

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

KENT COUNTY LEVY COURT,	:	
KENT COUNTY, DELAWARE,	:	
	:	Representation Petition
and	:	<u>No. 04-08-447</u>
	:	
DELAWARE PUBLIC EMPLOYEES COUNCIL 81,	:	Bargaining Unit Determination
AMERICAN FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES, AFL-CIO.	:	

APPEARANCES

Noel E. Primos, Esq., Schmittinger & Rodriguez, P.A.
for Kent County Levy Court

Francis M. Rally, III, for AFSCME Council 81

BACKGROUND

Kent County Levy Court, Kent County, Delaware, (“County”) is a public employer within the meaning of §1302(p)¹ of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). The Department of Public Safety is an executive branch department and the Emergency Medical Services Division is an agency of the County within the Department of Public Safety. The Emergency Medical Services (“EMS”) Division is staffed with 37 positions, headed by an Assistant Public Safety Director, who

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 has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees.

manages three administrative positions (an Administrative Officer, an Operations Support Officer and a Secretary), four Field Supervisors, and 29 Paramedic positions.

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

On August 30, 2004, AFSCME filed with the Public Employment Relations Board (“PERB”) a Petition for Bargaining Unit Determination and Certification of Exclusive Representative, seeking to represent:

. . . Emergency Medical Services employees in Kent County to include all Paramedics including paramedics with special designations such as FTO, Operations Support Officer, Field Supervisor, Administrative Officer, or any other special designation; Dispatcher and any special designation of dispatchers.

The County objected to the proposed bargaining unit composition, noting that Dispatchers were organizationally under the Emergency Communications Division (not the EMS Division). The County also objected to the inclusion of supervisory positions³ in the bargaining unit, including two Administrative Officers, four Field Supervisors, and four Dispatcher III positions. It also asserted the two Operations Support positions were confidential positions⁴ and should also be excluded.

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 19 Del.C. § 1302(s): "Supervisory employee" means any employee of a public employer who has the authority, in the interest of the public employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility 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.

⁴ 19 Del.C. §1302(f): "Confidential employee" means any employee whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate effectively if the employee were a member of an appropriate bargaining unit.

A prehearing conference was convened by the Hearing Officer on November 24, 2004, at which time the scope of the petition was discussed. Prior to hearing, the County withdrew its objection to Operation Support Officers, and AFSCME modified its petition to include only EMS Division employees. Emergency Communication Division positions were dropped from the petition without prejudice to future efforts to organize those positions.

A hearing was held on December 20, 2004, for the purposes of receiving evidence concerning the supervisory status of the Administrative Officer and Field Supervisor positions within the Kent County EMS Division. Thereafter, the parties presented closing arguments in the form of simultaneous post-hearing submissions, with the final submission received on January 10, 2005. The following decision results for the record thus created by the parties.

ISSUE

ARE THE POSITIONS OF EMS FIELD SUPERVISOR AND EMS ADMINISTRATIVE OFFICER, EMPLOYED BY THE KENT COUNTY DEPARTMENT OF PUBLIC SAFETY, DIVISION OF EMERGENCY MEDICAL SERVICES, SUPERVISORY POSITIONS WITHIN THE MEANING OF 19 DEL.C. §1302(s), AND THEREFORE INELIGIBLE FOR REPRESENTATION FOR PURPOSES OF COLLECTIVE BARGAINING UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT?

POSITIONS OF THE PARTIES

Kent County:

The County asserts that including Field Supervisors and the Administrative Officer in the bargaining unit with Paramedics and the Operation Support Officer would impede the County's ability to effectively supervise its employees.

Field Supervisors have front-line supervisory responsibilities including disciplining, directing and assigning subordinate paramedics. Field Supervisors have the authority to fulfill these responsibilities independently, based upon the exercise of their discretion and judgment.

The Administrative Officer directs the Division's educational and Quality Assurance/Quality Improvement programs. She supervises the activities of four Field Training Officers (FTO's) and directly intercedes in situations where individual Paramedics have training or performance deficiencies. The Administrative Officer has authority and responsibility to remediate such deficiencies and may use discipline, reassignment and/or direct employees to undergo additional training in accomplishing this task.

AFSCME:

AFSCME asserts EMS Field Supervisor and EMS Administrative Officer positions do not have independent authority or responsibility to effectively recommend in any of the statutorily defined supervisory functions and, therefore, are not supervisory employees within the meaning of the statute. It argues these positions are more akin to

“lead workers” than *bona fide* supervisors, asserting their functions are more routine in nature than requiring the exercise of independent judgment or discretion.

AFSCME argues the documented discipline issued by Field Supervisors and the Administrative Officer is for minor infractions and reveals a very limited scope of response thereto. There is no evidence of any exercise of discretion as the documents show the Field Supervisors and Administrative Officer only have authority to issue verbal counseling and written reprimands. The County concedes these positions have no independent authority to suspend or discipline subordinate paramedics.

It argues the Administrative Officer supervises “process” (namely the educational and Quality programs) rather than positions. The Administrative Officer testified she does not have independent authority to authorize overtime, direct the operational control of a shift or of the Operational Support Officer or to suspend or discharge employees for failure to meet training and certification requirements.

OPINION

The issue presented in this case is whether EMS Field Supervisors and the EMS Administrative Officer are ineligible for representation for purposes of collective bargaining as a matter of law because the positions meet the statutory definition of “supervisor”. That definition includes an enumeration of activities which indicate supervisory status, specifically:

“Supervisory employee” means any employee of a public employer who has the authority, in the interest of the public employer, to

- hire,
- transfer,
- suspend,
- layoff,

- recall,
- promote,
- discharge,
- assign,
- reward or discipline other employees,
- or responsibility 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. 19 Del.C. §1302(s), *emphasis added*.

In Delaware Dept. of Public Safety and CWA (Del.PERB, Rep. Pet 96-07-187, III PERB 1543, 1548 (1997), this Board adopted the sequential supervisory analysis employed by the National Labor Relations Board in NLRB v. Health Care and Retirement Corp., 114 S.Ct. 1778, 146 LRRM 2321 (1994):

- 1) Does an employee in this position have the authority to engage in one or more the twelve listed activities?
- 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?

There was no evidence adduced at the hearing establishing the Field Supervisors or the Administrative Officer have the authority to hire, transfer, suspend, lay-off, recall discharge or adjust grievances. The County, however, did present evidence and argument that these positions have authority to assign, discipline and direct subordinate Paramedics and possess the authority to make meaningful recommendations in other areas.

The evidence supports the conclusion that Field Supervisors do have supervisory authority and responsibility relating to discipline as prescribed by the statute. Documented disciplinary actions taken by Field Supervisors (and Acting Field Supervisors) during the period of 1998 through October, 2004, support the County's

position. County Exhibits 1 – 5. Although AFSCME argues that these records were for low level disciplinary actions (documenting verbal warnings and counsellings as well as written warnings and reprimands), they are consistent with the progressive discipline policy set forth in Section 68.14 of the County Personnel Policy:

§68.14 *Disciplinary Action.*

A. Deficiencies in the performance of an employee based upon the position classification and description or misconduct committed on the job shall be remedied by a procedure for progressive disciplinary action as follows:

- (1) For a first offense, the department head or supervisor of the employee shall give an oral warning and maintain written documentation of the same.
- (2) For a second offense, the department head or supervisor of the employee shall issue a written reprimand to the employee within five working days of learning of the offense, outlining the offense and serving a warning that subsequent offense may result in demotion, suspension and/or termination. The employee shall have the opportunity to review, comment upon and sign the reprimand before it is sent to the Personnel Director for inclusion in the employee's personnel file. If the employee refuses to sign the notification, the refusal shall be duty *[sic]* noted and witnessed.
- (3) A third offense shall constitute just cause for suspension with or without pay pursuant to the provisions of this chapter, after the employee is afforded a pre-suspension hearing. Such hearing shall be scheduled within five working days of learning of the offense.
- (4) Subsequent offenses shall be just cause for further suspension, demotion or termination of employment pursuant to the provisions of this chapter; provided, however, that in the event of further suspension or termination, the employee shall be afforded a pre-suspension or pre-termination hearing, whichever is appropriate. Such hearing shall be scheduled within five working days of learning of the offense and held at a time and date selected by the Personnel Director. *Joint Exhibit 9.*

This policy also supports the undisputed evidence that Field Supervisors do not have autonomous authority to suspend or terminate subordinates. The record adequately establishes that Field Supervisors do exercise their judgment and discretion in issuing this discipline. Further, a number of the documented disciplinary actions also warn the disciplined employee further violations may result in suspension without pay.

There are three EMS stations in Kent County, including the main station and headquarters in Dover⁵, a satellite station in Harrington and one in Smyrna. The testimony of Chief Faulkner that Field Supervisors have authority to assign and transfer paramedics on their shifts to different stations (either as a result of staff shortages, training needs, or for the convenience of employees or the department) was unrebutted. Field Supervisors also redirect or reassign paramedics on individual emergency calls based upon their skills, location at the time, and/or type of response required. They also direct paramedics on their shifts in performing operational and administrative tasks not directly related to emergency medical care.

Unlike the situation in the Dept. of Public Safety/CWA case (Supra.), there is no evidence in this case that Field Supervisors primarily serve as operational paramedics, fulfilling supervisory functions only when directed to do so. The record supports a finding that the Field Supervisors, consistent with their job description, are primarily responsible for the operational efficiency and effectiveness of their shift personnel.

The position of the Administrative Officer (“AO”) presents a slightly different issue, but results in a similar finding. The AO Job Description summarizes the duties of this position as:

⁵ The Field Supervisors and the Administrative Officer all maintain offices in the Dover headquarters.

This position carries with it the rank of Staff Captain and all the responsibilities of this classification. This position is primarily an administrative position which will support quality assurance and patient information programs as detailed. This is a classified exempt position with occasional obligations to work on shift and in the field to cover shortfalls in staffing and to maintain certification as a Delaware Paramedic. This position reports directly to the Assistant Director and assumes duties in his/her absence. *Joint Exhibit.8.*

The evidence presented by both the County and AFSCME are that the AO is primarily responsible for administration of the Quality Assurance/Quality Improvement programs as well as maintaining and developing the Department's relationship with the Delaware Technical and Community College "ride-along" program for students completing EMS coursework. The AO is also responsible for overseeing the work of Field Training Officers⁶ who identify training needs of staff Paramedics and also assist in training and retraining as required. In these responsibilities it is clear that the AO serves a fundamentally different function than any of the other bargaining unit positions and is primarily responsible for administrative and managerial functions, and not primarily for patient care or emergency medical care operations.

The record, however, also establishes that a portion of the AO's time is also spent serving as an Acting Field Supervisor and in working on an EMS crew in responding to calls, as staffing and maintenance of her certification require.⁷ The County again presented documentary evidence that the Administrative Officer has issued verbal counseling to paramedics for quality assurance issues and as part of her responsibilities when serving as an Acting Field Supervisor. Testimony also established that the AO

⁶ There is an identified Paramedic who serves as a Field Training Officer on each of the four shifts. The AO meets and communicates regularly with the FTO's to identify training needs, to review certifications, and to plan for remediation of identified staff deficiencies.

⁷ In order to maintain EMS certification (which is required of the AO), a paramedic must meet a State-established number of patient contact hours and must perform identified technical EMS skills and procedures with a level of proficiency. These standards are most easily met by working on an EMS crew.

played a critical role in identifying and ultimately suspending a paramedic who allowed a required certification to lapse. This evidence supports a finding that the AO also has supervisory responsibilities and is, therefore, ineligible for representation under the statutory framework.

Any analysis of the scope of responsibilities and application of the statutory supervisory definition is highly fact-bound and turns on consideration of the record created. The parties created a thorough record in this case and their arguments were well constructed based on the criteria in the statute.

DECISION

Based upon the record created by the parties in this matter, EMS Field Supervisor and EMS Administrative Officer positions are determined to be supervisory within the meaning of 19 Del.C. §1302(s) and are, therefore, ineligible for representation under the Public Employment Relations Act..

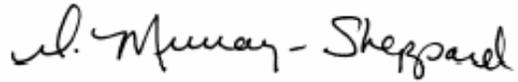
Based upon the unique circumstances as they currently exist and as presented by this representation petition, the appropriate bargaining unit is determined to be:

All Emergency Medical Services employees of Kent County Levy Court, including all Paramedics (including those with special designations such as FTO, Operations Support Officer or any other special designation), but excluding the supervisory positions of EMS Field Supervisor and EMS Administrative Officer.

An election will be scheduled within forty-five (45 days) 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.

DATE: 14 February 2005



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.