

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

SUSSEX COUNTY, DELAWARE, : Representation Petition
:
and : No. 07-02-557
:
COMMUNICATION WORKERS OF AMERICA, AFL-CIO. : (CERTIFICATION)

RE: Sussex County Emergency Operations Dispatchers

APPEARANCES

*Barry M. Willoughby, Esq., and Michael P. Stafford, Esq.,
Young, Conaway, Stargatt & Taylor, for Sussex County
Charles P. Burns, Esq., Communication Workers of America, District 13, AFL-CIO*

BACKGROUND

Sussex County, Delaware (“the County”), is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).

Communications Workers of America, District 13, AFL-CIO (“CWA”) is an employee organization within the meaning of 19 Del.C. §1302(i) and has as one of its purposes the representation of public employees in collective bargaining.

On or about February 20, 2007, CWA filed a Petition for Bargaining Unit Determination and Certification of Exclusive Representative with the Delaware Public Employment Relations Board (“PERB”), seeking to create and represent a bargaining unit comprised of:

Sussex County 911 Dispatchers in the Emergency Operations Center with the following titles: Supervisor, Assistant Supervisor, Com 2 and Telecommunicator.¹ *CWA Petition*

The petition was accompanied by a number of authorization cards in support of representation by the CWA, signed by employees holding positions in the proposed bargaining unit.

On or about February 27, 2007, the County filed its response to the CWA petition, clarifying the position titles in issue. It objected to the inclusion of Emergency Communication Supervisors (“EC Supervisors”) and Emergency Communication Specialists II (“EC Specialists II”), asserting the positions are supervisory within the meaning of 19 Del.C. §1302(s) and/or because they do not share a community of interest with Emergency Communication Specialist I (“EC Specialist I”) positions. Accompanying its position statement, the County provided the required list of employees in the bargaining unit as proposed by the CWA.

The employee list provided by the County was used to verify that the CWA petition was properly supported by at least thirty percent (30%) of the employees in the petitioned-for bargaining unit.

A public hearing was convened on April 10, 2007 in order to allow the opportunity for the parties to create a factual record on which a determination can be made as to the appropriate bargaining unit of Sussex County Emergency Operations employees, as required by 19 Del.C. §1310(d).

Written closing argument was received from both CWA and the County with the final brief received on May 22, 2007. This decision results from the record thus created by the parties.

¹ The County clarified the correct position titles in its response to the petition: Emergency Communication Specialist I, Emergency Communication Specialist II and Emergency Communication Supervisor.

FACTS

The Sussex County Emergency Operations Center employs 29 persons of which 16 are commonly referred to as “Dispatchers” (which includes both Emergency Communication Specialists I (Pay Grade 9) and II (Pay Grade 11)) and 4 EC Supervisors (Pay Grade 13)). *County Exhibit 2, TR. 41.* The dispatchers are divided among four shifts (Shifts A, B, C and D) each of which is under the direction of an EC Supervisor. Shifts A, B and C are staffed by three full-time dispatchers, Shift D has four assigned dispatchers and Sussex County employs three full-time dispatchers as “relief”. Of the “dispatchers” five are classified as EC Specialists II, with one assigned to each of Shifts A, B and D and two assigned to Shift C. The remaining eleven dispatchers are classified as Emergency Communication Specialists I. *County Exhibit 3.*² The Center’s operations are overseen by an Administrative team comprised of the Director/Chief Dispatcher, the Assistant Chief Dispatcher and the Quality Assurance Supervisor.

The Emergency Operations Center operates 24 hours each day, every day of the year. Each shift works a rotation of two day shifts from 7:00 a.m. to 7:00 p.m., two night shifts from 7:00 p.m. to 7:00 a.m., followed by four days off. Minimum staffing on each shift is three dispatchers during most of the year; but is increased to four during Sussex County’s tourist season, which extends annually from Memorial Day to Labor Day. *TR 24, 91.* There is an EC Supervisor assigned to each shift and that position is counted in assuring minimal staffing levels are met. *County Exhibit 22.*³

² The Assistant Chief Dispatcher testified the positions listed in County Exhibit 3 as “Acting EC Supervisor” and “Acting EC Specialist II” were all made permanent as of March 1, 2007. *TR 15.*

³ For example, a cursory review of County Exhibit 22 reveals that minimal staffing of three was met by including the Supervisor as a “dispatcher” on six of eight day shifts for Shift A in January, 2005. In December 2006, a Supervisor counted towards meeting the minimum staffing requirements on 20 of the available 62 shifts that month.

