

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

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IN THE MATTER OF

STATE OF RHODE ISLAND  
DEPARTMENT OF TRANSPORTATION  
Employer

AND

LOCAL 400 INTERNATIONAL FEDERATION  
OF PROFESSIONAL AND TECHNICAL :  
ENGINEERS :

Petitioner

CASE NO: EE-3115  
(Central Services Officer)

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DECISION AND ORDER

TRAVEL OF CASE

The above matter came on to be heard on a Request for Clarification (hereinafter Petition) for the position of "Central Services Officer" held by Mr. John Borek. The petition was filed with the Rhode Island State Labor Relations Board (hereinafter "Board") on September 9, 1997 by Local 400 of the International Federation of Professional and Technical Engineers (hereinafter Petitioner). On September 29, 1997 and October 3, 1997, the Board's Agent conducted interviews with Mr. John Borek, Central Services Officer and Mr. Phil Kydd, Acting Director of Administrative Services/Department of Transportation. On October 6, 1997, the Board's Agent conducted an informal hearing with the parties and prepared a written report concerning the results of her investigation. On May 21, 1998, the Board met, reviewed the Agent's report and made a preliminary determination that the position of Central Services Officer should rightfully be included within the bargaining unit certified by Case No EE 3115. The Petitioner and Respondent were provided with a copy of the Investigative report and were notified that the matter would be set down for formal hearing.

A formal hearing was conducted on November 24, 1998 and both the Petitioner and the Respondent were represented by legal counsel. <sup>1</sup> The parties had the opportunity

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<sup>1</sup> At the commencement of the formal hearing, the Respondent suggested that the matter be held in abeyance because other Unions had filed petitions (EE 3591 and EE 3602) seeking to represent the same position and that one of these unions was seeking to form a supervisory unit. The Respondent stated that a supervisory unit would be more appropriate for the position in question. The Board decided to move forward with the hearing.

to present evidence and witnesses and to cross examine witnesses. Upon conclusion of the hearing, the parties were directed to file briefs within two weeks of receipt of the transcript, if they wanted to submit briefs at all. The deadline for filing briefs was extended three times, at the request of the parties. The Petitioner filed its brief on February 4, 1999 and the Respondent filed its brief on January 25, 1999. In arriving at the within decision, the Board considered the testimony and the evidence set forth in the record and the arguments of counsel as set forth in the briefs.

### SUMMARY OF TESTIMONY

The Petitioner presented the testimony of Mr. Francisco Faraone, Jr., a thirty four year employee of the Department of Transportation and the President of the petitioning union, Local 400. He testified that Local 400 represents approximately 550 of the 850 or so employees at the Department of Transportation. (TR. p. 12) The bargaining unit consists of pay grades from level 6 or 8 up to level 33. Mr. Faraone testified that he filed the petition for this position because he believed that the duties of the title are the same as the duties performed by the employee when he was working under a different title. (TR. p. 14) He also testified that Mr. Borek works the same shift and hours that most DOT employees work.

On cross examination, Mr. Faraone testified that he does not have direct supervisory involvement with Mr. Borek. (TR. p. 15) He stated that his knowledge of Mr. Borek's duties comes from discussions he's had with Mr. Borek over coffee. (TR. p. 15) Mr. Faraone was aware that Mr. Borek had received an upgrade of his position from Engineering Tech IV to Central Services Officer through a "desk audit". (TR. p. 16) Mr. Faraone also testified that he did not believe that Mr. Borek, in his capacity as Central Services Officer, could effectively recommend discipline or that he has much responsibility for any grievance procedures or discipline (TR. p. 18) Mr. Faraone also remarked that Mr. Borek had been in the Union prior to his upgrade and that it was unfortunate that the union had to go through the accretion process because it was his opinion that Mr. Borek should have stayed in the Union. (TR. p. 20) Mr. Faraone testified that he did not believe that Mr. Borek would be a necessary witness in a grievance which had been filed by Local 400 concerning a memo which had been sent to union members by Mr. Borek, Mr. Franklin and a Mr. Peterson. (TR. p. 20-21)

The Respondent presented the testimony of Ronald Clare, the Chief of Merit Selection and Classification for the State of Rhode Island since 1986. He testified that in March, 1997, his office received a classification questionnaire form Mr. Borek which stated that he felt he was performing duties of a different classification. (TR. p. 28-29) In response, Mr. Clare's office conducted an investigation and an analysis of Mr. Borek's duties and rendered a decision on June 3, 1997 which indicated that Mr. Borek's job title should more correctly be classified as Central Services Officer and that he should be reallocated. (TR. p. 29) In conducting this type of investigation, Mr. Clare testified that the first step is to determine whether the employee's current duties are properly classified. If not, then an attempt is made to determine which class, if any, most appropriately reflects the duties being performed. (TR. p.30) Mr. Clare testified that he personally conducted the investigation on Mr. Borek's request for re-classification. (TR. p. 31) Mr. Clare also testified that the core responsibility to manage a fleet did not change much from Mr. Borek's old job description to the new one, but that the position of Central Services Officer also had additional responsibilities such as conducting investigations of accidents and driver issues and creating policies relating to fleet performance. (TR. p. 44-45) Mr. Clare testified that the Department of Administration also had the position of a Central Services Officer which is a member of the supervisory union in that Department. (TR. p. 46-47)

On cross examination, Mr. Clare testified that he chose to complete Mr. Borek's classification study himself [instead of assigning to another employee] because he knew most of the people in the Department and that it was easy to make contact with them (TR. p. 49) Of the 700 job studies done by his office in 1997, he performed 440 of them. (TR. p. 49) He also testified that during the job classification investigation he would also have considered the title of Chief of Motor Pool and Maintenance. (TR. p. 56) Mr. Clare testified that the differences between the job of Central Services Officer and the Chief of Motor Pool and Maintenance is that the Central Services Officer conducts investigations and creates policies and procedures that affect the entire fleet of vehicles and that the Central Services Officer would typically handle a larger fleet than the Chief of Motor Pools. ( TR. p. 57-59) Further, if the Chief of the Motor Pool found out that one of his vehicles was being improperly used, then he would report that issue to his supervisors for

an investigation. Mr. Borek, as Central Services Officer, has the direct responsibility to do the investigation. (TR. p. 60) On re-direct examination, Mr. Clare testified that Mr. Borek had responsibilities and input for the development of policy and investigative functions. (TR. p. 61)

The Respondent also presented the testimony of Mr. Borek, a State employee of approximately 22 years. He testified that he is in charge of a fleet of 170 road-worthy vehicles and a few other vehicles, including two boats. (TR. p.. 63) He testified that he conducts investigations on reports of bad driving and reports that a vehicle has been driven out of state without authority. (TR. p. 65) He also testified that when he assumed his responsibilities, he re-wrote and developed some of the rules and procedures in the Department concerning the fleet. (TR. p. 67) He then assigned copies of the procedure handbook to every person in the Department who received a new vehicle and told people to read the policy book. (TR. p. 66) The policies are submitted to his supervisor for approval before implementation. (TR. p. 70)

Mr. Borek further testified that he attends senior staff meetings with the Director of Transportation to review general functions that are taking place in the Department (TR. p. 71) He also attends meetings with the Assistant Director of Transportation regarding current issues or need assessments. (TR. p. 71) He also testified that he participates in the purchase of new vehicles and performs cost analysis for all vehicles. (TR. p. 72) Mr. Borek stated that he has the authority to issue reprimands and warnings concerning the misuse of state vehicles. (TR. p. 73) If a situation warrants it, he can also recommend to his supervisor or to the Assistant Director or Director that a vehicle be taken away from a particular driver and that his recommendation is usually followed. (TR. p. 74) Mr. Borek's investigative results are reported to his superiors which sometimes leads to situations where a grievance is filed by an employee. (TR. p. 74) Mr. Borek testified that he would then be required to participate in the grievance process. (TR. p. 74) He stated that there was a grievance currently pending regarding a rule which regulates the valuation of personal use of the fleet vehicles. He stated that two of the people that work for him in his office were adversely affected by this rule (referred to in the transcript as the \$3.00 a day rule) and that they were part of the grievance which had been filed which listed his name. (TR. p. 81)

Mr. Borek also testified that his duties include regulating the communication systems within the Department, such as two way radios, cell phones and pagers. (TR. p. 82) He reviews all invoices to verify the validity of the charges and to make sure that employees who use the equipment for personal calls, reimburse the state. (TR. p. 83) He believes that he has the authority to initiate disciplinary measures, such as taking away phones, when violations occur. (TR. p. 83) He does not hire or fire. (TR. p. 83) He can issue oral or written reprimands and believes that he is acting in a managerial capacity when issuing the same. (TR. p. 84-85) Higher disciplinary measures are handled by his superior, but Mr. Borek would probably be present. (TR. p. 84) Finally, Mr. Borek testified that when his title changed from Engineering Tech IV to Central Services Officer, his job changed considerably, in that he now has people that he supervises and that his duties are more complex. (TR. p. 85)

