

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

In the Matter of
Twinsburg Fire Captains,
Employee Organization,
and
City of Twinsburg,
Employer.

STATE EMPLOYMENT
RELATIONS BOARD
2010 NOV 12 P 12: 22

Case No. 2009-REP-06-0072

DIRECTIVE GRANTING REQUEST FOR RECOGNITION
(OPINION ATTACHED)

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: August 12, 2010.

On June 18, 2009, the Twinsburg Fire Captains (“the Employee Organization”) filed a Request for Recognition under Ohio Revised Code (“O.R.C.”) § 4117.05 seeking to represent Fire Captains of the City of Twinsburg (“the Employer”). On June 26, 2009, the Employer filed objections to the request. On December 17, 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 18, 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, Background, Discussion, and Conclusions of Law in the attached Opinion, incorporated by reference, finds that the Fire Captains are “public employees” as defined by O.R.C. § 4117.01(C) and 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, the Employee Organization 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.



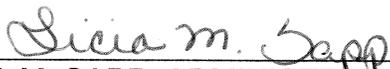
N. EUGENE BRUNDIGE, CHAIRPERSON

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 via certified mail, return receipt requested, and upon each party's representative via electronic mail, this 12th day of November, 2010.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

SERB

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

Ted Strickland, Governor

Sherrie J. Passmore Executive Director

Case No. 2009-REP-06-0072

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 November, 2010.

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

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

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Twinsburg Fire Captains,
Employee Organization,
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City of Twinsburg,
Employer.

Case No. 2009-REP-06-0072

OPINION

Brundige, Chairperson:

This matter comes before the State Employment Relations Board (“SERB” or “the Board”) following a Request for Recognition filed by the Twinsburg Fire Captains (“the Captains” or “the Employee Organization”) on June 18, 2009, under Ohio Revised Code (“O.R.C.”) § 4117.05. The Employee Organization seeks to represent Fire Captains of the City of Twinsburg (“the Employer”). On June 26, 2009, the Employer filed objections to the request. On December 17, 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 18, 2010.

The Board has reviewed all of the evidence in the record. For the reasons that follow, we conclude that the Fire Captains are “public employees” as defined by O.R.C. § 4117.01(C) and 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, Twinsburg Fire Captains is hereby certified as

the exclusive bargaining representative for all the employees in the proposed bargaining unit.

I. FINDINGS OF FACT

1. Twinsburg Fire Captains is an “employee organization” as defined by O.R.C. § 4117.01(D).
2. The City of Twinsburg is a “public employer” as defined by O.R.C. § 4117.01(B).
3. Clay Morris is the Director of Human Resources for the City. His duties include contract administration, hiring, termination, and grievance process administration. Shortly after taking office, Mr. Morris changed discipline procedures so that discipline in every department in the city, including the fire department, would be consistent with the rest of the city with final decision making authority resting with the Human Resources Director.
4. The Captains do not conduct review of proposals made by the Lieutenants and Firefighters; those proposals are sent directly to the Fire Chief along with any budget proposals made by the Captains.
5. Captains, Lieutenants, and Firefighters have conducted interviews of applicants for open positions and made recommendations to the Fire Chief that applicants be hired. However, the Fire Chief makes the decision on whether to actually hire the applicant, and he has used his discretion at times to deny the recommendation of the interviewers.
6. The main role for Captains today is to actively participate in fire suppression and EMS duties.
7. Insofar as Captains are involved in the formation and implementation of policy, it is at the request and under the direction of the Fire Chief.
8. The Captains do have some ability to make scheduling decisions for the other employees. However, these decisions are restricted to situations in which they are acting to meet minimum standards for the number of employees on duty at a particular time. In making these scheduling

decisions, the Captains must follow directives issued by the Fire Chief instructing the Captains on the process they must follow. Furthermore, this duty is not limited to Captains; anyone acting as a Shift Commander, including Lieutenants, must make these scheduling adjustments.

