

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
:
Case No. PERA-R-06-100-W
:
(PERA-R-91-571-W)
WESTMORELAND COUNTY :

FINAL ORDER

On November 19, 2008, Westmoreland County (County) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a Nisi Order of Certification issued on November 10, 2008, in which the Board Representative adopted the Findings of Fact and Conclusions of Law from an Order Directing Submission of Eligibility List (ODSEL) issued by a duly designated Hearing Examiner of the Board on September 23, 2008. In the ODSEL, the Hearing Examiner concluded that the positions of Adult Probation Supervisor, Juvenile Probation Supervisor and Establishment/Case Initiation Supervisor in Domestic Relations were not management level or supervisory positions within the meaning of the Public Employee Relations Act (PERA). These positions were included among other employees who were accreted into an existing bargaining unit of the County's professional, court-appointed employees pursuant to the Board's Westmoreland Intermediate Unit procedures.¹ In that election, the Westmoreland Court Association of Professional Employees (Union) received a majority of the valid ballots cast by bargaining unit employees and was accordingly certified as the exclusive bargaining representative of the County's professional, court-appointed employees. On December 10, 2008, the Union filed its brief in response to the County's exceptions.

After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

22. Nicole Angelo is the Establishment/Case Initiation Supervisor in the Domestic Relations Office. She has been in this position since January of 2007. (N.T. 157-159, 172, 175, 177; County Exhibit 9).

25. Ms. Angelo does not have the authority to hire, transfer, suspend, lay off, discharge, discipline or reward any employees in the Domestic Relations office, nor does she effectively recommend any such action. Personnel changes, such as changing the status of employees from temporary to part-time and from part-time to full-time, have been made by Mr. Ciwoski and Mr. Graham without Ms. Angelo's knowledge or input. (N.T. 157-163).

26. Although Ms. Angelo attends management meetings, she is not and has never been involved in the establishment of policy for the Domestic Relations Office. Rather, policy is established by the Directors of the Domestic Relations Office and the Judges of the Court of Common Pleas of Westmoreland County. (N.T. 178-179).

DISCUSSION

The facts as found by the Hearing Examiner are summarized as follows. Gary S. Miscovitch, an Adult Probation Supervisor, is above the Probation Officer 1s and 2s, a Probation Officer Aide and a Legal Secretary in the field unit in the Adult Probation Office. Mr. Miscovitch and other court-appointed employees at his level do not, and have not, hired any employees. He is not directly involved in suspending or disciplining employees and has no authority to do so. Only the President Judge of Westmoreland County can hire or discharge employees. No employee in the Adult Probation Office at Mr. Miscovich's level can hire, transfer, suspend, layoff, recall, promote, or discharge

¹In Westmoreland Intermediate Unit, 12 PPER 12347 (Order and Notice of Election, 1981), the Board espoused the rule that when a party seeks to accrete a number of employees that amounts to fifteen percent or more of the existing bargaining unit, an election must be held.

employees. The Director of Adult Probation is Andrew Urban. Although Mr. Miscovitch and other employees at his level report disciplinary matters to their Director, they do not initiate or impose discipline.

The Court's computer system assigns new cases in the Adult Probation Office to Adult Probation Officers based on the geographic territory of the case and the officer already assigned to that territory. Mr. Miscovitch does not verify the Probation Officers' work time. He cannot move or reassign any Probation Officer to a different unit. Mr. Miscovitch does not possess the ability to reward or sanction employees. He and the other employees at his level in the Adult Probation Office have no authority to resolve or adjust grievances, even though they are designated as the first step in the contractual grievance procedure for the existing unit.

When one employee was terminated, Mr. Miscovitch was not involved in his termination. Although he did report that employee's errant behavior to Director Urban and recommended discipline, his recommendation was not followed for that incident. Mr. Miscovitch substitutes for absent Probation Officers at hearings. He is responsible for working with the Sheriff's Office to execute bench warrants. He distributes and documents the results of urine tests. Mr. Miscovitch verifies the expense vouchers submitted by the Probation Officers, i.e., he reviews the mileage calculations with a calculator and submits the calculator strip to Director Urban for final review and approval. The expense vouchers are approved for payment by the Director, not Mr. Miscovitch or other Adult Probation Supervisors. He also reviews the Probation Officers' telephone records. Mr. Miscovitch ensures that Probation Officers requesting vacation leave have the time being requested, but he does not provide final approval. Final approval for leave comes from Director Urban. Mr. Miscovitch ensures that the sub-office is adequately staffed and that any court hearings are covered. He also may arrange for substitutes for the vacationing Probation Officers.

