

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Ohio Council 8, American Federation of State, County and
Municipal Employees, AFL-CIO,

and

Mahoning County Department of Human Services

Case Number: 90-REP-01-0019

OPINION

POTTENGER, Vice Chairman:

The supervisory issue addressed in this case was analyzed under existing SERB case law at the time it was decided and the Board adopts the hearing officer's Recommendations and Conclusions of Law on the point with such understanding. SERB is, however, presented with the opportunity to reconsider its previous position with respect to Ohio Revised Code 4117.01(F) as that section pertains to the definition of "supervisor." Specifically, and in pertinent part, this section provides:

"Supervisor means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, layoff, 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;..." (Emphasis added.)

The National Labor Relations Act, Section 2(11), has a similar provision:

"The term 'supervisor' includes: any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (Emphasis added.)

This, however, is where the similarity ends. Pursuant to the interpretation and application of this provision in the National Labor Relations Act, possession of only one of the listed indicia is sufficient to establish supervisory status, provided independent judgment is used in the exercise of that authority.

In explaining this interpretation, the Sixth Circuit Court of Appeals offered the following reasoning, which we find persuasive:

The statute does not contain any of the conjunctives contended for. Such a construction would require a supervisor to have all of the powers referred to rather than merely one of them. We see no merit in the contention. In addition to adding something to the statute which is plainly not present, it ignores the use of the word "or" in the phrase "or discipline other employees" which immediately follows the enumeration of the preceding qualifications. If Congress had intended the words to be construed in the conjunctive instead of the disjunctive it could easily have used the word "and" and reached that result. Its failure to do so, together with the use of the word "or" leads us to construe the statute in the disjunctive. In Re. Edward G. Budd Manufacturing Co., 169 F. 2d 571, 576, 22 LRRM 2414 (6th Cir. 1948). See also, NLRB Fullerton Publishing Co., 283 F. 2d 545, 47 LRRM 2061 (5th Cir 1960); and Ohio Power Co. v. NLRB, 176 F. 2d 385, 24 LRRM 2351 (6th Cir. 1949).

SERB, on the other hand, has historically required the presence of more than one of the listed indicia. This is so, even though the provision is written in the disjunctive. The previous Board acknowledged this fact in In re Lucas County Recorder's Office, SERB 85-061 (11-27-95) in which it indicated that an employee need not have authority in all the areas mentioned in 4117.01(F) to be considered a supervisor. The Board did not address exactly how many of the responsibilities were required, however, until its decision in In re Greater Cleveland Regional Transit Authority,

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SERB 86-015 (4-17-86) in which it was established that to qualify as a supervisor an individual must possess more than one of the responsibilities listed. The Board reasoned that, "While R.C. 4117.01(F) is similar to the National Labor Relations Act (NLRA), it applies to the public rather than private sector. Herein lies the difference. The public sector is governed by many more constraints in relation to promotions and supervisory status than is the private sector. Thus, R.C. 4117.01(F) requires a more narrow interpretation."

We recognize that in some areas there are limitations on the authority that public sector employees may exercise. But it does not naturally follow that we should require the possession of more than one indicia of authority to establish supervisory status in the public sector. Rather, where it is difficult to meet even one of the criteria listed in the statute, such a standard would seem to place an undue burden on any party seeking to prove that an individual is a supervisor.

We acknowledge, as the concurring opinion notes, that through statutory language some other public sector jurisdictions have sought to require more than one indicia for supervisory status.

What is more telling, however, is that states with statutory language nearly identical to our own, have chosen to apply that language in the public sector exactly as it is written and as we apply it here. This is true in California, Indiana and Pennsylvania. See e.g., Sanger Unified School District, 13-PERC-20148, (California Public Employment Relations Board, 6-30-89); Quakertown Community School District, 11 PPER Para 11011 (Pennsylvania Labor Relations Board, December 4, 1979; Borough of Pen Argyl,

9 PPER Para 9210 (PLRB, September 20, 1978); Lawrence Township M.S.D., 11 IPER Para 17013 (Indiana Education Employment Relations Board, November 21, 1986), adopting and affirming Indiana EERB Hearing Officer's Decision/Report, 10 IPER Para 16018 (June 12, 1985).

Moreover, in Michigan, where the Public Employment Relations Act does not define the term "supervisor" at all, the Court of Appeals has applied the NLRB definition and interpretation in defining public sector supervisors. Mecosta County Board of Commissioners v. Michigan Council 25, American Federation of State, County and Municipal Employees, AFL-CIO, 420 N.W. 2d 210 (1989) citing Clare-Gladwin Intermediate School District, 396 N.W. 2d 538 (1986). Here, where the legislature chose the NLRB definition, it is reasonable and appropriate to apply it as written.

