

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

In the Matter of

Wilmington Firefighters, IAFF Local 3011,

Employee Organization,

and

City of Wilmington,

Respondent.

Case No. 2002-REP-11-0230

**DIRECTIVE GRANTING PETITION FOR CLARIFICATION OF BARGAINING UNIT
(OPINION ATTACHED)**

Before Chairman Drake, Vice Chairman Gillmor, and Board Member Verich:
May 20, 2004.

On November 8, 2002, the Wilmington Fire Fighters, IAFF Local 3011 ("Employee Organization") filed a Petition for Clarification of Bargaining Unit, seeking to clarify the existing unit to include the positions of Lieutenant and Fire Inspector. On December 6, 2002, the City of Wilmington ("Employer") filed a position statement and a motion to dismiss. On December 19, 2002, the Employee Organization filed a memorandum in opposition. On January 18, 2003, the Employer filed a motion to strike, and a motion to substitute affidavit and reply.

On July 10, 2003, after a preliminary investigation, the State Employment Relations Board ("Board") granted the Employer's motions to strike and to substitute affidavit and reply, denied the Employer's motion to dismiss, directed this case to hearing to determine the bargaining-unit status of the employees in question, and directed the parties to mediation. Prior to hearing, the parties stipulated that the Lieutenants were to be included in the bargaining unit, leaving only the status of the Fire Inspector position for determination. A hearing was held on December 3, 2003.

On March 2, 2004, the Administrative Law Judge's Recommended Determination was issued. On March 12, 2004, the Employer filed exceptions to the Recommended Determination. On March 23, 2003, the Employee Organization filed its response to the Employer's exceptions.

After reviewing the record, the Recommended Determination, and all other filings in this case, the Board amends the first paragraph of the Analysis and Discussion by adding "See, e.g., In re Ohio State Troopers Assn, SERB 2000-003 (3-27-00); In re Shawnee State Univ, SERB 97-010 (6-30-97), aff'd in part, rev'd in part sub nom. Shawnee Ed Assn v SERB, 1999 SERB 4-16 (CP, Franklin, 9-27-99), aff'd 2000 SERB 4-33 (10th Dist Ct App, Franklin, 11-16-00)." after the reference for Rule 4117-5-01(E)(2). The Board adopts the Findings of Fact, Analysis and Discussion, as amended, and Conclusions of Law in the Recommended Determination, incorporated by reference; grants the Petition for Clarification of Bargaining Unit; and clarifies the bargaining-unit description to include the position of Fire Inspector.

It is so ordered.

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



CAROL NOLAN DRAKE, CHAIRMAN

I certify that a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 28th day of May, 2004.



DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

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

WILMINGTON FIRE FIGHTERS, IAFF LOCAL 3011,	:	
	:	CASE NO. 02-REP-11-0230
	:	
Employee Organization,	:	
	:	KAY A. KINGSLEY
and	:	Administrative Law Judge
	:	
CITY OF WILMINGTON,	:	
	:	<u>RECOMMENDED DETERMINATION</u>
Employer.	:	

I. INTRODUCTION

On November 8, 2002, the Wilmington Fire Fighters, IAFF Local 3011 ("Union"), filed a Petition for Clarification of Bargaining Unit seeking to clarify the existing unit to include the positions of Lieutenant and Fire Inspector. On December 6, 2002, the City of Wilmington ("Employer" or "City") filed a position statement and a motion to dismiss. On December 19, 2002, the Union filed a memorandum in opposition. On January 18, 2003, the Employer filed a motion to strike, and a motion to substitute affidavit and reply.

On July 10, 2003, after a preliminary investigation, the State Employment Relations Board ("SERB") granted the Employer's motions to strike and to substitute affidavit and reply, denied the Employer's motion to dismiss, directed this case to hearing to determine the bargaining-unit status of the employees in question, and directed the parties to mediation. Prior to hearing, the parties stipulated that the Lieutenants were to be included in the bargaining unit, leaving only the status of the Fire Inspector position for determination. A hearing was held on December 3, 2003, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

II. ISSUE

Whether the existing bargaining unit should be clarified to include the position of Fire Inspector?

III. FINDINGS OF FACT¹

1. The City of Wilmington, Ohio, is a "public employer" within the meaning of § 4117.01(B).² (S.)
2. The Wilmington Fire Fighters, IAFF Local 3011, is an "employee organization" within the meaning of § 4117.01(D). (S.)
3. In 1986, the Wilmington Fire Department consisted of a Fire Chief, an Assistant Fire Chief, Battalion Chiefs, and Fire Fighters. The Union filed a petition to represent the members of the Fire Department, excluding the Fire Chief and Assistant Fire Chief. Battalion Chiefs and Fire Fighters were to be in the bargaining unit. The parties agreed to a consent election, with the representation election to be held on April 10, 1986. The Union received a majority of the votes cast in the election. (S.; Case No. 86-REP-1-0029)
4. In connection with the consent election, the City of Wilmington provided a list of employees eligible to vote in the election. The list included the name of Thomas H. Gauden, who held the rank of Battalion Chief and who performed Fire Inspector duties at the time. Mr. Gauden was a charter member of the Union. (S.)
5. In May 1986, SERB certified a bargaining unit of certain employees working in the Employer's fire department. SERB's order in Case Number 86-REP-01-0029 described the bargaining unit as follows:
 - Included: All Fire Fighters and Battalion Chiefs of the Wilmington Fire Department.
 - Excluded: The Fire Chief, Assistant Fire Chief, and all other employees not included above. (S.)
6. In 1986, the Employer and the Union executed an initial collective bargaining agreement ("CBA") covering the bargaining unit. The CBA, which became effective

¹ All references to the Joint Stipulations of Fact are indicated parenthetically by "S.," followed by the stipulation number(s). All references to the transcript of hearing are indicated parenthetically by "T.," followed by the page number(s). All references to the Employer's exhibits in the record are indicated parenthetically by "Er. Ex.," followed by the exhibit number(s). All references to the Union's exhibits in the record are indicated parenthetically by "U. Ex.," followed by the exhibit numbers. References to the record are intended for convenience only and are not intended to suggest that such references are the only support in the record for that related Finding of Fact.

² All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

on November 20, 1986, contained an Article 2, entitled "Union Recognition," which included the following provisions, among others:

Section 2.1. The Employer recognizes the Union as the sole and exclusive representative for those full-time employees included in the bargaining unit. Whenever used in this Agreement, the term "bargaining unit" shall be deemed to include those individuals employed by the Employer in the classifications of Fire Fighter and Battalion Chief, as certified by the Ohio State Employment Relations Board in Case Number 86-REP-01-0029, on May 7, 1986.

Section 2.2. All positions and classifications not specifically established herein as being included in the bargaining unit shall be excluded from the bargaining unit. (S.)

7. The Employer and the Union subsequently executed a series of successor CBAs containing language identical to that included in Sections 2.1 and 2.2 of the 1986 CBA. (S.)
8. In the autumn of 1997, the Employer and the Union commenced negotiations for a successor CBA. (S.)
9. On November 12, 1997, the parties' bargaining teams reached a tentative agreement on Article 2, Union Recognition. The tentative recognition article called for the exclusion of the previously included Battalion Chief position from the bargaining unit and expressly stated: "The result of such exclusion will change the makeup of the bargaining unit so as to include only the classification of firefighter within the bargaining unit." (S.)
10. The bargaining teams ultimately reached a tentative agreement embracing all contract issues, including the revised recognition article addressing the composition of the bargaining unit. Under the applicable bylaws and constitution, an agreement by the Union's bargaining committee is tentative and, to be effective, must be ratified by the membership. Although the bargaining committees for the City and the Union reached a tentative agreement to exclude Lieutenants (formerly Battalion Chiefs) from the bargaining unit, making firefighters the only individuals in the bargaining unit, this tentative agreement was rejected by the local membership on January 21, 1998, and did not become part of the CBA. (S.)
11. The parties executed the CBA on April 3, 1998, with a recognition article stating: "All positions and classifications not specifically established herein as being included in the bargaining unit shall be excluded from the bargaining unit." As with all of the previous agreements, the only positions and classifications specifically established in the 1998 contract as being in the bargaining unit were Battalion Chief

and Fire Fighter. The CBA did not expressly list the position of Fire Inspector as being included in or excluded from the bargaining unit. (S.)

12. The remaining employees in the Battalion Chief position retired shortly after the execution of the 1998 CBA. (S.)
13. The parties never jointly submitted a petition to SERB requesting that the bargaining unit certification be altered in any way. (S.)
14. On November 4, 1999, the Wilmington City Council enacted Ordinance 3973, reorganizing the fire department to eliminate the Battalion Chief classification and to establish the following officers and members of the fire department: one Chief, two Assistant Chiefs, one Inspector, not more than three Lieutenants, not more than thirteen Full-time Firefighters, not more than twenty Intermittent Firefighter/EMTs to include one regular call Intermittent Captain and two regular-call Intermittent Lieutenants. (S.)
15. The Union did not file a grievance or unfair labor practice charge challenging the City's enactment or implementation of Ordinance 3973. (S.)
16. On January 25, 2001, the Employer and Union executed a successor CBA, effective through December 31, 2003. (S.)
17. In the negotiations leading to the current collective bargaining agreement, the parties again bargained over the wording of the recognition article, dropping the previous reference to the now-abolished Battalion Chief classification and expressly including in the bargaining unit only individuals in the Fire Fighter and Lieutenant classifications, and excluding "all positions and classifications not specifically established herein as being included in the bargaining unit." (S.)
18. Prior to October 8, 2001, the Employer often assigned fire inspection responsibilities to employees who occupied bargaining-unit positions, including Battalion Chiefs and other positions. David Meyers, who performed fire inspection duties prior to October 2001, was a Lieutenant, the President of the Union, and the negotiator for the Union who signed the 2001 collective bargaining agreement on behalf of the Union. (S.)
19. The Employer has also assigned fire inspection duties to Craig Rauch. When he began to perform those duties, Mr. Rauch was a Battalion Chief and a bargaining-unit member. Mr. Rauch continued to perform inspector duties for a period of time after he was promoted to Assistant Chief. (S.; T.71)

20. In January 2002, the City's Representative asked the Union to join in a Petition for Amendment of Certification. In that petition, drafted by the City, it was stated: "The parties have agreed to add Lieutenants to, and remove Fire Inspectors from, the Bargaining Unit." The Union refused to sign the Petition. (S.)
21. On November 8, 2002, the Union filed a Petition for Clarification of Bargaining Unit seeking to clarify the existing unit to include the position of Lieutenants and Fire Inspector. (S.)
22. The Wilmington Fire Department currently consists of 18 full-time career Fire Fighters including the Chief, Assistant Chief, and Fire Inspector and 10-12 part-time Fire Fighters. (T. 42)
23. The current Fire Inspector, Jerry Quigley, started with the Wilmington Fire Department as a part-time Fire Fighter in 1995 and became a career Fire Fighter in 1999. (T. 10-11)
24. Mr. Quigley started as Fire Safety Inspector in October 2001. He replaced Mr. Meyers, a bargaining-unit member who had held the position of Fire Inspector for approximately one year. Since October 8, 2001, the Employer has not treated Mr. Quigley as a bargaining-unit member. (S.; T. 11-12)
25. The Fire Inspector's duties include inspecting existing businesses to ensure compliance with fire and building codes, issuing citations, reviewing plans for new construction, evaluating sites for hydrant water supplies, providing public education for schools and civic groups, conducting fire scene investigations and determining cause and origin, developing and coordinating fire-prevention and in-service training programs, and administering the Buster Program involving installation, removal, and abandonment of underground storage tanks. (T. 16-18, 21)
26. The last classification specification for Fire Inspector required the individual filling the position to have the rank of Battalion Chief, although the Fire Inspector position is an unranked position. (U. Exhs. 9-11 ; T. 33-35)

IV. ANALYSIS AND DISCUSSION

The Union filed a Petition for Clarification of Bargaining Unit to have the position of Fire Inspector included in the existing unit. The purpose of a clarification petition is to determine whether a particular employee or group of employees is included in or excluded from an existing bargaining unit based upon the unit description and the duties performed by the employees in question. Rule 4117-5-01(E)(2). See, e.g., In re Ohio State Troopers

Assn, SERB 2000-003 (3-27-00); In re Shawnee State Univ, SERB 97-010 (6-30-97), aff'd in part, rev'd in part sub nom. Shawnee Ed Assn v SERB, 1999 SERB 4-16 (CP, Franklin, 9-27-99), aff'd 2000 SERB 4-33 (10th Dist Ct App, Franklin, 11-16-00). Unit clarification does not alter the status quo, but rather maintains it. In re Ohio Council 8, AFSCME, SERB 95-021

The specific position of Fire Inspector did not exist when SERB certified the bargaining unit in May 1986. The unit description included "all Fire Fighters and Battalion Chiefs of the Wilmington Fire Department" and excluded "the Fire Chief, Assistant Fire Chief, and all other employees not included above." At that time, Tom Gauden, a Battalion Chief and bargaining-unit member, performed the fire inspection duties. In 1999, Craig Rauch, also a Battalion Chief, performed fire inspection duties. Mr. Rauch was promoted to Assistant Chief, but continued to perform fire inspection duties until later in 1999, when the Employer assigned the fire inspection duties to David Meyers, a Lieutenant and President of the Union. As of October 8, 2001, the Employer assigned the fire inspection duties to Jerry Quigley. Mr. Quigley was sworn into the Fire Inspector position as a Lieutenant but was told approximately one year later that he was an unranked officer. The Employer continued to treat Mr. Quigley as being outside the bargaining unit.

The sole purpose of a petition for clarification is to maintain the status quo. The status quo at the time SERB certified the bargaining unit was that a bargaining-unit member was performing the fire inspection duties. This status changed only briefly when Mr. Rauch continued to perform fire inspection duties after being promoted to Assistant Chief until a replacement was named, and then again in October 2001, when the Employer made the decision to treat the Fire Inspector position as being outside the bargaining unit. Although the specific position of Fire Inspector was not created until November 1999, the fire inspection duties were in existence and being performed by bargaining-unit members at the time of certification. The current Fire Inspector spends in excess of 90% of his time performing fire inspection duties that have been performed since the inception of the department.

The Employer argues that the parties agreed to place only Fire Fighters and Lieutenants in the bargaining unit, excluding all other positions, including that of Fire Inspector. The parties did not address this point in 1999, even though they knew that the position of Battalion Chief had been replaced by the Lieutenant position and that the Employer's reorganization ordinance specifically referenced one Inspector position. Both parties effectively ignored the issue until January 2002, when the Employer asked the Union to file a Joint Amendment of Certification excluding the Fire Inspector position. The Union declined and, instead, filed its Petition for Clarification of Bargaining Unit seeking to include the positions of Lieutenant and Fire Inspector. Any discussions or tentative oral agreements between the parties were never reduced to writing and filed with SERB in a joint petition to amend the certification of the bargaining unit under Rule 4117-5-01(E)(1) and, therefore, remain unenforceable.

Based upon the analysis above, the duties of the Fire Inspector were being performed by a position within the bargaining unit at the time of the most recent certification. Therefore, the existing bargaining unit should be clarified to include the position of Fire Inspector.

V. CONCLUSIONS OF LAW

1. The City of Wilmington is a "public employer" as defined by § 4117.01(B).
2. The Wilmington Fire Fighters, IAFF Local 3011 is an "employee organization" as defined by § 4117.01(D).
3. The existing unit should be clarified to include the position of Fire Inspector.

VI. RECOMMENDATIONS

Based upon the foregoing, the following is respectfully recommended that:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board grant the Petition for Clarification of Bargaining Unit and clarify the bargaining unit's description accordingly.