

Senior Telecommunications Central Control Specialists. The Section also employs approximately twelve (12) civilian Telecommunications Shift Supervisors and four (4) civilian Telecommunications Central Control Shift Supervisors. The Section operates three (3) Emergency Reporting Centers ("ERC"), commonly referred to as 911 call centers, with one center located in each county of the State. The Section also operates the central Headquarters Communications Center, which is the repository for statewide criminal justice data. Each of these four operational centers operates twenty-four (24) hours a day, every day. Each is staffed by four (4) shifts. Each shift works a rotating schedule of eight hour shift assignments. Each ERC is also staffed by an ERC Manager. The Headquarters Communication Center employs a HQ Communications Operations Supervisor. Each of these Managers works during the regular day shift.

The Communications Workers of America, AFL-CIO ("CWA"), is an employee organization within the meaning of 19 Del.C. §1302(h).²

On July 2, 1996, the CWA filed with the Public Employment Relations Board ("PERB") a Petition for Bargaining Unit Determination and Certification of Exclusive Representative, seeking to represent:

All full and regular part time Telecommunications Specialists, Senior Telecommunications Specialists, Telecommunications Shift Supervisors, Telecommunications Central Control Specialists, Senior Telecommunications Central Control Specialists, and Telecommunications Central Control Shift Supervisors.

The petitioned for unit specifically excluded "Managerial and supervisory personnel as defined by the Act and all other employees."

The State objected to the inclusion of Telecommunications Shift Supervisors and Telecommunications Central Control Shift Supervisors ("Shift Supervisors") in

² "Employee organization" means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

the bargaining unit, asserting that they are supervisory employees within the meaning of 19 DeL.C. §1302(p) and are therefore ineligible for representation under the Act.

A hearing was held on August 28, September 11, and September 20, 1996. Thereafter, the parties presented closing arguments in the form of simultaneous post-hearing briefs, with the final submission being received on November 15, 1996. The following decision results from the record thus compiled.

ISSUE

Are the positions of Telecommunications Shift Supervisor and Telecommunications Central Control Shift Supervisor, within the Delaware Department of Public Safety, Division of State Police Communications Section, "supervisory" within the meaning of 19 DeL.C. §1302(p), and therefore, ineligible for representation for the purposes of collective bargaining under the Public Employment Relations Act?

POSITIONS OF THE PARTIES

State:

The State argues that the Shift Supervisors need only perform one of the twelve (12) activities listed in the §1302(p) supervisory definition, where the authority to perform that activity is exercised with independent judgment, on behalf of the employer and not in a routine or clerical way. It further asserts that the statute requires only that the position in question possess the requisite authority to engage in any of the listed activities or to effectively recommend such an action in order to find that position to be supervisory.

The State asserts that the Shift Supervisors have the ability to adjust grievances and the responsibility to train and direct their subordinates. Shift

Supervisors actively participate in the hiring process for their subordinates and exercise independent judgment in performing this function. The State maintains these employees evaluate the subordinates on their shift and it argues that these evaluations result in the promotion, discharge or extension of probation for the employees. It also argues that Shift Supervisors have disciplinary authority as they are responsible to completing Formal Contacts, which may ultimately result in the subject employee being either rewarded or disciplined.

CWA:

The CWA argues that the status of the Shift Supervisors in this matter is controlled by the prior Delaware PERB decision in DHSS, Stockley Center Habilitation Supervisors (Rep. Pet. 95-06-145 (1996)) and Caesar Rodney School District Instructional Aides (Rep. Pet. 92-03-070 (1992)). It asserts that the Shift Supervisors are, at most, "working leaders who only occasionally participate in minor supervisory type duties." Because they do not possess consequential responsibilities or exercise consequential authority over subordinates, they do not satisfy the statutory supervisory definition, and are, therefore, eligible for representation under Delaware law.

OPINION

The PERB has broadly construed employee representation as a fundamental right of individual employees under the statutes it administers. In RE: U.D. Bus Drivers, Del.PERB, Rep. Pet. 95-04-126 (1995, PERB Binder @ p. 1210). Positions which are not statutorily excluded from eligibility for representation can only be excluded from bargaining units where they are inappropriate based on the considerations set forth in 19 DeL.C. §1310(d). The PERB has held that "... except for the most compelling reason(s), eligible employees should not be denied access to the rights and protections to which they are otherwise entitled [under the statute]". In RE: Internal

Affairs Officer of the Wilmington Fire Department, Del.PERB, Rep. Pet. 95-06-142 (1996, PERB Binder @ 1397).

