

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

CITY OF NEW CASTLE, DELAWARE,

AND

**AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 81.**

:
:
:
:
:
:
:
:
:
:
:

**Representation Petition
98-12-250**

Appearances

*Wendy K .Voss, Esq., Potter, Anderson & Corroon, for the City of New Castle
Perry F. Goldlust, Esq., Heiman, Aber, Goldlust & Baker, for AFSCME Council 81*

The City of New Castle, Delaware (“City”), is a public employer within the meaning of §1301(n) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).¹ Department of Labor records indicate the first bargaining units of City employees were certified in 1969. DOL Cases 55 and 56.

American Federation of State, County and Municipal Employees, Council 81 (“AFSCME”), is an employee organization within the meaning of 19 Del.C. §1302(h).²

On December 7, 1998, AFSCME filed with the Public Employment Relations Board (“PERB”) a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining

¹ “Public employer” or “employer” means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body had elected to come within the former Chapter 13 of this title, which hereinafter election to come within this Chapter, or which employs 100 or more full-time employees.

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.

Representative, seeking to represent a bargaining unit of “wall to wall City employees”. This request was defined to include employees in the following positions:

Chief of Police, Police Department Clerk, Finance Director, Finance Clerk, Director of Public Works, Foreman – Public Works, Laborer, Equipment Operator, Truck Driver, Building Code Inspector, Investigator, Secretary to the Mayor and Secretary to the City Administrator.

The City objected to the inclusion of the Chief of Police based on the fact that a different statute covers police officers and that the Department of Labor had previously found the Chief to be inappropriate for inclusion in the bargaining unit of rank and file police officers; the inclusion of the Secretaries to the Mayor and City Administrator on the grounds that they are confidential employees; and the inclusion of the Finance Director, Director of Public Works, and Building Code Inspector, asserting these employees are supervisory employees within the meaning of 19 Del.C. §1302(p).

A hearing was convened on February 11, 1999 by the PERB. At the opening of the hearing, AFSCME withdrew its request to include the Chief of Police in the proposed bargaining unit. The City withdrew its objection to the appropriateness of the Secretaries to the Mayor and City Administrator with the understanding that these employees would not have any right to disclose any information marked “confidential”. Consequently, the only issue in dispute is whether the Finance Director, Director of Public Works and Building Code Inspector are “supervisory” employees within the meaning of 19 Del.C. §1302(p).

The decision herein reached results for the record created by the parties in this matter.

ISSUE

Are the positions of Finance Director, Director of Public Works and Building Code Inspector employed by the City of New Castle, Delaware, “supervisory” employees within the

meaning of 19 Del.C. §1302(p), and therefore, ineligible for representation for purposes of collective bargaining.

OPINION

The Public Employment Relations Board has broadly construed the right of employees to be represented for purposes of collective bargaining as a fundamental right created by the PERA. In RE: U.D. Bus Drivers, Del.PERB, Rep. Pet. 95-04-126, II PERB Binder 1210 (1995). Positions that are not excluded from eligibility for representation by statute can only be excluded from bargaining units where they are inappropriate based on the considerations set forth in 19 Del.C. §1310(d). In RE: Del. Department of Public Safety and CWA, Del.PERB, Rep. Pet. 96-07-187, III PERB Binder 1543 (1997). Except for the most compelling reasons, “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, II PERB Binder 1397 (1996).

The issue raised by this petition is not whether the three positions in issue are appropriate for inclusion in a bargaining unit with the other petitioned for positions, but rather whether these three positions are eligible for inclusion in any bargaining unit. 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 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 of a merely routine or clerical nature, but requires the use of independent judgment.

In resolving whether a position is supervisory within the meaning of the statutory definition, PERB had adopted the test established by the National Labor Relations Board and approved by the United States Supreme Court in NLRB v. Health Care and Retirement Corporation, 114 S.Ct. 1778, 146 LRRM 2321 (1994):

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

Applying this test to the specific facts of this case, there is no testimony that any of the three positions in question do or have engaged in the transfer, suspension, lay-off or recall, promotion, discharge, or reward of any subordinate employee nor in the adjustment of any grievance. The City argues, however, that these employees direct others, are involved in the hiring process, and have authority to discipline subordinates.

The statutory definition of a supervisory employee requires a supervisor have authority to act in the interest of the public employer. As PERB held in RE: Caesar Rodney Instructional Aides (Del.PERB, Rep. Pet. 92-03-070, I PERB Binder 829 (1992)):

It is the delegation of essential authority which is the foundation of supervisory status. In order to qualify as a bona fide supervisor under the statutory definition, one must possess consequential responsibility and exercise consequential authority over subordinate employees.

Absent from this record is any clear indication of delegated authority from the Mayor and Council through the City Administrator to any other level. It is evident that the Mayor and Council and the City Administrator retain most of the authority for supervisory functions as defined by the statute. The testimony of the witnesses establishes City employees know what their job responsibilities are and perform them with few problems. Where problems do arise, the City Administrator acts quickly to resolve them, whether in response to a request by the Mayor and Council, the public, or another employee. City Administrator Martin testified he does not normally operate through the Directors for resolution of issues and that the City does not operate under a clear "chain of command" system.

Director of Public Works

Rick Harrison holds the position of Director of Public Works. He testified he divides the work to be done each day among ten employees. The work performed by the Public Works Department includes routine functions such as trash removal, grass cutting, and road and equipment maintenance, in addition to special requests from City Administrator Martin. After assigning these jobs, Mr. Harrison goes out and works side by side with the other employees to complete the work. He testified he spends at least seventy-five percent (75%) of his day working side by side with other Public Works employees. He has never hired, fired, nor disciplined another employee.

Mr. Harrison believes he could recommend disciplinary action to City Administrator Martin should the need arise, but he does not believe he can impose discipline on his own authority. While Mr. Martin believes Mr. Harrison could discipline an employee, he also testified that, as the City Administrator, he keeps tight control over personnel matters. There is nothing in the record which resolves their difference of opinion. There is no history that Mr. Harrison has

ever imposed discipline and no record of any delegated authority which provides that he could do so in the future.

Mr. Martin testified the Director positions (which he considers to also include the Building Code Inspector) were created approximately three years ago because the City “needed to go into a salary arrangement.” He testified Mr. Harrison would be involved in hiring procedures under a new draft personnel system currently being considered by the Mayor and Council. It is undisputed that Mr. Harrison has never participated in the hiring process in the past.

The record is void of compelling evidence supporting the proposition that Mr. Harrison has supervisory authority sufficient to exclude this position from eligibility for representation. It is undisputed that Mr. Harrison’s assignment of work to other employees is routine in nature. There is no evidence he designs or enforces performance standards nor that he has such fundamental authority as the authorization of over-time work. There is no evidence he has authority to promote public works employees or even to effectively recommend such action.

The record is not sufficient to establish the Director of Public Works has been delegated the essential authority which is the foundation of supervisory status. It does not establish that he has either consequential responsibility or that he exercises consequential authority over subordinates.

Building Code Inspector

Jeff Bergstrom is the Building Code Inspector for the City of New Castle. Calls for service come into his office through a secretary who splits her time between the Code and Finance Departments. As calls are received, the secretary divides them up according to subject matter (i.e., residential, commercial, or health related) and distributes them to the employees who are primarily assigned to each of these areas. Mr. Bergstrom, the only full-time inspector employed by the City, handles primarily and commercial calls. Mr. Taylor, who works out of the

same office, handles residential calls. Calls which involve health codes are referred to Mr. Swanson who works for the Board of Health. Mr. Bergstrom testified the division of labor between himself and Mr. Taylor resulted from a mutual agreement between them.

The City argued Mr. Bergstrom is responsible for supervising both Mr. Taylor and Mr. Swanson. Mr. Bergstrom testified Mr. Swanson reports to the Mayor and the Board of Health. The organizational chart submitted by the City supports Mr. Bergstrom's testimony that Mr. Swanson does not report to him. He also testified, without contradiction, that structural inspections constitute a small part of Mr. Swanson's responsibilities. Although Mr. Bergstrom signs Mr. Swanson's time sheets, he has no knowledge as to where or how Mr. Swanson spends his work time.

Mr. Bergstrom was a member of the hiring team which hired Mr. Swanson, along with the Mayor and the City Administrator. Mr. Bergstrom was not charged with making an individual recommendation. Mr. Swanson was ultimately hired by the full Mayor and Council, as are all City employees.

As evidence of Mr. Bergstrom's supervisory responsibilities, the City introduced a memorandum addressed to Andrew Reese (Mr. Swanson's predecessor as Health Inspector) from Mr. Martin, dated October 23, 1997. The document, however, is marked "draft". It includes hand-written editions and does not contain any indication that Mr. Bergstrom received a copy. Mr. Bergstrom testified he did not recall any arrangement or agreement with the Mayor wherein he was directed to supervise Mr. Reese. Although Mr. Bergstrom did recall that Mr. Reese had been instructed to clear all written communications through Mr. Bergstrom before sending them, he testified he had no authority to enforce these instructions.

Based on the record, there is insufficient evidence to support a finding that the Building Code Inspector has been delegated consequential authority sufficient to exclude this position from eligibility for representation.

Finance Director

Marian Delaney is the Finance Director for the City of New Castle. In this position, she is responsible for all of the City's banking, property taxes, drafting checks, employee benefit functions, and updating real estate settlement information. She is also responsible for overseeing two employees, a Finance Assistant and a Payroll Clerk. She assigns work to these employees and reviews their work. She spends approximately one-third (1/3) of each day supervising these employees, with the remainder of her day spent doing her own work.

The City placed in evidence a memorandum to Bud Waraksa, Finance Clerk, which was authored by Ms. Delaney and dated March 2, 1994. The memo concerns the extension of Mr. Waraksa's probationary employment period. The memo includes a hand written note reading "Placed in Personnel File" with Ms. Delaney's initials, and indicates both Mr. Martin and the Council Finance Committee Chairperson received copies. The memo includes numerous references to Ms. Delaney's relationship to Mr. Waraksa, including:

This memorandum will address concerns that I have verbalized to you regarding your job performance as Finance Clerk...

... Again I request that any correspondence that leaves this office be reviewed by me.

... I view this incident as a deliberate disregard of my instructions. Regardless of the position you held in your previous employment, you are now an employed by the City and subject to supervision.

... As your supervisor, I will be more concerned with the quality of your work rather than the quantity of work performed.

... My observation is that you are setting your own agenda and disregarding my instructions as your supervisor.

Ms. Delaney testified she discussed this issue with City Administrator Martin before issuing this memorandum. She further testified that although Mr. Martin did not initially want to extend Mr.

Waraksa's probationary period, he did ultimately support her recommendation and it was extended.

Although this is the only formal written performance evaluation Ms. Delaney recalled preparing, she testified that she discusses performance evaluations with Mr. Martin. She also recalled that Mr. Martin has cancelled joint meetings for the purpose of discussing employee performance.

Ms. Delaney testified that both she and Mr. Martin assign tasks to the two employees in her department. She was responsible for implementing Mr. Martin's suggestion that payroll and accounts payable be disbursed every other week. She testified she believes she has the authority to direct her subordinates but does not have independent authority to assess discipline without Mr. Martin's approval. On a day-to-day basis, she directs Mr. Waraksa and Ms. Paulin, who follow her direction. Ms. Delaney also participated as a member of the team who recommended Mr. Waraksa for the position of Finance Clerk.

Based on this record, Ms. Delaney does exercise supervisory authority within the meaning of 19 Del.C. §1302(p). She responsibly directs subordinates and has effectively recommended actions which directly impact their employment status. It is clear she has acted with authority and in the interest of the public employer in fulfilling these responsibilities.

Finally, the record establishes the City of New Castle is engaged in a process to clarify and codify some of its personnel and organizational functions. Placing the Director of Public Works and the Building Code Inspector in the bargaining unit at this time does not preclude the possibility that these positions may, in the future, be given responsibility and the concomitant authority for supervisory functions as defined by the statute. When and if this should occur, the City may petition PERB, based upon the change in circumstances, to reconsider the eligibility of these positions to remain in the unit.

DECISION

For the reasons set forth herein, it is determined that the positions of Director of Public Works and Building Code Inspector are not supervisory positions within the meaning of 19 Del.C. §1302(p) and therefore are eligible for representation.

The position of Finance Director qualifies as supervisory within the meaning of the PERA and is, therefore, ineligible for representation for purposes of collective bargaining.

An election shall be scheduled forthwith to determine whether employees included in the bargaining defined below desire to be represented for purpose of collective bargaining:

All full-time and part-time clerical, fiscal, administrative and public works employees of the City of New Castle, excluding supervisory and confidential positions within the meaning of 19 Del.C. Chapter 13.

IT IS SO ORDERED.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
PERB Hearing Officer

DATED: 1 April 1999