

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: PERA-R-09-225-W
: :
OKLAHOMA BOROUGH :

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On June 17, 2009, the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Works International Union AFL-CIO (Petitioner or Union) filed a petition for representation with the Pennsylvania Labor Relations Board (Board) alleging that thirty per cent or more of the full-time and regular part-time maintenance employes of Oklahoma Borough (Respondent or Borough) wished to be represented by the Union and that the Union desired to be certified as their representative. On June 29, 2009, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on July 14, 2009, in Pittsburgh, Pennsylvania.

On July 2, 2009, the Union filed an Amended Petition for Representation seeking to be certified to represent a unit of all full-time and regular part-time maintenance employes and secretaries employed by the Borough of Oklahoma.

On the day of the hearing, the Borough requested a continuance of the matter to allow it to retain special labor counsel on the grounds that it had just been served with the amended petition on July 13 and had been unable to retain labor counsel to advise on the issue raised in the amended petition. The hearing examiner granted the request for a continuance. After discussions with the parties as to the availability of witnesses, the matter was rescheduled for hearing for September 14, 2009.

The hearing was held on the rescheduled date, at which time the hearing examiner afforded all parties a full opportunity to present evidence and cross-examine witnesses.

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

FINDINGS OF FACT

1. That Oklahoma Borough is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act (PERA).
2. That the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Works International Union, AFL-CIO, is an employe organization under Section 301(3) of PERA.
3. That Diane Lizik is the Borough Secretary. She has held this position since at least 2004. (N.T. 11, 15 Borough Exhibit 1)
4. That other than the Borough Tax Collector, Ms. Lizik is only office employe for the Borough. (N.T. 21)
5. That Ms. Lizik is paid a salary of \$850 a month. (N.T. 30-31)
6. That Ms. Lizik is expected to work eight hours a week, but she sometimes works more hours when the job requires it. Her normal schedule is Tuesday, 12:00 noon to 3:00 p.m.; Wednesday, 9:00 a.m. to 12:00 noon and Thursday 6:00 to 8:00 p.m. (N.T. 20-21)

7. That Ms. Lizik performs the duties of a Secretary under the Borough Code, which are set forth at 53 P.S. § 46111:

"The secretary shall attend all meetings of the borough council and shall keep full minutes of its proceedings; he shall transcribe the bylaws, rules, regulations and ordinances adopted into a book kept for that purpose; he shall preserve the records and documents of the borough, and shall have custody of the corporate seal. He shall certify copies of any book, paper, record, bylaw, rule, regulation, resolution, ordinance or proceeding of the borough, under the seal thereof which copies, when so certified, shall be admissible in evidence in any court of the Commonwealth. He shall attest the execution of all instruments record all ordinances and attest the same by his signature. He shall file of record proof of service of all notices required by law, and his certificate thereof shall be good evidence of such notice. The borough shall furnish the secretary with such dockets, books, forms and files as are necessary for the conduct of his office, such dockets, books, forms and files to be and remain the property of the borough. He shall deliver to his successor the seal and all books, papers and other records and things belonging to the borough."

(N.T. 16, Borough Exhibit 1)

8. That in addition to the duties set forth in the Borough Code, Ms. Lizik also performs clerical and administrative duties such as the monthly sewer billings, coordinating home sewer inspections by the Borough's two maintenance employes and responding to citizens' requests for information under the Right to Know Act. (N.T. 22-24)

9. That of the eight hours a week, Ms. Lizik spends the majority of her time on these clerical and administrative duties as opposed to the official duties for a Secretary under the Borough Code. (N.T. 24-27)

10. That Richard Dickey and John Staller are the Borough maintenance employes. (N.T. 41, 46-47, 67-68).

11. That Mr. Dickey was also a Borough Council member from 2000 to September 1, 2009, when he resigned his position. (N.T. 43-44, 68, Union Exhibit 1)

12. That during his time on Council, Mr. Dickey also served a two-year term as president of council and a two-year term as Mayor. (N.T. 69-70)

13. That Mr. Dickey has worked as a maintenance employe for nine years; Mr. Staller for six years. (N.T. 46, 67)

14. That the maintenance employes perform a variety of duties. Some of their duties are to maintain the Borough's streets and roads in all four seasons, clean the Borough offices, do plumbing and carpentry work, clean storm sewers, lay sewer lines, make One-Call markings, maintain street signs, cut grass and perform home inspections for sewer line functioning when a home is sold. (N.T. 47-48)

15. That the maintenance employes' hours vary depending on season, the weather and the tasks to perform. Mr. Dickey and Mr. Staller work approximately the same times. (N.T. 49-50, 55, 60 and 70-72)

16. That the maintenance employes are part-time workers. On an annual basis, they work approximately 65 hours a month. (N.T. 52, 78-79)

17. That the maintenance employes work in a cooperative way, sharing the tasks that need to be completed. (N.T. 71-73)

18. That in knowing what jobs need to be done, Mr. Staller sometimes talks with Mr. Dickey, sometimes with the Mayor and other times with Kathleen Zanewicz, the Council President. (N.T. 58-59)

19. That if Mr. Staller wants to take time off, he simply does so without getting approval from Mr. Dickey. (N.T. 73)

20. That the Borough Council is comprised of five persons. (N.T. 68-69)

DISCUSSION

The Union has petitioned the Board to be certified as the exclusive representative of a unit of all full time-time and regular part-time maintenance and secretarial employes.

There are three positions in the proposed bargaining unit, the Borough Secretary and two maintenance employes. The Borough objects to including two of the three positions in a bargaining unit.

