BEFORE THE PUBLIC EMPLOYEES RELATIONS BOARD
STATE OF OKLAHOMA

FILED
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Public Employees Relations Board

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| AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES UNION, | ) | |
| 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 13th day of December, 2007. Petitioner American Federation of State, County and Municipal Employees Union (the "Union" or "AFSCME") appeared by and through its attorneys, Chanda R. Graham and James R. Moore. The City of Lawton, Oklahoma (the "City") appeared by and through its attorney, Timothy Wilson.

On October 12, 2006, the Board heard arguments on the Motion to Sustain Petition for Certification filed by 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.* ("OMECBA"). Both parties filed briefs and the Board heard arguments from counsel. The Board then entered its Order filed March 5, 2007 interpreting "supervisor" and "confidential employee" as defined in § 51-202 of OMECBA and set out the parties' burdens.

For most of the employees, the City and AFSCME have resolved whether or not the employee is in the bargaining unit; however, the parties have requested the Board to make determinations regarding 23 remaining positions. The Board undertakes this task in accordance with 11 O.S. Supp. 2006 § 51-210(C) and OAC 585:35-5-3.

Applying the law to the facts as they existed at the time of the filing of the request for clarification, *FOP Lodge 173 v. City of Yukon*, PERB Case No. 00164 and 11281 UC (1988), the Board finds as follows regarding the contested positions:

**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). With regard to "supervisors" under OMECBA, the burden then shifts back to the Union to establish that the position is, in fact, primarily non-supervisory pursuant to 11 O.S. Supp. 2006 § 51-202.14.

**B. "Supervisor"**

Section 51-202.14 of OMECBA 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 her subordinates; or

(4) Is a lead employee, an employee who participates in peer review, employee involvement programs or occasional employee evaluation programs.

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).

The Board finds that the Union has met its burden of establishing that the following positions in dispute are held by persons who are municipal employees and who could be members of the bargaining unit; however, the City has met its burden of establishing that these positions are exempt pursuant to 11 O.S. Supp. 2006 § 51-203 because the employees holding these positions are supervisors:

1. Network Administrator/David Wood[1]

2. Chief Chemist/Pre-Treatment Coordinator/Cynthia Williams

3. Circulation Coordinator/Adoracion "Dory" Thomas

4. Land Surveyor/Edward Deral Paulk

5. Civil Engineer/Pratap Ganti.

The Union has failed to rebut the presumption that these employees are "supervisors". Therefore, these positions are not included in the bargaining unit.

**C. "Confidential employee"**

Section 51-202.4 of OMECBA 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

[1] The City also asserts that the person currently holding the Network Administrator position, David Wood, is a "confidential employee" in addition to being a supervisor. The Board, having determined that Mr. Wood is a supervisor, finds it unnecessary to determine whether or not he is also a "confidential employee" under OMECBA.

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 finds that the Union has met its burden of establishing that the following positions in dispute are held by persons who are municipal employees and who could be members of the bargaining unit and that the City has failed to meet its burden of establishing that these positions are exempt pursuant to 11 O.S. Supp. 2006 § 51-203 because the employees holding these positions are confidential employees. Therefore, these positions/individuals are included in the bargaining unit:

1. Senior Secretary, Community Dev., Community Svcs./Donna Gibson
2. Senior Secretary, License & Permits, Community Svcs./Sara Johnson
3. Admin. Secretary, Planning Division, Community Svcs./Cynthia Reynolds
4. Senior Clerical Assoc., Recreations Svcs., Parks & Rec./Brenda Graham
5. Senior Secretary, Engineering, Public Works/Evlyn "Marie" Caro
6. Public Works Scheduler, Sewer System Construction Division, Public Works/Sheri Poolaw
7. Senior Clerical Asst., Solid Waste Collection, Public Works/Kathleen Whitehead
8. Clerical Associate, Solid Waste Disposal, Public Works/Cheryl Richardson
9. Public Works Scheduler, Streets, Public Works/Linda Barreal
10. Public Works Scheduler, Wastewater Maint., Public Works/Teresa Crabtree
11. Public Works Scheduler, Water Dist., Public Works/Judy McConnell

The remaining individuals whom the City has established are confidential employees are not included in the bargaining unit. At the current time these individuals and positions are:

1. Vicki Ange, Senior Secretary, Police Department
2. Marci Sego, Senior Secretary, Finance Department

3. Jackie Somerlott, Senior Administrative Secretary, Public Works

4. Sharon Thompson, Senior Secretary, Library

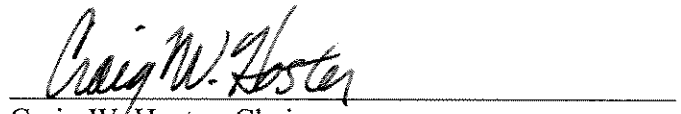
5. Alfreda Wheeler, Senior Secretary, Parks & Recreation.

6. Julie A. Magness, Accountant, Finance Department

7. Georgia Peters, Fiscal Technician, Finance Department

The first five individuals listed above (*i.e.,* Ange, Sego, Somerlott, Thompson and Wheeler) are senior secretaries to department heads. Each department head is entitled to designate one senior secretary who meets the statutory requirements to be considered a confidential employee and who consequently would not be included in the bargaining unit.

Dated: December 19, 2007



Craig W. Hoster, Chair
Public Employees Relations Board