

98-003

**STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

District 925, Service Employees International Union,

Employee Organization,

and

University of Cincinnati,

Employer.

Case Nos. 96-REP-12-0281 & 97-REP-03-0052

OPINION

GILLMOR, Vice Chairman:

This representation case comes before the State Employment Relations Board ("SERB" or "Board") upon the filing of exceptions to the Hearing Officer's Recommended Determination issued on August 15, 1997. For the reasons below, we find that Patricia Hunkler, Susan Bill, Kenneth Wainwright, and Glen Ganger are not "management level employees" within the meaning of Ohio Revised Code ("O.R.C.") § 4117.01(L); that Kenneth Wainwright is not a "supervisor" within the meaning of O.R.C. § 4117.01(F); that Glen Ganger does not "act in a fiduciary capacity" within the meaning of O.R.C. § 4117.01(C)(9); that Patricia Hunkler, Susan Bill, and Kenneth Wainwright perform bargaining-unit work and, hence, the unit is clarified to include them; and that Glen Ganger performs non-bargaining-unit work and, thus, the unit is clarified to exclude him.

I. BACKGROUND

District 925, Service Employees International Union ("District 925") and the University of Cincinnati ("University" or "Employer") entered into a consent election agreement on or about April 17, 1995. On June 22, 1995, following an opt-in election, SERB certified District 925 as the exclusive representative for the bargaining unit. On December 20, 1996, District 925 filed a Petition for Clarification of Bargaining Unit (Case No. 96-REP-12-0281) seeking a determination of the bargaining-unit status of certain employees of the University. On March 11, 1997, District 925 filed another Petition for Clarification of Bargaining Unit (Case No. 97-REP-03-0052)

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seeking a determination of the bargaining-unit status of certain additional employees. The University contended that the employees in question do not perform bargaining-unit work. The Board found that a question concerning representation existed, consolidated the two cases, and directed them to hearing. A hearing was conducted on July 2, 1997. The bargaining-unit status of four employees was in dispute at the hearing: Patricia Hunkler, Susan Bill, Kenneth Wainwright, and Glen Ganger.

II. DISCUSSION

A. What Is A "Management Level Employee"?

O.R.C. § 4117.01(L) provides in relevant part:

(L) "Management level employee" means an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiated agreements, or have a major role in personnel administration.

The record lacks evidence to support any claim, and no such claim was made, that any of the employees in dispute may reasonably be required to assist in the preparation for the conduct of collective bargaining negotiations, administer collectively negotiated agreements, or have a major role in personnel administration. Thus, the only part of the "management level employee" definition in dispute here is the formulation and the responsible direction of policy implementation.

In *In re City of Gahanna*, SERB 85-052 (9-30-85), the Board held that O.R.C. § 4117.01(K) [relettered as O.R.C. § 4117.01(L) in subsequent legislation] is directed at high-level management and its assistants. The National Labor Relations Board concluded that managerial status is not conferred upon rank-and-file workers, or upon those who perform routine tasks, but rather is reserved for those in executive-type positions who are closely aligned with management as true representatives of management.¹

¹*General Dynamics Corp.*, 213 NLRB 851, 87 L.R.R.M. 1705, 1715 (1974). See also, *NLRB v. Yeshiva University*, 103 L.R.R.M. 2326 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S.

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267 (1974); *Micronesian Telecommunications Corp.*, 273 NLRB No. 56, 118 L.R.R.M. 1067 (1984); *Eastern Camera and Photo Corp.*, 140 NLRB 569, 52 L.R.R.M. 1068 (1963); *Wilson & Co., Inc.*, 90 NLRB 1388 (1952); *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 21 L.R.R.M. 1039 (1947).

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The majority of public jurisdictions follow in the same direction. California has concluded that managerial employees are those with more than minor executive functions outside of policy-making areas and those who have discretion in the performance of their jobs independent of their employer's established policy.² The Florida Public Employees Relations Commission held that the criteria for management level employees must be narrowly construed and that the individual's duties must be viewed from the broad perspective of their actual significance within the organization of the public employer.³ In Illinois, a management level employee is an individual who is engaged predominantly in executive and management functions and is part of the employer's management team.⁴ Michigan and New Jersey use the term "managerial executive" and define them as those individuals who formulate management policies and practices and those individuals who responsibly direct the effectuation of such management policies and practices. One of the indicia of managerial executive employees, according to the Michigan Supreme Court, is that they formulate, determine, and effectuate management policy on an employer-wide basis.⁵ The New Jersey Supreme Court sheds some light on just what formulating and effectuating actually mean:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes.⁶

²*Antelope Valley Federation of Teachers v. Antelope Valley College Faculty Association and Antelope Valley Community College Dist.*, 10 PERC ¶¶ 17147 (CA PERB ALJ, 8/5/86).

³*In re Petition of School Food Service Managers, P.A.*, 14 FPER ¶¶ 19281 (FL PERC 9/9/88).

⁴*Chief Judge of the Sixteenth Judicial Circuit v. Illinois SLRB*, 156 L.R.R.M. 2425 (IL 1997); *Cook County (Cermak Health Services)* 2 PERI ¶¶ 3020 (IL LLRB 8/8/86).

⁵*Grandville Municipal Executive Association v. City of Grandville*, 553 N.W.2d 917, 924; 153 L.R.R.M. 2792 (MI 1996).

⁶*In the Matter of New Jersey Turnpike Authority*, 23 NJPER ¶¶ 28198 (NJ 1997) citing *Borough of Montvale*, PERC No. 81-52, 6 NJPER ¶¶ 11259 (1980).

The New York Public Employment Relations Board ruled that to meet the policy formulation requirement, the employee must "either individually select from among options those which are to be the objectives of a public employer in fulfilling its mission, and the methods and extent of meeting those objectives, or who regularly participates in the essential process resulting in such decisions[.]"⁷

Applying the above principles to this case, the employees in dispute do not have a direct access or direct influence upon anyone in a policy-making role and do not formulate, determine, and effectuate management policy on an employer-wide basis.

1. Patricia Hunkler Is Not A Management Level Employee

The University employs Patricia Hunkler as a Data Systems Technician 2 at the University Health Services Fitness Center. She reports to the Program Director for the Department of Fitness and Health Promotion. Ms. Hunkler's duties include developing a data collection system utilizing prepackaged software to track College of Nursing students' educational requirements and membership in the University's Fitness and Health facility. She prints the invoices and tracks the payments of members of the Fitness and Health facility. She deletes the information in the databases related to inactive Fitness and Health members. Ms. Hunkler also provides computer training and support for employees of the Fitness Center. She produces advertising posters regarding special events and promotions. She assists in the publication of a newsletter and develops a web page for the Fitness Center that describes the classes offered and related information. Ms. Hunkler does not have the authority to order or purchase computer software or hardware or make major purchases. She does not make any decisions regarding the program offerings reported in the newsletter and web page; those decisions are made by the Program Director. Ms. Hunkler does not play a major role in personnel administration or in administering collectively negotiated agreements and does not

⁷*In the Matter of Rockland Professional Management*, 28 PERB ¶ 3063 (NY PERB 11/29/95).

assist in preparation for collective bargaining.⁸

Ms. Hunkler does not serve in an executive-type position closely aligned with management. While her activities require creativity, none of those activities resemble discretionary policies of the kind that confer the status of management level employee. Under these facts, Ms. Hunkler is not a management level employee.

2. Susan Bill Is Not A Management Level Employee

⁸Findings of Fact ("F.F.") Nos. 8-11.

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The University employs Susan Bill as a Staff Assistant in the University's College of Engineering where she reports to an Associate Dean. Her duties primarily consist of assisting with the College of Engineering's continuing education program. Ms. Bill contacts federal agencies (*e.g.*, Army Corps of Engineers, Army Industrial Operations Command) to discuss what course content and curriculum they desire. She then coordinates who will teach the courses with the Associate Dean and the College of Engineering faculty. She purchases course materials, authorizes expenditures for the various courses, and develops course evaluation forms. Ms. Bill also assists in the effort to establish and publish a new international journal, *Environmental Engineering and Policy*. The Associate Dean, who chose the title of the journal, is the editor. Ms. Bill also plans and coordinates visits of international scholars for research collaboration with the College of Engineering faculty. Although Ms. Bill may suggest what to charge for a course, the ultimate decision is made by the Associate Dean. All final decisions regarding course requests are made by the Associate Dean. Ms. Bill has no responsibilities relative to the payroll.⁹

Ms. Bill does not serve in an executive-type position closely aligned with management. Her duties involve contact with the public and a lot of program coordination, but her job duties are not such that clearly align her with management or confer the status of management level employee. Under these facts, Ms. Bill is not a management level employee.

3. Kenneth Wainwright Is Not A Management Level Employee Or A Supervisor

⁹F.F. Nos. 15-17.

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From 1989-1995, Library Associate 1s and 2s, unofficially titled "Evening and Weekend Supervisor," were bargaining-unit positions supervised by Senior Library Associate Supervisors. In late 1995, the University posted a Library Associate 2 vacancy in the Evening and Weekend Supervisor position in the Health Sciences library. The University posted this position as non-union until District 925 questioned its status. The University later re-posted the Library Associate 2 position as a Senior Library Associate Supervisor in February/March 1996. The Associate Director created this position in January 1996, and directed that it report to her instead of to a Senior Library Associate Supervisor.¹⁰

Kenneth Wainwright is employed as Senior Library Associate Supervisor at the University's Health Sciences library, which serves the College of Medicine and the College of Pharmacy. He reports to the Associate Director of the Medical Center libraries. Mr. Wainwright works Sunday through Thursday, from 3:00 p.m. to 12:00 a.m. He is responsible for the library via pager after the Associate Director leaves on Fridays and is on call via pager on Saturdays. The staff over which Mr. Wainwright is responsible consists mostly of student employees.¹¹

Labeling an employee's action a "formulation of policy" cannot by itself confer managerial status on that employee. The conferring of managerial status depends on the nature of the policy and the formulating process for the policy. For example, the ten-page policy on shelving library materials created and implemented by Mr. Wainwright is important, very helpful, and probably a great improvement. The formulation of this kind of policy, however, does not confer management level employee status. This policy does not significantly affect the mission of the Employer; this policy does not by its nature identify its creator as a member of the management team; and this policy does not have an employer-wide application. The circulation desk-log policy, also formulated by Mr. Wainwright, does not confer management level employee status for the same reasons. Under these facts, Mr. Wainwright is not a management level employee.

¹⁰F.F. No. 20.

¹¹F.F. Nos. 19 and 22-23.

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O.R.C. § 4117.01(F) describes a supervisor as follows:

(F) "Supervisor" means any individual who has authority, in the interest of the public 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[.]

An individual will be excluded from a bargaining unit as long as the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in O.R.C. § 4117.01(F), actually exercises that authority, and uses independent judgment in doing so. *In re Mahoning County Dept. of Human Services*, SERB 92-006 (6-5-92), at 3-19.

The record in this case reveals that Mr. Wainwright has exercised no supervisory authority over any public employee. Indeed, during the majority of Mr. Wainwright's work hours, the library is staffed only by students. His alleged supervisory authority over an Information Technician 1 is best described as routine because it consists of making certain that the employee maintains paper in the printers, empties recycling bins, maintains toner in the cartridges and the like. Moreover, the Information Technician 1, who is assigned to the Health Sciences Library for half of his hours, is actually employed within the Employer's Computer Systems Department and his supervisor is the department head. While Mr. Wainwright claimed that he once reprimanded this employee for the improper use of the telephone, this "discipline" was not put in the employee's personnel file and actually was no more than an e-mail message from Mr. Wainwright to the employee.

The public employees whose hours do overlap with Mr. Wainwright's hours have immediate supervisors other than him and work most of their hours under the authority of their individual immediate supervisor. Mr. Wainwright has not recommended or participated in the hiring of public employees except for one situation where he served as part of an interview committee. Likewise, he has not adjusted their pay, disciplined them, or adjusted grievances related to their pay or discipline. He has not promoted, transferred, or laid off any of those

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employees.¹² Thus, the record does not support a finding that Mr. Wainwright is a "supervisor" under O.R.C. § 4117.01(F).

¹²F.F. Nos. 27 and 29.

4. Glen Ganger Is Not A Management Level Employee Or A Fiduciary Employee

Glen Ganger is employed as an Accountant 1 in the Business Office of the Department of Psychiatry ("Department"). He moved into this title from the bargaining-unit position of Senior Business Services Assistant. Mr. Ganger spends approximately 80% of his time balancing financial ledgers. He prepares year-end financial reports for the Department and issues keys, employee badges, and telephone and copy cards. He does have signature authority for making purchases, payroll, personnel action forms, and the like. He can only exercise this signature authority, however, when someone in the Department expresses a specific need for a particular item. All purchases over \$200 require written approval from the respective division head. At least two levels of supervision are above Mr. Ganger in the Department's table of organization. He reports to the Business Administrator, who reports to the Senior Business Administrator. The Business Administrator is responsible for managing the Department's \$6 million budget.¹³

The "policies" formulated by Mr. Ganger do not confer management level employee status on him. "Policies" for using copy charge cards, processing telephone and e-mail requests, and ordering business cards are not the kind of policies that only those persons on the management team have the authority to formulate; that have a significant effect on the Employer's mission; or that affect management policies on an employer-wide basis. Under these facts, Mr. Ganger is not a management level employee.

O.R.C. § 4117.01(C)(9) excludes from the definition of "public employee" those "[e]mployees of a public official who act in a fiduciary capacity, appointed pursuant to section 124.11 of the Revised Code." An employee who acts in a fiduciary capacity for an employer has more than the ordinary relationship between employer and employee. When examining whether the employer-employee fiduciary relationship exists, the focus should be on whether the assigned job duties require a high degree of trust, confidence, reliance, integrity, and fidelity above and beyond whatever technical competence the position may require. A high degree of discretion in carrying out assigned duties indicates a trust relationship. *In re SERB v. Fulton*

¹³F.F. Nos. 30-32.

County Engineer, SERB 96-008 (6-24-96), at 3-76 - 3-77 (citations and footnotes omitted).

The thrust of the Employer's argument that Mr. Ganger is a fiduciary employee is that he has a high degree of discretion in carrying out his duties inasmuch as he may approve or disapprove all of the Department's expenditures without financial limit, and his decisions are not reviewed by any superiors. The record does not support a finding that Mr. Ganger has such high degree of discretion as to confer a fiduciary status. While it is true that Mr. Ganger may approve or disapprove all expenditures without financial limit, his discretion is very limited. The record shows that Mr. Ganger has no authority to approve spending more than \$200 without the signature of the head of the relevant department. The record also shows that the only "discretion" Mr. Ganger exercises in denying an expenditure signed by a department head is if the department account does not have sufficient funds to cover the required expenditure, or when the expenditure involves an item which is in stock in the storage and there is no need to buy it. The record does not reflect that Mr. Ganger has the truly high degree of discretion to disapprove an expenditure on the grounds, for example, that in his judgment the department should spend money on something else rather than on the item the department head requested.

Thus, we cannot find under the facts of this case that Mr. Ganger's signature authority makes him a fiduciary employee under O.R.C. § 4117.01(C)(9).

B. Patricia Hunkler, Susan Bill and Kenneth Wainwright Perform Work Similar to Positions in the Bargaining Unit

The record shows that Ms. Hunkler performs work substantially similar to the bargaining-unit position of Record Management Officer 2. The job description of Record Management Officer 2 accommodates her various duties, including the development of data collection systems utilizing prepackaged software programs as well as providing computer training and support for departmental employees. A review of the record shows that Ms. Bill performs work in a capacity closely resembling the bargaining-unit position of Administrative Coordinator. The Administrative Coordinator classification specification describes the handling of travel arrangements and schedules as well as the coordination of arrangements for special events, which accommodates her duties relative to the Professional and Executive Development Program for continuing education. The record shows that Mr. Wainwright performs work in a capacity closely resembling the bargaining-unit position of Library Associate 1. He oversees a

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library unit comprised of a number of discrete operations (*i.e.*, circulation, information services, interlibrary loan/document delivery, computer systems). Also, the pay rate for Ms. Hunkler, Ms. Bill, and Mr. Wainwright fall well within the bargaining-unit range of \$7.28 - \$19.26 per hour.¹⁴ Thus, the duties performed by these positions fall within the bargaining unit. Consequently, the bargaining-unit description should be clarified to include these employees.

C. Glen Ganger Performs Work Similar To A Position Outside This Bargaining Unit

A review of the record leads to the conclusion that Mr. Ganger performs work in a capacity closely resembling the Accountant 1 position, which is outside this bargaining unit. His duties are consistent with many aspects of the Accountant 1 classification specification, including the maintenance of routine account journals, the preparation of basic financial statements, and the preparation of reports on accounts or group of accounts for various sponsors and granting agencies. Consequently, the bargaining-unit description should be clarified to exclude this employee.

III. CONCLUSION

For the reasons above, we find that Patricia Hunkler, Susan Bill, Kenneth Wainwright, and Glen Ganger are not "management level employees" within the meaning of O.R.C. § 4117.01(L); that Kenneth Wainwright is not a "supervisor" within the meaning of O.R.C. § 4117.01(F); that Glen Ganger does not "act in a fiduciary capacity" within the meaning of O.R.C. § 4117.01(C)(9); that Patricia Hunkler, Susan Bill, and Kenneth Wainwright perform bargaining-unit work and, hence, the unit is clarified to include them; and that Glen Ganger performs non-bargaining-unit work and, thus, the unit is clarified to exclude him.

Pohler, Chairman, concurs; Mason, Board Member, concurs in part and dissents in part in a separate opinion.

¹⁴F.F. Nos. 13, 18, and 21; Joint Exhibit 5.

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DISSENTING OPINION

MASON, Board Member:

I concur with the majority opinion on all points except where they find that Glen Ganger performs non-bargaining-unit work and exclude him from the bargaining unit. I thoroughly reviewed the record, including the transcript, and could find nothing to justify reversing the hearing officer's well-reasoned finding that Glen Ganger performs bargaining-unit work. Thus, I would adopt the hearing officer's conclusion of law on this matter and clarify the bargaining-unit description to include Glen Ganger.