

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

In the Matter of

Hamilton Police Captains, Fraternal Order of Police, Lodge 38,

Employee Organization,

and

City of Hamilton,

Employer.

Case No. 2009-REP-06-0065

DIRECTIVE GRANTING REQUEST FOR RECOGNITION
(OPINION ATTACHED)

STATE EMPLOYMENT
RELATIONS BOARD
2010 AUG 12 A 9:24

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: July 22, 2010.

On June 2, 2009, the Hamilton Police Captains, Fraternal Order of Police, Lodge 38 (“the Captains” or “the Employee Organization”) filed a Request for Recognition under Ohio Revised Code (“O.R.C.”) § 4117.05 seeking to represent Police Captains of the City of Hamilton (“the Employer”) in its Police Department. On June 18, 2009, the Employer filed objections to the request. On December 3, 2009, the Board directed the matter to hearing to determine an appropriate bargaining unit and for all other relevant matters. A hearing was conducted by the full Board on March 11, 2010.

After reviewing the Request for Recognition, the Employer’s objections, all other filings in this case, and all of the evidence in the record, the Board, for the reasons set forth in the Findings of Fact and Conclusions of Law in the attached Opinion, incorporated by reference, finds that the proposed bargaining unit in the Request for Recognition is the “unit appropriate for purposes of collective bargaining” under O.R.C. § 4117.06(A). Therefore, Hamilton Police Captains, Fraternal Order of Police, Lodge 38 is hereby certified as the exclusive bargaining representative for all the employees in the proposed bargaining unit.

It is so ordered.

BRUNDIGE, Chairperson; VERICH, Vice Chairperson; and SPADA, Board Member, concur.



N. EUGENE BRUNDIGE, CHAIRPERSON

TIME AND METHOD TO PERFECT AN APPEAL

Any party desiring to appeal shall file a Notice of Appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, setting forth the order appealed from and the grounds of the party's appeal. A copy of such Notice of Appeal shall also be filed with the Court of Common Pleas of Franklin County, Ohio. Such Notices of Appeal shall be filed within fifteen (15) days after the mailing of the State Employment Relations Board's order as provided in Section 119.12 of the Ohio Revised Code.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 12th day of August, 2010.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

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

In the Matter of

Hamilton Police Captains, Fraternal Order of Police, Lodge 38,

Employee Organization,

and

City of Hamilton,

Employer.

Case No. 2009-REP-06-0065

OPINION

Brundige, Chairperson:

This matter comes before the State Employment Relations Board (“SERB” or “the Board”) following a Request for Recognition filed by the Hamilton Police Captains, Fraternal Order of Police, Lodge 38 (“the Captains” or “the Employee Organization”) on June 2, 2009, under Ohio Revised Code (“O.R.C.”) § 4117.05. The Employee Organization seeks to represent Police Captains of the City of Hamilton (“the Employer”) in its Police Department. On June 18, 2009, the Employer filed objections to the request. On December 3, 2009, the Board directed the matter to hearing to determine an appropriate bargaining unit and for all other matters. A hearing was conducted by the full Board on March 11, 2010.

The Board has reviewed all of the evidence in the record, and for the reasons that follow, concludes that the proposed bargaining unit in the Request for Recognition is the “unit appropriate for purposes of collective bargaining” under O.R.C. § 4117.06(A). Therefore, Hamilton Police Captains, Fraternal Order of Police, Lodge 38

is hereby certified as the exclusive bargaining representative for all the employees in the proposed bargaining unit.

I. FINDINGS OF FACT

1. The Fraternal Order of Police, Lodge 38 is an “employee organization” as defined by O.R.C. § 4117.01(D).
2. The City of Hamilton is a “public employer” as defined by O.R.C. § 4117.01(B).
3. Neil Ferdelman is the Chief of Police for the City of Hamilton, Ohio. (T. Ferdelman 4:57)
4. The City of Hamilton Police Department employs two individuals as Police “Captains,” an Administrative Captain and an Operations Captain. (T. Ferdelman 7:10)
5. Captain Joseph Murray in charge of the Operations Bureau of the Police Department, and Captain Steve Poulemanos commands the Administrative Bureau. (T. Ferdelman 7:40)
6. Captain Murray has attended contract negotiations with unions on behalf of management. He attended these negotiations at the request of Chief of Police Neil R. Ferdelman and never went without Chief Ferdelman. His purpose in attending the meetings was to gather information for Chief Ferdelman. Additionally, in at least one instance, a Sergeant and Lieutenant attended a negotiation on behalf of management without Captain Murray or Captain Poulemanos. Neither Captain Murray nor Captain Poulemanos was a signatory to the collective bargaining agreements. (T. Ferdelman 60:34, 68:15; T. Murray 94:58, 98:50)
7. Chief Ferdelman reserves final decision power over all policy decisions. Captains Murray and Poulemanos, as well as anyone else in the department, can suggest policy changes to Chief Ferdelman, but Chief Ferdelman has the ultimate discretion to accept or reject these suggestions. Once a new policy has been implemented, it is the duty of sergeants and lieutenants to distribute the

- policies to the employees on their shifts so that it will be implemented. (T. Murray 83:20, 94:00)
8. Captains Murray and Poulemanos have each acted as Acting Chief when Chief Ferdelman is away from the office. In this role, they still answer to Chief Ferdelman, who is always available via his Blackberry. In addition, department regulations specifically state that anyone acting in the capacity of Acting Chief does not have the power to hire or fire personnel or make major policy changes without approval of the Chief of Police. (T. Ferdelman 56:55, 62:50; T. Murray 120:53; Employers' Exhibit C)
 9. Captain Murray signed papers to lay off dispatch workers while serving as Acting Chief. He did so under the supervision of and at the request of Chief Ferdelman, who was in contact with Captain Murray despite being physically absent from the office. Captain Murray had no input on the drafting of the letters or which individuals were laid off. (T. Ferdelman 67:05)
 10. Both Captain Murray and Captain Poulemanos attend disciplinary conferences. Chief Ferdelman is the hearing officer at these conferences and determines the discipline for the employees. The investigation of disciplinary charges is done by sergeants and lieutenants. No one in the department, including Captains Murray and Poulemanos, can suspend an employee without approval of Chief Ferdelman. (T. Ferdelman 61:07; T. Murray 103:05)
 11. Unionized employees such as sergeants have served in the position of Acting Chief of Police when Captains Poulemanos and Murray are unable to serve as Acting Chief. (T. Murray 121:33)

II. DISCUSSION

O.R.C. Chapter 4117 provides that all "public employees" are entitled to representation for collective bargaining purposes. O.R.C. § 4117.01(C) defines "public employees" as follows:

(C) "Public employee" means any person holding a position by appointment or employment in the service of a public employer, * * * except:

* * *

- (6) Confidential employees;
- (7) Management level employees;

* * *

- (10) Supervisors[.]

The sole issue in this case is whether Captains Murray and Poulemanos are "public employees" as defined by O.R.C. § 4117.01(C). Because Captains Murray and Poulemanos work for a public employer, they are public employees unless they meet one or more of the O.R.C. § 4117.01(C) exemptions. In particular, they would not be considered public employees if they fall under O.R.C. § 4117.01(C)(6), (C)(7), or (C)(9). Because Captains Murray and Poulemanos do not meet the standards for these exemptions, they are "public employees" under the meaning of the term as defined by O.R.C. § 4117.01(C).

In analyzing such a case, the Board starts with the assumption the persons in question are public employees. The burden of establishing an exclusion from a bargaining unit under O.R.C. § 4117.01(C) rests upon the party seeking it. *In re Fulton County Engineer*, SERB 96-008 (6-24-96); *In re Franklin Local School District Board of Education*, SERB 84-008 (11-8-84).

In the present case, it is incumbent on the employer to demonstrate that the Police Captains meet one or more of the relevant statutory exemptions enumerated in O.R.C. § 4117.01(C). There are three that must be examined: "supervisor," "confidential employee," or "management level employee."

O.R.C. § 4117.01(K) states: "Confidential employee" means * * * any employee who works in a close continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer. The record demonstrates that the Police Captains are not confidential employees. While Captain Murray testified that he attended contract negotiations, it was at the request of and on

behalf of Chief Ferdelman that he went. Furthermore, Captain Murray described the purpose behind his attendance as merely informational.

Chief Ferdelman accompanied Captain Murray to each of these negotiations. Even after attending the negotiations, Captain Murray was not a signatory to the collective bargaining agreements as a participant in the negotiations. Finally, Chief Ferdelman testified that Sergeants and Lieutenants had attended negotiations on behalf of management without either Captain present. Attending negotiations for informational purposes on behalf of management, like the Police Captains did here, does not by itself meet the standard of a confidential employee.

For some of the same reasons articulated above, the Police Captains are not “management level employees” under O.R.C. § 4117.01(L) because neither Police Captain is an “individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiated agreements, or have a major role in personnel administration.”

While Chief Ferdelman receives input from his Police Captains regarding policy decisions, he alone makes the final determinations. In addition, Chief Ferdelman takes similar input from employees at all levels and does not exclusively confer with Captains Murray and Ferdelman; Captain Murray testified that he has no more authority to suggest policy change than any other member of the organization. Once a policy change is made, neither Captain has the final responsibility for implementation; Sergeants and Lieutenants on each shift explain the new policies to the employees on their shift and ensure that each employee understands and can implement the new policy. For the reasons stated above, the Police Captains are not management level employees.

Finally, In *In re State of Ohio, Rehabilitation Dept*, SERB 99-023 (9-17-99), the employees in question were called upon to serve as hearing officers at pre-disciplinary hearings, were found to have a major role in personnel administration, and were found to be management level employees. Herein although both Captains Murray and

Poulemanos attend disciplinary hearings, Chief Ferdelman serves as the hearing officer and makes the determination regarding discipline beyond the level of a written reprimand. The record lacks sufficient evidence to show that the Police Captains are "management level employees" under O.R.C. § 4117.01(L).

O.R.C. § 4117.01 provides in relevant part as follows:

(F) "Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment, provided that:...

* * *

(2) With respect to members of a police...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. * * *

Supervisory issues are a question of fact in each case, and such status must therefore be determined on a case-by-case basis. *In re Lucas County Recorder's Office*, SERB 85-061 (11-27-85). An individual will be excluded from a bargaining unit if the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in O.R.C. § 4117.01(F), actually exercises that authority, and uses independent judgment in doing so. *In re Mahoning County Dept of Human Services*, SERB 92-006 (6-5-92). The Police Captains lack the authority to make personnel decisions that would make them eligible for the supervisor exemption.

Captains Murray and Poulemanos serve as Acting Chief of Police when Chief Ferdelman is away from the office; however, the Police Department's General Orders stipulate that "a member serving in the capacity as Acting Chief of Police shall not have the authority to hire or fire departmental personnel, nor make major departmental policy changes without consultation with the Chief of Police." Employers' Exhibit C. At least one Sergeant has served in the position of Acting Chief when both Captains Poulemanos and Murray were unable to serve as Acting Chief. Finding of Fact No. 11.

Captain Murray's signature did appear on papers notifying dispatch workers of the termination of their employment as part of city layoffs while Chief Ferdelman was on vacation. Captain Murray exercised no discretion, however, in making these decisions and did not draft the wording of the letters he signed. In fact, Captain Murray was in constant contact with Chief Ferdelman through Chief Ferdelman's Blackberry even though Captain Murray was serving as Acting Chief. The record lacks sufficient evidence to show that the Police Captains have discretionary authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action" and therefore do not meet the statutory definition of "supervisor."

III. CONCLUSION

For the reasons set forth above, we determine that the Police Captains are "public employees" as defined by O.R.C. § 4117.01(C), that the proposed bargaining unit in the Request for Recognition is the "unit appropriate for purposes of collective bargaining" under O.R.C. § 4117.06(A), deny the Employer's objections, and certify the Hamilton Police Captains, Fraternal Order of Police, Lodge 38 as the exclusive representative of the bargaining unit composed of Police Captains.

Vice Chairperson, Verich; and Board Member, Spada, concur.



N. Eugene Brundige, Chairperson
Michael G. Verich, Vice Chairperson
Robert F. Spada, Board Member

Ted Strickland, Governor

Sherrie J. Passmore Executive Director

Case No. 2009-REP-06-0065

CERTIFICATION

I, the undersigned General Counsel and Assistant Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Directive Granting Request for Recognition of the State Employment Relations Board entered on its journal on the 12th day of August, 2010.

A handwritten signature in black ink, appearing to read "J. Russell Keith", is written over a horizontal line.

J. Russell Keith
General Counsel and Assistant Executive Director
August 12, 2010