

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

In the Matter of

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

Employee Organization,

and

Akron Metropolitan Housing Authority,

Employer.

Case No. 2009-REP-12-0160

STATE EMPLOYMENT
RELATIONS BOARD
2010 NOV 30 P 1:53

DIRECTIVE GRANTING AMENDMENT OF CERTIFICATION
(OPINION ATTACHED)

Before Chairperson Brundige, Vice Chairperson Verich, and Board Member Spada: November 18, 2010.

On December 29, 2009, Ohio Council 8, AFSCME, AFL-CIO (“Employee Organization”) filed a Petition for Amendment of Certification, seeking to amend the existing bargaining unit to include the Network Administrator position. On February 3, 2010, the Akron Metropolitan Housing Authority (“the Employer”) filed a position statement with objections to the petition. On March 11, 2010, the Board directed the matter to Pre-Determination Mediation; the mediation was unsuccessful.

On May 6, 2010, the Board directed this matter to hearing before the full Board to determine an appropriate bargaining unit and for all other relevant issues. On August 18, 2010, the hearing was conducted. On September 1, 2010, the parties filed post-hearing briefs with proposed findings of fact and conclusions of law.

After reviewing the Petition for Amendment of Certification, the Employer’s objections, all other filings in this case, and all of the evidence in the record, the Board, for the reasons set forth in the findings of fact, discussion, and conclusions of law in the attached Opinion, incorporated by reference, finds that the current position of Network Administrator does not meet the criteria for exclusion from the definition of “public

employee" under Ohio Revised Code §§ 4117.01(C)(7) or (C)(10) and that the current position of Network Administrator shares a community of interest with other members of the bargaining unit identified in the Petition for Amendment of Certification; denies the Employer's objections; grants the Petition for Amendment of Certification; and amends the bargaining unit accordingly.

It is so ordered.

BRUNDIGE, Chairperson; VERICH, Vice Chairperson; and SPADA, Board Member, concur.



N. EUGENE BRUNDIGE, CHAIRPERSON

TIME AND METHOD TO PERFECT AN APPEAL

Any party desiring to appeal shall file a Notice of Appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, setting forth the order appealed from and the grounds of the party's appeal. A copy of such Notice of Appeal shall also be filed with the Court of Common Pleas of Franklin County, Ohio. Such Notices of Appeal shall be filed within fifteen (15) days after the mailing of the State Employment Relations Board's order as provided in Section 119.12 of the Ohio Revised Code.

PROOF OF SERVICE

I certify that a copy of this document was served upon each party via certified mail, return receipt requested, and upon each party's representative via electronic mail, this 30th day of November, 2010.



LICIA M. SAPP, ADMINISTRATIVE ASSISTANT

SERB

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Board**



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Michael G. Verich, Vice Chairperson
Robert F. Spada, Board Member
Sherrie J. Passmore, Executive Director

Ted Strickland, Governor

Case No. 2009-REP-12-0160

CERTIFICATION

I, the undersigned General Counsel and Assistant Executive Director for the State Employment Relations Board, hereby certify that the attached document is a true and exact reproduction of the original Directive Granting Amendment of Certification of the State Employment Relations Board entered on its journal, on the 30th day of November, 2010.

A handwritten signature in black ink, appearing to read "J. Russell Keith", is written over a horizontal line.

J. Russell Keith
General Counsel and Assistant Executive Director

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OPINION

VERICH, Vice Chairperson:

This matter comes before the State Employment Relations Board (“SERB” or “the Board”) following a Petition for Amendment of Certification filed under Ohio Administrative Code (“O.A.C.”) Rule 4117-5-01(E) by the Employee Organization, Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO (“AFSCME”). In its Petition, AFSCME seeks to amend the existing bargaining unit to include the newly created position of Network Administrator. The Employer, Akron Metropolitan Housing Authority (“Akron MHA”), filed Objections to the Petition, arguing that the Network Administrator position meets the criteria for exclusion from the definition of “public employee” under Ohio Revised Code (“O.R.C.”) §§ 4117.01(C)(7) or (C)(10).