9. Captain Simon administers the Driver Training Program and was involved in the adoption of MABAS. Both of these actions, though, were at the direction or under the supervision of the Fire Chief. Captain Simon was ordered by the Fire Chief to run the Driver Training Program after Captain Bender passed away, and the Fire Chief retains control over the program. After Captain Simon suggested a modification of the MABAS system, he worked with the Fire Chief, who made the ultimate decisions on any changes or modifications.
10. While Captain Bosso presides over the Fire Safety Committee, that committee is just one of several committees within the Fire Department, and Captains do not preside over all of those committees. The lesson plans implemented in training are created by Firefighters. After the Captains approve the lesson plans, the Fire Chief must also approve the plans before implementation. The Captains have no discretion to determine what drills are done in training.
11. The Fire Department must have all discipline approved by the City's HR Department. The Captains were informed that all disciplinary matters must be referred to the City's HR Department and approved by the City.
12. Since 2000, the Captains have not routinely attended collective bargaining agreement negotiations between the City and IAFF Local 3630.

II. BACKGROUND

In 2000, the Union filed an Opt-In Request for Recognition seeking to add Lieutenants and Captains to the existing bargaining unit. (See Case No. 2000-REP-02-0035.) The City filed an Objection to the Request for Recognition. After the Union and the City stipulated that the Lieutenants were to be included in the

bargaining unit and the Captains were not supervisors pursuant to O.R.C. § 4117.01(F), SERB held a hearing to determine whether the Captains were management level employees pursuant to § 4117.01(L). SERB determined in 2000 that the Captains were, in fact, management level employees and thus excluded from the bargaining unit since they did not meet the definition of “public employee” pursuant to O.R.C. § 4117.01(C).

Subsequent to this ruling, the City restructured its Fire Department. At the time of the 2000 decision, the Fire Department had a Chief, an Assistant Chief, and four Captains, one of whom served as the Fire Prevention Officer. Since that time, the Fire Department expanded to six Shift Captains, and the positions of Fire Prevention Officer and Assistant Chief were not filled. Furthermore, the City hired a new Director of Human Resources, Clay Morris, in January 2007. Mr. Morris’ duties include contract administration, hiring, termination, and grievance process administration. Upon taking office, Mr. Morris changed discipline procedures so that discipline in every City department, including the fire department, would be consistent with the rest of the city with final decision making authority resting with the Human Resources Director. The Request for Recognition herein was filed in June 2009; the City filed an Objection alleging that the Captains were not “public employees” pursuant to O.R.C. § 4117.01(C).

III. DISCUSSION

The issue in this case is whether the Captains are “management level employees” and thereby excluded from the definition of “public employee” under O.R.C. § 4117.01, which provides in relevant part as follows:

As used in this chapter [O.R.C. Chapter 4117]:

* * *

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

* * *

(7) Management level employees;

* * *

(L) “Management level employee” means 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. * * *

O.R.C. § 4117.01 anticipates that limited, top-level, management authority can be shared with high-ranking department personnel, exempting them from the definition of “public employee” pursuant to O.R.C. § 4117.01(C). The scope and quality of managerial duties is, by its nature, limited. Therefore, a valid measure of the duties is to review the proportional part of a work force that the City is contending should be excluded. 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 City of Hamilton*, SERB 2010-012 (8-12-2010); *In re SERB v Fulton County Engineer*, SERB 96-008 (6-24-96); *In re Franklin Local School Dist Bd of Ed*, SERB 84-008 (11-8-84).

Here, the City has failed to establish that the Captains have continued to meet the criteria for “management level employees.” The size of the workforce and the current assignment of the Captains to be actively involved in day-to-day fire suppression support a finding that the City has failed to meet its burden to prove that the six Captains are involved in policy making to the extent that such duties would exclude them from collective bargaining. In addition, the City has not presented evidence to show that the Captains meet any of the other exceptions to “public employee” listed in O.R.C. § 4117.01(C). As a result, the Captains should not be excluded from the bargaining unit.

A. The Previous Petition in Case No. 2000-REP-02-0035

On February 23, 2000, the Twinsburg Fire Fighters IAFF, Local 3630 (“Local 3630”) filed an Opt-In Request for Recognition seeking to add Lieutenants and Captains to the existing bargaining unit of employees of the

Employer. The Employer filed a timely Objection to the Request for Recognition, asserting that certain employees in the proposed unit were management level employees and that the proposed unit was not appropriate. On June 6, 2000, the Board directed the matter to hearing to determine an appropriate unit and for all other relevant issues.