The Emergency Operations Center includes both the Sussex County Emergency Services Operations and SUSCOM, a division of the Delaware State Police Communications section. The County employees are responsible for fielding emergency medical and fire calls to 911, as well as handling security calls for County properties, tracking County sheriffs who are serving warrants, and routing calls when there are problems at the County's sewer facility. All County dispatchers (including the EC Supervisors) are accredited Emergency Medical Dispatchers and Emergency Fire Dispatchers, as required by State and County law. *TR 10, 92.* SUSCOM fields 911 calls for police. All 911 calls, as well as radio traffic from emergency equipment, are recorded and can be monitored or replayed for training and/or quality assurance purposes.

The Center is equipped with four computer consoles on each side of the room (four are used by SUSCOM and four are used by Sussex County dispatchers), a supervisor's console in the back of the room, and three additional consoles, one on the right, one on the left and one in the center toward the front of the room. *Testimony of Clark, p. 91-92.* The County has an established system of rotation by dispatchers among its consoles:

911 CALL TAKING ROTATIONS

Each 911 position will handle a different phase of 911 call processing that will rotate every four hours. There will be a call taking position, fire dispatch position and medical dispatch position.

The call taking position will handle all incoming calls, input information into the CAD⁴ and post for dispatch positions to take over the incident. The call taker will interrogate all calls for service by using the EFD and EMD protocols.

The Fire Dispatch position will dispatch and handle through completion all fire related incidents to include traffic accidents that require fire apparatus. On fire incidents that require medical units,

⁴ Computer Aided Dispatch console

once the units are enroute to a medical facility from the scene, they will become the responsibility of the medical dispatcher.

The Medical Dispatch position will dispatch and handle through completion all medical related incidents that require ambulance and/or medics to be dispatched. This is to include requests for medical resources from other dispatch centers. This will also include traffic accidents that do not require fire apparatus, medical and manpower assists for medical incidents and CPR.

WHEN THE CALL TAKING POSITION IS BUSY, THE OTHER POSITIONS WILL ASSIST IN HANDLING ALL INCOMING CALLS.

The supervisor will become a supervisor and will help as a backup to any position as needed. *County Exhibit 5.*

The Job Descriptions for EC Specialist I (*County Ex. 19*) and EC Specialist II (*County Ex. 18*) are identical, with the exception that the EC Specialist II requires “considerable” knowledge, experience and training, where as the EC Specialist I requires “some” knowledge, experience and training. The job descriptions each indicate that the EC Specialist I and II work under the “general supervision of Chief Dispatcher”. Duties and Features of these positions are described as:

Handles and processes emergency and non-emergency calls for fire, rescue, emergency, medical, police, government, and private agencies in conjunction with the 911 system. *County Exhibits 18 & 19.*

The Job Description for the EC Supervisor (*County Ex. 4*) describes the Duties and Features of this position to be:

An employee in this class is responsible for directing and supervising all callboard section activities, including emergency and operational communications, staff and equipment during an assigned shift. Works under general supervision of the Deputy Chief Dispatcher or other designated superiors.

An EC Supervisor is required to have “thorough” knowledge, experience and training, and at least “two years experience as a Dispatcher II, supplemented by some electronics

training.” There is no requirement that an EC Supervisor have supervisory training or experience.

ISSUES

- 1) ARE THE POSITIONS OF EMERGENCY COMMUNICATION SUPERVISOR AND EMERGENCY COMMUNICATION SPECIALIST II “SUPERVISORY” WITHIN THE MEANING OF 19 DEL.C. §1302(s), AND THEREFORE, INELIGIBLE FOR REPRESENTATION FOR THE PURPOSES OF COLLECTIVE BARGAINING UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT?

- 2) IF NOT, ARE THE POSITIONS OF EMERGENCY COMMUNICATION SPECIALIST II AND EMERGENCY COMMUNICATION SUPERVISOR APPROPRIATE FOR INCLUSION IN A BARGAINING UNIT WHICH INCLUDES EMERGENCY COMMUNICATION SPECIALIST I, WITHIN THE MEANING OF 19 DEL.C. §1310(d)?

APPLICABLE STATUTORY PROVISION

“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 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(s).

