

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

AMERICAN FEDERATION OF STATE, COUNTY,	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL 3109, AFL-CIO,	:	REPRESENTATION PETITION
	:	<u>17-02-1096</u>
AND	:	
	:	(MODIFICATION)
NEW CASTLE COUNTY, DELAWARE.	:	

RE: INFORMATION SYSTEMS MANAGERS

Appearances

Lance Geren, Esq., AFSCME Local 3109

Laura T. Hay, Esq, New Castle County

BACKGROUND

The American Federation of State, County, and Municipal Employees, AFL-CIO, Council 81 (“AFSCME”) is an employee organization within the meaning of §1302(i) of the Public Employment Relations Act, 19 Del. C. Chapter 13 (PERA). AFSCME, through its affiliated Local 3109, is the exclusive bargaining representative of Information Systems Managers, within the meaning of 19 *Del. C.* §1302(j).

New Castle County, Delaware (“County”) is a public employer within the meaning of 19 *Del. C.* § 1302(p).

On February 21, 2017, AFSCME filed with the Public Employment Relations Board (“PERB”) a Petition for Bargaining Unit Modification, seeking to amend the bargaining unit of New Castle County employees currently represented by AFSCME LU 3109 (DOL Case 100) to

include the position of Information Systems Manager (“IS Manager”).

On March 23, 2017, the County objected to the inclusion of the IS Manager position in the existing bargaining unit, asserting that they are statutory supervisors within the meaning of 19 Del. C. §1302(s).

On June 2, 2017, a hearing was held for the purpose of receiving evidence concerning the supervisory status of the IS Manager position. Thereafter, the parties submitted arguments in the form of simultaneous post-hearing submissions, which were received on July 17, 2017. The following decision results from the record thus created by the parties.

FACTS

The facts set forth herein are derived from the evidence and testimony presented by the parties.¹

The General Manager of the Office of Administrative Services (one of six executive branch agencies of New Castle County) reports directly to the County Executive. His working title is Chief of Technology and Administrative Services and the position has been held by Michael Hojnicky since January 30, 2017.

Information Systems (“IS”) is one of the component departments in the Office of Administrative Services. There are 38 positions in the IS department² (including the IS Managers), which provides support to the technology and information systems for County government, the volunteer fire service, EMS, 911 and police services. There are two division in Information

¹ The parties jointly entered the current New Castle County Class Specification for the Information Systems Manager position and the County entered fifteen additional exhibits without objection from the Union. Only one witness testified on behalf of the County, Chief Michael Hojnicky. AFSCME did not enter any exhibits into the record and did not call any witnesses.

² At the time of the hearing, there were four vacant positions (which are included in the 38 position count).

Systems which are overseen by IS Managers, both of whom report directly to Chief Hojnicky.³

IS Manager Jon Yearly oversees the Infrastructure/Network (“I/N”) unit which directly employs 11 employees including a GIS⁴ Coordinator, a Customer Service Specialist, a Senior Network Engineer, a Program Analyst, Planners, a Senior Office Assistant, a Network Engineer, an IS Coordinator and an IS Specialist. The unit employs six contractors who also report to IS Manager Yearly. The I/N unit is responsible for “... process evaluation and design, vendor coordination and management, systems evaluation, systems design, programming, computer operations, data, image and voice networks, technical support and end-user training and support.”⁵

IS Manager Tim Arnett is responsible for the Support/Applications (“S/A”) unit which directly employs 13 individuals including IS Coordinators, an IS Specialist, Customer Service Specialists and Systems Analysts. The S/A unit also employs six contractors who report to IS Manager Arnett. The unit is responsible for management of the information systems hardware and operating a Help Desk (or service desk) which provides technical information and support to County employees who are experiencing problems or have questions concerning their computers and/or software applications.

