

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
:  
: Case No. PERA-U-06-535-E  
: (PERA-R-04-520-E)  
NORTHAMPTON COUNTY :

**PROPOSED ORDER OF DISMISSAL**

On October 26, 2006, Northampton County (County or Petitioner) filed a petition for unit clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude seven deputy clerk positions from the unit of court-related, non-professional employees represented by AFSCME District Council 88 (AFSCME or Respondent) and certified by the Board at PERA-R-04-520-E.

On November 30, 2006, the County filed an amended petition for unit clarification.

On March 8, 2007, the Secretary of the Board issued an order and notice of hearing fixing March 21, 2007, in Easton as the time and place of hearing. The hearing was continued and held on November 30, 2007.

At that time, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The hearing examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That Northampton County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)
2. That AFSCME District Council 88 is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)
3. That in 2004, at Case No. PERA-R-04-520-E, the Board certified AFSCME District 88, as the exclusive representative of

All full-time and regular part-time nonprofessional employees who are directly involved with and necessary to the functioning of the courts and who are directly involved with and necessary to the functioning of the courts and who are not hired, fired and directed by the courts including but not limited to employes in the District Attorney's Office, the Public Defender's Office, the Sheriff's Office and the Court Services Department; and excluding management level employes, supervisors, first level supervisors, confidential employes, and guards as defined in the Act.

(N.T. 5, Board Exhibit 1)

4. That William Hillanbrand is the Director of Court Services for Northampton County. He was appointed to the position in late 2006, by the County Executive, an elected official. (N.T. 11, 52, County Exhibit 1)

5. That Hillanbrand supervises several row offices, including the Clerk of Courts-Civil Division, formerly known as the Office of Prothonotary. (N.T. 10-11)

6. That the Clerk of Courts is Leigh Ann Fisher. She is appointed by the County Executive. (N.T. 77)

7. That the Clerk of Courts has authority over the criminal division and the civil division. (N.T. 77, 104)

8. That the Criminal Division has a Lead Deputy, Jean Kosalko and two Deputy Court Clerks, one in charge of fines and the other in charge of criminal cases. Each Deputy Clerk has 8 clerks reporting to her. (N.T. 11 County Exhibit 1)

9. That the Civil Division has a Lead Deputy, Holly Ruggiero, and two Deputy Court Clerks who each have 8 to 10 clerks reporting to her. (N.T. 11, 77, 104, County Exhibit 1)

10. That on occasion when the Clerk of Courts is not present, the Lead Deputies can approve leave for other employes in the offices. (N.T. 16-18, 55-56)

11. That Julie Kosalko is the Lead Deputy Clerk-Criminal Division. She began in the position in April, 2007. (N.T. 70, 71)

12. That on April 27, 2007, Ms. Kosalko approved personal leave for an employe in the office because her supervisor, the Clerk of Courts, was not available. (N.T. 72, County Exhibit 4)

13. That Julie Swartz is one of two Deputy Court Clerks-Criminal Division. In June, 2007, Julie Swartz served as the Acting Lead Deputy Clerk-Criminal Division when the position was vacant. While in that temporary position, she approved leave for personal and vacation leave and overtime leave. (N.T. 83-84)

14. That Ms. Swartz once disciplined an employe in her role as acting lead deputy, but never in her role as deputy. On March 8, 2007, she gave a verbal warning to a clerk. This was the only documented example of discipline Mr. Hillanbrand was able to obtain after he requested the different offices in the Clerk of Courts to search their files for evidence of discipline. (N.T. 57-58, 86, 89, 91, 94, County Exhibit 3)

15. That Ms. Swartz, in her role as Deputy Clerk-Criminal Division, has sat on a committee for approximately 9 hiring interviews. In all cases, the person she recommended was hired, but the Clerk of Courts made the decision to hire. (N.T. 90)

16. That the Lead Deputy Clerk-Civil Division is Holly Ruggiero. Ms. Ruggiero did not appear as a witness in this proceeding. (N.T. 101, 104)

17. That the Deputy Court Clerk, Civil Division is held by Marie Cunningham and Joanna Lawler. Ms. Cunningham has held the position for ten years. Ms. Lawler has held the position for five years. They report to Lead Deputy Clerk-Civil Division, Holly Ruggiero. (N.T. 99, 104, 109)

18. That Ms. Cunningham has never been told that she has the authority to hire, fire and discipline employes. (N.T. 100)

19. That in the ten years she has held the position, Ms. Cunningham has sat in on approximately three interviews for hiring new employes. In that role, she was told she was to give her opinion of the candidate, but she did not make a recommendation for hiring. On one occasion, the person she thought was the most qualified, did not get hired. (N.T. 101-104)

20. That Ms. Cunningham has approved leave when Ms. Ruggiero is absent. (N.T. 106)

21. That on occasion, Ms. Cunningham counsels clerks on improving their job performance. (N.T. 104, 107)

22. That 17 persons are employed in the civil division. (N.T. 108)

23. That Ms. Lawler has never been told that she has the authority to hire, fire and discipline an employe. She has never exercised that authority. (N.T. 110)

24. That in her five years in the position, Ms. Lawler has sat in on two interviews for hiring employes. (N.T. 110)

25. That on those two occasions, Ms. Lawler expressed her opinion on the best candidate. On one occasion, the Clerk of Courts followed her opinion; on the other occasion, she did not. (N.T. 111)

26. That on occasions when the Lead Deputy was absent, Ms. Lawler would pencil in leave requests but told the employe that final approval for the leave request would have to come from Ms. Ruggiero. (N.T. 112)

27. That on occasion, Ms. Lawler counsels employes when they commit work errors. (N.T. 113)

28. That Melissa Bender is the deputy court clerk-Orphans Court. (N.T. 39-41, County Exhibit 7)

29. That Mr. Hillanbrand was not sure if Ms. Bender has ever approved time off for employes. (N.T. 41)

30. That Ms. Bender has never disciplined employes in the office. (N.T. 41)

31. That there in addition to the Deputy Clerk-Orphans Court, there are two clerical technicians in the office. (N.T. 44)

32. That there is a position called Deputy Court Clerk--Register of Wills. (N.T. 43, County Exhibit 8)

33. That in addition to the Deputy Court Clerk-Register of Wills, there is only one other employe in that office, a clerical technician. The next budget provides for hiring another clerical technician next year. (N.T. 43)

34. That Mr. Hillanbrand was not aware of any examples of the Deputy Court Clerk-Register of Wills granting leave or disciplining employes. (N.T. 45)

35. That both the Deputy Court Clerk-Orphans Court and the Deputy Court Clerk-Register of Wills report to the Clerk of Orphans Court (who also holds the position of Register of Wills), a position that is appointed by the County Executive. (N.T. 44)

36. That Doris Lombardo is the Real Estate Deputy Clerk. She has held that position for approximately 13 years. She reports to Lead Deputy Clerk-Civil Division, Holly Ruggiero. There are five other persons in her office. (N.T. 114, 116)

37. That Ms. Lombardo has never been told that she has the authority to hire, fire or discipline an employe. She has never recommended hiring, firing or disciplining employes. (N.T. 115)

#### DISCUSSION

The County has petitioned the Board to exclude seven deputy court clerks and lead deputy court clerks from the court related bargaining unit on the grounds that they are supervisors under Section 301(6) of PERA. The seven positions, with the number of persons in each position in paragraphs, are Lead Deputy Clerk-Criminal Division (1 person); Deputy Court Clerk-Criminal Division (2); Lead Deputy Clerk-Civil Division (1); Deputy Court Clerk-Civil Division (2); Deputy Court Clerk-Orphans Court (1); Deputy Court Clerk-Register of Wills (1) and Real Estate Deputy Clerk(1).

As the petitioning party, the County has the burden of proving that the positions 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."

Employees 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 employees. Mifflin County, 14 PPER ¶ 14012 (Proposed Decision and Order, 1982); 14 PPER ¶ 14051 (Final Order, 1983).

It should 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 employees 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 462 (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 employee performs predominantly supervisory duties, that employee is excluded from the rank and file unit as supervisory. AFSCME v. PLRB, 342 A.2d 155 (Pa. Cmwlth. 1975).

The County's lead witness was William Hillanbrand, the Director of Court Services. Under Northampton County's Home Rule Government, he is appointed by the elected County Executive to oversee all of the employees in the court related row offices. The Clerk of Courts, Leigh Ann Fisher, who reports to Mr. Hillanbrand and who apparently exercises supervisory duties, did not appear as a witness in this proceeding.

Mr. Hillanbrand testified that the Lead Deputies and Deputies have authority to exercise supervisory duties by virtue of job descriptions. (County Exhibits 2 and 5-8). However, the Board has long and frequently held that it is the actual job duties, not a written job description that determines bargaining unit status. See In the Matter of Employees of West Chester Area School District, 1 PPER 92, 93 (Nisi Order of Certification, 1971); Albert Einstein Medical Center v. PLRB, 330 A. 2d 264 (Pa. Cmwlth. 1975) and Mifflin County, 14 PPER ¶ 14012 (Proposed Order of Unit Clarification, 1982), 14 PPER ¶ 14051 (Final Order, 1983).

On cross-examination, Mr. Hillanbrand admitted that the job descriptions do not say that the employees have the actual authority to exercise the duties of a supervisor (N.T. 48). Furthermore, the employees themselves testified credibly that they were never told they had such authority. Also Mr. Hillanbrand admitted that he obtained only one example of a documented instance of discipline in his request from the different offices in the Clerk of Courts, a verbal warning from Ms. Swartz to a clerk in March, 2007.

Mr. Hillanbrand also offered into evidence other documents in support of the argument for finding supervisory status. However, like Ms. Swartz' verbal warning, the evidence covered activity after the amended petition was filed on November 30, 2006. The Board cannot consider post-petition job duties in judging the merits of a unit clarification petition. See North Hills School District v. PLRB, 722 A. 2d 1155 (Pa. Cmwlth. 1999). "This policy is designed to deter an employer from assigning activities to an employee after a petition is filed simply to create the appearance that the employee should be excluded from the unit." Elizabeth Township, 33 PPER ¶ 33053 (Final Order, 2002).

As for the individual positions at issue, the first position is Lead Deputy Clerk-Civil Division, held by Jean Kosalko. The County asserts that the position is a supervisor because Ms. Kosalko has occasionally granted leave in the absence of the Clerk of Courts. However, the exercise of supervisory power on occasion when a supervisor is absent is not sufficient to prove supervisory status. West Perry School District v. PLRB, supra.; Cameron County School District, 33 PPER 33117 (Final Order, 2002) The County also asserts that Ms. Kosalko has been part of the interviewing and hiring process for deputy clerks. It is questionable if Ms. Kosalko has had effective authority or exercises

independent judgement in the hiring of employees. On one occasion, Ms. Kosalko sat in on a meeting for the hiring of a part-time employee and a full-time employee and was allowed to ask questions. Joining her in the meeting were the Clerk of Courts, Ms. Fisher, and Deputy Court Clerk-Criminal Division, Julie Swartz. The County hired the two people Ms. Kosalko recommended, but it is unclear what weight, if any, the County gave to Ms. Kosalko's recommendation, as is necessary to establish that she has an effective role. In Chester County Solid Waste Authority, 18 PPER 18021 (Order Directing Submission of Eligibility List, 1986), the Board held that recommendations are "effective" for purposes of Section 301(6) of PERA where they are routinely followed, are of controlling weight, and are not subject to independent investigation by higher authority.

Ms. Kosalko started working in the position in April, 2007, after the filing of the petition for unit clarification. The County offered evidence showing examples of supervisory duties done after November 30, 2006, the date the amended petition for unit clarification was filed. (County Exhibits 3,4 and 9). The Board cannot consider post-petition job duties in judging the merits of a unit clarification petition. See North Hills School District v. PLRB, *supra*.

