

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME Council 81, : Determination of Eligibility for
and : Inclusion in §1311A Merit Unit #1
STATE OF DELAWARE. : **Representation Petition 07-12-608(b)**

IN RE: Dept. of Elections Senior Voting Machine Technician

Appearances

Perry F. Goldlust, Esq., for AFSCME Council 81

Aaron Shapiro, Office of Labor Relations & Employment Practices, for the State

BACKGROUND

The State of Delaware is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). The Board of Elections (“BoE”) of each county is an agency of the State. Each county BoE employs a single Senior Voting Machine Technician (“SVMT”) position, which is a merit system position.

The Public Employment Relations Act was amended in August 2007, to expand the rights of State merit employees to collectively bargain for compensation as defined in 19 Del.C. §1311A. As a condition precedent to engaging in the expanded scope of bargaining, the General Assembly created a new bargaining structure, which was superimposed upon the existing structure of bargaining units created pursuant to §1310 of

the PERA. Section 1311A(b) descriptively identifies twelve (12) bargaining units which are intended to ultimately include all Merit classifications.

The Public Employment Relations Board (“PERB”) was specifically charged with determining “...the proper assignment of job classifications to bargaining units and the bargaining unit status of individual employees and shall provide for certified bargaining representatives to combine bargaining units or portions of bargaining units of employees they represent within the bargaining units defined in this section based upon the job classifications of the employees represented.” 19 Del.C. §1311A(b).

On or about December 6, 2007, the American Federation of State, County and Municipal Employees, AFL-CIO, Council 81 (“AFSCME”) filed a representation petition pursuant to 19 Del.C. §1311A seeking clarification concerning the scope of §1311A Merit Unit 1, which is defined as:

Labor, maintenance, trade and service workers which is composed of generally recognized blue collar and service classes including mechanics, highway, building and natural resource maintenance, skilled craft, equipment operators, toll collectors, food service, custodial, laundry, laborers, security officers and similar classes. 19 Del.C. §1311A (b)(1).

At PERB’s request, the State, through the State Labor Relations and Employment Practices office, OMB/HRM, provided a list of merit positions statewide which it asserts fall under the §1311A Merit Unit 1 definition. Many of the identified positions were represented for purposes of collective bargaining in appropriate bargaining units established pursuant to 19 Del.C. §1310. AFSCME, United Food and Commercial Workers Local 27 (“UFCW”), and Laborers International Union of North America, Local 1029 (“LIUNA”) were identified as the certified representatives of currently represented employees. The State’s list also included a number of positions which were identified as

not being currently represented by a union.

Included on the initial list received from the State on or about January 9, 2008, were three Senior Voting Machine Technicians classifications, employed by the New Castle County Board of Elections, Kent County Board of Elections, and Sussex County Board of Elections, respectively. On or about June 6, 2008, the State revised its position and sought to exclude the Senior Voting Machine Technician classification from Unit 1, asserting the positions are supervisory and therefore ineligible for representation.

In order to resolve the question of supervisory status and eligibility, a hearing was convened on December 3, 2008, for the purpose of receiving evidence. The parties were afforded the opportunity to file written argument, and the final brief was received on February 10, 2009. This decision results from the record thus created by the parties.

FACTS

Title 15, Chapter 2 of the Delaware Code establishes three separate, independent Boards of Elections, one in each of Delaware's three counties. The Board of each County is comprised of gubernatorial appointees, subject to the consent of the majority of the State Senate.¹ The composition, qualifications, terms and responsibilities of the Boards are defined by statute.

Each county Board is required to appoint an Administrative Director and a Deputy Administrative Director. Additional employees may be hired by each Board. The duties and compensation of such additional staff are prescribed by the State Office of Management and Budget ("OMB"), and those positions are included in the State merit system.

¹ New Castle County has ten members on its Board; Kent and Sussex County Boards each have six members. 19 Del.C. §201; 203.

Each of the County Boards of Election employs a single Senior Voting Machine Technician. There are no junior positions, nor is there a career ladder for this classification. The class specification for Senior Voting Machine Technician (#MCCZ26) states this classification "...is responsible for overseeing and participating in the maintenance, repair, and preparation of voting machines for elections." *State Exhibit 1*. It also states an SVMT "supervises 10 to 12 seasonal voting machine technicians." The SVMT is supported by casual/seasonal employees who are hired periodically throughout the year to help in maintaining, repairing and preparing voting machines for elections.

The SVMT class specification further states:

A class incumbent reports to the Administrative Director and is responsible for supervising and participating in pre-election servicing and inspection of machines, and preparing machines for elections. An incumbent also performs the major repairs of voting machines which require removal of component parts. A class incumbent recruits, schedules and conducts training for seasonal mechanics involved in routine maintenance, servicing and inspection of election machines.