The issue in the instant matter, however, is not a question of whether the Shift Supervisors share a community of interest with the other civilian Telecommunications employees the CWA seeks to represent, but rather whether the Shift Supervisors are ineligible for representation as a matter of law because they are supervisors within the meaning of §1302(p) of the PERA. Following the standard established under the federal Labor Management Relations Act, the PERA explicitly excludes supervisory employees from the definition of a public employee:

§1302(m) "Public employee" or "employee" means any employee of a public employer except:

(7) Supervisory employees of the public employer, provided however, that any supervisory position in a bargaining unit deemed to be appropriate prior to the September 23, 1994, shall so continue, unless said unit is decertified in accordance with Section 1311(b) of this title, or is modified in accordance with the procedures authorized by Section 1310(e) of this title.

The Public Employment Relations Act defines a "supervisory employee" to be:

... any employee of a public employer who has authority, in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

The supervisory definition included in the PERA and the exclusion of supervisory employees from eligibility for representation is lifted directly from the provisions of the federal Labor Management Relations Act, (specifically Section 2(11) of that statute) administered by the National Labor Relations Board. Where Delaware law mirrors federal statutes, as it does here, Delaware can reasonably be expected to follow the precedent established in the federal sector. The NLRB clearly enunciated the underlying purpose of the supervisory exclusion and the Board's handling of these issues since 1947 in Quadrex Environmental Co., Inc. and Oil, Chemical and Atomic Workers, AFL-CIO, (308 NLRB 20, 140 LRRM 1300 (1992)):

In enacting Section 2(11) of the Act, Congress asserted that only persons vested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen, ... and other minor supervisory employees." Therefore, "the Board has a duty to employees ... not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied ... rights which the Act is intended to protect." The burden of proving supervisory status is on the party who alleges that it exists. The Board must judge whether the record proves that an alleged supervisor's role was other than routine communication of instructions between management and employees without the exercise of any significant discretion.

... As the Board noted in Chicago Metal Corp., the "exercise of some 'alleged' supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee. [citations omitted]"

In resolving whether a position is supervisory within the meaning of the statutory definition, the following questions must be answered affirmatively:

- 1) Does an employee in this position have the authority to engage in one or more of the twelve listed activities? Specifically, does this position have authority to either "...hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances?"
- 2) If so, does the exercise of this authority require the use of independent judgment?
- 3) Does the employee hold the authority in the interest of the public employer?

NLRB v. Health Care and Retirement Corporation, 114 S.Ct. 1778, 146 LRRM 2321 (1994).³

Before applying this test to the alleged supervisory functions of the Shift Supervisor, the Hearing Officer notes that the record evidences the four

³ The Public Employment Relations Board has often repeated that decisions rendered under federal labor statutes, as well as those from other public sector jurisdictions, are often useful in providing guidance and background for decisions of the Delaware PERB. Council 81, AFSCME, v. DelDOT Division of Highways, Del. PERB, ULP 95-01-111, PERB Binder II @ p. 1279 (1995).

communication operations centers at issue here are regularly operated at "minimal staffing levels".⁴ Under the minimum staffing conditions, Shift Supervisors are working side by side with other civilian telecommunications employees in the communication center manning a console and performing the same duties at those consoles as the other Telecommunications employees. These job duties include receiving and routing incoming calls to the appropriate response agency based on the priority and nature of the call, receiving and dispatching information to State and municipal police agencies, directing police officers to the scenes of crimes, accidents or complaints, monitoring citizens' band radios and scanners to provide assistance during emergency situations, inputting and retrieving information from computer terminals to relay to officers and/or other criminal justice agencies.

Turning to evaluation of the role of Shift Supervisors in performing the identified supervisory functions, the State acknowledges that there have been no lay-offs within the Communications Section and therefore there have also been no recalls. Shift Supervisors have obviously had no responsibility for these functions.

