

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PF-R-13-106-W
:
WASHINGTON TOWNSHIP :

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On November 6, 2013, Teamsters Local Union No. 205 (Union or Local 205), filed a Petition for Representation with the Pennsylvania Labor Relations Board (Board) seeking to represent the police employes of Washington Township (Township or Employer). On November 22, 2013, the Secretary of the Board issued an Order and Notice of Hearing in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating January 15, 2014, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed timely post-hearing briefs in support of their respective positions.

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

FINDINGS OF FACT

1. The Township is a public employer and political subdivision under Act 111 as read *in pari materia* with the Pennsylvania Labor Relations Act (PLRA). (N.T. 4)
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 4)
3. The parties stipulated and agreed that the only outstanding issues in this case are the status of the Chief of Police/Superintendent and the part-time police officers; the parties stipulated and agreed that if the position of the Chief of Police/Superintendent is not found to be managerial, it shares a sufficient community of interest to be included in the bargaining unit. (N.T. 4-5)
4. The parties stipulated that the unit ("Unit") deemed appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time police officers including, but not limited to, patrolmen, sergeants, and the Chief; provided the Chief is not found to be managerial. (N.T. 5)
5. The Union stipulated that Ben Salvio is not a regular, part-time police officer and should not be included in the unit. (N.T. 6)

6. Raymond Moody has been employed as the Chief or Superintendent of Police for the Washington Township Police Department since 2008. Initially, he worked on a part-time basis, but became full-time in 2010. From 1994 to 2008, he was a part-time patrolman for the Township. (N.T. 10-11)

7. The Township employs four full-time officers and six part-time officers. The part-time officers are Ben Salvio, Stephen Olesky, Terry Childs, Joshua Haines, James Jeffrey, and Ryan McWreath. (N.T. 11-12, 21; Township Exhibits 1 & 2)

8. Since June 2013, Officer Olesky has been scheduled to work at least one shift per week, with the exception of the first two weeks in November 2013 when he was not scheduled at all. Oftentimes, however, Olesky has worked more than one shift per week. There are 21 shifts in each week, 20 of which are filled by the full-time officers. Olesky typically fills the one open shift during the week, which is not taken by any of the full-time officers. (N.T. 12, 25; Township Exhibits 1 & 2)

9. The other four individuals, including Officers Childs, Haines, Jeffrey, and McWreath, obtain their shifts on a fill-in basis during vacations or holidays. There is an unwritten policy in the police department whereby officers must find their own replacement if they cannot work a scheduled shift, as long as it does not result in overtime. (N.T. 13-14)

10. Officer Childs was hired in April 2009 and worked an average of 5.06 hours per week in 2013. Jeffrey was hired in October 2011 and worked an average of 3.02 hours per week in 2013, while Haines was hired in December 2011 and worked an average of 13.38 hours per week in 2013. Olesky and McWreath, meanwhile, were both hired in June 2013 and worked an average of 15.27 and 2.25 hours per week in 2013, respectively. (N.T. 38-42; Township Exhibit 3)

11. Prior to the filing of the petition on November 6, 2013, Officer Childs worked as a scheduled part-time officer during 2013 for some portion of the weeks beginning: May 6, 13, 20, 27, June 24, July 1, 15, 22, 29, August 5, 12, 19, 26, September 9, 16, 23, 30, October 7, 28, and November 4, for a total of 20 weeks. (Township Exhibits 1 & 2; Union Exhibit 1)

12. Prior to the filing of the petition on November 6, 2013, Officer Haines worked as a scheduled part-time officer during 2013 for some portion of the weeks beginning: December 31, 2012, January 7, 14, 21, 28, February 4, 11, 18, 25, March 4, 11, 18, 25, April 1, 8, 15, 22, 29, and May 6, for a total of 19 weeks. (Township Exhibits 1 & 2; Union Exhibit 1)

