

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PERA-R-24-54-E
:
BOROUGH OF RIVERSIDE :

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On March 7, 2024, Teamsters Local 764 (Union) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Representation under Section 603 of the Public Employee Relations Act (PERA or Act). In the Petition, the Union alleged a 30 percent or more showing of interest in support of Union representation among employes in a unit consisting of all full-time and regular part-time nonprofessionals in the Riverside Borough (Borough) street and sewer department and the Borough Secretary.

On April 19, 2024, the Secretary of the Board issued an Order and Notice of Hearing directing that a hearing be held on June 24, 2024, in Harrisburg. The hearing was rescheduled twice, and it was ultimately held on July 9, 2024. During the hearing on that date, all parties in interest were afforded a full and fair opportunity to enter testimony, documents, and cross-examination into the record. Both parties filed separate post-hearing briefs on August 5, 2024.

The Examiner, based on the hearing testimony and exhibits, and from all the matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8-9, 23-24, 27 40-43, 55, 64-66; Board Exhibit 1; Borough Brief at 1; Riversideborough.org; Pennsylvania Manual 6-112 (126th ed.))

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (Petition; Board Exhibit 1; Unionfacts.com)

3. The parties stipulated and agreed that the Borough Secretary is properly excluded from the proposed bargaining unit. (N.T. 6-7; Union Brief at 1; Borough Brief at 1)

4. The Borough has 3 street department positions currently held by Danny Gable, Eric Mann, and Chris Henry. The parties stipulated and agreed that Mr. Mann and Mr. Henry are properly included in the proposed bargaining unit. (N.T. 7-8, 23-24, 38-39; Union Brief at 1; Borough Brief at 1-2)

5. Mr. Gable began employment with the Borough in the street department in October 2011. He is the Borough's Street/Sewer Supervisor. Mr. Gable reports directly to Peter Fleming, Council Vice President. There is no Borough Manager. Stephen Wagner has been Borough Council President since January 2024, having been elected to Council in November 2023. Mr. Wagner does not know when the job description for the Street/Sewer Supervisor was created. He looked at it in March or April 2024. (N.T. 9-10, 22-23, 38-39, 66-67; Borough Exhibit A)

6. Mr. Gable attends monthly Borough Council meetings and reports the work that has been completed, the work that is being done, and the work that has yet to be done by the street department. (N.T. 14, 19-20)

7. Council members often identify road repair projects to Mr. Gable. Mr. Gable also identifies road repair needs. Council initiated the sewer repair and rehabilitation project, not Mr. Gable. Council received a 1-million-dollar grant and a matching 1-million-dollar loan to rehabilitate the sewer system for 1 side of the Borough. (N.T. 15, 25-26, 34-35)

8. The seasons and the weather dictate the type of work to be done by street department employes such as leaf collection in the fall, snow plowing in the winter, and grass mowing in the spring and summer. All street department employes know what work to perform, and they work collaboratively. Mr. Gable has no discretion or authority to refuse to plow when it is snowing. (N.T. 23-24, 40-41)

9. Circumstances dictate decisions and action. When Mr. Gable notices a drainpipe in need of repair because of a sink hole, he and the street department employes will repair it. When a stop sign is leaning, Mr. Gable will fix it. Any Borough employe or Borough resident can report a problem that needs to be addressed by the street department, such as potholes or low hanging branches. Reporting a problem does not require any expertise in road work. When the other street employes, i.e., Mr. Mann and Mr. Henry, have seen something in need of repair, they have fixed it on their own. (N.T. 40-41, 44, 85-86)

10. With only 3 street department employes, Mr. Gable works alongside the other 2 employes. The street department employes work as a team and collectively address situations or problems. The majority of Mr. Gable's time is spent on road labor with the other 2 employes filling potholes, building up road edges washed away by storm water, using the same equipment, digging ditches, collecting leaves, and plowing snow. Mr. Gable spends approximately 38 hours of his 40-hour work week doing manual labor with the other street crew employes. When he is not on a particular job with the other road crew employes, he checks to see if the job was completed properly. (N.T. 27, 40, 43, 64-66. 78)

