

SERB OPINION 89-028

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
District 925, Service Employees International Union,
Petitioner,

and
University of Cincinnati,
Respondent.

CASE NUMBER: 88-REP-12-0270
DIRECTIVE

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
September 14, 1989.

On December 21, 1988, District 925, Service Employees International Union (Petitioner) and the University of Cincinnati (Respondent) jointly filed a Petition for Clarification of Bargaining Unit seeking determination whether certain positions should be included into the existing bargaining unit.

The case was heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's recommended determination, exceptions, cross-exceptions and response. The Board adopts the hearing officer's Statement of the Case, Stipulations, Findings of Fact, Conclusions of Law and Recommendations.

The Board adopts the Analysis and Discussion with the following amendments: In Section I of the Analysis and Discussion, after the first sentence in paragraph 5, add a footnote stating: "While NLRB precedent and procedures are not binding upon this Board, examination of NLRB approaches with regard to comparable issues often is instructive." Also, in Section II of the Analysis and Discussion, the last citation in paragraph 1 should read: In re Franklin Local School District Board of Education, SERB 84-008 (11-8-84), rev'd. on other grounds, Franklin Co. Ct. C.P. (4-30-87). The amended Analysis and Discussion, pursuant to O.A.C. 4117-1-15 and 4117-1-17, carries the same precedential value as a Board opinion.

The Bargaining Unit is clarified to include the Records Management Officer 2 positions in the Records Division at the University of Cincinnati.

It is so directed.

SHEEHAN, Chairman; DAVIS, Vice Chairman; and LATANE, Board Member,
concur.


WILLIAM P. SHEEHAN, CHAIRMAN

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You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 119.12, by filing a notice of appeal with the Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the Franklin County Common Pleas within fifteen days after the mailing of the Board's directive.

I certify that this document was filed and a copy served upon each party on this 12th day of October, 1989.

470B:LSI/jlb


CYNTHIA L. SPANSKI, CLERK

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
District 925, Service Employees International Union,
Petitioner,
v.
University of Cincinnati,
Respondent.

CASE NUMBER: 88-REP-12-0270

HEARING OFFICER'S RECOMMENDED DETERMINATION

On April 5, 1989, upon due notice to all parties, a public hearing was held in the above-styled case before State Employment Relations Board Hearing Officer Kathryn A. Nowack in Cincinnati, Ohio. The parties were represented as follows:

On behalf of the Employee Organization:

James Robinson, Esquire
Kircher & Phalen
125 East Court Street
Cincinnati, Ohio 45202

On behalf of the Employer:

Duane Boggs, Esquire
Porter, Wright, Morris & Arthur
250 East Fifth Street, Suite 2200
Cincinnati, Ohio 45202-4166

I. STATEMENT OF THE CASE

On December 21, 1988, District 925, Service Employees International Union, AFL-CIO and the University of Cincinnati jointly filed a Petition for Clarification of Bargaining Unit with the State Employment Relations Board (Board) seeking a determination whether the Records Management Officer 2 positions at issue should be included in the bargaining unit.

On January 26, 1989, the Board directed the matter to hearing. A notice of hearing was sent to all parties on February 1, 1989. Thereafter, the hearing was held on April 5, 1989. By mutual consent of the parties, post-hearing briefs were submitted on May 19, 1989. The record was closed at that time.

II. ISSUES

Whether the Records Management Officer 2 positions held by Nancy Tennyson and Joyce Kenan in the Records Division at the University of Cincinnati are "supervisory" within the meaning of the Ohio Revised Code Section 4117.01(F).

