

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Employee Organization,

and

Medina County Health Department,

Employer.

Case Number: 93-REP-06-0118

OPINION

MASON, Board Member:

This case comes before the State Employment Relations Board ("SERB") on exceptions from the Hearing Officer's Recommended Determination and Supplemental Recommended Determination issued on July 27, 1994, and November 30, 1994, respectively. There are two issues in this case. The first issue is whether the proposed unit, a combination of professional and nonprofessional employees, is an appropriate unit, in light of the employer's argument that if a strike occurs in the combined unit it would be impossible to provide critical services to the public. The second issue is whether the three positions of Public Health Nurse 3 ("PHN3") Communicable Disease Coordinator, PHN3 Home Health Coordinator, and Plumbing Inspector 2 are supervisory positions under Ohio Revised Code ("O.R.C.") § 4117.01(F). For the reasons below, we find the proposed unit is an appropriate unit, pending a unit-determination election and, of the three positions in dispute, the position of PHN3 Home Health Coordinator is the only supervisory position under O.R.C. § 4117.01(F).

I. BACKGROUND

On June 16, 1993, Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") filed a Petition for Representation Election in a proposed bargaining unit combining professional and nonprofessional employees of the Medina County Health Department ("Employer"). AFSCME's proposed professional employee bargaining unit included several of the Employer's divisions.

All professional and nonprofessional employees in the petitioned for unit work in the same building, working side-by-side in many instances. Some professional and nonprofessional employees share a common supervisor. They also share a common personnel manual and work with one another on a regular basis.¹

According to the Director of Nursing, if there was a strike, and an overwhelming majority of employees honored the strike, it would result in an interruption of services. However, she could only give such an opinion in regard to the Nursing division, and not the impact of a strike on other divisions. In the event of a strike by nonprofessional employees, the Employer would have to cancel many programs. In the event of a strike by either the professional or nonprofessional employees, the Nursing division could not operate most of its programs the first day of a strike. In addition, if the nonprofessional employees were to strike, all or most public health functions would be cancelled on the first day and the Nursing division would only respond to calls. By the second day of a strike by nonprofessional employees, the division would start transferring all clients who need weekly care. However, with either the nonprofessional or professional staff available for work, the Employer could respond on an emergency basis and at least provide the critical services.²

¹Finding of Fact ("F.F.") No. 28.

²F.F. Nos. 23-25; Transcript ("Tr.") 124-126, 143, and 188.

The Director of Nursing has no prior work experience where a strike has taken place. The Health Commissioner has not developed a work stoppage plan for any of the departments at issue in the professional or nonprofessional units. There is an "emergency plan" in place for natural disasters.³

In addition to the appropriateness of the petitioned-for unit, there are three positions at issue as to inclusion in either unit. The parties agree the PHN3 Home Health Coordinator and the PHN3 Communicable Disease Coordinator are professional employees and should be included in the professional unit if they are determined to be employees instead of supervisors. The parties also agree the Plumbing Inspector 2 is a nonprofessional employee and should be included in the nonprofessional unit if he is determined to be an employee instead of a supervisor.⁴

Suzanne Thomas is employed as PHN3 Home Health Coordinator for the Employer. She is responsible for managing the quality assurance program, orienting and training new employees and assuming the responsibilities of the Home Health Supervisor in the supervisor's absence. When new employees are hired into Ms. Thomas' department, she is responsible for orienting them to the policies and procedures of the department and for observing them during in-home patient visits to determine if they are adhering to those policies and procedures. Ms. Thomas devises and revises the policies and procedures for Home Health. She also reviews certain questions a Licensed Practical Nurse ("LPN") may have as a result of the case file review process and LPNs are to bring any questions they have about information they find in the files directly to her for resolution. Most important, she supervises an LPN who reviews charts for billing and quality assurance. She also assigns, delegates, prioritizes, and evaluates the work of that LPN. In addition, Ms. Thomas assists all LPNs by

³F.F. Nos. 27 and 29.

⁴Stipulation of Fact No. 9.

prioritizing their workload on a weekly basis.⁵ Ms. Thomas is authorized to perform supervisory duties.⁶

Phyllis Leohr is employed as a PHN3 Communicable Disease Coordinator by the Employer. No one reports to her as a supervisor. She does not have the authority to perform or recommend any of the following: hiring employees, interviewing job applicants, agreeing to terms or conditions of employment for employees, transferring employees from one job to another, suspending employees, laying off employees, recalling employees, promoting employees, discharging employees, assigning work to employees, rewarding employees, disciplining employees, or addressing employee grievances. Ms. Leohr also has no authority to, and does not, investigate situations that could result in discharge or discipline, grant leave requests, assign overtime, monitor other employees to ascertain whether they have signed an attendance book, or handle safety problems. She does not have direct responsibility for safety regulations, nor does she have the authority to excuse tardiness or absenteeism of other employees. She does not schedule employees or complete performance evaluations of employees. While Ms. Leohr's job description states in part that she is to have supervisory duties, she does not do any supervising or evaluating of personnel and she does not attend meetings between the Employer and supervisors. In addition, she was not informed by the Director of Nursing that her position would have any supervisory authority.⁷

Richard Kohler is employed as Plumbing Inspector 2 by the Employer. Like Ms. Leohr, Mr. Kohler has no authority to perform or recommend: hiring of employees, rejecting applicants for employment, agreeing to terms and conditions of employment for employees, transferring employees, suspending employees, laying off employees, recalling employees, promoting employees, discharging employees, assigning work to employees, rewarding

⁵F.F. Nos. 10, 11, amended 12, 13, and 15.

⁶Tr. 110, 145, and 147.

⁷F.F. Nos. 1-8.

employees, disciplining employees, or addressing employee grievances. Again, like Ms. Leohr, Mr. Kohler does not perform or recommend the investigation of situations that might result in discipline or discharge, grant leave requests or make recommendations concerning leave requests, assign overtime, take call-ins to report off from work, excuse tardiness or absenteeism, examine the performance records of others, prepare personnel reports, attend supervisory meetings, prepare employee progress reports, remedy complaints of employees, or perform evaluations.⁸

II. ANALYSIS

A. THE APPROPRIATENESS OF THE PETITIONED-FOR UNIT

The first question before us is whether the proposed unit, including all professional and nonprofessional employees of the Employer and excluding all management level employees and supervisors as defined in O.R.C. Chapter 4117, is an appropriate bargaining unit.⁹ The only objection raised by the Employer to the petitioned-for bargaining unit was the proposed inclusion of both professional and nonprofessional employees in the same bargaining unit. The Employer argued that if such a combined unit went on strike, it would be impossible to provide critical home health services or to adequately respond to a serious outbreak of disease with only management and supervisory personnel. However, it could adequately respond, on an emergency basis, with the assistance of either its professional or nonprofessional staff. Thus, according to the Employer, a combined unit would be contrary to the safety, health, and welfare of the general public of Medina County, and would substantially and irreparably harm the efficiency of the Employer's operations. This argument is not persuasive.

⁸F.F. Nos. 16-18.

⁹The parties agreed on the professional and nonprofessional classifications in Stipulations of Fact Nos. 8 and 9.

7

O.R.C. § 4117.06(B)¹⁰ lists some of the factors to be considered in the Board's determination of bargaining units. The impact of a certain unit configuration on an employer's ability to operate during a strike, which may or may not occur, is not a factor. While this statutory list of factors is not all-inclusive, speculations of what may occur in case of a possible strike, or whether at that point in time the employer will be able to practice damage control, are not appropriate considerations. It should also be noted that the statutory, ten-day notice requirement before a strike may take place aims at giving the employer time to control possible damage.

If a strike does occur and creates a danger to the health and safety of the public, the employer may utilize the clear and present danger section in O.R.C. § 4117.16. The legislature, after determining those public employees who are not permitted to strike¹¹, and extending all other employees the right to strike¹², was aware that even strikes by strike-permitted employees may create a danger to the public health and safety. Thus, the legislature enacted O.R.C. § 4117.16 to address these types of situations.

In sum, the proper mechanism to deal with situations of strikes causing a danger to the public health and safety is O.R.C. § 4117.16, the clear and present danger section, and not O.R.C. § 4117.06, the unit determination section.

¹⁰O.R.C. § 4117.06(B) states:

The board shall determine the appropriateness of each bargaining unit and shall consider among other relevant factors: the desires of the employees; the community of interest; wages, hours, and other working conditions of the public employees; the effect of over-fragmentation; the efficiency of operations of the public employer; the administrative structure of the public employer; and the history of collective bargaining.

¹¹O.R.C. § 4117.14(D)(1).

¹²O.R.C. § 4117.14(D)(2).

Considering the factors listed in O.R.C. § 4117.06 for determining the appropriateness of the petitioned-for unit combining professional and nonprofessional employees, we find the petitioned-for unit is appropriate, provided the majority voters in both units of professional and nonprofessional employees vote to be included in the same unit, as required by O.R.C. § 4117.06(D)(1).¹³ The record shows there is community of interest among all the employees at issue. The employees work together in the same building, some side-by-side, and some even share the same supervisor. Apart from the strike argument discussed above, the record does not raise any question regarding the appropriateness of the unit under the factors to be considered in O.R.C. § 4117.06.

B. SUPERVISORY STATUS

The second question before us is whether the three positions in dispute, PHN3 Communicable Disease Coordinator, PHN3 Home Health Coordinator and Plumbing Inspector 2, are supervisory positions under O.R.C. § 4117.01(F).

In *In re Mahoning County Dept. of Human Services*, SERB 92-006 (6-5-92), SERB set forth the following standard for determining supervisory status:

Accordingly this Board rules that henceforth an individual will be excluded from a bargaining unit, pursuant to O.R.C. § 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, actually exercises that authority and uses independent judgment in doing so.

(*Id.* at 3-19, footnotes omitted).

¹³Where combined units of professional and nonprofessional employees are involved, the statutory requirement to conduct unit-determination elections is not the beginning and the end of SERB involvement in the process. Apart from conducting a unit-determination election, SERB has the discretion, authority and, as a matter of law, the duty to determine the appropriateness of combined bargaining units under the O.R.C. § 4117.06(B) analysis.

Thus, SERB's standard in *Mahoning* involves three steps. First, the record has to show the employee at issue has the authority to perform one or more of the supervisory functions listed in O.R.C. § 4117.01(F).¹⁴ This may be evidenced, for example, by the employee's job description. Second, the record has to show the employee actually exercises this authority. This warrants evidence illustrating specific incidents in which the employee actually performed the relevant function. Third, the exercise of this function cannot be routine and clerical, but must involve independent judgment.

Applying the *Mahoning* test to the facts before us, we find Ms. Thomas, PHN3 Home Health Coordinator, is a supervisor. First, the record shows that both her job description and her supervisor authorized her to handle supervisory duties. Second, the record shows that there is an LPN who reports to her as a supervisor and Ms. Thomas assigns work to this LPN. Third, the record shows this assignment of work involves independent judgement since Ms. Thomas both evaluates the workload of the LPN as well as prioritizes it on a weekly basis. Thus, Ms. Thomas is authorized to assign work, which is one of the supervisory indicia listed in O.R.C. § 4117.01(F)(1), and exercises independent judgement in doing so. Hence, she is a supervisor under the *Mahoning* standard.¹⁵

Ms. Leohr, PHN3 Communicable Disease Coordinator, does not meet the requirements of *Mahoning* to be a supervisor. Ms. Leohr might have the authority to supervise since her

¹⁴In order to satisfy the *Mahoning* standard the supervisory functions analyzed must be listed in O.R.C. § 4117.01(F). For example, the record includes a few instances where the function of training was treated as a supervisory indicator. Training is not on the statutory list as a supervisory indicator and cannot support a finding of supervisory status.

¹⁵The record mentions various activities of Ms. Thomas other than assigning work to the LPN who reports to her, e.g., responsibly managing the quality assurance program, orienting and training new employees, observing new employees during in-home patient visits and ensuring additional training if necessary. However, none of these activities, as stated on the record, are listed in O.R.C. § 4117.01(F). Hence, under *Mahoning*, these activities do not satisfy the standard for a finding of supervisory status.

job description states so in part.¹⁶ However, the record demonstrates no specific incident where Ms. Leohr exercised any of the supervisory indicia listed in O.R.C. § 4117.01(F)(1). While the first step in the *Mahoning* standard may be satisfied, the second step is not satisfied. Consequently, she cannot be found to be a supervisor. In fact, Ms. Leohr cannot be a supervisor since no one reports to her as a supervisor.¹⁷

Mr. Kohler, the Plumbing Inspector 2, is also not a supervisor. The record does not show that he had supervisory authority nor does it show any specific incident where Mr. Kohler exercised any of the supervisory indicia listed in the statute as required by *Mahoning*.

III. CONCLUSION

For the reasons above, we find the proposed unit including professional and nonprofessional employees is appropriate pending a unit-determination election. This unit-determination election, along with a representation election, is directed in the proposed unit at a time and place to be determined by the Representation Section Administrator in consultation with the parties. The positions of PHN3 Communicable Disease Coordinator and Plumbing Inspector 2 are not supervisory positions and, thus, are included in the professional and nonprofessional bargaining units, respectively. The position of PHN3 Home Health Coordinator is a supervisory position and is excluded from the bargaining unit.

POHLER, Chairman, and POTTENGER, Vice Chairman, concur.

¹⁶F.F. No. 8.

¹⁷F.F. No. 3.

11