On May 6, 2010, the Board directed the matter to hearing to determine whether the existing bargaining unit should be amended to include the current Network Administrator position. The hearing was conducted by the full Board on August 18, 2010.

The Board has reviewed all the evidence in the record. For the reasons that follow, we conclude that the current position of Network Administrator does not meet the criteria for exclusion from the definition of "public employee" under O.R.C. §§ 4117.01(C)(7) or (C)(10) and that the current position of Network Administrator shares a community of interest with other members of the bargaining unit identified in the Petition for Amendment of Certification.

I. JOINT STIPULATIONS OF FACT AND EXHIBITS

1. Akron Metropolitan Housing Authority is a public employer within the meaning of O.R.C. § 4117.01(B).
2. Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO is an employee organization within the meaning of O.R.C. § 4117.01(D).
3. AFSCME is the Board-certified representative of a bargaining unit of employees of Akron MHA.
4. From March 6, 2000 through November 30, 2009, Patricia Taylor was employed by the Akron MHA in the classification Hardware Technician and was a member of the bargaining unit represented by AFSCME.
5. As a Hardware Technician, Ms. Taylor's immediate supervisor was Steven Warner, Information Systems Director. Ms. Taylor's duties included the following:
 - a. Installing computer hardware and providing technical assistance to Akron MHA employees using that hardware;
 - b. Installing computer software and providing technical assistance to Akron MHA employees using that software;
 - c. Providing technical assistance with respect to the MHA's local area network (LAN) and wide area network (WAN) connections, including running cables and making new connections;
 - d. Costing out potential equipment, hardware and software purchases;
 - e. Maintaining documentation with respect to the MHA's computer systems and maintaining an inventory of the MHA's software and hardware; and
 - f. Creating and maintaining a procedure manual/handbook to be used in the event she is absent from work.
6. A copy of the job description for Hardware Technician (date April 2002) was provided by the parties and identified as Jt. Ex. B.

7. On December 1, 2009, Ms. Taylor began to be employed by the Akron MHA in the classification of Network Administrator.
8. As a Network Administrator, Ms. Taylor's immediate supervisor is Steven Warner, Information Systems Director. Ms. Taylor's duties include the following:
 - a. Installing computer hardware and providing technical assistance to MHA employees using that hardware;
 - b. Installing computer software (including installing a new operating system, 10-MAS) and providing technical assistance to MHA employees using that software;
 - c. Providing technical assistance with respect to the MHA's local area network (LAN) and wide area network (WAN) connections, including running cables and making new connections;
 - d. Costing out potential equipment, hardware and software purchases;
 - e. Maintaining documentation with respect to the MHA's computer systems and maintaining an inventory of the MHA's software and hardware;
 - f. Backing up the MHA's server/computer data in the event her supervisor is absent from work;
 - g. Creating and maintaining a procedure manual/handbook to be used in the event she is absent.
9. A copy of the job description for Network Administrator (dated June 2009) was provided by the parties and identified as Jt. Ex. C.
10. At all times relevant to this matter, the Akron MHA and AFSCME have been parties to a collective bargaining agreement that has been in effect from October 1, 2009 through September 30, 2012. A copy of that collective bargaining agreement was provided by the parties and identified as Jt. Ex. D.
11. Since Patricia Taylor became the Network Administrator, no permanent employee has been hired or assigned to replace the Hardware Technician position. Beginning around April 2010, the Akron MHA contracted with a private temporary employment agency, Tech Systems, to fill the vacant Hardware Technician position.
12. At all times relevant to this matter, no permanent employee has been hired or assigned to perform the duties of the Help Desk Representative position. At all times relevant to this matter, the MHA has contracted with a private temporary employment agency, Carey Staffing Associates, to fill the vacant Help Desk Representative position.
13. A copy of the current table of organization for the Akron MHA was provided by the parties and identified as Jt. Ex. E.

II. ADDITIONAL FINDINGS OF FACT

14. As a Hardware Technician, Ms. Taylor's work hours were 8:00 a.m. to 4:30 p.m. Ms. Taylor's office was located at 100 West Cedar Street in Akron, although Ms. Taylor was required to travel from site to site within the Akron MHA to perform her duties. As Hardware Technician, Ms. Taylor received pay at the rate of \$23.17 per hour and earned both comp time and overtime in the approximate amount of \$5,000 per year. (Er. Ex. A; Ex. 11; T. Taylor at 46:00) Ms. Taylor's job duties required her to interact with other bargaining-unit employees. (T. Taylor at 47:39)
15. As a Network Administrator, Ms. Taylor continues to perform the same job duties that she performed as Hardware Technician. (T. Taylor at 49:09) Ms. Taylor continues to work at the Akron MHA's administrative offices at 100 West Cedar Street, Akron, as she did prior to her promotion. (T. Taylor at 51:55) Ms. Taylor's work hours continue to be 8:00 a.m. to 4:30 p.m. As a Network Administrator, Ms. Taylor is required to travel from site to site within the Akron MHA to perform her job duties, as she did prior to her promotion. (T. Taylor at 49:09) Ms. Taylor's job duties require her to interact with bargaining-unit employees, as she did prior to her promotion. (T. Taylor at 52:15, 52:40) Upon her promotion, Ms. Taylor received a pay increase to the rate of \$30.03 per hour. (Er. Ex. A)
16. Upon her promotion, Ms. Taylor was given a higher level of permission on the Akron MHA's server, so that she can now independently log herself in and out of the system. (T. Taylor at 49:09)
17. As Hardware Administrator, Ms. Taylor is required to direct the work of two employees of temporary agencies: Curtis Brinely, employed by Tech Systems and working in the classification of Hardware Technician, and Dan Gerstenberger, employed by Carey Staffing Associates and working the classification of Help Desk Representative. (T. Brinely at 22:00; T. Gerstenberger at 23:00; T. Warner at 7:34)
18. During all times relevant to this matter, there have been only two permanent employees within the Akron MHA's Information Systems Department: Network Administrator Patricia Taylor and Information Systems Director Steven Warner. The other two individuals working in the Department of Information Systems are employees of temporary agencies: Curtis Brinely and Dan Gerstenberger.
19. The decision to use employees of temporary agencies to fill the Hardware Technician and Help Desk Representative positions was made by Steven Warner. Mr. Warner also flatly rejected Ms. Taylor's recommendations regarding retention of employees of temporary agencies on two occasions.

20. Ms. Taylor assigns work to Mr. Brinely and Mr. Gerstenberger and signs their time sheets. (T. Taylor at 33:49, 34:32) Mr. Warner also assigns work directly to these employees of temporary agencies. There have been occasions when the work assignments given to the employees of temporary agencies by Mr. Warner have taken precedence over what Ms. Taylor has given these employees.
21. Steven Warner initiated the coaching session involving Mr. Brinely by bringing to Ms. Taylor's attention concerning regarding Mr. Brinely's work performance. (T. Taylor at 1:11:04) Steven Warner and Patricia Taylor attended the coaching session with Mr. Brinely in early July 2010.
22. Patricia Taylor participated in an interview panel of three Akron MHA employees that included Steven Warner for the interview of Curtis Brinely.
23. Akron MHA presented no evidence to establish that a contract exists between Akron AMH and the private employers/temporary agencies that employ Curtis Brinely and Dan Gerstenberger. Akron MHA presented no evidence to establish that the National Labor Relations Board has declined jurisdiction over the private temporary agencies that Akron MHA has supposedly contracted with to perform the Hardware Technician and Help Desk Representative classifications.
24. The job description submitted by Akron MHA was created subsequent to the filing this petition and contradicts the testimony before the Board. Consequently, the job description was given very little consideration in this matter.

III. DISCUSSION

From March 6, 2000 until November 30, 2009, Patricia Taylor served as Hardware Technician for Akron MHA. Effective December 1, 2009, Ms. Taylor was promoted to a new position in Akron MHA's Information Systems Department, Network Administrator, which was not in the bargaining unit. Subsequently, AFSCME filed the Petition for Amendment of Certification herein to amend the existing unit to include the Network Administrator position. Akron MHA timely filed Objections, arguing that the Network Administrator position meets the criteria for exclusion from the definition of "public employee" under O.R.C. §§ 4117.01(C)(7) and/or (C)(10). On May 6, 2010, the Board directed the matter to hearing to determine whether the existing bargaining unit should be amended to include the current Network Administrator position.

During the time period relevant to this proceeding, Akron MHA's Information Systems Department has been composed of two permanent employees: Information Systems Director Steven Warner and Network Administrator Patricia Taylor. Two individuals from two private temporary employment agencies have been brought in by Mr. Warner to assist the Department: Curtis Brinely, employed by "Tech Systems," and Dan Gerstenberger, employed by "Carey Staffing Associates." At the time of the hearing in this matter, Mr. Brinely was working in as a Hardware Technician and Mr. Gerstenberger was working as a Help Desk Representative.

The issue presented is whether the position of Network Administrator, held by Patricia Taylor, is an appropriate classification for inclusion in the existing Board-certified bargaining unit or whether the position should be excluded on the basis that it is supervisory, management-level, and/or lacks a community of interest with the Board-certified bargaining unit. O.R.C. § 4117.01 provides, in pertinent part:

* * *

(C) "Public employee" means many person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer, except::

* * *

(7) Management level employees;

* * *

(10) Supervisors;

* * *

(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 reasonably direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not a merely routine or clerical nature, but requires the use of independent judgment, . . . [Emphasis added.]

* * *

(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 burden of establishing an exclusion from a bargaining unit under O.R.C. § 4117.01(C) rests upon the party seeking it. *In re City of Hamilton*, SERB 2010-012 (8-12-2010); *In re Fulton County Engineer*, SERB 96-008 (6-24-96); *In re Franklin Local School District Board of Education*, SERB 84-008 (11-8-84).

A. The Network Administrator Position Is Not a “Supervisor” as Contemplated by O.R.C. § 4117.01(F).

Akron MHA argues that as Network Administrator, Patricia Taylor, supervises two public employees as defined by O.R.C. § 4117.01(C) and that the Network Administrator position she holds constitutes a supervisory position pursuant to O.R.C. § 4117.01(F). We disagree.

Our analysis begins with a review of the scope and nature of the Network Administrator’s job duties. The testimony and evidence establishes that after being promoted from Network Technician to Network Administrator, Ms. Taylor continues to perform the same software and hardware maintenance duties she performed as Network Technician. In addition to those duties, Ms. Taylor is required to direct the work of the two employees of temporary agencies, Mr. Brinely and Mr. Gerstenberger. Ms. Taylor also has a higher level of permission on the Akron MHA’s server that allows her to independently log in and out of the system.

With regard to the supervisory duties outlined in O.R.C. § 4117.01(F), the evidence fails to establish that the Network Administrator has independent authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees. In terms of the authority to effectively recommend such actions, we find that the testimony establishes that while Ms. Taylor may make certain recommendations regarding the work of the two employees of temporary agencies, her authority is limited, and her recommendations do not appear to carry significant weight.

Mr. Warner, not Ms. Taylor, determined the need to bring in the two employees of temporary agencies. Mr. Warner flatly rejected Ms. Taylor’s recommendations

regarding retention of the employees of temporary agencies on two occasions. With regard to Mr. Gerstenberger's job performance, it is noted that it was Mr. Warner, not Ms. Taylor, who determined that a coaching session was necessary. Further, it was Mr. Warner, not Ms. Taylor, who initiated the process. Thus, Ms. Taylor's role was limited to preparing talking points for the coaching session to assist Mr. Warner, and she attended the coaching session.

