

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PF-U-17-80-E¹
:
WARMINSTER TOWNSHIP :

PROPOSED ORDER OF UNIT CLARIFICATION

On October 26, 2017, the Warminster Township Police Benevolent Association (Association or Union) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification pursuant to the Pennsylvania Labor Relations Act (PLRA) and Act 111, seeking to include the positions of Chief of Police and Lieutenant in a bargaining unit of police officers employed by Warminster Township (Township or Employer). On November 7, 2017, the Secretary of the Board issued an Order and Notice of Hearing, assigning February 2, 2018 in Harrisburg, as the time and place of hearing, if necessary. The hearing was subsequently continued to April 20, 2018 at the Township's request and without objection from the Association.

The parties eventually agreed to submit stipulations of fact in lieu of appearing for a hearing. The Board received the duly executed stipulations on April 18, 2018. The parties each filed post-hearing briefs in support of their respective positions on May 17, 2018.

The Examiner, on the basis of 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 PLRA.

2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA.

3. The Township is a Second-Class Township as classified by the Commonwealth of Pennsylvania. (Joint Exhibit 1)²

4. The governing body and appointing authority of the Township is the Board of Supervisors. (Joint Exhibit 1)

5. The Township Police Department provides police services to the Township. (Joint Exhibit 1)

6. The Department employs 43 officers, including 40 patrol officers, two Lieutenants, and one Chief of Police. (Joint Exhibit 1)

¹The caption appears as amended by the Hearing Examiner.

²The duly executed stipulation of facts has been marked as Joint Exhibit 1.

7. The Township has voluntarily recognized the Association as the exclusive bargaining agent for officers employed by the Township. (Joint Exhibit 1)

8. Since the voluntary recognition, the Township and the Association have been parties to collective bargaining agreements dating back in excess of 20 years. (Joint Exhibit 1)

9. Through negotiations, the Township and the Association agreed that the proper scope of the unit represented by the Association includes "all [p]olice [e]mployees whom the Township employs on either a full-time or part-time bases (sic) as sworn [p]olice [o]fficers, excluding the rank of Lieutenant and the Chief of Police." (Joint Exhibit 1)

10. This definition of the unit has been included in the parties' collective bargaining agreement (CBA) for at least the last 20 years. (Joint Exhibit 1)

11. The position of Chief is not, nor has it ever been, included in the unit. (Joint Exhibit 1)

12. The duties of the Chief, as detailed in Department Policy 7.12.1, dated December 6, 2011, include the following: fiscal management and planning for the Department, including development of the annual budget; evaluate potential recruits and decide, in conjunction with the Township Manager and Board of Supervisors, which recruits to hire; review findings of disciplinary investigations and impose discipline on officers when necessary; determine the internal organization of the Department; organize, direct and control all resources of the Department; develop and implement policies for education and training requirements and programs; develop and implement Department emergency response plans; and develop and conduct a public relations program to promote public confidence in the police. (Joint Exhibit 1)

13. The holder of the position of Chief of Police has discharged the above duties and exercised discretion in those areas. (Joint Exhibit 1)

14. To the extent the Chief of Police does not have express authority to act in certain areas, such as the hiring, suspension or discharge of police officers, the parties agree that he has effectively recommended that such actions be taken. (Joint Exhibit 1)

15. Since the parties agreed to exclude the position of Chief of Police from the collective bargaining unit, there has not been any material change in the duties of the Chief. (Joint Exhibit 1)

16. The rank of Lieutenant is not, nor has it ever been, included in the unit. (Joint Exhibit 1)

17. The duties of the Lieutenants, as detailed in Department Policy 7.12.1, dated December 6, 2011, include the following: issue or recommend discipline, including issuance of reprimands, cautionary letters and suspensions. The effectiveness of the Lieutenants' involvement was evidenced where a Lieutenant recommended a police officer be discharged and the recommendation was accepted. The Lieutenants also develop and maintain minimum standards for officers assigned to specialized units. The exercise of this authority is evidenced by the Lieutenant being in the process of completely changing and restructuring the Department's Field Training Program

for all new police officers and reporting his progress to the Chief of Police. The Lieutenants additionally develop and maintain minimum requirements for selection to specialized units. Exercise of this authority was evidenced in making recommendations to the Chief of Police for selection of police officers for specialized units, and those recommendations are routinely accepted. (Joint Exhibit 1)

18. Since the parties agreed to exclude the position of Lieutenant from the collective bargaining unit, there has not been any material change in the duties of the Lieutenant position. (Joint Exhibit 1)

DISCUSSION

The Association has petitioned the Board to include the positions of Chief of Police and Lieutenant in the bargaining unit, alleging that neither position is managerial. The Township opposes the petition and contends that both positions are managerial in nature, and should therefore be excluded from the bargaining unit.

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 this case, the Township has sustained its burden of proving the Chief's duties meet four of the criteria for managerial status under Act 111.

Indeed, the record shows that the Chief's duties satisfy the policy implementation, overall personnel administration responsibility, budget making, and independence in public relations elements of the Star Lodge test. Therefore, the Chief position must be excluded from the bargaining unit.

First of all, the record shows that the Chief has exercised discretion in developing and implementing policies for education and training requirements and programs. This satisfies the policy implementation criteria, as the Chief clearly has the authority to develop and change programs of the department as a result. Likewise, the record supports an exclusion under the budget making criteria, as the parties stipulated the Chief has exercised discretion in fiscal management and planning for the department, including the development of the annual budget. Thus, the Chief has demonstrated effectiveness in the preparation of proposed budgets, as distinguished from merely making suggestions with respect to particular items. What is more, the Chief's duties also satisfy the overall personnel administration responsibility element of the Star Lodge test in that the Chief evaluates potential recruits and decides, in conjunction with the Township Manager and Board of Supervisors, which recruits to hire. The Chief reviews findings of disciplinary investigations and imposes discipline on officers when necessary. And, the Chief has exercised discretion in discharging these duties. Furthermore, to the extent the Chief does not have express authority to act in certain areas, such as hiring, suspension or discharge of police officers, he has effectively recommended that such actions be taken. As such, the Chief has effective involvement in hiring, serious disciplinary actions, and dismissals. See North Wales Borough, 39 PPER 10 (Final Order, 2008) (overall personnel administration responsibility requires a showing of all three functions; hiring, serious disciplinary actions, and dismissals). Finally, the Chief has also exercised discretion in developing and conducting a public relations program to promote public confidence in the police, which satisfies the independence in public relations element of the test.

The Association contends that application of Star Lodge in the disjunctive has become so fraught with the potential for misuse by employers as to remain unworkable. The Association urges the Board to employ a balancing analysis instead to determine if a police officer is truly more managerial than not. However, I am without authority to depart from the consistent line of precedent from the Board and the Commonwealth Court in this area, and therefore, I decline to adopt a balancing test for managerial status under Act 111 and the PLRA.

Based on this record, the Chief of Police clearly meets several of the factors deemed indicative of managerial status under the PLRA and Act 111. Accordingly, the Chief position will remain excluded from the bargaining unit as a managerial employee. However, a different result must obtain with regard to the Lieutenant position.

The Township contends that the Lieutenant position meets the policy formulation, policy implementation, and overall personnel administration responsibility elements of the Star Lodge test. However, the record does not support a managerial exclusion under the overall personnel administration criteria. The record shows that the Lieutenants issue or recommend discipline, including issuance of reprimands, cautionary letters and suspensions. The effectiveness of the Lieutenants' involvement was evidenced where a Lieutenant recommended a police officer be discharged and the recommendation was accepted. As the Association points out, there is no

evidence that the Lieutenants have any involvement in the hiring process. Therefore, the Lieutenants do not have effective involvement in hiring, serious disciplinary actions and dismissals. See North Wales Borough, supra (overall personnel administration responsibility requires a showing of all three functions; hiring, serious disciplinary actions, and dismissals).

