

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PERA-R-17-126-E
: :
SOUTH COATESVILLE BOROUGH :

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On May 22, 2017, Teamsters Local Union No. 312 (Teamsters or Union) filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board) alleging a thirty percent showing of interest among the full-time and regular part-time nonprofessional, blue-collar employes of South Coatesville Borough (Borough or Employer) and seeking to represent those employes for the purposes of collective bargaining. On June 2, 2017, 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 July 31, 2017, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed timely post-hearing briefs in support of their respective positions on September 25, 2017.

The Examiner, on the basis of the testimony and exhibits presented at the hearing, and from all of the matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act (PERA or Act). (N.T. 5)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)

3. The Borough stipulated that if the Foreman position is not found to be supervisory or managerial under the Act, it shares an identifiable community of interest with the rest of the employes in the proposed unit. (N.T. 8-9)

4. The Borough is comprised of several departments, including the public works department, the police department, the sewer department, and the administrative staff. Chris Corle is the head of the public works department and has been employed as the Foreman for approximately eight months. There are also two full-time laborer positions in the public works department, one of which was vacant at the time of the hearing. (N.T. 12-13, 24, 38-40)

5. The Borough does not have a Borough manager. Instead, the Foreman reports directly to Borough Council once per month unless there is an emergency. (N.T. 13, 18)

6. There is one part-time employe in the sewer department named Lloyd Garrett. (N.T. 14, 37, 48)

7. The Foreman oversees the public works department. He assigns duties on a daily basis regarding park maintenance, grass cutting, curbside recycling, snow removal, and other cleanup duties throughout the Borough. The Foreman also performs this work alongside the laborers. (N.T. 15-17, 41)

8. The Foreman is responsible for taking action in cases of inclement weather, downed street signs, and storm water or erosion. The Foreman is not required to obtain Council's approval to assign overtime in addressing these issues. (N.T. 19-21)

9. The Foreman has authority to impose counseling or verbal reprimands with regard to discipline. He has implemented a performance improvement plan. (N.T. 22)

10. The Foreman does not have the authority to suspend or terminate employes. In cases of more severe discipline, the Foreman has made the recommendation for such action, which was followed by Council after the Council conducted its own investigation. (N.T. 22-25)

11. For example, in June 2017, the Foreman recommended that an individual holding one of the laborer positions be terminated. The Borough Council conducted a workplace investigation and followed his recommendation by discharging the employe on July 21, 2017 for insubordination, threats of violence against a coworker, using foul and abusive language, and misuse of Borough property. (N.T. 26-28, 51-52; Borough Exhibit 2,3)

12. There was no Foreman in the Borough, who predated Corle and who made any recommendations for suspension or termination in the past six years. (N.T. 26)

13. The Foreman outlines the requirements or needs for the public works department budget. The Borough Council has modified his requests, rejected expenditures it believes to be too costly, and adjusted line items for the public works department budget. (N.T. 29-30)

14. The Foreman approves and denies requests for leave, such as vacation, sick, or bereavement leave for employes. (N.T. 31)

15. The Foreman has authority to spend money from the petty cash fund for expenses, such as rakes, shovels, or other equipment, not to exceed \$250.00. He is also responsible for purchasing salt. In doing so, he searches for the best price and makes a recommendation to Council, who votes on it. (N.T. 31-33)

16. The Borough has a sewer department, which consists of three or four pumping stations throughout the Borough. The sewer department employe monitors the operations of the equipment and rakes the sludge. (N.T. 33-34, 55)

17. The sewer department employe works an average of 16 to 24 hours per week and is required to provide a monthly report to Council. (N.T. 34-35)

18. The two laborer positions and the sewer department employe are all paid hourly wages. Neither the laborer positions, nor the sewer department position require a college or professional degree. (N.T. 58-59)

DISCUSSION

The Union has petitioned to represent a bargaining unit comprised of all full-time and regular part-time nonprofessional, blue-collar employes of the Borough. However, the Borough contends that the Foreman position should be excluded from the unit as supervisory and/or managerial under the Act. As the party seeking to exclude the Foreman from the unit, the Borough has the burden of proving by substantial evidence the asserted statutory exclusions apply. Westmoreland County v. PLRB, 991 A.2d 976 (Pa. Cmwlth. 2010) *alloc. denied* 17 A.3d 1256 (Pa. 2011). The Board reviews actual job duties and will only consider written job descriptions to corroborate testimony of actual duties. *Id.* at 980.

Section 301(6) of PERA provides as follows:

"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 employes 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).

In Abington Heights School District, 42 PPER 18 (Final Order, 2011), the Board quoted Luzerne County Community College, 37 PPER 47 (Final Order, 2006) and opined as follows:

Employes 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). It must also be noted that Section 604(5) of PERA provides that the Board, in making supervisory determinations, "may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604(5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employes who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. West Perry School District v. PLRB, 752 A.2d 462 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 795 A.2d 984 (2000; State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999); Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB, 409 A.2d 532 (Pa. Cmwlth.

1980). Conversely, where the employe performs predominantly supervisory duties, that employe is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlth. 1975).

As a result, the Board in Abington Heights School District, *supra*, went on to hold that, absent evidence an employe spends a majority of his or her time performing supervisory duties, this is not sufficient evidence to show that the position in question should be excluded as supervisory under Section 301(6) of PERA.

Here, the Borough maintains that the Foreman is supervisory under the Act because he assigns overtime, approves or denies leave requests, and disciplines employes. However, even assuming these alleged job duties support a supervisory exclusion pursuant to Section 301(6) of the Act, the Borough has not been able to establish that the Foreman spends a majority of his time performing supervisory duties. To the contrary, the Borough presented the testimony of the Council President, Joseph Frisco, who acknowledged that the Foreman works alongside the two laborers performing the same job duties much of the time. What is more, Frisco also testified that, while he is familiar with the Borough Code, which purportedly sets forth the job duties of the Foreman, none of the Borough Council members are present during the Foreman's workday to actually observe the extent to which the Foreman performs any of these alleged supervisory duties. (N.T. 18-22). As such, this testimony is not sufficient to support an exclusion.

In any event, the record shows that even the most persuasive evidence of supervisory status offered by the Borough, namely the Foreman's recommendation to terminate one of the laborers in June 2017, does not support a supervisory exclusion.¹ Instead, the record shows that the Foreman made a recommendation, but the Borough Council performed its own independent investigation of the incident in question and took statements from the Foreman, as well as the other employes, which belies any claim by the Borough that the Foreman's recommendations are given controlling weight. (N.T. 51-52, 55-56, 58). Further, the Board has held that approval of leave and overtime will not support an exclusion for supervisory status when those duties are not present in conjunction with other significant indicia of supervisory authority. In the Matter of the Employes of Luzerne County Community College, 37 PPER 47 (Final Order, 2006).² Accordingly, the Foreman will not be excluded from the bargaining unit as a supervisory employe pursuant to Section 301(6) of PERA.

¹ Post-petition evidence is admissible where there has been no showing that the employer changed job duties merely to influence the Board's determination regarding the placement of the position in question. In the Matter of the Employes of Housing Authority of the City of Shamokin, 42 PPER 32 (Proposed Order of Unit Clarification and Proposed Order of Amendment of Certification, 2011) *citing* In the Matter of the Employes of Westmoreland County, 40 PPER 35 (Final Order, 2009). There is no indication that the post-petition evidence in this case, the Foreman's recommendation to terminate one of the laborer employes, was suspicious in any way or designed to influence these proceedings.

² To the extent the Foreman assigns certain duties to the laborers during the workday, there is no evidence that this is anything other than routine or clerical in nature, and therefore, not sufficient to support an exclusion.

Next, the Borough contends that the Foreman should be excluded from the bargaining unit as a managerial employe under Section 301(16) of PERA. However, the Borough has not sustained its burden of proving the managerial exclusion for the Foreman position either.

Section 301(16) of PERA provides that:

"Management level employe" means 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).

The Board has held that if employes meet only one part of the three-part test set forth in Section 301(16), then those employes are managerial. Pennsylvania Ass'n of State Mental Hospital Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1990). In Horsham Township, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), the Board stated:

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.

The remaining criteria for designating an employe as managerial concerns one "who responsibly directs the implementation (of policy)" and shall include "all employes above the first level of supervision." We interpret these criterion to include those persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task. The administration of a policy involves basically two functions: (1) observance of the terms of the policy and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine and ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy. Furthermore, the interpretation of policy would constitute responsible implementation of policy as a continuation of the managerial decision making process.

* * *

In City of Lebanon, 4 PPER 24 (1974), we stated that policy formulation and implementation must be distinguished from

technical expertise. To define the problem and directly implement the proposed solution to a problem is not the same as performing a function within a known discipline with competence. The former has to do with policy and the latter deals with technical expertise.

The Commonwealth Court has opined that an employee's decisions are not managerial if they are part of the employee's routine discharge of professional duties. Municipal Employees of the Borough of Slippery Rock v. PLRB, 14 A.3d 189 (Pa. Cmwlth. 2011). Rather, in order to be considered a managerial 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. *Id.* at 192. The exercise of authority to take remedial action in the event of noncompliance with governmental regulations is the hallmark of a management level employee. In the Matter of the Employees of Jefferson Morgan School District, 31 PPER ¶ 31115 (Proposed Order of Unit Clarification, 2000) *citing* School District of Philadelphia v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998).

