

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

CITY OF PAWTUCKET

-AND-

R.I. COUNCIL 94, AFSCME, AFL-CIO

CASE NO: EE- 3541

Unit Clarification: Police Computer
Operations Specialist

DECISION AND ORDER

TRAVEL OF CASE

The above-entitled matter came on to be heard before the Rhode Island State Labor Relations Board (hereinafter "Board") on an Request for Clarification (hereinafter "Petition") for the position of Police Computer Operations Specialist. The Petition was filed with the Board by R.I. Council 94, AFSCME, AFL-CIO on January 17, 2002. On March 4, 2002, an informal hearing was held with representatives of the Union and the Employer, pursuant to R.I.G.L. 28-7-9 (b) (5).

The Board's Agent conducted a subsequent investigation on the request. On March 11, 2002, the Agent met with Edward Warzycha, incumbent Police Computer Operations Specialist. On March 12, 2002, the Board's Agent met with Mr. Warzycha's supervisor, Mr. Douglas Clary, who serves as the "Commander of Administration" in the Pawtucket Police Department. Upon completion of his investigation, the Board's agent filed an investigative report with the Board and on June 5, 2002, provided a copy of the same to the parties. On July 17, 2002, the Employer filed a written response taking issue with the conclusions contained in the investigative report, and claiming that the position of Police Computer Operations Specialist is both managerial and supervisory; and, thus, excluded from collective bargaining.

On August 13, 2002, the Board met and made a preliminary determination that the position should be accreted to the bargaining unit. The parties were notified of the Board's decision by letter dated August 15, 2002, and the Board set the matter down for formal hearing on October 29, 2002. Representatives from the Employer and Union participated and were provided a full and fair opportunity to examine and cross examine witnesses and to submit appropriate documentary evidence. On November 21, 2002, the Employer notified the Board that it was waiving its right to put on additional witnesses and the formal hearings were closed. Thereafter, the briefing schedule established by the Board was extended by request and consent

of both parties. The Union filed its brief on April 14, 2003, and the Employer filed its brief on April 17, 2003. The matter was considered by the Board at its May 13, 2003, and June 10, 2003 meetings.

FACTUAL SUMMARY

The Union presented the testimony of two witnesses: Mr. Angel Garcia, the Personnel Director for the City of Pawtucket, and Mr. Edward Warzycha, the Police Computer Operations Specialist. Documentary evidence included the official job descriptions for the positions of Police Computer Operations Specialist and the Manager of Information Systems (citywide position), a portion of the formal hearing transcript from the initial consent certification of the bargaining unit, a memorandum from Mr. Garcia to Mr. Warzycha concerning interviews, and a memorandum from Mr. Warzycha to Mr. Garcia concerning qualifications of Dispatchers.

Mr. Garcia testified that he has been employed by the City of Pawtucket as a Personnel Director for three (3) years. (TR. p. 8) In his capacity as Personnel Director, Mr. Garcia has been involved in creating job descriptions for the City's employees, including those for the Manager of Information Systems and the Police Computer Operations Specialist. (TR. p. 9, 11) Mr. Garcia testified that both of these positions perform similar, although not identical, functions. (TR. p. 17, 18, 19) Mr. Garcia also testified that Mr. Warzycha retired as a sergeant from the Pawtucket Police Department in October 2001, and that prior to his retirement, Mr. Warzycha was in charge of the computer operations for the police department, performing essentially the same functions as he does now in his civilian position of Police Computer Operations Specialist (TR. p. 20) Mr. Garcia confirmed that, during the time that Mr. Warzycha was employed by the police department doing essentially the same work as in his present position, the City of Pawtucket never attempted to remove Mr. Warzycha's position from the police union's bargaining unit for either confidentiality or supervisory reasons. (TR. p. 51-52)

At the time of the formal hearing in this matter, Mr. Warzycha had no other employees working either with or for him in the computer operations. (TR. p. 25) Mr. Garcia testified that Mr. Warzycha had a role in establishing a better hiring procedure for police dispatchers by finding an outside testing firm for the City to hire. (TR. p. 33, 35) After dispatchers are hired, Mr. Warzycha does have a role in recommending whether they are retained in their positions. (TR. p. 33) Once the test has been scored, if there are union members that have passed the test,

the hiring for the open position is done strictly by union seniority. (TR. p. 36) New dispatchers must serve a 20 day probationary period, during which time Mr. Warzycha performs weekly evaluations and makes recommendations to the Personnel Director. (TR. p. 36)