The essential functions of an SVMT include:

- Supervises and prepares machines for inspection prior to election for each representative district. Prepares machines includes but is not limited to lifting and setting up machines, packing them with ballots, testing operation of machines, and closing the machines.
- Supervises and participates in pre-election servicing and inspection of voting machines to ensure proper operation.
- Makes major repairs of machines such as straightening machine frames to correct torsion damage, replacing public counters, motors and transmission assemblies.
- Rebuilds component parts and fabricates out of stock parts, as necessary.
- Trains and instructs other technicians in the routine maintenance, servicing and inspection of voting machines.
- Maintains inventory of tools and parts.

- Maintains records and prepares reports. *State Exhibit 1*

In addition to the Senior Voting Machine Technician, the New Castle County Board of Election also employs a Warehouse and Distribution Manager, to whom the SVMT reports. In New Castle County, the Warehouse and Distribution Manager approves on all overtime, supervises the SVTM and is responsible to the Administrative Director for all warehouse and voting machine functions. *Tr., p. 31, 34.* Neither Kent nor Sussex County has a Warehouse and Distribution Manager.

ISSUE

WHETHER THE SENIOR VOTING MACHINE TECHNICIANS EMPLOYED BY THE NEW CASTLE, KENT AND SUSSEX COUNTY BOARDS OF ELECTION ARE SUPERVISORY EMPLOYEES WITHIN THE MEANING OF 19 DEL.C. §1302(S) AND ARE THEREFORE NOT ELIGIBLE TO BE REPRESENTED FOR PURPOSE OF COLLECTIVE BARGAINING.

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)*

"Public employee" or "employee" means any employee of a public employer except: ... (7) Supervisory employees of the public employer, provided however, that any supervisory position in a bargaining unit deemed to be appropriate prior to September 23, 1994 shall so continue, unless said unit is decertified in accordance with § 1311(b) of this title, or is

modified in accordance with procedures authorized by § 1310(e) of this title. 19 Del.C. §1302(o)

PRINCIPAL POSITIONS OF THE PARTIES

State:

The State argues that the Public Employment Relations Act does not limit the application or interpretation of the definition of a supervisory employee based on the number or type of work subordinate employees perform. PERB has previously held that casual employees may be included in appropriate bargaining units. Exemptions from collective bargaining rights under the PERA are based on the type of work performed, not on the duration or type of employment.

Senior Voting Machine Technicians are frontline supervisors who have authority on behalf of their employer to engage in or effectively recommend “hiring and discharge of casual employees; determining how many employees should be brought in to complete tasks; assign work schedules and approve time off; assign specific duties; hold the employees accountable for their performance; authorize overtime; and review and certify time sheets for payroll.” *State’s Opening Brief, p. 4.*

The State argues the statutory definition of a supervisory employee is not informed, modified, or limited by whether the purported supervisor or the subordinate employees are covered by the State merit system. The State disputes AFSCME’s conclusion that the merit rule defining supervisory responsibilities as only relating to supervision of classified subordinate employees (and specifically excluding casual, seasonal and contractual employees) should be read to limit the statutory definition for State employees. It asserts AFSCME has provided no authority for its argument and

concludes that statutory supervisors may be responsible for the oversight of merit, casual, seasonal, or contractual subordinates.

AFSCME Council 81:

AFSCME argues that the State Merit Rules require that supervisory positions, supervise two or more classified employees.² The definition specifically excludes casual, seasonal and contractual employees from the type of employees over which supervisory authority may be exercised under the State merit system.

Although the statutory definition of a supervisory employee under the PERA does not place a limitation on either the number or types of positions that are subject to supervision, AFSCME argues that the PERA definition should be read in harmony with the merit rule definition. Consequently, unless the SVMT's supervise "two or more classified employees", they cannot be excluded from collective bargaining rights under the PERA.

Further, the evidence does not provide substantive support for the State's position. SVMT's do not have the authority to perform the requisite functions of a statutory supervisor, primarily because casual and seasonal employees do not have any rights or protections. Any authority SVMT's have over casual and/or seasonal employees is merely routine or clerical in nature (e.g., signing time cards) and does not require the use of independent judgment. The record reveals that independent judgment is retained and exercised by the Administrative Director of the Board of Elections in each county.

² Merit Rule 19.0 Definitions: "**Supervisor**": a person in a position who, on a regular and continuing basis, plans, assigns, reviews, disciplines, recommends hire, termination and promotion and completes and approves performance plans of two or more Classified employees excluding casual, seasonal, and contractual employees.

