

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF ITHACA,
Public Employer,

Case No. R03 C-68

-and-

MICHIGAN AFSCME COUNCIL 25,
Petitioner-Labor Organization.

APPEARANCES:

Thrun, Maatsch, Nordberg, P.C., by Robert Huber, Esq., for Public Employer

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq., for Petitioner-Labor Organization

DECISION AND DIRECTION OF ELECTION

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, this case was heard at Lansing, Michigan on June 11, 2003, and June 12, 2003, before D. Lynn Morison, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including briefs filed by the parties on or before August 5, 2003, the Commission finds as follows:

The Petition:

The Michigan AFSCME Council 25 filed this petition on March 31, 2003. Petitioner seeks an election in a bargaining unit described in the petition as consisting of all regular full-time water superintendents, assistant water superintendents, and laborers employed by the City of Ithaca's Department of Public Works (DPW), but excluding supervisors. The Employer contends that one of the laborers, William DeVuyst, is a supervisory employee, not properly included in the bargaining unit with non-supervisory employees.

Facts:

The DPW is responsible for the operation and maintenance of the City water and sewer system, cemetery, parks, streets, tree trimming and snow and ice removal. The City of Ithaca's Department of Public Works consists of DPW Superintendent Neil Allen, seven full-time laborers, and two or three seasonal workers. Allen manages the DPW and oversees the work of the employees. The DPW falls under the jurisdiction of City Manager Bradley Heffner.

The seven laborers employed by the DPW are: William DeVuyst, Jeff Peters, Jack Martin, Mike Allen, Larry Stoner, Joel Zuker, and Matt Bupp. DeVuyst is the most senior laborer, having worked twenty-five years at the DPW. Peters, Martin, Mike Allen and Stoner have each worked there about sixteen years. Zuker has worked there six years. Bupp is the least senior with four years of experience. The laborers are paid on an hourly basis, in accordance with a wage scale established to reflect differences in merit, skill, and seniority. When the wage scale was originally established, DeVuyst was paid ten cents more per hour than the other laborers in recognition of the fact that he had greater seniority than the other laborers. Presently, DeVuyst receives thirty cents per hour more than the next highest paid laborer. In the past, when setting wages for laborers, the City Council has discussed maintaining a difference between the wages paid to DeVuyst and those paid to the other laborers in consideration for the extra duties DeVuyst has when Neil Allen is absent.

The laborers are responsible for a variety of duties, including heavy equipment operation, mowing City property, tree trimming, street repair, repairing or replacing storm drains, and ice and snow removal. One of the laborers, Larry Stoner, is designated as a water superintendent. His principal duties are to operate and maintain the water and sewer systems, but he also does the work performed by the other laborers.

Generally, Neil Allen determines the laborers' work assignments. Allen prepares a list of jobs to be done for each day and assigns them to employees. If laborers become aware of additional jobs that need to be done, they may go ahead and do the work themselves or they will inform Allen and he adds the jobs to the list. If Allen is not there, the laborer will write the job on a board on the wall to be added to the list. Information regarding jobs that need to be done is often received through central dispatch. When emergencies arise after regular working hours, central dispatch notifies Allen of the emergency, but if he is unavailable, they use a contact list, which lists all of the DPW laborers in order of seniority. The laborer contacted will then determine what needs to be done, and if necessary, call in coworkers for assistance.

Neil Allen has supervised the DPW since 1992. Since that time, DeVuyst has been responsible for substituting for Allen when Allen is absent. Since 2000, Allen has been absent between ten and forty-one days per year. When he is absent, Allen generally leaves the list of job assignments with DeVuyst and it is DeVuyst's responsibility to inform the laborers of their assignments, to check to ensure that these jobs are completed, to cross the completed jobs off the list, and to offer assistance if needed. On a few occasions, Allen has left the list with Peters or Martin, instructing them to inform the other laborers of their assignments. The list generally contains more jobs than the laborers can complete in the time that Allen is away. If a laborer to whom Allen had assigned a particular job is also absent, the laborers often collectively determine which of them should be reassigned to the priority job and which job to postpone.

When Allen is absent, in addition to his regular duties, DeVuyst is also responsible for transferring the laborers' hours onto a payroll sheet, and periodically attending department meetings. DeVuyst answers a larger number of citizen complaints when Allen is absent, although other employees respond to these complaints as well. In Allen's absence, DeVuyst has the authority to call in off-duty employees and retain employees for overtime work, but has never done so without first getting approval from Allen or the city manager. Other DPW laborers have also called in off-duty employees to work during emergencies.

Although DeVuyst has never issued a verbal reprimand, oral warning, or written warning, when substituting for Allen he has the authority to give verbal reprimands or oral warnings and may make recommendations for more serious discipline. DeVuyst does not possess the authority to hire, transfer, suspend, layoff, recall, promote or discharge employees.

Discussion and Conclusions of Law:

It is evident that any authority the Employer has delegated to DeVuyst is not sufficient to qualify his position as supervisory. A supervisor is one who possesses authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to effectively recommend such action, as long as this authority requires the use of independent judgment and is not merely routine. See *Village of Paw Paw*, 2000 MERC Lab Op 370; *City of Grand Rapids Police Dep't*, 2000 MERC Lab Op 384. The authority to discipline, or to effectively recommend discipline, is a particularly important indicia of supervisory authority, even if that authority is rarely exercised. See *Tuscola Intermediate School Dist*, 2000 MERC Lab Op 226; *City of Detroit Dept of Pub Works*, 1999 MERC Lab Op 283. See also *Eastern Mich Univ*, 1999 MERC Lab Op 550. Although DeVuyst has been substituting for Allen for over ten years, he has never disciplined or recommended the discipline of an employee.

DeVuyst acts as a substitute supervisor when the DPW superintendent is absent. Commission precedent is clear that employees who act as substitute supervisors in the absence of the full-time supervisor are not excluded from nonsupervisory bargaining units. *Berrien County Sheriff*, 1999 MERC Lab Op 177, 186-187; *Lapeer County*, 1997 MERC Lap Op 149, 155; *Village of Jonesville (Police Department)* 1989 MERC Lab Op 513, 516; *Melvindale Police Dept*, 1975 MERC Lab Op 695, 698; Model Neighborhood Inner City Drug Abuse Program 1975 MERC Lab Op 406, 408; *United Rent-All* 1972 MERC Lab Op 378; *Eastern Michigan Univ* 1972 MERC Lab Op 876, 887. DeVuyst only periodically “filled in” for Allen, from as little as ten days a year to forty-one days a year at most. DeVuyst’s sporadic and infrequent exercise of the functions the Employer contends are supervisory, in Neil Allen’s absence, does not, under long-standing Commission precedent, preclude DeVuyst’s inclusion in the bargaining unit with the protections afforded by PERA. See *Lapeer County*, at 155. See also *Village of Fowlerville*, 1971 MERC Lab Op 462, 465, *Alpena County*, 1970 MERC Lab Op 731, 737-739; *Mackinac County*, 1969 MERC Lab Op 479, 481-483; *Ypsilanti Twp*, 1968 MERC Lab Op 811, 812-813.

The Employer argues that the Michigan Court of Appeals effectively overruled this long-standing line of Commission precedent in *Bloomfield Hills Sch Dist v Bloomfield Hills Support Personnel Ass'n/MESPA*, unpublished opinion per curiam of the Court of Appeals, decided August 6, 2002 (Docket No. 231709). Unpublished Michigan Court of Appeals decisions, although helpful for guiding Commission decisions, are not binding precedent. Here, the Employer misconstrues the Court’s holding. In *Bloomfield Hills Sch Dist*, in affirming our decision, the Court stated that the exercise of any one of the indicators of supervisory power is enough to confer supervisory status, regardless of the frequency with which the power is exercised. In that case, the position at issue retained the supervisory power on a consistent basis, but exercised it infrequently. The Court did not address the issue of employees who are only authorized to exercise such power when standing in for an absent supervisor.

The Employer argues that DeVuyst’s authority to assign and direct employees establishes supervisory status. To support this assertion, the Employer points to evidence that when Allen is

absent, DeVuyst tells the employees their daily assignments, “checks up” on them during the day, and calls in employees for overtime or during emergencies. An individual is not a supervisor under PERA, however, if his or her authority is limited to merely directing the daily work of other employees and/or making work assignments of a routine nature. See *City of Lansing*, 2000 MERC Lab Op 380; *Whitmore Lake Pub Schs*, 1999 MERC Lab Op 117; *City of Detroit Human Resources Dep’t*, 1999 MERC Lab Op 81. When Allen is absent, DeVuyst merely reads the daily assignments from a list that Allen has prepared. When the need arises to change the assignments due to an emergency or the absence of an employee, the employees decide as a group how to rearrange the work. Furthermore, “checking out” jobs throughout the day simply means that DeVuyst determines whether the jobs are finished so that he can cross them off the list. Although DeVuyst has called in employees for overtime, he has never done so without the approval of Allen or Heffner.

Based on a careful review of the record, we find that William DeVuyst does not qualify as a supervisor under PERA.

ORDER DIRECTING ELECTION

We find that a question concerning representation exists under Section 12 of PERA. We direct an election in the following unit, which we find appropriate under Section 13 of PERA:

All regular full-time water superintendents, assistant water superintendents, and laborers employed by the City of Ithaca’s Department of Public Works (DPW), but excluding supervisors.

Pursuant to the attached Direction of Election, the aforesaid employees will vote on whether or not they wish to be represented for purposes of collective bargaining by the Michigan AFSCME Council 25.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Harry W. Bishop, Commissioner

Maris Stella Swift, Commissioner

Dated: _____