Turning to the instant dispute, the record shows that the Foreman is not a managerial employee pursuant to Section 301(16) of the Act. First of all, the record is devoid of any evidence that the Foreman is involved directly in the determination of policy. There is simply no evidence whatsoever that Corle has the authority to select among options and to put a proposed policy into effect. Nor does the record show that Corle participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Indeed, the Borough has offered no evidence that the Foreman has created, adopted, or otherwise put any policy into place, or that he even participates in any process that results in policy proposals and decisions to effectuate those proposals. Therefore, the Borough has not shown that the Foreman satisfies the first part of the test for managerial employees under Section 301(16).

Likewise, the Borough has not established that the Foreman satisfies the second part of the managerial test set forth in Section 301(16). The Borough asserts that the Foreman is solely responsible for establishing work rules and standard operating procedures for the public works department and enforcing the same. (N.T. 18, 44-45). However, the record shows that the Foreman has not actually developed any written work rules or standard operating procedures. (N.T. 45). The Borough also points to the Foreman's authority to spend money from the petty cash fund, along with his authority to take action in cases of inclement weather, downed street signs, and water damage, as evidence of managerial status. Once again, this is not sufficient to support an exclusion for managerial status under the Act, as these duties reflect nothing more than the routine discharge of the Foreman's professional duties and technical discretion. The Borough additionally maintains that the Foreman is a manager because he develops the budget for the public works department. However, the record shows that the Borough Council has modified his requests, rejected expenditures it believes to be too costly, and adjusted line items for the public works department. As such, the Foreman will not be excluded from the bargaining unit as a managerial employee under Section 301(16) of the Act.³

³ The Borough has not argued or presented any evidence to show that the Foreman is above the first level of supervision in accordance with the third part of the test under Section 301(16) of the Act.

Finally, the Borough opposes the inclusion of the part-time sewer department employe on the basis that the sewer department employe lacks an identifiable community of interest with the other employes in the proposed unit.⁴ However, the sewer department employe shares an identifiable community of interest with the other employes in the proposed unit and must be included therewith.

Section 604 of PERA provides, in relevant part, as follows:

The [B]oard shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the [B]oard shall:

(1) Take into consideration but shall not be limited to the following: (i) public employes must have an identifiable community of interest, and (ii) the effects of over fragmentation.

43 P.S. § 1101.604.

In determining whether employes 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 employes, grievance procedures, bargaining history, and employes' 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.* at 464.

In this case, the record clearly supports an identifiable community of interest between the sewer department employe and the rest of the employes in the proposed unit. Indeed, the two laborer positions and the sewer department employe are all paid hourly wages. The positions have similar educational requirements, as none of them require a college or professional degree. Further, the positions all perform blue-collar work. In addition, the Board has long favored a policy of certifying broad-based units. In the Matter of the Employes of University of Pittsburgh, 16 PPER ¶ 16205 (Order Directing Amendment of or Request to Withdraw Petition for Representation, 1985) citing Athens Area School District, 10 PPER ¶ 10128 (Order and Notice of Election, 1978). Indeed, to hold that the sewer department employe lacks an identifiable community of interest would violate the Act's prohibition against over-fragmentation, in that the Borough could potentially have two separate units of blue-collar, nonprofessional employes.⁵ Accordingly, the sewer department employe must be included in the petitioned-for unit.

⁴ The Borough does not argue that the sewer department employe is casual and not a regular, part-time employe. Indeed, the record shows that the sewer department employe works an average of 16 to 24 hours per week, which clearly constitutes a regular, part-time employe under the Act.

⁵ In fact, the record shows that the sewer department employe is the only blue-collar, nonprofessional employe, aside from the public works department, as the rest of the Borough workforce includes the police department and the white-collar administrative staff. Thus, to find that the sewer department employe lacks an identifiable community of interest with the public works employes would deprive the sewer department employe of certain Article IV rights, as the Board will not certify a bargaining unit under PERA containing

CONCLUSIONS

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

1. The Borough is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Foreman is not a supervisor or management level employe within the meaning of PERA.
5. The sewer department employe shares an identifiable community of interest with the employes in the proposed bargaining unit.
6. The unit deemed 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 nonprofessional employes, including but not limited to the Foreman, Laborers, and the sewer department employe; and excluding all management level employes, supervisors, confidential employes, and guards as defined by the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Borough shall within ten (10) days from the date hereof submit to the Board a current alphabetized list of the names and addresses of the employes 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 20th day of October, 2017.

PENNSYLVANIA LABOR RELATION BOARD

John Pozniak, Hearing Examiner

only one employe. In the Matter of the Employes of East Mead Township, 47 PPER 6 (Proposed Order of Dismissal, 2015), reversed on other grounds, 47 PPER 46 (Order Directing Remand to Hearing Examiner for Further Proceedings, 2015).