In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider community of interests including such factors as the similarity of duties, skills and working conditions of the employees involved; the history and extent of the employee organization; the recommendations of the parties involved; the effect of overfragmentation on the efficient administration of government; and such other factors as the Board may deem appropriate. The Board or its designee shall exclude supervisory employees from all appropriate units created subsequent to September 23, 1994. 19 Del.C. §1310(d).

PRINCIPAL POSITIONS OF THE PARTIES

Sussex County:

The County argues that EC Supervisors are ineligible for representation because they are statutory supervisors within the meaning of §1302(s). It asserts that EC Supervisors have the authority to transfer, promote, discharge, assign, reward or discipline, and responsibly direct subordinates, or to effectively recommend such actions.

The County also argues that EC Specialists II are ineligible for representation because they function as EC Supervisors when EC Supervisors are not present during a shift. They spend a regular and substantial portion of their work time performing supervisory functions. The County asserts that when EC Specialists II fill in for an EC Supervisor, they are held to the same standards and have the same authority and responsibility for the performance of the shift as do EC Supervisors.

Alternatively, the County argues that even if either the EC Supervisor or the EC Specialist II positions are not found to be supervisory, they are not appropriate for inclusion in a unit with EC Specialists I, because they do not share a community of interest as required by 19 Del.C. §1310(d). EC Specialists I never exercise supervisory authority or responsibility and are subject to management and discipline during their shifts by both EC Supervisors and EC Specialists II.

Communication Workers of America, District 13:

CWA argues that EC Supervisors and EC Specialists II are not supervisory employees within the meaning of 19 Del.C. §1302(s), but are, at best, working leaders who occasionally participate in minor duties which the County has portrayed as supervisory. Both classifications are eligible for representation because neither possesses consequential supervisory responsibilities, nor do they exercise consequential authority

over subordinates.

EC Supervisors and/or EC Specialists II do not use independent judgment to perform any of the listed supervisory functions. The record supports the conclusion that they do not have the ability to hire, fire, transfer, layoff, recall, assign or reward, discipline, adjust grievances, or to effectively recommend such actions. Supervisory status is not determined by title or classification, but by an employee's functions, responsibilities and authority in the workplace.

It is evident from the record that EC Specialists I, EC Specialists II and EC Supervisors share a community of interest, which includes similarities in duties, skills and working conditions. They are all "dispatchers", who are all required to have the same training and to hold both AMD and EFD certifications, and who work together on each shift performing similar work in the same room using the same equipment.

OPINION

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

I. Supervisory Status

The supervisory definition included in the PERA and the exclusion of supervisory employees from eligibility for representation is a direct excerpt from Section 2(11) of the federal Labor Management Relations Act, which is administered by the National Labor Relations Board ("NLRB"). *In RE: State Police Communications Section & CWA*, Rep. Pet. 96-07-187, III PERB 1543, 1547 (1997). Where Delaware law mirrors federal

statutes (as is the case with §1302(s)), Delaware can reasonably be expected to follow the precedent established in the federal sector. *CoFrancesco v. City of Wilmington*, 419 F. Supp. 109 [93 LRRM 2387] (D.Del., 1976).

The United State Supreme Court has affirmed the NLRB's allocation of the burden of proving a supervisory exclusion on the party asserting that the position in question is a statutory supervisory, noting

The Act does not, however, expressly allocate the burden of proving or disproving a challenged employee's supervisory status. The [NLRB] therefore has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor.

...The [NLRB's] rule is supported by 'the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.' (*citations omitted*)... [I]t is easier to prove an employee's authority to exercise 1 of the 12 listed supervisory functions than to disprove an employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status. *NLRB v. Kentucky River Community Care*, 532 US 706 [167 LRRM 2164, 2167] (2001).

The Delaware PERB has followed the NLRB's guidance in requiring that the burden to establish supervisory status by a preponderance of the evidence be met by the party asserting that such status exists. Similarly, the PERB has been cautious to narrowly construe the supervisory definition because when a position is determined to be ineligible for representation, employees are denied rights which the State has statutorily declared should be protected. *In Re: Internal Affairs Officer of WFD*, Del. PERB, Rep. Pet. 95-06-142, II PERB 1387, 1397 (1996).

In *Delaware Dept. of Public Safety and CWA* (Del.PERB, Rep. Pet 96-07-187, III PERB 1543, 1548 (1997), PERB adopted a sequential supervisory analysis:

- 1) Does an employee in this position have the authority to engage in one or more of 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?
In RE: Kent County Paramedics, Del. PERB, Rep. Pet. 04-08-447, V PERB 3235,3240 (2005).

