

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

In the Matter of

Fraternal Order of Police, Ohio Labor Council, Inc.,

Employee Organization,

and

Muskingum Watershed Conservancy District,

Employer.

Case No. 2006-REP-06-0082

**DIRECTION TO ELECTION
(OPINION ATTACHED)**

Before Chairman Mayton, Vice Chairman Gillmor, and Board Member Verich:
October 4, 2007.

On June 7, 2006, the Fraternal Order of Police, Ohio Labor Council, Inc., ("Employee Organization"), filed a Request for Recognition under Ohio Revised Code § 4117.05, seeking to represent a proposed bargaining unit of employees of the Muskingum Watershed Conservancy District ("Employer"). On June 28, 2006, the Employer filed an Objection to Request for Recognition and a Petition for Representation Election-Employer. On September 14, 2006, the State Employment Relations Board ("SERB") directed this case to hearing to determine an appropriate bargaining unit and for all other relevant issues.

On March 19, 2007, a hearing was held during which testimonial and documentary evidence was presented. On March 27, 2007, the parties supplemented the record with an additional joint stipulation of fact. Subsequently, both parties filed post-hearing briefs. The Recommended Determination was issued on July 24, 2007. Neither party filed exceptions to the Recommended Determination.

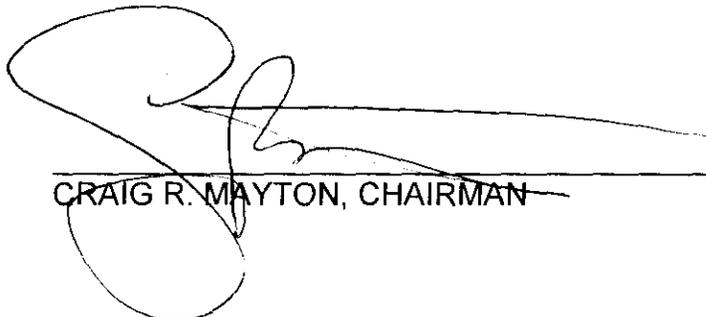
After reviewing the record, the Recommended Determination, and all other filings in this case, the Board adopts the Findings of Fact, Analysis and Discussion, Conclusions of Law, and Recommendations in the Administrative Law Judge's Recommended Determination, finding that the Assistant Park Superintendents are "supervisors" within the meaning of Ohio Revised Code § 4117.01(F) and are not "public employees" pursuant to

Ohio Revised Code § 4117.01(C), and directs that a representation election be conducted in accordance with Ohio Revised Code § 4117.07 and the administrative rules set forth in Ohio Administrative Code Chapter 4117-5 in the appropriate bargaining unit described as including "All Full-time Park Rangers and Park Ranger/Technicians" and excluding "Assistant Park Superintendents and all other employees," said election to be conducted at a date, time, and place to be set by the Representation Section in consultation with the parties.

As required by Ohio Administrative Code Rule 4117-5-07(A), no later than October 20, 2007, the Employer shall serve on the Employee Organization and shall file with the Board a numbered, alphabetized election eligibility list containing the names and home addresses of all employees eligible to vote as of the pay period ending immediately prior to October 4, 2007.

It is so ordered.

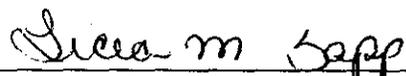
MAYTON, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,
concur.



CRAIG R. MAYTON, CHAIRMAN

PROOF OF SERVICE

I certify that a copy of this document was served upon each party by certified mail, return receipt requested, and upon each party's representative by ordinary mail, this 10th day of October, 2007.


LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

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MUSKINGUM WATERSHED
CONSERVANCY DISTRICT,

Employer.

CASE NO. 06-REP-06-0082

BETH A. JEWELL
Administrative Law Judge

RECOMMENDED DETERMINATION

I. INTRODUCTION

On June 7, 2006, the Fraternal Order of Police, Ohio Labor Council, Inc., ("FOP"), filed a Request for Recognition under Ohio Revised Code ("O.R.C.") § 4117.05,¹ seeking to represent a proposed bargaining unit of employees of the Muskingum Watershed Conservancy District ("Employer"). On June 28, 2006, the Employer filed an Objection to Request for Recognition and a Petition for Representation Election-Employer. On September 14, 2006, the State Employment Relations Board ("SERB") directed this case to hearing to determine an appropriate bargaining unit and for all other relevant issues.