III. STIPULATIONS

The following matters were stipulated by the parties:

1. The University of Cincinnati is a "public employer" within the meaning of Ohio Revised Code §4117.01(B).
2. The Service Employees International Union District 925 is an "employee organization" within the meaning of Ohio Revised Code §4117.01(D).
3. The bargaining unit description by classification listing should state Included Violations Coordinator, Excluded Office Manager 2, Elvira Harris, Parking Services; Library Associate 2, Kathy Scardina, Engineering Library; Data Systems Technician 2; Word Processing Specialist 1, President's Office. (See Bargaining Unit description Appendix A.)
4. Nancy H. Tennyson's position was reclassified to Records Management Officer 2 in the Records Division of University Personnel Services effective September 1, 1981.
5. Joyce M. Kenan was promoted to Records Management Officer 2 in the Records Division of University Personnel Services effective October 1, 1984.
6. Joyce Kenan and Nancy Tennyson participate in the evaluation process for department employees.
7. Joyce Kenan and Nancy Tennyson do preliminary approvals of vacation requests.
8. Joyce Kenan and Nancy Tennyson have interviewed some candidates for employment.

IV. FINDINGS OF FACT

1. The Records Division of University Personnel Services at the University of Cincinnati operates from 8:00 a.m. to 5:00 p.m. Monday through Friday. This division has responsibility for maintaining the personnel records for all classified and unclassified employees of the University of Cincinnati.

AG OFFICER'S
RECOMMENDED DETERMINATION

Wajlyyah Cunningham is currently the Director of Personnel Records and is present in the division during operating hours. She has been informally organized into two units. Directly under Cunningham in the chain of command are two Records Management Officer 2's, Joyce Kenan and Nancy Tennyson. There are currently 3.5 Personnel Technician 1's who report to Kenan. In addition, there is a Clerical Specialist, a Clerk II, and a one-half time delivery worker who report to Tennyson. The division also employs a one-half time secretary who reports directly to Cunningham. (T. 15, 67-69, 151).

3. The record indicates that during Cunningham's absence, Kenan oversees the division. For three months in 1986, Cunningham was acting director of Compensation and worked one-half day in Compensation and the other half of the day in the Records Division. During that time, Kenan acted as the part-time director of Personnel Records. Kenan stated that Cunningham was available by phone, and at times she does not exercise the same degree of authority as Cunningham and if something important comes up during the director's absence, she contacts Jill Parris, the Director of Personnel Services, or one of the other directors for guidance. (T. 17, 18, 19). Tennyson and Kenan operate as backup for each other during vacations and absences. (T. 17).
4. On a day-to-day basis, Kenan and Tennyson oversee and direct the work of the staff. They also spend a great deal of their time engaged in the same work as the technicians. Kenan testified that she spends approximately 40% of her time auditing and processing Personnel Action Forms (PAFs). (T. 65). Tennyson estimated that she spends slightly more time on this function. (T. 140). In addition to processing PAFs, Kenan and Tennyson also spend time providing advice and consultation on records management with other persons or departments. Indexing, and making longevity sick and vacation adjustments. These functions are also performed by the technicians. (T. 139-140, 142, 192).
5. The division has developed a desk manual which details the tasks performed in the division. Kenan and Tennyson were both involved in the creation of this manual, as were the other employees in the division. (T. 34). This manual is utilized for instruction in the performance of the daily activities. In certain instances when a new task is created, or a task is revised, Kenan or Tennyson prepare a task description, circulate it, then add it to the manual. (T. 33-37, Union Ex. 19, 20, 21, 22). Kenan stated that this does not happen often. She also stated that when something new arises, often the employees discuss how it should be handled or may attempt to agree on a method to handle it. (T. 38-39).
6. On a daily basis, the employees are aware of which tasks they are to perform and work accordingly. (T. 22, 104.). If Cunningham has special projects that need to be completed, Kenan distributes them equally among the technicians. (T. 22, 76). At times, Kenan has independently issued

verbal information logs (slips disseminating instructions or information) advising the employees that certain projects would temporarily be halted or other projects would begin. (T. 23, 83, Union Ex. 16, 17, 18). Pursuant to the record, the majority of these logs are distributed after Kenan or Tennyson has discussed the matter with Cunningham. (T. 77, 88, 179, 196).

