

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-U-08-505-E
 : (PERA-R-4596-C)
LEHIGH CARBON COMMUNITY COLLEGE :

PROPOSED ORDER OF DISMISSAL

On December 22, 2008, Lehigh Carbon Community College (College or Petitioner) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board), seeking clarification of a unit of nonprofessional employees represented by the Lehigh Carbon Community College Education Support Professionals (Union or Respondent) to exclude the position of Banner Systems Analyst Supervisor as a supervisor and/or management level employee.

On January 28, 2009, the Secretary of the Board issued an Order and Notice of Hearing in which March 5, 2009, was assigned as the time and place of a telephone pre-hearing conference to resolve the matters in dispute without a hearing and April 3, 2009, in Allentown, was assigned as the time and place of hearing, if necessary.

The hearing was necessary, and held as scheduled, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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

FINDINGS OF FACT

1. That Lehigh Carbon Community College is a public employer as defined in Section 301(1) of the Public Employee Relations Act (PERA). (N.T. 5)
2. That the Lehigh Carbon Community College Support Professionals is an employe organization as defined in Section 301(3) of PERA. (N.T. 5)
3. That the Lehigh Carbon Community College Support Professionals is the exclusive representative of a unit of all full-time and regular part-time non-professional employes and excluding all professional employes, confidential employes, college student employes, guards, supervisors and first level supervisors as defined in PERA. (N.T. 5-6)
4. That the College's Department of Library and Information Technology has purchased an information software system called the Banner Information System from SunGard Higher Education Systems. The College utilizes Banner to support a variety of activities in finance, student records, payroll and human resources. (N.T. 10, 11, 40-41)
5. That the Banner system is used by faculty, administrators and students. (N.T. 41)
6. That five employes are responsible for overseeing the operation of the Banner system: Jane Gilbert, Director of Application Support Services; Don Thaler, Banner Technical Services Supervisor; David Slater, Banner Systems Analyst Supervisor, Paul Feldman, Banner Technical Services Assistant and Wayne Youngblood, Assistant to the Banner Technical Services Supervisor. (N.T. 10, 42-44)
7. That two of these five employes-Ms. Gilbert and Mr. Thaler- are statutory supervisors. (N.T. 44)
8. That on the College's organizational chart, Ms. Gilbert, Director of Application Support Services, reports to the Associate Dean of Library and Information Technology, who reports to the Dean of Library and Information Technology, who reports to the Vice President for Academic Services and Student Development, who reports to the President of the College. (N.T. 8, 12, 65, College Exhibit 1)

9. That David Slater holds the position of Banner Systems Analyst Supervisor. He has held the position since June 1, 2007. (N.T. 17-18, 21, 59-60, College Exhibit 3)

10. That recently, the College developed a new job description for the Banner Systems Analyst Supervisor position. The position had been called Banner Technical Services Assistant but was upgraded when a vacancy occurred. The rewriting of the job description and the upgrading of the position was done at the request of Ms. Gilbert, who convinced the College that the change was necessary to deal with an anticipated expansion of the department and to help relieve Ms. Gilbert of some of the tasks and duties she currently performs. The present unit clarification petition is a further step in that effort. (N.T. 18, 44-45, Complainant's Exhibit 3)

11. That Ms. Gilbert testified that the position of Banner Systems Analyst Supervisor has a direct line of supervision over one position, the Banner Systems Support Analyst, held by Paul Feldman. (N.T. 18, 20, 65 Complainant's Exhibit 1, 2 and 4)

12. That recently Ms. Gilbert assigned Mr. Slater to a committee to review the application of Mr. Feldman as a Banner Systems Support Analyst. The other members of the committee were Ms. Gilbert and her supervisor, Larry Cleat, the Associate Dean of Library and Information Technology. (N.T. 55-56)

13. That Mr. Feldman was a former College employe who was returning to the College. The College received more than one application for the position, but Ms. Gilbert only sent Mr. Feldman's application to the committee for review. (N.T. 55-58)

14. That the committee decided to hire Mr. Feldman. (N.T. 55-59)

15. That Mr. Feldman began working for the College in November, 2008. Mr. Slater has assigned several projects to Mr. Feldman. (N.T. 30-31, 33 34-35, 37-38).