Before the hearing in Case No. 2000-REP-02-0035, the parties agreed that the only issue to be resolved was whether the Captains were management level employees; the parties stipulated that the Captains were not supervisors and that the Lieutenants would be included in the unit. An evidentiary hearing was held. Subsequently, the Administrative Law Judge's Recommended Determination was issued on August 31, 2000.

On September 20, 2000, Local 3630 filed exceptions to the Recommended Determination one week after the time for filing exceptions had expired. Local 3630 also filed a motion for evidentiary hearing to consider "newly discovered" evidence, all of which came into existence after the hearing was held. On September 29, 2000, the Employer filed a motion to strike Local 3630's exceptions and a memorandum in opposition to the motion for evidentiary hearing. On October 10, 2000, Local 3630 filed a motion for leave to file exceptions to the Recommended Determination. On October 16, 2000, the Employer filed a memorandum in opposition to the motion for leave to file exceptions.

Since Local 3630's exceptions were not filed "within ten days after service," as required by Ohio Administrative Code Rule 4117-1-13, and Local 3630 had not filed a motion for extension of time before the exceptions period expired, the Board, on October 19, 2000, granted the Employer's motion to strike Local 3630's exceptions to the Recommended Determination because the exceptions were untimely filed, and struck the exceptions from the record.

Local 3630 filed a motion for leave to file exceptions. This request was submitted after the time period for filing exceptions had expired. The Board denied that motion on October 19, 2000.

Local 3630 also filed a motion for evidentiary hearing to consider what it described as “newly discovered” evidence. “Newly discovered evidence refers to evidence that was in existence at the time of the administrative hearing but which was incapable of discovery by due diligence; however, newly discovered evidence does not refer to newly created evidence.” *Steckler v. Ohio State Bd. of Psychology*, 83 Ohio App.3d 33, 38 (Ohio App. 8 Dist. 1992). Local 3630’s proposed evidence was not “newly discovered” evidence since it did not exist at the time of the administrative hearing. *Id.* Consequently, the Board, again on October 19, 2000, denied the motion for evidentiary hearing.

After reviewing the Administrative Law Judge’s Recommended Determination and the record, the Board adopted the Findings of Fact and Conclusions of Law in the Recommended Determination, finding that the Captains were “management level employees” pursuant to Ohio Revised Code § 4117.01(L). The Board denied the Opt-In Request for Recognition seeking to add the Captains to the existing unit via voluntary recognition; granted the Opt-In Request for Recognition as it applied to the Lieutenants; and added the Lieutenants to the existing bargaining unit.

Local 3630 then appealed the Board’s Directive in Case No. 2000-REP-02-0035. On October 22, 2001, the Court of Common Pleas, Franklin County, found that the Captains were properly excluded from the existing bargaining unit because the record supported the Board’s finding that they were management level employees and, therefore, exempt from collective bargaining; consequently, the Court affirmed the Board’s Directive. *Twinsburg Firefighters, Local 3630 v SERB*, 2001 SERB 4-19 (CP, Franklin, 10-23-2001).

B. Captains Are Not Policy Makers within the Definition of O.R.C. § 4117.01(C).

First, the Captains do not make policy. The main role today for these Captains is to actively participate in fire suppression and EMS duties. This role signifies a substantive change from the previous petition in 2000, at which time Captains only went out on 25% or fewer of the calls. Insofar as Captains are

involved in the formation and implementation of policy, it is at the request and under the direction of the Fire Chief. For instance, Captain Hobart prepares a purchase budget, and other Captains, Lieutenants, and Firefighters prepare other budgets.

All of these budget proposals are sent to the Fire Chief, who conducts an independent review of the proposals before sending them to the Mayor's Office for approval. The Captains conduct no such review of the proposals made by the Lieutenants and Firefighters; those proposals are sent directly to the Fire Chief along with any budget proposals made by the Captains. Similarly, Captains, Lieutenants, and Firefighters have conducted interviews of applicants for open positions and made recommendations to the Fire Chief that applicants be hired. The Fire Chief, however, makes the decision on whether to actually hire the applicant. The Fire Chief has used his discretion at times to deny the recommendation of the interviewers.