Mr. Miscovitch reviews violation files. He then forwards the violation file to the assigned Probation Officer who, after review, forwards it to the judge. Mr. Miscovitch's review seeks to ensure that the proper amount of money has been received from the offender and/or that the offender's drug or alcohol treatment program information is correct. Mr. Miscovitch ensures that the work of the field officers is correctly and timely completed. He meets with Probation Officer 1s and 2s and completes their performance evaluations. He then submits those evaluations to Director Urban. Performance evaluations are not used to promote or demote or to give wage increases or decreases. The purpose of performance evaluations is to fulfill the requirements of a state grant. Mr. Miscovitch is made aware of Probation Officers in Adult Probation who call off sick so he can arrange to cover those officers' responsibilities, such as court appearances.

Norman Mueller, a Juvenile Probation Supervisor, is above the Probation Officer 1s and 2s in the Juvenile Probation Office. He has not hired, transferred or suspended any employees within the Juvenile Probation Office and has no authority to do so. He has not been involved with layoffs. Mr. Mueller is unable to promote or reward probation officers and has not done so. He is unable to demote or sanction Probation Officers and has not done so. Although there have been disciplinary problems within the Juvenile Probation Office, Mr. Mueller was not involved with any of those matters. Only the Judges have the authority to hire or discharge employees in Juvenile Probation. The Judges have not followed the recommendations for discipline of other employees at his level. Employees at Mr. Mueller's level do not initiate discipline.

Mr. Mueller does not assign cases to Juvenile Probation Officers. The cases are automatically assigned to the officer previously assigned to cover the geographic territory of the probationer. Mr. Mueller does not have the ability to assign or transfer a Juvenile Probation Officer to a particular unit or position. Mr. Mueller has not completed performance evaluations in three years. When he did complete evaluations, they were not used to promote or demote employees. The evaluations were only used to meet state requirements through the Juvenile Court Judges' Commission.

Mr. Mueller reports directly to the Director of Juvenile Probation, Adeline Beighley. Only Director Beighley can approve expense vouchers for employees in the Juvenile Probation Office. Mr. Mueller reviews expense vouchers for mathematical accuracy

before they are approved by the Director of Juvenile Probation. Mr. Mueller pre-approves vacation requests for Probation Officer 1s and 2s and Probation Officer Aides. The final approval for vacation is given by the Director of Juvenile Probation. Mr. Mueller ensures that the requesting employe has earned and banked the time he or she is requesting and that the time off will not conflict with office functions. Mr. Mueller does not have discretion or authority to pre-approve vacation leave if the requesting employe does not have the vacation time that he or she is requesting.

Mr. Mueller reviews the case files of the Probation Officer 1s and 2s on the computer. He ensures that cases are processed properly. He and other employes at his level would notify Director Beighley of any problems and provide corrective counseling to the assigned officer to remedy any mishandling or problems. Probation Officers in Juvenile Probation do not call off sick to Mr. Mueller. They call off to a County central computer. They do call Mr. Mueller directly if they need to arrange for hearing coverage when they call off. Probation Officers in Juvenile Probation also notify Mr. Mueller if they leave early.

In its exceptions, the County alleges that the Hearing Examiner erred in: 1) concluding that the testimony of Nicole Angelo, who is the Establishment/Case Initiation Supervisor in Domestic Relations, is irrelevant because the testimony related to post-petition job duties; 2) concluding that the positions at issue are not managerial; and 3) concluding that the positions at issue are not supervisory.

The County's first exception is that the Hearing Examiner erred by refusing to consider the testimony of Ms. Angelo because her testimony relates to job duties in her position as the Domestic Relations Establishment/Case Initiation Supervisor after the petition was filed. In its response to the County's exceptions, the Union states that it agrees with the County that the Hearing Examiner erred by refusing to consider the testimony of Ms. Angelo. The Hearing Examiner cited Elizabeth Township, 33 PPER ¶ 33053 (Final Order, 2002) in refusing to consider Ms. Angelo's testimony regarding her post-petition job duties as the Domestic Relations Establishment/Case Initiation Supervisor. The policy set forth in Elizabeth Township is designed to deter an employer from assigning job duties to an employe after a petition is filed simply to justify the employe's inclusion or exclusion from the unit. Because there is no reason to believe that there is any such concern in this case, Elizabeth Township is not applicable here. Indeed, here, the post-petition duties performed by Ms. Angelo support her inclusion in the bargaining unit. Further, as a result of the parties' prolonged efforts to agree to the composition of the bargaining unit, nearly two years passed between the filing of the petition and the hearing. During that time, the organizational structure of the Domestic Relations Office changed with the addition of a managerial employe above Ms. Angelo. These factors favor the consideration of Ms. Angelo's testimony regarding her actual duties. Accordingly, this exception is sustained and we have made additional findings of fact based on Ms. Angelo's testimony.

The County's second exception is that the Hearing Examiner erred by failing to find that the positions at issue are managerial. Section 301(16) of PERA defines management level employe as "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). The burden of proving the management level exclusion is on the party seeking the exclusion. School District of Philadelphia v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998). In West Penn Township, 37 PPER ¶ 120 (Final Order, 2006), the Board stated that:

In Commonwealth of Pennsylvania (Attorney Examiners), 12 PPER ¶ 12131 (Final Order, 1981), the Board interpreted Section 301(16) of PERA in the following fashion:

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.

12 PPER at 203.

In Horsham Township, 9 PPER ¶ 157 (Final Order, 1978), the Board interpreted the policy formulation part of the test of management level status as follows:

An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the Statute does not include a person who simply drafts language for the statement of policy 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 Board went on in Horsham Township to discuss the second part of the test for management level status, i.e.: policy implementation, to include the following:

...[T]hose 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.

Id. Accordingly, in order to be excluded from a unit as a management level employe under PERA, the employe must either engage in meaningful participation in development of the employer's policy, or must ensure fulfillment of that policy by concrete measures.

37 PPER at 397.

In support of its argument that the positions of Juvenile Probation Supervisor and Adult Probation Supervisor are managerial, the County states that the two individuals holding these positions are responsible for the oversight of several Probation Officers, including making sure they follow departmental policy while working on case files and approving vacation requests and expense vouchers. The County further states that these two individuals use independent judgment in conjunction with department policy to formulate solutions to problems that arise.

In Berks County, 35 PPER ¶ 25 (Final Order, 2004), the employer made similar arguments in support of its position that the First Deputy Coroner and Second Deputy Coroner should be excluded from the bargaining unit as managerial employes. In that case, the Deputy Coroners filled out time sheets for Coroner's Office employes, made recommendations regarding purchases, determined whether the Coroner's Office had jurisdiction and whether an autopsy was required. Based on that evidence, the Board determined that the Deputy Coroners were not management level employes.

In this case, as noted by the Hearing Examiner, the evidence cited by the County fails to show that the Adult and Juvenile Probation Supervisors actually develop or implement specific court policies. Rather, the evidence shows that they oversee the work

of Probation Officers and function more in the capacity of lead workers who follow mandates set forth by the Directors of their respective departments and the Judges. The County fails to cite to any specific policies or procedures that Mr. Miscovich or Mr. Mueller developed or any instances where they interpreted existing policy in response to a unique situation. Thus, like the Deputy Coroners in Berks County, the positions of Adult Probation Supervisor and Juvenile Probation Supervisor do not rise to the level of being managerial.

With regard to the position of Establishment/Case Initiation Supervisor in Domestic Relations held by Ms. Angelo, the County argues that Ms. Angelo is part of the management team and works with the Director to develop and interpret policies and procedures. However, as with Mr. Miscovich and Mr. Mueller, the County fails to cite to any specific policies or procedures that Ms. Angelo developed or any instances where she interpreted existing policy in response to a unique situation. At the time of her testimony, Ms. Angelo had been in her position for a year and a half. Evidence of such responsibility most surely would have manifested during that time. However, the County failed to produce any such evidence. Rather, the evidence adduced at the hearing reveals that Ms. Angelo only follows established policy that is developed by the Directors and the Judges.

The County's final exception is that the Hearing Examiner erred by failing to find that the positions at issue are supervisory. Section 301(6) of PERA defines supervisor as follows:

(6) "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.

43 P.S. § 1101.301(6). In Luzerne County Community College, 37 PPER ¶ 47 (Final Order, 2006), the Board stated that:

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). 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 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 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 testimony of Mr. Miscovich and Mr. Mueller indicates that they are, in effect, lead workers who help guide the Probation Officers whom they oversee and who substitute for Probation Officers when they are absent. The testimony of these two employes, which was relied upon by the Hearing Examiner, reveals that they have no role whatsoever in the hiring, promotion, or discharge of employes. With regard to disciplining other employes, the role of Mr. Miscovich and Mr. Mueller is limited to reporting any disciplinary issues to the Directors of the Adult and Juvenile Probation Offices. Mr. Mueller and Mr. Miscovich do not effectively recommend discipline. Rather, any discipline is handled by

the Directors. In fact, Mr. Miscovich testified that in one instance where he did report misconduct and recommended discipline, his recommendation was not followed. With regard to the ability to adjust grievances, Mr. Miscovich specifically testified that he has no such authority. As to the ability to reward employes, both Mr. Miscovich and Mr. Mueller testified that they performed evaluations of Probation Officers to meet state requirements or grant requirements, but that these evaluations were not used to reward or discipline employes. Further, any direction that Mr. Miscovich and Mr. Mueller provide to the Probation Officers in their departments is routine in nature. Indeed, new cases are assigned by a computer system based on the Probation Officer's geographic territory. Mr. Miscovich and Mr. Mueller review the case files of Probation Officers and ensure that they are processed properly. However, if there are any problems, Mr. Mueller testified that the Director would be notified. Also, expense vouchers are verified by Mr. Mueller and Mr. Miscovich for accuracy but are actually approved for payment by the Directors of the Adult and Juvenile Probation Offices.

As to Ms. Angelo, she testified that she reports directly to the Deputy Director of her department. Although Ms. Angelo's predecessor may have exercised some supervisory authority, Ms. Angelo, who had been in her position for a year and a half when she testified, stated that she does not have the ability to hire, discharge, discipline or reward employes, or to effectively recommend such action. In fact, Ms. Angelo testified that personnel changes have been made without her knowledge or input. In its brief, the County argues that Ms. Angelo's duties are similar to her predecessor and that she has yet to get the opportunity to perform the exact duties of her predecessor. However, the evidence shows that the job duties of the Establishment/Case Initiation Supervisor have changed significantly since the time of her predecessor. At that time, the Domestic Relations Office did not have a Deputy Director. Since Ms. Angelo took the position of Establishment/Case Initiation Supervisor, there is both a Deputy Director and a Director above that position in the Domestic Relations Office. If Ms. Angelo did have the authority of her predecessor, there would have been some evidence of her exercising that authority in the year and a half that she has been in her position. The County failed to produce evidence to prove that Ms. Angelo's duties are similar to her predecessor, such that she would meet the definition of a supervisor set forth in the Act. Rather, her testimony reveals that she would more appropriately be classified as a lead worker.

Finally, with regard to both the supervisory and managerial issues, the County argues that the Hearing Examiner erroneously based his conclusions on the fact that the Adult Probation Supervisor, Juvenile Probation Supervisor and Establishment/Case Initiation Supervisor cannot directly hire, fire, discipline, reward or sanction employes. By this logic, the County argues, no person in any of those departments could be classified as supervisors or managers because the President Judge has the ultimate authority to take such action.

In Carlynton School District, 377 A.2d 1033, 1035 (Pa. Cmwlth. 1977), the Commonwealth Court stated that employes do not lose management level status simply because their actions are subject to review by superiors. However, the Hearing Examiner did not ignore the prohibition set forth in Carlynton and include the positions of Adult Probation Supervisor, Juvenile Probation Supervisor and Establishment/Case Initiation Supervisor in the unit simply because their actions are subject to review by the Directors of the Adult and Juvenile Probation Offices or the Judges. Rather, he concluded that they should be included in the bargaining unit because they do not engage in meaningful participation in the development or implementation of departmental policy. Further, the Hearing Examiner also correctly concluded that the employes at issue do not even recommend, let alone effectively recommend, reward or sanction of other employes in their offices. For the reasons set forth above, the Hearing Examiner's conclusions in this regard are correct and supported by substantial evidence of record. Accordingly, we shall dismiss the County's exceptions to the Hearing Examiner's decision that the positions of Adult Probation Supervisor, Juvenile Probation Supervisor and Establishment/Case Initiation Supervisor are neither supervisory nor managerial and therefore are properly included in the unit represented by the Union.

After a thorough review of the exceptions and all matters of record, the Board shall sustain in part and dismiss in part the exceptions filed by the County and affirm the Nisi Order of Certification issued by the Board Representative.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the above case be and the same are hereby sustained in part and dismissed in part, and the Nisi Order of Certification, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member and James M. Darby, Member, this twenty-first day of April, 2009. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.