11. Mr. Gable spends approximately 2 hours per week answering voicemail messages, inspecting contractors' work, and patrolling the Borough to check if heavy rains washed out any roads. Mr. Gable does some of these patrols with Borough Council Vice President Fleming to let him see road conditions. (N.T. 79-82)

12. At times, the other 2 street employes seek Mr. Gable's direction regarding the work to be done. Mr. Mann and Mr. Henry do not seek Mr. Gable's direction for routine work such as mowing, truck maintenance, or pump station inspections. (N.T. 42, 46, 58-59)

13. Mr. Gable will interrupt routine duties to address a dangerous situation. (N.T. 42)

14. Mr. Gable reports to Council when equipment requires repair or replacement tires. Mr. Gable has recommended which sewer pumps to replace, but Council ultimately decides which ones to replace. Mr. Gable offers possible solutions for road situations to Council. Mr. Gable recommended that

Council approve a guardrail repair where the sinking of the street rendered the guardrail useless. (N.T. 28-30, 33-34, 43)

15. Council has required Mr. Gable to bring any issues among the street department employes to Council for discussion. Council makes any and all decisions about corrective or disciplinary action. Council, and not Mr. Gable, determines level of discipline. (N.T. 47-48)

16. Approximately 1 year after the Borough hired Mr. Gable, the Borough hired Mr. Mann without any involvement from Mr. Gable and without his knowledge. (N.T. 82-83)

17. Some years ago, Mr. Gable reported to Council that Mr. Mann was not performing well. Council gave Mr. Gable some recommendations to correct the situation. At some point, Council directed Mr. Gable to issue to Mr. Mann a written verbal warning. Mr. Gable did not type the verbal warning, but he presented the verbal warning to Mr. Mann. Mr. Gable did not make any recommendations for any type of discipline. Mr. Gable did not make any decision to discipline. (N.T. 48-53, 63)

18. Approximately 10 years ago, Council directed Mr. Gable to conduct a performance review on Mr. Mann as a result of certain work-related issues with him. Once Mr. Mann improved, Mr. Gable stopped doing performance reviews on Mr. Mann. Approximately 2 years ago, then-Council President John Domanski asked Mr. Gable to conduct performance reviews to justify raises. The street department employes all received the same "across the board" raises, and the performance reviews did not matter. Mr. Gable does not know what happened to the performance reviews after he gave them to the Borough Secretary. (N.T. 82-83, 88)

19. In 2015 or 2016, Mr. Gable participated in the interview of Mr. Henry with the Council President at the time, Carolyn Bausch. Mr. Henry was hired by the Borough. Since then, the Borough hired a part-time employe named Nathan Apple. Mr. Gable, Mr. Mann, and Mr. Henry all participated in the interviews of the 2 candidates. All 3 street employes collaboratively chose Mr. Apple and recommended him for hire to Council. Approximately 2 years ago, Mr. Gable was told not to use him anymore. (N.T. 53-54, 67-70)

20. During budget preparation, Mr. Gable gives Borough Secretary Lisa Fritz a wish list for items like tractor tires or back blades, after which he has no control over whether Council budgets for some or all of the items on his list. Mr. Gable has not suggested modifications to the budget for the street department. (N.T. 55, 77)

21. When a weed-whacker or plow breaks, it must be replaced and there is no discretion in determining whether to purchase a new one. Decisions about what equipment to use for a particular job are common sense decisions that are dictated by the job. For example, replacing a pipe requires the backhoe. Mowing grass requires the mowing equipment and weed-whackers. The same with leaf collection and snow removal. These decisions do not require independent judgment. (N.T. 56, 85)

22. The Borough's backhoe is "shot."¹ Mr. Gable asked Council many times for a new backhoe, but Council has not yet approved the purchase of a new backhoe. Mr. Gable has no input into allocating money in the budget for street repairs. Council allocates liquid fuels money for paving in the upcoming budget year. After Council allocates a certain amount of money, Mr. Gable approaches Council to see if there is enough money for certain projects. (N.T. 57-58)

23. Mr. Gable prioritizes street repairs or paving given the available liquid fuels money. At times, Council disagrees with Mr. Gable's priorities and chooses to prioritize different streets. (N.T. 58-59)

24. The priority of work on a given day is dictated by the voicemail messages from residents lodging complaints about matters they want fixed, such as a lowing hanging tree limb, which may put off planned mowing for the day.

25. Work is dictated by the seasons and the weather. In this manner, all street department employes already know what they are going to have to do the majority of the time. (N.T. 64-65)

26. Mr. Gable has never recommended the suspension, transfer, layoff, promotion, or reward of any Borough employe. In Mr. Gable's absence, Mr. Henry ensures that Mr. Mann is doing the work that they both know is supposed to be done. (N.T. 70)

27. In January of each year, all 3 street department employes place their desired vacation schedules on the calendar to avoid conflicting vacation schedules. Mr. Gable has not denied a street employe vacation or a day off for a personal reason. If he were to deny a street department employe his request for a day off, the employe could bypass Mr. Gable and appeal to Council. (N.T. 74-76)

28. A couple of years ago, then-Council President approached Mr. Gable to change summer hours. He asked Mr. Gable to bring the issue to Borough Council for a vote. Mr. Gable agreed, and every year Council approves the summer hours change. The change in summer hours was not Mr. Gable's idea, and it is not within his discretion to change summer hours without Council's approval. (N.T. 90-92)

DISCUSSION

The Borough seeks to exclude Dan Gable, the Street/Sewer Supervisor, from the proposed bargaining unit. During the hearing, the parties seemed to be disputing whether Mr. Gable was a statutory supervisor. Consequently, the Union addressed the supervisory question in its brief. However, the Borough addressed, in its brief, the issues of whether Mr. Gable was a management level employe and/or a confidential employe. Together, the parties have addressed 3 statutory exclusions, which I will evaluate in the following order: supervisory, management level, confidential.

¹ I do not know whether the term "shot" as used in this context means that the backhoe is completely inoperable or that it is in very poor condition.

The Borough has the burden of establishing that the duties of the Street/Sewer Supervisor meet the statutory exclusions under PERA. In the Matter of the Employees of State System of Higher Educ., 29 PPER 29234 (Final Order, 1998), *aff'd*, 737 A.2d 313 (Pa. Cmwlth. 1999); Dormont Borough, 41 PPER 66 (Proposed Order of Unit Clarification, 2010). City of Coatesville, 28 PPER 28053 (ODSEL, 1997); In the Matter of the Employees of Danville Area School District, 8 PPER 195 (Order and Notice of Election, 1977).

In determining whether an employe should be designated a statutory supervisor and deprived of the bargaining rights, benefits, and privileges provided by PERA, the Board must examine whether the employe in question performs the specifically prescribed duties contained in Section 301(6) of the Act, which provides as follows:

(6) "Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. § 1101.301(6).

The Board will only consider the actual job duties performed by the employe in question and will only consider written job descriptions to corroborate testimony of actual job duties. Elizabeth Township, 33 PPER 33053 (Final Order, 2002); Lower Bucks County Joint Municipal Authority, 39 PPER 95 (PDO, 2008). Written descriptions alone are not substantial, competent evidence of job duties. Lower Bucks, *supra*. Furthermore, "[a] mere job title or appellation, such as, supervisor or manager is not sufficient to overcome the actual duties performed as evidence of being a supervisor under Section 301(6) of PERA." West Perry School District v. PLRB, 752 A.2d 461, 465 (Pa. Cmwlth. 2000), *appeal den'd*, 568 Pa. 675, 795 A.2d 984 (2000). The Board has long held that the "hallmark of supervisory status under the Act in this regard is the ability to effect reward or sanction." Findlay Township Water Authority, 21 PPER 21130 (Final Order, 1990) (emphasis added). Pursuant to Section 604(5) of the Act, the Board must consider the frequency, duration and importance of the required duties performed. West Perry, *supra*; State System of Higher Education v. PLRB, 737 A.2d 313, 316 (Pa. Cmwlth. 1999). The Board will not find an employe to be a supervisor if the employe only exercises supervisory authority sporadically. Pennsylvania State University, 19 PPER 19156 (Final Order, 1989). The Board will not find an employe to be a supervisor if the employe's exercise of supervisory authority is as a substitute for his or her own supervisor. Monroe County, 18 PPER 18002 (Final Order, 1986). Also, the Board will not find an employe to be a supervisor if the employe's recommendations are not given controlling weight. In The Matter of the Employees of Philadelphia Housing Authority, 22 PPER 22082 (Order Directing Submission of Eligibility List, 1991); Keystone Central School District, 12 PPER 12044 (Nisi Order or Unit Clarification, 1981); Chester County Solid Waste Authority, 18 PPER 18021 (Order Directing Submission of Eligibility List, 1986).