The first step of the analysis requires a finding that the purported supervisors either perform or effectively recommend at least one of the twelve enumerated indicia of supervisory status, namely,

- | | |
|------------|----------------------|
| • Hire | • Discharge |
| • Transfer | • Assign |
| • Suspend | • Reward |
| • Lay-off | • Discipline |
| • Recall | • Responsibly direct |
| • Promote | • Adjust grievances |

19 Del.C. §1302(s)

In this case, there is no evidence or assertion that either the EC Supervisors or the EC Specialists II have authority or responsibility to make effective recommendations to hire, suspend, discharge, lay-off, or recall. It is undisputed that those responsibilities are reserved to the County Administrator. The County does assert that the EC Supervisors have authority to responsibly direct subordinate dispatchers and to effectively recommend assignment, transfers, rewards, discipline, and promotions.

The NLRB recently addressed the meaning and application of the terms “assign”, “responsibly direct” and “independent judgment”. *Oakwood Healthcare, Inc*, 348 NLRB 37, 180 LRRM 1257 (2006). In undertaking its analysis of the meaning of statutory provisions, the Board opined:

In interpreting those statutory terms, we do not ... blindly adopt ‘dictionary-driven definitions.’ Rather, we begin our analysis with a first principle of statutory interpretation that ‘in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed in the ordinary meaning of the words used.’

INS v. Phinpathya, 464 US 183, 189 (1984) (citations and internal quotation marks omitted). Thus, we eschew a results-driven approach and start, as we must with the words of the statute. We thereafter consider the Act as a whole and its legislative history, applicable policy considerations, and Supreme Court precedent. In so doing, our goal is faithfully to apply the statute while providing meaningful and predictable standards for the adjudication of future cases and the benefit of the Board’s constituents. We do not ... ignore potential ‘real world’ consequences of our interpretations. Rather, we simply decline to engage in an analysis that would seem to take as its objective the narrowing of the scope of supervisory status and to reason backward from there, relying primarily on selective excerpts from legislative history. *Oakwood*, p. 3.

The NLRB then applied its analysis to define “assign”, to

... refer to the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks to an employee. That is, the place, time and work of an employee are part of his/her terms and conditions of employment. *Oakwood*, p. 4.

The Board clarified that choosing the order in which an employee performs discrete tasks within an assignment is not indicative of assignment authority. It drew a line between the assignment of the overall duties to an employee, as distinguishable from providing ad hoc instruction to an employee to perform a specific task within the normal course of operations. *Oakwood*, p. 4.

The County argues the EC Supervisors have authority to assign employees because they can recommend approval or denial of dispatchers’ leave requests, have the discretion to release a dispatcher a few hours early if a shift is overstaffed, and one EC Supervisor has recently taken on some scheduling responsibilities.

The record in this case establishes that all dispatchers actively participate in taking calls, dispatching emergency response resources, and rotate through a series of work stations and roles during their shift. There is no assignment of duties, work station, or shift as defined by the NLRB in *Oakwood*. EC Supervisors (and EC Specialist II when

acting as supervisors on a shift) are responsible for overseeing and supporting the work of the dispatchers. It is clear from the record that the on-duty supervisor is more of a working leader, frequently filling in and working as a dispatcher to insure the emergency responsiveness of the shift is effective and timely.

Consequently, the record does not support a finding that EC Supervisors (or EC Specialists II when acting as an EC Supervisor) assign or effectively recommend assignment of EC Specialists I and II in the course of their duties.

Concerning the authority to “responsibly direct”, the NLRB held in *Oakwood*:

We ... find that for direction to be ‘responsible’, the person directing and performing oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . Thus to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take those steps.

... Significantly, the concept of accountability creates a clear distinction between those employees whose interests, in directing other employees’ tasks, align with management from those whose interests in directing other employees, is simply the completion of a certain task. In the case of the former, the dynamics of hierarchical authority will arise, under which the directing employee will have, if and to the extent necessary, an adversarial relationship with those he is directing. The directing employee will rightly understand that his interests, in seeing that a task is properly performed, are to some extent distinct from the interests of those under his direction. That is, in directing others, he will be carrying out the interests of management – disregarding, if necessary, employees’ contrary interests. Excluding from coverage of the Act such individuals whose fundamental alignment is with management is at the heart of Section 2(11). *Oakwood Healthcare, Inc.*, Supra., p 7.