The first objection is to the position of Borough Secretary, held by Diane Lizik. The Borough contends that Ms. Lisik performs official duties described in the Borough Code, and would therefore have a conflict of interest if she was included in a bargaining unit.

In Borough of Ridley Park, 27 PPER ¶ 27227 (Final Order, 1996), the Board, citing the Commonwealth Court's decision in West Hanover Township v. PLRB, 646 A.2d 625 (Pa. Cmwlth. 1994), held that the Borough Secretary/Treasurer, as the official custodian of the borough's financial and personnel records, had a conflict of interest with the other employes, and thus, was excluded from the bargaining unit sought by the petitioning union in that case.

"We read the Commonwealth Court's decision as requiring the exclusion of any appointed municipal Secretary whose duties include being the 'official custodian of all files.' "

27 PPER ¶ 27227 at 514.

The Union agrees that Ms. Lizik is the official Borough Secretary and that she performs those duties set forth in the Borough Code. However, the Union argues that Ms. Lizik's job entails more than these Borough Code duties and that these other duties should be considered when deciding whether to include a position in a bargaining unit under the Public Employee Relations Act. The Union argues that it would be unfair to exclude Ms. Lizik from the benefits of inclusion in a bargaining unit simply because a small part of her duties are statutory Borough Secretary duties.

The Union's position is understandable. However, the Board's decision in Borough of Ridley Park, supra did not require employers to show that all, or even a majority, of the duties of the Borough Secretary be duties related to the official custodian of the files under the Borough Code to prove the exclusion. Accordingly, the Borough Secretary position, held by Ms. Lizik, is excluded from the list of employes eligible to vote for a bargaining representative.

The Borough also objects to the inclusion of the position of one of the maintenance employes, that held by Richard Dickey. The Borough has two grounds for objecting.

The first is that Dickey, as a Borough Council member, has a conflict of interest with the union for future collective bargaining. However, Dickey resigned from Borough Council effective September 1, 2009. His resignation would seem to eliminate any conflict of interest.

The Borough counters with the argument that as of the date of this hearing, the Borough Council had not yet met to formally accept Dickey's resignation. Therefore, the Borough argues, until the Borough Council meets and takes official action to accept Mr. Dickey's resignation, his letter of resignation had no legal effect for this Board representation proceeding.

The Borough's argument will not be accepted because it violates the public policy set forth in Section 101 of PERA of "granting to public employes the right to organize and choose freely their representatives." 43 P.S. 1101.101. The Borough's argument, if

accepted by this Board, would place employees such as Mr. Dickey in the untenable position of having to subordinate his right to choose his representative to the Borough's decision whether or not to accept his letter of resignation from Council. If the Borough had its way, it could simply delay action on Mr. Dickey's resignation letter until a time when it suited Council to act on his letter. Such an outcome would be at odds with the right to "choose freely" one's representative guaranteed in PERA.

The second ground for objecting to Mr. Dickey is that his position is a supervisor under Section 301(6) of PERA. Mr. Dickey is one the two maintenance employes. The other is John Staller. Accordingly, the analysis will look at Mr. Dickey's supervisory activity over Mr. Staller.

As the party seeking to exclude the position, the Borough has the burden of proving the exclusion. In the Matter of the Employes of State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), *aff'd*, 737 A.2d 313 (Pa. Cmwlth. 1999).

Section 301 (6) of PERA defines a 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 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 a bargaining unit as supervisors if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise any such authority they have, and use independent judgment in exercising that authority. PLRB v. McKeesport Area School District, 14 PPER ¶ 14165 (1983).

It is also important to note that Section 604(5) of PERA, requiring the Board to evaluate the extent to which supervisory and non-supervisory duties are performed, is a material factor in determining supervisory status. See, State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999).

The Board has held that the power to reward and/or sanction distinguishes a supervisor from a lead worker. An employe who uses his authority to direct the workforce, but does not affect reward or sanction, is not a supervisor, as defined by PERA. In the Matter of the Employes of Berks County, 34 PPER ¶ 111 at 348 (Proposed Order of Unit Clarification, 2003).

The Borough has not sustained its burden of proving that the maintenance position held by Richard Dickey is a supervisor under PERA. Mr. Dickey regularly works along side Mr. John Staller, the other maintenance employe. At best, he is a lead worker, without the supervisory duties required for exclusion under PERA. McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983). It is noteworthy that Mr. Staller can take vacation leave without prior approval from Mr. Dickey.

The Borough argues that Mr. Dickey's seniority and his former role as a Borough Council member placed Mr. Dickey in the position of assigning work to Mr. Staller and directing him in the assigned tasks, and therefore a supervisor in the logical order of an organization. However, the testimony is unpersuasive that Mr. Dickey was anything more than a liaison between Council and the maintenance employes as to the work projects that needed attention.

Mr. Dickey's work activities vis a vis Mr. Staller are insufficient to prove that he is a supervisor under Section 301(6) of PERA.

CONCLUSIONS

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

1. That Oklahoma Borough is a public employer under Section 301 (1) of PERA.
2. That the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Works International Union, AFL-CIO, is an employe organization under Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The unit appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time nonprofessional employes, and excluding all management level employes, supervisors, first level supervisors, confidential employes and guards as defined in PERA.
5. The position of Secretary, held by Diane Lizik, is excluded from the unit.
6. That the position of maintenance employe, held by Richard Dickey, is not a supervisor and is properly included in the above described bargaining unit.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Employer shall immediately submit to the Board an alphabetized list of the names and addresses of the employes eligible for inclusion in the unit set forth above.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b) following the conduct of an election.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this fifth day of October, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner