

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
:  
: Case No. PERA-R-17-335-E  
:  
TOBYHANNA TOWNSHIP :  
:

**ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST**

On November 22, 2018, Teamsters Local Union No. 773 (Union) filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board) alleging a thirty percent showing of interest and seeking to represent a unit of all full-time and regular part-time blue-collar non-professional employees of Tobyhanna Township (Township or Employer) including but not limited to the Public Works Coordinator and road crew; and excluding management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Public Employee Relations Act (PERA or Act). The Union filed an Amended Petition on January 8, 2018. On February 1, 2018, the Secretary of the Board issued an Order and Notice of Hearing, in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating March 19, 2018, in Harrisburg, as the time and place of hearing, if necessary.

A hearing was held on March 19, 2018, in Harrisburg, before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief on May 11, 2018. The Township filed its post-hearing brief on June 11, 2018.

The Hearing Examiner, based on all matters of record, makes the following:

**FINDINGS OF FACT**

1. The Township is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9).

2. The Union is an employee organization within the meaning of Section 301(3) of PERA. (N.T. 9).

3. Edward Tutrone has been an employee of the Township since 1991. (N.T. 10).

4. Tutrone is currently the Director of Public Works in the Public Works Department for the Township and has held that position for approximately two years. The Director of Public Works position was created in November, 2016, by the then new Township Manager, John Jablowski. (N.T. 10, 31, 69).

5. There are currently four employees in the Township's Public Works Department, including Tutrone. There are two equipment operators, one Supervisor of Operations, and one Director of Public Works. (N.T. 11, 38).

6. All members of the Department of Public Works are paid hourly, receive the same benefits, and have the same hours. (N.T. 12, 48).

7. Tutrone reports to the Township Manager, John Jablowski. (N.T. 12, 57).

8. Tutrone works in the Township office and in the field. His main job responsibility is to perform maintenance. He also operates snow plows and assists in pothole repair, road resurfacing, and traffic control. Tutrone also performs administrative duties such as purchase order requests, interacts with the public, and interacts with the Township Manager. (N.T. 14-15, 46).

9. Tutrone does not have the authority to make large purchases. He cannot hire employees. On sensitive issues with residents, the Township Manager is involved. (N.T. 16, 20).

10. Tutrone does not develop department policies and procedures. He does monitor department performance to make sure departmental goals and objectives are met. Tutrone schedules daily work for the Public Works Department based on the Township's infrastructure plan and regular meetings with the Township Manager to obtain direction for the department. Tutrone also assigns department resources in response to natural occurrences and needs such as snow storms. Tutrone is responsible for efficiently allocating public works department resources and ensuring that work is done in a timely and appropriate manner. (N.T. 16-19, 26, 40, 47, 62, 65).

11. Tutrone attends Board of Supervisors' meetings where the budget for his department is determined. His input is usually limited to preparing a draft budget based on the previous year's budget. (N.T. 44, 63).

12. Tutrone does not establish staffing levels for the Public Works Department. The Township Manager is responsible for staffing levels, though Tutrone does give input. (N.T. 18).

13. Tutrone does not have authority to implement changes to the policies and procedures in the Public Works Department. Tutrone must clear changes with the Township Manager before they are implemented. (N.T. 19-20).

14. While Tutrone is involved with vendors and suppliers as a point of contact, he does not have any authority to contract on behalf of the Township. The Township Manager signs all vendor and supplier contracts. (N.T. 21).

15. Tutrone has never hired, transferred, suspended, laid off, recalled, promoted, rewarded, disciplined or discharged any employee. The final decision in these cases is with the Township Manager. (N.T. 23, 26-27, 78-79).

16. In the winter, Tutrone spends approximately 50% of his time in the field performing physical work with the other employees and approximately 50% of this time in the office performing office work. When it is not winter, his time is usually split 25% in the field performing physical work with the other employees and approximately 75% of this time in the office performing office work. (N.T. 28, 49).

