

BMS

BUREAU OF MEDIATION SERVICES
State of Minnesota

**IN THE MATTER OF A PETITION
FOR DETERMINATION OF AN
APPROPRIATE UNIT AND
CERTIFICATION AS
EXCLUSIVE REPRESENTATIVE**

June 5, 2012

City of Brooklyn Park, Minnesota

- and -

American Federation of State, County and Municipal Employees,
Minnesota Council 5, South St. Paul, Minnesota

BMS Case No. 11PCE1282

CERTIFICATION UNIT DETERMINATION ORDER

INTRODUCTION

On December 13, 2011 and February 2, 2012 the State of Minnesota, Bureau of Mediation Services (Bureau), conducted a hearing pursuant to a petition filed by the American Federation of State, County and Municipal Employees, Minnesota Council 5, South St. Paul, Minnesota (Council 5). The petition requested determination of an appropriate unit and certification as exclusive representative for certain employees of the City of Brooklyn Park, Minnesota (City). The Parties agreed to a briefing schedule. Timely briefs were received as of March 1, 2012 at which time the record was considered closed. On May 25, 2012 the Bureau requested that the parties clarify their stipulation concerning Lieutenants and each party responded in a timely manner.

APPEARANCES

At the hearing John M. LeFevre, Jr. and Susan E. Torgerson, Attorneys, appeared on behalf of the City; and Gregg Corwin and Cristina Parra Herrera, Attorneys, appeared on behalf of Council 5.

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AGREEMENTS OF THE PARTIES

At the hearing the parties agreed to the following:

A. The description of the appropriate unit:

All firefighters employed by the City of Brooklyn Park Fire Department, Brooklyn Park, Minnesota, who are public employees within the meaning of Minnesota Statute §179A.03 Subd. 14, (2011) excluding supervisory, confidential, and all other employees.

B. The cutoff date for eligibility is December 31, 2010.

C. The Bureau will use the calendar year 2010 payroll data for determining other eligible positions.

D. The bargaining unit shall include:

- a) Deputy Fire Marshall Cassandra Crego-Ofsthun
- b) Fire Technician Jeffrey Dedrick
- c) Fire Technician Richard Johnson II

E. Lieutenants are not supervisory employees, and are included within the appropriate unit subject to a determination of who are public employees within the meaning of Minn. Stat. §179A.03, Subdivision 14(e) (2011).

E. The following are supervisory employees excluded from the appropriate unit:

- a) Chief, Ken Prillaman,
- b) Deputy Chief of Operations, Todd Seitz.

ISSUES

1. Are Captains, Division Chiefs and other Deputy Chiefs supervisory as defined by the Public Employment Labor Relations Act (PELRA) Minn. Stat. §179A.01, (2011) *et seq.* and thus should be excluded from the unit?
2. Do the Captains, Division Chiefs and other Deputy Chiefs lack a community of interest with the firefighters so as to be excluded from the unit?

3. Should part-time firefighters be included in the unit?
4. Did Council 5 submit the required showing of interest to warrant the conduct of an election?

POSITIONS OF THE PARTIES

Council 5 asserts that the Captains, Division Chiefs, and other Deputy Chiefs should be excluded from the bargaining unit because they are supervisory. Or in the alternative, they assert that the Captains, Division Chiefs, and Deputy Chiefs do not share a community of interest with the rest of the bargaining unit and should be excluded from the unit. Council 5 argues the part-time firefighters who work more than 14 hours per week are "public employees" under PELRA, Minn. Stat. §179A.01, (2011) *et seq.* and are proper members of the unit.

The City asserts that because the firefighters' predominant work pattern is unpredictable, part-time and less than 14 hours per week, the proposed bargaining unit not be certified. The City also asserts the Captains and Division/District Chiefs and other Deputy Chiefs should not be excluded as supervisory; and that they do indeed share a community of interest with the firefighters therefore they should remain in the unit.

Applicable Standards

- A. Minn. Stat. §179A.09, Subdivision 1, (2011) PELRA sets forth the standards the Bureau is to use in determining appropriate units. The statute provides:
179A.09 Unit determination. Subdivision 1. Criteria. In determining the appropriate unit, the commissioner shall consider the principles and the coverage of uniform comprehensive position classification and compensation plans of the employees, professions and skilled crafts, and other occupational classifications, relevant administrative and supervisory levels of authority, geographical location, history, extent of organization, the recommendation of the parties, and other relevant factors. The commissioner shall place particular importance upon the history and extent of organization, and the desires of the petitioning employee representatives.

