

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

AMERICAN FEDERATION OF STATE, COUNTY,	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL 1832, AFL-CIO,	:	
	:	
Petitioner,	:	REPRESENTATION PETITION
	:	<u>22-10-1329</u>
AND	:	
	:	(MODIFICATION)
STATE OF DELAWARE, DEPARTMENT OF	:	
HEALTH AND SOCIAL SERVICES, DIVISION	:	
OF HEALTH CARE QUALITY,	:	
	:	
Respondent.	:	

RE: DHSS/DHCQ OFFICE MANAGERS

Appearances

Lance Geren, Esq., O’Donoghue & O’Donoghue, for AFSCME Local 1832
Krishna Hawkins, Labor Relations Manager, DHR/DELR, for DHSS/DHCQ

BACKGROUND

The Delaware Department of Health and Social Services (“DHSS”) is an agency of the State of Delaware (“State”) and is a public employer within the meaning of §1302(n) of the Public Employment Relations Act (“PERA”), 19 *Del. C.* Chapter 13 (1994). The Division of Health Care Quality (“DHCQ”) is a division of DHSS.

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

1832, is the exclusive bargaining representative of a variety of non-supervisory employees of DHCQ who are assigned to work locations in New Castle County within the meaning of 19 *Del. C.* §1302(j). DOL Case 47.

On October 13, 2022, AFSCME filed with the Public Employment Relations Board (“PERB”) a Petition for Bargaining Unit Modification, seeking to amend the bargaining unit currently represented by AFSCME Local 1832 to include the DHCQ administrative and operational support staff working in New Castle County. Specifically, AFSCME sought to modify the bargaining unit to include DHCQ Administrative Specialists, Operations Support Specialists and Office Managers.

By letter dated October 21, 2022, the State objected to the inclusion of the Office Manager positions asserting that they are statutory supervisors within the meaning of 19 *Del. C.* §1302(s). AFSCME responded that the Office Managers do not perform duties which meet the supervisory definition.

By agreement of the parties, an election was held January 26, 2023 to determine whether the petitioned for DHCQ administrative and operational support staff desired to be represented for purposes of collective bargaining by AFSCME Local 1832. The ballots cast by the two Office Managers were impounded, pending determination of their eligibility for representation. “AFSCME Local 1832” received a majority of the valid ballots cast in the election. As a result, DHSS/DHCQ Administrative Specialists and Operations Support Specialists working in New Castle County were modified into the existing bargaining unit of the DHSS non-supervisory employees.

In order to resolve the supervisory status of the Office Managers, a hearing was scheduled and conducted on February 28, 2023, at which the parties were provided the opportunity to submit documents and elicit testimony through direct and cross examination of witnesses. The record was

closed with the submission of written argument by the parties. This decision results from the record thus created by the parties.

ISSUE

ARE THE OFFICE MANAGERS EMPLOYED BY DHSS/DHCQ IN NEW CASTLE COUNTY STATUTORY SUPERVISORS WITHIN THE MEANING OF 19 DEL. C. §1302(S), AND THEREFORE INELIGIBLE FOR REPRESENTATION FOR PURPOSES OF COLLECTIVE BARGAINING UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT?

FACTS

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

The Office Manager Job Description (as established on July 1, 1987¹) lists the essential functions of the position as:

- Plans, coordinates and directs office support activities to relieve an administrative/ technical superior of day-to-day administrative tasks.
- Analyzes and makes recommendations regarding operating practices and procedures to include personnel, workflow, cost reduction recordkeeping, performance standards, equipment and supply utilization, to ensure smooth and efficient office operation. Implements new and revised procedures.
- Supervises, directly or through subordinate lead personnel, the agencies support staff; interviews job applicants and makes hiring recommendations; trains new employees; plans, assigns, and evaluates the work of subordinates; counsels and disciplines subordinate employees.
- Directs support services which include most of the following: fleet management, forms/records management, facilities management, inventory, contracting and purchasing, equipment maintenance and repair, mail distribution and messenger services, office typing support and telephone coverage.

¹ The document does not indicate it has been revised since it was established.