17. Tutrone wears a uniform similar to the other members of the Public Works Department. His uniform shirt is a different color than the other members of the Public Works Department. (N.T. 28, 49).

18. Tutrone performs annual written evaluations of the members of the Public Works Department. After the written evaluation is complete, the Township Manager and Tutrone sit down with the employee and review it with the employee. The responsibility of final approval of the evaluation lies with the Township Manager. As part of the evaluation process, Tutrone has recommended wage increases up to the budgeted amount. The authority to grant raises resides with the Manager and the Supervisors. (N.T. 28-29, 35, 37, 52, 59; Township Exhibit 1, 2).

19. Tutrone processes initial requests for time off from Department of Public Works employees. The Township Manager is responsible for final approval of leave requests. (N.T. 29-30).

20. Tutrone may grant overtime during snow or storm emergencies. In non-emergency situations, the Township Manager must approve overtime requests. Requests for overtime are occasionally denied by the Township Manager. (N.T. 41).

#### **DISCUSSION**

The Union has petitioned to represent a unit of all full-time and regular part-time blue-collar non-professional employees of Tobyhanna Township including but not limited to the Public Works Coordinator and the road crew. At the hearing, the Township agreed that the members of the Township's road crew, of which there were three at the time of hearing including two equipment operators and one Supervisor of Operations, were properly included in the petitioned-for unit. It was also determined at hearing that the proper title for Tutrone is Director of Public Works and not Public Works Coordinator. The Township objects to the inclusion of the Director of Public Works in the unit based on the argument that he is a supervisor or management level employee.

As an initial matter, it is not seriously contested that the employees in this matter lack an identifiable community of interest. When determining whether employees share an identifiable community of interest, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours and benefits, working conditions, interchange of employees, grievance procedures, bargaining history, and employees' desires. West Perry School District v. PLRB, 752 A.2d 461, 464 (Pa. Cmwlth. 2000). An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours, working conditions, or other factors. Id. In this matter, the record clearly shows that all Public Works employees (including two equipment operators, the Supervisor of Operations, and the Director of Public Works) perform similar types of work, have the same employer, have similar wages and benefits, and work similar hours and in similar conditions. Therefore, there is an identifiable community of interest among the employees covered by the Union's Petition.

Moving to the Township's objections to the inclusion of the Director of Public Works in the unit, as the party asserting the exclusion, the Township has the burden of proving that the position should be excluded from the

bargaining unit. State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 313 (Pa. Cmwlth. 1999); Danville Area School District, 8 PPER 195 (Order and Notice of Election, 1977).

Section 301(6) of PERA defines a supervisor as follows:

...any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. 1101.301(6). Employees must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983). The distinguishing characteristic of an alleged supervisor is that the person holds authority that calls for the use of independent judgment and carries with it the power to reward or sanction employees. Mifflin County, 14 PPER ¶ 14012 (Proposed Decision and Order, 1982), 14 PPER ¶ 14051 (Final Order, 1983).

Section 604(5) of the Act provides that the Board shall:

(5) Not permit employees at the first level of supervision to be included with any other units of public employees but shall permit them to form their own separate homogenous units. In determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed.

43 P.S. § 1101.604(5). When assessing supervisory status under Section 604(5), the Board may consider such factors as frequency, duration and importance of the various supervisory duties performed. State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999). Further, the issue of supervisory status under PERA was recently addressed by the Board in Cumberland Township, 49 PPER 66 (Final Order, 2018). In Cumberland Township, the Board noted that "the Board has consistently held that employees who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are lead workers and not supervisors within the meaning of PERA." Id.; State System of Higher Education, supra.

Applying the above law to the record in this matter, it is clear that the Township has not met its burden of establishing that Tutrone is a supervisor pursuant to PERA. The record in this matter shows that Tutrone does not have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline employees. This record shows that the authority for these actions rests with the Township Manager or, ultimately, the Township Supervisors. While Tutrone does participate in the hiring and evaluation process of Public Works employees, the record shows that authority for hiring and approval of evaluations rests squarely with the Township Manager.

The record in this matter does show that Tutrone assigns work on a day-to-day basis to employees. However, the record in this matter shows that the

degree to which Tutrone assigns employees is routine and responsive to circumstances. In Cumberland Township, supra, the Board upheld the Hearing Examiner's determination that a Roadmaster was not a supervisor and held:

The record indicates that the Roadmaster's assignment of duties is routine and based on natural occurrences and needs. For example, the Roadmaster assigns duties filling potholes, trimming brush and replacing signage, and the Roadmaster may also assign to himself duties including plowing snow, trimming trees, repairing drainage and storm sewer problems, and mowing grass.

Id., (internal citations omitted). The record in this matter is similar to Cumberland Township. On direct examination, Tutrone testified as follows:

Q. How does that work by the way? I mean how is the work assigned to the department with - what is your role in all that?

A. We - there's a plan in place. There's - as far as the Public Works Department is encompasses a lot. It encompasses the buildings grounds, roads, its not just for roads. It's the entire - lack of a better term infrastructure of the Township.

So there is different stuff that we know needs to be done, and I help coordinate with another person in my department there. And that may schedule the work for a day of what's going to be done and who's going to do it.

Q. When you say another person, who do you mean?

A. David Arcidiacono . . . .

Q. Is he in the road crew?

A. Yes. And also with direction from the Township manager I meet with him probably several times a day. There's a lot of stuff just to make it all work.

Q. For instance?

A. If [the Township Manager] has things that he wants to see done prioritized, we sit down and we go over everything and we come up with a list of stuff and priority what I can do.

He recommends - or he tells me he wants something and I'll tell him is it an obtainable goal in the time period he wants. If not, this is how much longer it will take, that kind of thing.

. . .

Q. How do you allocate resources?

A. If there is a - if we get a major storm and I need to send extra trucks to a certain area of the Township, then I send them out.

I would have to make sure that whatever the issue is at hand that it's taken care of.

(N.T. 17-19). Based on this testimony and the record as a whole, I find that Tutrone's assignment of employees is similar to Cumberland County in that it is routine and in response to natural occurrences and needs and lacks the statutory requirement for independent judgment and discretion.

In its brief, the Township argues that Tutrone has "exclusive authority over staffing assignments and granting overtime assignments to [department] employees during weather emergencies" and cites Mt. Olive Borough, 21 PPER ¶21104 (Order Directing Submission of Eligibility List, 1990), for the proposition that a municipality's department of public works head is a supervisor under PERA based solely on the employee's ability to authorize overtime during weather emergencies. Township's Brief at 9-10. With regard to "exclusive authority of staffing", the record in this matter shows that the Township Manager has exclusive authority over staffing. With regard to granting overtime assignments, the Hearing Examiner in Mt. Olive Borough writes:

The record shows that the street commissioner authorizes overtime for employees during snow emergencies without consulting with his own supervisor. The Board has found employees exercising that kind of authority to be supervisors. See City of Bethlehem, *supra*; Allegheny County Port Authority, 20 PPER ¶ 20009 (Order Directing Submission of Eligibility List 1988); City of Franklin, 16 PPER ¶ 16008 (Proposed Order of Unit Clarification, 1984); Middleburg Borough, 14 PPER ¶ 14229 (Order Directing Submission of Eligibility List, 1983). Accordingly, the street commissioner must be excluded from the unit as a supervisor.

Id. I do not find the conclusion reached by the Hearing Examiner in Mt. Olive Borough and cited cases to be controlling in this matter due to the subsequent decisions in State System of Higher Education v. PLRB, *supra*, and Cumberland Township, *supra*. PERA dictates that "[i]n determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 Pa. C.S. §1101.604(5). Indeed the Commonwealth Court held it is "entirely appropriate for the Board to consider such factors as frequency, duration and importance of the various supervisory duties performed. . . ." State System of Higher Education v. PLRB, at 316. As mentioned above, the Board has very recently held the "employees who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are lead workers and not supervisors within the meaning of PERA." Cumberland Township, *supra*. In this matter, the record shows that Tutrone has the authority grant overtime during snow emergencies. While this is a supervisory function, the Township did not sustain its burden to prove that Tutrone is sufficiently performing supervisory functions to be excluded from the bargaining unit as a statutory supervisor. Tutrone only grants overtime during snow emergencies, in other words the act is routine and based on natural occurrences, and at all other times his requests for overtime must be approved by the Township Manager.

Therefore, Tutrone may not be excluded from the unit as a supervisor based on his duties since, pursuant to Cumberland Township, *supra*. Tutrone is a lead worker and not a supervisor.

The Township also argues that Tutrone should be excluded from the unit as a management level employee. Section 301(16) of PERA states:

"Management level employee" means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employees above the first level of supervision.

43 P.S. § 1101.301(16). Under this provision, a position is at the management level if the employee holding that position (1) is involved directly in the determination of policy; (2) directs the implementation of policy; or (3) is above the first level of supervision. Pennsylvania Association of State Mental Hosp. Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1988); Commonwealth of Pennsylvania (Attorneys Examiner I), 12 PPER ¶ 12131 (Final Order, 1981). In Pennsylvania Association of State Medical Hospital Physicians v. Commonwealth, PLRB, 554 A. 2d 1021 (Pa. Cmwlth. 1989), the Commonwealth Court adopted the Board' s definition of the first part of Section 301(16) of PERA as set forth in Horsham Township, 9 PPER 9157 (Final Order, 1978):

An individual who is involved directly in the determination of policy would include not only a person who has authority or responsibility to select among options and to put proposed policies into effect, but also a person who participates with regularity in the central process which results in a policy proposal and a decision to put such proposals into effect. Our reading of the statute does not include a person who simply drafts language for the statement without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

Id.

The Board' s policy is that the use of independent judgment and discretion by the employee when implementing the employer' s policies is necessary to satisfy the second prong of the statutory test for management level employee under Section 301 (16) of PERA. Id.; Municipal Employees of Borough of Slippery Rock v. PLRB, 40 PPER 64 (Proposed Order of Unit Clarification, 2009), 40 PPER 122, (Final Order, 2009), aff'd 14 A.3d 189 (Pa. Cmwlth. 2011). In order to be considered a management level employee, the employee must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found. Slippery Rock, 14 A.3d 189, at 192. (Pa. Cmwlth. 2011).

The record in this matter shows that Tutrone is not involved in the determination of any Township policy. Moreover, the record in this matter is clear that Tutrone is not involved in the implementation of Township policy as the Township has not shown that Tutrone has independent judgement and discretion to monitor compliance with any policy and take action where noncompliance is found. Instead, the record in this matter shows that Tutrone is overseen by the Township Manager, who has final authority and discretion to approve actions taken by Tutrone.

#### CONCLUSIONS

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Township is a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employee organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties.

4. The full-time and regular part-time blue-collar non-professional employees of Tobyhanna Township share an identifiable community of interest.

5. The Director of Public works is not a supervisor or management level employee within the meaning of PERA and is properly included in the unit.

6. The unit appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time blue-collar non-professional employees including but not limited to equipment operators, the Supervisor of Operations, and the Director of Public Works; and excluding management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Public Employee Relations Act.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Act, the Hearing Examiner

#### **HEREBY ORDERS AND DIRECTS**

that the Township shall within ten (10) days from the date hereof submit to the Board a current alphabetized list of the names and addresses of the employees eligible for inclusion in the unit set forth above.

#### **IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that any exceptions to this decision and order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b).

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this second day of August, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

---

Stephen A. Helmerich, Hearing Examiner