

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

**IN THE MATTER OF:**

**STATE OF DELAWARE, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,  
DELAWARE PSYCHIATRIC CENTER,**

**AND**

**AMERICAN FEDERATION OF STATE, COUNTY, AND  
MUNICIPAL EMPLOYEES, AFL-CIO,  
COUNCIL 81, LU 640**

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**Representation Petition  
06-05-522**

<b>RE:    ACTIVITY THERAPISTS I &amp; II</b>
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Appearances

*Aaron Shapiro, SLRS/HRM/OMB, for State of Delaware, DHSS, DPC  
Phillip Williams, Sr., for AFSCME Council 81, LU 640*

The State of Delaware (“State”), is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).<sup>1</sup> The Department of Health and Social Services (“DHSS”) is an executive branch department of the State and the Delaware Psychiatric Center (“DPC”) is a State agency with DHSS, Division of Substance Abuse and Mental Health (“DSAMH”).

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<sup>1</sup> “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 hereinafter elects to come within this chapter, or which employs 100 or more full-time employees.

The American Federation of State, County and Municipal Employees, Council 81 (“AFSCME”), is an employee organization within the meaning of 19 Del.C. §1302(i).<sup>2</sup> AFSCME, through its Local Union 640, is the exclusive bargaining representative of a bargaining unit DPC employees defined by DOL Case 67, which is referred to in the parties’ 1998 -2001 collective bargaining agreement as “Unit II”.

On May 26, 2006, AFSCME filed with the Public Employment Relations Board (“PERB”) a Petition for Amendment or Clarification of Existing Certified Bargaining Unit, seeking to amend the existing unit to include the Activity Therapist I and Activity Therapist II positions into Unit II.

By letter dated June 13, 2006, the State objected to the proposed bargaining unit modification on three grounds:

- 1) The petition does not meet the requirements of PERB Regulation 3.4(8) because it fails to identify any supporting change in circumstances;
- 2) Activity Therapists II are not eligible for representation because they hold supervisory positions within the meaning of 19 Del.C. §1302(s)<sup>3</sup>; and
- 3) The parties’ 1998-2001 collective bargaining agreement at Articles 2.2 and 2.3 specifically exempts supervisory employees from inclusion in the bargaining unit.

The Hearing Officer dismissed the States procedural objection to the sufficiency of the petition on June 19, 2006, stating:

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<sup>2</sup> “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.

<sup>3</sup> “Supervisory employee” means any employee of a public employer who has the authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to

PERB has consistently held that ‘other compelling circumstances’ exist which support the filing of a modification petition when a group of unrepresented employees seek representation consistent with their statutory rights. *In Re: Battalion Chiefs of the City of Wilmington Fire Dept., Del.PERB, Rep. Pet. 95-06-142, II PERB 1253, 1258 (1995).*

Having resolved the procedural question, the only remaining issue was whether the Activity Therapists II are supervisory employees. A hearing was convened on August 21, 2006, at which time the parties were afforded full opportunity to present evidence and argument in support of their positions. Counsel provided oral argument at the conclusion of the introduction of evidence. This decision results from the record created by the parties in this matter.

### **ISSUE**

Is the ACTIVITY THERAPIST II position “supervisory” within the meaning of 19 Del.C. §1302(s) and therefore ineligible for inclusion in the bargaining unit of DHSS, Delaware Psychiatric Center employees currently represented by AFSCME Council 81, Local Union 640?

### **POSITIONS OF THE PARTIES**

**STATE:** The State asserts the evidence presented supports the conclusion that Activity Therapist II are supervisory employees within the meaning of 19 Del.C. §1302(s). Activity Therapists II are expected to use independent judgment in exercising their authority to make effective recommendations to their supervisor relative to hiring, discipline and evaluation of the performance of Activity Therapists I and Activity Aides. They have direct responsibility to manage and supervise the work of subordinate Activity

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recommend such actions, if the exercise of such authority is not of a merely routine or clerical nature, but

Therapists I and Activity Aides, including scheduling, handling leave requests, assigning work load and reviewing work product.

For all of these reasons, the State argues Activity Therapists II are supervisory employees and are therefore ineligible for representation for purposes of collective bargaining under the Public Employment Relations Act.

AFSCME: AFSCME argues the State has succeeded only in proving that Activity Therapists II are lead workers, rather than *bona fide* supervisors. None of the “recommendations” the State relies upon can be made by an Activity Therapist II without first consulting with and/or garnering the prior approval of a supervisor, namely the Activity Therapist IV. In fact, during the recent period when the Activity Therapist IV position was vacant, responsibility for supervisory functions was not shifted down to the Activity Therapists II; the Director of Therapy and Rehabilitative Services assumed the responsibilities of the Activity Therapist IV.

The majority of the Activity Therapists II normal workday is spent in direct services to patients. An insignificant amount of time is spent doing lower level “lead functions”. *Bona fide* supervision is provided by the Activity Therapist IV. Consequently, Activity Therapists II do not have the requisite level of authority to exercise independent judgment in the interest of the employer, and are therefore not supervisory employees within the meaning of 19 Del.C. §1302(s). Activity Therapists II, like Activity Therapists I, should have the opportunity to vote to decide whether they wish to be represented for purposes of collective bargaining.

