

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYEES OF :  
: Case Nos. PERA-U-10-62-E  
: PERA-U-10-66-E  
: (PERA-R-6-C)  
COMMONWEALTH OF PENNSYLVANIA :  
PENNSYLVANIA LIQUOR CONTROL BOARD :

**PROPOSED ORDER OF DISMISSAL AND  
PROPOSED ORDER OF UNIT CLARIFICATION**

On March 1, 2010, the Independent State Store Union (ISSU) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification pursuant to the Public Employee Relations Act (PERA) requesting that the Nisi Order of Certification issued by the Board on May 14, 1971, at Case No. PERA-R-6-C, be amended to include the position of retail wine specialist in the meet-and-discuss unit of first level supervisors represented by ISSU. This petition was docketed at Case No. PERA-U-10-62-E.

On March 2, 2010, the Commonwealth of Pennsylvania (Commonwealth) filed with the Board a petition for unit clarification pursuant to PERA requesting that the Nisi Order of Certification issued by the Board on May 14, 1971, at Case No. PERA-R-6-C, be amended to include the position of retail wine specialist in the bargaining unit represented by the United Food and Commercial Workers (UFCW). This petition was docketed at Case No. PERA-U-10-66-E.

On March 16, 2010, the Secretary of the Board issued an order and notice of hearing and directed that a consolidated hearing for both petitions be held on June 7, 2010 in Harrisburg. On April 1, 2010, I granted the Commonwealth's continuance request, and I rescheduled the consolidated hearing for July 28, 2010. At the hearing on that day, all parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Also during the hearing, ISSU moved to intervene as a full party in interest in Case No. PERA-U-10-66-E, and UFCW moved to intervene as a full party in interest in Case No. PERA-U-10-62-E. I granted both motions to intervene and all parties agreed that both unions possess a legal interest in both cases. (N.T. 135-136). The Commonwealth, ISSU and UFCW filed post-hearing briefs.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

**FINDINGS OF FACT**

1. The Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board (PLCB) is a public employer within the meaning of Section 301(1) of PERA. (In the Matter of the Employees of the Commonwealth of Pennsylvania, 9 PPER ¶ 9129 (Nisi Decision and Order, 1978)).

2. ISSU and UFCW are employe organizations within the meaning of Section 301(3) of PERA. (UFCW Exhibit 1; In the Matter of the Employees of the Commonwealth of Pennsylvania, 9 PPER ¶ 9129 (Nisi Decision and Order, 1978)).

3. Several years ago, the PLCB began marketing specialty wines through premium wine stores. (N.T. 39-41).

4. The Commonwealth recently created the classification of retail wine specialist to identify employes who would perform the duties of marketing premium wines to the public while compensating the employes performing those duties evenly in one classification. (N.T. 39-41).

5. The Commonwealth has created seventy retail wine specialist positions. Currently, no employe occupies the title of retail wine specialist, but there are employes performing the same duties that will be performed by the retail wine specialists. (N.T. 46-47, 51, 60).

6. The primary focus of the employees currently performing the duties of retail wine specialist is to provide a higher and deeper level of customer service for the niche market of specialty wines. The essential function of the wine specialist is to be on the sales floor selling premium wines. (N.T. 41, 52).

7. The primary responsibilities of a Clerk I are to operate the cash register and transact sales, clean the store, stock the shelves, unload trucks and change light bulbs. (N.T. 37, 42, 62).

8. Shift leaders assign work, oversee truck unloading and cash register operations, solve and override mistakes in sales transactions and account for all money in the store. A shift leader may be a clerk in the UFCW unit or a liquor store manager in the ISSU unit. (N.T. 37-38, 42).

9. The Clerk II position is in the bargaining unit of clerks represented by UFCW. Five years ago, John Ashworth was transferred to Store No. 0284 in Pleasant Hills, Pennsylvania where he was promoted to full-time Clerk II. As a Clerk II, Mr. Ashworth was in charge of the shift while the general manager was not present and performed the duties of a wine specialist. Currently, Mr. Ashworth is a liquor store manager I at the same store and continues to perform the duties of a wine specialist. (N.T. 14-19).

10. As a Clerk II, Mr. Ashworth, in performing the duties of wine specialist, would ask other clerks to help him prepare premium wine displays, and he did not have sole discretion about the placement or presentation of wines. Ashworth's general manager would ask Ashworth his opinion about stacking and displaying products. (N.T. 20-21).