Chief Hojnicky provided un rebutted testimony that IS Manager Arnett is responsible for planning the work of the team which manages the inbound calls to the Help Desk:

... Tim monitors the workload. He produces to me on a weekly basis in his weekly report the breakdown of the number of inbound calls, the number of calls opened by each individual, number calls closed by each individual. He monitors the volume of calls to make sure we have the right resources in the right places. He has and will shift people around based on need, based on the number of responses to the problems or issues and he balances out the workload directly with them. He meets with his teams as does the other manager. They

³ County Exhibit 1.

⁴ The Geographic Information System (GIS) is a mapping solution used for a variety of purposes, including insuring maps are current and up to date for parcel decisions, land use decisions, as well as 911 dispatch and emergency operations.

⁵ County Exhibit 8

have routine weekly meetings. Tim actually has two meetings. He has the applications meeting one day and then another day he has his routine Help Desk/Support Service Desk meeting to insure that he was in sync to make sure they understand the workload, the problems for the week, the challenges upcoming, the projects in flight.⁶

The IS Managers review and evaluate the performance of all IS employees annually, rating their performance, making recommendations for improving work performance, and identifying appropriate training and career development opportunities for the employees. In order to progress through the annual salary steps/merit steps⁷ of the County's compensation system, employees must receive at satisfactory or better evaluation.

The Chief of Technology and Administrative Services evaluates the work performance of the Information Systems Managers annually. Included in their evaluations is a section in which the IS Managers are evaluated on "Supervisory Performance" which "... includes assignment and monitoring of work, training and evaluation." In IS Manager Yearly's 2015 – 2016 annual review, it notes, "His area from [*sic*] growth is to take supervision training to help him better understand and deal with difficult personnel."⁸

When there is a vacant position in either the I/N unit or the S/A unit, the IS Manager initiates a request to the Human Resources staff to post the vacancy. It is the IS Manager who reviews the posting for accuracy, requests approval of an interview panel, and drafts interview questions, all for review by the human resources staff. The IS Manager customarily sits on the interview panel.

Chief Hojnicky also testified the IS Managers are responsible to initiate discipline within

⁶ Transcript p. 11- 12.

⁷ County employees are eligible for annual step or merit step increases annually up through Step 10 on the wage scale. This wage progression is available to both employees represented by AFSCME 3109 under the terms of the negotiated agreement and to non-union classified employees, including IS Managers. *County Exhibits 14 and 15*; Transcript p. 26

⁸ County Exhibit 8.

the units when necessary, although they do not have final independent authority to determine if and what level of discipline may ultimately be imposed. He clarified his testimony to indicate that he had no direct knowledge of how discipline would be initiated as there have not been any instances requiring discipline during his tenure with the County.⁹

IS Managers are compensated at Pay Grade 34 on the County's Non-Union Classified Service Employees wage scale. The next highest position in the I/N unit is Senior Network Engineer, who is compensated at Pay Grade 31 on the AFSCME Local 3109 negotiated wage scale for Classified Service Professional Employees. The next highest paid position in the S/A unit is the Information Systems Coordinator, who is compensated at Pay Grade 30 on the AFSCME Local 3109 scale.

ISSUE

ARE THE INFORMATION SYSTEMS MANAGERS EMPLOYED BY NEW CASTLE COUNTY STATUTORY SUPERVISORS 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?

OPINION

The Delaware Public Employment Relations Board has broadly construed employee representation as a fundamental right of individual employees under the Public Employment Relations Act. *In re: University of Delaware Bus Drivers*, Representation Petition 95-01-126, II PERB 1207, 1210 (1995). This Board has held that "... except for the most compelling reasons, eligible employees should not be denied access to the rights and protections to which they are otherwise entitled [under the statute]." *In re: Internal Affairs Officer of the Wilmington Fire*

⁹ Transcript p. 38

Department, Representation Petition 95-06-142, II PERB 1387, 1397 (1996).

The PERA excludes supervisory employees from all appropriate bargaining units created after September 23, 1994. 19 Del.C. §1310(d). A supervisory employee is defined as:

... 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 judgement. 19 Del.C. §1302(s).

PERB has adopted the NLRB's guidance in requiring that the party asserting supervisory status be responsible to establish the positions are, in fact, supervisory within the statutory definition. *In re: Sussex County and CWA*, Rep. 07-02-557, VI PERB 3949, 3957 (2008). Following NLRB guidance in evaluating evidence, "the mere use of a title or the giving of 'paper authority' which is not exercised does not make an employee a supervisor." *North Miami Convalescent Home & Local 1115*, 224 NLRB 1271, 1272 (1976). Supervisory status must be established based on the preponderance of the evidence presented.

This Board has held that general assertions of authority or responsibility which are not specific and/or which are contradicted by other evidence are not sufficient to meet the requisite standard for establishing supervisory status and thereby to deny public employees the rights guaranteed to them by the PERA. *In RE: LIUNA 1029 & DSCYF/DPBHS/FCU*, Rep. 16-09-1080, IX PERB 6907, 6916 (2017). At the hearing, Chief Hojnicky provided un rebutted testimony concerning the scope of responsibilities of the two IS Manager positions at issue in this case. Neither of the IS Managers testified concerning their current duties.

AFSCME argues the County is unable to meet its burden in this case because it relies upon the testimony of Chief Hojnicky, who has only held his position with the County since January 30,

2017.¹⁰ It also argues the County's reliance on the paper organizational chart and job descriptions cannot be accorded controlling weight in evaluating whether Information Systems Managers are statutory supervisors.

The County asserts IS Managers are directly responsible for managing the performance of their teams. They are responsible to assign and direct the work of their subordinates, to assess their job performance, and to prepare performance evaluations for those employees. IS Managers are compensated at a rate three to four paygrades above their closest subordinates. The County also argues IS Managers make effective recommendations in hiring, termination and disciplinary decisions.

The Delaware PERB has adopted a sequential analysis for determining supervisory status:

1. Do the employees in the contested position(s) have authority and responsibility to engage in one or more of the twelve activities (i.e., hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them or to adjust their grievances)
2. If so, does the exercise of that authority require the use of independent judgment?
3. If so, does the employee hold and exercise that authority in the interest of the public employer? *Delaware Dept. of Public Safety and CWA*, Rep. 96-07-187, III PERB 1543, 1548 (1997)

In order to meet the statutorily defined level of authority and responsibility, supervisory duties must be fundamental and consequential to the workplace, and the employees must be accountable for the performance of those duties.¹¹

The County does not contend that the IS Managers have authority to or effectively recommend transfers, layoffs, recalls, promotions, rewarding of other employees, nor that they have any role in the grievance procedure. Therefore, those factors play no part in this decision.

¹⁰ Chief Hojnicky testified he did not work for or with the County prior to his current appointment. He was previously employed by the State of Delaware, Department of Technology and Information.

¹¹ *LIUNA and DSCYF*, Supra. at 6916.

All determinations of supervisory issues are highly fact bound. Deciding whether an individual possesses the statutory indicia of a supervisor,

... often calls for making delicate, difficult and even fine distinctions, and there are frequently gray areas. In almost any employment situation, employees are given direction by other employees, including more experienced, straw bosses, technical and professional employees. Whether that direction is routine or requires independent judgment is the focus of the litigation of these issue..."¹²

Discipline

The record in this case is insufficient to establish that IS Managers have authority to issue or to effectively recommend discipline for employees in their units. Chief Hojnicky testified he had not had cause to be involved in any disciplinary action during his tenure and no records or other evidence were presented to support the conclusion that IS Managers have had any direct involvement in discipline in the past. Chief Hojnicky's speculation that should there be a problem with a unit employee below the IS Manager in the organizational chart which necessitates the consideration or application of discipline, that the IS Manager would be involved in that process, does not provide a sufficient basis upon which to conclude Information Systems Managers have authority or effectively recommend discipline.

Hiring

IS Managers have the authority to initiate the hiring process by requesting the County's human resources department to post a vacancy notice. IS Managers are responsible to review postings, to request approval of a recommended hiring panel, and to draft interview questions for review and approval by human resources staff. While these are all procedural steps in the hiring process, the record was insufficient to establish that IS Managers have the authority to actually

¹² *Northcrest Nursing Home*, 313 NLRB 491, 493 (1993).

hire or effectively recommend the hire of an individual applicant. Consequently, this criteria does not support the County's assertion that these are supervisory positions.

Assignment of Work

In *RE: Sussex County and CWA*¹³, PERB adopted the NLRB's standard for assigning work as set forth in *Oakwood Healthcare*. "Assign" refers 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.

The NLRB clarified that choosing the order in which an employee performs discrete tasks within an assignment is not indicative of assignment authority. It drew the line between the assignment of 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.

The record establishes that IS Manager Arnett was and is responsible to assign employees in the S/A unit to tasks and duties in order to complete mission critical projects for which the S/A unit is responsible and tasked to perform. Arnett was responsible for and exercised authority to assign unit employees to conduct and complete an inventory of all hardware (including computers, laptops, and printers) to determine the location, age, and warranty status of each, as part of the Office of Administrative Services financial planning process. He was required to simultaneously maintain adequate support and coverage for the Help Desk while this project was being conducted; consequently he had to reassign unit employees from their regular, day-to-day duties in order to complete the project. Chief Hojnicky testified on cross-examination,

Tim ... reassigned a couple of resources over to do a finalization of our old inventory that's being disposed of. So he would move... based on the task, I'd

¹³ *Supra.*, p. 3959.

say to Tim, here's the area you and your team must accomplish. He moved the pieces. So there are a number of people that were assigned, mainly the two interns, and led by one other person to work together to inventory the old stuff, but it's ultimately his responsibility to allocate the work.¹⁴

Although there was less testimony concerning the scope of IS Manager Yearly's responsibilities for assignment of work in the I/N unit, the established facts concerning IS Manager Arnett's responsibilities are sufficient to find that these positions exercise consequential authority in assignment of work. The record is sufficient to conclude that IS Managers exercise independent judgement and are accountable for the work of their units.

Responsibility to Direct

In order for a putative supervisor to exercise "responsibility to direct" another employee, it must first be established that the employee directs others in performing their job duties.¹⁵ The record clearly establishes that IS Managers are responsible to direct the work of their subordinates, to monitor and collect metrics on performance against departmental goals, and to report that information on a weekly basis to the Chief of Technology and Administration.¹⁶

It must also be established that purposed supervisor is accountable for the other employee's performance. In *Oakwood Healthcare*, the NLRB defined accountability:

[T]o 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 also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.¹⁷

The record establishes that IS Managers are responsible for the training and development

¹⁴ Transcript p. 47

¹⁵ *LIUNA & DSCYF*, Supra. at p. 6918.

¹⁶ Transcript p. 11; County Exhibit 8.

¹⁷ *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006).

of unit employees and for evaluating their work performance. In this case, where the performance of a subordinate employee is found by the IS Manager to be less than satisfactory, the employee will not receive an annual step increase; consequently, the evaluation has an impact on the wages of unit employees. IS Managers are evaluated on their supervisory performance including their ability to effectively assign, oversee and evaluate the work of their unit employees. A less than satisfactory performance evaluation for an IS Manager will also result in the withholding of a step increase. The record is sufficient to support the conclusion that IS Managers have responsibility and are held accountable to direct subordinate employees in their units.

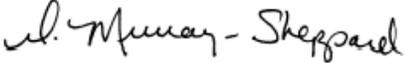
DECISION

Based upon the record created by the parties in this matter, Information Systems Managers employed by New Castle County in its Office of Administrative Services are statutory supervisors within the meaning of 19 Del.C. §1302(s). Consequently, they are not public employees and are not eligible for representation for purpose of collective bargaining. 19 Del.C. §1302(o)(7).

Wherefore, the petition for modification of the bargaining unit defined in DOL Case 100 and currently represented by AFSCME Local 3109 is denied and dismissed.

IT IS SO ORDERED.

DATE: November 27, 2017



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.