Neither does the record support an exclusion under the policy formulation or implementation prongs of the test. There is no evidence that the Lieutenants have initiated departmental policies, including the power to issue general directives and regulations. As such, the Lieutenant position does not satisfy the policy formulation criteria. Similarly, with regard to the policy implementation criteria, the record shows that the Lieutenants develop and maintain minimum standards for officers assigned to specialized units. The exercise of this authority is evidenced by the Lieutenant being in the process of completely changing and restructuring the Department's Field Training Program for all new police officers and reporting his progress to the Chief of Police. However, as the Association correctly notes, this evidence does not demonstrate that the program has actually been changed or that the Chief has accepted any proposals on which the Lieutenant may be working. The Association persuasively maintains that there is no indication that the Lieutenant has even accomplished anything in this regard other than notifying the Chief of his progress. Indeed, the record suggests that the Chief will ultimately decide which of the Lieutenant's ideas will be accepted or rejected. This is not sufficient to sustain the Township's burden under the policy implementation element of the test. See Dravosburg Borough, 35 PPER 82 (Proposed Order of Unit Clarification, 2004) (no finding of managerial status where the employee in question has not actually revised or changed the policy manual).

Finally, the record shows that the Lieutenants develop and maintain minimum requirements for selection to specialized units. Exercise of this authority was evidenced in making recommendations to the Chief of Police for selection of police officers for specialized units, and those recommendations are routinely accepted. This is evidence of nothing more than supervisory functions and not indicia of managerial authority. Butler Township, 41 PPER 43 (Proposed Order of Unit Clarification, 2010) (overseeing training, evaluating personnel, and recommending promotion are supervisory in nature and not sufficient to support an exclusion from an Act 111 bargaining unit).

In the alternative, the Township contends that the Association's Petition for Unit Clarification should be dismissed on estoppel grounds. Specifically, the Township posits that the parties have agreed through more than 20 years of negotiations that the positions of Chief of Police and Lieutenant are properly excluded from the unit and the Association should not be able to avoid the consequences of such a provision during the term of a collective bargaining agreement. However, the Board has rejected the notion that a clause in a collective bargaining agreement that excludes specific positions from the bargaining unit is a clear and unmistakable waiver of the bargaining representative's right to file a unit clarification seeking a Board determination on the inclusion of those positions. In the Matter of the Employees of Berks County, 35 PPER 25 (Final Order, 2004). Nor does FOP v. Hickey, 452 A.2d 1005 (Pa. 1982) change the analysis, as alleged by the Township. Indeed, the Board has distinguished Hickey from a situation substantially similar to the instant matter because that case involved the inability of a party to argue the illegality of an agreed-upon provision in a collective bargaining agreement to avoid having to comply with that provision. Here, by contrast, the Association is "merely seeking to

prospectively include the petitioned-for positions in its unit after having agreed to their exclusion." Berks County, 35 PPER at 83. It is well settled that the Board will process petitions for unit clarification at any time during a collective bargaining agreement and that such an agreement, which includes a description of a bargaining unit, is not a clear, express, and unequivocal waiver of the union's right to have the Board process such a petition. In the Matter of the Employees of Chambersburg Area School District, 20 PPER ¶ 20149 (Final Order, 1989). Accordingly, the Petition is not barred on estoppel grounds and will be granted with respect to the Lieutenant position.

CONCLUSION

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

1. The Township is public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Association is a labor organization under 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 is managerial, and is properly excluded from the bargaining unit.
5. The position of Lieutenant is not managerial, and is properly included in the bargaining unit.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read with Act 111, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the Petition for Unit Clarification is granted and the position of Lieutenant is included in the bargaining unit.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this 13th day of
June, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

JOHN POZNIAK, Hearing Examiner