The County supports its conclusion that EC Supervisors (and derivately EC Specialists II when acting in that capacity) responsibly direct dispatchers on their shift

with the testimony of the Chief Dispatcher and the Assistant Chief Dispatcher that they are responsible “to ensure that every person on a shift is doing his/her job correctly and following procedures.” In describing the responsibilities of the EC Supervisors, the Assistant Chief Dispatcher testified:

Basically, it’s the everyday operation during the shift. It’s their responsibility that they make sure the equipment is working properly prior to starting their shift. Each shift is required to report 15 minutes prior to go through a pass-off from the prior shift and to make sure that this equipment is working so that the equipment, the recording unit that records all 911 calls and radio traffic from emergency equipment; from there they make sure their shift is ready to go to work. *TR 17*

If there is an absence on the shift, the EC Supervisor is required to follow a specific procedure to fill the open position as directed by County Exhibit 20. EC Supervisors do have discretion not to fill an opening on a night shift, but must first advise the EC Supervisor who has recently been assigned some scheduling duties. *County Exhibit 14*

In support of its position that EC Supervisors responsibly direct their shifts, the County relies on a memorandum issued by the Quality Assurance Supervisor (“QAS”) on May 3, 2005, which advised dispatchers of a problem with communication “patches” to area medical facilities. The memo directs the EC Supervisors and EC Specialists II to review proper procedures and advises that the QAS will be “writing up any future incidents of this kind.” The memo appears to indicate that the supervisors are responsible for advising their shifts of the problem, but there is no evidence that the purported supervisors are responsible or accountable for their shifts’ performance or responsiveness to this memo. Rather, it is the QAS who will be responsible for taking action, i.e., writing dispatchers up for future infractions.

There was no evidence presented that evaluation of the purported supervisors is linked to the performance of their shifts on criteria like this. During cross-examination,

the Assistant Chief Dispatcher could not recall an instance in which a Supervisor was held accountable or disciplined for the actions of another employee on his or her shift. *TR 56.*

The Assistant Chief Dispatcher testified “it is everyone’s job to make sure the job is done correctly. It’s the supervisor’s or ECSII’s job to make sure, whichever one is present at the time, that each individual on the shift is doing the task that is given to him correctly, and that is the way the policies and procedures are written.” *TR, p. 58.* There was no specificity provided on any “tasks” which were given during a shift. The console rotation procedure requires that dispatchers rotate every four hours between consoles and types of calls. The procedure also requires that when a shift is staffed by more than three dispatchers, the extra individuals fill in wherever there is a need. When there are only three on the shift (including an EC Supervisor), however, all three persons must staff a console.

The testimony established that there is a rhythm to the rotation and coverage during each shift, and that direction is neither required nor provided on a regular basis. It is also evident that more senior and experienced staff assist newer, less experienced staff when a difficult or complex call for service is received. It is not only the EC Supervisor who provides this support and assistance, nor is the EC Supervisor solely responsible to provide training to new employees. EC Supervisor Clark testified that there are times when neither an EC Supervisor nor an EC Specialist II is working; at these times, the most senior EC Specialist I would provide assistance to newer dispatchers and oversee the operations during the shift. *TR 94.*

The County argues EC Supervisors make recommendations for transfers and promotions of EC Specialists I and II. It relies upon the testimony of the Chief

Dispatcher and the Assistant Chief Dispatcher that they consider the recommendations of the Supervisors “heavily” in making a decision. This testimony, however, was countered by that of EC Supervisor Clark who testified that, as a group, the Supervisors “suggest” which employees might be good promotional prospects during meetings when they are asked to discuss potential promotions. There was no evidence presented that a formal process exists for EC Supervisors to provide input, nor that there is a competitive promotional process to which the EC Supervisors provide meaningful input and effective recommendations. Anecdotal and general information was adduced concerning the promotional process; however, without specific references and examples, it was insufficient to conclude that the EC Supervisors have consequential responsibility or authority in either transfer or promotional decisions affecting EC Specialists I and II.