On cross examination, Mr. Borek testified that he first assumed responsibility for the fleet within the Division of Public Works of the Department of Transportation for about seven years prior to the formal hearing and that the fleet was about 135 vehicles at that time. (TR. p. 87) He stated that his responsibilities and duties have changed and that through policy changes, the way he monitors the fleet has become much more effective. (TR. p. 88) He also assumed additional responsibilities relating to procurement of specifications, budgeting and getting approval from the budget office on the procurement of new vehicles. (TR. p. 88) He stated that he decided to seek the job upgrade because he felt that he was doing more work and assuming more responsibilities given to him by the Director of Transportation and that he therefore felt he was entitled to receive an upgrade. (TR. p. 90-91) He further stated that although there is union representation from Local 400 at executive staff meetings, no union members are present at the senior staff meetings in the Director's office. (TR. p. 95) Mr. Borek testified that since he has been Central Services Officer he has assumed additional responsibilities including: investigating accidents and the misuse of vehicles, interacting with attorneys and insurance companies regarding accidents. (TR. p. 97)

The Respondent's final witness was David Sasso, Transportation Support Administrator for the Department of Transportation and a nineteen and a half year employee. Mr. Sasso supervises Mr. Borek. (TR. p. 100) Mr. Sasso testified that Mr.

Borek sets policy and that he reviews it with Mr. Sasso and Mr. Clingham before the policy is instituted. (TR. p. 102) Mr. Sasso stated that Mr. Borek can give oral and written discipline measures but that he usually checks with Mr. Sasso first. (TR. p. 103) Mr. Sasso also stated that Mr. Borek has attended management meetings. (TR. p. 104) There are times when Mr. Sasso accepts Mr. Borek's recommendations for discipline and sometimes when those recommendations are not accepted. (TR. p. 106) Mr. Sasso could recall three instances in the prior three years in which Mr. Borek instituted disciplinary actions; the first problem was resolved after a discussion with the employee; the second was resolved by taking a vehicle away from an employee and transferring that employee, and in the third instance, Mr. Borek only handled the investigation of the matter. (TR. p. 109) Finally, Mr. Sasso testified that Mr. Borek has independent judgment concerning his recommendations. (TR. p. 108)

#### POSITIONS OF THE PARTIES

The Respondent Employer asserts that the position of Central Services Officer is supervisory and managerial and should therefore be excluded from the bargaining unit represented by Local 400. The Respondent argues that Mr. Borek is "aligned with management in the performance of his duties as to setting and effectuating policy and regulations, recommending discipline, reporting to middle management, attending management staff meetings, and attending grievance hearings." (Respondent's Brief, p. 5) The Respondent also argues that Mr. Borek is named in a grievance filed by Local 400 and that it is likely that he could be called as a witness for the State against the Union. Therefore, the Respondent argues that an inherent conflict would arise if Mr. Borek were placed in the bargaining unit. The Employer also argues that Mr. Borek meets the definition of a manager as set forth in Fraternal Order of Police v Town of Westerly, 659 A.2d 1104 (R.I. 1995) and as such he is not eligible for inclusion in the collective bargaining unit.

The Union argues that Mr. Borek's duties did not change substantially when he assumed the title of Central Services Officer and that his pay-grade (30) is within the range of pay-grades represented by the Union. Further, the Union argues that since no supervisory unit exists within the Department of Transportation, that Mr. Borek should be accreted to the rank and file unit. The Union further argues that Mr. Borek does not have

the authority to hire or fire subordinates, to discipline them or to adjust employee grievances, that he does not meet the supervisory test set forth in Board of Trustees v Rhode Island State Labor Relations Board, 694 A.2d 1185, 1990 (R.I. 1997).

