

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PF-U-17-21-W
 : (PF-R-08-70-W)
WILKINSBURG BOROUGH :

PROPOSED ORDER OF DISMISSAL

On March 14, 2017, Teamsters Local Union No. 205 (Teamsters 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 exclude the Lieutenant position from the bargaining unit.

On March 27, 2017, the Secretary of the Board issued an Order and Notice of Hearing, designating an April 25, 2017 pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and assigning June 28, 2017 in Pittsburgh, as the time and place of hearing, if necessary. The hearing was continued three times, once at the request of Wilkinsburg Borough (Borough or Employer) without objection from the Union, once at the request of the Borough over the objection of the Union, and once at the request of the Union without objection from the Borough.

The hearing was necessary and was held on September 13, 2017 before the undersigned Hearing Examiner of the Board, at which time the parties were afforded a full and fair opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. The parties elected to make closing arguments in support of their respective positions on the record in lieu of submitting post-hearing briefs. The Board received the transcript on October 5, 2017.

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 Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 4)
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 4-5)
3. The Union is the exclusive bargaining representative for a unit of "[a]ll full-time and regular part-time policemen, including but not limited to patrolmen, sergeants, and lieutenants; and excluding the chief of police and management level employes." (See PF-R-08-70-W)
4. On June 6, 1978, the Wilkinsburg Police Officers Association (Association) filed a petition for representation with the Board, seeking to represent the police employes of the Borough. The Association and Borough litigated the status of the lieutenant position during a hearing on August 9, 1978. On November 2, 1978, the Board issued an Order Fixing Time and Place

of Election, finding that the lieutenant was not a managerial position and placing the lieutenant position in the bargaining unit. At the time of the hearing in that matter, the Borough employed 44 police officers, including 34 patrolmen, five sergeants, four lieutenants, and a chief. The lieutenants supervised sergeants and patrolmen in their respective departmental divisions, which included patrol, investigative, service, and administrative. The Association later disclaimed interest in further representing the police employes in connection with a Joint Request for Certification between the Teamsters and the Borough in 2008. (Joint Exhibit 1; See PF-R-51-W & PF-R-08-70-W)

5. As of the hearing date in this matter, the Borough employs 19 police officers with the ranks of lieutenant, sergeant, and patrolmen, along with its Chief, Ophelia Coleman. The Borough has detectives, but the position is a designation and not a rank. Since 2008, there has been only one lieutenant, Michele Krempasky. (N.T. 8-10)

6. As the sole lieutenant, Krempasky serves as the shift commander for the daylight shift, answers calls for service, performs roll calls, posts the daylight schedule, approves pass days for her shift, keeps running statistics on arrests, directs patrols to certain areas based on reports of crime, testifies at legal proceedings, and conducts disciplinary investigations of other police officers. She is also in charge of the crossing guards, the administrative staff, and the parking enforcement officers. (N.T. 24-25, 36, 54-55, 64-65)

7. Krempasky has made recommendations regarding discipline for other police officers. The Chief has increased and/or decreased her recommendation level on occasion. The Chief has final say over what level of discipline is recommended to Council. Krempasky has authority to issue minor discipline, such as a written reprimand. The sergeants also have authority to issue written reprimands. (N.T. 29-32, 59)

8. Krempasky has no involvement in the hiring process, aside from performing a background investigation of candidates. She has never made a recommendation on the quality of an individual candidate. The Chief participates in the first level interviews, while subsequent interviews occur with other police chiefs. The Chief does not seek hiring recommendations from anyone. (N.T. 20-21, 59-60)

9. Krempasky has no authority to purchase anything within the department's budget. Nor does she have authority to utilize petty cash for purchases. She must obtain approval from the Chief to make any purchases. The Chief has the sole authority to make purchases for the department. (N.T. 32, 60).

10. Krempasky has no involvement with the budget. The Chief attends the budget meetings with the Borough's finance director, as well as a member of Borough Council. The Chief is solely responsible for preparation of the budget proposal before submitting it for Council's approval. (N.T. 26-27, 32)

11. The Chief has final say over the policy manual before it goes to Borough Council for approval. The Chief sometimes considers suggestions from the Lieutenant, as well as the sergeants and patrolmen, but the Chief is the only officer that decides what policies are submitted to Council for approval. (N.T. 27-28)

DISCUSSION

The Union has petitioned the Board to exclude the Lieutenant position from the bargaining unit, alleging that the Lieutenant is a managerial employe. The Borough, however, opposes the Petition for Unit Clarification on the grounds that the Union has failed to demonstrate any change since the matter was previously litigated in 1978 and the Lieutenant's duties do not support an exclusion from the bargaining unit.

