

19 CIR \_\_\_\_\_ (2013)

**NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS**

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,	)	CASE NO. 1334
LOCAL 647,	)	REP. DOCKET NO. 469
	)	
Petitioner,	)	FINDINGS AND ORDER
v.	)	
	)	
CITY OF GRAND ISLAND, NEBRASKA,	)	
	)	
Respondent.	)	

**APPEARANCES:**

For Petitioner:	John E. Corrigan
	Dowd Howard & Corrigan, LLC
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	Omaha, Nebraska 68102

For Respondent:	William A. Harding
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**LINDAHL, COMMISSIONER**

**Before Commissioners Lindahl, McGinn, and Spray**

**NATURE OF THE CASE**

On May 2, 2013, the International Association of Firefighters, Local 647 ("Union" or "Petitioner") filed a Petition to clarify a bargaining unit, which currently consists of employees in the positions of Firefighter-EMT, Firefighter/Paramedic, and Fire Captain, to include two new positions created by the City of Grand Island ("City" or "Respondent"). Respondent filed its Answer on May 8, 2013.

A hearing was held on July 16, 2013 to determine the appropriate bargaining unit. Prior to the hearing, the parties stipulated that the Life Safety Inspector should be included in the bargaining unit. The sole issue for trial was whether the Shift Commander should be included in the bargaining unit.

**FACTS**

On April 9, 2013, the City Council of Grand Island ("City Council") approved the creation of two new positions within the City's fire department: Shift Commander and Life Safety Inspector. The Fire Chief recommended that three Fire Captains be promoted to a Shift Commander position and another employee would be hired as the certified Life Safety Inspector. In addition, the Fire Chief planned to eliminate one Division Chief position, which is not part of the bargaining unit.

The Shift Commander as described is to be responsible for the supervision of a shift, consisting of up to 20 people. The position would handle coordination of scheduling, including overtime, set performance objectives for a shift, and assist the Fire Chief in formulating department goals and objectives. Shift Commanders must respond to emergency and non-emergency incidents and determine what course of action is necessary and investigate fires for origin and cause.

The job description and organizational chart presented to the City Council on April 9, 2013 listed the Shift Commander as subordinate to the Division Chiefs, who are

subordinate to the Fire Chief. On June 25, 2013, the Fire Chief, Assistant City Attorney, City Attorney, HR Director, and City Administrator met and decided that the job description and organizational chart would be amended to place the Shift Commander subordinate only to the Fire Chief. This amendment came after the filing of this case and the closing date to apply for the position.

## **DISCUSSION**

On July 2, 2013 the parties submitted a joint stipulation agreeing that the position of Life Safety Inspector should be included in the bargaining unit. The Commission therefore finds that the bargaining unit shall be clarified to include the position of Life Safety Inspector as appropriately included in the unit.

With regards to the Shift Commander, Petitioner argues that the Shift Commander position shares a community of interest with the other bargaining unit positions, and that the community of interest presumption established by NEB. REV. STAT. § 48-816(3)(b) applies. Respondent contends that the Shift Commander is a supervisor subordinate only to the Fire Chief based on the amended organizational chart, and should therefore be excluded from the bargaining unit. As troublesome as the timing of Respondent's changes to the job description and organizational chart may be, this case is not a determination on the timing of Respondent's changes to the Shift Commander position but rather a determination of whether this position shares a community of interest with the bargaining unit.

Generally, supervisors are not to be included in a bargaining unit with other employees who are not supervisors. NEB. REV. STAT. § 48-816(3)(a). NEB. REV. STAT. § 48-801(14) defines a supervisor as:

“any public employee having authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees, or with responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with such action the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.”

An employee need only possess one of the enumerated supervisory powers but must use independent judgment when exercising the enumerated supervisory power. See *General Drivers & Helpers Union, Local No. 554 v. County of Saline and County Board of*

*Saline*, 13 CIR 418 (2001); *Hall County Pub. Defenders Org. v. County of Hall and the Hall County Bd. Of Supervisors*, 12 CIR 227, 240 (1996), *rev'd on other grounds*, 253 Neb. 763, 571 N.W.2d 789 (1998).

There is an exception to the supervisor rule found in NEB. REV. STAT. § 48-816(3)(b), which reads:

“All firefighters and police officers employed in the fire department or police department of any municipality in a position or classification subordinate to the chief of the department and his or her immediate assistant or assistants holding authority subordinate only to the chief shall be presumed to have a community of interest and may be included in a single bargaining unit represented by a public employee organization for the purposes of the Industrial Relations Act.”

When analyzing whether a job classification falls under the statutory exception to the supervisory rule, the Commission distinguishes between true supervisors, who have “genuine management prerogatives,” and employees such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees” who can be deemed as appropriately placed in a bargaining unit even though they perform “minor supervisory duties.” *County of Saline*, 13 CIR 418 (2001). The statutory definitions must be read narrowly to ensure that “exemptions from [the Act’s] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” *Neligh Assoc. Group v. City of Neligh*, 13 CIR 305 (2000) (citing *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996)). This statutory presumption of community of interest is permissible and rebuttable with sufficient evidence. See *Fraternal Order of Police Lodge #23 v. City of Holdrege and Holdrege Police Department*, 8 CIR 310 (1986); *City of Omaha v. Omaha Police Union Local No. 101*, 5 CIR 103 (1981).

An organizational chart can be helpful in determining whether a job classification is considered an “immediate assistant or assistants holding authority subordinate only to the chief” that would not be presumed to be part of the bargaining unit. The Commission has found in the past that a change in an organizational chart is considered management prerogative and can be done for the purpose of excluding a job classification from a bargaining unit. *Fraternal Order of Police Lodge 37 v. City of Fremont*, 13 CIR 232 (1998). However, the change must be bona fide and adhered to in practice. *Fraternal Order of Police Lodge 43 v. City of Sidney*, 13 CIR 241 (1999). In other words, the job classification in question must be sufficiently supervisory in reality and not just a supervisor on paper.

In *Fraternal Order of Police Lodge 31 v. City of York*, 13 CIR 250 (1999), the Commission considered whether a lieutenant should be included in a proposed bargaining unit consisting of certain sworn officers of the York Police Department. According to the organizational chart, the lieutenant reported directly to the Police Chief and used independent judgment in the course of directing other officers during a shift. The Commission found that the lieutenant was as an immediate assistant to the chief and could not be presumed to have a community of interest with the bargaining unit. However, the Commission followed the reasoning of *Nebraska City Police Officers Bargaining Unit v. City of Nebraska City*, 9 CIR 300 (1988) in determining that the lieutenant shared a strong enough community of interest with the bargaining unit to be included in the unit:

“[Section 48-816(3)] only says the immediate assistants cannot be included in the *presumption* that those subordinate to the immediate assistants belong in the same unit. We agree that the assistant chiefs ordinarily belong with the chief and not the patrolmen, and we have said so. We don’t, however read § 48-816(3) to require this and in this particular case, the application of the community of interest guidelines require a different bargaining arrangement.”

*Id.* at 303 (emphasis in original) (citations omitted).

In the present case, the June 25, 2013 amended organizational chart shows that the Shift Commander will report directly to the Fire Chief and may also use some independent judgment in directing Firefighters working during the assigned shift. Therefore, the Shift Commander would fall outside the presumption of having a community of interest with the bargaining unit. However, the evidence strongly suggests that the supervisory power delegated to the Shift Commander in reality will not be sufficient to overcome the community of interest that the position shares with the bargaining unit.

Several factors have been set forth by the Nebraska Supreme Court for the Commission to consider when determining whether a community of interest exists: mutuality of interest in wages, hours and working conditions; the duties and skills of the employees; the extent of union organization among the employees; the desires of the employees; the extent of employee interchange; and the policy against fragmentation of units. *Sheldon Station Employees Association v. Nebraska Public Power District*, 202 Neb. 391, 275 N.W.2d 816 (1979). These are not the only factors which the Commission can consider, and each factor does not need to be given equal weight. *Id.* at 395-96. The Shift Commander’s supervisory power over a shift is in line with the current supervisory power

held by the Captains, who supervise their own company and can also make disciplinary recommendations to a chief officer or remove an employee from working a shift if the employee has engaged in misconduct. Grand Island operates under Civil Service Commission statutes for cities of the first class, which means that the mayor ultimately makes the decision to terminate an employee. A Shift Commander has no power to hire, fire, promote or award employees, does not make policy decisions, and may also be relieved by a Division Chief or the Fire Chief at an emergency scene. If a Shift Commander is off duty, the position is envisioned to be filled by a Captain that will be paid out of class or another Shift Commander. A Shift Commander's wages and benefits, with the exception of steps on the pay plan and VEBA contributions, would be the same as those employees in the bargaining unit. A Shift Commander would be paid by the hour at a lower rate than a Division Chief and have a certain amount of overlap with Captain's wages. Like other employees in the bargaining unit, the Shift Commander will be subject to "Kelly Days," would not be exempt from overtime, and have the same health insurance and pension contributions. The Shift Commander shares the same 35-mile residency requirement as bargaining unit members. Additionally, Shift Commanders would accrue vacation and sick leave at the same rate as bargaining unit members.

As the party asserting the supervisory nature of the Shift Commander, the City carried the burden of proof to show that the position is indeed a supervisory position. Based on the evidence presented, the City has not met its burden. The Shift Commander will be performing some supervisory duties, but these duties do not rise to the supervisory level necessary to truly be a supervisor instead of a foreman and overcome the community of interest that the Shift Commander shares with the rest of the bargaining unit. We therefore find that the job classification of Shift Commander shares a community of interest and should be included in the bargaining unit represented by Petitioner.

**IT IS THEREFORE ORDERED** that:

1. The bargaining unit shall be clarified to include the positions of Life Safety Inspector and Shift Commander as being appropriately included in the bargaining unit.

Entered October 25, 2013.