- May act as principal assistant to the superior in a variety of operational areas which may include: disseminating directives, preparing required reports, assisting in budget preparation and development by maintaining records and/or compiling data; performing special projects studies including needs assessments; obtaining, organizing and drafting administrative material for public information or office use; acting as liaison with vendors, state/federal representative, the public, etc.
- Performs related work as required. ²

The Division of Health Care Quality (formerly the Division of Long Term Care Residents' Protection³) has two subdivisions: the Office of Health Facilities and Certification section⁴ and the Long-Term Care Investigative section.⁵ Melanie Edwards is employed by the Long Term Care section, and is the only Office Manager who reports directly to the DHCQ Deputy Director Denise Elliott.⁶

According to DHCQ's organizational chart, there are two positions which report to Ms. Edwards: an Administrative Specialist I and an Operations Support Specialist. The Operations Support Specialist (Barker) serves primarily as the office's receptionist. She also assists with the licenses, renewals and reciprocities for Certified Nursing Assistants. Ms. Edwards testified she does not direct the Operations Support Specialist's work. ⁷ The Administrative Specialist I (Babiarz) is responsible for preparing binders and documents for hearings for long-term care investigations and COOP emergency planning. Ms. Edwards also testified that she does not direct the work of the Administrative Specialist, who receives her work assignments from the DHCQ Deputy Director.⁸

² State Exhibit 4.

³ Transcript ("TR") p. 10.

⁴ The witnesses also referred to this as the "Acute Care Section."

⁵ State Exhibit 3.

⁶ TR p. 12.

⁷ TR p. 16.

⁸ TR, p. 17, 22.

Ms. Edwards testified she spends much of her time on the federal cost allocation plan for the long-term care side of DHCQ. She also is “involved in contracts ... involved in quotes for ... equipment, dealing with fiscal.”⁹ She also is the website publisher for DHCQ, a function which she retained from before being promoted to Office Manager. She participated in the hiring of the Administrative Specialist into a casual/seasonal position, sitting on the hiring panel, again before she was promoted to Office Manager.¹⁰ She again sat on the hiring panel when the full-time Administrative Specialist position was posted and filled.

Ms. Edwards has been the Office Manager for the Long-term Care Section for over three years. During her tenure she has never been involved in disciplining an employee, holding a grievance hearing or issuing a grievance decision, and/or directly assigning work to either the Administrative Specialist I or the Operations Support Specialist. She has delivered performance evaluations to employees for signature but is not responsible for the development of performance plans. Recently, she was asked to develop the performance review of the Operations Support Specialist, which she did in collaboration with that employee. The performance review Ms. Edwards prepared had not been delivered to the employee as of the time of the hearing because it was under review by the Deputy Director.¹¹

The second Office Manager, Amy-Joy Andrews, reports to the Nurse Administrator and supports the Compliance Nurse Supervisor in the Office of Health Facilities and Certification Section. At the time of the hearing, there was a single vacant Administrative Specialist I position below her on the DHCQ’s organizational chart. As a result, she is also required to perform the duties of this vacant position. Ms. Andrews testified she handles administrative, clerical, and

⁹ Supra.

¹⁰ TR p. 19.

¹¹ TR p. 23-25.

licensing responsibilities within the acute care side and is responsible for “the whole running of the office.” She serves as the backup on the emergency operations plan (COOP), processes work orders, serves as the receptionist (answering phones and directing calls to acute care staff).¹²

Both of the current Office Managers have participated as part of hiring panels which interview candidates for vacant positions.

Both Office Managers approved leave requests in the State’s attendance reporting program. Ms. Andrews testified that she basically makes sure there is someone in the office to cover the administrative duties, and that she and her direct supervisor discuss staffing daily.¹³

The two Office Managers meet periodically to discuss issues which may have arisen in the functioning of their offices. On one occasion during the COVID-19 pandemic restrictions, they (in collaboration with the Deputy Director) decided to modify the process for sending and receiving mail in the office. A table was moved out of the reception area and into the Administrative Specialist’s office in order to protect the privacy of the correspondence being sent and received and to minimize the number of people handling the mail due to pandemic concerns.¹⁴

POSITIONS OF THE PARTIES

State:

The State asserts the Office Managers currently supervise the Operation Support Specialist and the Administrative Specialists. The Office Managers have the authority to assign work and direct staff, to reward employees, to address employee grievances, participate in the hiring process and make effective recommendations on hiring decisions. The Office Managers have the authority

¹² TR p. 39-40.