For these reasons, AFSCME asserts Senior Voting Machine Technicians are not supervisory employees within the meaning of 19 Del.C. §1302(s).

DISCUSSION

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 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 narrowly construed the supervisory definition in order not to deny public employee rights which the statute declares should be protected. *In RE: Sussex County and CWA*, Rep. Pet. 07-02-557, VI PERB 3949, 3957 (2008).

The record in this case establishes that the maintenance, servicing, inspection and preparation of voting machines is completed by the SVTM in each county, assisted by casual/seasonal employees who are called to work on an as-needed basis.³ The Administrative Director in each County relies upon the experience and expertise of the

³ New Castle County’s Warehouse and Distribution Manager also assists with the machine preparation, and in fact, prior to the 2008 general election, was primarily responsible for this function while the SVMT was on active military duty. *Testimony of Albence, TR. p. 103.*

SVMT to insure that the electronic voting machines are ready, reliable, and in place for every election and that they are properly retrieved, stored and maintained between elections. It is clear that the SVMT's are responsible for the machines and the processes which assure that the physical casting of ballots in various types of elections in Delaware is not compromised by equipment problems.

The statutory supervisory exclusion, however, is not dependent on supervision of a process, but rather depends upon the supervision of subordinate employees. Contrary to the State's opening statement, the record clearly establishes that SVMT's do not presently supervise any full-time merit employees. *Tr. p. 4.* The PERB has broadly construed employees' representation rights as a fundamental premise of the Act, consistently throughout its twenty-five year history. The PERA neither defines nor excludes from the definition of a "public employee" casual/seasonal or any other category of less than full time employees. *Delaware Public Employees Council 81, AFSCME, AFL-CIO v. State of Delaware Turnpike Administration*, Rep. Pet. No. 95-06-140, II PERB 1189 (1995).

AFSCME asserts that SVMT's cannot be defined as statutory supervisors because Merit Rule 19.0 excludes consideration of oversight of Casual/Seasonal employees in determining that a position is supervisory. The State Merit Rule defines a supervisor as:

... a person in a position who, on a regular and continuing basis, plans, assigns, reviews, disciplines, recommends hire, termination and promotion and completes and approves performance plans of two or more Classified employees excluding casual, seasonal⁴ and contractual employees. *Merit Rule 19.0*

⁴ State Merit Rule 19.0 also defines "Casual/Seasonal employees" as "employees serving in positions pursuant to 29 Del.C. §5903(1). Such employees are not covered by the Merit Rules. Such employees may be covered by collective bargaining agreements and by other State and Federal laws such as the Fair Labors Standards Act, Title VII of the Civil Rights Act, the Family Medical Leave Act, etc."

The merit definition is not identical to the statutory definition under the PERA and differs in several material areas. One might presume that the merit definition is used for purposes of classification and pay grade assignment. Whereas the Merit definition limits supervisory status based on the number and type of employment of subordinates, it is clear that the supervisory definition under the PERA is a functional definition, without similar limitations.

PERB is specifically charged with interpreting and applying the statutory definition found at 19 Del.C. §1302(s), which defines a supervisory employee as “... 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.”

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 supervisor either performs or effectively recommends at least one of the twelve enumerated indicia of supervisory status, namely,

- Hire
- Transfer
- Suspend
- Discharge
- Assign
- Reward

- Lay-off
- Recall
- Promote
- Discipline
- Responsibly direct
- Adjust grievances ⁵

The record establishes that most of the enumerated functions do not apply to the Casual/Seasonal employees intermittently hired by each County Board of Elections, because of the nature and type of employment engagement. There is no formal hiring process – most hiring is done based on recommendation from BoE employees or others. Informal interviews may be conducted by the SVMT, but there is no formal posting or application process. A person interested in working with the voting machines as a casual/seasonal employee may have an informal trial period where the SVMT instructs and observes the individual’s work and determines whether he/she can meet the demands of the job. The Administrative Director has final authority to determine which individuals are on the list from which casual/seasonal employees are assigned hours to work.

There is also no formal discharge procedure. If the Administrative Director determines, usually following conversation and consultation with the SVMT, that an individual is not “working out”, that person is simply not recalled to work when the opportunity arises again.

There is no dispute that there are no formal procedures or occasion under the existing system for casual/seasonal employees to be transferred, laid-off, recalled, rewarded, promoted or to file a grievance. Casual/seasonal employees are not protected by the State Merit System and there is no evidence in the record that these employees are included in any collective bargaining unit or otherwise have access to a negotiated grievance procedure.

⁵ 19 Del.C. §1302(s)

There is no evidence in the record that SVMT's have authority to discipline or suspend the casual/seasonal employees. These employees are not formally evaluated, nor is there any evidence that there are any rewards provided for above-average work. The casual/seasonal employees do not have benefits, and there is no evidence that the SVMT or the Administrative Directors have authority to reward effort with monetary remuneration or paid time off. It appears that the only benefit for a job well done is the opportunity to work more hours when the need arises. There is no evidence that anyone in any of the county Boards of Election offices can modify the rate of pay for casual/seasonal employees.

The hours of available casual/seasonal work is determined by operational need and budgetary constraints. It is undisputed that final authority to approve casual/seasonal hours lies with the Administrative Director. It is clear that the Administrative Directors routinely consult with the SVMT's in order to gain information on which that decision will be made in Kent and Sussex counties. It is less clear in New Castle County where the Warehouse and Distribution Manager reports directly to the Administrative Director, and is the individual who directly discusses the need for casual/seasonal help.

Once hours are approved for employing casual/seasonal employees, the choice of individual workers, how and when they are scheduled, and what their assigned tasks and responsibilities are while working are clearly overseen by the SVMT. It is equally clear that the SVMT is working alongside the casual/seasonal employees, and that in periods when no casual/seasonal employees are hired, the SVMT performs the same functions and tasks as the casual/seasonal employees.

The SVMT in each county does develop the schedule for using the casual/seasonal employees, based both on operational need and the availability of

individuals. The schedule is often determined by the time frames and deadlines surrounding elections, as well as the physical man-power required to do certain tasks (e.g., moving machines to polling locations in Kent and Sussex Counties). The SVMT also schedules casual/seasonal employees to support the training of poll workers on the set-up, use, reporting of results and break down of machines during elections. The record establishes that when necessary, with prior approval by the Administrative Director, SVMT's can retain casual/seasonal employees for overtime hours in order to complete the required work.

The record also does not support a finding that the SVMT's have the authority to "responsibly direct" the casual/seasonal employees. Applying the standard PERB adopted in *Sussex County & CWA*,

... 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. *Sussex County & CWA*, Supra, p. 3960. (citing *Oakwood Healthcare*, p. 7)

There is no record evidence that SVMT's are held accountable for the performance of the casual/seasonal employees.

The only remaining criterion to be considered is whether the SVMT's are responsible for assigning work. PERB recently adopted the NLRB's *Oakwood* analysis to interpret and apply the statutory term "assign" as used in the supervisory definition 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 Healthcare, Inc*, 348 NLRB 37, 180 LRRM 1257 (2006).

The assignment of the overall duties to an employee is distinguishable from providing *ad hoc* instruction to an employee to perform a specific task within the normal course of operations. The order in which an employee performs discrete tasks within an assignment, however, is not indicative of assignment authority. *Sussex County & CWA*, *Supra*, p. 3959.

There is substantial evidence on the record to find that SVMT's do have the authority, in the interest of their employer to assign work to casual/seasonal employees, and that they do exercise judgment in such assignment. SVMT's exercise authority to assign work whenever casual/seasonal employees are employed to perform work required for preparing for, executing, and cleaning up after elections. While casual/seasonal employees are in the workplace, the SVMT is responsible for the scheduling, assignment of work, and determining who performs which functions and the order in which those jobs are completed. This is an important and significant function of an SVMT as described by the Class Specification and supported by the documentary and testimonial evidence offered in this case.

The definition of a "supervisory employee" requires that employee perform only one or more of the enumerated functions. The degree of supervisory responsibility, however, must be significant and critical to the primary operational objective of the employer in order deny employees holding the purportedly supervisory position the right to be represented for collective bargaining.

Although no specific evidence was provided which would have allowed for a calculation of the amount of work time each SVMT actually was engaged in supervising casual/seasonal employees, it was clear that the oversight SVMT's provide in the workplace is critical to effectively maintaining, repairing and preparing the voting machines. The record supports the conclusion that when casual/seasonal employees are working for the county Board of Election on voting machines, their work is assigned and monitored by an SVMT, who is performing a critical supervisory function.

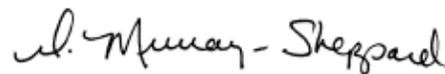
DECISION

For the reasons discussed above, the State merit classification of Senior Voting Machine Technician (#MCCZ26) is determined to be a "supervisory employee" within the meaning of 19 Del.C. §1302(s).

Consequently, this classification is not eligible for representation in a bargaining unit for purposes of collective bargaining. 19 Del.C. §1302(o). This classification is ineligible for inclusion in State Merit Unit 1.

IT IS SO ORDERED.

Date: May 6, 2009



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB