

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

IN THE MATTER OF

STATE OF RHODE ISLAND
DEPARTMENT OF TRANSPORTATION
Employer

AND

CASE NO: EE-3115
(Supervising Accountant)

LOCAL 400 INTERNATIONAL FEDERATION
OF PROFESSIONAL AND TECHNICAL :
ENGINEERS :
Petitioner

DECISION AND ORDER

TRAVEL OF CASE

The above matter came on to be heard on a Request for Clarification for the position of "Supervising Accountant" (hereinafter Petition) filed by Local 400 of the International Federation of Professional and Technical Engineers (hereinafter Petitioner). The petition was filed on October 23, 1995 and was coupled with a request for clarification of several other titles. An investigation and informal hearings were held for a number of the positions sought by the Petition. However, since the position of Supervising Accountant was assigned to the Capital Center Project, which was originally scheduled to close on July , 1996, the investigation for this position was held in abeyance, with the consent of the Petitioner and the Employer. On February 12, 1997, the Board notified the Petitioner that if the position of Supervising Accountant was still in existence and still being sought, that the Petitioner should resubmit its request with current information. On March 28, 1998, the Board's Agent conducted an informal hearing and on June 25, 1998, the Board issued an Order which dismissed six of the nine titles originally requested by the Petitioner. Also on June 25, 1998, the Board sent the Petitioner a letter which stated in part

"Relative to your request dated 11/6/95 for the position of Assistant Business Management Officer held by Sandra Nadeau and your request dated 10/23/95 for the position of Supervising Accountant held by John Napolitano, both located at the Capital Center Project, please be advised that at the time of investigation, the Capital Center Project was scheduled to close effective June 30, 1996. Therefore no action was taken by the Board on these two positions. However, it has recently come to the Board's attention that the Capital Center Project is on-going, and the two

positions in question are still located on North Main Street in Providence. A follow-up investigation will be conducted by the Board's agent. You will receive a copy of that investigation when completed."

On July 8, 1998, the Board's agent interviewed Mr. John Napolitano, Supervising Accountant and Mr. Wendall Flanders, Chief Engineer of the Capital Center Project. On July 10, 1998, the Board's Agent prepared a memorandum relative to her investigation and provided a copy of the same to the Petitioner and the Respondent. On July 30, 1998, the Respondent filed a response to the investigative report which urged the Board to find that Mr. Napolitano was a confidential employee with extensive involvement and access to sensitive managerial information. On September 29, 1998, the Board met and discussed the Petition and concluded that the information contained in the investigative report supported the accretion of the position to the bargaining unit. The parties were notified of this preliminary determination and the matter was then set down for formal hearing on October 27, 1998. Due to scheduling conflicts of the parties, the matter was rescheduled to December 3.

Upon conclusion of the formal hearing, the parties elected to file briefs which were directed to be filed within 30 days. The Respondent requested and received two extensions of time in which to file its brief. The Petitioner's brief was filed on February 22, 1999 and the Respondent's brief was filed in February 23, 1999.

SUMMARY OF TESTIMONY

The Respondent presented the testimony of Mr. John Napolitano, Supervising Accountant, and a State employee since 1974. He testified that his duties include being responsible for the financial management and management information systems employed by the Capital Center Project. He develops and implements the financial management systems, recordkeeping systems, cost accumulation and reporting. (TR. p 11) He described the accounting and record keeping systems as a complex "memorandum highway cost accounting system". He is responsible for making sure the contract payments properly reflect the work and the funding source commitments to the project, and that funds drawn from the different funding sources are drawn down in a timely fashion. (TR. p. 13) In his work he deals with the Federal Highway Administration and the Federal Railroad Administration. He also provides consulting services to the Freight

Rail Improvement Project. (TR. p. 13) Mr. Napolitano reviews funding and budget issues as to how staffing levels can be funded and he makes recommendations as to how many positions could be funded. (TR. p 16)

Mr. Napolitano testified that his office is separate from the Department of Transportation's state office building and that he reports to Mr. Wendall Flanders, the Chief Engineer of Operations on a weekly or biweekly basis. (TR. p 15, 17) Mr. Napolitano and Mr. Flanders have discussed staffing levels. (TR. p 16) Mr. Napolitano has on occasion acted as a designee for Mr. Flanders with contractors, funding sources and other state agencies (Administration, Economic Development) and the City of Providence. (TR. p 17-18) Mr. Napolitano testified that the Capital Center Project's computers are connected to the Department of Transportation but that its systems run independently from the Department. (TR. 18). He also testified that he supervises Sandra Nadeau, the Assistant Business Management Officer, in how the financial operation of the Department is conducted. (TR. p. 18-19) He also reviews reports that Ms. Nadeau generates. (TR. p. 19) Mr. Napolitano testified that although he has never had any disciplinary problems with Ms. Nadeau, if he did, he would consult with Mr. Flanders on how to handle it. (TR. p. 20-21, 24) Finally, Mr. Napolitano testified that his pay-grade is

On cross examination, Mr. Napolitano stated that his duties have always been financially related and that he does not report to any other senior person with financial duties; he reports to Mr. Flanders whose expertise is in engineering. (TR. p. 23) Mr. Napolitano has never participated in any negotiations with Local 400 as part of a management team. (TR. p 23) Mr. Napolitano has never attended an arbitration hearing as either witness or participant on behalf of the Department of Transportation. (TR. p 24) He has not fired any employees and he testified that he does not have the authority to do so. (TR. p 24) He has never been consulted by anyone in either the Department of Administration or the Department of Transportation for assistance in collective bargaining with Local 400. (TR. p 24) He also testified that there are two other people who work on financial matters within the Capital Center Project; Ms. Nadeau and Ms. Katherine Meyer. Ms. Nadeau reports to Mr. Napolitano and Ms. Meyer reports to Mr. Flanders. (TR. p 28)

The Respondent also presented the testimony of Mr. Wendall Flanders, the Chief Engineer for the Department of Transportation, specifically for Operations. Mr. Flanders testified that he has known Mr. Napolitano for many, many years. When Mr. Flanders was hospitalized, he assigned Mr. Napolitano many responsibilities that wouldn't normally be assigned to a Supervising Accountant. (TR. p 31) Mr. Flanders concurred with Mr. Napolitano's description of his job responsibilities but stated that he thought Mr. Napolitano had been more involved in recent years in the day-to-day operations and administrative functions because of Mr. Flanders' increased responsibilities in the Department. (TR. p 31) Mr. Flanders testified that the "Capital Center" operation has expanded into handling other programs such as the Freight Rail Project and that Mr. Napolitano is assigned to these projects because of this experience in dealing with the federal funding agencies and the people in Washington and Philadelphia. (TR. p 34)

Mr. Flanders also testified that he believed that Mr. Napolitano could and would make recommendations to him concerning disciplinary matters. (TR. p 38) Mr. Flanders testified that the power to hire or fire remains with him, subject to the Rules and Regulations of the Department. (TR. p 38) Mr. Flanders testified that he attends meetings with the Director of the Department and that he is involved with policy decisions. (TR. p 40) When Mr. Flanders wants a policy instituted at the Capital Center office, he talks it over with Mr. Napolitano. (TR. p 41) Finally, Mr. Flanders testified that if Mr. Napolitano were placed into the Union, his duties would change in some fashion. (TR. p. 42)

The Union presented brief testimony from Francisco Faraone, Jr., a thirty-four (34) year employee of the Department of Transportation and the Union President. Mr. Faraone testified that Local 400's bargaining unit has titles that encompass positions up to pay-grade 33. The Union represents all the technical and professional positions including accountants, computer people, real estate planners, engineers, technicians, administrative staff and secretaries. (TR. p 45)

DISCUSSION

The Respondent Employer asserts that the position of Supervising Accountant is confidential, supervisory and managerial and should therefore be excluded from the bargaining unit represented by Local 400.

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 whether a particular secretary was considered a “confidential employee” and in its analysis the Court adopted the following federal “labor-nexus” test for determining “confidential” employees:

“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)

In this case, there was no evidence set forth by the Respondent that Mr. Napolitano acts in any confidential capacity to anyone who formulates, determines or effectuates management policies in the field of labor relations. Nor was there any evidence that Mr. Napolitano has access to any anticipated changes which may result from collective bargaining, either with Local 400 or with any other union. In fact, Mr. Napolitano testified on direct examination that his input has never been sought by either the Department of Administration or the Department of Transportation on issues pertaining to collective bargaining. Therefore, the Board finds that Mr. Napolitano is not a confidential employee as defined by the Barrington Court and is not excluded from collective bargaining on this basis.

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

Further, managerial employees (who are excluded from collective bargaining) are not the same as "professional employees" (who are permitted to bargain collectively).

Professional employees are defined by the Board's policy statement as:

"any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine, manual, or physical processes; or

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph a, and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

In this case, it is clear that Mr. Napolitano is a professional employee, as defined above. He has a Bachelor's degree in Business Administration and his work engages him in intellectual endeavors which involve the consistent exercise of discretion and judgment. However, the record is devoid of any evidence that Mr. Napolitano represents management interests by taking or recommending discretionary actions that control or implement employer policy. In fact, Mr. Flanders testified that he, not Mr. Napolitano, attends meetings with the Director of the Department and that he, not Mr. Napolitano, is involved with policy decisions. (TR. p 40) It is Mr. Flanders that decides when policy should be implemented at the Capital Center and then directs Mr. Napolitano, after discussion. Therefore, while Mr. Flanders could be defined as a managerial employee, his subordinate, Mr. Napolitano does not rise to that level and his position is not excludable from collective bargaining as managerial.

In the Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board, 694 A.2d 1185, 1189 (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))

The Respondent argues that since Mr. Napolitano’s duties are not clerical or routine in nature, he must therefore be a supervisory employee. However, the definition of supervisor as set forth above clearly states that the issue of “routine or clerical” relates to the exercise of the supervisory authority to hire, fire, discipline, etc., not an employee’s normal duties of his or her job description. In this case, the record was very clear that Mr. Napolitano did not have the authority to hire or fire, in fact that control remains with Mr. Flanders, subject to the Rules and Regulations of the Department. (TR. p. 38) Mr. Napolitano would need to consult with Mr. Flanders before initiating disciplinary actions. (TR. p. 20-21, 24, 38) As for whether or not Mr. Napolitano can responsibly direct employees, the evidence set forth is not persuasive that he can. Mr. Napolitano testified that he and Ms. Nadeau perform certain functions together and that he reviews reports that she generates. There was no evidence or testimony that Mr. Napolitano either assigns her work or responsibly directs her. Therefore, this Board finds that Mr. Napolitano’s position is not excludable as supervisory.

FINDINGS OF FACT

- 1) The Petitioner, Local Union 400, International Federation of Professional and Technical Engineers, is a labor organization, which exists and is constituted for the purpose, in whole or in part, of collective bargaining relative to wages, rates of pay, hours, working conditions and all other terms and conditions of employment and of dealing with employers concerning grievances or other mutual aid and protection.
- 2) The Respondent is an “Employer” within the meaning of the Rhode Island State Labor Relations Act.

- 3) On October 23, 1995, the Petitioner filed with the Board a Request to Clarify nine positions including Supervising Accountant. The petition was held in abeyance because the Capital Center Project was supposed to close on July 1, 1996.
- 4) On February 12, 1997, the Board notified the Petitioner that if the position of Supervising Accountant was still in existence and still being sought, that the Petitioner should resubmit its request with current information.
- 5) On March 27, 1998, the Board's Agent conducted an informal hearing and on December 3, 1998, the Board conducted a formal hearing. Both the Petitioner and the Respondent were represented at the formal hearing and each had full opportunity to present evidence and witness testimony and to conduct cross examination.
- 6) Mr. John Napolitano, Supervising Accountant, testified that he has never attended an arbitration hearing as either witness or participant on behalf of the Department of Transportation; he has not hired or fired any employees and does not have the authority to do so; he has never participated in collective bargaining sessions with Local 400; he has never had the occasion to discipline an employee and would not do so without first consulting with his superior.
- 7) Mr. Napolitano has a Bachelor's degree in Business Administration and his work engages him in intellectual endeavors which involve the constant exercise of discretion and judgment.
- 8) Mr. Napolitano does not represent management interests by taking or recommending discretionary actions that control or implement employer policy.
- 9) The position of Supervising Accountant is a pay-grade 31
- 10) Mr. Wendall Flanders supervises Mr. Napolitano and only Mr. Flanders takes part in policy discussions with the Director of the Department.
- 11) The bargaining unit represented by Local 400 in certification 3115 represents pay-grades up to level 33. The Union represents all the technical and professional positions including accountants, computer people, real estate planners, engineers, technicians, administrative staff and secretaries.

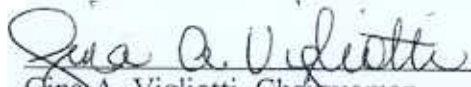
CONCLUSIONS OF LAW

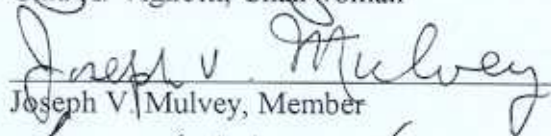
- 1 The position of Supervising Accountant held by John Napolitano is not managerial, confidential or supervisory
- 2 The position of Supervising Accountant held by John Napolitano is a professional position

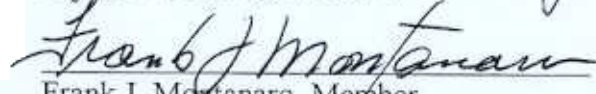
ORDER

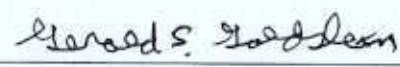
) The position of Supervising Accountant held by John Napolitano shall be and is hereby accreted to the certification in Case No EE 3115.

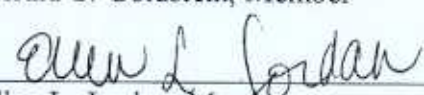
RHODE ISLAND STATE LABOR RELATIONS BOARD

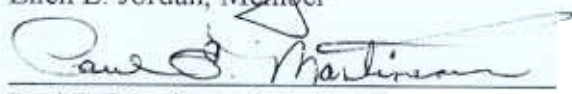

Gina A. Vigliotti, Chairwoman


Joseph V. Mulvey, Member


Frank J. Montanaro, Member

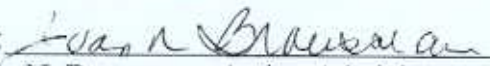

Gerald S. Goldstein, Member


Ellen L. Jordan, Member


Paul E. Martineau, Member

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

Dated: June 10, 1999

By: 
Joan N. Brousseau, Acting Administrator