On March 19, 2007, a hearing was held during which testimonial and documentary evidence was presented. On March 27, 2007, the parties supplemented the record with an additional joint stipulation of fact. Subsequently, both parties filed post-hearing briefs.

II. ISSUE

Whether Assistant Park Superintendents are supervisors within the meaning of § 4117.01(F)?

¹ All references to statutes are to the Ohio Revised Code, Chapter 4117, and all references to administrative code rules are to the Ohio Administrative Code, Chapter 4117.

III. FINDINGS OF FACT²

1. The Employer is a "public employer" within the meaning of O.R.C § 4117.01(B). (S.; T. 5-6)
2. The FOP is an "employee organization" within the meaning of O.R.C § 4117.01(D). (S.; T. 6).
3. The Employer manages and controls land in 18 Ohio counties and operates 5 major parks: Tappan Lake, Seneca Lake, Atwood Lake, Charles Mill Lake, and Pleasant Hill Lake. (T. 12)
4. At each of the five major parks, the Employer employs both year-round and seasonal staff and offers full amenities and programming, including campgrounds, marinas, boating opportunities, launch ramps, swimming, hiking trails, nature programs and other activities. The season for programming and activities runs from April to October. (T. 12-14, 20-21)
5. The FOP's proposed bargaining unit consists of full-time employees in the classifications of Assistant Park Superintendent ("APS"), nine employees; Park Ranger/Technician, six employees; and Park Ranger, one employee. (S.; T. 6)
6. The Employer's Manager of Operations is Mark Jukich, and the Employer's Park Operations Administrator and Chief Ranger is Scott Barnhart. (T. 12)
7. The Employer's four Park Superintendents are Tony Luther (Atwood Lake), Dan Mager (Charles Hill and Pleasant Hill lakes), Gary Parrish (Seneca Lake), and John Birney (Tappan Lake). The APSs report to the Park Superintendents. (T. 15-16; Er. Doc. A, pp. 4-11)
8. The two Assistant Park Superintendents at Atwood Lake are Jeremy Hoffer and Ed Davy. (T. 17)

² All references to the transcript of the hearing are indicated parenthetically by "T.", followed by the page number. References to the Joint Stipulations of Fact entered into at hearing are indicated parenthetically by "S.," followed by the transcript page number. References to the Employer's Exhibits in the record are indicated parenthetically by "Er. Exh.," followed by the exhibit letter. The Employer also introduced "Documents" into the record. These materials are referenced by "Er. Doc.," followed by the document letter. References to the transcript, stipulations, and exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for that related finding of fact.

9. At Atwood Lake, employees in the following classifications report directly to Mr. Hoffer: Facility Attendants, Park Attendants, Park Technicians, and Activities Staff. (T. 18; Er. Doc. A, p. 7)
10. At Atwood Lake, employees in the following classifications report directly to Mr. Davy: Gate Attendants, Park Rangers, and Park Ranger/Technicians. (T. 19; Er. Doc. A, p. 7)
11. At Charles Mill Lake, the Park Superintendent, Dan Mager, directly supervises the Park Technicians and Park Attendants. (T. 23)
12. The Assistant Park Superintendent at Charles Mill Lake is Steve Rice. (T. 23)
13. At Charles Mill Lake, employees in the following classifications report directly to Mr. Rice: Gate Attendants, Activities Staff, Park Ranger/Technicians, and Park Rangers. (T. 23; Er. Doc. A, p. 8)
14. The two Assistant Park Superintendents at Pleasant Hill Lake are Andy Seib and Bill Martin. (T. 24)
15. At Pleasant Hill Lake, employees in the following classifications report directly to Mr. Seib: Park Technicians; Park Attendants; Gate Attendants; and Kokosing Mohawk Camp Supervisors, Facility Attendants, and Park Attendants. (T. 24, 27; Er. Doc. A, p. 9)
16. At Pleasant Hill Lake, employees in the following classifications report directly to Mr. Martin: Park Ranger/Technicians, Beach Guards, Activity Staff, and Park Rangers. Mr. Martin also is the Regional Ranger Supervisor, which requires him to do the scheduling for the Park Rangers at both Charles Mill and Pleasant Hill lakes. (T. 27; Er. Doc. A, p. 9)
17. The two Assistant Park Superintendents at Seneca Lake are Lucas Pace and Lynn Lyons. (T. 28; Er. Doc. A, p. 10)
18. At Seneca Lake, employees in the following classifications report directly to Mr. Pace: Park Ranger/Technicians, Activities Staff, Beach Guard, and Park Rangers. (T. 28; Er. Doc. A, p. 10)
19. At Seneca Lake, employees in the following classifications report directly to Mr. Lyons: Gate Attendants, Park Technicians, Park Attendants, and Facility Attendants. (T. 28; Er. Doc. A, p. 10)

