

Before the
LABOR AND INDUSTRIAL RELATIONS COMMISSION
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<http://www.dolir.mo.gov/lirc>

DECISION OF COMMISSION

INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, LOCAL 42,)	
)	
Petitioner,)	
)	
v.)	Public Case No. 2007-001
)	
KEARNEY FIRE AND RESCUE)	
PROTECTION DISTRICT)	
)	
Respondent.)	

INTRODUCTION

On July 19, 2006, International Association of Fire Fighters, Local 42 (“Petitioner”), filed a petition with the Labor and Industrial Relations Commission (the “Commission”) seeking to represent a unit (the “Unit”) of employees of Kearney Fire and Rescue Protection District (“Respondent”), described as follows: all full-time and part-time employees of Respondent, including the ranks of Assistant Chief, Captain, Firefighter-EMT-Paramedic, Firefighter EMT, and probationary firefighters but excluding the Fire Chief and clerical staff.

On September 5 and 12, 2006, an authorized officer of the Commission conducted informal conferences, pursuant to 8 CSR 40-2.100, in which both Petitioner and Respondent participated. During these conferences, the parties agreed to stipulate that the position of Assistant Chief should be excluded from the Unit. Respondent contended, however, that Captains and part-time and probationary employees should also be excluded from the Unit.

Because the parties were unable to resolve this question as to which employees should be included in the Unit, the Chairman of the Commission ordered that a hearing be scheduled pursuant to 8 CSR 40-2.140(1).

After notice to the parties, the Commission conducted a hearing regarding this matter on November 28, 2006, at the Clay County Administration Building in Liberty, Missouri. Respondent was represented by Katherine Sinatra and Robert L. Ortvals, Jr. Six witnesses testified on behalf of Respondent: Robert Baer, Scott Williams, David Pratt,

Brad Weber, Larry Pratt, and Kevin Pratt. Petitioner was represented by Joseph W. Moreland, Esq. One witness testified on Petitioner's behalf: Sean Gudde.

During the hearing, Petitioner orally amended its petition to reflect that it was only seeking the inclusion of "regular" part-time employees (employees working at least 48 hours per month) in the Unit.

We have now read the briefs of the parties and considered the whole record and issue the following Findings of Fact, Conclusions of Law, Decision, and Direction of Election.

FINDINGS OF FACT

Overview of Fire District

Respondent's fire district was established in 1990. Respondent has a five-member Board of Directors. Larry Pratt is Respondent's longstanding Fire Chief. Respondent has two Assistant Chiefs. Both of the Assistant Chiefs are volunteers. While one of them works occasional compensated shifts (never more than two a month), these Assistant Chiefs are not involved in the day-to-day operation of the fire district and tend to be present only when needed for major events. One of the Assistant Chiefs is in charge of the junior firefighter program, while the other one is in charge of maintenance issues. The Assistant Chiefs are only in charge when a Captain is not present; otherwise, when they work they are treated like any of the other firefighters.

Respondent has three Captains. It is also supposed to have 15 additional full-time firefighters; but, as of the date of the hearing, Respondent was shorthanded due to two firefighter vacancies. Respondent also has five part-time firefighters. At present, Respondent has no probationary employees.

Respondent receives approximately a thousand calls each year. Of these calls, approximately 80% (800) are emergency medical calls while the other 20% (200) are fire calls. Respondent only receives approximately two or three "actual working structure fires" each year. Respondent has nine pieces of fire suppression equipment and one hazardous material decontamination trailer.

Captains

Next to the Chief, the Captains have worked the longest period of years for Respondent. Each of the three is in charge of one of the three shifts designated A, B, and C. Each shift is supposed to have five additional firefighters working so that of the total of six employees, three are assigned to fire apparatus, two to the ambulance, and one to the ladder truck. The pay range for Captains is from \$40,476.00 to \$51,239.00. Because of their many years of service, the current Captains are at the top of their pay range. In comparison, the pay range for a full-time firefighter/EMT is \$28,639.00 to 36,142.00. The pay range for a full-time firefighter/paramedic is \$31,821.00 to \$44,240.00.

The Captains, full-time, and probationary firefighters enjoy many benefits. Respondent provides all these employees with health, vision, and dental insurance; short and long-

term disability coverage; vacation and sick leave; pension; deferred compensation plan; paid educational incentives; and holiday pay.