7. In one case, Becky Powell, an employee returning from leave, questioned the size of her caseload. Kenan reviewed the assignments and agreed that it was an excessive load. She testified that she reviewed the statistics and decided to even the workload by assigning the extra work to herself and another employee. (T. 62). She spoke to Cunningham who recommended a different solution. Cunningham's recommendation was utilized. (T. 59-61, 180, 196).
8. Kenan and Tennyson sign the timesheets for their employees verifying that the hours on the time sheets are correct. (T. 37, 83,) The employees contact either Kenan or Tennyson when reporting in sick. Kenan acknowledged that she has never denied an employee sick leave nor challenged the hours on a time sheet. (T. 82). Both Kenan and Tennyson authorize leave slips, vacation requests, and compensatory time requests, however these items are reviewed by Cunningham. (T. 112-114). Tennyson stated that if two employees request vacation at the same time and only one employee can be absent, the employees themselves work it out or Cunningham makes the decision. (T. 136, 137).
9. Cunningham testified that neither Kenan nor Tennyson can reward the employees who work for them. (T. 175). The evidence shows that some employees have been rewarded for excellence in attendance if their attendance was at a certain level, however, this is routinely granted based on University policy. Upon Parris' request, Kenan or Tennyson merely submits the names of the employees which have met the University standard. Those employees are then given a perfect attendance award. Previously, a program was in effect whereby an employee could be given a "spice" award for outstanding performance. However, any employee could recommend that an award be given, not just Kenan or Tennyson.
10. Both Kenan and Tennyson prepare the performance evaluations for their employees. These performance evaluations are utilized to calculate retention points for promotion or layoff purposes. (T. 87). The evaluations are performed utilizing standards promulgated by Administrative Services. (T. 86). An evaluation form is filled out in pencil by either Kenan or Tennyson, as the rater. An additional form is filled out by the employee being evaluated. Both forms go to Cunningham. If she has no revisions, the form is finalized and signed. (T. 71). If Cunningham has questions, she and the rater go over the scores and may revise the scores. There has been at least one instance when Cunningham felt a change was necessary, however, Kenan did not agree, and the score was not revised. (T. 87-90). At other times, changes have been made based on Cunningham's request. (T. 29, 30, 31, 110). After the evaluation form is final, the rater, the employee, and Cunningham meet to discuss the result. (T. 29,71). Kenan testified that evaluations are not utilized to determine salary or salary increases. (T. 87).

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11. Pursuant to University procedures, the hiring process commences with a position posting. Next, an exam is given to the applicants and the persons with the top three scores are interviewed. In the Records Division, these interviews are conducted by Kenan and Tennyson. After the interviews, they rate the candidates. Next, Cunningham interviews the same three candidates and selects one. She testified that she gives varying degrees of weight to their recommendations. (T. 170-173). In two examples cited in the record, once Cunningham selected the candidate ranked first by Kenan and Tennyson. (April Harris, T. 49). The second time she did not select the candidate recommended by Kenan and Tennyson. (Debora Edwards, T. 49, 69, 122, 124, 193).
12. During the promotion process, Kenan and Tennyson also provide input into the selection. In early 1986, Terry Crawford was eligible for promotion from Personnel Aide to Personnel Technician I. She previously worked for Kenan. She and the other candidates were interviewed by Kenan and Tennyson. After the interviews, they recommended to Cunningham that Crawford be promoted. (T. 43-45). Cunningham interviewed Crawford and the other candidates and promoted Crawford to Personnel Technician I.
13. Cunningham stated that Kenan and Tennyson are authorized to issue verbal and written discipline. (T. 176). Kenan did not recall whether she had ever verbally counseled an employee. (T. 63-67). There is one example in the record of Kenan writing a conference report on Donna Muller, one of Tennyson's employees. (Union Ex. 30). There is no indication in the record whether the conference report was utilized for discipline or that Muller was ever disciplined. (T. 130-134). Tennyson disputed that she herself had ever disciplined any employee. (T. 203). She indicated that she was advised by Cunningham on each occasion when and how to discipline the employee. (T. 126-130, 194). Cunningham stated that Tennyson had disciplined certain employees in writing, but agreed that although Tennyson has been encouraged to act independently, "it hasn't worked well with Nancy." (T. 185).
14. Although there have not been any formal grievances filed in the department, Cunningham stated that Kenan and Tennyson would have the opportunity to adjust "problems or grievances" if they arose. However, she acknowledged that "they would certainly tell her that they would be doing it" and, in fact, she would be informed and consulted regarding the resolution. (T. 179).