20. The two Assistant Park Superintendents at Tappan Lake are Jared Oakes and Joe McGlothlin. (T. 29; Er. Doc. A, p. 11)
21. At Tappan Lake, employees in the following classifications report directly to Mr. Oakes: Park Technicians, Park Attendants, Facility Attendants, Activities and Naturalist Staff, and Boat Rental Attendants. (T. 29; Er. Doc. A, p. 11)
22. At Tappan Lake, employees in the following classifications report directly to Mr. McGlothlin: Park Ranger/Technicians, Beach Guard, Gate Attendants, and Park Rangers. (T. 29; Er. Doc. A, p. 11)
23. The number of employees employed at each park varies based both on the size of the park and the season of the year. On average, each of the parks employs between 30 and 50 people during the peak season, which lasts from April through October. The busiest time of year for all of the parks is the time between Memorial Day and Labor Day. In its Personnel Policy Manual, the Employer categorizes the vast majority of the employees who report to the APSs as "Group 4," or "seasonal," employees, for the purposes of benefits and other terms and conditions of employment; however, the parties do not dispute that, under Chapter 4117, these employees are "public employees." Each year, seasonal employees are hired as the parks prepare for the peak season. Each year, the Employer terminates the seasonal employees at the end of the peak season, when their services are no longer needed. The vast majority of seasonal employees who work one year return the following year. Seasonal employees average, in the aggregate, more than 500 hours of work annually. (S.; T. 20-21, 35, 116; Supplemental Joint Stipulation of Fact filed March 27, 2007; Er. Doc. B)
24. Each of the parks employs a small staff of between six and eight people during the off-season, which lasts from November through March. Each year, the number of seasonal employees employed at each park gradually declines from September to December, and then gradually increases from February to May. During the off-season, the APSs work on maintenance projects in the parks alongside the other year-round employees. (T. 20-21, 30, 32, 33)
25. The primary duty of both seasonal and full-time Park Rangers is law enforcement. Park Ranger/Technicians do a combination of law enforcement and maintenance work. The APSs and the Park Superintendents are certified by the Ohio Peace Officer Training Academy. Park Superintendents and APSs can respond to a law enforcement emergency when a Park Ranger is not available. (T. 23-24, 117-120)

26. At each park, the APSs interview and recommend the hiring of the seasonal employees. Most of the interviews are conducted by the APSs alone; sometimes, a seasonal employee joins the APS in the interview. (T. 45-46, 47-48, 63, 95, 116)
27. The APSs issue lower-level discipline, primarily in the form of verbal and written warnings, to the employees they supervise. (Er. Exh. B)
28. Toward the end of the peak season, the APSs evaluate the job performance of the seasonal employees they supervise. The performance evaluations are used to determine whether the employee evaluated is eligible to be rehired the following year. The APSs frequently end the performance evaluations with a statement indicating whether the employee is "welcome back next season." (T. 36, 214; Er. Exh. A)

IV. ANALYSIS AND DISCUSSION

A. Definition of "Supervisor"

The primary question in this matter is whether the APSs are "supervisors" within the meaning of § 4117.01(F), which defines "supervisor" and provides in relevant part as follows:

'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 if the record contains substantial evidence that the employee has the authority to perform one or more of the functions listed in § 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)("Mahoning"), at 3-19. Those individuals found to be supervisors under § 4117.01(F) are not considered "public employees" pursuant to § 4117.01(C); consequently, a public employer cannot be compelled to bargain collectively with them. Mahoning, at 3-19. Supervisory issues are 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(C) rests upon the party seeking it. In re SERB v Fulton County Engineer,

SERB 96-008 (6-24-96); Oakwood Healthcare Center, 348 NLRB No. 37 (2006) ("Oakwood Healthcare"), *slip op.* at 9 (construing analogous federal statute) (citing Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003)).

In construing the statutory definition of a supervisor, recognition must be given to the basic reality in the public sector that final decisions regarding areas such as hiring, discipline, and salaries are reserved to persons far removed from the employee's immediate supervision. See, e.g., Sweetwater Union High School District, 1 PERC ¶ 10 (CA EERB, 1976). The ability to effectively recommend these changes in employment status, as described in § 4117.01(F), is accorded great weight in the public sector. Section 4117.01(F) directs SERB to find that an employee is a supervisor if the employee has the authority to effectively recommend the promotion, discharge, or hiring of other employees. 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." Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 319, 98 L.R.R.M. 2582, 2590-2591 (IA S.Ct., 1978). SERB cited this definition with approval in In re University of Cincinnati, SERB 89-028 (10-12-89) at 3-193.

B. The Use of "Independent Judgment"

SERB has held that to be a statutory supervisor, an "individual must not be using judgment of a routine or clerical nature." In re Ohio Attorney General, SERB 2000-002 (3-3-00) ("Ohio Attorney General"), at 3-21. Independent judgment is the "opportunity to make a clear choice between two or more significant alternative courses of action without plenary review or approval." Ohio Attorney General, *supra*.

While the decisions of the National Labor Relations Board ("NLRB") are not binding upon SERB, Oakwood Healthcare, *supra*, is instructive because of its analysis of the phrase "Independent judgment." In order to be found to use "independent judgment," a putative supervisor "must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Oakwood Healthcare, *supra*, *slip op.* at 8. Essentially, "a spectrum [exists] between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the [National Labor Relations] Act lies somewhere in between these extremes." Oakwood Healthcare, *supra*, *slip op.* at 8. In determining whether independent judgment is exercised, "the [NLRB] must assess the *degree* of discretion exercised by the putative supervisor." *Id.* Ultimately, an alleged supervisor does not use "independent judgment" if that judgment "is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* However, the existence of policies and procedures is not

dispositive, and “does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.*

C. Using Independent Judgment, the APSs Discipline and Effectively Recommend the Hiring of Seasonal Employees

A preponderance of the evidence reveals that the APSs utilize “independent judgment” in disciplining seasonal employees and in completing performance evaluations of seasonal employees that effectively allow these individuals to be rehired the following season or not. Thus, the APSs fall under the definition of “supervisor” as outlined in § 4117.01(F). The Employer’s exhibits include records of many verbal and written warnings the APSs have issued to their subordinate employees. While the Progressive Discipline section of the Personnel Policy Manual provides a description of the steps in progressive discipline, and a list of “examples of infractions of rules of conduct that may result in disciplinary action,” this section³ does not further dictate to supervisory staff how to administer discipline in any specific situation. A review of this section in conjunction with the verbal and written warnings in the record reveals that the Employer’s discipline policy allows for discretionary choices by the APSs. The APSs exercise independent judgment in meting out the warnings and addressing the rules infractions with the employees involved. For example, APS Davy issued a verbal warning to Parks and Recreation employee Ralph Grasselli, who left work without explaining his reason for leaving. Mr. Grasselli subsequently explained that he left work because he was upset with another employee and “needed time to cool down.” APS Davy instructed Mr. Grasselli on how to appropriately handle such a situation should it occur in the future. APS Hoffer issued a written warning to Parks and Recreation Employee Ashley Eckleberry, in which APS Hoffer addressed not only Ms. Eckleberry’s excessive tardiness but also her communication with her crew leader. Ms. Eckleberry was not completing her assigned duties. APS Hoffer prepared a list of actions to be taken by both the crew leader and Ms. Eckleberry to ensure that Ms. Eckleberry completed her duties adequately and in a timely manner. The action plan also addressed Ms. Eckleberry’s expressed concern that the crew leader was not distributing the workload evenly.⁴

APSs have the authority to discipline other public employees, and use independent judgment in so doing. The numerous performance evaluations in the record confirm the disciplinary role of the APSs. In one such evaluation, APS Hoffer wrote of Della Long, the seasonal Gate and Registration Supervisor, that “[t]here rarely is a situation that requires *corrective action*.”⁵ This comment indicates that an APS has the authority, and is even sometimes required, to take “corrective action” against a subordinate employee. The

³ Er. Exh. Doc. B, at pp. 701:1-701:2.