The evidence also shows that while Ms. Taylor has participated in the interview of at least one candidate, she was merely an equal participant on a hiring panel and therefore was not individually responsible for the hiring recommendation. Additionally, it should be noted that while Ms. Taylor does assign work to the two employees of temporary agencies, Mr. Warner also assigns work directly to these individuals. There have been occasions when the work assignments given by Mr. Warner to these individuals have taken precedence over those given by Ms. Taylor.

Although the evidence demonstrates that Ms. Taylor performs supervisory functions, such as approving Mr. Brinely and Mr. Gerstenberger's time sheets and assigning some work, these responsibilities are limited and routine. Such limited duties are insufficient to establish that Ms. Taylor has the "right to control" the work of these employees or the authority to effectively supervise them as contemplated by O.R.C. § 4117.01(F).

With regard to the employment status of Curtis Brinely and Dan Gerstenberger, Akron MHA asserts that the "right to control" test is determinative of whether or not a worker from a temporary service firm is a "public employee" under O.R.C. § 4117.01(F). Akron MHA argues that Ms. Taylor has the "right to control" the work of two temporary employees, Curtis Brinely and Dan Gerstenberger, and, therefore, they are public employees supervised by Ms. Taylor.

The Supreme Court of Ohio set out the "right to control" test as the principal common law test for determining whether a person is an independent contractor in *Hamilton v. State Emp. Relations Bd.* (1994), 70 Ohio St.3d 21, 213, quoting *Gillum v. Indus. Comm.* (1943), 141 Ohio St. 373, paragraph 2 of the Syllabus, as follows:

“Whether one is an independent contractor or in service depends upon the facts of each case. The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created.”

Initially, we note that no evidence was presented to establish that Akron MHA’s employment of Mr. Brinely and Mr. Gerstenberger fulfills the requirements of a “public employee” pursuant to O.R.C. § 4117.01(C). No evidence was presented to establish that a contract exists between Akron MHA and the private employers/temporary agencies that employ Mr. Brinely and Mr. Gerstenberger.

Normally, the burden of establishing that an employee is not covered by O.R.C. Chapter 4117 lies with the party moving for such exclusion. *In re City of Hamilton*, SERB 2010-012 (8-12-2010). In this case, however, the coverage status of the two employees of temporary agencies is only at issue to the extent that the employer seeks to exclude another employee, Ms. Taylor, from the unit. In such instance, it would be anomalous for the *employee* to bear the burden of establishing that the employees of temporary agencies are excluded from the unit. Such a requirement would effectively shoulder her with the burden of proving her own inclusive status. For this reason, and consistent with our holding in *In re City of Hamilton*, *supra*, we conclude, in this instance, that the burden of establishing that the temporary employees/employees of temporary agencies are excluded from coverage must lie with the Employer.

O.R.C. § 4117.01(C) initially defines “public employee” as “any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer.” No evidence was presented to establish that the National Labor Relations Board has declined jurisdiction over the private temporary agencies that Akron MHA has

supposedly contracted with to perform the Hardware Technician and Help Desk Representative classifications.

We further note that the evidence does not support a conclusion that Ms. Taylor has the “right to control” the work of Mr. Brinely and Mr. Gerstenberger. As previously discussed, the weight of the testimony and evidence presented established that Ms. Taylor has limited authority with respect to directing two temporary employees working at the Akron MHA. We conclude that the limited authority Ms. Taylor exercises with respect to the work of Mr. Brinely and Mr. Gerstenberger does not constitute a “right to control” their work. Rather, the evidence indicates that Information Systems Director Warner is the individual who exercises a high level of independent judgment and supervisory/managerial authority over the workers employed by the Information Systems Department.

