

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
 :  
 : Case No. PERA-R-14-337-E  
 :  
 CARBON COUNTY :

**FINAL ORDER**

Carbon County (County) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on April 17, 2015 from a Nisi Order of Certification (NOC) issued on April 6, 2015, under the Public Employee Relations Act (PERA). The NOC certified the Carbon County Sheriff's Association (Union) as the exclusive bargaining representative of "all full-time and regular part-time security guards who are involved with and necessary to the functioning of the courts ... including but not limited to Deputy Sheriffs, Sergeants and Lieutenants in the Sheriff's Office". The Union has not filed a response to the exceptions.

On October 17, 2014, the Union filed with the Board a Petition for Representation alleging that thirty per cent or more of the deputy sheriffs, including Sergeants and the Lieutenant, who are directly involved with and necessary to the functioning of the Court of Common Pleas of Carbon County, wish to be exclusively represented by the Union, as a separate unit of security guards. In response to the Petition, the County asserted that the Sergeants in the Sheriff's Office were first level supervisors under Section 301(6) of PERA, and that the Lieutenant was a management level employe under Section 301(16) of PERA by virtue of being above the first level of supervision. Pursuant to an Order and Notice of Hearing, a hearing was held before the Hearing Examiner on December 2, 2014, during which both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Based on the testimony and documentary evidence presented, the Hearing Examiner made Findings of Fact, which are summarized as follows.

The parties stipulated that the County intends to utilize deputy sheriffs to protect County property during times of labor unrest and therefore they are security guards under Section 604(3) of PERA. (FF 4). In the Sheriff's Office, there are the following positions, ranking highest to lowest: Elected Sheriff; Chief Deputy; Lieutenant; Sergeant; and deputy. (FF 5). Sergeants perform the same duties as the deputies, including prisoner transportation, warrant service and execution as well as courtroom security, and work side-by-side with deputies daily. (FF 6 and 10). When two deputies are on an assignment, without a Sergeant, the senior deputy is in charge, and the senior deputy would have the same authority on the scene as a Sergeant. (FF 11).

One of the two Sergeants typically schedules the duty assignments for the Sherriff's Office. (FF 14). The schedules and assignments are subject to last-minute changes, and Sergeants can verbally reassign deputies to different posts throughout the day. (FF 7 and 14). Sergeants spend approximately 40% of their time overseeing deputies, but are not involved in the decision whether to promote a deputy. (FF 12 and 13). If a Sergeant witnesses misconduct, they can issue a verbal warning to the deputy. (FF 7). However, only the Elected Sheriff can decide and issue discipline, although he will follow the recommendation of the observing Sergeant or Lieutenant approximately 75% of the time. (FF 9).

The Hearing Examiner concluded, based on the Findings of Fact and credibility determinations, that the extent of supervisory duties performed by the Sergeants did not meet the statutory criteria to be classified as first level supervisors under PERA. The Hearing Examiner also rejected the County's argument that the position of Lieutenant was management level because it was above the first level of supervision. Accordingly, on February 12, 2015, the Hearing Examiner issued an Order Directing Submission of Eligibility List (ODSEL) describing the appropriate bargaining unit to include deputy sheriffs, Sergeants and Lieutenants in the Sheriff's Office.

An Order and Notice of Election was issued on March 5, 2015, and a secret ballot election held March 26, 2015, among the employees in the unit as described by the Hearing Examiner. Following the canvassing of ballots, the Board Representative issued a NOC on April 6, 2015. In the NOC, the Board Representative found that a majority of the valid votes cast by employees were in favor of representation by the Union, and certified the Union as the exclusive representative of "all full-time and regular part-time security guards who are involved with and necessary to the functioning of the courts, ... including but not limited to Deputy Sheriffs, Sergeants and Lieutenants in the Sheriff's Office..."

The County timely filed exceptions to the Nisi Order of Certification, arguing that the Hearing Examiner erred in finding that the Sergeants did not meet the statutory definition of supervisors under PERA. The County also argues that the Lieutenant is above the first level of supervision and therefore, a management level employee.

Section 301(6) of PERA defines a supervisor as follows:

[A]ny individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees 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). Section 604(5) of PERA, provides that "[i]n determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 Pa. C.S. §1101.604(5); **West Perry School District v. PLRB**, 752 A.2d 461 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 568 Pa. 675, 795 A.2d 984 (2000). Indeed, the Board has consistently held that employees who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are lead workers and not supervisors within the meaning of PERA. *E.g. Westmoreland County*, 40 PPER 35 (Final Order, 2009), *affirmed sub nom. Westmoreland County v. PLRB*, 991 A.2d 976 (Cmwlth. Ct. 2010). Section 301(16) of PERA, 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).

On exceptions, the County challenges Finding of Fact 6 that the Sergeants and deputy sheriffs perform the same duties, as not supported by substantial evidence because the Sergeants also perform supervisory functions. Finding of Fact 6 does not state that Sergeants only perform the duties that are performed by the deputy sheriffs. Moreover, the issue before the Hearing Examiner, in accordance with Section 604(3) of PERA, is the extent to which Sergeants perform supervisory duties vis-à-vis performing the same duties as are performed by the deputy sheriffs. **Westmoreland County**, *supra*. The County's exception does not dispute, and therecord amply supports, that the Sergeants do in fact perform the same duties as the deputy sheriffs, and thus Finding of Fact 6 is not in error.

The County argues on exceptions that the Hearing Examiner erred in stating that Sergeants "sporadically recommend discipline." Instead, the County argues that the Elected Sheriff "always" requires the Sergeants to provide a recommendation on disciplinary matters. Also, the County argues that the Hearing Examiner's finding that the Elected Sheriff follows the recommendation of discipline "approximately 75% of the time" is not supported by the Sheriff's testimony that it is "more than that." (N.T. 27).

The question for purposes of Section 604(3), and the Hearing Examiner's findings, go to the frequency and extent to which the Sergeants are involved in discipline of deputy sheriffs. That the Elected Sherriff requires a recommendation of discipline whenever a misconduct report is filed is irrelevant to the question of the frequency of the Sergeants' involvement in discipline of deputy sheriffs. Additionally, the fact that the Sheriff may accept the disciplinary recommendation of the Sergeants more than 75% of

the time, does not evidence the extent to which the Sergeants are involved in the supervisory duties of making those recommendations.

Indeed, on this record, there is only one instance offered by the County, occurring in March 2014, to show the extent to which supervisory duties related to discipline are performed by Sergeants. In that instance, a verbal warning was issued after the Sheriff authorized that discipline based on a report of a Sergeant. (Exhibit E-3). However, what differentiates a supervisor from that of a lead worker is an ability to independently sanction or reward subordinate employees. *E.g. Danville Area School District*, 8 PPER 195 (Order and Notice of Election, 1977); *Trafford Borough*, 29 PPER ¶29191 (Order Directing Submission of Eligibility List, 1998). While the parties stipulated that the Sergeants have the authority to issue a verbal warning, there is no evidence offered to establish that Sergeants have, in fact, issued a verbal warning without the pre-authorization of the Sheriff. In assessing the record evidence to determine supervisory status, the Board must look to the duties actually performed. *E.g. Westmoreland County, supra.*; see also, *Zenlienople Borough*, 23 PPER ¶23107 (Order Directing Submission of Eligibility List, 1992) (“[b]ecause the Board’s focus is on what employees do rather than on what they should or should not be doing ... the apparent inconsistency between the manual and practice is irrelevant”). Where the record reflects only a single instance of a disciplinary report, reflecting the Sheriff’s authorization that a verbal warning be issued by a Sergeant, we must dismiss the County’s exceptions to the Hearing Examiner’s findings that Sergeants “sporadically recommend discipline,” and that the Sheriff accepts their recommendations “approximately 75% of the time”. See *Great Bend Township*, 31 PPER ¶31010 (Order Directing Submission of Eligibility List, 1999) (a single instance of exercising supervisory authority in hiring was insufficient to sustain burden of proving supervisory status under Section 301(6) of PERA); see also *Westmoreland County*, 991 A.2d at 980 (“[a] party seeking to exclude a position from a bargaining unit has the burden of proving by substantial evidence the statutory exclusion applies”).

The County also excepts to Finding of Fact 12, which states that the Sergeants “spend approximately 40% of their time overseeing deputies.” The County argues that the testimony of Sheriff Dwight Nothstein is that the Sergeants work side-by-side and oversee the deputy sheriffs approximately 40 to 60 percent of the time. The testimony in this regard is somewhat confusing and contradictory. Sheriff Nothstein did testify that the Sergeants work side-by-side with deputies 40 to 60 percent of the time. (N.T. 19). When asked by the Hearing Examiner how much of the Sergeant’s time was spent overseeing the deputies, Sheriff Nothstein testified unequivocally that it was 40 percent of the time. (N.T. 62). However, on further direct examination, Sheriff Nothstein indicated that whenever the Sergeant was working alongside a deputy, he is concurrently overseeing the individual with whom he is working. (N.T. 68).

Evident from the testimony cited by the Hearing Examiner, and dispositive of the County’s exception, is that the Hearing Examiner’s Finding of Fact that Sergeants oversee the deputies’ work performance 40% of the time, is clearly based on a credibility determination. In this respect, the Hearing Examiner may accept or reject the testimony of any witness in whole or in part. *Limerick Township Police Officers v. Limerick Township*, 36 PPER 125 (Final Order, 2005). The Hearing Examiner’s credibility determinations will not be overturned on exceptions absent the most compelling of circumstances. *Mt. Lebanon Education Association v. Mt. Lebanon School District*, 35 PPER 98 (Final Order, 2004). It is sufficient that the Hearing Examiner’s findings of fact, based on the credibility determination, are supported by substantial evidence of record. *PLRB v. Kaufmann Department Stores, Inc.*, 29 A.2d 90 (Pa. 1942). Finding of Fact 12, stating that the Sergeants spend approximately 40% of their time overseeing deputies, is supported by substantial evidence of record which was found credible by the Hearing Examiner, and will not be disturbed.

Regardless, the Commonwealth Court has rejected the notion that simply because the Sergeants work side-by-side and oversee the deputy sheriffs, they are performing supervisory functions. *Westmoreland County, supra.*; *West Perry School District, supra.*; see also, *Zenlienople Borough, supra.* (“the fact that the superintendents work alongside the laborers is irrelevant”). In *West Perry School District*, the cafeteria managers spent

almost all of their time working alongside the rank and file cafeteria employees. The Board found, and the Commonwealth Court agreed, that "overseeing" is not one of the supervisory duties set forth in Section 301(6) of PERA, and therefore the employer failed to prove that the cafeteria managers were performing supervisory duties by simply being there. So too here, aside from allegations of "overseeing" the deputy sheriffs, the County has produced scant evidence of the Sergeants' actual performance of the supervisory duties enumerated in Section 301(6) of PERA.

After a thorough review of the exceptions and all matters of record, we find that the Hearing Examiner did not err in concluding that, on this record, the extent to which the Sergeants perform supervisory duties is not sufficient to render them first level supervisors, but is indicative of lead workers includable in the collective bargaining unit. As such, the County failed to establish that the Sergeants were first level supervisors within the meaning of Section 301(6) of PERA, and the County's exceptions thereto are dismissed. Because the Sergeants are not first level supervisors, the County's exception to the Hearing Examiner's determination that the Lieutenant is not above the first level of supervision, is also dismissed. Accordingly, upon review of the record, the February 12, 2015 ODSEL, and the April 6, 2015 NOC, are hereby made absolute and final.<sup>1</sup>

#### **ORDER**

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

#### **HEREBY ORDERS AND DIRECTS**

that the exceptions filed by Carbon County are hereby dismissed, and the February 12, 2015 Order Directing Submission of Eligibility List and the April 6, 2015 Nisi Order of Certification are hereby 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, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this sixteenth day of June, 2015. 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.

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<sup>1</sup> In its brief in support of exceptions, the County requests as relief that the Board vacate the March 26, 2015 certified election results. Even if the Board had agreed with the County that either the Sergeants and/or the Lieutenant were excluded from the unit, a new election would not be an appropriate remedy. During the Board election, the County did not challenge any ballot cast by a Sergeant or the Lieutenant, thus failing to preserve that objection. Furthermore, the maximum number of votes by the two sergeants and one lieutenant would not have changed the outcome of the election and NOC, where nine of the ten votes of the eligible employees were cast in favor of representation. (NOC, FF 19).