16. That Mr. Slater also occasionally assigns work to the position of Technical Services Assistant, held by Wayne Youngblood. (N.T. 22)

17. That Mr. Slater has not disciplined any employe. (N.T. 50)

18. That Mr. Slater is authorized to evaluate employes, but he has not done that yet. (N.T. 51-52)

19. That Mr. Slater has the responsibility for seeing that several technical projects selected by Ms. Gilbert are successfully completed. Two examples are an electronic billing project and a student admissions project. Ms. Gilbert has had the ultimate responsibility for seeing that the projects are done properly. Mr. Feldman and Mr. Youngblood worked with Mr. Slater on these projects. (N.T. 33-34, 52-54)

20. That Mr. Slater has been given the authority to evaluate and prioritize data requests from faculty and administrators. The requests involve such issues as the development of mailing lists. Mr. Slater evaluates the requests to determine whether they would be requests that would be repeated. He also evaluates whether the request should be assigned to Mr. Feldman or Mr. Youngblood for completion. (N.T. 19, 37-38)

DISCUSSION

The College's petition for unit clarification seeks to exclude the position of Banner Systems Analyst Supervisor as a supervisor within the meaning of Section 301(6) of PERA and a management level employe within the meaning of Section 301(16) of PERA.

The College, as the petitioner, has the burden of proving the factual elements necessary to meet the statutory exclusion. 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).

The first ground for excluding the position is that it is a supervisor within the meaning of Section 301(6) of PERA, which defines a supervisor as

"...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 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).

The College recently rewrote the job description for the position, adding responsibilities and adding the word "supervisor" to the job title. However, in deciding whether an employee is a supervisor under Section 301(6) of PERA, the Board looks at the duties the employee actually performs, not at the title of the position. Albert Einstein Medical Center v. PLRB, 330 A.2d 264 (Pa. Cmwlth. 1975).

The College asserts that Mr. Slater is a supervisor because he served on a committee that was involved in the hiring of Paul Feldman for the position of Banner Systems Support Analyst. The Board will find an employee to be a supervisor within the meaning of Section 301(6) of PERA if the employee has authority set forth in that section, actually exercises that authority and uses independent judgment in doing so. Schuylkill County, 28 PPER ¶ 28140 (Final Order, 1997) and McKeesport Area School District, 14 PPER ¶ 14165 (Final Order, 1983).

Mr. Slater's role in the College's hiring of Mr. Feldman does not meet the statutory definition of a supervisor. He did not hire Mr. Feldman, but rather served on a committee that reviewed Mr. Feldman's application. Mr. Feldman's application was the only one that the supervisors sent to the committee for its review. Finally, Mr. Feldman was a rehire, having recently worked for the College

Under these facts, the College's argument for supervisory status must also meet the proviso of Section 301(6) that Mr. Slater "to a substantial degree effectively recommended" the hiring of Mr. Feldman. This proviso also requires the College to demonstrate that Mr. Slater's recommendation called "for the use of independent judgment." Ms. Gilbert testified that Mr. Slater was an integral part of the committee decision. The committee was comprised of Mr. Slater, Ms. Gilbert and Ms. Gilbert's supervisor, Larry Cleat, the Associate Dean of Library and Information Services. At best, Mr. Slater's opinion was one of three on the committee. In such cases, the Board has rejected the argument that the hiring recommendation of a committee member was an effective recommendation to deem that position a supervisor. In the Matter of the Employees of State System of Higher Education, 29 PPER ¶ 29030 (Order Directing Submission of Eligibility List, 1998); 29 PPER ¶ 29234 (Final Order, 1998); aff'd 737 A. 2d. 313, 30 PPER ¶ 30177 (Pa. Cmwlth. 1999).

The College also asserts that Mr. Slater is a supervisor because he assigns work to Mr. Feldman and occasionally to Wayne Youngblood, the Technical Services Assistant. However, Mr. Youngblood is not in a direct report line to Mr. Slater, so assignments to him are not part of the legal analysis of supervisory duties.

As for the assignments to Mr. Feldman, it appears that Mr. Slater is more like a team leader who is responsible for seeing that projects involving the Banner Systems are successfully completed. There is no evidence that he possesses the ability, or has exercised the ability, to reward or sanction employees. See, e.g. Danville Area School District, *supra*. The ability to reward or sanction employees is the hallmark of supervisory status. Thus, if an employee directed other employees but does not reward or sanction them, then the employee is not a supervisor. Armstrong County, 21 PPER ¶21160 (Final Order, 1990); Pennsylvania State University, Milton S. Hershey Medical Center, 20 PPER ¶ 20126 (Final Order, 1989).

