

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| IN THE MATTER OF: | : | |
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| STATE OF DELAWARE, DEPARTMENT | : | |
| OF CORRECTION, BUREAU OF COMMUNITY | : | |
| CORRECTIONS, DIVISION OF PROBATION | : | Representation Petition |
| AND PAROLE, | : | |
| | : | |
| AND | : | <u>99-03-256</u> |
| | : | |
| FRATERNAL ORDER OF POLICE LODGE 10. | : | |

RE: Probation/Parole Supervisors
Pre-Release Services Administrator

Appearances

Jerry M. Cutler, SLRS/SPO, for State
Jeffrey M. Weiner, Esq., for the FOP Lodge 10

The State of Delaware, Department of Correction, Bureau of Community Corrections, Division of Probation and Parole (“State”) is a public employer within the meaning of §1302(n) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).¹ The Department of Correction is an executive branch department of the State and the Division of Probation and Parole is a State agency. The Division of Probation and Parole is staffed with approximately two hundred and ninety four (294) Probation/Parole Officers, thirty (30) Probation/Parole Supervisors and five (5) Regional Managers.

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.

Fraternal Order of Police Lodge 10 (“FOP”) is an employee organization within the meaning of 19 Del.C. §1302(h).² FOP Lodge 10 is the exclusive bargaining representative of a bargaining unit of Division of Probation and Parole employees, defined by the Department of Labor in case #165, which includes Probation/Parole Officers I, Probation/Parole Officers II, and Senior Probation/Parole Officers, within the meaning of 19 Del.C. §1302(i).³

On March 30, 1999, FOP Lodge 10 filed a petition to modify this bargaining unit to also include the positions of Probation/Parole Supervisor and Pre-Release Services Administrator.

The State objects to the inclusion of these positions on the basis that they are supervisory positions within the meaning of 19 Del.C. §1302(p).

A PERB hearing was convened on June 20, July 28 and August 5, 1999, at which time the parties were afforded full opportunity to present evidence in support of their positions. The record closed upon receipt of written summaries and argument. This decision results from the record created by the parties.

ISSUE

Whether the Probation/Parole Supervisors and Pre-Release Services Administrators are “supervisory employees” within the meaning of 19 Del.C. §1302(p) and therefore ineligible for representation for purposes of collective bargaining under the Public Employment Relations Act?

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.

³ “Exclusive bargaining representative” or “exclusive representative” means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent of all employees in that bargaining unit.

POSITIONS OF THE PARTIES

State:

The State argues the evidence presented clearly indicates Probation/Parole Supervisors have responsibility to direct subordinate Probation/Parole Officers and Senior Probation/Parole Officers, to make assignments, and to adjust grievances both under the collective bargaining agreement and under the State Merit system. The State asserts Supervisors also have authority to effectively recommend hiring, promotion, and disciplinary decisions. The exercise of this authority involves the use of independent judgment.

FOP Lodge 10:

FOP Lodge 10 argues the decision of the PERB Hearing Officer in Delaware Dept. of Public Safety and CWA (Rep. Pet. 96-07-187, III PERB Binder 1543 (1997)), involving the supervisory status of Telecommunications Shift Supervisors employed by the Communications Section of the Delaware State Police, is controlling in this matter.

The FOP asserts the State has failed to prove by a preponderance of the evidence that Probation/Parole Supervisors have actual authority to hire, discipline, promote, or direct employees, or to adjust their grievances. It argues the opportunity to provide recommendations in each of these circumstances does not meet the statutory requirement for vesting these employees with genuine management authority. The Supervisors' acknowledged authority to direct subordinates in the limited area of caseload supervision is governed by the Department's Operations Manual and does not require the use of independent judgment. Similarly, the requisite final approval by Regional Managers of holiday and overtime pay, compensatory time, and sick and annual leave negates any alleged authority Probation/Parole Supervisors may nominally have in these areas.

FOP Lodge 10 argues the State's objection should be dismissed and the petition for bargaining unit modification granted.

OPINION

The Public Employment Relations Act (19 Del.C. Chapter 13) excludes supervisory employees from inclusion in any bargaining unit for purposes of collective bargaining. The statute 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. 19 Del.C. §1302(p).

The statute does not require that a supervisory employee perform all of the functions enumerated in the definition, but rather sets forth the twelve functions in the disjunctive. It also requires that the position have authority to perform the tasks or authority to "effectively to recommend such actions." The exercise of this authority must, however, require the use of independent judgment by the supervisor.

The burden of proving supervisory status is on the party asserting its existence. California Beverage Co., NLRB, 253 NLRB 328, 124 LRRM 1309 (1987). The documentary evidence provided by the parties in this matter was comprehensive. Included in the State's exhibits are Job Analysis Questionnaires (JAQ's) submitted by nineteen (19) Probation/Parole Supervisors and one (1) Pre-Release Services Administrator in March 1998. State Exhibits #1 - #20. These forms were completed by these employees in an effort to have their classification and compensation level re-evaluated under the State classification system. JAQ forms are readily available to State employees through departmental personnel offices, the State Personnel Office, and on the State Personnel Website.

