

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

TENNESSEE EDUCATION ASSOCIATION,

Employer

- and -

Case 26-UC-200

TENNESSEE STAFF ORGANIZATION (TSO)/
NATIONAL STAFF ORGANIZATION,

Petitioner

BEFORE: JILL C. ADKINS, Board Agent

BRIEF SUBMITTED BY THE
TENNESSEE STAFF ORGANIZATION / NATIONAL STAFF ORGANIZATION

DATED: AUGUST 24, 2009

SUBMITTED BY: Jack Schamel
NSO Representative for CCSO
Box 250-601 Main Street
Chemung, NY 14825

THE EMPLOYER HAS NOT MET ITS BURDEN OF PROOF

The Hearing Officer stated on the record that the burden of proof was on the employer (Trans. pg. 27, 89 & 113).

The employer's only witness, Mr. Mance who is the Executive Director of the Tennessee Education Association (hereinafter TEA) testified that he had no direct knowledge of the day to day activities of the six positions that are the subject of this case.

Mr. Mance testified that he gets his information on what the six people in the disputed positions are doing from what have been referred to as the Executive Managers (Carol Schmock- Mitchell Johnson- Brian McCarty) (Trans. pg. 89-92, 115).

To prove its case TEA should have had the immediate supervisors of the six disputed positions testify, since it is clear from the testimony of the Tennessee Staff Organization's (hereinafter TSO) witnesses that the Executive Managers had more knowledge than Mr. Mance to the day-to-day activities of the six disputed positions.

Having failed to have those who would have the most knowledge of the activities of the six disputed positions and having offered no reason why they could not be present to testify, greater weight must be given to the testimony of

the TSO witnesses as to what they do and do not do in their respective positions.

**TEA'S OWN TESTIMONY ESTABLISHES THAT THE SIX
DISPUTED POSITIONS ARE NOT MANAGEMENT OR
SUPERVISORY.**

The Hearing Officer questioned the Executive Director during the hearing about the authority of the six disputed positions (Trans. pg. 132-145) and it is clear that the six persons in the disputed positions can not perform what would normally be considered managerial or supervisory duties without review from a higher authority.

It is clear that although the TEA calls the six individuals in the disputed positions managers they do not meet the Board's requirements for being classified as managerial or supervisory so as to exclude them from the unit.

This point is brought home by the fact that there is a group called the Executive Managers and that they meet once a month, usually away from headquarters and usually every Monday morning.

The six individuals who are in the disputed positions do not attend those meetings and when the Board of Directors of the TEA goes into Executive Session the six individuals in the disputed positions are required to leave the meeting. The six do not attend the Executive Manager's meetings, and for all practical purposes do not direct staff.

As the Executive Director stated, he doesn't know what they do on a daily basis and what he does know about their activities comes from the Executive Managers.

**THE TESTIMONY OF TSO'S WITNESSES CONFIRMS
THE TESTIMONY OF THE EXECUTIVE DIRECTOR THAT
THEY DO NOT POSSESS THE ABILITY TO ACT WITHOUT
REVIEW AND DO NOT SET POLICY.**

TSO had the six persons currently holding the disputed positions testify about their job descriptions and what they actually did in their positions.

Winters said he did not discipline (Trans. pg 158), did not do day to day assignments, had no role in the Board of Director meetings except to provide information (Trans. Pg. 159), and didn't believe he could resolve grievances. (Trans. pg. 162, 174-175) Winters believes all decisions are made at the Executive Managers meetings which he does not attend.

Clemons testified that he doesn't manage Associate Staff (Trans. pg. 177) and that the Uniserv Staff are pretty much self directed by the job description. His evaluations can be appealed directly to the Executive Director (Trans. pg. 178), that he doesn't train (Trans. pg. 181) and has never handled a grievance (Trans. pg. 182). He has requested a doctor's slip, but at the direction of the Executive Director and his supervisor (Trans. pg. 185). When he did a Performance Improvement Plan, he shared it with his immediate supervisor (Trans. Pg. 187). When there was a vacant position recently, he played no role in the decision to fill it as it was a lateral transfer (Trans. pg. 190).

Cotner testified that she coordinated more than directs the staff under her (Trans. pg. 191). When it comes to evaluations she follows the contract and they go directly to the Executive Director (Trans. pg. 192). She believes she can resolve minor grievances at her level but nothing impacting the organization (Trans. pg. 195 & 207). She has participated in interviews but not in the final decision and when involved with interviews, was asked to rank the candidates (Trans. pg. 196 & 210). She never saw the resumes of the candidates (Trans. pg. 209). The Performance Improvement Plan that she did was done by direction of her supervisor and was modified by Mitchell (Trans. pg 197).

Brown testified that she doesn't really supervisor work is distributed based upon expertise (Trans. pg 212). Brown doesn't believe that she has any authority to resolve grievances (Trans. pg. 213). She has been told by her supervisor that she can not tell an employee by the name of Ogg when to come and leave work (Trans. pg. 214). When involved in the interview process she had selected 3 candidates but they were not interviewed (Trans. pg 216). When the interviews were held she was only asked to rank not reject (Trans. pg. 217-227). She has requested a doctor's note of someone under her but it was done at the request of her supervisor (Trans. pg.218). She was told by her supervisor that she was not to evaluate Ogg an employee who is under her (Trans. pg. 230).

Hayes testified that his evaluations go directly to the Executive Director and that because of the nature of the work his supervision is routine (Trans. pg. 234). His Performance Improvement Plans are shown to his immediate

supervisor (Trans. pg. 241). When he has participated in interviews, he has only been given the choice of ranking the top two candidates (Trans. pg. 238).

Gibson testified that he created a Performance Improvement Plan and then turned it over to his supervisor who edited it (Trans. pg. 260). He has issued discipline but ran it by his supervisor who made some changes (Trans. pg 260-261). He has participated in interviews but the final decision went to the Executive Director (Trans. pg. 262-266).

The testimony of the six makes it clear that except for routine decisions what they do is subject to review by the Executive Managers and the Executive Director.

CONCLUSION

TSO believes that Clarification is not appropriate in this case because of the agreement between the union and the employer over an extended period of time with little or no change in the duties of the positions in question. *Union Electric Co., 217 NLRB 666, 667 (1975)*. The record is clear from the Executive Director that the manager's positions have remained unchanged since the beginning of the bargaining with the employer and has never been an issue. The Board as a general rule has stated that it will not clarify a bargaining unit to interfere with or change a long term collective bargaining history. That rule should be applied in the instant case.

It is clear from the record that the six are not held accountable when their subordinates don't perform satisfactorily, their judgment as to assignments and supervision is routine and any independent judgment is minor and routine. It is clear that the six do not engage in any substantial assignment or direction of work. Work for the most part is determined by area of expertise and job description.

What is clear is that the only evidence of what the six do on a day to day basis is their testimony. What the authority of the six is to qualify as supervisors or managers is evidenced by the testimony of the Executive Director who admitted on examination by the Hearing Officer that there was little the six could do without review from either the Executive Managers or the Executive Director.

The six are more closely aligned being Sergeants, Lieutenants or Captains in a police department where they are in many cases part of the bargaining unit with street officers.

In *Alliance Medical Center 20-UC-425* it was held, "... individuals are statutory supervisors if they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and, their authority is held "in the interest of the employer."

Supervisory status may be shown by demonstrating that the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. *Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006)*.

Further, whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility and relationship to management. *Phillips v. Kennedy, 542 F.2d 52, 55 (8th Cir. 1976)*. The Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB, 445 F.2d 237, 243 (D.C.Cir. 1971)*. Mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears Roebuck & Co., 304 NLRB 193 (1991)*. Although a supervisor may have "potential powers . . . theoretical or paper power will not suffice. Tables of organization and job descriptions do not vest powers." *Oil Workers v. NLRB, supra, 445 F.2d at 243*. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB*

v. Tio Pepe, Inc., 629 F.2d 964, 969 (4th Cir. 1980). Finally, the burden to prove supervisory status is on the party asserting it. See *Oakwood, supra*.

It is clear that that the six do not give responsible direction and what independent judgment they exercise is minor and routine, the six are merely an instrument for information to reach the Executive Managers and a vehicle for the Executive Managers, and Executive Director to pass information and directives.

There is nothing in the record to say that there is not a community of interest.

Based upon all the above the Petition should be dismissed in its entirety.