11. When Mr. Ashworth received his promotion from Clerk II to liquor store manager I, he retained his wine specialist duties at his store. (N.T. 23).

12. The Commonwealth presented three liquor store clerks who perform the duties of retail wine specialist and the other duties of store clerks. They were Peter Knauss, Jack Broadnix and Robert Peters. Their testimony was consistent, and I credit their testimony in full.

13. Peter Knauss is a liquor store Clerk I at Store No. 4631 (Sweet Square Wine Experience). That store is a premium wine store with a separate carpeted area for stacking and displaying premium wines. The store also contains a temperature controlled room for storing wines that sell for over thirty dollars per bottle. The personnel organization at this store is as follows: a general manager, two liquor store managers, five or six full-time clerks and five or six seasonal (itinerant) clerks. (N.T. 62-63, 66-71).

14. As a Clerk I, Mr. Knauss operates the cash register, cleans the store, performs basic maintenance such as light bulb changes, stocks shelves and unloads trucks. (N.T. 62).

15. Mr. Knauss also performs the duties of a wine specialist. He coordinates the ordering, coding, tagging, presentation and signage of specialty vintage wines. He also advises customers on specialty wines. His general manager sometimes interjects her opinion about wine displays. As a Clerk I focusing on specialty wines, Mr. Knauss operates the cash register in a support capacity when the store is busy. His focus is to market and sell vintage wines. He focuses on customer service and helps customers pair wines with the foods they plan to prepare, and he directs their purchases to suit their expressed tastes or interests. (N.T. 63-65, 69, 74).

16. The general manager and the liquor store manager of the Sweet Square Wine Experience also order wine. Mr. Knauss orders wine by selecting wines from an excel spreadsheet known as an offering survey. Mr. Knauss receives most of the wines that he selects. (N.T. 68-69, 74-75, 91-92).

17. The PLCB offers a basic, advanced, and master wine class to educate clerks about wines. Mr. Knauss has taken the basic and advanced classes. (N.T. 65).

18. Mr. Knauss does not hire, transfer, suspend or layoff other employees. He does not promote, discharge, reward, discipline, direct other employees or prepare their work schedules. He does not conduct performance reviews or evaluations. When Mr. Knauss needs help performing his duties, he asks the store general manager if another clerk can help him; he does not direct other clerks himself. (N.T. 69-70, 77).

19. Jack Broadnix is a liquor store clerk at Store No. 909 in Newtown, Pennsylvania, which is a specialty store that sells premium wines. After one year at the Newtown store, Mr. Broadnix began performing the duties of a wine specialist. In addition to those duties, Mr. Broadnix performs the duties of other clerks; he cleans bathrooms and floors, stocks shelves, unloads trucks and cuts boxes. (N.T. 80-81, 88).

20. The Newtown store has one general manager, three assistant managers, full-time and part-time clerks. (N.T. 85).

21. As a clerk performing the duties of a wine specialist, Mr. Broadnix operates the cash register when customer volume requires. He performs any other duties assigned by the general manager. For example, one day recently, he operated a cash register for seven hours because another clerk called off that day. (N.T. 83-84, 89).

22. As a clerk performing the duties of wine specialist, Mr. Broadnix keeps all incoming specialty wines in a separate room, tags and codes the wines and places the correct signage for the various wines. He also selects the store location for the wines with the approval of the general manager. (N.T. 83-84, 90).

23. The Newtown store has a separate carpeted area for specialty wines which constitutes approximately 25% of the store. This store does not have a temperature controlled room. (N.T. 89).

24. Robert Peters is a liquor store Clerk I at Store No. 4602 in Ardmore, Pennsylvania. The Ardmore store is a specialty store. At the Ardmore store there is a general manager, four assistant managers, one Clerk II, six full-time Clerk Is and eight part-time or seasonal clerks. As a Clerk I, Mr. Peters operates the cash register, stocks shelves, unloads trucks and tends to wholesale transactions for restaurant licensees. (N.T. 94-95, 98).

25. As a Clerk I performing the duties of a wine specialist, Mr. Peters also helps customers find particular wines for which they may be searching. By questioning customers, Mr. Peters is able to match certain wines to a customer's tastes and interests. He pairs wines with a customer's food preparation and helps customers determine the quantity of wine for entertaining guests. He spends approximately 95% of his workday with customers. (N.T. 96-97).

26. Mr. Peters occasionally operates the cash register to help or cover for other clerks. He completes the offering survey and selects his choice of wines. Mr. Peters receives approximately 85-90% of his offering survey selections. (N.T. 98, 107-109).

27. Mr. Peters is not able to hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline employees. He does not direct or assign work to employees. He does not perform evaluations or scheduling employees. (N.T. 102).

28. Mr. Peters has taken all three levels of PLCB training for wine specialist. (N.T. 105).

## DISCUSSION

ISSU contends that the position of retail wine specialist should be placed in the meet-and-discuss unit of first level supervisors. The Board has held that in representation and unit clarification proceedings, a petitioner has the burden of persuasion to establish the averments in the petition. In the Matter of the Employees of Riverview Intermediate Unit No. 6, 37 PPER 106 (Final Order, 2006). Accordingly, ISSU has the burden of establishing that the job duties of the employees performing the work of retail wine specialist satisfy the statutory requirements of a supervisor under PERA.

## 1. Supervisor

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

(6) "Supervisor" means 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).

PERA requires the Board to "take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604(5) (emphasis added); In the Matter of the Employees of the Luzerne County Community College, 37 PPER ¶ 47 at 148 (Final Order, 2006). The exclusion does not authorize excluding a position filled by an employee who infrequently or sporadically exercises supervisory functions. In the Matter of the Employees of Philadelphia Housing Authority, 22 PPER ¶ 22206 (Final Order, 1991), aff'd, 23 PPER ¶ 23029 (Court of Common Pleas of Philadelphia County, 1992).

ISSU offered the testimony of John Ashworth, who is a liquor store manager I in the meet-and-discuss unit of first level supervisors. However, Mr. Ashworth was performing the duties of wine specialist before he was promoted to his supervisory position. The duties associated with a wine specialist have no supervisory functions. ISSU failed to demonstrate on this record, either with Mr. Ashworth or with the Commonwealth's witnesses, that the duties of the wine specialist classification have any supervisory functions recognized by Section 301(6) of PERA. The fact that Mr. Ashworth performs supervisory duties is mutually exclusive of his wine specialist duties. His supervisory duties remain a function of his promotion to liquor store manager I. The record does not indicate that he performed any supervisory functions while he was a Clerk II performing the duties of wine specialist. He simply took the wine specialist duties with him when he became a supervisor.

Also, ISSU failed to establish that significant numbers of liquor store managers in the meet-and-discuss unit of supervisors perform retail wine specialist duties. On this record, most of the employees performing those duties (including Mr. Ashworth when he began performing those duties) are clerks in the UFCW bargaining unit. The three clerks presented by the Commonwealth corroborated each others' testimony that there are no supervisory duties associated with their position as clerks or with their duties as wine specialists.

Moreover, the Board has held that, when applying the balancing test under Section 604(5) for determining supervisory status, the Board examines the individual job duties and responsibilities of employees in the position as a statewide employee classification. In the Matter of the Employees of the Commonwealth of Pennsylvania, PLCB, 9 PPER ¶ 9129 (Nisi Decision and Order and Order and Notice of Pre-election Conference, 1978). In the PLCB case, the Board was examining, inter alia, the status of Clerk IIs at state liquor stores as supervisors. In that context, the Board opined as follows:

In other words, most Clerk II's are not supervisors within the meaning of Section 301(6) of the PERA because their responsibilities are routine and they do not have the authority to hire, fire, suspend, layoff or discipline other employees. Additionally, while some of the Clerk II's do exercise to a greater or lesser extent such authority by virtue of their status as shift supervisor, the state-wide classification of Clerk II's cannot be considered "supervisors" within the meaning of Section 301(6) of the PERA because most Clerk II's are not shift supervisors.

Id. at 282. Accordingly, although Mr. Ashworth exercises supervisory duties and responsibilities, he does not represent the class of retail wine specialists statewide because most employees exercising the duties of wine specialist are clerks who do not exercise any supervisory authority. Also, the fact that Mr. Ashworth is a supervisor and

performs wine specialist duties is a distraction from the proper inquiry, which is whether the duties of wine specialist are supervisory. On this record, the duties of the wine specialists are not supervisory.