The role of Shift Supervisors in the disciplinary process was limited to the issuance of Formal Contacts and verbal counseling. The testimony of the Shift Supervisors established that problems which may require issuance of a Formal Contact are normally and routinely discussed with the ERC Managers first and are often only issued at the direction of the Manager. The record further established that the Manager exercised his or her authority in reviewing any Formal Contacts, often reviewing them before their issuance or modifying the document or consequence after its issuance. It is evident that Shift Supervisors do not possess independent authority with respect to the issuance of Formal contacts.

⁴ The majority of the testimony presented concerned the operation of the ERC's. No evidence was received which significantly differentiated the operations of the Headquarters Communication Section or of its Shift Supervisors from those of the Shift Supervisors in the ERC's.

No evidence was presented that Shift Supervisors have ever suspended a Telecommunications Specialist. Article 24 of the "Delaware State Police Civilian Manual" specifically provides that "Any disciplinary action in which a suspension is considered must first be approved by the Deputy Superintendent." Clearly, under this language Shift Supervisors do not possess the requisite supervisory authority on this dimension.

Formal Contacts may also be used as a formal commendation for a job well done. Testimony established that Shift Supervisors seldom use the Formal Contact in this manner, unless so directed by their Manager or in response to a contact from the general public. It was established that Shift Supervisors do not possess the authority to reward their subordinates with either bonuses, merit increases, or time off.

The record does not support a finding that Shift Supervisors have authority to discharge employees assigned to their shifts. Although the State argued that the performance evaluations which Shift Supervisors annually complete for the telecommunications employees assigned to their shifts may contribute to the ultimate discharge of an employee this hypothetical nexus was not established by the record.

The State argued that Shift Supervisors are directly involved in hiring their subordinates. It asserted that Shift Supervisors are part of the hiring process through their inclusion as members of the interview panels for the purposes of interviewing candidates who have successfully completed the written examination and have been certified as "minimally qualified" by the Department's Personnel section. The Shift Supervisor participates as a member of a 3 - 5 person team, completes a numerical ranking of each candidate interviewed using the identified criteria and provided on a form by Departmental Personnel staff. The final ranking of each candidate is accomplished by averaging the scores of all of the interview panel members. Where there is wide disparity in rankings for an individual candidate discussion occurs among the interview panel. The list of interview panel composition provided by the Personnel Section included Shift Supervisors on twelve

of the nineteen panels listed. State Exhibit 6. The list itself, however, is somewhat suspect. The Personnel Officer who introduced the document and testified that she had generated it, was unable to accurately state that this list either included all panels in the period of April, 1990, through July, 1996, or to identify what percentage of panels are represented. Additionally, some persons who are identified in the Sections Organizational Chart as ERC Managers, are designated as Shift Supervisors in State Exhibit 6. When contrasted with the testimony of current Shift Supervisors, of whom only one testified that he had never participated in the hiring process and then only as stand-in for the ERC Manager, the record is inconclusive as to whether Shift Supervisors have authority related to the hiring of Telecommunications employees.

The State has also argued that the Shift Supervisors have authority to promote Telecommunications Specialists to Senior Telecommunications Specialists. The record, however, indicates that this career ladder promotion is more a routine matter, once an individual Telecommunications Specialist (which is the entry level position into this section) has been completed identified training requirements and has been evaluated as performing at the full performance level. The training of new hires is shared by and among senior Telecommunications employees on the shift to which the new hire is assigned, including the Shift Supervisor. The new hire is usually paired with a senior employee for on-the-job training. The senior employee is responsible for assessing the new hires level of proficiency and the new hires are evaluated monthly by the senior employee with whom they are working. Training responsibilities may be share by a number of senior employees on a shift. Exhibits introduced during the hearing also evidence that where the submission of a memo "recommending" the career promotion from Telecommunications Specialist to Sr. Specialist is delayed due to oversight, the employee himself was able to initiate the process by sending a written memorandum to the Personnel Section requesting that his eligibility be reviewed, and in fact, that he be awarded the promotion retroactive

to his one year anniversary date in the position. This request was approved by the Assistant Chief of the Communications Section and processed by the Personnel Section. When reviewed in its totality, the evidence supports the conclusion that the promotion of Telecommunications Specialist to Senior Telecommunications Specialist is a responsibility of a routine or clerical nature and therefore cannot support the finding that Shift Supervisors are supervisory employees.

Evidence was not presented which supported a conclusion that Shift Supervisors have the authority to transfer employees either to or from their assigned shifts.

The closest issue concerns whether Shift Supervisors have the authority, in the interest of the employer, to assign and/or direct subordinate employees during their shifts, and, if so, whether this activity requires they exercise independent judgment. Testimony established that telecommunications employees on each shift rotate between work stations ("consoles" in the case of the ERC's) on a "routine basis", in some centers on a daily rotation while in others the rotation occurs several times during each shift. Shift Supervisors participate in the rotation between work stations. Each employee on a shift rotates to every position or console during the course of either a day or a week. The record does not establish that the assignment or direction of employees to specific work stations during the course of a shift is based on anything other than standard routine.

In support of its assertion that the Shift Supervisors further "direct" the employees assigned to their shifts, the State asserted that the Supervisors have the authority to prioritize emergency calls during their shifts. Testimony established that a significant portion of the prioritizing of incoming calls is accomplished by a computerized system used in all of the ERC's. The record does establish that when two high priority service requests are received in close proximity to each other, the computer system does not always satisfactorily prioritize the calls, thereby requiring human evaluation. Testimony established that prioritizing under this circumstance

is more a function of experience gained through having handled similar calls in the past, rather than a function for which the Shift Supervisor is trained and which is reserved exclusively to the Shift Supervisor. Testimony established junior employees often seek the same type of advice and guidance in handling tough calls or in situations where they have questions or concerns, from more senior employees, whether they are the Shift Supervisors or not.

Grievances are defined by Article XXV of the Civilian Manual. The established procedure states that any permanent employee with a question, problem or misunderstanding should first discuss the issue with his/her first or second line supervisor before filing a grievance. If the issue is not resolved, a formal grievance may be filed with the Section Chief. The record in this matter does not establish that the Shift Supervisor has any role or authority in resolving or adjusting grievances which are filed with the Section Chief.

For all of these reasons, the record supports the conclusion that Shift Supervisors are not bona fide supervisors within the meaning of 19 Del.C. §1302(p). Absent is the essential authority which is the foundation of supervisory status. In order to qualify as a bona fide supervisor, one must possess consequential responsibility and exercise consequential authority over subordinate employees. In RE: Caesar Rodney Instructional Aides, Del.PERB, Rep. Pet. 92-03-070 (1991).

Finally, the presentations of the parties were thoughtful and thorough and their arguments were extensive and well documented. All of the arguments, supporting cases and testimony was reviewed in detail in preparing this decision. The level of scrutiny required in addressing questions of supervisory status is expressed well by the NLRB in Northcrest Nursing Home and District 1199, SEIU, AFL-CIO, (313 NLRB 54, 145 LRRM 1214 (1993)):

Supervisory issues are, of course, highly fact bound. Deciding whether an individual possess any 2(11) indicia of supervisory authority often calls for making delicate, difficult and even fine distinctions, and there are frequently gray areas. In almost any employment situation, employees are given direction by other

employees, including more experienced, straw boss, technical and professional employees. Whether that direction is routine or responsible or requires the independent judgment is the focus of the litigation of these issues ...

DECISION

Based upon the circumstances set forth in the record created by the parties Telecommunications Shift Supervisors and Telecommunications Central Control Shift Supervisors are determined not to be supervisory employees within the meaning of 19 Del.C. §1302(p), and are therefore, eligible for representation under the Act.

THEREFORE, based on the unique circumstances presented by this petition, the appropriate bargaining unit is determined to be:

All full and regular part time Telecommunications Specialists, Senior Telecommunications Specialists, Telecommunications Shift Supervisors, Telecommunications Central Control Specialists, Senior Telecommunications Central Control Specialists, and Telecommunications Central Control Shift Supervisors. This bargaining unit specifically excludes managerial and supervisory personnel as defined by the Public Employment Relations Act and all other employees.

An election will be scheduled within thirty (30) days of the date of this decision in order to determine if and by whom the employees in this bargaining unit wish to be represented for purposes of collective bargaining.

IT IS SO ORDERED.

/s/ Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Principal Assistant/Hearing Officer
Del. Public Employment Relations Bd.

DATED: 8 January 1997