In addition to the benefits that other employees enjoy, Respondent has also provided the Captains Nextel telephones, an office, and a computer. Furthermore, like the Chief, the Captains are privy to their subordinates' health information.

Chief Pratt described his Captains' functions as being somewhat different than many of the captains in other fire districts with which the Chief was familiar. Unlike these other districts, Respondent does not have multiple levels of officers sharing duties. Consequently, Respondent's Captains have to assume many additional duties, including administrative and supervisory functions, because the Chief is not around consistently.

Captains spend some time during every shift doing shift reports or other paperwork required. They spend at least one hour each shift inputting information into their computer. They also prepare annual evaluations for each firefighter, do fire and inspection reports, do the logbook, and check reports prepared by firefighters. They prepare (or assign to prepare) training lessons. The annual evaluations that the Captains prepare discuss strengths and weaknesses and set goals but have no impact on the firefighters' pay. The Captains attend monthly officer meetings.

Like the Chief and in conjunction with the Chief, the Captains are involved in the hiring process. The best evidence shows that while their subordinates may help with the administration and scoring of the agility and medical tests, only the Captains and Assistant Chiefs perform the formal oral interviews of potential employees. The Captains and Assistant Chiefs then make their hiring recommendations to the Chief. The Chief, in turn, passes on his recommendations to the Board. (One of the Captains explained how he was effectively responsible for hiring an employee that otherwise might not have been offered the position.)

The Captains are also involved in the strategic planning for Respondent. They variously help plan for Respondent's growth by investigating and preparing plans for location of additional facilities, for promoting the career advancement of personnel by training firefighters to take on additional duties or positions as they become available, and for budget expenditures (like rescue equipment and vehicle replacement) and salary scales. They not only plan, but deal with supply budget matters (at a minimum for emergency medical supplies and public education materials). Lastly, they investigate and make recommendations with respect to employee benefits. Regular firefighters would not be involved in such matters unless an officer specifically recruits their help.

Chief Pratt's testimony (supported by the Captains' testimony) was that the "[Captains] run the operation of the fire district and whatever it takes to do things [They] handle the day-to-day things, the decision making, and basically just operating the district." While the evidence was clear that much of the daily operation of the firehouse was routine due to advance scheduling, planning, and training, Captains still either exercised or retained the right to exercise discipline, decide how much and what kind of training to provide their subordinates, decide when and what tasks firefighters will perform, change

assigned tasks and deny or change vacation time or shift-swapping, and decide whether they want to personally participate in any of the day-to-day housecleaning and other daily chores.

The Captains testified that they have, in fact, disciplined employees for being late and for being argumentative. They have documented reprimands. They have sent personnel home without pay for the balance of a day. The Respondent's written policies give Captains the right to do verbal warnings, documented verbal warnings, written reprimands, and suspensions up to 12 hours in length for career personnel and up to seven days in length for volunteer personnel, all without input from the Chief. With respect to longer suspensions, demotions, and discharges, the Captains must consult with the Chief.

When scheduling changes are necessitated, whether planned or last-minute, the Captains use the "overtime box" to determine which firefighter (whether full-time or part-time) will be offered the additional time. Using this system, the Captains simply go to whatever name is next on the list to be called, first from the full-time employees then from the part-time. If that person chooses not to accept the additional time, the Captain goes to the next person on the list.

The Captains decide onto which shift new hires will be placed in order to maintain what they believe is an appropriate balance of skills. They have the right to do "project management" and to organize, coordinate, evaluate, and give feedback to subordinates. Ultimately, it is the responsibility of the Captains to maintain control, deal with any problems or changes (including problems among personnel), insure the smooth operation of the firehouse and all emergency responses, and make sure that all apparatus is clean, in good order, and regularly maintained.

In connection with incoming emergency calls, they decide or have the right to decide what apparatus (e.g., whether for medical emergencies the circumstances seem to require only the ambulance or whether the fire truck should also be sent) and personnel will respond, whether they will personally accompany the firefighters sent in response to the call, whether to call for additional help, when to discontinue the call, and whether to command (unless the Chief is present and assumes command) or to participate. In connection with non-fire emergency calls, the Captains normally remain in charge even if the Chief is present.

The Captains' day-to-day uniforms are the same as their counterparts, except that their title is displayed in embroidered letters. The dress uniforms of the Captains are different from their counterparts; the Captains dress uniforms are white, not dark.

Comparison of Full-Time, Part-Time, and Probationary Firefighters

Full-time firefighters work 24 hours on-duty followed by 48 hours off-duty. Consequently, during any given month, a full-time firefighter works an average of approximately 10 shifts per month. Respondent schedules their shifts for long periods in advance. On the other hand, part-time fighters must work at least 48 hours per month (which can be split into 12 or 24-hour segments). Consequently, during any given month, part-time

firefighters must work at least two shifts per month. Part-time firefighters can decline shifts, so long as they work the minimum number of hours required.

Unlike full-time employees, part-time employees enjoy few of the benefits that Respondent provides to the other employees. Respondent may pay them time-and-a-half for holidays. Respondent provides their workers' compensation insurance and a \$25,000.00 accidental death policy. Part-time firefighters are expected to perform the same activities as the full-time employees, and they have the same training and qualifications. The only part-time firefighter that testified indicated he had been working for Respondent for four or five years and that it paid him \$10.50 an hour.

Probationary employees have the same training and qualifications and would work the same amount of shifts and perform (as learned) the same duties as the full-time employees. From the day they begin, probationary firefighters have the same benefits as their full-time counterparts. The probation or trial period generally lasts up to one year. After the probationary employee has satisfactorily performed his or her duties for the trial period, he or she can be granted regular status. In order to extend the trial period, the Chief must tell the probationary employee how long the extension will last and the reason or reasons for the delay. On the other hand, the rights that Respondent gives its probationary firefighters under the written disciplinary policies are much more limited than those it gives to permanent status employees.

CONCLUSIONS OF LAW

Petitioner filed a petition to this Commission seeking to be certified as the exclusive bargaining representative for the Unit. Respondent contends that the Unit proposed is not appropriate -- that Captains, part-time firefighters, and probationary firefighters should be excluded from the Unit. During the course of the hearing before this Commission, the parties further narrowed the issues before this Commission by agreeing to exclude from the Unit Assistant Chiefs and any part-time firefighters working less than 48 hours per month.

Section 105.525, RSMo. 2000, and Executive Order 05-16¹ indicate that questions with regard to the appropriateness of proposed public sector bargaining units will be resolved by this Commission. Consequently, the issue facing this Commission is whether Captains, regular part-time firefighters (employees working at least 48 hours per month), and probationary firefighters should be included in the Unit proposed in Petitioner's petition.

Furthermore, before deciding the issue before us, we think it important to note certain additional principles of law relevant to our determination. First, since it is Petitioner that is asserting the appropriateness of the Unit set forth in its petition, the law places the burden on Petitioner to prove that Captains, regular part-time and probationary employees should be included in the Unit. *Central County Emergency 911 v. Int'l Ass'n of Firefighters, Local 2665*, 967 S.W.2d 696, 699 (Mo. App. W.D. 1998) Second, the

¹ Issued July 1, 2005.

courts have given us broad discretion in deciding Public Sector Labor cases and have confirmed our authority to experiment. *Parkway School Dist. v. Parkway Ass'n of Education, Support Personnel, PA-ESP, Local 902/MNEA*, 807 S.W.2d 63, 69 (Mo. banc 1991). Lastly, we are neither bound by National Labor Relations Board ("NLRB") precedent (*Central County Emergency 911*, 967 S.W.2d at 700) nor our own previous decisions (*MNEA v. Mo. State Board of Mediation*, 695 S.W.2d 894, 899 (Mo. banc 1985)).

Section 105.500, RSMo. 2000, defines an "appropriate unit" as "a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned." Neither Missouri's laws nor its regulations provide any further guidelines for determining what constitutes a "clear and identifiable community of interest."

This Commission holds to the opinion, however, that certain employees should be excluded from units containing rank and file employees (*Central County Emergency 911*, 967 S.W.2d at 700) because they tend to be more closely associated with management (*City of Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 194 (Mo. App. W.D. 1980)). After all, not all persons who work for a public body can be employees; someone must act for the interests of the employer. *City of Columbia*, 605 S.W.2d at 194.

"Among the categories of employees whose duties involve acting directly or indirectly in the interest of the employer in relation to other employees are 'managerial' employees and 'confidential' employees. . . . 'Managerial' employees formulate, determine or effectuate policies on behalf of their employer while 'confidential' employees are persons who, in the normal performance of their duties, have access to confidential information affecting the employer-employee relationship. 'Management' employees and 'confidential' employees are excluded from the bargaining unit either because their inclusion could create conflicts of interest in the performance of their duties or because they lack sufficient community of interest with other workers." *MNEA*, 695 S.W.2d at 898 (citations omitted).

"The essential issue is whether the challenged employees have such a close relation to [Respondent's] management of labor relations that the district would be prejudiced by their inclusion in a bargaining unit with other employees. The employees involved surely have common interests with other employees in securing improvement in wages, hours and working conditions, and in obtaining assistance in the processing of grievances. The [state] has recognized that there is strength in size and that a unit may be too small to be effective, so that employees should be excluded from bargaining units only for substantial reasons." *Parkway School Dist.*, 807 S.W.2d at 68.

To determine the supervisory status of employees, we use the following seven factors:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline, or discharge of employees;
2. The authority to direct and assign the work force;

3. The number of employees supervised and the number of other persons exercising greater, similar, or lesser authority with respect to the same employees;
4. The level of pay, including an evaluation of whether the supervisor is paid for his or her skill or for his or her supervision of employees;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;
6. Whether the supervisor is a working supervisor or whether he or she spends a substantial majority of his time supervising employees; and
7. The amount of independent judgment and discretion exercised in the supervision of employees.

Central County Emergency 911, 967 S.W.2d at 700.

Not all of the above-listed factors need to be present for a position to be supervisory. On the other hand, more than just one factor must be present to find that a position is supervisory. *Id.* at 701. Also, no one factor is controlling. Instead, the inquiry will be whether these factors are present in sufficient combination and degree to warrant the conclusion that the position is supervisory. *Int'l Ass'n of Firefighters, 2d Dist. v. City of Gladstone*, Public Case No. R1998-004, page 10 (Missouri State Board of Mediation ("SBM") 1998).

We are aware that the factors and opinions set forth above are contrary to the NLRB's fluctuating standards. As pointed out in *City of Gladstone*, Public Case No. R1998-004, at pages 11-12,

We see no reason to change our existing standard for determining supervisory status to the standard used by the NLRB. Here is why. . . . [T]he NLRB's standard is derived from the statutory definition of the term "supervisor" which is contained in the NLRA, as amended. That definition though is not contained in the Missouri statute which we administer. That being so, there is nothing in our statute which requires us to apply the same standard as the NLRB. We therefore take this opportunity to announce that we will continue to apply the same standard for determining supervisory status as we have applied for the last 20 years. In our view, our existing standard for determining supervisory status is known and accepted in Missouri public sector labor relations circles. Were we to now change it to the NLRB's standard, we are convinced this would result in years of new legal challenges to the supervisory decisions which this Board has rendered over the last several decades.

Accordingly, we now apply our seven factors to the Captains to determine whether they should be considered supervisory and, thus, excluded from Petitioner's proposed Unit.

Seven Factors Applied to Captains

The undisputed evidence shows that the Captains have the right to exercise and have actually exercised their right to effectively recommend at least a couple of the procedures

mentioned in the first factor, namely, the hiring and discipline of firefighters. The Captains, together with the Assistant Chiefs, conduct and grade the formal interview with new hire applicants. The Chief and Board then make their decisions to hire based on the Captains' recommendations. At least one of the Captains has actively campaigned for and secured the hiring of an employee that probably would not have otherwise been hired. The Captains have a great deal of leeway in exercising discipline, too, and have exercised such discretion on occasion without the Chief's input. The Captains' subordinates do not have such authority. Thus, the first factor weighs in favor of the Captains' being supervisors.

Although Respondent can be proud that its drills, training, and professional workforce greatly reduce the need for any intervention by Captains in the day-to-day activities of the firefighters, the Captains still retain the right to direct and assign the workforce. During most of the emergency calls (which deal with medical situations), the Captains are completely in charge and exercise their judgment (based on their experience of past situations and knowledge of the skills and number of the firefighters at their command) as to what personnel and equipment to send and whether or not to personally accompany the response team sent.

Unless the Chief shows up at a fire incident and assumes command, the same holds true during responses to fire emergencies. Again, the Captains must use their independent judgment to decide what personnel and apparatus will respond. The Captains may and do direct the activities of the firefighters at the fire scene. They must decide when to request help from additional fire districts and when conditions warrant and permit entry of buildings.

Even with respect to the day-to-day routines at the firehouse, the Captains have the responsibility for making sure that the firehouse itself is maintained and cleaned and that all machines and equipment are clean, ready to use, and in good working order. Consequently, the Captains have the right to change schedules and duties as they see a need. Furthermore, the Captains also exercise their judgment as to what training the firefighters on their shifts need, when to provide that training, and who will provide that training. The other firefighters generally do not have any such authority to direct and assign the workforce. Accordingly, this second factor also weighs in favor of the supervisory status of the Captains.

Only the Chief and Respondent's Board of Directors have authority over the Captains. The Assistant Chiefs are not present often; and when either is present, he does not exercise any authority (unless no other officer is there). The Board is never present on the job, and the Chief is "not there on a consistent eight hours a day" basis. Consequently, the Captains are, by necessity, in charge of their five subordinates at least 16 hours each day. As the Chief pointed out in his testimony, this fire district may be unlike many other districts because of its lack of additional supervisory officers. Thus, we are persuaded that the third factor suggests that the Captains are supervisors.

Turning our attention to the fourth factor, the record shows that the Captains' level of pay is considerably higher than the pay of the other firefighters. The pay range for Captains

is from \$40,476.00 to \$51,239.00. The Captains are all at the highest end of their pay scale because of their many years of service to Respondent. The pay range for a full-time firefighter/EMT is \$28,639.00 to 36,142.00. The pay range for a full-time firefighter/paramedic is \$31,821.00 to \$44,240.00. Thus, if the years of service of a Captain are equal with that of either a full-time firefighter/EMT or firefighter/paramedic, the Captain's pay will be much higher. Even the most inexperienced Captain would make more than most highly experienced firefighters. Therefore, we conclude that while a Captain's skill level certainly affects his level of pay, the generally much higher Captains' salaries are due to the additional supervisory duties they have to satisfy. Accordingly, this factor, too, suggests that the Captains are supervisors.

With respect to the fifth factor, it seems to us that during the vast majority of their time on the job, the Captains are simply making sure that the firefighters are performing the routines with which they are very familiar and need little supervision. Little judgment is needed in deciding who will perform the various routine tasks. The Captains are simply making sure that the assigned activities are completed. On the other hand, the Captains do exercise their supervision over the employees by deciding and directing the training that their subordinates need.

The Captains exercise somewhat more supervision at the emergency scenes. During such emergency calls, the Captains exercise critical supervisory authority as to which and how many personnel and apparatus need to respond. Since the best evidence suggests that much of the firefighters' time is spent in routine maintenance at the firehouse, we find this factor either neutral or slightly in favor of the Captains not being supervisory.

The sixth factor is whether the Captains are working supervisors or whether they spend a substantial majority of their time supervising employees. Again, because of the firefighters' high level of professionalism, skill, and training, it is difficult to say that the Captains spend a "substantial majority" of their time supervising. The Captains may spend an hour or two of every 24 hour shift doing paperwork. During the balance of their shift, the firefighters are performing the tasks the firefighters know to perform. The Captains participate in many of those activities. While the Captains may choose to direct and command at emergency scenes, they are generally again working shoulder to shoulder with the other firefighters. This factor, then, seems to suggest that the Captains are more in the nature of lead workers and not supervisors.

We have discussed the seventh factor during the course of examining the other six factors. Clearly, the Captains know the strengths and weaknesses of the firefighters on their shifts. At times, the Captains exercise their independent judgment in deciding how to use those personnel in response to emergency calls. The Captains also use their judgment in deciding the training and discipline needed by their subordinates. The best evidence show, though, that the great majority of the Captains' time is spent doing the same activities as their fellow firefighters. This fact, then, suggests that the "amount" of independent judgment and discretion "exercised" is relatively small. Consequently, this factor is indicative of a non-supervisory status.

After considering all seven factors, we are not persuaded that the Petitioner has met its burden of proving that the Captains should be included in the Unit. At least the first four of the seven factors suggest that the Captains are actual supervisors. We conclude that these factors are of sufficient combination and degree to warrant the conclusion that the position of Captain is supervisory. Therefore, the position of Captain should be removed from the Unit and listed in the positions excluded from the Unit.

Part-time and Probationary Firefighters

In some respects, the rights and obligations of regular part-time and probationary firefighters may differ greatly from their full-time, permanent counterparts. The evidence suggests that Respondent pays part-time employees less per hour. Part-time employees do not receive most of the benefits that Respondent gives its full-time employees. (This difference is not true, though, for probationary employees, who receive the same benefits as their full-time counterparts beginning as soon as they become employed.) Respondent does not give probationary employees the same disciplinary rights that it accords to its permanent status employees.