The JAQ instructions state in the introduction: “This questionnaire has been designed to provide information which will give us a better understanding of your job for purposes of job analysis, evaluation, and classification.” All employees completing a JAQ are required to sign the questionnaire under the statement, “I certify the information contained in this questionnaire is accurate and complete.” Nineteen of the completed forms were signed by Probation/Parole Supervisors; one was completed and signed by a Pre-Release Services Administrator (State Exhibit 11).

The State relies upon the JAQ’s to establish the scope of the Probation/Parole Supervisors’ responsibilities and job functions. The FOP argues the JAQ’s should be accorded little weight because they were prepared for the purpose of job evaluation. This argument is rejected because the scope of the information contained in the JAQ’s regarding what Probation/Parole Supervisors actually do is wholly consistent with an investigation into whether these employees perform supervisory functions. Probation/Parole Supervisors were required to consider their job as a whole and to reflect the full scope of their responsibilities in completing a JAQ. The answers provided go to the heart of answering the question of what the job responsibilities of this position are and how they are normally performed. The employees completed these JAQ’s of their own volition and without solicitation from their employer.

A review of the JAQ’s reveal that each of the twenty employees completing the questionnaire indicated in response to question 10, Management of People, that they “directly supervise the work activities of others, and make recommendations concerning selection, termination, performance appraisal and professional development.” The completed questionnaires further reveal that core functions of Probation/Parole Supervisors include:

- ◆ Planning and review of the work of subordinate unit staff;
- ◆ Providing technical guidance to Probation/Parole Officers through case conferences and caseload audits;
- ◆ Evaluating the effectiveness and efficiency of subordinate unit staff;

- ◆ Determining training needs and monitoring the professional development of subordinate staff; and
- ◆ Supervising the work of subordinate unit staff

These responsibilities, as described by the Probation/Parole Supervisors themselves, are consistent with the functions enumerated in the Performance Plans and reviewed in the Performance Evaluations for Probation/Parole Supervisors which are part of the record. State Exhibits #24; #26; #27. Additionally, some of the JAQ's describe responsibility for Step 1 grievances (both contractual and Merit System) and for resolving employee problems. This is consistent with the language of the Article 6.7.1 of the collective bargaining agreement, was supported by testimony, and is consistent with the agency's operational procedures:

Procedure 1.7, subsection V.

- E. Staff are to present individual concerns and problems to their immediate Supervisor. If a satisfactory solution is not achieved at this level, the matter can be forwarded to the Manager for resolution. If a satisfactory solution is not achieved at this level, the matter can be forwarded to the Director for resolution. All staff are encouraged to resolve such matters at the lowest level possible in order to avoid the unnecessary escalation of the problem. FOP Exhibit 8.

Many of the JAQ's indicate responsibility for development of unit staff operating procedures.

This was also supported by testimony.

The record evidences Probation/Parole Supervisors are primarily responsible for reviewing and monitoring the work of their unit staff through case conferences, caseload audits, unit staff meetings, and field observation. Agency Procedure 1.7, subsection V(D) requires:

Unit Supervisors will schedule case conferences with individual Officers and other personnel for the purpose of providing direction and review of job performance, to conduct work audit reviews, to review offender supervision plans, assist staff development and provide general counsel concerning the nature of the job duties and responsibilities. FOP Exhibit 8.

While this Board has held that the completion of annual Performance Reviews, in and of itself, is not sufficient to establish supervisory status, it is clear that Probation/Parole Supervisors are

engaged in an on-going review of the work of subordinates and are responsible for the effectiveness of their unit operations.

Probation/Parole Supervisors are actively involved in the hiring processes for Probation/Parole Officers I positions, and for the promotional processes for Probation/Parole Officers II and Senior Probation/Parole Officers. In the case of new hires of Probation/Parole Officer I and the competitive promotional process for Senior Probation/Parole Officers, Supervisors serve on the interview panels. The chairperson of the panel (which has frequently been a Probation/Parole Supervisor) is responsible for assembling interview questions from a bank of questions maintained by the Agency. These questions are forwarded to the Regional Manager for approval, but there was no evidence presented that these submissions were routinely rejected or overruled. The panel is then responsible for soliciting information through these questions during the interview and for individually evaluating candidates for positions based on the interview and the review of a written submission. The panel subsequently meets to discuss its evaluations and rank orders the candidates. The panel then meets with a management team, comprised of Regional Manager(s) and the Director of the agency (or his/her designee) to discuss the panel's recommendations.

There was testimony concerning individual incidents in which some but not all of the recommended candidates were hired for a position or where management expressed concern over individual candidates. However, the preponderance of the evidence supports the conclusion that management relies upon the evaluations and independent judgments of Probation/Parole Supervisors on these panels in reaching its hiring/promotional decisions. There is a clear indication that as this agency has grown over the last years, there has been an expanding demand for Probation/Parole Officers which required that these panels be convened with some frequency. It was also evident that the role Probation/Parole Supervisors play in the daily supervision of unit

operations provides important expertise and judgment to the department in evaluating candidates for subordinate positions.

Probation/Parole Supervisors also are primarily responsible for recommending the career progression of Probation/Parole Officer I to Probation/Parole Officer II. Supervisors are responsible for completing a promotional package (usually at the end of one year of service) which includes a description of how the PPO I meets the minimum qualifications required of a PPO II and a recommendation for promotion. FOP Exhibit 22. The Probation/Parole Supervisor is also required to do a caseload audit before submitting a promotional package as part of his/her evaluation of the PPO I. A Supervisor's recommendation for promotion carries significant weight. The examples of rejection provided involved PPO I's for whom promotional packages were submitted prior to completion of the one year service period. The evidence suggests that the Regional Manager's or Acting Director's rejection of the three requests was routine, based upon the employees' tenure. Understanding that promotion prior to a year's tenure is the exception rather than the rule in this agency, rejection of these three promotional packages does not require a conclusion that promotional recommendations made by Probation/Parole Supervisors are not effective or do not require the use of independent judgment.

Probation/Parole Supervisors also conduct disciplinary investigations and are required to complete a "210 Package". FOP Exhibit 21. While they do not have authority to impose discipline, they make oral recommendations, as a result of the investigation. In conducting these investigations, Probation/ Parole Supervisors are required to interview witnesses, review the investigatee's job performance and disciplinary history, and to identify both mitigating and aggravating circumstances. The exercise of independent judgment by the Supervisor is clearly required by this process. There is no compelling evidence that these disciplinary recommendations are routinely rejected or that management undertakes an independent investigation to confirm information provided by the Supervisors.

On a daily basis, Probation/Parole Supervisors can direct arrests by their subordinates during normal working hours⁴, can direct the assignment of Duty Officers⁵, can direct subordinates to take specific actions in response to caseload demands, and can direct unit staff in case related matters. Supervisors can acknowledge exemplary performance of subordinates during the formal performance evaluation process, as well as by submitting a letter to the Regional Manager or Director acknowledging a subordinate's contribution. Supervisors meet both formally and informally with subordinate Officers to discuss issues involved in case management and to review subordinates performance and progress.

Supervisors are also responsible for evaluating performance and developing performance plans for unit staff. Although the Regional Manager is required to review a Supervisor's performance evaluation of a subordinate prior to the evaluation being discussed with the employee, this is required by the evaluation system which was devised by the State, and which all State agencies are required to use. The Manager's review is intended to assure consistency across the agency and to assure appropriate documentation is provided to support the evaluated rating. The record does not support a conclusion that performance evaluations are frequently modified by Regional Managers or that their judgment replaces that of Probation/Parole Supervisors as a general rule.

The FOP argues the resolution of this case is dictated by the finding and logic of the Hearing Officer's decision in Delaware Dept. of Public Safety and CWA (Rep. Pet. 96-07-187, III PERB Binder 1543 (1997)). Significant factual differences, however, separate these two cases and dictate opposite conclusions. Like the Public Safety case, Probation/Parole Supervisors may fill in and perform the work of a subordinate when dictated by operational need. In this case, however, it is clear Probation/Parole Supervisors are normally involved primarily in supervising

⁴ FOP Exhibit 16.

⁵ FOP Exhibit 10

the work of their subordinates and operations of their units, rather than spending the majority of their working hours performing the same work as their subordinates.

The statutory supervisory definition does not require the employees in question to have absolute, final authority for any of the enumerated supervisory functions, only that they have responsibility and authority to make effective recommendations, employing independent judgment, in the interest of the employer. Obviously, effective recommendations do not require that such recommendations be automatically accepted without variation, but rather that the person or position to which the recommendations are made does not routinely substitute its judgment for that of the recommender. The record in this case supports a finding that Probation/Parole Supervisors make effective recommendations, using their independent judgment, in the areas of hiring, promotions, discipline, and in the direction of their unit staff. For these reasons, these employees are found to be supervisors within the meaning of 19 Del.C. §1302(p).

Finally, although the position of Pre-Release Services Administrator was not addressed in great detail by the parties, the parties did not contest that this position is organizationally and functionally equivalent to that of Probation/Parole Supervisor. FOP Witness Ronald Keen, who held this position for three years, testified he performed similar tasks in the two positions (he is currently a Supervisor). The JAQ completed by Pre-Release Services Administrator Alan Grinstead (State Exhibit 11) is consistent with and very similar to the nineteen JAQ's prepared by Probation/Parole Supervisors. For these reasons, Pre-Release Services Administrator is also found to be a supervisory position.

DECISION

For the reasons set forth herein, it is determined Probation/Parole Supervisors and Pre-Release Services Administrators employed by the Department of Correction, Bureau of Community Correction, Division of Probation and Parole are supervisory employees within the

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

WHEREFORE, the bargaining unit modification petition filed by FOP Lodge 10 is hereby dismissed.

IT IS SO ORDERED.

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

DATED: 4 February 2000