

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PERA-R-16-333-E
:
:
:
CUMBERLAND TOWNSHIP :

FINAL ORDER

On August 21, 2017, Cumberland Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to a Nisi Order of Certification (NOC) issued on July 31, 2017,¹ in which the Board Representative adopted the Findings of Fact and Conclusions of Law from an Order Directing Submission of Eligibility List (ODSEL) issued by a duly designated Hearing Examiner of the Board on June 15, 2017. In the ODSEL, the Hearing Examiner concluded that the position of Roadmaster is not management level or supervisory, and that the position of Planning Secretary-Receptionist is not confidential within the meaning of the Public Employee Relations Act (PERA). Accordingly, these positions were included in the bargaining unit of all full-time and regular part-time nonprofessional employes of the Township, including but not limited to secretaries and employes of the Road Maintenance Department. Teamsters Local 776 (Union) received a majority of the valid ballots cast by unit members in the secret ballot election held on June 20, 2017, and thus was certified by the Board as the exclusive representative of the unit. On exceptions to the NOC,² the Township asserts that the Roadmaster position is management level within the meaning of Section 301(16) or supervisory under Section 301(6) of PERA, and thus should be excluded from the certified bargaining unit. On September 12, 2017, the Union filed a brief in response to the Township's exceptions.

The party seeking to exclude a position from a bargaining unit has the burden of proving by a preponderance of evidence that the statutory exclusion applies. In the Matter of the Employes of State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), *affirmed*, 737 A.2d 313 (Pa. Cmwlth. 1999); School District of Philadelphia v. Pennsylvania Labor Relations Board, 719 A.2d 835 (Pa. Cmwlth., 1998); Westmoreland County, 40 PPER 35 (Final Order, 2009), *affirmed*, 991 A.2d 876 (Pa. Cmwlth. 2010). The Board explained the burden of proof in such cases as follows:

¹ The Township's exceptions are timely because August 20, 2017, the twentieth day following the issuance of the Nisi Order of Certification, was a Sunday and is therefore excluded from the computation of the 20-day period for the filing of exceptions. 34 Pa. Code § 95.100(b).

² The Board's Rules and Regulations provide that no exceptions may be filed to orders directing elections. 34 Pa. Code §95.96(a). A party may, however, file exceptions to the nisi order issued after the election under §95.96(b). 34 Pa. Code §95.98.

Because the Public Employee Relations Act encourages and protects the right of public employes to organize and; collectively, to bargain with their public employer over wages, hours, and other conditions of employment, the coverage of the Act is inclusive rather than exclusive. The burden is upon the employer to establish by a preponderance of the evidence that a particular employee or groups of employes should be excluded from an otherwise appropriate unit.

Danville Area School District, 8 PPER 195 at 196 (Order and Notice of Election, 1977); West Penn Township, 39 PPER 41 (Order Directing Submission of Eligibility List, 2006).

On exceptions, the Township argues that the Roadmaster is a management level employe under Section 301(16) of PERA. Section 301(16) of PERA defines a management level employe as "any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision." 43 P.S. §1101.301(16). In applying this statutory definition, the Board has held "that an employe who satisfies any of the following three criteria is a manager: (1) either the employe is directly involved in the determination of policy; (2) the employe directly implements policy; or (3) the employe is above the first level of supervision." In the Matter of the Employes of Allegheny-Clarion Valley School District, 41 PPER 21 (Final Order, 2010); Commonwealth of Pennsylvania, Attorney Examiner's I, 12 PPER ¶12131 (Final Order, 1982). If an employe meets any one of the three prongs of the test, the Board must find that the employe is management level. Commonwealth of Pennsylvania, Department of Education, 14 PPER ¶14136 (Final Order, 1983).

Relying on In the Matter of the Employes of East Mead Township, 47 PPER 46 (Order Directing Remand to the Examiner for Further Proceedings, 2015), the Hearing Examiner held that the authority of the Roadmaster to make purchases for road maintenance and repair did not render him a management level employe. In this regard, the Township argues that the Hearing Examiner's Finding of Fact that the Roadmaster needed to obtain approval for any purchase over \$100 is not supported by substantial evidence. However, the Hearing Examiner expressly credited the testimony of the current Roadmaster Chris Walters, who testified that he believed approval was necessary for purchases over \$100. (FF 14, ODSEL at 3, footnote 2). The Hearing Examiner may accept or reject the testimony of any witness in whole or in part. The Hearing Examiner's credibility determinations will not be overturned on exceptions absent the most compelling of circumstances. *E.g.* Carbon County, 47 PPER 2 (Final Order, 2015). Upon review of the record and the Hearing Examiner's citation thereto, the Board finds no compelling circumstances for reversal of the Hearing Examiner's decision to credit the testimony of the current Roadmaster.

As recognized in East Mead Township, mere purchasing authority is not implementation of the general budget for purposes of determining management-level status under the second prong of Section 301(16) of PERA. Indeed, under the second prong of the analysis in Horsham Township, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), it is generally apparent that an employe recommending a departmental purchase

is not independently implementing managerial policy where other management level employees must first approve the employer's general budget allocations or changes thereto, and authorize the purchase. Thus, in East Mead Township the Board held that once a general budget has been adopted by a public employer, an employee's purchases in accordance with the budget are not implementation of budget policy under the second prong of the test for managerial status. In finding that the Roadmaster in East Mead Township did not meet the second prong of the test for managerial status, the Board stated that "the Road Master's recommendation of purchases of equipment, in and of itself, is insufficient to establish that the position is effectively involved in the implementation of Township policy regarding road repair and maintenance." East Mead Township, 47 PPER at 166. Having determined that the Roadmaster in East Mead Township did not meet the second prong of the test for management level employee, the Board turned its analysis to the first prong, and found no evidence that the Roadmaster had any role in the development and adoption of the overall general budget for the township. Id. at 167 (citing Berks County, 35 PPER 25 (Final Order, 2004)).

On exceptions here, the Township argues that the Hearing Examiner erred in his analysis by failing to find that the Roadmaster in this case plays an effective role in the general budget process to meet the first prong of the test for management-level status. The Board has explained the first prong of the test for an employee who is "involved directly in the determination of policy," as follows:

An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the statute does not include a person who simply drafts language for the statement of policy 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.

Horsham, 9 PPER at 327.

Here, with respect to the formulation of the Township budget, the record reflects that the Roadmaster does not have meaningful decision making participation in the formulation of the Township budget. See State System Of Higher Education, 28 PPER ¶ 28046 (Final Order, 1997). Indeed, the Township Manager works with the Township Secretary/Treasurer and leads a team of the Police Chief (or Lieutenant) and the Roadmaster, to develop the Township budget. However, the Roadmaster's involvement on the team consists of presenting estimates of the costs for foreseeable and projected road maintenance matters, and formulating recommendations for buying new equipment for the road department. As found by the Hearing Examiner, "[t]he Roadmaster ... reviews line items involving road maintenance. The Roadmaster estimates the costs for foreseeable and projected road maintenance matters and submits his estimates to the manager's team. The Roadmaster averages the cost of road salt for the previous 3-5

years and estimates the cost of road salt for the upcoming budget year." (FF 10). After presenting the projected road maintenance costs to the budget team, the Roadmaster's budget recommendations regarding the road department are reviewed by a Township Highway committee, and then by the Township Finance Committee, and finally the refined road maintenance needs and costs are presented to the Township Board of Supervisors for their review at a public meeting. (FF 10, 18).

Thus, the record indicates that the Roadmaster's involvement on the Township Manager's budget team consists of little more than simply researching or collecting data necessary for the development of a road department budget proposal and possibly drafting proposed language for the road department budget without meaningful participation in the decisional process for the final Township budget approval. Indeed, the Hearing Examiner found that "the Roadmaster's budget recommendations have been modified and rejected as presented." (FF 10). Accordingly, on this record, the Roadmaster does not have meaningful participation in the decisional process of preparing the Township's general budget. Thus, the Township failed to sustain its burden of showing that the Roadmaster meets the first prong of being a management level employee under Section 301(16) of PERA.

In the alternative, the Township argues on exceptions that the Roadmaster is also excludable from the bargaining unit as a supervisor under Section 301(6) of PERA. Section 301(6) defines a supervisor as follows:

[A]ny 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). Section 604(5) of PERA, provides 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); State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999) (SSHE v. PLRB). The Township's argument in this case is akin to that raised by the employer in SSHE v. PLRB, wherein the Commonwealth Court stated as follows:

Employer presents the undisputed assertion that § 301(6) of the Act envisions that employees who exercise authority over co-workers are not suitable for inclusion in the same bargaining unit with those co-workers. Employer further asserts that neither § 301(6) nor § 604(5) of the Act provide for review of time or frequency of task performance when assessing the supervisory status of a given job classification. The gravamen of Employer's argument is that any performance of supervisory duties renders an employee a supervisor within the meaning of § 301(6) of the Act. In contrast, the Board asserts that the plain language of the Act and interpretive case law provide that the Board may

examine whether an employee's performance of supervisory duties is sufficient to justify exclusion from a rank and file bargaining unit. We agree that such an inquiry is proper.

SSHE v. PLRB, 737 A.2d at 315-16. In upholding the Board's finding that head coaches were not proven to be supervisory employes in SSHE v. PLRB, the Commonwealth Court stated that "the Board properly engaged in an assessment of the extent to which this group of head coaches performs supervisory duties. In conducting this assessment, it was entirely appropriate for the Board to consider such factors as frequency, duration and importance of the various supervisory duties performed by these head coaches." SSHE v. PLRB, 737 A.2d at 316. Indeed, the Board has consistently held that employes 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.; West Perry School District v. PLRB, 752 A.2d 461 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 568 Pa. 675, 795 A.2d 984 (2000); Carbon County, supra.; Westmoreland County, supra.

Despite the more than twenty-year tenure of the prior Roadmaster, Thomas Shealer, and the year and a half that his successor, Chris Walters, has held the position, only some four specific instances of discipline of a road department employe were presented at the hearing. (FF 7, 8, 22). Two of those instances involved the same employe. As the Hearing Examiner found, "[w]hen the Roadmaster reported to the Township Manager that a road crew employe was taking Township material for his personal use, the Township's legal counsel, the Township Manager and the Roadmaster all equally recommended suspension and the full Township Board of Supervisors approved... When the employe returned, he committed the same infraction and the Roadmaster recommended termination and his recommendation was followed." (FF 9). In a more recent instance, the Township Manager decided on essentially a written warning. As found by the Hearing Examiner, "Mr. Walter consulted with the Township Manager regarding the possible discipline of an employe in the Road Department. The Township Manager ultimately decided to create a written record of a consultation with the employe. Written discipline must be approved by the Township Manager." (FF 22). Thus, in each of those instances, the Township Manager was directly and significantly involved, in determining discipline for road crew employes, or recommending that they be disciplined to the Township Supervisors.

Over the same period exceeding two decades, testimony was presented of two persons who went through the hiring and promotion process. That process was described by the Hearing Examiner as follows:

Job applications for positions in the Road Department are reviewed by the Roadmaster, the Road Foreman, the Township Manager and the Personnel Committee from which 3-4 are chosen for interviews. After the first round of interviews, the Roadmaster recommends to the Township Manager and Personnel Committee which candidates to recall for a second interview, after which the Roadmaster makes a recommendation to the Township Manager. The Township Manager then relays the recommendation to the full Board of

Supervisors. The Township Board of Supervisors determines which candidate to hire based on the recommendation of the Township Manager.