Mr. Garcia testified that Mr. Warzycha participated in interviews for hiring a summer intern for the police computer division. (TR. p. 42) When Mr. Warzycha was still employed as a police officer, he made recommendations to the City concerning the position of dispatcher, some of which (2 out of 7) have been followed by the City. (TR. p. 26, 51)

The Union also presented the testimony of Edward Warzycha who testified that, prior to serving in the civilian position of Police Computer Operations Specialist; he was employed by the City's police department for nearly 21 years (TR. p. 56) At the time he retired, Mr. Warzycha had been in charge of the computer operations division for several years. (TR. p. 57, 59) He testified that when he was a police officer, he directly supervised the dispatchers, but that he no longer has that function in his civilian position. (TR. p. 57) Mr. Warzycha testified that he makes approximately \$50,000.00 per year and receives vacation time, sick time, and life insurance, like other City employees. His work-week is 35 hours, from 8:00 am to 4:00 pm. He works in the Police station, which is located within the City Hall. (TR. p. 59, 60) He interacts with other members of the 3960 bargaining unit on a daily basis. (TR. p. 61)

He also testified that, until just before the formal hearing in this case, he had another police officer (Detective Allcock) assisting him on whatever he needed in the computer division. (TR. p. 68) Mr. Warzycha testified that his office handles and has access to all data within the police department, including narcotics investigations, sexual assaults, police reports, building access control, and video monitoring. (TR. p. 63) Mr. Warzycha maintains total control of the operation of the computer system,¹ to the point of not allowing the software vendor the ability to have a dial-up connection, as is done in some other police departments. (TR. p. 68) Mr. Warzycha makes technical and professional recommendations on software and equipment. (TR. p. 69) Mr. Warzycha makes recommendations to his superiors for policies pertaining to computer usage, and then implements the policies once they have been approved. (TR. p. 70-71)

On cross examination, Mr. Warzycha acknowledged that there was a college intern working in his office that Mr. Warzycha wasn't really happy about, but that he did not have the authority to get rid of him. (TR. p. 73-74) Mr. Warzycha also testified that he assists in police

¹ Consisting of a network with seven servers, 125 work stations, 40 mobile units, and three off-site locations. (TR. p. 70)

investigations of civilian criminals, potential suspects, and city employees, including police officers and bargaining unit employees, including the proposed bargaining unit for the subject position. (TR. p 78-79) Mr. Warzycha also testified that his recommendations for hiring dispatchers are always followed. (TR. p. 90) Some time in the year before the formal hearing, Mr. Warzycha also had access to the City's other computer system for the purpose of conducting an investigation. (TR. p. 91)

Mr. Warzycha testified that after Detective Allcock went back to police work, two (2) individuals "bid" for the vacated computer position Mr. Warzycha did not want either of those individuals placed into the job, and the Chief adhered to Mr. Warzycha's request. (TR. p. 92) Mr. Warzycha also testified that he had nothing to do with contract negotiations or labor relations. (TR. p. 102, 103) He also testified that, although he has had access to the Personnel Director's computer files during a previous investigation, this access is not ongoing and was limited to the specific purpose of that particular investigation. (TR. p. 104)

DISCUSSION

Under Rhode Island law, only certain employees are permitted to engage in collective bargaining (See Title 28, Chapter 7, et seq., the Rhode Island State Labor Relations Act.) Supervisory, confidential, and managerial employees are excluded from collective bargaining for various public policy and labor stability concerns.

Supervisory Employees:

In the Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board, 694 A.2d 1185, 189 (R.I. 1997), the Rhode Island Supreme Court adopted the following federal definition of "supervisor"

"any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." (29 U.S.C. § 152(11))

Under federal labor law, this list of supervisory functions have been determined to be disjunctive; that is, a supervisor is an individual with the authority to undertake any one of these functions. Rest Haven Living Center, Inc. 322 NLRB, No. 33, 153 LRRM 1132 (1996) It also includes individuals who possess the authority to recommend any of the foregoing actions However, as a practical matter, an individual who fails to exercise any of the indicia of statutory

authority will rarely be found to be a supervisor. Capitol Transit Company, 114 NLRB 617, 37 LRRM 1005 (1955) enforced, 38 LRRM 2681 (D.C. 1956)

Determining whether an individual uses independent judgment in the exercise of functions indicative of supervisory status is extraordinarily fact intensive analysis. N.L.R.A. Law & Practice 2.03 (4) In analyzing the indicia of “assignment” and “responsibly directing” employees, it is clear that “not all assignments and directions given by an employee involve the exercise of supervisory authority. As stated by the Fifth Circuit

‘If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.’” N.L.R.A. Law & Practice 2.03 (4) citing Providence Hospital, 320 NLRB 717 (1996).