Based on the entire record and the credibility of the three witnesses, I find that Kenan and Tennyson do not independently issue written reprimands. In addition, I credit Kenan's testimony that she could not recall verbally counseling any employee, and on that basis find that there is no credible evidence in the record demonstrating that Kenan or Tennyson verbally counsel the employees without consulting Cunningham.

V. ANALYSIS AND DISCUSSION

I

As a preliminary matter, counsel for the Employee Organization requests reconsideration of an evidentiary ruling granting sequestration of witnesses. Counsel argues that sequestration is not applicable in a representation hearing because the witnesses are effectively parties whose rights are being adjudicated in the hearing. In addition, counsel argues that NLRB precedent does not allow for sequestration in representation cases and the same rule should apply in this case.

The Hearing Officer agrees that as a general rule, sequestration is not necessary or desirable in a representation case, however, not for the reasons advanced by the counsel for the Employee Organization. First, the employees whose positions are at issue are not parties to the action.

Also, in general, because a representation hearing is a non-adversarial hearing in which the main objective of the Hearing Officer is to elicit all available evidence, sequestration is, for the most part, unnecessary. However, sequestration of witnesses is appropriate in certain circumstances.

Pursuant to Rule 615 of the Ohio Rules of Evidence the exclusion of witnesses is often utilized and is designed to prevent a prospective witness from hearing another witness' testimony in order to ensure that the subsequent witness is able to testify pursuant to his or her own unbiased knowledge. In that manner, it is an important tool in ascertaining the truth. Although the rules of evidence are not binding upon the State Employment Relations Board, they are helpful and are often utilized.

Counsel for the Employee Organization argues that the NLRB does not sequester witnesses in representation cases. It is true that the NLRB does not generally sequester witnesses in representation matters, however, a review of the NLRB's policy on exclusion demonstrates that the NLRB allows the Hearing Officer wide discretion in determining when witnesses are to be sequestered. See Hamilton Nursing Home, 270 NLRB 203, 116 LRRM 1300 (1984).

Counsel cites Fall River Savings Bank, 246 NLRB 128, 102 LRRM 1667 (1979) for support for this proposition. However, Fall River does not state that sequestration is not allowed in representation cases. It states that the general rule regarding sequestration in unfair labor practice cases does not apply to representation cases. In Fall River Savings Bank, *supra*, it states:

"[I]n regard to sequestering witnesses we note that a representation case, unlike an unfair labor practice case, is not an adversary proceeding and, therefore, the Board's reasoning and conclusions in Unga Painting Corporation, 237 NLRB No. 212, 99 LRRM 1141 (1978) do not apply; ... (2) since Hearing Officer concluded that presence of alleged supervisor was necessary to enable union to present its case, his ruling arguably was proper exercise of discretion even under Unga Painting.

The conclusion reached in that case was to uphold the discretion of the Hearing Officer. The NLRB ruled that the Hearing Officer's ruling not to allow sequestration was correct and did not prejudice the party seeking sequestration. Thus, the case does not enunciate a rule regarding sequestration in a representation case.

Upon commencement of the hearing in the case, sub judice, counsel for the Employer moved that the witnesses be sequestered due to the fact that both witnesses would be testifying regarding the same position. He alleged that although the job classification was the same, the employees had different duties and responsibilities and therefore the possibility existed that the testimony of one could influence the other. Counsel for the Employee Organization did not present any persuasive argument to demonstrate that sequestration would in any way prejudice his case or prevent a fair litigation of the merits. Based upon the arguments presented, the Hearing Officer agreed that because only one position with multiple incumbents was being litigated, it would be prejudicial if the testimony of one employee influenced the testimony of the other employee. Utilizing her discretion, the Hearing Officer granted the Employer's motion to sequester.

