COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

:

IN THE MATTER OF THE EMPLOYES OF

DUNMORE BOROUGH Case No. PF-U-11-122-E

FINAL ORDER

On September 15, 2011, Dunmore Borough (Borough) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the Fire Chief from the bargaining unit of firefighters as a managerial employe. The bargaining unit is represented by the International Association of Fire Fighters, Local 860 (Association). On September 22, 2011, the Secretary of the Board issued an Order and Notice of Hearing directing that a prehearing telephone conference be held on October 26, 2011 and a hearing be held on March 16, 2012 before a Hearing Examiner of the Board.

On October 19, 2011, a Motion to Intervene was filed with the Board by counsel for Christopher DeNaples, the Fire Chief of the Borough. On October 21, 2011, the Borough filed a letter opposing Chief DeNaples' Motion to Intervene. On that same date, the Hearing Examiner issued an Order Denying Motion for Intervention, concluding that Chief DeNaples lacked standing to intervene, relying on <u>Commonwealth of Pennsylvania</u>, 26 PPER ¶ 26135 (Final Order, 1995)(individual bargaining unit members lack standing to litigate their inclusion or exclusion from the bargaining unit).

The hearing was subsequently continued by the Hearing Examiner and held on March 22, 2012. The Borough was provided an opportunity to present testimony and evidence to support its request to exclude the Fire Chief from the bargaining unit.¹ On May 2, 2012, the Hearing Examiner issued a Proposed Order of Unit Clarification granting the Borough's Petition to clarify the bargaining unit to exclude the position of Fire Chief from the unit. The Hearing Examiner concluded that the duties of the Fire Chief established that Chief DeNaples is a managerial employe within the test set forth in <u>Fraternal Order of Police Lodge No. 20 v. PLRB (Star Lodge)</u>, 522 A.2d 697 (Pa. Cmwlth. 1987), <u>aff'd</u>, 522 Pa. 149, 560 A.2d 145 (1989).²

On May 22, 2012, Chief DeNaples filed timely exceptions and a supporting brief with the Board, challenging the Hearing Examiner's Order Denying Motion for Intervention issued on October 21, 2011, and the Proposed Order of Unit Clarification issued on May 2, 2012. The Borough timely filed a response to the exceptions and a supporting brief on June 6, 2012.

In the exceptions, Chief DeNaples alleges that the Hearing Examiner erred in denying his Motion to Intervene because the Association had indicated that it would not participate in the hearing and did not oppose Chief DeNaples' Motion to Intervene. Chief DeNaples further alleges that the Hearing Examiner denied him due process by failing to notify Chief DeNaples of the continuance of the hearing and by not permitting him to participate in the hearing. Chief DeNaples additionally asserts that the Hearing Examiner erred in allegedly relying on hearsay evidence in concluding that the Fire Chief position should be excluded from the bargaining unit.

The exceptions filed by Chief DeNaples must be dismissed because he lacks standing to participate as a party in unit clarification proceedings. In <u>Aleppo Township</u>, 27 PPER \P 27157 (Final Order, 1996), a police chief similarly attempted to file exceptions to the

 $^{^{\}rm 1}$ The Association did not participate in the March 22, 2012 hearing.

² Pursuant to <u>Star Lodge</u>, a position is managerial if the actual duties of the position involve one of the following: (1) policy formulation; (2) policy implementation; (3) overall responsibility for personnel administration; (4) budget making authority; (5) purchase authority; or (6) independence in public relations. The test for managerial status under Act 111 is disjunctive, such that the performance of any of the enumerated functions results in a finding of managerial status.

Board's Nisi Order of Certification excluding his position from the bargaining unit as a managerial employe. In dismissing the police chief's exceptions, the Board cited <u>East</u> <u>Allegheny School District</u>, 10 PPER ¶ 10023 (Final Order, 1979) for the proposition that an individual employe does not have standing to intervene in unit clarification proceedings because the only appropriate parties to a unit clarification petition are the employer and the exclusive bargaining representative. <u>See also County of Berks</u>, 11 PPER ¶ 11297 (Final Order, 1980); <u>Lackawanna County Housing Authority</u>, 20 PPER ¶ 20067 (Final Order, 1989); <u>Commonwealth of Pennsylvania</u>, <u>supra</u>; <u>Allegheny County</u>, 37 PPER 58 (Final Order, 2006). In <u>Aleppo Township</u>, the Board also relied on the decision of the Pennsylvania Supreme Court in <u>Official Court Reporters of the Court of Common Pleas of</u> <u>Philadelphia County v. PLRB</u>, 502 Pa. 518, 467 A.2d 311 (1983), in which the Court held that individual employes lack standing to litigate their inclusion or exclusion from a bargaining unit. In that case, the Supreme Court stated as follows:

> The process of selecting the exclusive representative of a group of employees is itself a representative process. Consequently, individuals or small groups of employees which have not met the requirements for intervention cannot litigate the appropriateness of the bargaining unit or their individual status concerning inclusion or exclusion from the bargaining unit. That requirement is consistent with the concept of collective bargaining as a representative process which eliminates the individual employee's right to represent himself in the bargaining process.

<u>Id.</u> at 535-536, 467 A.2d at 320. Accordingly, the Hearing Examiner did not err in denying Chief DeNaples' Motion to Intervene and excluding him from participating in the proceedings before the Board.

As the Board stated in Commonwealth of Pennsylvania:

[T]his result is consistent with a variety of cases decided by our courts involving the standing of individual employes in the context of a collective bargaining relationship. For example, in Maggs v. PLRB, 50 Pa. Commonwealth Ct. 549, 413 A.2d 453 (1980), the Commonwealth Court affirmed a Board final order denying an individual employe standing to file an unfair labor practice charge alleging that the employer had failed to process a grievance to arbitration. The Commonwealth Court agreed with the Board that only the exclusive representative had standing to process such a charge. Similarly, in McClusky v. Department of Transportation, 37 Pa. Commonwealth Ct. 598, 391 A.2d 45 (1978), the Commonwealth Court, citing Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903 (1967), concluded that an individual employe had no standing to appeal a grievance arbitration award. Accord, Gardocki v. Department of Transportation, 42 Pa. Commonwealth Ct. 579, 401 A.2d 410 (1979); McGrath v. Municipality of Penn Hills, 64 Pa. Commonwealth Ct. 477, 440 A.2d 1279 (1982); Krenzelak v. Canon-McMillan School District, 129 Pa. Commonwealth Ct. 490, 566 A.2d 346 (1989), pet. for allowance of appeal denied, 577 A.2d 892 (1990); see also Chamblis v. PLRB, 17 PPER ¶ 17204 (Court of Common Pleas of Philadelphia County, 1986)(individual employe lacks standing to enforce grievance arbitration award through unfair labor practice charge); Roderick v. PLRB, 86 Pa. Commonwealth Ct. 278, 484 A.2d 841 (1985)(individual employe lacked standing to force implementation of advisory arbitration award); PLRB v. Eastern Lancaster County Education Association, 58 Pa. Commonwealth Ct. 78, 427 A.2d 305 (1981), pet. for allowance of appeal denied, March 26, 1982, at No. 199 E.D. Misc. Dkt. 1981, cert. denied sub nom. Schreffler v. PLRB, 459 U.S. 838 (1982)(limitations upon individual employe rights justified by compelling state interest in the orderly resolution of labor disputes).

2

26 PPER at 318.

Further, the exceptions must be dismissed because Chief DeNaples has no standing to file exceptions as a result of his not being a party to the proceedings. Section 93.1 of the Board's Rules and Regulations defines "party" as follows:

The employer, person or organization filing a charge or petition, or otherwise named in a charge or petition; another person or organization designated in the notice of hearing and served therewith; and another person or organization whose intervention has been permitted by the Board or trial examiner, except as limited by the Board or trial examiner in granting the permission.

34 Pa. Code § 93.1. Because Chief DeNaples does not fall within any of the above-listed categories, he is not a party to the unit clarification proceeding and has no standing to file exceptions to the Hearing Examiner's Proposed Order of Unit Clarification. Therefore, the exceptions filed by Chief DeNaples must be dismissed.

After a thorough review of the exceptions, the response thereto and all matters of record, the Board shall dismiss the exceptions and affirm the Proposed Order of Unit Clarification.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Christopher DeNaples are dismissed and the May 2, 2012 Proposed Order of Unit Clarification be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this seventeenth day of July, 2012. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.