Miller was then told that this cannot be done without the Trustees' approval to terminate an employee.

The ESS Captain is the quartermaster for uniforms and equipment. He recommends purchases, but only Chief Becker decides what will comprise the uniforms after obtaining the Township Trustees' approval.

When Chief Becker goes on vacation, he does not leave a phone number where he can be reached. As second in command, the ESS Captain is in charge in the Chief's absence. He maintains the status quo and does not change policies, procedures, or daily operations. If he needs any advice, he calls the Assistant Administrator of the Township. The ESS Captain has never attempted to access personnel files. He does not have access to the Chief's locked office in the Chief's absence.

C. Other Duties

The AIS Captain has general responsibility for administrative matters, such as scheduling, grant procurement, payroll, and computerization. He prepares a monthly report to the Township Trustees that lists: the number of fire runs, EMS runs, total runs, fuel logs, total miles put on the vehicles, response times, and trainings held each month, including attendance. The AIS Captain communicates about station issues such as cleanliness, lighting, and parking issues. The position description states that the AIS Captain "is an Executive Officer, third in command, and may be charged, with prior approval, departmental responsibilities, in the absence of the Chief of Department." Chief Becker has designated the AIS Captain as his third in command to the Warren County Fire Chiefs Association.

The ESS and AIS Captains both work an alternating schedule of ten-hour days, Monday through Thursday, or Tuesday through Friday, from 6:00 a.m. to 5:00 p.m. For the first four or five months of Chief Becker's employment, he lived outside the Township; when he was out, the ESS Captain was in charge and could exercise the Chief's authority. The AIS Captain was placed in charge only when the ESS Captain was unavailable.

Employee interviews are conducted on a team basis. The ESS Captain has headed a team of five interviewers for full-time employees during the last two hiring opportunities; the AIS Captain and Chief Becker have headed a team for the part-time employee

interviews. In each situation, the Chief makes a recommendation to the Township Trustees. The full-time personnel are evaluated by the Captains, while the part-time personnel are evaluated by the Lieutenants.

Each Tuesday is used for training. Training is scheduled from 7:00 p.m. to 10:00 p.m. Chief Becker attends as many sessions as he can. The training classes are videotaped and shown on Wednesday mornings to those individuals who could not attend the previous evening. The ESS Captain has primary responsibility for training functions, but he is assisted by the AIS Captain. The ESS Captain has authorized small sums for training expenses such as \$25-50 amounts, but only the Chief has ever authorized reimbursement for meal allowances, car allowances, and overnight-stay costs associated with training.

Grievances are presented to the Captains at the second step of the process, to the Fire Chief at the third step, and to the Township Trustees at the fourth step. The Captains have never acted at step three in the Chief's absence.

II. DISCUSSION

A. The ESS Captain Is a Supervisor Pursuant to O.R.C. § 4117.01(F)(2)

The ESS Captain is a "member of a fire department" within the meaning of O.R.C. § 4117.01(P). The definition of supervisor in O.R.C. § 4117.01(F)(2) applies in this instance. O.R.C. § 4117.01(F)(2) provides in relevant part:

With respect to members of a police or fire department, no person shall be deemed a supervisor except the chief of the department or those individuals who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department.

Those individuals found to be supervisors under this definition are not "public employees" pursuant to O.R.C. § 4117.01(C)(10). Whether a position is a "supervisor" is a question of fact that must be determined on a case-by-case basis. *In re Mahoning County Dept of Human Services*, SERB 92-006 (6-5-92); *In re Lucas County Recorder's Office*, SERB 85-061 (11-27-85). The party seeking an exclusion from a bargaining unit under O.R.C. § 4117.01 has the burden of proof. *In re Fulton County Engineer*, SERB 96-008 (6-24-96); *In re Franklin Local School Dist Bd of Ed*, SERB 84-008 (11-8-84).

