

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

International Brotherhood of Teamsters, Local 73,)	
)	
Petitioner)	
)	
and)	Case No. S-RC-14-007
)	
Village of Elburn,)	
)	
Employer)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On July 17, 2013, the International Brotherhood of Teamsters, Local 73 (Petitioner/Teamsters) filed a petition in Case No. S-RC-14-007 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1300 (Rules). The petition sought to represent a bargaining unit proposed to include "highway/street and building workers maintaining and repairing street, water systems, sewer systems, and painting; working foreman directing work; [and] Secretary relating work orders" employed by the Village of Elburn (Employer/Village) and excluding the "superintendent and secretary supervisor." The Employer responded to the petition and identified seven employees working in positions covered by the proposed unit: four Laborers, the Public Works Foreman, the Wastewater Operator, and the Utility Billing Clerk. The Employer opposed inclusion of the positions other than the Laborers. The Union stipulated to the exclusion of the Public Works Foreman and the Utility Billing Clerk.

Administrative Law Judge Heather Sidwell issued an Order to Show Cause directing the Employer to provide specific evidence, including documentary evidence and/or affidavits, which support[s] its position that the remaining petitioned-for position, its Wastewater Operator, is a statutory supervisor. The Employer responded on September 24, 2013. ALJ Sidwell determined that there was an unresolved issue regarding whether the Wastewater Operator was a supervisory employee, necessitating a hearing. The hearing was held on December 18, 2013, before ALJ Sidwell in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity

to participate, adduce relevant evidence, examine witnesses, and provide oral closing arguments.¹

After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find, that:

1. At all times material hereto, the Employer has been a public employer within the meaning of Section 3(o) of the Act;
2. The Employer is subject to the jurisdiction of the State Panel of the Board pursuant to Sections 5(a-5) and 10(b) of the Act;
3. The Petitioner is a labor organization within the meaning of Section 3(i) of the Act; and
4. The positions of Public Work Foreman and Utility Billing Clerk are excluded from the Act's coverage.

II. ISSUES AND CONTENTIONS

The issue to be resolved is whether the Wastewater Operator position is supervisory within the meaning of Section 3(r) of the Act, such that it should not be included in a bargaining unit with the Laborers. The Employer argues that the position is excluded from the Act's coverage because the Operator is ultimately responsible for the operation of the plant and spends his entire day directing the assigned Laborer. The Petitioner denies that the position is supervisory and concludes that it is therefore included in the Act's coverage.

III. FINDINGS OF FACT

The Village of Elburn has a Public Works Department. The Public Works Department is led by Superintendent John Nevenhoven. Four Laborers are employed in the Public Works Department. The Laborers have duties varying from changing oil in vehicles, mowing grass, and doing general maintenance work throughout the Village on Village-owned equipment. One Laborer is assigned to work at the wastewater treatment plant (plant). That assignment generally is made on a two-week rotation. The Foreman is primarily responsible for overseeing the Laborers not assigned to the plant; he reports directly to the Superintendent.

¹ ALJ Sidwell subsequently left the employ of the Board, and the case was reassigned to me.

The State of Illinois regulates wastewater treatment plants. The Environmental Protection Agency (EPA) by law or rule establishes a protocol to be followed and tests to be performed. The State requires a certified operator to sign off on and submit reports showing that the plant is complying with State laws and regulations. The certified operator is also responsible for testing materials and submitting documents to the State to maintain the qualification of the onsite lab. For a plant the size of the one operated by the Village, the State requires someone with a Class I certificate of competency for operation of a wastewater plant to oversee the plant.

The Village employs John Wartenbe as a Wastewater Treatment Operator. Wartenbe possesses a Class I wastewater operator's license and has served as the Village's Operator for approximately five years. Wartenbe reports directly to the Foreman. Prior to hiring Wartenbe as Operator, the Village contracted with an engineer who would spend approximately four to five hours, one day per week, to ensure that the tests were being done. The engineer did not usually perform the tests and sent the tests out to a lab for results.