⁴ Er. Exh. B, at pp. 5-6, 9-10.

⁵ Er. Exh. A (emphasis added).

performance evaluations completed by the APSs also reveal that the APSs have the authority to effectively recommend whether seasonal employees will be rehired or not for the following season.

In their performance evaluations, APS Hoffer makes ringing endorsements of seasonal Gate Attendants Wilber Derwacter and Jerry Charley, saying that they are "welcome to return next season."⁶ Also, APS Hoffer wrote that Richard Anderson, a seasonal Park Ranger, was "more than welcome back next season."⁷ To welcome employees back suggests that, should they choose to return the following year, they will be rehired. The evidence in the record confirms that the Employer normally follows the rehire recommendations made by the APSs. Thus, the APSs have made effective recommendations that public employees will be rehired. This authority meets another criterion for supervisor status within the meaning of § 4117.01(F).

As previously noted, each APS completes performance evaluations for subordinate employees, most of which make either an explicit or implicit recommendation of whether or not the person would be rehired in subsequent years. Though the FOP argues that this duty is merely clerical in nature, a closer examination reveals that the APSs are required to use independent judgment in making their recommendations. When considering whether or not an employee should be rehired, the APSs evaluate all of the experience they have had with the employee. The criteria range from measurable factors such as accuracy, attendance and punctuality to such intangibles as interpersonal skills and work habits. Often the APS considers how many seasons the employee has worked for the Employer, or considers other work completed that the employee was not assigned to do. These different types of mental processes, taken as a whole, form a mosaic of independent judgment.

The FOP points out that the Park Superintendent also signs the evaluations, suggesting that the APS is merely a middleman in the process of evaluations and that the ultimate authority rests with the Park Superintendents. However, closer review detracts from this line of reasoning. What is telling is that the evaluations are completed by the APS and signed by the APS and the employee at various points throughout the end of the summer, but finally signed by the Park Superintendent much later, sometimes in excess of a month or two. Also, the Park Superintendents signed several performance evaluations on the same date, suggesting that they sign off on them in one sitting.⁸ This evidence verifies Mr. Barnhart's testimony that the APS's evaluation of an employee is relied upon

⁶ Id.

⁷ Id. The evaluations of APS Hoffer are cited here as examples; more evaluations addressing the eligibility of the employee to return the following year are evident in Er. Exh. A.

⁸ Er. Exh. A, performance evaluations completed by Jared Oakes (each of 15 evaluations completed and signed by the employee and the APS in August 2006 is signed by Park Superintendent Birney on September 15, 2006).

by the Employer. Because the Park Superintendents themselves merely play an administrative or oversight role in this process, this evidence cannot defeat the conclusion that the performance evaluations and other evidence in the record demonstrate that the APSs are statutory supervisors.

For the reasons stated, the APSs are supervisors within the meaning of § 4117.01(F), and thus must be excluded from the bargaining unit proposed by the FOP.

V. CONCLUSIONS OF LAW

1. The Muskingum Watershed Conservancy District is a "public employer" as defined by § 4117.01(8).
2. The Fraternal Order of Police, Ohio Labor Council, Inc. is an "employee organization" as defined by § 4117.01(D).
3. Assistant Park Superintendents are excluded from the definition of "public employee" within the meaning of § 4117.01(C) because they are supervisors within the meaning of "supervisor" as defined by § 4117.01(F).
4. The following described unit is appropriate for collective bargaining:

INCLUDED: All Full-Time Park Rangers and Park Ranger/Technicians.

EXCLUDED: Assistant Park Superintendents and all other employees.

VI. RECOMMENDATIONS

It is respectfully recommended that:

1. The State Employment Relations Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The State Employment Relations Board direct a representation election in accordance with § 4117.07 and the rules set forth in Chapter 4117-5 in the bargaining unit described below:

INCLUDED: All Full-Time Park Rangers and Park Ranger/Technicians.

EXCLUDED: Assistant Park Superintendents and all other employees.