In 2000, Captain James Hartung (at the time, Assistant Chief Hartung) testified that the Captains had recently recommended changes to the Standard Operating Procedures (S.O.P.'s) and Standard Operating Guidelines (S.O.G.'s). Since that time, however, all changes in the S.O.P.'s and S.O.G.'s have gone through the Assistant Chief and the Fire Chief. The Fire Chief must approve changes to the S.O.P.'s and S.O.G.'s just like he must approve any other policies that the Captains, Lieutenants, or Firefighters suggest.

The Captains do have some ability to make scheduling decisions for the other employees. But these decisions are restricted to situations in which they are acting to meet minimum standards for the number of employees on duty at a particular time. In making these scheduling decisions, the Captains must follow directives issued by the Fire Chief, instructing the Captains on the process they must follow. Furthermore, this duty is not limited to Captains; anyone acting as a Shift Commander, including Lieutenants, must make these scheduling adjustments.

Captain Simon administered the Driver Training Program and was involved in the adoption of MABAS. Both of these actions, though, were at the direction or under the supervision of the Fire Chief. Captain Simon was ordered by the Fire Chief to run the Driver Training Program after Captain Bender passed away, and the Fire Chief retained control over the program. After Captain Simon suggested a modification of the MABAS system, he worked with the Fire Chief, who made the ultimate decisions on any changes or modifications.

Additionally, while Captain Bosso presides over the Fire Safety Committee, that committee is just one of several committees within the Fire Department, and Captains do not preside over all of those committees. The lesson plans implemented in training are created by Firefighters. After the Captains approve the lesson plans, the Fire Chief must also approve the plans before implementation. The Captains have no discretion to determine what drills are done in training.

C. Captains Do Not Have Personnel Administration Duties

The Captains do not have personnel administration duties. The City's HR Director, Clay Morris, has changed the manner in which discipline is handled within the Fire Department. Under Mr. Morris' changes, the Fire Department must have all discipline approved by the City's HR Department. The Captains were informed that all disciplinary matters must be referred to the City's HR Department and approved by the City.

The Captains do have a role in Step 2 of the grievance procedure, as dictated by the Collective Bargaining Agreement. In this role, the Captains review the findings made by the Lieutenants in Step 1 of the grievance procedure. If a Captain believes that the grievance may move beyond Step 2, the Captain consults with the Fire Chief before acting and the Captain discusses with the Fire Chief how the grievance should be handled.

Additionally, Captain Bender was part of the negotiating team for the collective bargaining agreement in place in 2000. At that time, the Fire Chief

expected the Captains to be involved in future contract negotiations. Since that time, however, the Captains have not routinely attended collective bargaining agreement negotiations between the City and IAFF Local 3630.

Since 2000, the Fire Department and the City have made structural changes. Because of those changes and the resulting effects on the duties of the Captains within the Fire Department, the Captains no longer meet the definition of management level employees pursuant to O.R.C. § 4117.01(L). As such, the Captains are “public employees” under O.R.C. § 4117.01(C) and should not be excluded from the bargaining unit.

IV. CONCLUSIONS OF LAW

1. The City of Twinsburg is a “public employer” as defined by O.R.C. § 4117.01(B).
2. Twinsburg Fire Captains is an “employee organization” as defined by O.R.C. § 4117.01(D).
3. The Captains in the City of Twinsburg’s Fire Department are “public employees” as defined by O.R.C. § 4117.01(C), and the bargaining unit that was proposed in the Request for Recognition is the “unit appropriate for purposes of collective bargaining” under O.R.C. § 4117.06(A).

V. DETERMINATION

For the reasons set forth above, the State Employment Relations Board finds that the Captains in the City of Twinsburg Fire Department are “public employees” within the meaning of Ohio Revised Code § 4117.01(C). Thus, these employees are eligible to engage in collective bargaining under Ohio Revised Code Chapter 4117. The City of Twinsburg’s objection is denied, the Request for Recognition is granted, and the Twinsburg Fire Captains are certified as the exclusive representative for all of the employees listed in the proposed bargaining unit.

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