Discipline is the closest case for a supervisory argument. Chief Dispatcher Thomas described the responsibility of EC Supervisors to oversee the work of subordinates. He considers shift supervisors to be the “eyes and ears of the administration” and if a supervisor sees,

...somethings are not being done right or there is something wrong, they [*Supervisors*] need to document it and get it to us [*Administration*] so we can take action if we need be or in the case if they need to verbally or orally reprimand someone, they need to document it so we’re aware of it. *TR 69.*

He describes an oral reprimand to be,

... if a situation arises during a shift and they’ve had a problem, a discrepancy, the supervisor has the ability to, what we call oral reprimand that particular individual and go over the issue and hopefully get it cleared up so that it does not escalate.

... All we ask on the administrative side is that if they do that, they document it and submit it to either Mr. Short or myself so that we have it as part of the record. *TR 82.*

County Exhibit 20 (p. 4) summarizes guidance which was provided during a Supervisor's meeting on counseling employees during a shift:

When counseling personal [sic] on your shift, make sure documentation is done, be it a verbal warning or a write up. Make sure you go over with the individual the problems you have found. Supervisors are the administration's eyes and ears when they are not here. Make sure that friendships are put aside when counseling is needed.

It is undisputed that EC Supervisors (and EC Specialists II when acting as Supervisors) do not have the authority to go beyond verbal counseling with documentation. There is nothing on the record to suggest that they are responsible for disciplinary investigations or recommendations for further discipline.⁵ The County introduced a number of exhibits wherein Supervisors documented problems and conversations they had with employees on their shifts. It is clear from the review of these documents that once a problem was identified, the Supervisor was responsible to address it directly with the employee and to then advise Administration in writing as to what had occurred. It was also evident that the Supervisor did not have any authority, nor did they make recommendations, for further disciplinary or corrective action.

The responsibility of the EC Supervisors at the Sussex County Emergency Operations Center to identify and address problems on their shifts is significantly different from the disciplinary responsibility and authority of Shift Supervisors employed by the Communications Section of the Delaware State Police, which was considered by PERB in *RE: DPS, DSP Communications Section and Communication Workers of America*, Rep. Pet. 96-07-187, III PERB 1543, 1549 (1997). Unlike the State Police

⁵ Disciplinary investigation and recommendation for discipline beyond verbal counseling were dispositive factors in *Re: Probation and Parole Supervisors ,DOC and FOP Lodge 10*, Rep. 99-03-256, III PERB 1925, 1932 (2000).

case, this record establishes that initial contact with employees on concerns or problems is not directed by the administrative staff, but is a responsibility of the EC Supervisor.

In order, however, for that responsibility to constitute valid indicia of supervisory status, EC Supervisors must exercise independent judgment in exercising that authority.

The National Labor Relations Board also recently addressed this issue:

... to exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data . . . [T]hese requisites are necessary, but not in all cases sufficient, to constitute independent judgment within the meaning of the Act. . . Here, we must interpret ‘independent judgment’ in light of the contrasting statutory language ‘not of a merely routine or clerical nature.’ It may happen that an individual’s assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical.

... We find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instruction of a higher authority, or in the provisions of a collective bargaining agreement. . . On the other hand, the mere existence of company policy does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.⁶ *Oakwood Healthcare, Inc.*, Supra. @ p. 8.

The record supports the conclusion that EC Supervisors do rely on their experience, training and judgment in identifying problems and initiating contact with employees on their shift to correct the problem. For this reason, I find that EC Supervisors are supervisory employees within the meaning of 19 Del.C. §1302(s) and are ineligible for inclusion in the bargaining unit.

The County has argued that EC Specialists II often assume the supervisory responsibilities of the EC Supervisor when they are the highest level employee on a shift.

⁶ An example, if there are explicit policies and procedures in place for responding to an “emergency” but the purported supervisor is required to use judgment to determine when an emergency exists such that those procedures should be activated, this is an indication that the individual exercises independent judgment within the meaning of the Act.

The record is insufficient to establish that EC Specialists II are consistently responsible to perform bona fide supervisory functions (in this case, disciplinary counseling) with enough regularity to conclude that they are supervisory employees within the statutory definition.