The College asserts that Mr. Slater should be found to be a statutory supervisor because he brings technical expertise to assignments he makes as a project leader. It is not the complexity of the job itself but the actual exercise of supervisory duties over other employes that qualifies an employe as a supervisor. Columbia-Snyder-Montour-Union Mental Health-Mental Retardation Program v. Commonwealth, PLRB, 383 A. 2d 546 (Pa. Cmwlth. 1978), Cumberland County, 12 PPER 12198 (Proposed Decision and Order, 1981), 13 PPER ¶ 13035 (Final Order, 1983).

Finally, the College asserts that Mr. Slater is a supervisor because he has the authority to evaluate Mr. Feldman. However, Mr. Slater has not yet evaluated Mr. Feldman. The Board looks at what an employe does, rather than how an employer intends to use an employe or what an employe should be doing. Mifflin County, 14 PPER ¶ 14012 (Proposed Decision and Order, 1982). 14 PPER ¶ 14051 (Final Order, 1983). Quakertown Community School District, 11 PPER ¶ 11011 (1979). Furthermore, if an employe evaluates other employes but does not reward or sanction them, then the employe is not a supervisor. Belle Vernon Area School District, 21 PPER ¶ 21165 (Final Order, 1990).

Additionally, the College did not produce evidence to support the proposition that any alleged supervisory duties performed by the Banner Systems Analyst Supervisor comprise a significant amount of Mr. Slater's time. Section 604(5) of PERA provides that the Board may consider the extent to which supervisory duties are performed in determining whether a position should be excluded from a bargaining unit. See Pennsylvania State University, 19 PPER ¶ 19156 (Final Order, 1988); Pennsylvania State University (Hershey Medical Center), 20 PPER ¶ 20126 (Final Order, 1989); Bedford Area School District, 24 PPER ¶ 24069 (Final Order, 1993). In this case, the Employer did not prove that the Banner Systems Analyst Supervisor performs the requisite supervisory duties which would justify their exclusion from the bargaining unit.

Based on the evidence of record, the College has not met its burden of proving that the position of Banner Systems Analyst Supervisor is a supervisor within the meaning of Section 301(6) of PERA.

Turning to the next ground advanced by the College for excluding the position, "management level employe" is defined in Section 301(16) of PERA as

"(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)

The Commonwealth Court, in Pennsylvania Assn of State Mental Hosp. Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1989) adopted the Board's test for determining whether an employe is a management level employe under Section 301(16). This test provides that an employe is a management level employe if any one of the following three factors are established: (1) the employe is involved directly in the determination of policy; (2) the employe directs the implementation of policy; or (3) the employe is above the first level of supervision. Id. at 1023.

As for the first ground to establish management level status, there is nothing in the record to show that Mr. Slater has had any role in determining College or Department policy, directly or indirectly. Policy decisions on how the College and the Department utilize its computers and information technology are decisions made by employes at higher levels than by Mr. Slater.

As for the second ground for establishing management level status, the College contends that Mr. Slater directs the implementation of policy, as evidenced in his job description stating that he is responsible for managing day-to-day requests for reporting data and identifying situations where end users can be given the ability to self-produce reports. (See College Exhibit 3). As an example of exercising this duty, Mr. Slater has evaluated at least one request and determined it would be a recurring request, so he

decided to ask Wayne Youngblood to develop a tool so that the user could have the ability in the future to have access to the data.

It is obvious that Mr. Slater's position is one in which technical expertise in computer programming, software and information technology is a necessity. However, the Board has frequently stated that technical expertise is not the equivalent of policy formulation and implementation. As the Board stated in City of Lebanon, 4 PPER 24 (1974), "To define the problem and directly implement the proposed solution is not the same as performing the function within a known discipline with confidence. The former has nothing to do with policy and the latter deals with technical expertise." See also Pennsylvania State University, 19 PPER ¶ 19156 (Final Order, 1988); Luzerne County Community College, 31 PPER ¶ 31117 (Proposed Order of Dismissal, 2000)(Director of Internet Services held not management level employe.)

Finally, as to the third ground to establish management level status, as discussed above in the section on the supervisory exclusion, there is no evidence that Mr. Slater's position would be a management level employe on the ground that the position is above the first level of supervision.

Based on the evidence of record, the College has not met its burden of proving that the position of Banner Systems Analyst Supervisor is a management level employe within the meaning of Section 301(16) of PERA.

CONCLUSIONS

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

1. That Lehigh Carbon Community College is a public employer within the meaning of Section 301(1) of PERA.
2. That the Lehigh Carbon Community College Support Professionals is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the Banner Systems Analyst Supervisor is not a supervisor within the meaning of Section 301(6) of PERA or a management level employe within the meaning of Section 301(16) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the petition for unit clarification is dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania this twenty-fourth day of June, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner