COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF

Case No. PERA-U-08-212-W (PERA-R-92-191-W)

BEAVER BOROUGH

PROPOSED ORDER OF UNIT CLARIFICATION

On June 10, 2008, the Beaver Borough Municipal Employes Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification to include the superintendent in a unit of Beaver Borough (Borough) employes previously certified by the Board at Case No. PERA-R-92-191-W. On June 18, 2008, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on August 8, 2008. The hearing examiner thereafter continued the hearing at the request of the Association and without objection by the Borough. On October 2, 2008, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On November 14, 2008, the Borough filed a brief by deposit in the U.S. Mail. On November 17, 2008, the Association filed a brief by fax.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On April 28, 1992, the Board certified the Association as the exclusive representative of a unit of Borough employes described as follows:

"All full-time and regular part-time blue-collar nonprofessional employes including but not limited to operators, laborers, working foreman and meter checker; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the [Public Employe Relations] Act [(PERA)]."

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- 2. Members of the bargaining unit perform a wide variety of tasks, including cutting grass, replacing curbs and sidewalks, installing water lines, running the water and sewer plants and salting and plowing roads. (N.T. 9)
- 3. The superintendent (Dan McKeel) generally assigns employes other than the meter checker to a task each morning based on their individual areas of expertise. If no one is available to do the work, he does it himself. On occasion, the Borough manager (John Barrett) will tell him to assign a particular employe to a particular task. (N.T. 5, 9, 11, 15-16, 22-23)
- 4. The superintendent generally monitors the employes during the course of a day. If an employe has a problem, he sees if he can help. For non-mundane tasks, Mr. Barrett monitors the employes on occasion. (N.T. 10, 24, 28-29)
- 5. The superintendent has no authority to discipline an employe and has not been involved in the discipline of an employe. Mr. Barrett would investigate any need to discipline an employe. (N.T. 11-12, 14, 17-18, 28, 30)
- 6. The superintendent spends more than 50% of his time performing manual labor. (N.T. 12)
- 7. The superintendent has an identifiable community of interest with the employes in the unit. (N.T. 4)

 $^{^{\}rm 1}$ The name of the Association appears as amended at the hearing (N.T. 3).

DISCUSSION

The Association has petitioned to include the superintendent (Mr. McKeel) in the unit. According to the Association, he should be included in the unit because he has an identifiable community of interest with the employes in the unit.

The Borough contends that the superintendent should remain excluded from the unit because he is a management level employe and/or a supervisor.²

The parties have stipulated that the superintendent has an identifiable community of interest with the employes in the unit if he is not a management level employe or a supervisor (N.T. 4). The dispositive question, then, is whether or not he is a management level employe and/or a supervisor.

The party arguing for the exclusion of an employe from a unit on a statutory ground bears the burden of proving a basis for the exclusion. School District of Philadelphia v. Commonwealth of Pennsylvania, PLRB, 719 A.2d 835 at n. $\overline{5}$ (Pa. Cmwlth. 1998). Thus, the Borough had the burden of proving that the superintendent is a management level employes and/or a supervisor.

Section 301(16) of the PERA defines a management level employe as follows:

"'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."

In West Penn Township, 37 PPER 120 (Final Order 2006), the Board explained as follows:

"The Statute may be read to state a three-part test in determining whether an employe will be considered managerial. Those three parts are (1) any individual who is involved directly in the determination of policy; (2) any individual who directs the implementation policy; or (3) employes above the first level of supervision."

37 PPER at 397, $\underline{\text{quoting Commonwealth}}$ of $\underline{\text{Pennsylvania}}$ (Attorney Examiners), 12 PPER ¶ 12131 at 203 (Final Order 1981).

The Borough contends that the superintendent is a management level employe under the second part of the test because, "in assigning workers and monitoring their job performance in order to secure the proper accomplishment of a project (policy) undertaken by" the Borough, he responsibly directs the implementation of policy. Brief at 5. As the Board explained in West Penn Township, however, the second part of the test covers

"those persons who have a responsible role in giving practical effect to and ensuring 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 ensure completion of the task. The administration of 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 ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy."

<u>Id.</u>, <u>quoting Horsham Township</u>, 9 PPER ¶ 9157 at 327 (Final Order 1978). The record does not show that the superintendent, "in assigning workers and monitoring their job performance in order to secure the proper accomplishment of a project (policy) undertaken by" the Borough, ever changed procedures or methods of operation to ensure the actual

² In its brief at 8, the Borough points out that historically the terms and conditions of employment of the superintendent have not been governed by the parties' collective bargaining agreement but rather have been set each year by the Borough (N.T. 7-8; Borough Exhibit B). In deciding whether or not a unit should be clarified to include a particular employe, however, "[t]o give controlling weight to past bargaining history would tend merely to perpetuate existing misalignments." FOP, Star Lodge No. 20 v. Commonwealth of Pennsylvania, PLRB, 522 A.2d 697, 701 (Pa. Cmwlth. 1987). Thus, to the extent that the Borough argues that past bargaining history is relevant, its contention is without merit.

fulfillment of policy by concrete measures. Thus, there is no basis for finding that the superintendent responsibly directs the implementation of policy. Accordingly, the superintendent is not a management level employe.

Section 301(6) of the PERA defines a supervisor as follows:

"'Supervisor' means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes 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."

Section 604(5) of the PERA provides that "[i]n determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed."

In <u>Luzerne County Community College</u>, 37 PPER 47 (Final Order 2006), the Board explained as follows:

"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)."

37 PPER at 148. Earlier, in Findlay Township Water Authority, 21 PPER ¶ 21130 (Final Order 1990), the Board explained that "[t]he hallmark of supervisory status under [section 301(6)] is the ability to effect reward or sanction. Danville Area School District, 8 PPER 195 (Order and Notice of Election, 1977)." 21 PPER at 324.

In Luzerne County Community College, the Board also explained as follows:

"It must also be noted that Section 604(5) of PERA provides that the Board, in making supervisory determinations, 'may take into consideration the extent to which supervisory and nonsupervisory functions are performed.' 43 P.S. § 1101.604(5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employes who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. West Perry School District v. PLRB, 752 A.2d 46[1] (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 568 Pa. 675; 795 A.2d 984 (2000); State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999); Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB, 409 A.2d 532, 532 (Pa. Cmwlth. 1980). Conversely, where the employe performs predominantly supervisory duties, that employe is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlth. 1975)."

37 PPER at 148.

The Borough contends that the superintendent is a supervisor because he assigns work to employes and monitors their performance. In support of its contention, the Borough cites <u>Upper Darby School District</u>, 1 PPER 85 (1971), for the proposition that an employe is a supervisor "where he has formal responsibility to assign work or to oversee the manner in which it is carried out, even though his decisions are appealable." <u>Id</u>. at 86. The Borough also cites <u>North Schuylkill School District</u>, 1 PPER 28 (1971), for the proposition that in deciding whether or not an employe is a supervisor "[w]hether or not they actually perform the acts that they are empowered to perform is not as important as whether they are authorized to perform them." <u>Id</u>. at 29.

In light of <u>Luzerne County Community College</u>, <u>supra</u>, and <u>Findlay Township Water Authority</u>, <u>supra</u>, however, <u>Upper Darby School District</u> and <u>North Schuylkill School District</u> are no longer good law, so the Borough's reliance on them is misplaced. Moreover, although the superintendent assigns work to employes and monitors their performance (findings of fact 3-4), it does not show that he has the ability to effect reward or sanction. To the contrary, it shows that he has no authority to discipline employes and has not been

involved in the discipline of an employe (finding of fact 5). Furthermore, to the extent that his assignment of work and monitoring of employes may be considered supervisory, the record does not show that he predominately performs those duties. To the contrary, it shows that he spends more than 50% of his time performing manual labor (finding of fact 6). Thus, there is no basis for finding the superintendent to be a supervisor.

On a substantially similar record in <u>West Perry School</u> <u>District</u>, <u>supra</u>, the court reached the same result with respect to cafeteria mangers. As the court explained,

"it is apparent that the cafeteria managers are not supervisors within the meaning of PERA, but instead were properly included in the rank and file. The cafeteria managers perform mostly standard cafeteria work and are not involved, to any extensive degree, in the hiring, firing, promotion, or discipline of employees. In addition, they do not often direct cafeteria workers in their assignments as the workers generally know their assignments and do not need to be directed in their work activities. Instead, they spend the majority of their work day doing standard cafeteria work. Therefore, the Board did not err in concluding that the cafeteria managers spent most of their time performing non-supervisory functions, making them rank and file employees not supervisors."

752 A.2d at 465 (footnotes omitted). <u>See also Borough of Ridley Park, supra</u>, where the Board on a substantially similar record found a foreman not to be a supervisor, and <u>Liberty Borough</u>, 39 PPER 55 (Order Directing Submission of Eligibility List 2007), <u>Trafford Borough</u>, 29 PPER ¶ 29191 (Order Directing Submission of Eligibility List 1998), and <u>Charleroi Borough</u>, 17 PPER ¶ 17147 (Order Directing Submission of Eligibility List 1986), where the hearing examiner on substantially similar records found street commissioners not to be supervisors.

CONCLUSIONS

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

- 1. The Borough is a public employer under section 301 (1) of the PERA.
- 2. The Association is an employe organization under section 301(3) of the PERA.
- 3. The Board has jurisdiction over the parties.
- 4. The superintendent is not a supervisor under section 301(6) of the PERA.
- 5. The superintendent is not a management level employer under section 301(16) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner $\ \ \,$

HEREBY ORDERS AND DIRECTS

that the unit previously certified by the Board at Case No. PERA-R-92-191-W is amended to include the superintendent.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this twenty-fifth day of November 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

DONALD A. WALLACE, Hearing Examiner