The statute is clear and unambiguous on its face, and one need look no further than the clear language to ascertain the legislature's intent.

Accordingly this Board rules that henceforth¹ an individual will be excluded from a bargaining unit, pursuant to O.R.C. Sec 4117.01(F), so long as the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in that section,

¹ This standard is to be applied prospectively only. If an individual's status has previously been determined through stipulation or litigation, we decline to re-examine that status under the new standard. If it is contended that the individual's duties have changed so as to justify a change of status, then the party advocating the change must demonstrate a change of status under the standard existing at the time of the original stipulation or litigation.

actually exercises that authority and uses independent judgment in doing so.²

In so ruling, the Board remains fully cognizant of its duty not to construe supervisory status too broadly for to do so would be to divest employees of their collective bargaining rights. Cases raising the supervisory issue will continue to be addressed on a case-by-case basis.

SHEEHAN, Board Member concurring:

I respectfully disagree with the majority's departure from SERB's historical standard by now requiring only one determinant be present to establish supervisory status.

The thrust of the majority's argument is that Ohio Revised Code §4117.01(F) is clear and unambiguous and we need to look no further than the clear language to ascertain intent. The majority places heavy emphasis on the disjunctive "or" in support of this position. It is not clear, nor am I aware, that "or" in statutory construction is always interpreted as only one of a list. While the National Labor Relations Board (NLRB) chose to apply it that way, this is but one interpretation and it is clearly not binding on SERB.

² In the instant matter, the Board has thoroughly reviewed the record and concluded that the data security specialist at issue is not a supervisor under either application of the statute.

For example, in the State of Oregon the statutory definition of a "supervisory employee" found in the Oregon Public Employee Collective Bargaining Act is the same as Ohio Revised Code §4117.01(F) and the National Labor Relations Act (NLRA). O.R.S. 243.650(14) states:

"Supervisory employee" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or having responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of such authority is not merely routine or clerical nature, but requires the use of independent judgment..."

The legislature in Oregon was moved to give instructions on how this provision was to be applied when it added the following sentence:

"...However, the exercise of any function of authority enumerated in this subsection shall not necessarily require the conclusion that the individual so exercising that function is a supervisor within the meaning of ORS 240.065, 240.080, 240.123, 243.650 to 243.782, 292.055, 341.290, 662.705, 662.715 and 662.785."

If the definition is so clear and unambiguous that one indicator is enough to determine supervisory status then the restrictions of the Oregon legislature would have been a clear contradiction to the definition. I do not think so and, obviously, the Oregon legislature did not think so.¹

¹ What is even more telling is that O.R.S. 663.005(9) which is the "supervisor" definition for the private sector in the Oregon statute has the same NLRB definition as the public sector but does not contain the instructions on how to interpret the provisions which were prominently included in the public sector statute. While the NLRB "supervisor" definition can be used for both the private and the public sector, the Oregon legislature was acutely aware that the application of the definition should differ because of the varying policies, procedures and conditions of these two sectors.

The crucial determination of supervisory status under the Oregon Act is demonstrated authority to act or to effectively recommend action in the areas of discipline and discharge, grievance handling and hiring. AFSCME Council 75 v. Hood River County, Case No. C-168-81, 6 PECBR 5169, 5179 (1982). Secondary indicia of supervisory status include the exercise of authority in such areas as shift responsibility, instruction, evaluation, timekeeping and granting time off. AFSCME Council 75 v. Lane County Sheriff's Office, Case No. C-281-79, 5 PECBR 4507 (1981). Exercise of authority in the secondary but not the primary areas of responsibility often indicates lead worker status rather than supervisory status within the meaning of O.R.S. 243.650(14). AFSCME, Council 75, Local 1246, AFL-CIO v. Fairview Training Center, 8 NPER OR-17001 (1985).

Clearly the legislature in Oregon did not find the NLRA supervisory definition so clear on its face and the addition of the last sentence was not seen as a contradiction to the original definition.

So much for the majority's argument that "the statute is clear and unambiguous on its face, and we need look no further than the clear language to ascertain the legislature's intent."

The fact that the NLRB chose to interpret supervisory definition the way it did is not a mandate on SERB to do so. The NLRB deals principally with the private sector where authority is more easily bestowed and expanded than in the public sector. For instance, in the public sector; hirings and promotions are mostly accomplished through competitive testing; dismissals, disciplinary actions, transfers and layoffs are procedurally structured; and grievances are usually signed-off on at high levels of management. The

private sector is not nearly so burdened. Promotions and monetary rewards to encourage good performance are common tools in the private sector. This latitude of operation is practically non-existent in the public sector.