The next position at issue is Deputy Court Clerk-Criminal Division, held by Julie Swartz and another person not identified in the proceedings. The County produced evidence to show that Ms. Swartz, on one occasion disciplined an employee in her office. This one instance involved a verbal reprimand. (County Exhibit 3). However, this occurred on March 8, 2007, after the Petition for Unit Clarification was filed. The Board cannot consider post-petition job duties in judging the merits of a unit clarification petition. North Hills School District v. PLRB, *supra*. Furthermore, the reprimand was given when she was Acting Lead Deputy. Disciplining employees is not part of her job duties as a Deputy.

The next position at issue is the Lead Deputy Court Clerk-Civil Division, held by Holly Ruggiero. The County did not call Ms. Ruggiero, a person who could have provided the best evidence of the position's duties. Instead, Mr. Hillanbrand testified as to his knowledge of the position. However, his testimony did not support an argument that the position was a supervisor. Accordingly, the County did not meet its burden of proof on this position.

The next position is Deputy Court Clerk-Civil Division, held by Marie Cunningham and Joanna Lawler. The County has not supported its burden of proving that these persons act as supervisors. They testified credibly that they have not been authorized to act as supervisors, particularly with regard to the hiring and disciplining of employees. The County claimed that they approved leave on occasion. The approval of leave is one indicia of supervisory status. Luzerne County Community College, (Final Order, 2002). The occasional granting of leave in the absence of the Clerk of Courts does not qualify as sufficient proof of supervisory status. West Perry School District, *supra*. The County also argues that these employees have had an effective role in hiring clerks. Any involvement these employees would have had on an interviewing committee is not sufficient proof because it is unclear what weight, if any, the employer gave to their views. Chester County Solid Waste Authority, *supra*.

The next position at issue is Deputy Clerk of Courts-Orphans Court, held by Melissa Bender. Mr. Hillanbrand testified that he was uncertain if Ms. Bender ever approved leave requests from employees. He admitted that Ms. Bender has never disciplined employees. On this record, the County has not sustained its burden of proving that this position is a supervisor.

The next position at issue is the Deputy Clerk-Register of Wills. The office is very small. In addition to the deputy court clerk-register of wills, there is only one other employee, a clerical technician. The County's budget provides for hiring another clerical technician next year. The record had no evidence to show the Deputy Clerk-Register of Wills exercised supervisory authority.

The final position at issue, Real Estate Deputy Clerk, is held by Doris Lombardo. The position is in a small office. There are six employees including her. The employees have been doing their jobs for a long time, and need little daily supervision. The record revealed no instances of Ms. Lombardo's exercise of supervisory authority. In particular,

Ms. Lombardo has not been told she has the authority to discipline and has never disciplined any of the employees in her office.

#### CONCLUSIONS

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

1. That Northampton County is a public employer within the meaning of Section 301(1) of PERA.
2. That AFSCME District Council 88 is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties.
4. That the position of Lead Deputy Clerk-Criminal Division is not a supervisor within the meaning of Section 301(6) of PERA.
5. That the position of Deputy Court Clerk-Criminal Division is not a supervisor within the meaning of Section 301(6) of PERA.
6. That the position of Lead Deputy Court Clerk-Civil Division is not a supervisor within the meaning of Section 301(6) of PERA.
7. That the position of Deputy Court Clerk-Civil Division is not a supervisor within the meaning of Section 301(6) of PERA.
8. That the position of Deputy Court Clerk-Orphans Court is not a supervisor within the meaning of Section 301(6) of PERA.
9. That the position of Deputy Court Clerk-Register of Wills is not a supervisor within the meaning of Section 301(6) of PERA.
10. That the position of Real Estate Deputy Clerk is not a supervisor within the meaning of Section 301(6) of PERA.

#### ORDER

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

HEREBY ORDERS AND DIRECTS

that the petition is dismissed.

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 (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED and MAILED from Harrisburg, Pennsylvania, this twenty-ninth day of April, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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THOMAS P. LEONARD, Hearing Examiner