In some very important respects, though, all these firefighters share a community of interest. They have the same supervisors. They perform the same activities. They have the same qualifications and training.

“Regular part-time employees are considered to have a community of interest with the full-time employees and qualify for inclusion in the bargaining unit. The question . . . is whether the part-time employees in question are regular part-time employees or casual employees.” *American Federation of State, County, and Municipal Employees, Local 410 v. City of Festus*, Public Case No. R1999-052, page 7 (SBM 1999). The NLRB’s “Outline of Law and Procedure in Representation Cases” (“NLRB Outline”) states that “[p]art-time employees are included in a unit with full-time employees whenever the part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours, and working conditions of the full-time employees in the unit.” NLRB Outline, Chapter 20-110, page 237 (citations omitted).

In the case before us, part-time employees can decline shifts. We are persuaded, though, that other considerations are of greater importance. “In evaluating the part-time status of employees, consideration is given to regularity and continuity of employment, the similarity of duties and functions to those of full-time employees, the similarity of wages, benefits, and other working conditions, and the supervision of the part-time employees.” NLRB Outline, Chapter 20-110, page 238 (citations omitted).

The only part-time employee who testified indicated that he had been working for Respondent for four or five years. Thus, the only evidence before us demonstrates a great deal of continuity of the part-time workforce. They clearly work less frequently than but regularly with their full-time counterparts. They must work either two or four shifts each month (totaling 48 hours). Full-time employees work an average of approximately ten shifts per month. As stated above, the part-time firefighters have the same

supervisors, perform the same activities, and have the same qualifications and training as the full-time employees. Our consideration of all these facts persuades us that the “regular” part-time firefighters that work for Respondent at least 48 hours per month are not casual employees; rather, they enjoy a sufficient community of interest with their full-time counterparts that they should be included in the Unit.

The probationary employees (Respondent presently has none) probably even more closely align their interests with the permanent, full-time firefighters. They perform all the same functions, have the same supervisors, and enjoy most of the same benefits. The only question with respect to probationary employees remaining to be answered is whether they have a “reasonable expectation to become permanent” in their positions. *Service Employees Int’l Union, Southwestern Joint Council No. 29 v. Dept. of Labor and Industrial Relations, Div. of Employment Security*, Public Case No. R1984-111, page 11 (SBM 1984). The NLRB Outline, Chapter 20-610, page 246, states as follows concerning probationary employees:

Where their general conditions of work and their employment interests are like those of the regular employees and they have a reasonable expectation of continued employment, probationary employees are included in the unit. The requirement of the completion of a probationary period does not militate against a finding that the employees are permanent.

(Citations omitted.)

The evidence presented to us suggests that probationary firefighters working for Respondent would generally be well-trained professionals with every expectation of successfully completing their trial period after one year. In order to even postpone a probationary employee’s trial period, the Chief must be dissatisfied with his or her performance, must give the relevant employee a new extended trial period date, and must provide the employee a reason for the postponement. We have no evidence that Respondent has ever failed to hire a probationary employee, or has even lengthened the trial period connected with such an employee. Consequently, we conclude that the probationary employees, too, enjoy a sufficient community of interest with their permanent counterparts that they should be included in the Unit.

DECISION

The following is the appropriate Unit of employees in connection with Petitioner’s petition:

All full-time and regular part-time (working 48 hours or more per month) employees of the district, including the Firefighter-EMT-Paramedic, Firefighter-EMT, and Probationary Firefighter; excluding the Fire Chief, Assistant Chiefs, Captains, casual part-time firefighters working less than 48 hours per month, and Clerical Staff.

The Commission hereby orders an election in accordance with the Direction of Election that follows.

DIRECTION OF ELECTION

The Chairman of this Commission, or his designated officers, shall conduct an election by secret ballot of the employees set forth in the Unit immediately above-described in the Decision. This election shall take place as soon as possible, but not later than 45 days from the Decision date below. The time and place for the election will be set forth in a Notice of Election that this Commission shall issue subsequent to this Decision, in accordance with the applicable regulations.

Only those employees in the Unit who were employed during the last payroll period ending before the Decision date below (including employees who did not work during that period because of vacation or illness) are eligible to vote in such election. Employees who would otherwise be eligible to vote but have quit or been discharged for cause prior to the election (and have not been rehired or reinstated prior to the election) are not eligible to vote. The issue to be resolved by eligible Unit employees will be whether or not the Unit employees want Petitioner to be their exclusive bargaining representative.

Within 14 calendar days after the Decision date below, the Commission must receive from Respondent an alphabetical list of the names (including their addresses and job titles) of employees in the Unit who are eligible to vote as described above. The Commission will promptly forward a copy of this list to Petitioner.

Given at Jefferson City, State of Missouri, this _____ day of February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

/s/ William F. Ringer
William F. Ringer, Chairman

SEAL

Concurring Opinion attached
John J. Hickey, Member

Attest:

/s/ Alice A. Bartlett
Alice A. Bartlett, Member

Pamela M. Hofmann, Secretary

CONCURRING OPINION

(This opinion is not the decision of the Commission)

I have reviewed and given consideration to all of the competent and substantial evidence on the whole record. Although I concur with the Commission's decision in this matter, I feel that the question regarding Captains is much closer than the majority's opinion portrays and, accordingly, write this separate opinion.

What makes this decision so difficult is the reality of the firefighters' work and workplace. As the record suggests, most of a firefighter's average shift is spent around the firehouse doing the day-to-day chores. On Monday, bathrooms. On Tuesday, bay floors. On Wednesday, windows and bathrooms. On Thursday, cleaning and disinfecting the ambulance. Friday, bathrooms again. And so on in perpetuity.

The firefighters are well-trained professionals. Each person knows how to perform his duties and needs no direction. Little discipline is required. No one has been fired. The Chief is the only one who can decide to impose any serious discipline anyway. The Captains are the only real step in between the firefighters and the Chief. There is one Captain for each of the three shifts, so promotion is not a factor. The firefighters sit down together and decide their assignments and rotations for a year in advance. When the district receives calls, many are not really emergencies. When true emergencies arise, the largest percentage are medical in nature. Again, because of training and experience, the firefighters know what to do without being told.

If employees need to change shifts, they normally do so among themselves. If a Captain becomes involved in a shift change, he exercises no authority or judgment because he simply picks out the next name from the overtime box. The Chief and the board members are the only persons who really matter when it comes to hiring. Accordingly, most of the time, experience and training -- not the exercise of someone's independent judgment -- is what tells firefighters what to do. Thus, these realities speak to a workplace that most of the time runs itself.

With respect to the seven factors, I am not even persuaded that a majority of these factors point to the Captains as being supervisors. In the majority's opinion, it is often the *right* to exercise certain authorities or discretions that seems to tip the scales. On the other hand, it could be argued that the rank and file firefighters may have some of these same theoretical rights.

Having said all this and even if a majority of the seven factors does not support the Captains' supervisory status, the analysis does not end. As suggested in the majority's opinion, it is not mere simple arithmetic that determines whether the Captains should be excluded from the Unit. In determining whether they should be included or excluded, we must decide whether these factors are present in "sufficient combination and degree" to show that the Captains share more of a community of interests with management or with the rank and file.

Although the question is extremely close, I am just barely persuaded that a sufficient number of these factors are present in the facts before us to agree with the majority's decision.

These Captains and the Chief have been working together for a long time. Except with respect to actual structural fires, the Chief's hands-off approach to emergency calls is undoubtedly a testament to his faith in their judgment. Consequently, the Captains' ability to recommend hires and serious disciplines is probably enhanced. Furthermore, the evidence is clear that the Captains have the right to exercise more supervisory power than they generally exercise and *if* problems or circumstances were to arise during the 16 or more hours per day when the Chief is not present, these Captains would have to then deal with such matters.

Lastly, as the fire district continues to grow in resources and personnel, these Captains will be forced to exercise more and more of the rights to direct, hire, and discipline they possess in policy or theory in order to fulfill their duties. Because the Assistant Chiefs have no real authority over the Captains and because the Assistant Chiefs have little interaction (let alone supervisory interaction) with the full-time personnel, the Captains are the only "management" other than the Chief. This reality is recognized in the Captains' much higher pay scale.

Accordingly, I am persuaded that the Captains enjoy more of a community of interest with management than with their fellow firefighters. For this reason, I concur in the majority's decision that Captains should be excluded from the Unit.

/s/ John J. Hickey
John J. Hickey, Member