

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

COMMUNICATIONS WORKERS OF AMERICA,	:	
DISTRICT 2-13, AFL-CIO, CLC,	:	
	:	
PETITIONER,	:	REPRESENTATION PETITION
	:	<u>23-12-1390</u>
AND	:	
	:	(CERTIFICATION)
STATE OF DELAWARE, DEPARTMENT OF	:	
STATE, OFFICE OF THE STATE BANK	:	
COMMISSIONER,	:	
	:	
RESPONDENT.	:	

**RE: DOS/OSBC CHIEF BANK EXAMINERS, REVIEW EXAMINERS,
AND INVESTIGATIVE SUPERVISORS**

Appearances

*Laurence M. Goodman & Joseph B. Salamon, Willig, Williams & Davidson
for CWA District 2-13*

Khrishna Hawkins, Labor Relations Manager, DHR/DELR, for DOS/OSBC

BACKGROUND

The Delaware Department of State (“DOS”) 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 Office of the State Bank Commissioner (“OSBC”) is a division of DOS.

Communications Workers of America, AFL-CIO, CLC (“CWA”) is an employee organization within the meaning of §1302(i) of the PERA.

CWA filed a Petition for Bargaining Unit Certification on December 4, 2023, with the

Public Employment Relations Board (“PERB”), seeking to create a bargaining unit which includes:

**ALL FULL-TIME AND REGULAR PART-TIME EMPLOYEES EMPLOYED
BY THE OFFICE OF THE STATE BANK COMMISSIONER INCLUDING:**

Administrative Specialists	License Investigators
Bank Examiners	Review Examiners
Chief Bank Examiners	Senior Accountants
Investigative Supervisors	Tax Auditors

By letter dated December 13, 2023, the State objected to the inclusion of the Chief Bank Examiner, Review Examiner, and Investigative Supervisor positions, asserting that they are statutory supervisors within the meaning of 19 *Del. C.* §1302(s).

By email dated December 26, 2023, CWA responded that the positions of Chief Bank Examiner, Review Examiner, and Investigative Supervisor do not meet the standards of a statutory supervisor required to exclude those employees from the right to be represented.

With the agreement of the parties, an election was held February 1, 2024, to determine whether the unchallenged, petitioned-for OSBC employees desired to be represented for purposes of collective bargaining by CWA. “Communication Workers of America” received a majority of the valid ballots cast in the election. As a result, a bargaining unit of non-supervisory OSBC employees was created and CWA, by and through its affiliated Local 13101, was certified as the exclusive bargaining representative of the unit. DOL Case 275.

Employees in the contested positions of Chief Bank Examiner, Review Examiner, and Investigative Supervisor were permitted to cast challenged ballots. Five ballots were cast and impounded, pending determination of their eligibility for representation.

In order to resolve the supervisory status of the Chief Bank Examiner, Review Examiner, and Investigative Supervisor positions, a hearing was scheduled and conducted on March 7, 2024, 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, the last of which was received on April 15, 2024. This decision results from the record thus created by the parties.

ISSUE

ARE THE CHIEF BANK EXAMINERS, REVIEW EXAMINERS, AND INVESTIGATIVE SUPERVISORS EMPLOYED BY THE OFFICE OF THE STATE BANK COMMISSIONER 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 of the State Bank Commissioner is responsible for administering and enforcing the provisions of Delaware's banking laws as found in Title 5 of the Delaware Code. The OSBC is responsible for:

- Maintaining a strong financial services industry;
- Chartering state banks and trust companies and regulating them to ensure their safety and soundness;
- Licensing non-depository institutions, including mortgage loan brokers, licensed lenders, mortgage loan originators, check sellers, money transmitters, check cashers, motor vehicle sales finance companies, money transporters, business and industrial development corporations and preneed funeral contract providers, and examining them for compliance with state and federal laws and regulations;
- Responding to consumer questions and complaints about regulated financial institutions;
- Administering the bank franchise tax, which covers all banking organizations and trust companies operating in the state and providing revenue estimates to the Delaware Economic Financial Advisory Council for state budgetary purposes;

- Developing proposed laws and implementing effective and efficient regulations to maintain an attractive economic environment for the financial services industry in Delaware;
- Providing consumer education for Delaware residents to improve understanding of financial services.