The evidence in the record does not support a finding that Mr. Brinely and Mr. Gerstenberger, the two employees of temporary agencies, are “public employees” under O.R.C. § 4117.01(C). Consequently, the record does not support a finding that the Network Administrator supervises *any* public employees. Thus, the Network Administrator Position is not a “supervisor” under O.R.C. §§ 4117.01(C)(10) or (F).

B. The Network Administrator Position Is Not a “Management Level Employee” as Contemplated by O.R.C. § 4117.01(L).

In its Position Statement, Akron MHA argues that Ms. Taylor should be excluded from the bargaining unit under the managerial exemption. As noted above, an individual is a “managerial employee” if he or she formulates policy on behalf of the public employer, responsibly directs the implementation of policy, or 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.

Akron MHA has provided no evidence that Ms. Taylor performs the functions of a managerial employee. No evidence has been presented to establish that Ms. Taylor

regularly attends management-level meetings, that she has the authority to adjust grievances, or that she has the authority to bargain collectively on behalf of Akron MHA. There is no evidence establishing that Ms. Taylor formulates policy. To the extent that Information Systems Director Warner permits Ms. Taylor to make any policy recommendations at all or implement same, the testimony indicates that those activities are infrequent and are limited to her area of responsibility. Therefore, we find Ms. Taylor's limited responsibilities with regard to the formulation or implementation of Information Systems Department policies do not meet the policy formulation requirements of the managerial exemption under O.R.C. § 4117.01(L).

C. As Network Administrator, Patricia Taylor Shares a Community of Interest with Other Bargaining Unit Employees.

Lastly, Akron MHA argues that the Network Administrator position lacks a community of interest with the bargaining-unit employees; however, Akron MHA does not explain *why* this position lacks a community of interest. We decline to speculate.¹

AFSCME argues that Ms. Taylor's un rebutted testimony establishes that she continues to perform the duties she performed as Hardware Technician, that she shares the same work hours as the bargaining-unit employees, and that she continues to spend the majority of her day interacting with employees in every classification in the bargaining unit, except one. With respect to the pay raise Ms. Taylor received at her promotion, AFSCME argues that when one takes into consideration both the comp time and overtime she earned as a Hardware Technician, the pay increase was not drastic, and, in itself, is not sufficient to justify the exclusion of Ms. Taylor from the bargaining unit.

¹The following factors used to determine unit appropriateness are contained in O.R.C. § 4117.06(B): (1) the desires of the employees; (2) the community of interest; (3) wages, hours, and other working conditions of the public employees; (4) the effect of over-fragmentation; (5) the efficiency of operations of the public employer; (6) the administrative structure of the public employer; and (7) the history of collective bargaining.

IV. CONCLUSIONS OF LAW

1. Akron Metropolitan Housing Authority is a “public employer” as defined in Ohio Revised Code § 4117.01(B).
2. Ohio Council 8, American Federation of State, County and Municipal Employees, AFL-CIO is an “employee organization” as defined in Ohio Revised Code § 4117.01(D).
3. The current position of Network Administrator does not meet the criteria for exclusion from the definition of “public employee” of either O.R.C. 4117.01(C) (7) or (10).
4. The current position of Network Administrator shares a community of interest with other members of the bargaining unit identified in the Petition for Amendment of Certification.
5. The bargaining unit described in the Petition for Amendment of Certification is the “unit appropriate for purposes of collective bargaining” under O.R.C. § 4117.06(A).

V. DETERMINATION

For the reasons set forth above, the State Employment Relations Board finds that the current position of Network Administrator does not meet the criteria for exclusion from the definition of “public employee” under Ohio Revised Code §§ 4117.01(C)(7) or (C)(10) and that the current position of Network Administrator shares a community of interest with other members of the bargaining unit identified in the Petition for Amendment of Certification. Consequently, the Employer’s objections are denied, the Petition for Amendment of Certification is granted, and the bargaining unit is amended accordingly.

Brundige, Chairperson, and Spada, Board Member, concur.