### DISCUSSION

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

In this case, the record is very clear that Mr. Borek does not have the authority to transfer, suspend, lay-off, recall, promote, discharge, assign or reward any employees or to adjust their grievances or to effectively recommend such action. In determining whether Mr. Borek's duties are supervisory then, the Board is constrained to consider whether or not Mr. Borek either disciplines employees or can effectively recommend such action. The record established that although Mr. Borek believes that he may issue oral or written reprimands, the record is devoid of any such examples. Further, Mr. Sasso confirmed that prior to issuing any disciplinary measures Mr. Borek usually checks with Mr. Sasso first and that Mr. Sasso does not always accept Mr. Borek's recommendations. The Board does not believe that such facts support a claim that Mr.

may or actually does independently issue discipline. Further, the record established that there were only three instances in which Mr. Sasso could recall Mr. Borek as having "instituted" disciplinary actions. (TR. p. 109) However, Mr. Sasso did not testify as to how Mr. Borek "instituted" such action. Was this by recommending to Mr. Sasso? Was it by taking action and then having it upheld by Mr. Sasso? Further, although Mr. Sasso testified how the matters were resolved, he did not testify as to by whom the actions were resolved. On such testimony, the Board is not convinced that Mr. Borek indeed exercises independent judgment and has the true authority to discipline an employee or to even effectively recommend the same to his superiors. Therefore, the

Board finds that the facts in the rerecord do not support an exclusion from the bargaining unit for Mr. Borek's position.

The final issue before the Board then is whether or not Mr. Borek's position should be lawfully excluded as managerial. 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.

In determining whether Mr. Borek is a managerial employee, the Board has carefully reviewed the testimony in the record. The only issue presented which could arguably support a finding that Mr. Borek is a managerial employee is the claim that he sets policy. However, Mr. Clare testified that the policies and procedures that Mr. Borek has developed are related to fleet performance. (TR. p. 44-45 and 57-59) As Mr. Borek testified, these policies, which are embodied in a handbook that is delivered to employees, must be submitted to his supervisor for approval before the policies are implemented. (TR. p 70). As set forth above, employees whose decision-making is limited to the routine discharge of professional duties may not be excluded as managerial employees. In this case, the facts demonstrate that Mr. Borek performs the duties of his position in a highly responsible manner and takes his duties very seriously. He is clearly to be commended for the same. However, the fact that Mr. Borek has assumed more professional duties and responsibilities and as a result, has received an upgrade to his



title, does not transform this position into a “managerial” position, at least as it is defined within the context of labor relations and collective bargaining. This Board therefore finds that Mr. Borek does not represent management interests by taking or recommending discretionary actions that control or implement employer policy. Mr. Borek cannot independently set policy.

The Respondent also argues that Mr. Borek may be called as a witness in a grievance hearing and that therefore he should be excluded as being managerial. First of all, any employee is subject to being called in as a witness in a grievance hearing. Whether that employee can provide appropriate relevant testimony is another issue. Further, that employee will be under oath, so if an employee’s allegiance ran to one side or the other, it is irrelevant because witnesses must testify under oath. Furthermore, to say that Mr. Borek should be excluded based on testimony that he may or may not be required to give, is speculative at best and self-serving at worst.

#### 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) Mr. John Borek has been an employee of the Respondent for 22 years. His current title is Central Services Officer and his title was changed to Central Services Officer as the result of a “desk audit” performed by Ronald Clare, the Chief of Merit Selection and Classification.
- 4) Mr. Borek’s responsibilities include: conducting investigations of bad driving and driving out of state without authorization; developing policies and procedures for the department’s fleet and having the same approved by his supervisor; regulating communications systems; reviewing invoices; budgeting and obtaining specifications for the procurement of new vehicles; investigating accidents and interacting with attorneys and insurance companies.

- 5) The policies developed by Mr. Borek for the fleet were approved by his supervisor prior to implementation.
- 6) Mr. Borek does not hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or adjust their grievances.
- 7) Mr. Borek initiated disciplinary actions three times in the three years prior to the hearing, but the record does not indicate what is meant by “initiated” or by whom these matters were settled.
- 8) Mr. Borek’s paygrade is grade 30 and is within the range of paygrades represented by the Union.

#### CONCLUSIONS OF LAW

- 1 The position of Central Services Officer held by John M. Borek is not managerial or supervisory.

#### ORDER

- 1) The position of Central Services Officer held by John M. Borek shall be and is hereby accreted to the certification in Case No EE 3115.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Gina A. Vigliotti  
Gina A. Vigliotti, Chairwoman (Dissent)

Joseph V. Mulvey  
Joseph V. Mulvey, Member

Frank J. Montanaro  
Frank J. Montanaro, Member

Gerald S. Goldstein  
Gerald S. Goldstein, Member

Ellen L. Jordan  
Ellen L. Jordan, Member (Dissent)

Paul E. Martineau  
Paul E. Martineau, Member

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

Dated: July 14, 1999

By: Joan N. Brousseau  
Joan N. Brousseau, Acting Administrator