Upon review of this ruling, the Hearing Officer does not find that the Employee Organization was prejudiced in any way by that ruling. It had a full and fair opportunity to present its case. On that basis, the ruling is reaffirmed.

II

The issue in this case is to determine if the Record Management Officer 2 positions, in question, are supervisory and thus excluded from the bargaining unit. On this issue, the Ohio Revised Code (O.R.C.) Section 4117.01(F) is controlling. That section provides in relevant part:

- (F) Supervisor means any individual who has authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment, ...

Those individuals found to be supervisors within the meaning of the above definition are not considered public employees pursuant to §4117.01(C)(10), and an employer cannot be compelled to bargain with them. Whether an individual falls within the definition of a supervisor is a question of fact in each case and such status must therefore be determined on a case-by-case basis. In re Lucas County Recorder's Office, SERB 85-061 (11-27-85). The burden of establishing an exclusion from a bargaining unit under §4117.01 rests upon the party seeking it. In re Franklin Local School District Board of Education, SERB 84-008 (11-8-84).

In order to be determined to be a supervisor, an individual must possess more than one of the responsibilities enumerated in §4117.01(F); and the key to that supervisory status is the use of independent judgment in the exercise of authority. In re Greater Cleveland Regional Transit Authority, SERB 86-015 (4-17-86).

The determination regarding whether individuals should be accorded supervisory status is a difficult question due to the infinite gradations of authority between the employer and the rank and file. The degrees of difference in the case of "supervisors" and "employees" can be so subtle that deciding who is a supervisor must practically involve "a large measure of informed discretion."² Moreover, according to the Ohio Public Employment Relations Board, O.R.C. §4117.01(F) requires a narrower interpretation than the similar provision found in the National Labor Relations Act.³ This is due to the unique nature of decision making and accountability present in the public sector. In re Greater Cleveland Regional Transit Authority, supra.

In the present case it is clear that the Records Management Officers 2's have no independent authority to hire, transfer, suspend, lay off, recall, promote, or discharge other public employees. Therefore, the determination whether the positions are supervisory must be made based on the evidence presented regarding their authority to assign or discipline other public employees or responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Regarding the authority to assign employees, the record reflects that both Kenan and Tennyson have some authority in this area, however, the assignment of work in the division is routine and well structured. On a daily basis, the employees work independently on a routine schedule and are aware of and familiar with the tasks they are to perform. Although special assignments occasionally arise, Kenan stated that this work is distributed equally to the technicians or as necessary to balance the workload. While this may require knowledge of the current workloads, there is no indication that it requires independent judgment beyond choosing between narrowly defined parameters.

In other instances, when reassignment of work is necessary, such as the case with Becky Powell, the evidence demonstrates that the work is reassigned pursuant to consultation and review by Cunningham.⁴ There are no examples in the record to demonstrate that Kenan or Tennyson have the sole

² Trustees of Boston University v. NLRB, 575 F.2d 301, 305 (1st Cir. 1961).

³ 29 U.S.C.A. §151 et seq.

⁴ See Finding of Fact No. 7

authority to reschedule employees or schedule overtime without reviewing the matter with Cunningham. On that basis, this exercise of authority does not rise to the level of autonomy required to satisfy the statutory requirement set forth in O.R.C. §4117.01(F).

Also, while the Records Management Officer 2's are responsible for review and approval of time sheets and preliminary approval of leave and vacation requests, the record reveals that Kenan routinely approves sick leave requests and time sheets pursuant to established policies.

Plus, there is nothing in the record which indicates that such leave is ever denied by either Kenan or Tennyson. Nor do they give final approval to any of these requests. The evidence demonstrates that when a conflict arises in scheduling, either the employees attempt to work it out themselves or Cunningham is consulted for a final decision. On that basis, there is no indication that this function requires the use of independent judgment. Rather, the evidence indicates that these tasks are ministerial and lack the requisite degree of authority to mandate exclusion pursuant to Chapter 4117.01(F).

With regard to the authority to direct employees, I find that the Records Management Officer 2's authority does not rise to the level of supervisory status within the meaning of the Act. Although Kenan and Tennyson direct and oversee the work of the employees in their unit, the role of direction is minimal and more that of a "leadman."

The term "leadman" suggests some responsibility beyond that of the rank and file employee; it is customarily applied to an individual who directs the work of a small group of employees, while at the same time performing the same work as those employees. Leadman status is often conferred upon the most experienced employee on the job. The critical element is whether their direction of the work is routine in nature and does not call for frequent exercise of independent judgment or managerial discretion.

Both Kenan and Tennyson have responsibility beyond that of the other employees in their respective units, however, rarely do they exercise independent judgment. On a daily basis, the employees work on their own

* See Finding of Fact No. 8.

* State of California, 3 NPER 5-12014 (California Public Employment Relations Board 12-31-80).

* Davenport v. Public Employment Relations Board, 264 NW 2d 307, 96 A.L.R. 3d 698 (1975).

according to the division policies and instructions detailed in the task manual. A majority of Kenan and Tennyson's time is spent performing the same tasks as the other employees in the division. Although the employees may consult Kenan and Tennyson to clarify or explain certain procedures, the evidence suggests that, generally, joint problem solving is utilized; that is, the employees all consult each other with regard to clarification of tasks or questions concerning assignments. If a new task or problem arises, the employees discuss the matter and attempt to reach a solution, or if it is an important matter, Cunningham is consulted. Most public sector jurisdictions, as well as the private sector, require more than the giving of instruction, minor decision making, or routine direction to demonstrate actual supervisory authority. See In re Lucas County Recorder's Office, supra (minor decision-making) and In re Greater Cleveland Regional Transit Authority, supra.

Also, the sporadic exercise of some supervisory authority does not of itself convert an employee into a supervisor. Therefore, the limited time that Kenan was acting director does not automatically convert her current position into a supervisory position.

The authority of the Records Management Officer 2's to discipline employees is sharply limited. Although Cunningham testified that both Kenan and Tennyson have the authority to discipline the employees, both verbally and in writing, that evidence was decisively rebutted by both employees. Kenan could not recall disciplining any employee either verbally or in writing, other than a conference report written on Donna Muller, one of Tennyson's employees. There was no evidence regarding what significance this conference report had on disciplinary action or if there was any discipline taken in regard to this employee. Her job classification was later reduced, however, this was as a result of a job audit initiated by the employee herself.

In addition, Tennyson stated that she had never taken any disciplinary action in regard to any employee without being advised to do so by Cunningham. On that basis, the evidence clearly fails to demonstrate that either Kenan or Tennyson has the authority to independently discipline employees or effectively recommend discipline.

- Schoolcraft Community Schools, 1 NPER 23-10125 (Michigan Employment Relations Commission 11-15-79), Holidaysburg Area School District, 3 NPER 40-12275 (Pennsylvania Labor Relations Board 7-31-81), Brooklyn Board of Education, 1 NPER 07-10022 (Connecticut State Labor Relations Board, 4-3-79), City of Akron, 1 NPER 16-10044 (Iowa Public Employment Relations Board, 7-19-79), City of Alpena, 1 NPER 23-10110 (Michigan Employment Relations Commission 10-23-79).
- State of New Jersey, 4 NPER 31-13036 (Rep. Dir. 1-7-82, affirming Hearing Officer decision, 2 NPER 31-11072 3-11-80), NLRB v. Metropolitan Life Ins. Co., 405 F2d 1169 (2nd Cir. 1968).