¹³ TR p. 43.

¹⁴ TR 29-31.

to make decisions independently and effectively in furtherance of the agency's business. For these reasons, the State asserts the Office Managers meet the statutory definition of supervisors and should be excluded from the bargaining unit.

The State also argues that if it is determined that these positions are not supervisory, it will disturb DHCQ's organizational structure and may require that the Office Manager positions be reclassified because these positions "play a crucial role in managing the enterprise of DHCQ."¹⁵

AFSCME:

AFSCME argues the Office Managers are not supervisors within the meaning of §1302(s) of the PERA. They do not have the authority to hire, assign or direct, to discipline, or to adjust grievances. Any purported supervisory authority the Office Managers have is mere paper authority, as the evidence presented clearly fails to support the conclusion that they have actual authority in the interest of the public employer to supervise other employees using their independent judgment.

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.¹⁶ 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]."¹⁷

¹⁵ State's closing argument, 5/2/23.

¹⁶ *In re: University of Delaware Bus Drivers*, Representation Petition 95-04-126, II PERB 1207, 1210 (1995).

¹⁷ *In re: Internal Affairs Officer of the Wilmington Fire 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). The Delaware PERB has adopted the National Labor Relations Board's ("NLRB") guidance in requiring that the party asserting supervisory status be responsible to establish the positions are, in fact, supervisory within the statutory definition.¹⁸ The use of a title or the giving of 'paper authority' which is not exercised does not constitute compelling evidence that an employee is a supervisor.¹⁹ Supervisory status must be established based on the preponderance of the evidence presented.

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).

In order to resolve the supervisory status of DHCQ Office Managers, the State must affirmatively prove:

- 1) The Office Managers have the authority to engage in at least one or more of the twelve activities listed in §1302(s);
- 2) That Office Managers are required to use independent judgment in exercising that authority; and
- 3) That Office Managers hold and exercise the authority in the interest of the State.²⁰

All eligibility determinations are highly fact bound and specific to each case. 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

¹⁸ *In re: Sussex County and CWA*, Rep. 07-02-557, VI PERB 3949, 3957 (2008).

¹⁹ *North Miami Convalescent Home & Local 1115*, 224 NLRB 1271, 1272 (1976).

²⁰ *In Re: Delaware Dept. of Public Safety, DSP Communications Section and CWA*, REP 96-07-187, III PERB 1543, 1544 (1997).

supervisory status and thereby to deny public employees the rights guaranteed to them by the PERA.²¹

The State's assertion of supervisory status is limited to the authority to assign work and direct staff, to reward subordinate employees, to address their grievances, and to participate in the hiring process wherein they make effective recommendations in hiring decisions.²² The State's support for its assertion that Office Managers are supervisory employees included the testimony of the DHCQ Deputy Director, who only directly supervises one of the two Office Managers. Her testimony consisted of reviewing the Office Manager Job Description and the Performance Plan she prepared for Ms. Edwards in November, 2021, but under which Ms. Edwards had not yet been evaluated as of the date of the hearing.²³ Neither a Performance Plan, a Performance Evaluation nor testimony from a direct supervisor was provided for Ms. Andrews.

Much of the DHCQ Deputy Director's testimony was speculative, at best. When asked to explain Ms. Edward's daily supervisory responsibilities, the Deputy Director responded, "... I can only go by my expectation of what she should be doing..."²⁴ It is noted that Ms. Edwards has held the Office Manager position for more than three years.²⁵ If a grievance was filed by either the Administrative Specialist or the Operations Support Specialist who report to Ms. Edwards on the DHCQ organizational chart²⁶, the Deputy Director expected Ms. Edwards would hear the Step 1 grievance, although it is not listed as an expectation on her Performance Plan.

The Deputy Director also testified she expected Ms. Edwards to confront and resolve

²¹ *In RE: LIUNA 1029 & DSCYF/DPBHS/FCCU*, Rep. 16-09-1080, IX PERB 6907, 6916 (2017).

²² Consequently, there is no need to consider or address whether Office Managers have authority to transfer, layoff, recall, promote, discharge, or discipline employees.

²³ State Exhibits 4 and 5.