The State Bank Commissioner is appointed by the Governor, confirmed by the Delaware Senate, and serves a four-year term. The Deputy Bank Commissioner (“Deputy”) and the Senior Deputy Bank Commissioner (“Senior Deputy”) report directly to the Commissioner. The Senior Deputy oversees the Licensee Examinations and Depository Institutions Examinations sections of OSBC. An Administrative Specialist and two Review Examiners (one for each section) report directly to the Senior Deputy. There are no subordinates under the Review Examiner for the Licensee Examinations section. As of December 13, 2023, the Depository Institutions and Examinations section includes three Chief Bank Examiners, six Bank Examiners I, two Bank Examiners II, one Bank Examiner III, and one Bank Examiner IV.¹

The Deputy oversees the Administration and Non-Depository Institutions and Compliance sections of the OSBC. The Administration section includes a Tax Auditor III, a Senior Accountant, and an Administrative Specialist II. The Non-Depository Institutions and Compliance section is comprised of one Investigative Supervisor, an Administrative Specialist II, a License Investigator I, four License Investigators II, and one Investigator III.²

The Investigators I and III and Bank Examiners I, II, and III have defined career ladders. As stated in both classification specifications³:

... Employees may be promoted through the career ladder in accordance with minimum qualifications and promotional standards. Promotional standards, a selection document under separate cover, sets forth the criteria that defines and describes the requirements that must be met at each level. Advancement of

¹ State Exhibit 3.

² State Exhibit 3.

³ State Exhibits 1 and 16.

employees through the career ladder is dependent on an agency's/department's operational needs and distribution of work.

Examples of the Career Ladder Promotional Certification packet for two Bank Examiners and for an Investigator from 2022 were submitted as State Exhibits 11, 12, and 19, respectively. Each packet includes a checklist and form which must be completed.

OSBC has an effective and well-defined process for promoting employees through the career paths. Bank Examiners and Investigators are assigned to specific investigations and license applications to ensure they have on-the-job training and experience required for promotion through the career ladder. Examiners and Investigators are reviewed throughout the year by those providing the training to assess progress toward meeting promotional standards. Testimony established that the three Chief Bank Examiners together compile the promotional package for a Bank Examiner, on which the Review Examiner must sign-off.⁴ The Investigative Supervisor compiles the promotional package for career ladder advancement for Investigators.⁵ The Career Ladder Promotional packets must be reviewed by the appropriate Deputy Commissioner and the Commissioner. Final approval must be granted by the Department of Human Resources.

Additional facts derived from the record are included in the substantive portions of this decision.

POSITIONS OF THE PARTIES

State:

The State argues that the Investigative Supervisor, Chief Bank Examiner, and Review Examiner positions are supervisors within the meaning of 19 *Del. C.* §1302(s). It asserts they engage in hiring, disciplining, promoting, discharging, assigning, directing staff and/or effectively

⁴ Transcript (“TR”) at p. 66.

⁵ TR. at p 109.

recommending such actions. Their actions are not merely clerical or administrative and they exercise independent judgement in the interest of OSBC in performing these duties.

It asserts that all three classifications would have the authority to either discharge and/or discipline employees, or to effectively recommend such action, although they have not been called upon to exercise this authority.

The Investigative Supervisor is responsible for the hiring process for the Administrative Specialist for the Non-Depository Institutions and Compliance section. She designates assignments to Investigators to ensure that they reach the required benchmarks to qualify for career ladder promotion. She is also responsible for assigning work and directing Investigators in scheduling, conducting investigations and learning the skills necessary to be effective. The Investigative Supervisor is held accountable to complete the duties listed on her annual performance plan, including supervising and managing the investigatory team.

The State asserts Chief Bank Examiners are field supervisors and not just lead workers, who handle issues which arise during bank examinations relating to personnel management and examination questions. They are responsible to ensure that Bank Examiners are progressing through the career ladder and that they are trained and become proficient on all components of examination protocols and guidelines.

Chief Bank Examiners are held accountable to perform the duties enumerated on their annual performance plans, including conducting pre-examination reviews, determining the scope of examinations, drafting supervisory correspondence, and monitoring and evaluating the performance of Bank Examiners. Chief Bank Examiners work together collaboratively to evaluate Bank Examiners I, II, and III for promotion, based on the subordinates training and performance as part of examination teams.

The State argues that the Review Examiner for Depository Institutions and Examinations

creates schedules and assigns examiners to tasks, including determining who to assign to specific institutions, how long an examination should take and when it will begin. She can also be held accountable for failing to perform duties described in her performance plan.

Although the Review Examiner for Licensee Examinations does not directly supervise any subordinate employees, the State argues she does direct staff in the interest of OSBC. She is responsible for the duties included on her annual performance plan, including reviewing examination reports and the operations of licensed non-depository financial institutions to ensure compliance with all regulatory requirements. She also serves as a liaison between the Senior Deputy and the examination field staff. She can be held accountable for the failure of lower classification employees to meet expectations or perform satisfactorily.

Consequently, the State concludes, the Investigative Supervisor, Chief Bank Examiner, and Review Examiner positions are statutory supervisors and are, thus, ineligible to be represented by CWA or any other labor organization for purposes of collective bargaining.

CWA:

CWA argues that the State has failed to meet its burden to establish that the Investigative Supervisor, Chief Bank Examiner, and Review Examiner positions in OSBC are statutory supervisors within the meaning of 19 *Del. C.* §1302(s).

It asserts that the assignment functions performed by the Investigative Supervisor are merely routine and clerical and cannot support a finding of supervisory status. In scheduling Investigators, the primary concern is ensuring that they are getting the required experience for career ladder promotion. The Investigative Supervisor does not set the promotional requirements and does not have discretion as to where or when to assign Investigators.

Similarly Chief Bank Examiners are not responsible for assigning work. The Review

Examiner is responsible for setting the schedule and assignments for all Bank Examiners. Chief Bank Examiners provide general guidance and feedback to Bank Examiners (as do other senior Bank Examiners). It further argues that the evidence does not support the State's conclusion that the Chief Bank Examiners have authority to discharge employees based on a single example when Chief Bank Examiner recommended not retaining an Examiner who was unsuccessful during the term of the employee's probationary employment.

Chief Bank Examiners do not have independent authority to promote or reward Bank Examiners. In preparing annual performance reviews for Bank Examiners, the Chief Bank Examiners consult with each other, the Review Examiner and the Deputy Commissioner. The same is true for promotion of Bank Examiners through the career ladder.

CWA asserts the Review Examiner for Licensee Examinations has no subordinate employees. She has never evaluated or disciplined a Bank Examiner. She provides training to Bank Examiners as a subject matter expert. Even her recommendations for training have to be approved in advance by the Senior Deputy Bank Commissioner.

The Review Examiner for Depository Institutions and Examinations in scheduling employees to bank examinations is performing routine and clerical functions. She has no discretion as to when to schedule an examination, as they occur at regular intervals. In assigning individual Examiners, she is primarily concerned with ensuring the employees are receiving sufficient training and experience to meet the established criteria for career ladder promotion. She also does not direct examiners when she reviews the draft examination reports prior to making any changes to a report; rather, she consults with the Senior Deputy Bank Commissioner.

For these reasons, CWA concludes the State has failed to meet its burden to establish the Investigative Supervisor, Chief Bank Examiner, and Review Examiner positions perform supervisory functions as defined in the PERA. Consequently, they are eligible for representation

for purposes of collective bargaining and are appropriate to be included in the bargaining unit with other OSBC positions.

OPINION

The Public Employment Relations Board has broadly construed employee representation as a fundamental right of public employees in Delaware under the Public Employment Relations Act.⁶ 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].”⁷

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 that the positions are, in fact, statutory supervisors within the statutory definition.⁸ The statute focuses on workers’ authority to supervise other employees (rather than a process), not on what a position is called. 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.⁹ In order to meet the statutorily defined level of authority and responsibility, duties must be fundamental and consequential and employees must be held accountable for the performance of those duties.¹⁰ Supervisory status is determined based on the preponderance of

⁶ *In re: University of Delaware Bus Drivers*, Representation Petition 95-04-126, II PERB 1207, 1210 (1995).

⁷ *In re: Internal Affairs Officer of the Wilmington Fire Department*, Representation Petition 95-06-142, II PERB 1387, 1397 (1996).

⁸ *In re: Sussex County and CWA*, Rep. 07-02-557, VI PERB 3949, 3957 (2008).

⁹ *North Miami Convalescent Home & Local 1115*, 224 NLRB 1271, 1272 (1976).

¹⁰ *AFSCME Local 3109 & New Castle County*, Rep. 17-02-1096, IX PERB 6943, 6949 (2017); citing *LiUNA Local 1029 & DSCYF/DPBHS/FCU*, Rep. 16-09-1080, IX PERB 6907, 6916 (2017).

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).

To establish the supervisory status of the contested OSBC positions, the State must affirmatively prove:

- 1) The contested positions have the authority to engage in at least one or more of the twelve activities listed in 19 *Del. C.* §1302(s);
- 2) That they are required to use independent judgment in exercising that authority; and
- 3) That they hold and exercise the authority in the interest of the State.¹¹

All supervisory determinations are highly fact bound and specific to each case. 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.¹² Deciding whether an employee exercises supervisory authority,

... 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 issues...¹³

The State's assertion of supervisory status for these three classifications is limited to the authority to hire, discipline, promote, reward, assign, and direct subordinates. It does not contend

¹¹ *In Re: Delaware Dept. of Public Safety, DSP Communications Section and CWA*, REP 96-07-187, III PERB 1543, 1544 (1997).

¹² *In RE: Kent County Paramedics*, Rep. 04-08-447, V PERB 3235, 3240 (2005).

¹³ *Northcrest Nursing Home*, 313 NLRB 491, 493 (1993).

that any of these positions have the authority to transfer, suspend, lay-off, recall, discharge, or to adjust the grievances of other employees, or to recommend any of these actions in the interest of OSBC. The State's support for its assertion that the Investigative Supervisor, Review Examiners, and Chief Bank Examiners are supervisory employees included the testimony of the Senior Deputy Bank Commissioner and the Deputy Bank Commissioner. CWA called a Chief Bank Examiner and the Review Examiner for the Licensee Examination section.

Chief Bank Examiners

The job description for Chief Bank Examiner states, in relevant part:

This level is responsible for the examination of financial institutions at the administrative level as examiner in charge and supervising a team of Bank Examiners.

- Supervision is exercised over at least two or more full time positions per Merit Rule 5.1460¹⁴, both of which must be in the Bank Examiner series.

¹⁴ Merit Rule 5.1460 was adopted on April 25, 1987, and revised November 1, 1988, and April 13, 1992. It is clear that it was intended to create a wage premium for employees performing the requisite supervisory functions, as listed therein. It stated:

5.1460 Supervisory Pay

Recognition of supervisory duties shall be included in assigning position classifications. In order for a position to be considered for classification purposes as a supervisor, the position must, on a regular and continuing basis, plan, assign, review, discipline, recommend hire, termination, and promotion and complete and approve performance plans of two or more classified employees excluding casual, seasonal and contractual employees. Therefore, pay supplements for supervisory duties will not be made except as provided in 5.1461.

A supervisor may have subordinates who are paid at a rate higher than his rate, since pay rates do overlap as length of service varies and since a subordinate position may have the same pay grade, due to other factors of job content. However, no appointing authority shall assign a lower pay grade to supervise, even temporarily, a higher pay grade, without the written approval of the Director.

An employee receiving a supervisory supplement under the previously effective rules at the time of this revision shall not have this pay reduced, as long as he continues to qualify for that supplement under those provisions.

However, he shall receive no further increments except as herein defined.

Current Merit Rules define a supervisor to mean: "[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.

- The elements of supervision include planning, assigning, reviewing, evaluating, coaching, training, recommend hire/fire and discipline...

Planning, reviewing, evaluating, coaching, and training are not criteria for supervisory status under the PERA. They are, however, included in the definition of “supervisor” in the State’s Merit Rules which is used to classify and determine compensation under the State’s merit system:

“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.¹⁵

I note that the merit rules require that a supervisor perform these duties on a regular and continuing basis. This Board has held that supervisory duties must be fundamental and consequential responsibilities in order to disqualify a public employee from the right to be represented.

The Public Employment Relations Board does not enforce, apply, or interpret the State’s merit rules. PERB’s authority is limited to application of the more limited supervisory definition in the PERA for the purpose of excluding certain employees from the protections afforded to public employees generally by the statute.

Testimony established that the Review Examiner assigns work to the Bank Examiners and Chief Bank Examiners.¹⁶ The Review Examiner assigns Bank Examiners and Chief Bank Examiners to individual examinations. She also assigns an Examiner in Charge for each examination, which may be a Chief Bank Examiner, a Bank Examiner III or IV, or even a Bank Examiner II who is training with a senior mentor.

The NLRB has found that employees who possess greater skills or experience than their fellow employees often give instructions and direction to other employees regarding what to do next and how to work more skillfully or efficiently. The more experienced employees are

¹⁵ Delaware Merit Rules, Section 19, Definitions.

¹⁶ TR. at p. 47 describing State Exhibit 5.

generally regarded as lead workers. The authority to give this type of general assignment or direction, without more, does not confer statutory supervisory status.¹⁷

The State argues that the responsibility to review the performance of other employees as the primary evaluator is an indicium of supervisory status. This Board held that the State's performance review process does not support a determination of supervisory status because it is not undertaken independently by the evaluators.¹⁸ The State's Performance Review process requires that evaluations be prepared by an assigned evaluator and then be reviewed by a superior reviewer before they can be presented to the employee being evaluated. Additionally, there are no rewards inherent in receiving an acceptable evaluation as the performance review is a reflection of the work performed in the past.¹⁹

Testimony established the Chief Bank Examiners worked together as a team of three in compiling the performance reviews of Bank Examiners.²⁰ They collectively assembled the notes provided for each Examiner (at the conclusion of examinations on which they had been team members) by the Examiner-in-Charge as well as by other Examiners who functioned as mentors during an examination. Testimony further established that the Chief Bank Examiners also discussed their draft performance evaluations with each other and with the Review Examiner

¹⁷ *Northcrest Nursing Home*, at p. 494-495.

¹⁸ *In RE: LIUNA 1029 & DSCYF/DPBHS/FCCU* at 6916.

¹⁹ Merit Rule 13.3: When an employee's work performance is considered unsatisfactory, the performance must be documented in writing, and the specific weaknesses must be made known to the employee. The employee shall be given documented assistance to improve by the designated supervisor. An opportunity for re-evaluation will be provided within a period of 3 to 6 months.

Section 8(c)(1)(iv) of the FY 2024 State Budget further provides:

Any Merit System employee who is denied the salary increase referred to in Section 8(c)(1)(i) due to an unsatisfactory performance rating in accordance with Merit Rule 13.3 shall become eligible for the salary increase upon meeting job requirements as defined by their supervisor, but the salary increase will not be retroactive.

²⁰ TR. at p. 81.

before finalizing the printed review to be presented to the Examiner.

The three Chief Bank Examiners work together collaboratively.²¹ The Senior Deputy Chief Commissioner testified that when she was a Chief Bank Examiner (2012-2015) she was:

... in the field overseeing the staff of Bank Examiners, I, II, III and IVs. I was one of three. There's three Chief Bank Examiners.... [W]e ensure that the examination takes place, that there's no real issues, hiccups, if you will, that the team is getting the particular training that they need. Individuals within the career ladder are getting the training that they need, on the job training. We also, as Chief Bank Examiners, made sure that they got training – outside training, meaning going to... we utilize other training facilities. For example, FDIC provides training because they regulate banks as well. So we would utilize them, the Federal Reserve, CFPB, CSBS, that's the Conference of State Bank Supervisors.²²

...

During that time, I was making sure that when an examination was taking place, that the examination was getting done in accordance to the time frame that it was scheduled for, making sure that the individual was reviewing the... as they're reviewing the area that they're assigned, that they are doing an adequate job, that they understand. There's a lot of training on the job, training that comes along with bank examining. So for those that are under you make sure that they're understanding, they get what they need. The goal is to progress through the career ladder.²³

The Senior Deputy Bank Commissioner explained that the training provided to junior level Bank Examiners was based on a manual and exposing them to all the component parts of the examination process as a component of their on-the-job training. Chief Bank Examiners provide guidance and act as mentors to junior examiners,²⁴ as do Bank Examiners III and IV. The OSBC's mentorship program is well-defined and appears to be both effective and efficient. A Chief Bank Examiner testified:

The mentoring program has evolved throughout the years. And what happens is, from the Bank Examiner III/IV and Chief ... there would be individuals

²¹ TR. at p. 19.

²² TR. at p. 20.

²³ TR. at p. 25.

²⁴ TR. at p. 27.

assigned to Junior Examiners to mentor them and train them throughout their career ladder progression.

So as a mentor... you may or may not mentor the certain individual that you're assigned to, but you'd be the mentor on the examination. But for example, using myself, I have mentees when I was a Bank Examiner III and a IV...

What you would do is you would do mentor progress reports on a quarterly basis. You would meet with the individuals assigned to you. You would kind of go through their progression just to see where they are, if they need any type of additional work or reference to the different processes or things. The items that they're working on in the examination...

And then that is actually overseen by the Review Examiner and working throughout that process is working with the Review Examiner and the mentor reports, which are filed quarterly with the Review Examiner. That's how the certain assignments are doled out or certain things to ensure that everyone has an opportunity to progress through the career ladder.²⁵

The Senior Deputy Bank Commissioner testified that if a personnel issue occurred in the field, while she was a Chief Bank Examiner, she was responsible to take it back to discuss with the Review Examiner.

The identical 2024 Performance Plans²⁶ for the three Chief Bank Examiners summarizes their roles in supervising the Examination process, including conducting pre-examination reviews, determining the scope of the examination, overseeing and administering the examination process in accordance with standard examination procedures to meet regulatory objectives, draft supervisory correspondence for both depository and non-depository institutions, etc. The only listed responsibilities which require interaction with Bank Examiners include mentoring assigned mentees²⁷ in all aspects of job responsibilities, monitoring and evaluating the performance of examiners, and developing remediation plans for junior examiners who are performing below expectations.

Based on the record created, the duties and responsibilities of Chief Bank Examiners are

²⁵ TR. at p. 117-118.

²⁶ State Exhibits 8, 9, and 10.

²⁷ It is noted that the Chief Bank Examiners are not choosing their mentees, but are assigned mentees.

not sufficient to establish that they are statutory supervisors.

Investigative Supervisor:

The State employs the job description for the Investigative Supervisor to support its position that this is a supervisory position with authority to hire, discipline, assign, and direct subordinates.²⁸ Under “Essential Functions” the document states:

... Since class specifications are descriptive and not restrictive, employees can complete job duties of a similar kind not specifically listed here...²⁹

The classification specification covers the Investigator series from Investigator I, II, III and the Investigative Supervisor, as last revised October 22, 2023. There is a career ladder for Investigator I and II³⁰, but the Investigator III and Investigative Supervisor positions are filled competitively. The job description lists the essential functions of all positions in the Investigator classifications, and lists the job requirements for an Investigative Supervisor, which includes “Coursework, training and/or work experience in staff supervision which may include performing as a lead worker overseeing the work of others.”³¹

The more relevant document is the Performance Plan which lists “the duties, projects or performance standards that will be used for evaluation purposes”.³² The 2024 Performance Plan for the sole OSBC Investigative Supervisor lists her duties to include:

- Supervise and manage the investigative team in a professional manner.

²⁸ State Exhibit 16.

²⁹ State Exhibit 16, p. 2/8.

³⁰ The Classification Specification notes there is a career ladder for Investigator levels I and II. It further states, “The promotional standards, a selection document under separate cover, sets forth the criteria that identify, measure, and verify successful performance at each level. The advancement of employees through the career ladder is dependent on an agency’s or department’s operational needs and distribution of work.”

³¹ *Ibid*, at p. 7 of 8.

³² State Exhibit 17.

- Investigate complex and/or unusual complaints and make determinations as required.
- Communicate with the industry and other regulatory agencies in a way that displays knowledge of regulatory compliance.
- Properly navigate the Nationwide Multistate Licensing System site.
- Review applications for licensure, noting missing information, and make determinations as required.
- Review reports of unlicensed activity and make determinations as required.
- Develop training plans for investigators.
- Manage departmental projects such as license renewal and supervisory assessment.
- Consistently follow established policies and procedures and maintain confidentiality.
- Consistently follow the State of Delaware's Acceptable Use Policy, reviewed annually.³³

The Deputy Bank Commissioner (to whom the Investigative Supervisor reports) testified the Investigative Supervisor receives the reports on licensee applications from the six Investigators that report to her.³⁴ If the Investigative Supervisor finds a report to be incomplete, she may send it back to the Investigator and direct him/her/them to make necessary changes and/or to contact the applicant directly for additional information. He testified that while the Investigative Supervisor could, potentially, reprimand an Investigator who does not make the required changes, the practice is that these types of issues would be discussed with the Deputy Bank Commissioner who would determine the next steps.³⁵

Considering the job description and the testimony of the Deputy Bank Commissioner, the record is insufficient to establish that the Investigative Supervisor has authority to discipline other investigators.

³³ *Ibid.*

³⁴ TR at p. 101.

³⁵ TR at p. 102.

It is undisputed, however, that the Investigative Supervisor does schedule and coordinate the assignment of Investigators to review licenses and complaints. While those assignments are largely based on enabling Investigators I to gain the experience and training necessary to be promoted within the career ladder to Investigator II positions, she must also assign the Investigators II and III. The majority of the Investigators working under the Investigative Supervisor are Investigators II and III, whose assignment would be based on something other than career ladder promotional standards. As the Investigative Supervisor is responsible for the “assignment, completion and reporting of results of the departmental workflow”³⁶ assigning work to Investigators is a fundamental and consequential responsibility for which she is held accountable.

Testimony and documentary evidence also establishes that the Investigative Supervisor has authority to hire at least the Administrative Specialist who reports to her. The Deputy testified the Investigative Supervisor:

... reached out to [Human Resources] to let them know about the vacant position... [S]he submitted the PAR³⁷ for termination because the prior employee in that position left their office in bad terms... [and then submitted] a request to hire.³⁸

He testified, without dispute, that the Investigative Supervisor also assembled a hiring panel of four people, drafted the questions for interviews, reviewed the referral list of applicants, and selected the applicants to be interviewed.³⁹

Based on the record created by the parties, the Investigative Supervisor does meet the requirements of a statutory supervisor as she has the authority to exercise independent judgement

³⁶ State Exhibit 17.

³⁷ Personnel Action Request.

³⁸ TR. at p. 103-104.

³⁹ State Exhibit 18.

in assigning work and in hiring at least one subordinate employee. Consequently, the Investigative Supervisor is ineligible for representation for purposes of collective bargaining at this time.

Review Examiner

The Senior Deputy testified that the Review Examiner responsible for the Depository Institutions and Examinations section is “the only one doing the scheduling”:

[S]cheduling for our office is a job in and of itself, because not only [does the Review Examiner] have to ensure that all of the examiners are getting what they need... to make sure that they can progress through the career ladder, making sure that they have the correct mentor in place to get the training that they need, but ... also have to coordinate with the institution. So it is a lot of coordinating and collaborating, and it takes a lot of time, and it’s very time consuming. As far as assigning a job, the review examiner would do that.⁴⁰

She also testified concerning the preparation of examination reports:

The examiner in charge⁴¹ who writes the report has a duty to make sure that it’s well written. And then, at that point, that examination is what we call in our office censored by another examiner. So it could be someone within the career ladder or a chief bank examiner, but it’s censored by another examiner, another field examiner... [W]hen I was a review examiner, I reviewed the report of examination, and then the deputy does review it as well, and then [the Bank Commissioner].⁴²

The Review Examiner has authority, if a mistake is found, to either make the correction or to return it to the examiner-in-charge for correction. The record supports the conclusion that the Review Examiner for the Depository Institutions and Examinations section has fundamental and

⁴⁰ TR at p. 31-33.

⁴¹ It is undisputed that any examiner from a Level II through IV or a Chief Bank Examiner may be assigned by the Review Examiner and may serve as an examiner in charge. As explained by the Deputy Commissioner, “... [Examiners in Charge are] ultimately responsible for the examination to ensure that the different areas of review are being completed. They work through the process to begin the examination, complete the examination, ensure that it goes through the censoring process, which could be another Bank Examiner before it is handed in to the Deputy Bank Commissioner for review.” *TR at p. 119*. Serving as an examiner-in-charge is also listed in the Levels of Work for Bank Examiners II through IV, and for Chief Bank Examiners. *State Exhibit 1*.

⁴² TR p. 33-34.

consequential authority to assign work to the employees in the Depository Institutions and Examinations section.

The Review Examiner responsible for the Licensee Examinations is a very different story. There are no employees who report to her directly, she does not evaluate nor has she ever disciplined any other employees. She serves as a subject matter expert, providing training on changes to state and federal laws that impact the examination process. She may, on occasion, perform or be part of an examination.⁴³ When she is tasked with reviewing an examination, she provides comment and feedback and may ask that additional information be included in a report. She can also make changes to a report when it is clear that an examiner has misunderstood a federal or state law or policy.⁴⁴ She also provides training to Bank Examiners and Chief Bank Examiners, serving as resource and providing guidance on changing requirements or in areas where there appears to be a need. She keeps the Senior Deputy Bank Commissioner informed on the work that she is doing.⁴⁵ The current Performance Plan for this position does not include any supervisory duties in the list of “the duties, projects or performance standards that will be used for evaluation purposes.”⁴⁶ Identifying an employee as a supervisor, without more, is insufficient to tip the scale in favor of excluding the position from the right to be represented for purposes of collective bargaining.

The functions and responsibilities of the Review Examiner for Licensee Examinations and the Review Examiner for the Depository Institutions and Examinations are very different and are distinct. The record is not sufficient to conclude that the Review Examiner for Licensee

⁴³ TR p. 50.

⁴⁴ TR p. 148 – 153.

⁴⁵ TR p. 53 – 56.

⁴⁶ State Exhibit 6.

Examinations has fundamental and consequential authority to assign work, or hire, direct, or discipline other employees in the OSBC.

While it is unusual to make a distinction between two positions which hold the same classification, the differences in this case are stark. All determinations on supervisory status are temporally and factually anchored in the facts presented at the time the question is raised. The record supports the conclusion that the two OSBC Review Examiner have very different responsibilities and perform unique functions. Only the Review Examiner for the Depository Institutions and Examinations section has bona fide supervisory responsibilities and is, therefore, ineligible for representation for purposes of collective bargaining by application of §1302(s) of the PERB.

Finally, the presentations by counsel were well done and the arguments submitted were clear and direct. The Office of the State Bank Commissioner was presented as well-organized and effective. Its process for moving employees through career path progression is textbook and is to be commended. It is clear that the people in this office take pride in their work and work together collaboratively and well to advance the office's charge.

DECISION

Based upon the record created by the parties in this matter, the Investigative Supervisor for Non-Depository Institutions and Compliance and the Review Examiner for Depository Institutions and Examinations are determined to be statutory supervisors within the meaning of 19 *Del. C.* §1302(s). Consequently, they are ineligible for inclusion in the bargaining unit by operation of 19 *Del. C.* §1310(d).

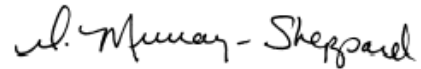
Chief Bank Examiners and the Review Examiner for Licensee Examinations are determined not to be statutory supervisors within the meaning of 19 *Del. C.* §1302(s).

Consequently, they are public employees within the meaning of 19 *Del. C.* §1302(o) and are eligible to be represented for purposes of collective bargaining.

WHEREFORE, the ballots cast by Chief Bank Examiners and the Review Examiner for Licensee Examinations 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 Chief Bank Examiners and the Review Examiner for Licensee Examinations.

IT IS SO ORDERED.

DATE: June 12, 2024



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