At issue is the interpretation of the words "authorized to exercise the authority and perform the duties of the chief of the department" in O.R.C. § 4117.01(F)(2). In *City of Canfield v. SERB*, 1991 SERB 4-74 (10th Dist Ct App, Franklin, 7-23-91) ("*Canfield*"), the court interpreted this provision in deciding whether the lieutenants of the Canfield Police Department were supervisors. The department consisted of a police chief, three lieutenants, six patrol officers, and four part-time patrol officers. Each of the lieutenants in the Canfield Police Department had served as acting police chief in the absence of the police chief. If the lieutenants and the chief were not on duty, a patrol officer would be left in charge. Under these facts the court found that none of the lieutenants were supervisors under O.R.C. § 4117.01(F)(2) because no lieutenant was specifically designated as the acting chief. The Court explained in relevant part:

The evidence here indicates that any of the lieutenants may be authorized to act in place of the chief in his absence. However, it is not automatic that a particular lieutenant so act. In other words, a lieutenant is not authorized to act for the chief as acting chief in the chief's absence, unless the lieutenant is specifically authorized either by the chief or the city manager to do so. There is no automatic chain of command whereby a specific lieutenant assumes the authority of the chief in the chief's absence. There is no routine assumption of authority by any of the lieutenants. Occasional temporary assignments as acting chief of police do not make a lieutenant a "supervisor" within the contemplation of the statutory definition. *Id.* at 4-75.

The present case exhibits a direct contrast to *Canfield, supra*. A specific position, the ESS Captain, has been officially designated second in command. The record demonstrates an automatic chain of command: when the ESS Captain is present, he is always in charge in Chief Becker's absence. Whenever Chief Becker goes on vacation, he does not even leave a phone number where he can be reached; therefore, the ESS Captain routinely assumes the Chief's authority. Further, we are not presented with an artificially created structure designed to exclude a position from the bargaining unit; the Township's reporting structure has essentially been in place since 1994.

The only instance in the record where the ESS Captain was told he did not have authority in the Chief's absence was a single occasion when the ESS Captain told an employee he was fired and sent him home. But even the Chief cannot fire an employee without prior approval of the Township Trustees. Thus, in this single instance, the ESS Captain had actually *exceeded* the Chief's authority.

It is common practice in both police and fire departments to expect the person left in charge in the chief's absence to exercise the exclusive authority of the chief only when necessary. Given the nature of such organizations and the high rank of the individual left in charge, it will be a rare instance when those aspects falling within the chief's exclusive authority will need to be actually exercised in the chief's absence. Many police and fire departments would be left without any supervisors other than the chief if the employer had to prove *actual* exercise of the chief's authority as opposed to authorization to exercise the chief's authority if it should become necessary.

It would be a completely unrealistic standard to expect a person in charge in the absence of the Chief to have actually prepared and submitted the annual budget of the department, or to have recommended to the Township Trustees to hire or fire someone, or to have approved a temporary promotion, or to have submitted to the Township

Trustees new rules or regulations for the department without the Chief having approved them first. It is sufficient if the evidence in the record establishes that the person acting in the absence of the Chief *could* exercise such authority if it became necessary in the Chief's absence. The record in this case shows that the ESS Supervisor, as the second in command, is not only authorized to exercise the authority and to perform the duties of the Chief, but he also performs some of the Chief's duties. Thus, the ESS Captain is a "supervisor" under O.R.C. § 4117.01(F)(2) and, as a result, is not a public employee under O.R.C. § 4117.01(C).

B. The Appropriate Unit Is Substantially Different from the Proposed Unit

Where no election petition has been filed, an employee organization requesting recognition must file a new Request for Recognition if the bargaining unit found to be appropriate differs from the proposed unit in any substantive way. *In re City of Hilliard*, SERB 86-045 (11-20-86). The exclusion of the ESS Captain amounts to a substantive change from the proposed unit. Therefore, the Request for Recognition in this case must be dismissed.

III. CONCLUSION

For the reasons above, we find that the Captain of Emergency Support Services is a supervisor pursuant to Ohio Revised Code § 4117.01(F)(2) and, as a result, is not a public employee under O.R.C. § 4117.01(C). Therefore, the bargaining unit proposed by the Clearcreek Firefighters, IAFF, Local 3798 is inappropriate, and the Request for Recognition must be dismissed.

Pohler, Chairman, and Verich, Vice Chairman, concur.