(FF 21). However, notably on the record evidence, one of those persons who went through the hiring process was Mr. Walters when he was promoted from the Road Foreman position to the Roadmaster position. The other instance found by the Hearing Examiner did involve a new hire. However, even in the case of the new hire, as found by the Hearing Examiner, the Township Manager presents the recommendation to the Township Supervisors for hiring. (FF 21). Indeed, that finding is consistent with the Township Manager's testimony that once hired by the Township Supervisors, the Township Manager, not the Roadmaster, contacts new hires to offer them employment with the Township. (N.T. 53).

While Mr. Shealer had performed road crew employe evaluations with a written evaluation sheet, (FF 24) as found by the Hearing Examiner, it was not established that the Roadmaster's evaluations resulted in reward or sanction of employes who exceeded, met, or failed to meet expectations. In over a year and a half, Mr. Walter, the current Roadmaster, has completed only one six-month employe evaluation for a new hire completing his probationary period. (FF 24). But there is no record evidence of the outcome of that evaluation, or who determined the outcome.

With respect to the other duties of the Roadmaster, such as assignment of work, overtime, and approval of leave, it is apparent from the record, as found by the Hearing Examiner, that these duties could not have taken up a significant amount of the Roadmaster's time. Indeed, other than the Roadmaster, there are only four (4) employes in the road department. (FF 6).

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 including filling potholes, trimming brush and replacing signage, and the Roadmaster may also assign himself to duties including plowing snow, trimming trees, repairing drainage and storm sewer problems, and mowing grass. (FF 5). The Roadmaster may also remove debris and fallen limbs from Township roads. (FF 23).

With regard to employe payroll, the Roadmaster does sign bi-weekly timesheets for the road crew employes. (FF 12). However, those records are submitted to the Township Secretary-Treasurer and are audited and subsequently reviewed by the Township Manager. (FF 12, N.T. 37, 39-40).

The Roadmaster does approve vacation, sick and bereavement leave for the road crew employes. (FF 13). That leave, however, is reflected on the payroll timesheets that are reviewed and audited by the Township Secretary/Treasurer and the Township Manager. Moreover, it is understood by the road crew employes that if there is a winter snowfall, the road crew employes are expected to come to work unless they are out of the area. (N.T. 64).

Overtime for road crew employes is not discretionary, but dependent on weather conditions. As found by the Hearing Examiner,

"[w]eather conditions require employes in the Road Department to work overtime when it snows or floods or there are road obstructions. The Road Department crew does not need approval to work overtime for snow removal or other safety related overtime." (FF 23).

On this record, the Hearing Examiner did not err in finding that the Roadmaster is essentially performing the same duties as the other road crew employes a significant portion of the time. While the Roadmaster does perform some supervisory duties, the record does not show that the Township sustained its burden to prove that the Roadmaster is sufficiently performing supervisory functions to be excluded from the bargaining unit as a statutory supervisor. Indeed, the alleged administrative duties of the Roadmaster, alluded to by the Hearing Examiner and reflected in the job description as testified to by Mr. Shealer, do not include any statutory supervisory duties other than "[s]upervising and assigning ... job assignments". (Joint Exhibit B). Moreover, as the record reflects, the assignment of duties for the road crew is largely governed by the routine immediate needs for road maintenance. As found by the Hearing Examiner, and supported by the record, the frequency with which, and the extent to which, the Roadmaster is involved in non-routine assignment of work, promotions, hiring or discipline of road crew employes is infrequent and limited, especially in light of the direct involvement and decision-making of the Township Manager. Accordingly, the Hearing Examiner did not err in concluding that the Roadmaster is not a statutory supervisor within the meaning of Sections 301(6) and 604(5) of PERA.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the Township failed to sustain its burden of establishing that the Roadmaster is a management level employe under Section 301(16) of PERA, or a first-level supervisor under Section 301(6) of PERA. Accordingly, the Township's exceptions are dismissed, and the Nisi Order of Certification shall be made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Cumberland Township are hereby dismissed, and the July 21, 2017 Nisi Order of Certification, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member, this twentieth day of February, 2018. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.