The record in this case does not establish that Mr. Gable exercises the necessary authority or discretion regarding the statutorily required duties of a supervisor to any extensive degree for a substantial amount of his work

time. West Perry, supra. Mr. Gable works alongside his fellow road crew employes and performs the same tasks with the same equipment as do the other street department employes for the vast majority of his work week, i.e. approximately 38 out of 40 hours. This fact alone prevents Mr. Gable from qualifying as a statutory supervisor. 43 P.S. § 1101.604(5); West Perry, supra; State System, supra. Moreover, Mr. Gable only sporadically assigns work because the street crew employes already know what work to do based on routine, weather, seasons, and circumstances. West Perry, supra. Also, there is no evidence that the sporadic assignment of work comes with the ability of Mr. Gable to reward or sanction employes for the manner in which the employes perform or complete any work. Mr. Gable is very knowledgeable and skilled. He serves an important and necessary function in the Borough. However, the manner in which Mr. Gable sporadically assigns work without reward or sanction renders him, at most, a lead street/sewer worker, despite the title of "Supervisor" that the Borough has given him.

The record does show that Mr. Gable has never recommended the suspension, transfer, layoff or promotion of any Borough employe. The record also shows that he has no authority to reward or sanction any Borough employe. Mr. Gable has no role to play in determining or recommending any type of discipline to road crew employes. Mr. Gable merely reports on projects and employe performance to Council members. The Council members decide whether or not to discipline an employe and whether to have Mr. Gable deliver any counseling or discipline to the employe. When Mr. Gable has reported to Council, he has never intended for any disciplinary result.

Any direction, constructive criticism, coaching, or guidance that Mr. Gable provides to the road crew employes regarding the work being done is the exercise of technical expertise and constitutes advice, not discipline. To the extent that Mr. Gable's work advice may constitute training, the Board has held that training without the ability to reward or sanction employes being trained is not a supervisory function under Section 301(6). Pennsylvania State University, Milton S. Hershey Medical Center (Hershey), 20 PPER 20126 (Final Order, 1989). Although Mr. Gable has done performance reviews, there is no evidence showing that those reviews resulted in either a reward or sanction of the employe reviewed by him. To the extent that Council President Domanski directed Mr. Gable to prepare performance reviews with the intent that Council would use them to determine wage increases, there is no evidence that individuals received more or less of a wage increase based on those reviews. All 3 employes received the same "across-the-board" wage increases. Additionally, preparing evaluations alone is not an indication of supervisory status under Section 301(6). For evaluations to have any relevance in determining supervisory status, the record must show that, like training, the evaluations affected wages, transfers, promotions, layoffs, or work assignments, as specifically required by that Section. That is, the evaluations must be tied to some type of reward or sanction, which are the hallmarks of supervisory status.

Mr. Gable did participate in the interview of Mr. Henry along with Borough Council President Carolyn Bausch in 2015 or 2016. Although Mr. Henry was hired by the Borough, the record does not establish that Council gave controlling weight to any recommendation that may have been made by Mr. Gable or whether Council gave controlling weight to the recommendation of Council President Bausch. Similarly, all 3 road crew employes participated in the interviewing of 2 part-time candidates. All 3 collaboratively agreed to recommend Nathan Apple, who Council hired. However, the Board has long held that the participation on a panel that interviews and recommends a candidate

for employment is insufficient to support a supervisory determination. Saucon Valley Education Association v. Saucon Valley School District, 32 PPER 32167 (Final Order, 2001). Accordingly, the Borough did not meet its burden of establishing that Mr. Gable effectively recommends hiring any Borough employees.

Additionally, Mr. Gable has no supervisory control over granting or denying leave or vacations. The 3 road crew employees figure out their vacations together at the beginning of the calendar year. Mr. Gable has not denied a street employee a vacation or days off for personal reasons. Even if he were to deny such leave, the employee can directly ask Council for the leave, demonstrating that Council is ultimately responsible for determining whether an employee may take leave. Also, approving or denying leave is not a recognized function under the definition of a statutory supervisor. In the same vein, Mr. Gable has no control over the hours or schedule of any Borough employees. It was the idea of a former Borough Council President to change summer hours and to have Mr. Gable recommend the change to the full Council, which approves the summer hour schedule from year to year. Mr. Gable lacks the authority to change the work schedule on his own. Overall, the record shows that Council has not imbued Mr. Gable with the authority to make employment related decisions on his own, other than routine work assignments, for any Borough employees, including the prioritization of non-routine projects. Accordingly, the Borough has not met its burden of establishing that Mr. Gable, the Borough's Street/Sewer Supervisor, is a statutory supervisor within the meaning of Section 301(6), Section 301(19), and Section 604(5) of the Act.

The Borough maintains that the Street/Sewer Supervisor should be excluded from the proposed bargaining unit as a management level employee under the Act. The Borough contends that Mr. Gable is a "second level supervisor who is charged with determining the department budget, exercising discretion in making project and labor policy determinations, including discipline, resource allocation, and spending," which constitutes a management level employee. (Borough Brief at 3). In support of its position, the Borough relies on the written job description for the Street/Sewer Supervisor. However, I have rejected the written job description, identified as Borough Exhibit A, as evidence of Mr. Gable's job duties because the duties and responsibilities in the written job description conflict with the actual duties and responsibilities about which Mr. Gable himself credibly testified. Also, the reliability of the job description is questionable without knowing whether it was created or modified before or after the filing of the Petition. Additionally, I am unable to give much weight to the Borough Council President's testimony that the written job description accurately describes the actual job duties of Mr. Gable because he became Borough Council President just 3 months before the filing of the Petition. Thus, his familiarity with the nature and extent of Mr. Gable's actual duties is unclear.

Section 301(2) of PERA provides that the term "[P]ublic employe" under the Act does not include management level employees. 43 P.S. § 1101.301(2). Management level employees, therefore, do not possess the rights provided in Article IV of the Act. 43 P.S. §1101.401. Furthermore, Section 301(16) of the Act defines a management level employee as: "any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employees above the first level of

supervision.” 43 P.S. §1101.301(16). That is, a manager is an employee (1) who is directly involved in the determination of policy; (2) who directly implements policy; or (3) who is above the first level of supervision. Port Authority of Allegheny County, 48 PPER 47 (Final Order, 2016); Allegheny-Clarion Valley School District, 41 PPER 21 (Final Order, 2010). The test is disjunctive. East Stroudsburg Area School District, 52 PPER 51 (Final Order, 2021).

The record in this case does not support the conclusion that Mr. Gable is directly involved in the development or implementation of policy. Also, the record does not demonstrate that any employees in the street and sewer department are first level supervisors such that Mr. Gable’s claimed supervision of them could qualify him as a management level employee.

Mr. Gable determines work priorities that are routine in nature because most work assignments are governed by weather, seasons, and circumstances. There is no discretion in determining work priorities and assignments. Moreover, making project determinations, even if proven, is not a management function within the meaning of Section 301(16). Repairing roads, guardrails and signs and the decision to do so does not constitute the implementation of a specific Borough policy or code. There is no discretion in fixing the roads, signs, and guardrails to ensure road safety and integrity. Also, the other road employes are also involved in making decisions to fix signs and repair roads. Under the Borough’s view, all street department employes would be managers.

The Borough cited Municipal Employees of the Borough of Slippery Rock v. PLRB, 14 A.3d 189 (Pa. Cmwlth. 2011) in support of its position that Mr. Gable is a management level employee. However, the record is devoid of any evidence that Mr. Gable makes labor policy determinations or that he has the discretion to deviate from, change, or determine not to apply any written or enacted policies of the Borough on a case-by-case basis, as the code enforcement officer in Slippery Rock. The Slippery Rock Court concluded as follows:

In the present case, the evidence establishes that the code enforcement officer accepts or denies permit applications, conducts inspections, issues citations and presents enforcement actions to the local magistrate. Thus, the officer meets the Board's description of management employees in observing the terms of the policy and interpreting it within and without the procedures outlined in the policy. Further, in implementing policy and in taking action in situations where non-compliance is found, the code enforcement officer exercises independent discretion reflective of managerial responsibility.

Slippery Rock, 14 A.3d at 193.

Unlike in Slippery Rock, however, there is no evidence on this record that Mr. Gable is implementing or enforcing any Borough policies or codes. Certainly, there is no evidence showing that Mr. Gable takes any action in situations where non-compliance with a Borough policy or code is found. Routine determinations about whether to mow grass, plow snow, or fix a broken sign does not qualify as the development or implementation of labor policy. Also, Mr. Gable has never considered or

determined to impose any discipline on any Borough employe, nor has he determined that any employes have violated any Borough work rules, policies, or ordinances.

Moreover, in East Mead Township, 47 PPER 46 (Order Directing Remand to Hearing Examiner for Further Proceedings, 2015), the Board concluded that the Township's adoption of the Road Master's recommendation to purchase a large grader, costing half the Township's annual budget, was not indicative of managerial status and did not involve managerial discretion to develop or influence the annual budget for the employer. The Board further stated that "the Road Master's recommendation of purchases of equipment, in and of itself, is insufficient to establish that the position is effectively involved in the implementation of Township policy regarding road repair and maintenance." East Mead, supra.

Indeed, the East Mead Board rejected the Borough's arguments in this case and stated the following:

In West Penn Township, the Board found that a road master who was responsible for maintaining and repairing the roads and recommended road repair, the purchase of equipment and subcontracting of major road projects was not a management level employe under Section 301(16) of PERA because the work was routine in nature and the township's board of supervisors had to approve any major projects. Similarly, in Liberty Borough, 39 PPER 55 (Order Directing Submission of Eligibility List, 2007), a street commissioner position that was responsible for determining the public works projects to be performed, purchasing supplies and making recommendations for subcontracting of major public works projects and purchase of equipment was not a managerial level employe because, among other things, the work was routine and the position was required to obtain approval from borough council members for any major project. As in West Penn Township and Liberty Borough, the record reflects that the work of the Road Master in repairing the Township's roads and recommending the purchase of equipment is routine in nature and that the position is required to obtain approval for major purchases. Moreover, the authority of the Road Master to purchase less costly equipment and materials without prior approval, and to purchase more costly equipment with prior approval, is insufficient to meet the Township's burden of proving that the position is a management level employe under Section 301(16) because there is no evidence in the record that the Road Master also has an effective role in development of the overall budget for the road department. Berks County, 35 PPER 25 (Final Order, 2004) (participation in the budgetary process must go beyond purchasing of equipment and must extend to the overall budget in order to substantiate a management level exclusion under PERA). As the Board explained in Berks County in rejecting the argument that managerial status was demonstrated by an employe's effective recommendation of significant purchases:

In Pennsylvania Association of State Mental Hospital Physicians v. PLRB, [554 A.2d 1021 (Pa. Cmwlth. 1989)], the Commonwealth Court agreed with the Board that the mental health physicians at issue were management level employes because of their participation in the overall budget of the institution

and not merely making recommendations regarding the purchase of equipment. We believe that the participation in the budgetary process must go beyond purchasing of equipment and must extend to the overall budget in order to substantiate a management level exclusion under PERA.

East Mead, supra.

The same result obtains regarding Mr. Gable in the instant case. To the extent that Mr. Gable engages in "resource allocation," the record shows that these actions do not involve managerial discretion. Mr. Gable credibly testified that determining which equipment to use for certain purposes does not involve discretion because the determination is dictated by the nature of the work, such as using a lawn mower to mow grass, and that all street department employees select the equipment they will use for the work. Additionally, Mr. Gable does not have any spending authority beyond the ability to purchase small replacement items from a hardware store. He cannot even buy a weed-whacker without Council authorization. When equipment fails or breaks, there is no discretion in determining that the equipment should be repaired or replaced. Also, Council did not follow Mr. Gable's recommendation to replace the backhoe, which means that Council does not give weight to Mr. Gable's purchasing recommendations. And, Council sometimes disagrees with Mr. Gable's prioritization of road repairs, showing that Council has not trusted Mr. Gable with the authority to determine which jobs to do first. Council, not Mr. Gable, decided to overhaul the sewer system in the Borough, which required Council's procurement of grant money and a loan. There is no evidence that Mr. Gable effectively recommended the renewal of the sewer system.

The record also shows that Mr. Gable is not involved in the Borough's overall budget determination process in a manner that demonstrates the authority or discretion to effectively recommend budgetary outcomes, within the meaning of State Mental Hospital, supra. Mr. Gable submits to the Borough Secretary a short wish list of street department items such as new tractor tires or back blades, after which he has no control or influence over whether Council budgets for the items on his list. Mr. Gable has not suggested modifications to the Borough's budget for the street department. The budget for the street department is set by Council, and the money budgeted by Council for road repair and paving is determined by available liquid funds. Mr. Gable has no input in allocating funds for road repairs or equipment.

The Borough also contends that Mr. Gable is confidential because he is an employe who is consulted on confidential matters involving "the implementation of labor, disciplinary practices and personnel decisions." (Borough Brief at 9). Therefore, posits the Borough, Mr. Gable should be excluded from the proposed unit because he is not a public employe under Section 301(2) of the Act. As with the term "supervisor," the term "confidential," as defined in Section 301(13) of PERA, has a very specific meaning that deviates significantly from society's common understanding of the term.

The Act provides that a "'Confidential employe' shall mean any employe who works: (i) in the personnel offices of a public employer and has access to information subject to use by the public employer in collective bargaining; or (ii) in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the

employer." 43 P.S. § 1101.301(13) (emphasis added). Although Subparts (i) and (ii) are disjunctive, the two elements of Subpart (i) are conjunctive. The Borough has the burden of establishing the underlying facts necessary to support the conclusion that Mr. Gable is confidential, under either of the 2 prongs of Section 301(13) of PERA. In the Matter of the Employees of Tunkhannock Area School District, 29 PPER 29023 (Final Order, 1997); Jeanette City School District, 11 PPER 11122 (Order Directing Submission of Eligibility List, 1980); Old Lycoming Township, 18 PPER 18059 (Final order, 1987).

Under the first prong of Section 301(13), the Board has required that the employe in question have actual knowledge of the employer's collective bargaining strategies. Tunkhannock, *supra*. The Board has held that an employe who accesses and compiles raw personal employe data, payroll data, and insurance data for reports that may ultimately be used by the employer in the formulation of its collective bargaining strategy is insufficient to remove a person from the bargaining unit and deprive them of their rights under the statute. Tunkhannock, *supra*. In Tunkhannock, an accounting supervisor, who had access to the employer's financial information, was involved in the cost analysis of fringe benefits, based on both the union's and the employer's proposals. The Tunkhannock Board held that the accounting supervisor did not qualify for the confidential exclusion because the information was not "of such definite nature that the [e]mployer's bargaining strategy would be revealed and the [e]mployer's ability to engage in collective bargaining would be seriously impaired." *Id.*

In Columbia/Snyder/Montour/Union Mental Health/Mental Retardation Program v. PLRB (Columbia), 383 A.2d 546 (Pa. Cmwlth. 1978), the Commonwealth Court held that an employe was not confidential even though that employe would have access to and knowledge of budgets, allocations of funds, and salaries that were a matter of public record, before that information was made known to the union in bargaining. The collective bargaining information must be of such definite strategic nature that the union would know of the employer's plans or position if the information were revealed. Bangor Area Sch. Dist., 9 PPER 9295, 533 (Nisi Decision and Order, 1978). Indeed, employes who had access to payroll, grievances, and personal employe information and who had compiled information for collective bargaining and budget preparation, were not confidential because the employe was not privy to the employer's bargaining strategy. In the Matter of the Employees of Western Beaver County School District, 37 PPER 53 (POUC, 2006).

The record in this case does not establish that Mr. Gable works in the personnel offices of the Borough, and it does not establish that he has access to or knowledge of the Borough's collective bargaining strategies. Mr. Gable also does not have a close continuing working relationship with anyone involved in collective bargaining. The "implementation of labor, disciplinary practices and personnel decisions" does not satisfy the test for a confidential employe. Moreover, there is nothing in the record to establish that there has ever been a union representing employes at the Borough, either in the street/sewer department or the police department. Therefore, as a matter of law, Mr. Gable does not satisfy either prong of the test for confidential employe. Both prongs require either access to past or current bargaining strategies and information or a close relationship with someone involved in past or current bargaining. Any planned or speculative post-Petition job duties regarding possible future bargaining circumstances are

not admissible, and they are not substantial evidence upon which to determine the statutory exclusion of an employe from a proposed bargaining unit.²

Accordingly, the record does not establish with substantial, competent, and credible evidence that Mr. Gable is either a statutory supervisor, a statutory management level employe, or a statutory confidential employe. Given the lack of statutory exclusions, the Union has met its burden of establishing that the Street/Sewer Supervisor has a community of interest with the other employes in the proposed bargaining unit. Mr. Gable, Mr. Mann, and Mr. Henry all work for the same Borough employer, under the same working conditions with similar benefits. They all perform the same duties during the same hours most often working alongside one another with the same Borough equipment, in Borough buildings and out on Borough roads and other properties. Additionally, by agreement of the parties, the Borough Secretary is excluded from the Bargaining unit.

CONCLUSION

The Hearing Examiner, therefore, after due consideration of the foregoing, and the record as a whole, concludes and finds as follows:

1. The Borough is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Street/Sewer Supervisor shares an identifiable community of interest with the other employes in the proposed bargaining unit.
5. The Street/Sewer Supervisor is not a first-level supervisor as defined in Sections 301(6), 301(19), and 604(5) of the Act.
6. The Street/Sewer Supervisor is not a management level employe as defined in Section 301(16) of the Act.
7. The Street/Sewer Supervisor is not a confidential employe as defined in Section 301(13) of the Act.
8. The Street/Sewer Supervisor is properly included in the proposed bargaining unit of nonprofessional employes.
9. The Borough Secretary is properly excluded from the proposed bargaining unit of nonprofessional employes.
10. The unit appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular

² The exception to this rule is Ford City Borough, 47 PPER 51 (Final Order 2015), wherein the Board concluded that a borough secretary duly appointed by council pursuant to the Borough Code is properly excluded as confidential as a matter of law because the appointed secretary is the custodian of borough records.

part-time Borough employes including but not limited to all Street and Sewer department employes and the Street/Sewer Supervisor and excluding the Borough Secretary, management level employes, supervisors, first level supervisors, and confidential employes, as defined in the Public Employes Relations Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Borough shall within ten days of the date hereof submit to the Board and the other parties an alphabetized list of the names and addresses of the employes eligible for inclusion in the unit set forth above.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b) following the conduct of an election.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this ninth day of August, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Jack E. Marino

JACK E. MARINO, Hearing Examiner