Determining whether an employee has used independent judgment in making an assignment requires careful analysis of the facts. For example, work assignments made to equalize work on a rotational basis or assignment based on skills when the differences in skills are well known to the employee is routine. Further, assigning tasks that clearly fall within an employee’s job description does not require the use of “independent judgment”.

Finally, since the definition of “supervisor” is highly specific and requires a legal conclusion, the statement of employees who either claim or agree they are “supervisors” is not given extensive weight by the Board. In the experience of this Board, there are many occasions when an employee would like to believe that he or she is a supervisor or that a job description claims that an employee is responsible for supervising others. However, when a detailed examination is made of the employee’s actual authority to undertake the actions as described in the definition of supervisor, many times the employee fails the “test”. For instance, there have been occasions when an employee erroneously thinks he or she is a supervisor because he or she has simply initialed time cards of employees who have reported their hours or who have made assignments to employees within the scope of their regular duties. Therefore, the Board analyzes the actual authority of employees against their statements, or job descriptions, and makes a legal conclusion as to whether positions are supervisory or not

Confidential Employees:

In Barrington School Committee v. Rhode Island State Labor Relations Board, 694 A.2d 1185 (R.I. 1992) the Rhode Island Supreme Court considered the question of what employees qualify as “confidential” and held

“Two categories of employees are recognized as confidential under the test and are therefore excluded from collective bargaining. The first category comprises those confidential employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. ... The second category consists of employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. (Barrington at p. 1136, quoting NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 at 189)

This two prong test of confidentiality is commonly referred to as the “labor-nexus” test. In Barrington, the Court declined to adopt the labor-nexus test as necessarily controlling in all future instances. In so holding, the Court said, “it may that a broader definition of those employees considered to be ‘confidential’ would be desirable in other circumstances.” Id at 137. This Board has considered the question of the expansion of the labor-nexus test in other subsequent cases, but the most notable was the case of the State of Rhode Island and the Rhode Island Brotherhood of Correctional Officers, EE 2003 (December 18, 1998), affirmed by the Rhode Island Superior Court on October 29, 1999 (C.A. No P.C. 99-0230). In that case, the State of Rhode Island argued that its computer personnel had access to every “byte” of information within the department’s computer system; and, therefore, these employees should be excluded from collective bargaining as “confidential” employees. In that case, the Board held, “if the MIS employees truly have regular and uninhibited access to every ‘byte of information’ including labor relations information, within the Department, with no way for the Department to protect itself from unauthorized access to information, then we might well indeed be persuaded to find that such employees stand in a confidential capacity and should not be permitted to engage in collective bargaining.” EE-2003: Decision and Order at p. 9²

Managerial Employees:

“Managerial” employees are employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employers.” Fraternal Order of Police, Westerly Lodge 10 v. Town of Westerly, 659 A.2d 1104,1107 (1995); State v. Local 2883 AFSCME, 463 A.2d 186, 190 (1983)citing and quoting in part NLRB v. Bell Aerospace Co., 416 U.S. 267, 278 (1974). Managerial employees must exercise discretion within or even independently of established employer policy and must be aligned with management. N.L.R.B. v Yeshiva University, 444 U.S. 672 (1980). An employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that control or implement employer policy. Id. “Employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee’s activities fall outside

² In that case, there was extensive testimony on passwords and other system security measures, or the lack thereof.

the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.” Id at 690.

DISCUSSION

In this case, the Employer claims that the position of Police Computer Operations Specialist is supervisory, confidential, and managerial; and must, therefore, be excluded from collective bargaining. The Employer also argues that a similar position held by Darcy Viner, which is presently in the bargaining unit, is the subject of a unit clarification petition seeking to have that position removed. The Union argues that Mr. Warzycha is performing essentially the same functions that he did for approximately eight years when he was employed as a police department sergeant and that the City never attempted to remove him from the police bargaining unit.

The Union in this case was certified, pursuant to a consent election, on February 4, 1994, to represent: “all professional and technical employees of the City of Pawtucket, except those excluded under Chapter 9.4-2 of Title 28 of the General Laws of Rhode Island; and specifically excluding those positions and/or departments as stipulated by the parties and as reflected in the record of the formal hearing of January 14, 1994.” The testimony in the case established that Mr. Warzycha, through his hours, wages, and other terms and conditions of employment shares a community of interest with the professional and technical employees of the City of Pawtucket. Our primary task, therefore, is focused on whether or not the subject position can be excluded from collective bargaining as supervisory, confidential, or managerial.

In this case, the Employer argues that Mr. Warzycha is a supervisor because he has exercised the authority to effectively recommend whether or not signal operators (dispatchers) would remain in their positions after being a successful bidder, or be rejected and returned to their former positions. The Board finds that Mr. Warzycha’s function during the successful bidder’s 20 day probationary period is more of a technical skills screening than an exercise of supervisory authority. Mr. Warzycha himself possesses no power to determine that a successful bidder cannot be given the opportunity to exhibit his technical skills. If the successful bidder has the technical expertise for the position, then Mr., Warzycha has no authority to send the candidate back to his or her previous position. Moreover, there was no evidence in the record to support a finding that Mr. Warzycha had any authority to transfer, layoff, suspend, recall, promote, discharge, reward, or discipline other employees. In fact, the only testimony about whether or not Mr. Warzycha had the authority to get rid of unwanted employees, established

that he did not have the authority to divest his office of an unwanted college intern, for political reasons. (TR. p. 74)

There was some testimony in the record that Mr. Warzycha, when he was formerly employed by the Police Department, had some authority to assign work to a police detective. However, the position he presently fills is not the same as the position as when he was employed by the Police Department, according to the City. It is undisputed that, at the time of the formal hearing in this case, Mr. Warzycha no longer possessed any supervisory authority over the dispatchers and that there was no one else employed by the computer division (save the unwanted college intern.³) There was, therefore, no reliable, credible evidence in the records to establish that Mr. Warzycha maintained any supervisory authority over any other employee at the time this matter was heard. There was some evidence that the City had taken some steps to hire additional personnel for this office in the future. Whether or not Mr. Warzycha ultimately ends up acting in a supervisory capacity to any additional personnel is not in the record before this Board and is best reviewed in the future, in the scope of an appropriate proceeding. Therefore, since, there are presently no employees under the control of Mr. Warzycha, this Board finds that he is not a supervisor within the meaning of labor law

The Employer also argues that Mr. Warzycha is a confidential employee because he has access to all data within the police department, including narcotics investigations, sexual assaults, police reports, building access control, and video monitoring. There was no evidence in this record as to who in the Police Department, if anyone, is the "person who formulates, determines, and effectuates management policies in the field of labor relations." Therefore, since the record has not established who has these functions, then it is clear that the record has not established that Mr. Warzycha assists and acts in a confidential capacity to that unnamed person. The second category of confidential employees consists of employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. In this case, Mr. Warzycha candidly testified that he has nothing to do with these matters. Although on cross examination, Mr. Warzycha testified that he would have access to the Chief of Police's computer and, thus, any confidential files thereon. Once again, there was no information as to whether or not the Chief would have any confidential labor relations matters residing thereon, especially in an unprotected format

³ There was no evidence establishing that this individual had an employment relationship with the City, beyond the summer months.

Moreover, beyond the mere ability to technically access information, there was no evidence in the record to support a finding that Mr. Warzycha, in the normal course of his duties, would regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. Indeed, since Mr. Warzycha testified that he has nothing to do with collective bargaining, any such access to any of the Chief's files on collective bargaining (if the Chief even has any such files) would clearly be unauthorized. Even if Mr. Warzycha innocently and accidentally accessed such files, there is no evidence to suggest that it would affect him in his now-civilianized position. The record in this case was silent on whether or not there are "passwords" or "authorized user codes" or any other security measures as is so common in secured systems today. Therefore, there is no way for the Board to just assume that Mr. Warzycha could be "cyber-snooping" where he doesn't belong. We will not attribute such a severe finding to Mr. Warzycha's position on such a paucity of evidence. Therefore, we find that Mr. Warzycha's position should not be excluded from collective bargaining on a finding of confidentiality.

Finally, we consider the issue of whether or not Mr. Warzycha's position is managerial. The Employer argues that Mr. Warzycha exercises discretion with regard to the Department's computer system, with respect to the training involved in the system, the type of system and equipment, and the policies and procedures concerning the use of the same; and that these functions establish that Mr. Warzycha is managerial. There is no question that the Pawtucket Police Department relies upon Mr. Warzycha's extensive technical expertise and historical experience with the Department's systems. In fact, testimony established that the computer system was considered by most to be Warzycha's "baby". However, such technical controls should not be confused with "exercising discretion within or even independently of established employer policy", as is required of a "manager". Moreover, although there was mention of computer policies, none were entered into the record, so it is impossible for this Board to determine whether or not they extend beyond the mere technical aspects of computer use, as suggested by the testimony. Thus, although Mr. Warzycha's duties arguably may involve some divided loyalty (in the rare case when his job requires him to be involved in investigations of other employees), there is no evidence that Mr. Warzycha's decision-making extends beyond the routine discharge of his professional/technical duties in these matters. Therefore, this Board finds that there is not sufficient evidence in this record to establish that Mr. Warzycha is a

managerial employee as that term is defined by labor law, and we decline to exclude this position on that basis.

FINDINGS OF FACT

- 1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
- 2) The Union is a labor organization, which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection; and, as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act
- 3) Mr. Angel Garcia testified he has been employed by the City of Pawtucket as a Personnel Director for three years. (TR. p. 8) In his capacity as Personnel Director, Mr. Garcia has been involved in creating job descriptions for the City's employees, including those for the Manager of Information Systems and the Police Computer Operations Specialist. Both of these positions perform similar, although not identical, functions.
- 4) Prior to serving in the civilian position of Police Computer Operations Specialist, Mr. Edward Warzycha was employed by the City's police department for nearly 21 years. At the time he retired, Mr. Warzycha had been in charge of the computer operations division for several years, performing essentially the same functions as he does now in his civilian position.
- 5) At the time of the formal hearing in this matter, Mr. Warzycha had no other employees working either with or for him in the computer operations. He testified that when he was a police officer, he directly supervised the dispatchers, but that he no longer has that function in his civilian position.
- 6) When he was in the Police Department, Mr. Warzycha recommended that the City find an outside testing firm for the City to use when hiring dispatchers. Once the outside test has been scored, if there are union members that have passed the test, the hiring for the open position is done strictly by union seniority. New dispatchers must serve a 20 day probationary period, during which time Mr. Warzycha performs weekly evaluations and makes recommendations to the Personnel Director

- 7) Mr. Warzycha participated in interviews for hiring a summer intern for the police computer division, but had no authority to terminate the intern after the summer was over. Mr. Warzycha also testified that his recommendations for hiring dispatchers are always followed.
- 8) Mr. Warzycha earns approximately \$50,000.00 per year and receives vacation time, sick time, and life insurance, like other City employees. His work-week is 35 hours, from 8:00 am to 4:00 pm. He works in the Police station which is located within the City Hall. He interacts with other members of the 3960 bargaining unit on a daily basis
- 9) Mr. Warzycha testified that his office handles and has access to all data within the police department, including narcotics investigations, sexual assaults, police reports, building access control, and video monitoring.
- 10) Mr. Warzycha makes technical and professional recommendations on software equipment. Mr. Warzycha makes recommendations to his superiors for policies pertaining to computer usage and then implements the policies once they have been approved.
- 11) Mr. Warzycha also testified that he assists in police investigations of civilian criminals, potential suspects, and city employees, including police officers and bargaining employees, including the proposed bargaining unit for the subject position.
- 12) Mr. Warzycha plays no role in labor relations and does not act in a confidential capacity to any person that does have labor relations duties.
- 13) Mr. Warzycha did have access to the Personnel Director's computer files during an investigation, but this access is not ongoing and was limited to the specific purpose of that particular investigation.

CONCLUSIONS OF LAW

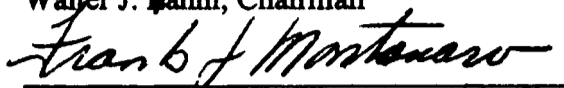
- 1) The position of Police Computer Operations Specialist held by Edward Warzycha shares a community of interest with the other positions within the bargaining unit organized under EE-3541. The position of Police Computer Operations Specialist held by Edward Warzycha is neither supervisory, nor confidential, nor managerial.

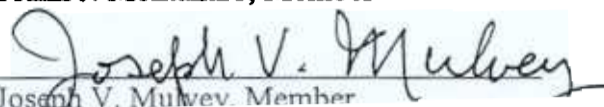
ORDER

The position of Police Computer Operations Specialist held by Edward Warzycha shall be and is hereby accreted to the bargaining unit covered by EE-3541

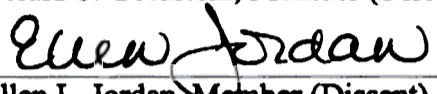
RHODE ISLAND STATE LABOR RELATIONS BOARD

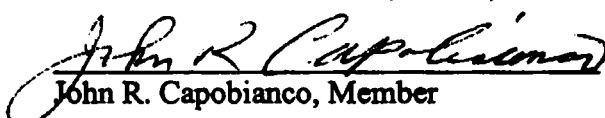

Walter J. Wanni, Chairman


Frank J. Montanaro, Member


Joseph V. Mulvey, Member

Gerald S. Goldstein, Member (Dissent)



Ellen L. Jordan, Member (Dissent)


John R. Capobianco, Member


Elizabeth S. Dolan, Member (Dissent)

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: OCTOBER 21, 2003

By: 
Joan N. Brousseau, Administrator