II. Appropriateness

The determination of bargaining unit appropriateness depends upon a factual analysis on a case-by-case basis, rather than a mechanical application of the rule of law. *AFSCME Council 81 and Del. Turnpike Administration*, Del.PERB, Rep. Pet. 95-06-140, II PERB 1189, 1193 (1995); *In RE: Rehoboth Beach Police Dept. and IBT Local 326*, Del.PERB, Rep. Pet. 96-10-198, III PERB 1531 (1997).¹ There is no bright line standard that clearly delineates appropriateness in all cases. *In RE: FOP Lodge 7 and University of Delaware, Div. of Public Safety*, Del. PERB, Rep. Pet. 00-10-292, III PERB 2137, 2140 (2001)

Consistent with the federal approach under the National Labor Relations Board (“NLRB”), the Delaware PERB has held a proposed bargaining unit need only be appropriate under the statutory criteria, and not necessarily the most appropriate unit in order to be certified. *Lake Forest Education Assn. v. Board of Education*, Del. PERB, Rep. Pet. 91-03-060, I PERB 651, 655 (1991).

The PERA does not require that all employees in an appropriate bargaining unit perform the same job functions, but rather that all bargaining unit positions share a community of interest based upon similarity of duty, skills and working conditions. *In RE: Battalion Chiefs of the Wilmington Fire Department*, Del. PERB, Rep. Pet. 95-06-142, II PERB 1253 (1995). In order to establish that particular positions are not

appropriate for inclusion in a proposed unit, the objecting party must establish those positions do not share a community of interest with other bargaining unit positions based upon the statutory factors listed in 19 Del.C. §1310(d), which include such factors as

- the similarity of duties, skills and working conditions of the employees involved;
- the history and extent of the employee organization;
- the recommendations of the parties involved;
- the effect of overfragmentation on the efficient administration of government;
- and such other factors as the Board may deem appropriate.

In this case, the County relies exclusively on its assertion that the supervisory authority and responsibilities of EC Supervisors (and EC Specialists II when performing the duties of EC Supervisors in their absence) are sufficient to establish that they do not share a community of interest with EC Specialists I. Other than the supervisory arguments, no evidence was placed in the record concerning how the duties, skills and working conditions between these positions differ or potential adverse impact of creating the proposed bargaining unit on the efficient administration of government.

On the other hand, a review of the documentary evidence establishes that job descriptions of EC Specialists I and II differ only in the degree of knowledge, experience and training, and that the duties and features of both are to handle and process “emergency and non-emergency calls for fire, rescue, emergency, medical, police, government and private agencies in conjunction with the 911 system.” County Exhibits 19 & 20. EC Supervisor Clark testified that during his regular work day, he follows “a rotation just like the Com Spec II’s and Com Spec I’s. We do fire and ambulance as well as take calls for the security, night security, day security at the Administration Building on the weekends, and also the night time ... after the Sheriff’s Department goes 10-7 for

the day, we monitor them.” TR Clark p. 92. Assistant Chief Dispatcher Short testified “The Emergency Communication Specialist II is basically a dispatcher until the time when the Supervisor is not present, then they take the role of the Supervisor for that shift during that time.” TR Short p. 46.

Based on the record before me, the specific facts presented in this case, and the prior discussion and determination that EC Specialists II are not statutory supervisors, there is insufficient support to find the proposed bargaining unit is inappropriate under the factors enumerated for consideration in 19 Del.C. §1310(d).

DECISION

Based upon the record created by the parties and the specific circumstances unique to this case, there is persuasive support to conclude that Emergency Communication Supervisors employed in the Sussex County Emergency Operations Center are “supervisory employees” within the meaning of 19 Del.C. §1302(s). Emergency Communication Specialist I and II share a community of interest and constitute an appropriate bargaining unit as defined by 19 Del.C. §1310(d).

THEREFORE, the appropriate bargaining unit is determined to be:

ALL SUSSEX COUNTY 911 DISPATCHERS EMPLOYED AS EMERGENCY COMMUNICATIONS SPECIALISTS I AND II IN THE EMERGENCY OPERATIONS CENTER AND EXCLUDING EMERGENCY COMMUNICATIONS SUPERVISORS.
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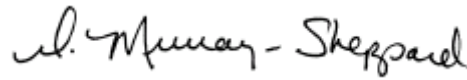
This decision is accompanied by a Notice of Bargaining Unit Determination which the County is required to post in the workplace to advise employees of this determination and in order to allow any other union which seeks to be included on the

ballot the opportunity to file a showing of support of at least ten percent (10%) of the bargaining unit, in accordance with the requirements of 19 Del.C. §1311(c).

An election will be scheduled within forty-five (45) days of the issuance of this decision to determine if and by whom the employees in the defined unit wish to be represented for purposes of collective bargaining.

IT IS SO ORDERED.

DATE: 14 February 2008



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