13. Prior to the filing of the petition on November 6, 2013, Officer Jeffrey worked as a scheduled part-time officer during 2013 for some portion of the weeks beginning: December 31, 2012, February 11, March 25, May 13, 20, 27, June 3, 10, 17, 24, and August 19, for a total of 11 weeks. (Township Exhibits 1 & 2; Union Exhibit 1)

14. Prior to the filing of the petition on November 6, 2013, Officer McWreath worked as a scheduled part-time officer during 2013 for some portion of the weeks beginning June 10, 17, 24, July 1, 15, 22, September 2, 9, 16, and October 7, for a total of 10 weeks. (Township Exhibits 1 & 2; Union Exhibit 1)

15. Superintendent Moody was off work on disability leave from approximately May 27, 2013 through October 7, 2013. During that time, there were a lot of part-time officers scheduled because the Superintendent was unable to work. The Superintendent has since returned to work, which results in approximately five shifts per week being taken away from the part-time officers. In June 2013, the Township hired two new full-time officers, who each work 40 hours per week, thereby increasing the number of full-time officers to the current total of four. (N.T. 22-23, 31, 42-43)

16. At some point in time, Superintendent Moody spoke with the Township Supervisors and advised them that the Township needed a policy for certain weapons they had, including the patrol rifle. As a result, the Supervisors requested that he put something together. The Superintendent subsequently presented a Patrol Rifle Policy to the Supervisors, which they approved without change. The Superintendent put together the policy after communicating with other agencies that already had patrol rifles in their cars. He obtained the policy from a neighboring department, North Belle Vernon, and simply labeled it Washington Township. (N.T. 56, 61-63, 76-77; Township Exhibit 7)

17. In November 2008, Superintendent Moody recommended a Taser policy, which the Supervisors adopted following his recommendation. Although he could not specifically recall from where he obtained the policy, the Superintendent used an existing policy which he put in writing and provided to the Supervisor in charge of the police department. (N.T. 89-90, 106-107; Township Exhibit 9)

DISCUSSION

The Union's petition for representation seeks an election to determine the exclusive bargaining representative of the police officers for the Township. The Township seeks to exclude the Chief of Police or Superintendent position as a managerial employe.

As a result, the issue depends on the test set forth in Fraternal Order of Police Star Lodge No. 20 v. Pennsylvania Labor Relations Board, 522 A.2d 697 (Pa. Cmwlth, 1987), aff'd 522 Pa. 149, 560 A.2d 145 (1989). Under Star Lodge, the burden of proving that a position is managerial is on the party seeking to exclude the position. The party must prove that the position meets one of the six criteria of managerial status, which the Court identified as follows:

Policy Formulation - authority to initiate departmental policies, including the power to issue general directives and regulations;

Policy Implementation - authority to develop and change programs of the department;

Overall Personnel Administration Responsibility - as evidenced by effective involvement in hiring, serious disciplinary actions and dismissals;

Budget Making - demonstrated effectiveness in the preparation of proposed budgets, as distinguished from merely making suggestions with respect to particular items;

Purchasing Role - effective role in the purchasing process, as distinguished from merely making suggestions;

Independence in Public Relations - as evidenced by authority to commit departmental resources in dealing with public groups.

522 A.2d 697, at 705. Significantly, the test for managerial status under Act 111 is disjunctive and not conjunctive, such that performance of any one of these functions results in a finding of managerial status. In the Matter of the Employees of Elizabeth Township, 37 PPER 90 (Final Order, 2006).

In the present case, the Township has sustained its burden of proving the Superintendent's duties meet at least one of the criteria for managerial status. While the record shows that the Superintendent does not have many managerial duties, the Township has demonstrated that the Superintendent's duties satisfy the policy formulation criteria for managerial status. Therefore, the Superintendent position must be excluded from the bargaining unit.

The record shows that the Superintendent spoke with the Township Supervisors and advised them that the Township needed a policy for certain weapons they had, including the patrol rifle. As a result, the Supervisors requested that he put something together. The Superintendent subsequently presented a Patrol Rifle Policy to the Supervisors, which they approved without change. The Superintendent put together the policy after communicating with other agencies that already had patrol rifles in their cars. He obtained the policy from a neighboring department, North Belle Vernon, and simply labeled it Washington Township. This clearly demonstrates the Superintendent's authority to initiate departmental policies, including the power to issue general directives and regulations. Although the recommendation also required the Supervisors to take action in terms of an approval, "the mere fact that policy determinations are subject to review by a higher authority does not necessarily negate managerial status." Star Lodge at 704. See also City of Erie, 23 PPER ¶ 23054 (Proposed Order of Unit Clarification 1992). In fact, the Board has held that selecting a policy or protocol that applies elsewhere and deciding that it would benefit one's own police department is the essence of managerial discretion. In the Matter of the Employees of Norristown Borough, 43 PPER 59 (Proposed Order of Unit Clarification, 2011).

Similarly, in November 2008, the Superintendent recommended a Taser policy, which the Supervisors adopted following his recommendation. Although he could not specifically recall from where he obtained the policy, the Superintendent used an existing policy which he put in writing and provided to the Supervisor in charge of the police department. This also demonstrates his authority to initiate departmental policies, including the power to issue general directives and regulations. As the Board held in Elizabeth Township, 37 PPER 90 (Final Order 2006), "[i]t is not significant in the development of the manual for his department that [the Chief] reviewed, edited and selectively chose portions from other manuals or entirely created an original document which became the Township's manual. In either event, the drafting is exercising independent managerial discretion regarding the content of the manual." In the same vein, the Superintendent in the instant matter has exercised his independent managerial discretion by making the choice to adopt an existing policy which was approved as the Township's Taser policy. As such, his duties clearly fall within the policy formulation criteria of managerial status under Star Lodge.

It is noted that the Superintendent specifically tried to downplay and minimize his job duties and his role with regard to these particular policy issues during the hearing. To the extent the Superintendent asserted that he was selected to formulate the policies only because he was specially trained in these subject areas, this testimony is not accepted as credible or persuasive. (N.T. 62, 107). As the Township points out, Supervisor Miller testified that she did not know why the Superintendent was selected to formulate a rifle policy. (N.T. 117). Furthermore, with regard to the Taser policy, the Superintendent testified that he merely had training in firearms. (N.T. 61-62, 106). This certainly does not qualify him as being specialized in the field of Tasers.

In any event, the record shows that the Supervisors chose the Superintendent to create the policies, which he did by utilizing the existing policies of other departments which, in turn, the Supervisors approved without change. Under Star Lodge, this is clearly indicative of managerial status. Although his authority has been limited in some respects, the Superintendent nevertheless exercises job duties in policy formulation, which mandate that he must be excluded from the unit. Accordingly, the Superintendent is not eligible to vote in an election for the exclusive bargaining representative.

Next, the parties dispute whether five of the six part-time police officers are "regular" part-time officers, as that term has been defined by the Board. In order for certain officers to be deemed regular part-time officers, as distinguished from casual employes, the Board requires a showing that they must be employed on a scheduled basis, i.e., in advance of their day of work and scheduled on a frequent basis in order to establish a reasonable expectation of continued employment. Town of Bloomsburg, 18 PPER ¶ 18086 (Order Directing Submission of Eligibility List, 1987) citing North Braddock Borough, 14 PPER ¶ 14191 (Order Directing Submission of Eligibility List, 1985); Ellport Borough, 16 PPER ¶ 16065 (Order Directing Submission of Eligibility List, 1985); Bethlehem Township, 10 PPER ¶ 10050 (Order and Notice of Election, 1979). Merely appearing on the schedule is not sufficient; it is the frequency and regularity of employment which is relevant to a determination that an employe is regular part-time. Borough of Whitaker, 14 PPER ¶ 14200 (Order Directing Submission of Eligibility List, 1983), 14 PPER ¶ 14273 (Final Order 1983).

The Board has been reluctant to establish a minimum number of hours during a time period in which the employes must work to determine regular part-time status. In the Matter of the Employes of Dalton Borough, 31 PPER ¶ 31045 (Order Directing Submission of Eligibility List, 2000) citing Dauphin County Commissioners, 7 PPER 7 (Order and Notice of Election, 1976); Radnor Township School District, 6 PPER 30 (Order Directing Pre-Election Conference, 1975).

Preliminarily, the Union has demonstrated that the five part-time officers at issue are employed on a scheduled basis. That is, they are scheduled in advance of their days of work. There is no question that each of the part-time officers appear throughout the Township's schedule, which was admitted as Township Exhibit 1. The more difficult question is whether these five officers are scheduled on a frequent basis in order to establish a reasonable expectation of continued employment, consistent with Town of Bloomsburg, supra.

The record shows that Officer Olesky is a regular part-time employe, as that term has been defined by the Board. Since being hired in June 2013, Olesky has consistently been scheduled to work at least one shift per week and oftentimes works much more than that. In fact, Olesky typically fills the one open shift during the week, which is not taken by any of the full-time officers. It is well settled that an officer who works at least one shift every week on a scheduled basis is a regular part-time officer. In the Matter of the Employes of Gettysburg Borough, 22 PPER ¶ 22083 (Order Directing Submission of Eligibility List, 1991) citing Borough of Whitaker, supra. What is more, Olesky has worked an average of 25.96 hours per week since being hired in June 2013. (See Township Exhibit 3). Thus, it cannot be seriously contested that Olesky is a regular part-time officer.

The record also shows that the other four officers, namely Childs, Haines, Jeffrey, and McWreath, are not regular part-time officers, as that term has been defined by the Board. The parties submitted the schedule and shift records for each of the officers during the 2013 calendar year. However, the Petition for Representation was filed on November 6, 2013. As a result, the appropriate period for analysis would be January 1, 2013 through November 6, 2013, which is 45 weeks up to and including the week during which the Petition was filed. See Gettysburg Borough, supra.

Childs worked on a scheduled basis for some portion of 20 of the 45 weeks in question. (Township Exhibits 1 & 2; Union Exhibit 1). This constitutes approximately 44 percent of the available weeks on the schedule, which is lower than the frequency the Board has deemed sufficient in similar cases. Indeed, the standard is that in order for employes to qualify as regular part-time, they should work at least one-half of an extended period as scheduled part-time employes. Gettysburg Borough, citing Town of Bloomsburg, supra. Further, there were several months where Childs did not appear on the schedule at all, including January, February, March, and April. (See Township Exhibits 1 & 2). The Board has held that this is another factor weighing against a determination of regular part-time employment. Gettysburg Borough, supra.

Haines worked on a scheduled basis for some portion of 19 of the 45 weeks in question, which constitutes approximately 42 percent of the available weeks in question. (Township Exhibits 1 & 2; Union Exhibit 1). Once again, this is lower than the frequency which the Board has deemed sufficient. Notably, Haines did not even appear on the schedule for the five-month period immediately preceding the filing of the petition. *Id.*

Similarly, Jeffrey only worked on a scheduled basis for some portion of 11 of the 45 weeks at issue, which is approximately 24 percent. (Township Exhibits 1 & 2; Union Exhibit 1). As was the case with Officers Childs and Haines, there are several months in which Jeffrey also does not appear on the schedule, including April, July, September, and October. *Id.*

Finally, McWreath who first worked on June 12, 2013 was available for work for 23 total weeks, rather than 45, prior to the petition being filed. Of those 23 weeks, McWreath worked on a scheduled basis during 10 weeks, which is approximately 43 percent. (Township Exhibits 1 & 2; Union Exhibit 1). McWreath also did not appear on the schedule at all during the month of August. *Id.*

Despite the evidentiary record, the Union contends that the regularity and consistency of the work habits of part-time officers is best assessed by

considering that group as a single subset and their attendance on an average monthly basis. The Union cites Somerset Borough, 26 PPER ¶ 26214 (Final Order, 1995) as support for the assertion that the disparity in earnings among the part-time officers and/or frequency with which they reported for duty (i.e., on a near monthly basis or with several months break between shifts) does not render the service of part-time officers irregular. The Union's reliance on Somerset Borough is misplaced.

In Somerset Borough, the police union argued that the Secretary erred in dismissing its petition for unit clarification to delete regularly scheduled part-time officers from the unit because the Board should have conducted hearings to make an employe-by-employe determination whether the part-time officers met the test for regularity. As support for its argument, the police union cited North Braddock Borough, *supra*, Gettysburg Borough, *supra*, Franklin Township, 16 PPER ¶ 16098 (Order Directing Submission of Eligibility List, 1985), and Town of Bloomsburg, *supra*. However, the Board rejected this argument, noting that an employe-by-employe determination was necessary in those cases in order to determine whether or not particular employes were eligible to vote in a representation election. The Board indicated that the police union's request in Somerset Borough did not involve election eligibility, as it was a unit clarification proceeding, and thus, would be of little or no value in the future depending on the subsequent employment record of the part-time employe. Thus, any employe-by-employe determination of regular part-time status would, of necessity, be merely a snapshot of the employe's status, which, depending upon subsequent scheduling, would be subject to constant change and presumably, re-examination from virtually the time any decision was rendered. *Id.* The Board concluded that this would be a grossly inefficient use of its resources to constantly address the individual bargaining unit status of part-time employes.

In the instant matter, however, it must be noted that the Union filed a Petition for Representation and that this is not a unit clarification proceeding, as was the case in Somerset Borough. Therefore, Somerset Borough is readily distinguishable, and the Board's warning against such a grossly inefficient use of its resources is wholly inapplicable. Instead, this matter is akin to the Board's decisions in North Braddock Borough, *supra*, Gettysburg Borough, *supra*, Franklin Township, 16 PPER ¶ 16098 (Order Directing Submission of Eligibility List, 1985), and Town of Bloomsburg, *supra*, which clearly requires an employe-by-employe inquiry to determine whether or not the particular part-time employes are eligible to vote in the representation election. Accordingly, the Union's argument that the part-time officers must be assessed as a group rather than individually is not persuasive.

Based on this record, Officers Childs, Haines, Jeffrey, and McWreath did not appear on the schedule with sufficient regularity to be deemed regular part-time employes.

CONCLUSIONS

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

1. The Township is a public employer and political subdivision within the meaning of Act 111 as read *in pari materia* with the PLRA.

2. The Union is a labor organization within the meaning of Act 111 as read *in pari materia* with the PLRA.

3. The Board has jurisdiction over the parties.

4. The position of Chief of Police/Superintendent is a managerial employe and is properly excluded from the unit.

5. The unit deemed appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time police officers, including, but not limited to, patrolmen and sergeants; and excluding the Chief of Police/Superintendent and any other managerial employes.

6. The position held by Stephen Olesky is a regular part-time police officer.

7. The positions held by Ben Salvio, Terry Childs, Joshua Haines, James Jeffrey, and Ryan McWreath are casual and not regular part-time police officers.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Examiner

HEREBY ORDERS AND DIRECTS

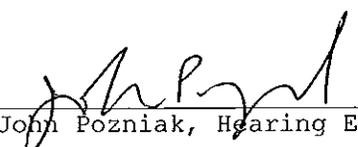
that the Township shall within ten (10) days from the date hereof submit to the Board a current alphabetized list of the names and addresses of the employes in the employer unit described in Conclusion number 5 above.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this tenth day of March, 2014.

PENNSYLVANIA LABOR RELATION BOARD



John Pozniak, Hearing Examiner