Both Kenan and Tennyson participate in the interviewing process for hiring and promotional purposes. The Employer argues that such participation amounts to effective recommendation. An "effective recommendation" has been defined as one "which, under normal policy and circumstances, is made at the chief executive level or below and is adopted by higher authority without independent review or de novo consideration as a matter of course."¹⁰

Based on this, it is clear that neither Kenan or Tennyson "effectively recommend" hiring or promotion. The evidence clearly indicates that the recommendations based on the interviews conducted by Kenan and Tennyson are merely a routine step in the hiring and promotional process. In all cases, Cunningham independently interviews all candidates for hiring and promotion. At times she has selected the candidate recommended by Kenan and Tennyson. Other times, she has selected a different candidate. In such cases, where the recommendations are subject to independent scrutiny by the director, the recommendation does not rise to the level of "effective" recommendation.¹¹

Kenan and Tennyson evaluate their employees. However, the evaluations are done in pencil until they are reviewed by Cunningham. She and the rater (either Kenan or Tennyson) review the employees' comments and agree on the final evaluation. Although the evidence indicates that at least once when Kenan and Cunningham disagreed, Kenan's rating prevailed, the record also reveals that Cunningham's review may result in changes. Also, there is no indication that the evaluations are utilized for anything other than promotion or layoff. Evaluating employees in and of itself is not a statutorily listed supervisory criteria. Only if the evaluations are "effective recommendations" for one of the listed supervisory functions would evaluation serve as a basis for exclusion. There is no evidence indicating that a layoff has ever occurred nor is there evidence that an evaluation has been performed or been relied upon without independent scrutiny by Cunningham for promotional purposes. Therefore, the authority to perform preliminary evaluations is insufficient to exclude the Records Management Officer 2's as supervisory employees.

There is a formal grievance procedure in effect, however, neither of the Records Management Officer 2's have ever resolved a grievance; as no grievances have ever been filed. Although Cunningham stated that Kenan and Tennyson have the necessary authority to resolve a grievance if one were filed, mere potential supervisory authority cannot be relied upon to establish supervisory authority.¹² Therefore, the Hearing Officer cannot conclude that the requisite authority exists to resolve formal grievances.

¹⁰ Davenport v. Public Employment Relations Board, 264 NW 2d 307.

¹¹ State of New Jersey at note 9, supra, City of Sunrise, 3 NPER 10-11314 (Florida Public Employment Relations Commission 11-13-80) Eau Claire County, 3 NPER 51-12068 (Wisconsin Employment Relations Commission, 3-20-81).

¹² Winnebago County Sheriff's Department, 1 NPER 51-10037 (Wisconsin Employment Relations Commission 3-29-79), Penn Township, 3 NPER 40-12062 (Pennsylvania Labor Relations Board 1-23-81).

There was no assertion or evidence presented to demonstrate that the Records Management Officer 2's effectively recommend transfer, suspension, layoff, recall, or discharge. In addition, the difficulty with the Employer's position in this case is that few, if any, tangible examples have been given in the record regarding the Records Management Officers' exercise of independent judgment regarding the statutory supervisory functions. The examples given by the employees of their exercise of authority are routine and for the most part administrative. Most functions and actions are reviewed by the director prior to being implemented or performed. There is nothing in the record to indicate that the Records Management Officer 2's exercise sufficient supervisory authority to mandate exclusion from the bargaining unit on that basis.

VI. CONCLUSIONS OF LAW

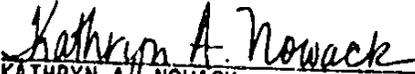
1. The University of Cincinnati is a "public employer" within the meaning of Ohio Revised Code §4117.01(B).
2. The Service Employees International Union District 925 is an "employee organization" within the meaning of Ohio Revised Code §4117.01(D).
3. Joyce Kenan and Nancy Tennyson are "public employees" within the meaning of Ohio Revised Code §4117.01(C).
4. Joyce Kenan and Nancy Tennyson positions, classified as Records Management Officer 2, are not supervisory within the meaning of §4117.01(F).

VII. RECOMMENDATIONS

Based upon the foregoing, it is respectfully recommended that:

1. The Board adopt the Stipulations of Fact, Findings of Fact, and Conclusions of Law set forth above.
2. The bargaining unit be clarified to include the Records Management Officer 2 positions in the Records Division at the University of Cincinnati.

ISSUED and SUBMITTED to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-1-15 and SERVED on all parties by certified mail, return receipt requested, this 11th day of July, 1989.


KATHRYN A. NOWACK
Hearing Officer