B. Minn. Stat. §179A.03, Subd.14(e) (2011) excludes from the definition of a public employee: ". . . part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit."

C. Minn. Stat. §179A.03, Subd. 17 (2011) contains the PELRA definition of a supervisory employee: "Supervisory employee" means a person who has the authority to undertake a majority of the following supervisory functions in the interest of the employer: hiring, transfer, suspension, promotion, discharge, assignment, reward, or discipline of other employees, direction of the work of other employees, or adjustment of other employees' grievances on behalf of the employer. To be included as a supervisory function which the person has authority to undertake, the exercise of the authority by the person may not be merely routine or clerical in nature but must require the use of independent judgment. An employee, other an essential employee, who has authority to effectively recommend a supervisory function, is deemed to have authority to undertake that supervisory function for the purpose of this subdivision. The administrative head of a municipality, municipal utility, or police or fire department, and the administrative head's assistant, are always considered supervisory employees.

DISCUSSION

SUPERVISORY ISSUE

As noted above, the parties have stipulated that the unit be a non-supervisory bargaining unit and employees who are supervisory within the meaning of Minn. Stat. §179A.03, Subd. 17 (2011) are excluded from the appropriate unit.

Council 5 contends the classifications of Captain, Division Chief and other Deputy Chiefs are supervisory and thus should be excluded from the appropriate unit.

The City contends the positions are not supervisory and should be included in the appropriate unit.

The record of the hearing indicates that Captains, Division Chiefs and other Deputy Chiefs have been delegated the authority to assign and direct the work of other employees and to issue and enforce workplace rules by issuing oral reprimands. While the hearing record established that the employees in question perform a variety of administrative and policy oversight responsibilities, they have not been delegated authority to directly undertake a majority of the ten statutory supervisory functions.

Council 5 contends that Division/District Chiefs also supervise Captains. The facts in this case do not support this contention.

The position description for the Division/District Chiefs indicates that these employees have the following assignments that may include statutory supervisory functions, (City Exhibit 4K):

1. responsible for enforcing the rules, regulations and established SOG's of the department and administering discipline as needed
2. delegates and assigns work to the station Captains as needed
3. provides direct supervision while working shifts
4. required to work as Shift Commander
5. delegates and assigns work to the training staff resources as needed
6. performs annual evaluations on training division staff

Position description, tasks 2, 3, 4, 5 and 6 all constitute the statutory functions of either assignment or direction of the work of other employees. The Bureau has consistently held that conducting performances evaluations is not a supervisory function of rewarding employees but rather of directing their work, State of Minnesota and Minnesota State Employees Union, AFSCME Council No. 6, and Middle Management Association, BMS Case Nos. 82-PR-558-A through 82-PR-574-A and 82-PR-686-A (June 29, 1982). Deputy Fire Chiefs are one level higher than the Division/District Chiefs. They are assigned only the following functions that are supervisory tasks under PELRA:

1. delegates and assigns work resources as needed
2. required to work as Shift Commander
3. directs the development, implementation and documentation of the department's training activities and supervise the department training resources

As with the Division/District Chiefs, these assigned duties involve direction and assignment of the work of other employees. Evidence fails to support the Council 5 assertion that these employees have been delegated authority to directly undertake a majority of the ten supervisory functions.

Therefore, Captains, Division/District Chiefs and Deputy Fire Chiefs have not been delegated a majority of supervisory tasks as defined in PELRA and should not be excluded from the appropriate unit as supervisory employees.

COMMUNITY OF INTEREST ISSUE

The second issue in this case is whether Captains, Division/District Chiefs and Deputy Chief classifications lack sufficient community of interest with the classification of firefighters to be included in the same appropriate bargaining unit.

Council 5 argued that the positions of Captain, Division/District Chiefs and other Deputy Chiefs do not share a community of interest with the unit of firefighters. Council 5 argued that the statutory factor; principles and coverage of uniform comprehensive position classification and compensation plans of the employees, supports exclusion of the classifications.

The City argued that the question of community of interest is not relevant in this case. In support of their position, the City cites Teamsters Local 320 and City of Hutchinson, BMS Case No. 09-PCE-0030 (September 30, 2008). In that case, the union asked BMS to exclude non-supervisory Sergeants from a base police officer unit. The Sergeants and police officers shared many common factors and the Bureau held that there was little reason or precedent to separate non-supervisory licensed police officers into two separate bargaining units, thus, the Sergeants were included in the police officer unit.

The record reveals the following in terms of the criteria enumerated in §179A.09, Subdivision 1, (2011):

- a) Principles and coverage of uniform comprehensive position classification and compensation plans of the employees.
All Brooklyn Park Fire Department employees are part of a uniform comprehensive position classification and compensation plan of the City. While there are differences in compensation, it is common in a hierarchical organization with different ranks, duties, positions and skills. This factor supports the City's request.
- b) Professions and skilled crafts, and other occupational classifications.
Captains, Division/District Chiefs and Deputy Chiefs within the Brooklyn Park Fire Department are all "firefighters" as defined in Minn. Stat. §179A.03, subd. 3, (2011) that defines the set of skills, knowledge, and ability required to hold these positions. Therefore, this factor supports the City's position.
- c) Relevant administrative and supervisory levels of authority.
The Bureau has determined that Captains, Division/District Chiefs and Deputy Chiefs are not supervisory employees under PELRA. However, these positions have increased rank and significantly greater administrative responsibility. Thus, this factor supports excluding Captains, Division/District Chiefs and Deputy Chiefs in the firefighters appropriate bargaining unit.
- d) Geographical location.
All Brooklyn Park Fire Department employees work from the same geographical locations within the City. This factor supports the City's position.
- e) History.
This is the first attempt to organize the City of Brooklyn Park Fire Department and there is no history of collective bargaining within the City Fire Department. This factor is neutral and provides no guidance in this case.

f) Extent of organization.

Extent of Organization means the groupings of employees among whom the union has support and upon which it has focused its organizing efforts. State of Minnesota, State Board of Public Defense, and Teamsters Local 320, BMS Case No. 98-PCE-490 (March 3, 1999). This factor supports the appropriate unit requested by Council 5.

g) The recommendation of the parties.

Council 5 recommends these positions be excluded from the bargaining unit, and the City recommends the positions be included in the unit, these positions offset each other and therefore provide no guidance in this case.

h) Other relevant factors.

No other relevant factors of significance are noted.

In reviewing the community of interest standards, the principles and coverage of uniform comprehensive position classification and compensation plans of the employees, professions and skilled crafts, other occupational classifications, and geographical location support the City's position. The relevant administrative and supervisory levels of authority, the extent of organization and the desires of the petitioning employee organization support the appropriate unit requested by Council 5.

Even after placing "particular importance" upon the extent of organization and desires of Council 5 as factors in support of the Union position, the factors favor a single appropriate unit for non-supervisory firefighters. The fact that all of the employees are defined as essential employees under statute and "firefighters", thus, outweighs other factors. This is in large measure because the employees share a profession defined by the PELRA. The Bureau finds that Division/District Chiefs and Deputy Chiefs share a community of interest with other City firefighters and are to be included in a single appropriate bargaining unit.

PART-TIME FIREFIGHTERS

In its written argument, the City concluded that: "The proposed unit of part-time firefighters should not be certified." (City Post-Hearing Memorandum of Law at page 15.)

A bargaining unit composed solely of part-time firefighters has not been proposed in this case. As noted above, the parties have agreed upon the description of the appropriate unit:

All firefighters employed by the City of Brooklyn Park Fire Department, Brooklyn Park, Minnesota, who are public employees within the meaning of Minnesota Statute §179A.03 subd. 14, (2011) excluding supervisory, confidential, and all other employees.

Thus, any non-supervisory, non-confidential firefighter employed by the City Fire Department who is a public employee within the meaning of PELRA must be included within the appropriate unit.

The City argued that the Bureau should apply the reasoning in International Association of Fire Fighters, Local No. 579 and City of Mankato, BMS Case No. 96-PCL-876 (August 30, 1996). In that case the Bureau held that volunteer firefighters were not public employees where all but two worked less than 14 hours per week. City of Mankato is distinguished from the matter at hand. In that case there was an existing appropriate unit of full-time firefighters and the City supplemented them with paid volunteers. The employees at issue in that case were not required to work a minimum number of hours or days. Further, the order in that case stated specifically that the holding was based upon the specific scheduling pattern of the affected employees and subject to review if the scheduling pattern changed. The case before us is a petition for a new bargaining unit. This case is further differentiated from Mankato because the employees in question are required to work a minimum number of hours per quarter and be available as needed to meet training requirements (City Exhibit 3c).

The standards the Bureau uses in such cases are well developed. In Independent School District No. 721, New Prague v. School Services Employees, Local 284, Richfield, 379 N.W.2d 673 (Minn. Ct. App. 1986) the Court of Appeals held, that "the normal work week is to be calculated by reference to the normal, predominant work week of the full-time employees of the bargaining unit." In that case, as here, the normal predominant work week of full-time employees is 40 hours. Consistent with the holding in New Prague, individual employees whose hours of work exceed 14 hours per week in the majority of weeks worked are public employees. In

Granite Falls (City of Granite Falls and AFSCME Council 65, BMS Case No. 96-PCL-1460) the Bureau described the process it uses in implementing the holding in New Prague. This process is:

1. Determine the number of hours in the normal work week of the bargaining unit in which the employee would be included.
2. Calculate the part-time hourly exclusion - either more than fourteen (14) hours per week or thirty-five (35) percent of the normal work week, whichever is the less.
3. Identify the previous calendar year period.
4. Establish the number of weeks during which the employee in question worked during the previous calendar year.
5. Determine the number of weeks worked during the previous calendar year in which the employee's hours worked exceed the number determined using the calculation listed in two (2) above.
6. If a majority of the weeks worked during the previous calendar year exceed the number determined in two (2) above, the employee is considered a public employee and is included in the appropriate unit. However, if, the employee's weeks worked is less than a majority during the previous calendar year, the employee is not a public employee and is excluded from the bargaining unit.

Applying these steps in this case discloses the following:

The parties in this case have stipulated that the Deputy Fire Marshall and two Fire Technicians are included in the appropriate unit. These are positions whose normal work schedules are 40 hours per week or more. Therefore, any employee whose position falls within the scope of the appropriate unit must work more than 14 hours per week. The parties agreed the previous calendar year to be used is calendar year 2010.

The City presented, in City Exhibit 9, a chart showing hours worked by firefighters for each week in calendar year 2010.

Firefighters who worked more than 14 hours in the majority of weeks worked are indicated in the chart.

The City argues that BMS should find that employees attain public employee status only if they worked 14 hours in each week of the previous calendar year. "To achieve over 14 hours per week, for the whole year, the firefighters would have to total at least 728 hours for the year (14 hours x 52 weeks)." (City Memorandum of Law, page 5). The City's proposed analysis is inconsistent with the statute. Past BMS Cases (see Granite Falls) have considered the number of weeks employees exceeded fourteen hours in comparison to the number of weeks in which an employee worked. If the Legislature had intended the consideration of each week of the calendar year as proposed by the City it would have stated this in the law. Thus, the Bureau rejects the City's argument and instead will apply the Granite Falls test in this case.

City Exhibit 9 is a chart showing hours worked by firefighters for each week in calendar year 2010. In Appendix A the Bureau uses the data in City Exhibit 9 to examine all firefighters using the Granite Falls test and specifies which employees are included within the stipulated bargaining unit in the City of Brooklyn Park Fire Department.

FINDINGS AND ORDERS

1. The agreements of the parties are appropriate.
2. The appropriate unit is described as:

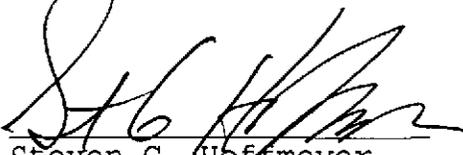
All firefighters employed by the City of Brooklyn Park Fire Department, Brooklyn Park, Minnesota, who are public employees within the meaning of Minnesota Statute §179A.03 Subd. 14, (2011) excluding supervisory, confidential, and all other employees.

3. Captain, Division Chief and other Deputy Chiefs are not supervisory employees within the meaning of Minn. Stat. §179A.03, Subdivision 17 (2011).

4. Captain, Division Chief and other Deputy Chiefs share a community of interest with other firefighters as set forth at Minn. Stat. §179A.09, Subdivision 1, (2011) and are included within the appropriate unit.
5. The firefighters who are public employees within the meaning of Minn. Stat. 179A.03, Subd. 14(e) are shown in Appendix A.
6. The Petitioner has submitted the required showing of interest, through valid authorization cards, to warrant the conduct of an election.
7. The Bureau shall conduct a mail-ballot election among the eligible employees in accordance with a Mail Ballot Election Order to be issued separately.
8. The City shall mail to the Bureau and Council 5 **no later than June 12, 2012**, a list of employees falling within the above-described appropriate unit, including home-mailing addresses and position titles (Appendix B).
9. The City shall post this Order at the work locations of all affected employees.

STATE OF MINNESOTA
Bureau of Mediation Services

JOSH L. TILSEN
Commissioner



Steven G. Hoffmeyer
Hearing Officer

cc: Jamie Verbrugge (2)
(Includes Posting Copy)
John M. LeFevre, Jr.
Susan E. Torgerson
Gregg Corwin
Cristina Parra Herrera
Eric Lehto

Appendix A

Name	Total Number of Weeks Worked by Employee in 2010	Number of Weeks in Which Employee Worked Greater than 14 Hours	Public Employee Yes/No
1. Bahr, T	48	18	No
2. Barton, T	50	0	No
3. Bell, T	39	0	No
4. Boos, J	52	4	No
5. Borst, C	49	10	No
6. Bottger, T	48	32	Yes
7. Braun, M	33	13	No
8. Bruch, K	51	38	Yes
9. Coffey, S	38	9	No
10. Coppa, R	15	1	No
11. Doherty, D	46	3	No
12. Driste, M	51	46	Yes
13. Dublin, A	51	15	No
14. Fisher, K	46	9	No
15. French, D	17	9	Yes
16. Greco, N	52	41	Yes
17. Haarstad, T	50	30	Yes
18. Hammernik, M	11	3	No
19. Hanlin, P	13	1	No
20. Hansen, A	49	32	Yes
21. Heidt, H	49	11	No
22. Hendrickson, G	37	14	No
23. Hollingsworth, B	42	26	Yes
24. Horsman, A	42	19	No
25. Hughes, K	47	20	No
26. Jasicki, G	52	31	Yes
27. Joens, J	50	35	Yes
28. Johnson, C	45	10	No
29. Jurek, G	44	12	No
30. Kaden, M	47	28	Yes
31. Kraus, J*	50	40	Yes
32. Lawrence, J	52	20	No
33. Lynne, E	46	7	No
34. Massicotte, E	51	36	Yes
35. Mata, M	30	0	No
36. Maurer, M	37	29	Yes

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37. McRae, R	47	36	Yes
38. McReynolds, J	38	14	No
39. Messer, T	46	20	No
40. Messer, W	18	6	No
41. Michaud, J	36	11	No
42. Miller, R	42	17	No
43. Podvin, T	51	13	No
44. Price, L	52	43	Yes
45. Qualley, P	45	15	No
46. Richards, B	41	1	No
47. Roepke, P	41	30	Yes
48. Rogers, J	18	12	Yes
49. Schmidt, B	39	26	Yes
50. Schmidt, D	52	40	Yes
51. Schmidt, S	49	49	Yes
52. Searle, H	27	1	No
53. Slipka, C	36	24	Yes
54. Smith, D*	52	42	Yes
55. Sperling, P	42	1	No
56. Stromdahl, J	51	51	Yes
57. Theiringer, G	42	28	Yes
58. Thornberg, K	36	19	Yes
59. Underwood, D	50	29	Yes
60. Winge, L	51	4	No
61. Wright, A	50	21	No
62. Zieba, J	52	52	Yes

Appendix B- Employees Included in the Bargaining Unit

1. Bottger, T
2. Bruch, K
3. Crego-Ofsthun, Cassandra
4. Dedrick, Jeffrey
5. Driste, M
6. French, D
7. Greco, N
8. Haarstad, T
9. Hansen, A
10. Hollingsworth, B
11. Jasicki, G
12. Joens, J
13. Johnson II, Richard
14. Kaden, M
15. Kraus, J
16. Massicotte, E
17. Maurer, M
18. McRae, R
19. Price, L
20. Roepke, P
21. Rogers, J
22. Schmidt, B
23. Schmidt, D
24. Schmidt, S
25. Slipka, C
26. Smith, D
27. Stromdahl, J
28. Theiringer, G
29. Thornberg, K
30. Underwood, D
31. Zieba, J