²⁴ TR p. 52-53.

²⁵ TR p. 11.

²⁶ State Exhibit 3.

problems through investigation, potentially disciplining employees. In the one example of an employee bringing a concern about the actions of another employee, the employee took her concern to both the Deputy Director and the Office Manager. It was the Deputy Director, not the Office Manager, who assumed responsibility for the investigation, notifying Ms. Edwards, “I will investigate and follow up with HR re: the incident and disposition.”²⁷

Hiring

Office Managers serve on hiring panels, which are required by State policy to include at least three individuals and to have a diverse composition. The evidence of record establishes both DHCQ Office Managers have served on hiring panels. Their participation consisted of asking questions (which they did not generate but which were provided by Human Resources) during employment interviews in a round-robin fashion with the two other panel members. Following the conclusion of the interviews, the Office Managers participated in discussion with the other panel members (each of whom held managerial positions) to evaluate the applicants’ effectiveness in the interviews. The Office Managers offered their opinions in this process, which the State asserts required the use of independent judgement based on their knowledge of the duties and responsibilities of the vacant positions. The ultimate hiring decision was made by a superior.

The fact that the successful applicant in any of these processes was the one an Office Manager, as a member of the interview panel, individually preferred does not equate to an effective recommendation.²⁸ The recommendation for hire came from the panel as a whole and is one consideration in the ultimate hiring decision. Nothing in the record established that the opinion of the Office Manager had any more weight than the other members of the panel, nor that the hiring

²⁷ State Exhibit 2.

²⁸ *In RE: LiUNA Local 1029 & DSCYF/DPBHS/FCCU* at 6921.

panel's input was the determinative criteria for selection of the successful candidate. Consequently, this evidence does not support the County's assertion that Office Managers have authority to hire their subordinates.

Reward Employees:

The State argued that because Ms. Edwards conducted the performance review of the Administrative Specialist, based on her "independent observations and conclusions", she has authority to reward employees when she evaluated the employee as meeting expectations.²⁹ Ms. Edwards testified she reached out to the Administrative Specialist to ask her "what her job duties were" and assembled the review based on the information provided.³⁰ The evaluation process was not completed as of the date of the hearing because the Deputy Director was required to review and provide final approval before the evaluation could be delivered. This Board held that the State's performance review process is not indicia of supervisory status because it is not undertaken independently by the evaluators.³¹

In *Thyme Holdings LLC v. NLRB*³², the DC Circuit Court of Appeals examined the employer's assertion that Licensed Vocational Nurses ("LVNs") working in its nursing home were supervisory employees because they had the authority to reward nursing home assistants.

Thyme maintains LVNs have authority to "reward" nursing assistants because they complete performance evaluations of the assistants, the results of which directly impact the assistants' individualized wage increases. To establish supervisory status on this basis, the employer must show a "direct correlation" between the evaluation and the reward, in that the evaluation directly leads to pay changes without management "independently investigat[ing] or chang[ing] the ratings." *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999); see *Franklin Hosp. Med. Ctr.*, 337 NLRB 826, 831 (2002). The completion of the evaluation must also rise above "a merely routine or clerical" activity and

²⁹ State's Opening Brief at p. 7.

³⁰ TR p. 25.

³¹ *In RE: LiUNA Local 1029 & DSCYF/DPBHS/FCCU* at 6922.

³² 2018 U.S. App. LEXIS 13936 (US Court of Appeals for DC Circuit, 2018), @ p. 4.

"require[] the use of independent judgment." 29 U.S.C. § 152(11). The evaluator must "at minimum act . . . free of the control of others and form an opinion or evaluation by discerning and comparing data." Oakwood, 348 NLRB at 692-93.

No evidence was adduced to establish a direct linkage between performance evaluations and a monetary or other reward. As evaluations are designed to reflect the performance of the employee being reviewed, a positive performance rating in and of itself is not a reward.

Assignment of Work

In *RE: Sussex County and CWA*³³, PERB adopted the NLRB's standard for evaluating a claim that an employee has authority to assign 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 only examples of assignment of work which were provided by the State were that the Office Managers are responsible to assure that the reception desk is covered. Ms. Edwards testified that she coordinates coverage for the front desk for the Long Term Care section, which is normally staffed by the Operations Support Specialist, sometimes covering the desk herself. Ms. Andrews testified that she was currently responsible for all front desk responsibilities in the Acute Care

³³ *Supra.*, p. 3959.

section (including answering phones and licensing questions) because the Administrative Specialist position had been vacant for most of the prior year and a half. The primary responsibility of the Operations Support Specialist and the Administrative Specialist in both divisions is to handle front desk responsibilities; it is the positions into which they were hired. No evidence was provided that the Office Manager had authority to assign or direct any other employee to perform these duties when the Operations Support Specialist or the Administrative Specialist was not available.

Responsibility to Direct

In order for an asserted supervisor to exercise “responsibility to direct” another employee, it must first be established that the employee directs others in performing their job duties.³⁴ It must also be established that the asserted 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.³⁵

The State relies on an incident in which Ms. Edwards worked with the Administrative Specialist in compiling binders for an IIDR³⁶ hearing. The Administrative Specialist expressed concern to both Ms. Edwards and to the Deputy Director about compiling what she considered to be incomplete information provided by the facility being reviewed. Because Ms. Edwards had prior experience in preparing the binders and with the format for presentation, she worked with

³⁴ *LIUNA & DSCYF*, Supra. at p. 6918.

³⁵ *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006).

³⁶ Informal Independent Dispute Resolution (“IIDR”), TR p. 70.

both the Administrative Specialist (who had not previously prepared IIDR Binders) and the Deputy Director to prepare the binders. The Deputy Director testified that Ms. Edwards trained both her and the Administrative Specialist while helping in the binder preparation, because Ms. Edwards “... knows how to do it.”³⁷ Ms. Edwards did not direct the Administrative Specialist to prepare the binders. Rather, she stepped in to help less experienced colleagues, as would be expected in any well-functioning workplace. Assisting in the training of less experienced employees to prepare binders does not constitute “responsible direction.”

The State also relied upon the Office Manager’s decision to change the process for handling incoming and outgoing mail as an example of their authority to direct other employees. Testimony established that the decision to move the table from the reception area into the Administrative Specialist’s office was made in conjunction with the Deputy Director. This is a clear example of modifying a process, rather than directing a subordinate employee.

In summary, the three witnesses testified to the best of their abilities and were credible. All of the arguments (and the cases cited by both parties as well as other applicable precedent) were carefully reviewed. When considering the evidence and argument as a whole, it is insufficient to support the conclusion that the two DHCQ Office Managers are supervisors within the meaning of 19 *Del. C.* §1302(s).

The State’s conclusory assertion that the managerial structure of DHCQ will be disturbed if the Office Managers are not excluded from representation is not supported by the record. The Office Managers are responsible for coordinating the office functions of the two sections of DHCQ, including supporting the DHCQ and section directors, ordering equipment and supplies, securing quotes for contractual services and equipment, overseeing the federal cost allocation plan

³⁷ TR p. 70-72.

and tracking expenses, updating the DHCQ website, helping in the development and implementation of the Continuity of Operations Plan (COOP), and are generally responsible to oversee and assure the smooth operations of their respective offices. The statutory exclusion requires direct and consequential supervision of subordinate employees. It is clear that these employees supervise process, rather than people.

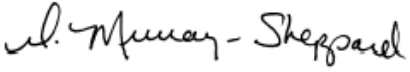
DECISION

Based upon the record created by the parties in this matter, Office Managers employed by the Delaware Department of Health and Social Services, Division of Health Care Quality and assigned to work locations in New Castle County are not statutory supervisors within the meaning of 19 *Del. C.* §1302(s). Consequently, DHSS/DHCQ Office Managers are public employees within the meaning of 19 *Del. C.* §1302(o) and are eligible to be represented for purposes of collective bargaining within the bargaining unit defined by DOL Case 47 and currently represented by AFSCME Local 1832.

WHEREFORE, the ballots cast by Office Managers which were challenged by PERB and impounded pending resolution of the question of supervisory status will be counted immediately. Should the majority of those ballots be in favor of representation, the bargaining unit will be modified to include DHCQ Office Managers assigned to work locations in New Castle County. 19 *Del. C.* §1311(d).

IT IS SO ORDERED.

DATE: September 8, 2023


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