Although the duties of a wine specialist require a specific training and skill set, they simply do not require supervisory functions. Exclusive of the additional wine knowledge and the focus on customer service, the duties of wine specialist are similar to those of the Clerk Is (i.e. they unload trucks, operate the cash register and stock shelves, albeit with an emphasis on specialty wines). When a clerk acting as a wine specialist asks for help with stocking wine, he or she is not assigning work. Rather the wine specialist is behaving like any other clerk seeking help with the heavy work of stocking, moving, or unloading wine. Mr. Ashworth admitted that while he was a clerk performing the duties of wine specialist, he asked, rather than directed, fellow clerks for help with stocking wine. When Mr. Knauss, a Clerk I, needs help performing his wine specialist duties, he asks the store general manager if another clerk can help him; he does not direct other clerks himself.

None of the clerks performing the duties of wine specialist is able to hire, transfer, suspend, layoff, recall, promote, discharge, reward or discipline employees. None of the clerks directs or assigns work to employees, performs evaluations or schedules employees. Also, although clerks acting as wine specialists spend most of the work day with customers and several times a year order specialty wines, those duties are not supervisory functions recognized by PERA. Rather the duties of employees acting as wine specialists are same duties as those of the clerks, and those duties are routine and clerical in nature.

## 2. Community of Interest

The Commonwealth and the UFCW met their burden of establishing that the employees performing the duties of retail wine specialist share an identifiable community of interest with the liquor store clerks in the bargaining unit certified by the Board at PERA-R-6-C and exclusively represented by the UFCW.<sup>1</sup> As then Hearing Examiner Lassi aptly noted:

To determine 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, areas of work, working conditions, interchange of employees, supervision, grievance procedures, bargaining history, and employee desires. Fraternal Order of Police v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999); West Perry School District v. PLRB, 752 A.2d 461 (Pa. Cmwlth. May 26, 2000), affirming, 29 PPER ¶ 29110 (Final Order, 1998); Allegheny General Hospital v. PLRB, 322 A.2d 793 (Pa. Cmwlth. 1974). An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours and working conditions or other factors. Id. As the Commonwealth Court stated in Western Psychiatric Institute and Clinic v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974):

"We do not read Section 604 [of PERA] to mean . . . that an identifiable community of interest cannot exist without some differences in requirements of experience, skills and education . . . To accept [that] proposition would lead to . . . over-fragmentation . . . [T]he Board's determinations may not ignore the effects of over-fragmentation and . . . the units must be as few as practicably can be . . . ."

Id. at 260.

In the Matter of the Employees of Spring Grove Area School District, 38 PPER 54 (Proposed Decision and Order, 2007).

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<sup>1</sup> At the hearing, the attorney for ISSU refused to stipulate that if the retail wine specialists were not supervisors then they would share an identifiable community of interest with the clerks in the bargaining unit represented by the UFCW. (N.T. 119-122). The purported reason for this refusal was that the Board could possibly determine that the retail wine specialists, as a separate classification, could be placed in a separate unit on their own. However, there is no petition seeking such a unit for consideration. Therefore, as a matter of law, the retail wine specialists cannot be placed in a separate, stand-alone bargaining unit.

In this case, the wine specialists work in the same retail stores and perform the same types of duties as the clerks. Specifically, both the wine specialists and the clerks stock shelves, unload trucks, operate cash registers and provide customer service. Mostly, the wine specialists are already clerks. Therefore, the specialists are supervised by the same individuals as the clerks. They also receive the same benefits and are on the same pay scale as the clerks. Accordingly, employees in the position of retail wine specialist share and identifiable community of interest with the employees in the bargaining unit of clerks represented by UFCW.

**CONCLUSIONS**

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

1. The Commonwealth, PLCB is a public employer within the meaning of section 301(1) of PERA.
2. The UFCW and the ISSU are employe organizations within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The employees in the classification of retail wine specialist share an identifiable community of interest with the liquor store clerks in the bargaining unit represented by UFCW and certified by the Board at PERA-R-6-C.
5. The position of retail wine specialist is not supervisory and is properly included in the bargaining unit represented by UFCW and certified by the Board at PERA-R-6-C.

**ORDER**

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

**HEREBY ORDERS AND DIRECTS**

that the petition at Case No. PERA-U-10-66-E is hereby sustained and the bargaining unit of nonprofessional employes of the Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board, certified by the Board at Case Number PERA-R-6-C, and exclusively represented by the UFCW is hereby amended to include the position of Retail Wine Specialist;

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that the petition at Case No. PERA-U-10-62-E is hereby dismissed;

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that in the absence of any exceptions to this order filed pursuant to 34 Pa. Code § 95.98 (a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this first day of February, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner