

8. The parties stipulated and agreed that the director of the Mann Older Adult Center, held by Brenda Collazo, is a first level supervisor and shares a community of interest with the other members of the unit certified by the Board at PERA-R-1063-E. (N.T. 16, 36)

9. The parties stipulated and agreed that the director of the Juniata Park Older Adult Center, held by Donna McKinney, is a first level supervisor and shares a community of interest with the other members of the unit certified by the Board at PERA-R-1063-E. (N.T. 18, 35)

10. The parties stipulated and agreed that the director of the South Philadelphia Older Adult Center, held by Lynn Marshall, is a first level supervisor and shares a community of interest with the other members of the unit certified by the Board at PERA-R-1063-E. (N.T. 15, 18)

11. Dawn Perry is the Director of the Martin Luther King, Jr. Older Adult Center. She is responsible for overseeing the operations of the programs at the center and the facility itself. (N.T. 46-47, 54 Respondent Exhibit 1)

12. Perry supervises four full-time employes and one part-time employe. There are also five employes identified as Mayor's Commission employes. (N.T. 46-47, 49)

13. The full-time employes Perry supervises are Rosalyn Koefer, a social worker II; Raymond Glass, maintenance worker; Phyllis Brice, a clerk stenographer II and Kimberly Abrams, a social worker trainee. The part-time employe is a nutritionist, who has responsibilities over the two kitchen employes, who are paid by the Mayor's Commission. (N.T. 48-50)

14. Koefer works as a program director at the center and must submit proposed programs to Perry for her approval. Perry makes sure there is money in the budget to pay for the programs. She tries to spend money consistent with how it was spent the previous year. (N.T. 51-53)

15. Perry administers the center and must follow a budget that is established by the city department of recreation and funded by the city department of recreation and the Philadelphia Corporation for the Aging (PCA). (N.T. 53-54, 60)

16. On occasion, Perry has to change the opening and closing time of the center, which is located within a recreation center building and must occasionally make way for the recreation center's program needs. (N.T. 56-57)

17. None of the King Center employes supervised by Perry are responsible for supervising other employes on a regular basis. They only exercise supervisory responsibility when Ms. Perry is not there due to sick leave or vacation leave. (N.T. 46, 49-50, 58-60)

18. Perry is the person at the King Center who is responsible for all of the employes' evaluations and for verifying their time and leave statements. (N.T. 58-59)

19. The social worker II oversees the volunteers who help at the center. (N.T. 56)

20. Maria Ramirez is the director of the Northeast Philadelphia Older Adult Center. (N.T. 62)

21. Ramirez supervises five full-time employes and six part-time employes. (N.T. 65-68, Respondent Exhibit 1)

22. Between 70 and 80 volunteers also work under Ramirez. (N.T. 65)

23. One of the full-time employes working under Ramirez is a Social Worker II. When Ramirez is on leave, the Social Worker II performs Ramirez' supervisory work. (N.T. 66)

24. One of the part-time employees is a nutrition aide, who, in Ramirez' words, "manage[s] the kitchen and makes sure that the kitchen aides are doing what they are supposed to and keep everything in order." (N.T. 65, 67)

25. Ramirez is the only supervisory employe in the Northeast Older Adult Center. She is the only employe with the authority to approve leave, to evaluate employes and to discipline employes. (N.T. 70-71)

26. The Northeast Center serves approximately 180 lunches a day. Ramirez has discretion over the starting times for meals and who eats first. (N.T. 69)

27. The Northeast Center's budget for personnel is established by managers in the City's Department of Recreation. Ramirez has nothing to do with that part of the budget. (N.T. 71)

28. The Northeast Center's lunch and transportation programs are funded by the Philadelphia Corporation for Aging. As for that part of the budget, Ramirez makes requests for the center's needs, but she does not make the funding decision. She does not always receive what she requests. This is the same funding pattern with all the older adult centers. (N.T. 72)

DISCUSSION

The Union's petition for unit clarification seeks to include six Older Adult Center Directors in the civil service first level supervisory unit of City of Philadelphia employes represented by the Union.

At the hearing, the Union withdrew its petition for one of the positions, the Director of the West Oak Lane Older Adult Center, held by Sharlene Waller. The Union and the City stipulated that the position is a non-civil service supervisory employe. The parties agreed that being outside of civil service, the position would not share a community of interest with the other positions which are civil service.

The parties also stipulated and agreed that three of the directors -- at Mann, Juniata Park and South Philadelphia - were first level supervisors. Accordingly these positions will be included in the supervisory unit.

The City opposes the inclusion of the Director of the Martin Luther King, Jr. Older Adult Center, held by Dawn Perry, and the Director of the Northeast Older Adult Center, held by Maria Ramirez.

As a threshold matter, in order to prove a unit clarification petition, the Union must show that the positions at issue share an identifiable community of interest under section 604(1)(ii) of PERA, 43 P.S. 1101.604(1)(ii).

In the Matter of the Employes of Spring Grove Area School District, 38 PPER 54 (Proposed Decision and Order, 2007):

To determine whether employes share an identifiable community of interest, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours and benefits, areas of work, working conditions, interchange of employes, supervision, grievance procedures, bargaining history, and employe desires. Fraternal Order of Police v. PLRB, 557 Pa. 586, 735 A.2d 96 (1999); West Perry School District v. PLRB, 752 A.2d 461 (Pa. Cmwlth. May 26, 2000), affirming, 29 PPER ¶ 29110 (Final Order, 1998); Allegheny General Hospital v. PLRB, 322 A.2d 793 (Pa. Cmwlth. 1974). An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours and working conditions or other factors. Id. As the Commonwealth

Court stated in Western Psychiatric Institute and Clinic v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974):

"We do not read Section 604 [of PERA] to mean . . . that an identifiable community of interest cannot exist without some differences in requirements of experience, skills and education . . . To accept [that] proposition would lead to . . . over-fragmentation . . . [T]he Board's determinations may not ignore the effects of over-fragmentation and . . . the units must be as few as practicably can be"

Id. at 260.

In the Matter of the Employes of Spring Grove Area School District, 38 PPER 54 at 143 (Proposed Decision and Order, 2007).

The Union proved that there is an identifiable community of interest between the directors of these two Older Adult Centers and the other supervisory positions in the unit. Just like the other supervisors in the unit, they are responsible for supervising other employes and do so by actually performing the duties set forth in Section 301(6) of PERA. Accordingly, the Union has established a community of interest between these supervisors and the other supervisors in the existing unit.

Director of Martin Luther King, Jr. Older Adult Center

This position is held by Dawn Perry. The City's contends that this position should be excluded because it is a management level employe under section 301(16) of PERA, which states:

(16) "Management level employe" means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision.

43 P.S. § 1101.301(16). Under this provision, a position is at the management level if the employe holding that position (1) is involved directly in the determination of policy; (2) directs the implementation of policy; or (3) is above the first level of supervision. Pennsylvania Association of State Mental Hosp. Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1988); Commonwealth of Pennsylvania (Attorneys Examiner I), 12 PPER ¶ 12131 (Final Order, 1981)

The City contends that Perry meets all three tests of a management level employe. The first basis for management level status is that Perry is "involved directly in the determination of policy." In deciding the City's contention, it is necessary to analyze the responsibilities of the director compared to the responsibilities of superiors in headquarters.

In Pennsylvania Association of State Medical Hospital Physicians v. Commonwealth, PLRB, 554 A. 2d 1021 (Pa. Cmwlth. 1989), the Commonwealth Court adopted the Board's definition of the first part of Section 301(16) of PERA as set forth in Horsham Township, 9 PPER 9157 (Final Order, 1978)

An individual who is involved directly in the determination of policy would include not only a person who has authority or responsibility to select among options and to put proposed policies into effect, but also a person who participates with regularity in the central process which results in a policy proposal and a decision to put such proposals into effect. Our reading of the statute

does not include a person who simply drafts language for the statement without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

9 PPER at 327.

The City has not proven that Perry is involved directly in the determination of policy. The policy for the King Center, and the other centers, is determined at management levels in the City's Department of Recreation and the Philadelphia Corporation for Aging.

The City's second argument for excluding the director as a management level employe is that Perry "directs the implementation of policy." In Horsham Township, supra, the Board set forth its definition of the second part of section 301(16) of the Act as follows:

We interpret [the phrase 'any individual . . . who responsibly directs the implementation' of policy] to include those persons who have a responsible role in giving practical effect to and insuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task. The administration of a policy involves basically two functions: (1) observance of the terms of the policy and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine and ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operations. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy. Furthermore, the interpretation of policy would constitute responsible implementation of policy as a continuation of the managerial decision-making process.

9 PPER at 327.

The City's argument that Perry "responsibly directs the implementation[of policy]" was based on Perry's decisions as to when to open and close the center. Perry must make such decisions when conflicts arise with City Recreation Department over use of the building in which it operates. However, these decisions are not a change that would rise to the level of a "change in procedure or methods of operations." Id. The Older Adult Center programs did not change with the change as a result of the change in the opening and closing time of the center. As such this is not evidence that would support a conclusion that Perry "responsibly directs the implementation of policy."

The City's third argument for excluding this position as management level rests on the third test of the statutory definition of management level employe. The City argues that Perry, the director of the King Older Adult Center, is "above the first level of supervision." The City contends that the senior adult center director supervises a social worker II, who is in charge of volunteers at the center, and a nutritionist, who works over kitchen employes.

In interpreting the third test of a management level employe, the Board has held that "in order to be excluded as a management level employe by virtue of being above the first

level of supervision, the position must supervise the first level supervisor." In the Matter of the Employees of Pennsylvania State University, Milton Hershey Medical Center, 20 PPER ¶ 20126, 345 (Final Order, 1989). The term "supervisor" is a term of art that is expressly defined in Section 301(6) of PERA. By invoking that term to further define when a management level employe is "above the first level of supervision," the Board intentionally incorporated the Section 301(6) definition of "supervisor" into the Section 301(16) definition of "Management level employe."

The fact that a position is higher in the chain of command in relation to first-level supervisors and the fact that it is one to which first-level supervisors report are strong indicia of management level employes supervising supervisors. But the Board also cautioned that "[t]he mere fact that a position is at a higher pay range or is 'considered' to be administratively and organizationally higher than a first-level supervisory position is insufficient to justify a management level exclusion under PERA." Hershey Medical Center, 20 PPER at 345. In the case In the Matter of the Employees of Commonwealth of Pennsylvania (Department of Labor and Industry), 9 PPER ¶ 962 (Final Order, 1978), the Board held that a position was excluded from the unit because "[t]he record show[ed] that [the employe] also exercise[d] supervisory powers inasmuch as he is responsible for the overall direction of the personnel in the Eastern District, including Workmen's Compensation Referees," who are first-level supervisors. Department of Labor and Industry, 9 PPER at 461.

As the party asserting the exclusion, the City has the burden of proving that the positions reporting to Perry are supervisors under section 301(6) of PERA. State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, 737 A.2d 313 (Pa. Cmwlth. 1999); Danville Area School District, 8 PPER 195 (Order and Notice of Election, 1977).

A supervisor is defined in Section 301(6) of PERA as follows,

"... any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment."

43 P.S. 1101.301(6).

Employes must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in section 301(6), actually exercise such authority and use independent judgment in exercising that authority. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983). The distinguishing characteristic of an alleged supervisor is that the person holds authority that calls for the use of independent judgment and carries with it the power to reward or sanction employes. Mifflin County, 14 PPER ¶ 14012 (Proposed Decision and Order, 1982); 14 PPER ¶ 14051 (Final Order, 1983).

Perry supervises a social worker II and a nutritionist. The City did not meet its burden of proving that the social worker IIs or the nutritionist perform any section 301(6) duties over the employes so as to be statutory supervisors. Rather, the evidence showed that the supervisory duties for that center are all done by the Director Perry. Only when she is absent does a worker do her supervisory duties, and this is insufficient to be a supervisor under section 301(6) of PERA. See, Child Development Council of Centre County, 10 PPER ¶ 10276 (Order and Notice of Election, 1979).

Also, any supervision of volunteers by the social worker II is not, by definition, supervisory work under Section 301(6) because volunteers are not employes. Employes cannot be found to supervisors unless they actually exercise supervise authority over other employes. Teamsters Local #430 v. Manchester Ambulance Club, 32 PPER ¶32039 (Final

Order, 2001), citing Columbia/Snyder/Montour/Union Mental Health/Mental Retardation Program v. Commonwealth, 383 A. 2d 546 (Pa. Cmwlth. 1978).

Accordingly, the City has not met its burden of proving that the King Older Adult Center Director meets the third test for a management level employe.

Director of the Northeast Older Adult Center, Maria Ramirez

The City also contends that this position is management level under section 301(16) on the basis of two arguments.

The City's first basis for excluding her as a management level employe comes from the second test of section 301(16), that Ramirez "responsibly directs the implementation [of policy]." Ramirez is in charge of the Northeast center. However, the facts do not show that she "responsibly directs the implementation" of policy. Ramirez sees that programs for older adults are carried out at the center, but she does so within the parameters of policy established by the funding sources for the center.

The City argues that Ramirez' decisions relating to the center's budget are examples of implementation of policy. In a similar social services setting, a day care center, a Board hearing examiner addressed the factor of budget responsibilities as a proof of "responsibly directs the implementation [of policy]." In Philadelphia Housing Authority, 22 PPER ¶ 22165 (Order Directing Submission of Eligibility List, 1991), Hearing Examiner Donald Wallace found that the day care center directors were not management level employes if the only ground was their work with the budget because their involvement with the budget was that of keeping within the budget by making monthly financial reports. Examiner Wallace found "their discretion with respect to the budget is limited." Id at 372. He found at Finding of Fact 30 that "if they want transfer funds from one budget category to another, they must contact the deputy director in charge of early childhood education for approval." Id. at 370.

In the present case, the annual budget for the programs is established by two funding agencies. The City Recreation Department provides funds for the costs of personnel at the center; the Philadelphia Corporation for Aging provides funds for the costs of lunches and transportation. If Ramirez wants an increase in those funds, she must make a request. Her requests are not always granted. Ramirez must obtain approval to change the budget in mid-year. The evidence shows that she has limited discretion over the budget at her center, similar to the limits on the discretion possessed by the day care directors in Philadelphia Housing Authority, Id.

The City has not met its burden of proving that Ramirez is a management level employe under the second test in section 301(16) of PERA.

The second argument that Ramirez is a management level employe is based on the third test in section 301(16), that she supervises first level supervisors. This argument is similar to that raised for Perry's position at the King Center. For similar reasons, the argument will be dismissed.

Maria Ramirez supervises five full-time employes and six part-time employes. The City did not show that any of the people she supervises are themselves supervisory employes under section 301(6) of PERA. Ramirez supervises a nutritionist but there is nothing in the record to show that this person performs any of the supervisory duties under section 301(6) or that she is anything more than a lead worker. The City did not meet this burden that the social worker IIs or the nutritionist perform any section 301(6) duties over the employes so as to be qualified as statutory supervisors.

Rather, the evidence showed that the supervisory duties for that center are all done by the Center Director Ramirez. Only when she is absent does a worker do her supervisory duties, and this is insufficient to be a supervisor under section 301(6) of PERA. See, Child Development Council of Centre County, 10 PPER 10 PPER ¶ 10276 (Order and Notice of Election, 1979). The facts show that Ramirez is the only supervisor in the

center. None of the other employes exercise section 301(6) supervisory duties. Accordingly, the City has not met its burden of proof for excluding Ramirez as a management level employe under the third test in section 301(16) of PERA.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The City is a public employer within the meaning of section 301(1) of PERA.
2. The Union is an employe organization within the meaning of section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Directors of the Juniata Park Older Adult Center, the South Philadelphia Older Adult Center, the Mann Older Adult Center, the Martin Luther King, Jr. Older Adult Center and the Northeast Older Adult Center are first level supervisors and share an identifiable community of interest with the supervisors in the unit certified by the Board at PERA-R-1063-E and represented by AFSCME Local 2186.
5. The Director of the West Oak Lane Older Adult Center, held by Sharlene Waller, does not share an identifiable community of interest with the supervisors in the unit certified by the Board at PERA-R-1063-E and represented by AFSCME Local 2186.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the unit of first level supervisory employes of the City of Philadelphia certified by the Board at Case Number PERA-R-1063-E, and exclusively represented by AFSCME Local 2186, is hereby amended to include the positions of Directors of the Juniata Park Older Adult Center; the South Philadelphia Older Adult Center; the Mann Older Adult Center; the Martin Luther King, Jr. Older Adult Center and the Northeast Older Adult Center

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions to this order filed pursuant to 34 Pa. Code § 95.98 (a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this eighteenth day of July, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner