

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Fulton County Engineer,

Respondent.

CASE NUMBER: 95-ULP-05-0219

**ORDER
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman McGee, and Board Member Mason: January 9, 1997.

On January 31, 1996, the Hearing Officer's Proposed Order was issued in this case. The Board issued its opinion in this case on June 24, 1996. *In re SERB v. Fulton County Engineer*, SERB 96-008 (6-24-96). On October 11, 1996, the Court of Common Pleas, Fulton County, Ohio issued its Judgement Entry remanding this case back to SERB to add a letter, from attorney R. Michael Frank to attorney Donald Theis dated June 4, 1996, to the record of this case.

On November 19, 1996, the Hearing Officer's Supplemental Proposed Order was issued in the above-styled case. On December 9, 1996, the Respondent filed its exceptions. On December 20, 1996, the Complainant filed its response to the Respondent's exceptions. On December 23, 1996, the Intervenor filed its response to the Respondent's exceptions.

The Board has reviewed the record, the Hearing Officer's Supplemental Proposed Order, the Respondent's exceptions and the Complainant's and Intervenor's responses. The Board adopts the Findings of Fact, Analysis and Discussion, Conclusions of Law, and Recommendation in the Hearing Officer's Supplemental Proposed Order, incorporated by reference. This matter is hereby returned to the Court of Common Pleas, Fulton County, Ohio.

Order
Case No. 95-ULP-05-0219
January 9, 1997
Page 2 of 2

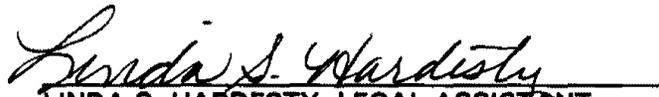
It is so ordered.

POHLER, Chairman; MCGEE, Vice Chairman; and MASON, Board Member, concur.


SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen (15) days after the mailing of the Board's order.

I certify that this document was filed and a copy served upon each party on this
10th day of January, 1997.


LINDA S. HARDESTY, LEGAL ASSISTANT

direct/01-09-97.01

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In the Matter of

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CASE NUMBER: 95-ULP-05-0219

HEARING OFFICER'S SUPPLEMENTAL PROPOSED ORDER

I. INTRODUCTION

The Hearing Officer issued his Proposed Order (HOPO) in this case on January 31, 1996. The State Employment Relations Board (SERB or Board or Complainant) issued its opinion in this case on June 24, 1996. In re SERB v. Fulton County Engineer, SERB 96-008 (6-24-96). On October 11, 1996, the Fulton County Court of Common Pleas (Court) issued its Judgement Entry remanding this case back to SERB to add a letter (dated June 4, 1996, from attorney R. Michael Frank to attorney Donald Theis) to the record of this case.

II. ISSUE

Whether the letter from R. Michael Frank dated June 4, 1996 warrants any change in the conclusion that Gary St. John was not a supervisor pursuant to Section 4117.01(F).

III. FINDINGS OF FACT

The Hearing Officer incorporates the entire HOPO dated January 31, 1996, as if set forth fully herein.

IV. ANALYSIS AND DISCUSSION

The letter dated June 4, 1996 from R. Michael Frank to Donald Theis is hereby admitted into the record as Respondent's Exhibit 35. It should be noted from the outset that Section 4117.12(B)(2)¹ provides in relevant part:

[T]he hearing officer or board member shall issue to the parties a proposed decision together with a recommended order and file it with the board. If the parties file no exceptions within twenty days after service thereof, the recommended order becomes the order of the board effective as therein prescribed. (emphasis added).

Although the Employer filed exceptions to the HOPO with SERB, those exceptions never specifically raised the Hearing Officer's conclusion on the supervisor issue, but rather challenged other findings and conclusions in the HOPO, including the Board's standard of viewing all claims that an employee meets one of the seventeen exceptions to the Section 4117.01(C) definition of "public employee" as an affirmative defense.

Rule 4117-1-13(C) provides:

Exceptions to a Hearing Officer's recommendation shall contain, in addition to the requirements of Rule 4117-1-02 of the administrative code, a brief statement of each issue with which the party takes exception, the reason for the exception, and a statement of the precise relief sought. (emphasis added).

Again, the Employer never listed the Conclusion of Law that Gary St. John was not a "supervisor" pursuant to Section 4117.01(F) as an issue in its exceptions. SERB's opinion did not specifically address the supervisor issue. Previous courts have held that the failure to raise an issue before an administrative agency precludes its consideration on appeal. However, on the assumption that the Court viewed the letter of June 4, 1996 as creating possible new evidence warranting reconsideration of that issue or an independent grounds for appeal of that issue, it will be considered on the merits herein.

The letter dated June 4, 1996 from R. Michael Frank to Donald Theis provides in relevant part:

¹All references to statutes are to the Ohio Revised Code, Chapter 4117, unless otherwise indicated. All references to rules are to the Ohio Administrative Code, Chapter 4117, unless otherwise indicated.

On Friday, May 31, 1996, Gary St. John accepted the Engineer's unilateral declaration of "reinstatement to the position of Ditch Maintenance Supervisor -- Roadside Vegetation Specialist * * *." On June 3, 1996, Mr. St. John reported to work only to discover that he was not reinstated to the position represented in the letter. He was stripped of all authority, isolated from the individuals he formerly supervised, and essentially demoted to a laborer's position.

As Ditch Maintenance Supervisor, Mr. St. John supervised the work performed by a crew. On his return to work, he was issued a shovel, a rake, a tile prod, and a tape measure and was informed that he is the crew. (emphasis added).

There are several reasons why the above letter is not given as much weight as the testimony of witnesses at the hearing regarding Gary St. John's actual job duties and authority. First, Gary St. John was not a party to this case and his attorney never participated in this proceeding. Indeed, had Gary St. John insisted on the witness stand that he was a supervisor, such statements would not have bound the Charging Party/Intervenor, Ohio Council 8, AFSCME or the Complainant. The parties to this case were entitled to litigate that issue independent of the desires or views of Gary St. John or his attorney.

Second, SERB has consistently held that regardless of the use of titles like "supervisor" or references to "supervision," an individual is not a supervisor unless it is established that the actual job duties performed and the authority that the individual possesses meet the statutory definition in Section 4117.01(F). In re Lucas Cty. Records Office, SERB 85-061 (11-27-85). The credible evidence in the record does not establish that Gary St. John effectively exercised any of the functions listed in Section 4117.01(F). Nothing in the letter of June 4, 1996 raises any doubts about either the accuracy of Gary St. John's testimony about his actual job duties or brings his credibility into question.²

Third, there is no indication in the record that Mr. St. John's attorney had any direct personal knowledge of Mr. St. John's duties or authority when the attorney wrote the letter dated June 4, 1996. Gary St. John's federal litigation apparently did not turn on the question of whether Mr. St. John was a supervisor or not under Chapter 4117. If called upon to testify, the attorney's testimony would be objectionable without a predicate of personal knowledge being laid or at least some exception to the hearsay rule. Even if viewed as an admission against interest, such an admission can only be made by an agent who is demonstrated to have knowledge of the matters admitted to on behalf of his principal. No such foundation was laid for the attorney's "supervisor" comments.

²Most of Gary St. John's testimony regarding the relevant job duties was supported by the testimony of other credible witnesses as well as by the exhibits in the record.

Last, the word "supervisor" in Section 4117.01(F) is a legal term of art under Chapter 4117, as it is specifically and precisely defined. Under Chapter 4117, a "crew leader" or a "lead worker" who exercises only limited authority over other employees is not considered a "supervisor." Gary St. John was specifically found to be such a "crew leader." The failure of Mr. St. John's attorney to appreciate the difference between a "crew leader" and a "supervisor" under Chapter 4117, when he wrote his letter complaining that Mr. St. John was stripped of his former authority over a crew upon his reinstatement, did not and could not transform Mr. St. John from a "crew leader" into a "supervisor". Stated another way, R. Michael Frank was apparently using the lay use of the word "supervisor" rather than the Chapter 4117 definition of "supervisor" when he wrote his letter of June 4, 1996.³ Accordingly, I conclude that the letter of June 4, 1996 does not in any way warrant any change in any of the Conclusions of Law in the HOPO dated January 31, 1996.

V. CONCLUSIONS OF LAW

1. The Fulton County Engineer is a public employer as defined in R.C. § 4117.01(B).
2. Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO is an employee organization as defined in R.C. § 4117.01(D).
3. Gary St. John is not a supervisor within the meaning of R.C. § 4117.01(F).
4. Gary St. John is not a management level employee within the meaning of R.C. § 4117.01(L).
5. Gary St. John does not act in a fiduciary capacity pursuant to R.C. § 124.11.
6. Gary St. John is a public employee within the meaning of R.C. § 4117.01(C).

³The Court apparently thought the supervisor issue was a close call based upon the detailed Findings of Fact and the lengthy explanation in the Analysis and Discussion section of the HOPO. Actually, once credibility was sorted out on a couple of facts, the "supervisor" issue was not a close call under SERB caselaw. The detailed treatment had more to do with the size of the record (i.e. a 1412 page transcript), the fact that it was a discharge case, the amount of money in question, the emphasis the parties placed on this issue prior to the issuance of the HOPO, and the relevance of these same facts to the other issues in the case such as the novel fiduciary issue. After the HOPO issued, both the Respondent and the Complainant abandoned this particular issue in the post-HOPO exceptions and responses filed with the Board. Accordingly, the Board's opinion did not specifically address the "supervisor" issue other than to note that any claim that an employee meets one of the 17 exceptions to the definition of "public employee" is an affirmative defense for purposes of determining that the Respondent had the burden of proof.

7. **The Fulton County Engineer violated §§ 4117.11(A)(1) and (A)(3) when it terminated Gary St. John for engaging in activities protected by Chapter 4117.**

VII. RECOMMENDATION

Based upon the foregoing, it is recommended:

1. **The State Employment Relations Board reaffirm the Jurisdictional Stipulations of Fact, Findings of Fact, Conclusions of Law, and Recommendations set forth above and in the HOPO dated January 31, 1996.**