The Village's Operator is responsible for the day-to-day operation of the plant, ensuring that equipment is in good operating order and that the biological processes are running appropriately. The Operator trains the Laborers on how to perform the day-to-day work at the plant and inspects the work of the Laborer who is assigned to the plant, because the Operator is ultimately responsible for the operation of the plant. The Operator completes a laboratory bench sheet three times a week with each form taking approximately one-half an hour to complete. Once a month, the Operator also completes a discharge monitoring sheet, which takes approximately two hours to complete. According to Wartenbe, he spends at most a couple hours per week filling out reports. In addition to completing the forms that require a certified operator's signature, the Operator performs many of the same duties as the Laborers assigned to the plant. He sets up tests, runs tests, performs back flushes, performs maintenance on the equipment, and is occasionally assigned to assist with plowing snow. Though the required tests could be run at any time, at the Village's plant, they do tests on certain days at certain times because it is more convenient. Regular maintenance tasks are also performed on certain days. Much of the day, the Operator is performing the same or similar work as the Laborer, often working side by side.

In the Operator's absence, the Laborer assigned to the plant performs the tests that are regularly done on each day. The Laborers are trained to do the work and to know what needs to

be done. The Operator does not leave instructions for the Laborers to complete certain tasks in his absence. The Laborers are trained and know what EPA-required tests must be set up and run. The Operator, at times, evaluates the time available to complete a certain test and decides when to run the test.

The Operator is not authorized to and has not hired, fired, determined Laborers' pay, made budget recommendations, grant Laborers' time off, decide which Laborer will be assigned to the plant, or complete performance evaluations of the Laborers' work. While the Operator may be authorized to recommend discipline, in his four years in the position, Wartenbe testified he has never made such a recommendation nor has the Foreman or Superintendent sought a recommendation from him.

IV. DISCUSSION AND ANALYSIS

Section 3(s) of the Act provides that a bargaining unit as determined by the Board may neither include both supervisory and non-supervisory employees nor consist solely of supervisory employees. 5 ILCS 315/3(s)(1) (2012). Thus, if the position of Operator is supervisory as that term is defined in the Act, the position may not be included in the petitioned-for bargaining unit.

Under the Act, a supervisor is an employee who: (1) engages in principal work that is substantially different from that of his or her subordinates; (2) has the authority, in the interest of the employer, to engage in at least one of 11 enumerated indicia of supervisory authority, or to effectively recommend such actions; (3) must consistently use independent judgment in performing or recommending the enumerated actions; and (4) devotes a preponderance of his time to the exercise of that authority. 5 ILCS 315(r) (2012) and City of Freeport v. Illinois State Labor Relations Board, 135 Ill. 2d 499, 512 (1990). As the party asserting the supervisory exclusion, the Employer has the burden of demonstrating by a preponderance of the evidence that the Wastewater Operator position satisfies all four prongs of the statutory definition. County of Boone and Sheriff of Boone County, 19 PERI ¶ 74 (IL LRB-SP 2003); Chief Judge of the Circuit Court of Cook County, 18 PERI ¶ 2016 (IL LRB-SP 2002).

A. Principal Work

The requirement that a supervisor's principal work be substantially different from that of his or her subordinates is easily satisfied where that work is obviously and visibly different from the work of the subordinates. City of Freeport, 135 Ill. 2d at 514.

Here the Employer contends that Wartenbe's work is obviously and visibly different from that of the Laborers who are also proposed for inclusion in the unit. Wartenbe works only at the plant, whereas the Laborers spend only approximately one-third of their time at the plant.² Wartenbe is responsible for the day-to-day operation of the plant by ensuring that the biological processes are working within EPA guidelines. He is responsible for signing off on compliance documents for submission to the EPA. He consults with Village management on proposed expansion of the plant. The Laborers do none of these additional duties even when they are assigned to the plant. He is not responsible for vehicle maintenance, mowing, and the general maintenance of other, non-wastewater treatment plant areas of the Village. As such, I find that the Village has satisfied the first prong of the supervisory test.

B. Supervisory Indicia

The second requirement of the statutory definition of a supervisor is the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, discipline employees, adjust their grievances, or effectively recommend any of these actions. Wartenbe provided unrefuted testimony that he is not authorized to hire, transfer, layoff, recall, or promote employees. Furthermore, because there is no history of representation with the Laborers, Wartenbe has had no past role in addressing grievances. The record evidences that Wartenbe has never disciplined an employee, has not recommended discipline, has not been asked to provide a recommendation for discipline, and was not aware that he may have the authority to recommend discipline.

The Employer contends that Wartenbe is a supervisor because he directs the Laborers when they are assigned to the plant. Specifically, the Village contends that Wartenbe gives job assignments, oversees and reviews the Laborer's daily work activities, provides instruction and assistance to the Laborers, and is ultimately responsible for the operation of the plant. The Board has recognized several functions that can indicate the authority to direct, including reviewing and monitoring work activities, scheduling work hours, approving time off and overtime, and formally evaluating job performance when the evaluation is used to affect the employees' pay or employment status. Chief Judge of the Circuit Court of Cook County, 19 PERI ¶ 123 (IL LRB-SP 2003); County of Cook, 16 PERI ¶ 3009 (IL LLRB 1999); County of Cook, 15 PERI ¶ 3022

² While the Village employs four Laborers, the Superintendent testified that one of the Laborers is not assigned to work at the plant. Therefore, the three remaining Laborers rotate two-week shifts at the plant.

(IL LLRB 1999), aff'd, by unpub. order No. 1-99-1183 (Ill. App. Ct., 1st Dist. 1999); City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992).

The record reveals that the Foreman, and not Wartenbe, is authorized to schedule hours and approve time off and overtime. While the Superintendent testified that Wartenbe's observations of a Laborer's conduct were included in the employee's performance evaluation the Superintendent completed, he testified that evaluations were not linked to raises or that they otherwise impact the employees' terms and conditions of employment. As such, any role Wartenbe may play in the completion of performance evaluations is insufficient to support performance of the supervisory authority to direct employees. Village of Bolingbrook, 19 PERI ¶ 125 (IL LRB-SP 2003). I turn then to the Village's contention that Wartenbe exercises supervisory authority to direct the Laborers by virtue of giving work assignments and reviewing the Laborers' work.

1. Directing by Assigning Duties

The Village asserts that it is Wartenbe's job to determine what particular tasks need to be accomplished to end up with clean water at the end of the treatment process. The record with respect to the daily activities at the plant is vague. Wartenbe testified that, for convenience, certain tasks (including EPA-required testing) are completed on each day of the week. The record reveals that Wartenbe and the assigned Laborer work together to accomplish the day's preset tasks. No evidence was elicited regarding who establishes the general schedule or whether Wartenbe is authorized to unilaterally change the general schedule of tasks.

The Board has held that assignment of work is not indicative of supervisory direction where it is based primarily on rotation or other routine factors. County of Vermillion, 18 PERI ¶ 2050 (IL LRB-SP 2002). In this case, there was certainly evidence of routine factors playing a role in assignments. For example, if Wartenbe decides to set up for tomorrow's tests, that leaves the Laborer to complete the other preset daily tasks like greasing the rotors.

The Superintendent testified that the Village expects the Operator to rely on his specialized knowledge to identify when additional tasks need to be completed in order to satisfactorily treat the Village's wastewater. Wartenbe does not contradict that this is his responsibility when he is present at the plant. However, the only evidence regarding how Wartenbe determines to whom to assign duties (in addition to those outlined in the preset schedule or otherwise) was Wartenbe's testimony that he considers the conditions inside the

plant, and if there is something else he should be doing, he would have the Laborer run the necessary test. Wartenbe gave the example that if he was going to be meeting with engineers visiting the plant, he would have the Laborer go ahead and run the day's tests. In short, if he was available he would do it, but if he was not available, he would direct the Laborer to do it.

Even if one assumes that in deciding what, if any, tasks outside of the preset daily tasks should be completed and by whom, the Operator exercises significant discretionary authority, the Village's objection fails. The record does not support that the Operator's alleged direction affects the Laborers' terms and conditions of employment. The Board has long held that if the exercise of discretion does not affect a subordinate's terms and conditions of employment such that the alleged supervisor would be potentially torn between his or her duty to the employer and loyalty to the union, the second prong has not been met. Village of Broadview v. Ill. Labor Relations Bd., 402 Ill. App. 3d 503, 510 (1st Dist. 2010) *citing* Ill. Fraternal Order of Police Labor Council v. McHenry, 15 PERI ¶ 2014 (IL SLRB 1999) and Chief Judge of the Circuit Court of Cook County, 9 PERI ¶ 2033 (IL SLRB 1993).

Directing staff which tasks to perform does not affect terms and conditions of employment. The Foreman, not Wartenbe, decides which Laborer is assigned to work at the plant instead of performing duties at other locations in the Village. Further, if Wartenbe decides that an additional test needs to be conducted or additional tasks must be completed, this discretionary decision does not affect the Laborers' hours, pay, or time off. Wartenbe cannot direct the Laborer to work beyond his regularly scheduled hours to complete the assigned tasks. The evidence indicates that only the Foreman or the Superintendent can approve overtime or assign an additional Laborer to the plant.

2. Directing by Reviewing Work

The Board has held that in the vast majority of cases, day-to-day review and oversight does not rise to the level of supervisory authority. Village of Bolingbrook, 19 PERI ¶ 125. Moreover, in order to rise to the level of supervisory authority, an alleged supervisor must exercise significant discretionary authority which affects the terms and conditions of his subordinates' employment. Village of Broadview, 402 Ill. App. 3d at 510. It is only when an alleged supervisor exercises discretionary authority that affects the terms and conditions of employment, such that the alleged supervisor would be potentially torn between his or her duty

to the employer and loyalty to the union, that the second prong is met. Village of Bolingbrook, 19 PERI ¶ 125.

The Superintendent testified that Wartenbe is the only one supervising the Laborer working at the plant and is the only one evaluating the Laborers' work at the plant. The Superintendent and Wartenbe both testified that on one occasion they had a conversation about the behavior of one Laborer and that Wartenbe's reported observations were considered in issuing a verbal reprimand and in the Laborer's performance evaluation. However, the record does not include evidence that the Superintendent or Foreman regularly seek Wartenbe's input regarding the Laborers' performance, such that Wartenbe's review of their work affects promotions, discipline, formal evaluation, or other terms and conditions of employment. Instead, the evidence establishes that Wartenbe inspects the assigned Laborer's work for the purpose of ensuring that the reported test results to which he affixes his signature and certification are accurate.

Because the Village has failed to present sufficient evidence to find that Wartenbe's assignment of duties to the Laborers or review of the Laborers' work rises to the level of supervisory authority under the Act, the Village has failed to prove the second prong of the supervisory test.

C. Independent Judgment

Even if one found that Wartenbe directed the assigned Laborer in a manner that affected the terms and conditions of his employment, the Village has failed to establish the third prong of the supervisory test as well. The third prong, the requirement that an alleged supervisor consistently use independent judgment when exercising supervisory authority, requires that the employee at issue “make choices between two or more significant courses of action without substantial review by superiors.” *Id. quoting St. Clair Housing Authority*, 5 PERI ¶ 2017 (IL SLRB 1989). The record is clear that Wartenbe's actions within the plant are not subject to substantial review by his immediate supervisor, the Foreman, or his second level supervisor, the Superintendent. However, in directing the Laborer assigned to the plant, Wartenbe does not exercise independent discretion in the interest of the Village.

Wartenbe is ultimately responsible for the operation of the plant, including determining whether additional tasks need to be performed to properly treat the Village's water. While this could be the exercise of independent judgment, the record reveals that Wartenbe is merely using

his technical expertise. The Board has long held that using technical expertise to direct subordinates is not the exercise of independent judgment in the interest of the employer. In City of Sparta, 9 PERI ¶ 2029 (IL SLRB 1993), the Board found lead workers who directed and reviewed the work of their subordinates based on their knowledge of construction technique were not statutory supervisors because they did not exercise the requisite independent judgment. Id. citing City of Burbank, 1 PERI ¶ 2008 (IL SLRB 1985); *see also* City of Freeport v. Ill. State Labor Relations Bd., 135 Ill. 2d 499, 554 N.E. 2d 155, 6 PERI ¶ 4019 (1990) and City of Naperville, 8 PERI ¶ 2016 (IL SLRB 1992).

Here, the Superintendent testified that Wartenbe was the only employee of the Village qualified to make the judgments necessary to run the plant. When asked by the administrative law judge what judgments Wartenbe makes, the Superintendent testified that Wartenbe was "the only one with the skills and knowledge...[o]n the operation of the plant, whether or not something within that operation - - or within the treatment training, needs to be adjusted so that the output, the water is free of bacteria, that the solids are being removed from the water, a number of judgments like that in the operation of the plant." The evidence regarding Wartenbe's judgments reveal that he is not expected to exercise independent judgment within the meaning of the Act, at least. Instead, he is expected to use his knowledge and training regarding wastewater treatment processes to ensure that the plant successfully treats the water.

As evidenced by his certification, Wartenbe has obtained additional training and education in the EPA requirements and the wastewater treatment process, which he then passes on to the Laborers when he trains them. Based on the training they receive, the Laborers know how to set up tests, run the necessary tests, read the tests, and maintain the equipment. The Superintendent testified that the Operator *must* direct the Laborers, as neither the Foreman or Superintendent have the specialized knowledge about the plant to direct them. Wartenbe instead testified that after being trained, the Laborers "know what to do" and that he did not have any input into what duties the assigned Laborer performed when he was not the plant.

The record reveals that State law and regulations dictate what tests must be performed and how to perform the tests. Wartenbe testified that in his absence, the assigned Laborer performs the necessary tasks based on the training received from Wartenbe. To the extent that the test results reveal that additional tasks are required to treat the wastewater, and Wartenbe

directs the Laborer which of any additional tasks to perform, Wartenbe is exercising technical expertise, not independent judgment in the interest of the employer.

Similarly, Wartenbe inspects the Laborers' work so that he can certify that the test results are accurate. The record does not support that he is reviewing the Laborers' work to ensure compliance with the Village's work standards or similar matters. Instead, he is charged with inspecting their work only to the extent that he can confidently sign off on reports that the wastewater treatment process is being conducted properly. This routine review does not indicate the consistent use of independent judgment within the meaning of the Act.

Because the Village has failed to present sufficient evidence to find that in Wartenbe's direction of the Laborers he exercises independent judgment in the interest of the Village, the Village has failed to prove the second prong of the supervisory test

D. Preponderance of Time

Petitioned-for employees are only deemed supervisory if they spend the preponderance of their work time performing supervisory functions.³ To satisfy this test, employees must spend more time on supervisory functions than on any one nonsupervisory function. Dep't of Cent. Mgmt. Servs. v. Ill. State Labor Relations Bd., 278 Ill. App. 3d 79, 83-85 (4th Dist. 1996); State of Ill., Dep't of Cent Mgmt. Servs. (EPA, DPH, DHS, DCEO), 26 PERI ¶ 155 (IL LRB-SP 2011). The Employer must demonstrate such allotments of time by setting forth the employees' day-to-day activities, as documented by specific facts in the record. Id. citing Stephenson County Circuit Court, 25 PERI ¶ 92 (IL LRB-SP 2009); Village of Bolingbrook, 19 PERI ¶ 125. The calculation of time under the preponderance requirement is based on time spent in the exercise of supervisory authority that qualifies as such under the Act. See Dep't of Cent. Mgmt. Servs., 26 PERI ¶ 155 citing Downers Grove v. Ill. State Labor Relations Bd., 221 Ill. App. 3d 47, 55 (2nd Dist. 1992) (noting that actual time does not include work time spent instructing or directing employees, when such instruction or direction does not qualify as supervisory direction under the Act).

Wartenbe provided uncontradicted testimony that he spends approximately two hours per week completing State forms and reports. Despite this, the Village argues that Wartenbe spends his entire 40-hour work week directing the Laborers. However, it failed to elicit sufficient evidence to support that position. The record is largely devoid of a description of what a day

³ The Act does not require this showing for petitioned-for police officers, but that exception is not relevant here.

inside the plant entails; how, when, and for how long the Operator interacts with the assigned Laborer; and what other tasks the Operator may perform that the Laborer does not.

Notably, the record reveals that in Wartenbe's absence, the Laborer assigned to the plant relies on his training to complete the necessary tests and maintenance tasks without any direction from Wartenbe, the Foreman, or the Superintendent. This certainly tends to support a finding that the Laborers assigned to the plant do not require a great deal of direction or review. Regardless, the record is insufficient to find that Wartenbe spends more time directing Laborers than he does any other non-supervisory task. Therefore, the Village has failed to prove the fourth prong of the supervisory test.

V. CONCLUSIONS OF LAW

The Wastewater Operator employed by the Village of Elburn is not a supervisory employee under the Illinois Labor Relations Act.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the following bargaining unit be certified:

Included: Highway/street and building workers maintaining and repairing streets, water systems, sewer systems, and painting, including the title of Wastewater Operator.

Excluded: Superintendent, Secretary Supervisor, Foreman, and Utility Billing Clerk

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200-1240, the parties may file exceptions no later than 14 days after service of this recommendation. Parties may file responses to any exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the recommendation. Within five days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed, if at all, with General Counsel Jerald Post, Illinois Labor Relation Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. Exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided

to them. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Springfield, Illinois, this 21st day of October, 2014.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

Sarah R. Kerley

**Sarah Kerley
Administrative Law Judge**