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requires the use of independent judgment.

## **OPINION**

There is no dispute between the parties that Activity Therapists I are eligible and appropriate for inclusion in the bargaining unit defined by DOL Case 67 which is currently represented by AFSCME LU 640. The sole issue remaining for resolution is whether Activity Therapists II are supervisory employees and therefore ineligible for representation.

The State's argument that the Recognition Clause of the parties' 1998-2001 collectively bargained agreement excludes supervisory employees from the unit definition is not dispositive or material to this case. The determination of appropriate bargaining units and application of the PERA are delegated exclusively to the Public Employment Relations Board ("PERB").

A determination of supervisory status turns on application of statutory provisions.

19 Del.C. §1310(d) provides in relevant part:

. . . The Board or its designee shall exclude supervisory employees from all appropriate units created subsequent to September 23, 1994.

Section 1302(o) of the Public Employment Relations Act defines a "public employee" or an "employee" to mean, in relevant part,

. . 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 §1311(b) of this Title, or is modified in accordance with procedures authorized by Section 1310(e) of this title.

The statute goes on to define a supervisory employee at 19 Del.C. §1302(s):

. . . 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 responsibility 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.

The supervisory functions are listed in the disjunctive; however, it is clear that in order to qualify as supervisor, a position must (1) have authority (2) to use independent judgment (3) in performing supervisory functions (4) in the interest of the public employer. Whether a position falls within the supervisory definition determines whether employees holding that position enjoy rights under the PERA.

The burden of establishing supervisory status rests with the party alleging that status. It is determined by the duties of the position in question, not its title or job classification. A supervisory employee must have the authority to act as an agent of the public employer, vis-à-vis subordinate employees. Discretion and the exercise of independent judgment are key to this determination. Time spent performing supervisory functions is not, in and of itself, determinative of supervisory status. The value to an employer of a contested position must be primarily in its supervisory responsibilities and authority. A supervisory employee must customarily and regularly direct the work of other employees.

Turning the application of these standards to the instant case, testimony and evidence established the following background:

1) Organizational Structure: The Activity Therapists II work at the Delaware Psychiatric Center, within the Therapy and Rehabilitative Services unit. The unit includes a variety of disciplines including Therapeutic Recreation, Occupational Therapy, Art Therapy, Movement Therapy, Music Therapy, Vocational Rehabilitation Therapy, the Pastoral Care program and the patient library. Activity Therapists II work

within the Therapeutic Recreation program and report to an Activity Therapist IV, who reports directly to the Director of Therapy and Rehabilitative Services. Activity Therapy work includes planning and implementing recreational and leisure time activity programs for in-patient adults suffering from severe and persistent mental illness.

2) Essential functions of Activity Therapist work include:

- Planning and conducting a therapeutic program of individual, group, social or recreational activities such as games, dances, movies, and field trips.
- Conducting small group and individualized activities for individuals unable to participate in large groups.
- Conducting activity assessments to determine the needs, interests, capabilities and deficiencies of each individual as they relate to participation in activities and community re-entry.
- Charting an individual's attendance in groups, response to activities and other pertinent observations.
- Providing coverage for planning activities in the absence of regularly assigned staff.
- Maintaining records and preparing reports.

Additionally, the level of work for Activity Therapists II includes:

- Supervision is exercised over at least two or more merit full time positions per the merit rules. The elements of supervision include planning, assigning, reviewing, evaluating, coaching, training, recommending hire/fire and discipline.
- Secures information concerning an individual's history and treatment plan; confers with the treatment team in developing activity therapy programs to meet the needs of individuals.
- Reviews individual charts to ensure that documentation of individual participation and progress in group activities is maintained for compliance with accreditation and certification standards.
- Coordinates program schedules and work assignments to ensure staff coverage for all activities and special events.
- Participates in departmental program planning and goal setting and assists other recreational, occupational and creative arts therapists in the coordination of recreational activities and other therapeutic activities.

- Prepares purchase orders and equipment requests based on planned activities and funding availability.
- Evaluates the effectiveness of programs and makes recommendations to superior.  
State Exhibit 1<sup>4</sup>

3) The State provided an Employee Performance Plan for the calendar year 2005-2006 for an Activity Therapist II, which detailed responsibilities for Therapeutic Interaction, Agency Representation, Compliance, Development of Others, Management of Resources, Planning, Training, Written Communication, Verbal Communication, Attendance, Training and Education, Adherence to DHSS Beliefs and Principles, and Employee Supervision, which set forth:

Employee Supervision: To Assign, delegate staff in order to provide maximal recreational activities to this facility.

### **Specific Responsibilities and Objectives**

1. Evaluation of program needs with number of available staff to assure that appropriate and adequate programming is achieved. Therapeutic Recreation programs both qualitatively and quantitatively will be in accord with team recommendations and identified patient needs. To ensure a minimum of 20 hours/week of Therapeutic Recreation programming for each assigned staff.
2. Oversee the work of Activity Aides and Activity Therapist. Assure that appropriate and adequate results are obtained. Evaluated via team feedback, personal observations, chart auditing, and quality improvement monitoring.
3. Consistently addresses and resolves staff problems and inconsistent, inadequate job performances. Will meet with subordinate staff regularly and evaluate in writing as required.
4. Recognizes and acknowledges special staff efforts, talents, and accomplishments both verbally and in

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<sup>4</sup> State Exhibit 1; Class Series Description, Activity Therapy Series, as corroborated by testimony.



writing.

5. Initiates and maintains a high degree of staff enthusiasm and morale.
6. Works with subordinate staff individually and collectively, as well as other TR staff, and disciplines to increase the understanding of therapeutic benefits of recreational intervention.
7. Completes performance evaluations by due dates.
8. Deficiencies identified in #2 are corrected, with follow up reports completed within the required time frame.  
*State Exhibit 2.*

In addition to the documentary evidence, testimony from the Director of Therapy and Rehabilitative Services and from the most senior Activity Therapist II established the following:

- Activity Therapists II are primarily responsible for ensuring Activity Therapists I and Activity Assistants perform their essential job functions on various psychiatric units at Delaware Psychiatric Center. They are responsible for making sure their subordinates are effectively administering their case loads and for making sure that all units have proper coverage. *Testimony of ATH Lee.*
- Activity Therapists II review the work product of Activity Therapists I by performing patient chart audits and observing Activity Therapists I and Activity Aides in their work. Activity Therapists II assist Activity Therapists I in managing their case loads by ensuring that appropriate patients are involved in programs, monitoring Activity Therapists I performance in group and individual settings, and providing coaching, mentoring and training as necessary.
- Activity Therapists II are responsible for evaluating the performance of their subordinates. As part of this process, the Activity Therapist II may recommend

an improvement plan for a subordinate who is underperforming. The final evaluation is reviewed by the Activity Therapists IV (direct supervisor of ATII), who has the authority to recommend changes or additions to the draft evaluation. Two performance evaluations of Activity Therapists I, authored by Activity Therapists II, were entered into evidence. Each included specific recommendations to employees for improving performance. *State Exhibits 3 & 4.*

- Activity Therapists II meet weekly with their direct supervisor, the Activity Therapist IV, during which time they collectively discuss issues concerning their subordinates' performance, unit performance, policies and procedures. Discussions may also include issues concerning discipline of subordinates.
- Activity Therapists II, in addition to their supervisory responsibilities, have a direct patient service caseload. Ms. Lee testified Activity Therapists II are required to spend four hours each day in active patient treatment. Activity Therapists II are the highest level of supervision providing coverage on weekends.
- Activity Therapists II assign the schedules of their subordinates and can approve or deny requests for schedule changes and leave. Activity Therapists II are required to advise the Activity Therapist IV of any changes so that she is aware of staffing levels. Activity Therapists II can also make recommendations for flexible or compensable time scheduling, but final approval for such changes is held by the Hospital Administrator.
- Activity Therapists II serve on interviewing teams and make recommendations for hiring qualified candidates. The interviewing committees at the time of the hearing were usually composed of the Director of Therapy and Rehabilitative

Services and two Activity Therapists II. At that time, the Activity Therapist IV position was vacant.

- Activity Therapists II can issue lower levels of discipline after consultation with the Activity Therapist IV, as evidence in the Letter of Reprimand placed into the record as State Exhibit 6. That document, which identifies an Activity Therapist II as its author, warns of “further disciplinary action” should the offending behavior continue. Recommendations for discipline are customarily passed up the chain of command for approval, from the Activity Therapist II to the Activity Therapist IV to the Director of Therapy and Rehabilitative Services to the Director of Hospital Services and finally to the Hospital Director, who has the authority to terminate employees.

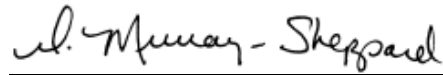
The record created by the parties establishes that the Activity Therapists II do perform supervisory functions, including assigning and directing subordinate Activity Therapists I and Activity Aides in performing their work. They also have authority and responsibility to recognize subordinates’ achievements and provide specific direction to underperforming subordinates. They conduct performance evaluations which may affect whether an employee is retained and/or receives additional salary dollars. Activity Therapists II are paid at a rate 14.5% (two paygrades) higher than Activity Therapists I, with the clear differentiation between these positions being that the Activity Therapists II are responsible for supervising subordinates and coordinating programs and work assignments. It is evident that the additional value of the Activity Therapist II position is in its direction of the work of other employees.

## **DECISION**

Considering the record as a whole, there is sufficient evidentiary support to conclude that Activity Therapists II are supervisory employees within the meaning of 19 Del.C. §1302(p).

WHEREFORE, because there was no dispute that Activity Therapists I were appropriate for inclusion in the bargaining unit defined by DOL Case 67, an election will be held forthwith to determine whether Activity Therapists I wish to be represented for purposes of collective bargaining within the unit currently represented by AFSCME LU 640.

**IT IS SO ORDERED.**

  
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DEBORAH L. MURRAY-SHEPPARD  
PERB Hearing Officer

DATED: 6 December 2006