It is indeed most significant and telling that public sector jurisdictions which tend to blindly follow the NLRB on many issues refuse to follow the NLRB on the supervisory issues and refuse to be satisfied with a simple rule of only "one of the listed indicia is enough."

Nor is Oregon the only example. Minnesota² defines a supervisory employee in the same way as Ohio Revised Code §4117. and as the NLRA does. However, the section is read in conjunction with Minn. State Section 179.71, Subd. 3, which provides in pertinent part as follows:

....with regard to the inclusion or exclusion of supervisory employees, the director must find that an employee may perform or effectively recommend a majority of these functions referred in Section 179.63, subdivisions 9 or 9a, before an employee may be excluded as supervisory...(Emphasis added). (In the matter of AFSCME No. 91, St. Paul, Minnesota and County of Washington, Stillwater, Minnesota 1 NPER 24-10000 (MN 12/12/78)).

In Connecticut, Section 7-471(2) of the Connecticut Act reads in pertinent part:

...In determining whether a position is supervisory the Board shall consider, among other criteria, whether the principal functions of the position are characterized by not fewer than two of the following: (a) Performing such management control duties or scheduling, assigning, overseeing and reviewing the work of subordinate employees; (b) performing such duties as are distinct and dissimilar from those performed by the employees

² Minn. State. Section 179-63 Subd. 9.

supervised; (c) exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing the provisions of a collective bargaining agreement; (d) establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement these standards. (Emphasis added.)

With regard to the application of the NLRB standards to the state law, the Supreme Court of Connecticut quite eloquently stated: "While the interpretation of provisions of the federal act may be extremely helpful...neither the state board nor our courts are compelled to slavishly follow policies which have been adopted by the NLRB for the purpose of ensuring administrative efficiency on the federal level. Connecticut State Labor Relations Board v. Connecticut Yankee Greyhound Racing, Inc., 175 Conn. 625.4 (1978).

In Florida, the statute contains no categorized exclusion from coverage for supervisory employers such as found in section 2 (11) of the NLRA. However, it is well established in the Florida Commission jurisprudence that only those supervisory employees whose duties create a conflict of interest with their subordinates are appropriately excluded from bargaining units containing those subordinates. IBFO Local No. 5 v. School Board of Pinellas County 2 FPER 18 (1976). The basis of this exclusion is that employees whose authority in the interest of their employer requires them to make decisions adverse to the interest of their fellow employees possess an inherent conflict of interest with their fellow employees. Fort Walton Beach Fire Fighters Association v. City of Fort Walton Beach, PERC Order No. 79E-102 (April 26, 1979).

Thus, in Florida, where Food Service Managers' independent supervisory authority is confined to the issuance of oral reprimands and the assignment of work and they lack the authority to independently hire, fire, discipline or evaluate their subordinate, the commissioners concluded that the position of Food Service Manager is appropriately included in the unit. School Board of Volusia County. 1 NPER 10-10176 (F1 05/31/79).

In New Hampshire the standards for determining a bargaining unit are formed in RSA 273-A which states: "Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise."

And the list goes on.

Again, while public sector jurisdictions tend to follow or at least look to the NLRB law on many issues, supervisory status is an exception, and for good reason. There are many more constraints in the public sector on promotion, hiring, firing, transfer, and reward than in the private sector because of civil service laws and other rules, regulations and statutory requirements. Increases in pay are often automatically implemented through the step system or by a general increase for all employees in the public sector. This eliminates a pay increase as a reward factor so frequently employed in the private sector.

The policy behind the supervisory exclusion is the inherent conflict of interest between employees in the unit and their supervisors whose jobs require them to make decisions adverse to the interests of their fellow employees. The thoughtful implementation of such policy can only be achieved by careful balancing on a case by case basis, and not by a

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simplistic and technical rule. Requiring one characteristic only does not take into account the differences of supervisory authority in the various indicators. If, for example, the only supervisory authority an employee has is assigning work, this should not be enough to exclude the employee from a bargaining unit. Obviously, this does not create a conflict of interest with his/her fellow employees. Under the majority's new technical rule, an employee with no conflict could be excluded.

Not all supervisory indicia have the same weight. Oregon recognized it and grouped the more "heavy weight" ones like hiring in a primary group and the less important ones like directing work in a secondary group. Like Florida, Oregon requires that the determination of supervisory status involve a balancing test.

Moreover, the liberal construction required by R.C. 4117.22 should extend rather than limit the bargaining rights of public employees.

SERB's historical standard for supervisory status of requiring more than one of the listed determinants be present with emphasis on the exercise of independent judgment should be retained.

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