

BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

Public Employees Relations Board

AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL)
EMPLOYEES UNION,)

FILED

MAR 05 2007

Petitioner,)

v.)

Case No. M1400

CITY OF LAWTON, OKLAHOMA,))

Respondent.)

ORDER

This matter came on for hearing before the Public Employees Relations Board (the "Board") on the 11th day of January, 2007.

On October 12, 2006, the Board heard arguments on the Motion to Sustain Petition for Certification filed by Petitioner American Federation of State, County and Municipal Employees Union (the "Union" or "AFSCME") and granted that motion. Subsequently, the parties asked the Board to determine if certain challenged employees are included in the certified bargaining unit. The Board then asked the parties to brief the issues who is a "supervisor" and who is a "confidential employee" as defined in § 51-202 of the Oklahoma Municipal Employee Collective Bargaining Act, 11 O.S. Supp. 2006 §§ 51-200, et seq (the "OMECBA"). Both parties filed briefs and the Board heard arguments from counsel. AFSCME appeared by and through its attorneys, James R. Moore and Chanda R. Graham. The City of Lawton, Oklahoma (the "City") appeared by and through its attorneys, Tony G. Puckett and Timothy Wilson.

The Board, having reviewed the briefs and heard the arguments of the parties and being fully

advised, interprets “supervisor” and “confidential employee” as defined in § 51-202 of the OMECBA and sets out the parties’ burdens as follows:

A. Initial Burden of the Parties

The Union has the burden of establishing that an individual is a municipal employee who could be a member of the bargaining unit, unless that employee is exempt under 11 O.S. Supp. 2006 § 51-203. The City then has the burden of establishing that that employee is exempt pursuant to 11 O.S. Supp. 2006 § 51-203. *See N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-712 (2001) (burden of proof on issue of employee's supervisory status under the NLRA is borne by the party claiming that the employee is a supervisor).

B. “Supervisor”

Title 11 O.S. § 51-202.14 defines “supervisor” as follows:

“Supervisor” means an employee who devotes a majority of work time to supervisory duties, who customarily and regularly directs the work of two or more other employees and who has the authority, in the interest of the employer, to hire, promote or discipline other employees but does not include individuals who perform merely routine, incidental or clerical duties or who occasionally assume supervisory or directory roles or whose duties are substantially similar to those of their subordinates and does not include lead employees, employees who participate in peer review, employee involvement programs or occasional employee evaluation programs.

Pursuant to this statutory definition, for an employee to be a “supervisor” that person must

- (1) Devote the majority of work time to supervisory duties;
- (2) Customarily and regularly direct the work of two or more other employees; and,
- (3) Have the authority, on the employer’s behalf, to hire, promote or discipline other employees.

Even if the City meets its burden of establishing these elements, the Union may rebut the

presumption that the employee is a “supervisor” by proving, pursuant to § 51-202.14, that the employee

- (1) Performs merely routine, incidental or clerical duties;
- (2) Occasionally assumes supervisory or directory roles;
- (3) Performs duties that are substantially similar to those of their subordinates; or
- (4) Is a lead employee, an employee who participates in peer review, employee involvement programs or occasional employee evaluation program.

The gist of the definition of “supervisor” is that the employee in question is “primarily a supervisor” rather than “primarily a rank-and-file employee during a majority of her employment time”. *See U.S. Dept. of the Army Parks Reserve Training Center, Dublin, CA and IAFF Local F-305*, 61 FLRA 537, 541 (2006) (some employees may have supervisory authority but are, for the most part, rank-and-file employees; the question really is whether the employee is primarily a supervisor or primarily a rank-and-file employee during a majority of her employment time).

C. “Confidential employee”

Title 11 O.S. Supp. 2006 § 51-202.4 defines “confidential employee” as follows:

“Confidential employee” means any municipal employee who acts in a confidential capacity to an individual who formulates or effectuates management policies in the field of labor management relations.

The definition of “confidential employee” has two parts.

1. “To an individual who formulates or effectuates management policies in the field of labor management relations”

The first part of the definition of “confidential employee” is that the employee must work for “an individual who formulates or effectuates management policies in the field of labor management

relations". The fact that an individual is a division or department head is not sufficient to make that person "an individual who formulates or effectuates management policies in the field of labor management relations". It is not sufficient that the individual has access to matters that are confidential, such as basic personnel information. It is also not sufficient that the individual gathers data that is available to the public. Rather, the individual must formulate or effectuate management policies in matters involving relations between management and labor. *U.S. Air Force 82nd Training Wing Sheppard Air Force Base, Wichita Falls, TX and AFGE Local 779, AFL-CIO*, 61 FLRA 443, 446 (2006). Responsibilities that are aspects of the formulation or effectuation of management policies in labor relations include:

- (1) Advising management on or developing negotiating positions concerning bargaining proposals;
- (2) Preparing arbitration cases for hearing; and,
- (3) Consulting with management regarding the handling of unfair labor practices.

Id.

2. "Acts in a confidential capacity"

The second part of the definition of "confidential employee" is that the employee must act "in a confidential capacity" to the policymaker. Factors to be considered when assessing whether an employee "acts in a confidential capacity" to a policymaker are whether the employee

- (1) Obtains advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters;
- (2) Attends meetings where labor-management matters are discussed;
- (3) Because of physical proximity to their supervisor, overhears discussions of labor-management matters; and

- (4) Has access to, prepares, or types materials related to labor management relations, such as bargaining proposals and grievance responses.

U.S. Dept. of Labor Washington, D.C. and AFGE Local 12, AFL-CIO, 59 FLRA 853, 855 (2004).

Simply because an employee has access to matters that are confidential, such as personnel matters, does not make that person a "confidential employee".

If the evidence establishes both parts of § 51-202.4 with respect to an employee, that employee is a "confidential employee".

The Board provides this interpretation of the definitions of "supervisor" and "confidential employee" to assist the parties in their attempt to work out their differences regarding those positions in dispute. After completion of their good faith efforts to work out their differences, the parties may submit for Board determination whether any positions still in dispute are a part of the bargaining unit.

Dated: February 12, 2007



Craig W. Hoster, Chair
Public Employees Relations Board