It is well settled that a lack of asserted change in job duties will bar subsequent unit clarification proceedings where the status of employes was previously litigated and there was a factual resolution of the dispute on the record. Northeastern Educational Intermediate Unit 19, 11 PPER ¶ 11232 (Nisi Order of Unit Clarification, 1980). In this case, there has been a change in facts and law, despite the prior litigation surrounding the Lieutenant position in 1978. The record shows that, in 1978, the Borough employed 44 police officers, including 34 patrolmen, five sergeants, four lieutenants, and a chief. The lieutenants supervised sergeants and patrolmen in their respective departmental divisions, which included patrol, investigative, service, and administrative. At the time of the hearing in this matter, however, the size of the department was greatly reduced. In fact, the Borough currently employs only 19 police officers with the ranks of lieutenant, sergeant, and patrolmen, along with the Chief. Likewise, Krempasky has been the only lieutenant since 2008. As a result, the record does not show that different lieutenants supervise sergeants and patrolmen within four separate departmental divisions, consisting of patrol, investigative, service, and administration. Instead, Krempasky serves as the sole lieutenant and shift commander. What is more, the Commonwealth Court handed down a decision in Fraternal Order of Police Star Lodge No. 20 v. PLRB, 522 A.2d 697 (Pa. Cmwlth. 1987), aff'd 560 A.2d 145 (1989), which was subsequent to the previous litigation regarding the lieutenant position, and which altered the analysis for managerial employes under the PLRA and Act 111. Therefore, the Union's Petition for Unit Clarification is not barred and will be considered on the merits.

The question of whether the Lieutenant is a managerial employe depends on the test set forth in Star Lodge, supra. 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 Employes of Elizabeth Township, 37 PPER ¶ 90 (Final Order, 2006).

In this case, the Union has not sustained its burden of proving that the Lieutenant position satisfies any of the six criteria of managerial status. To the contrary, the record shows that the Lieutenant does not meet the policy formulation or implementation elements of the test. Indeed, the record reveals that the Chief has final say over the policy manual before it goes to Borough Council for approval. The Chief sometimes considers suggestions from the Lieutenant, as well as the sergeants and patrolmen, but the Chief is the only officer that decides what policies are submitted to Council for approval. Likewise, there is absolutely no evidence whatsoever that the Lieutenant has the authority to develop or change programs of the department. This does not support a finding that the Lieutenant is a managerial employe under Act 111.

Similarly, the Lieutenant position does not satisfy any of the remaining four elements of the test, including overall personnel administration responsibility, budget making, purchasing role, or independence in public relations. The record shows that the Lieutenant has no involvement in the hiring process, aside from performing a background investigation of candidates. She has never made a recommendation on the quality of an individual candidate. The Chief participates in the first level interviews, while subsequent interviews occur with other police chiefs. The Chief does not seek hiring recommendations from anyone. While the Lieutenant has made recommendations regarding the level of discipline for other police officers, the Chief has increased and/or decreased her recommendation level on occasion. The Chief has final say over what level of discipline is recommended to Council. Although the Lieutenant has authority to issue minor discipline, such as a written reprimand, the sergeants also have authority to issue written reprimands. This is hardly evidence of effective involvement in hiring, serious disciplinary actions, and dismissals.¹

In addition, the Lieutenant has no involvement with the budget. The Chief attends the budget meetings with the Borough's finance director, as well as a member of Borough Council. The Chief is solely responsible for

¹The Union contends that the Lieutenant should be excluded from the bargaining unit because she performs investigations of other officers in disciplinary matters and physically sits with management during some grievance meetings and arbitrations. However, these factors do not support a managerial exclusion under the test set forth in Star Lodge. Furthermore, the Board has certified units of police officers under Act 111 since 1977 and has not certified a separate unit for the various police departments' internal affairs divisions and bargaining under Act 111 has proceeded unabated. In the Matter of the Employes of Philadelphia Housing Authority, 32 PPER ¶ 32046 (Final Order, 2001).

preparation of the budget proposal before submitting it for Council's approval. As such, it cannot be seriously contended that the Lieutenant has demonstrated effectiveness in the preparation of proposed budgets, as distinguished from merely making suggestions with respect to particular items. Nor can it be held that the Lieutenant has an effective role in the purchasing process, as distinguished from merely making suggestions. The Lieutenant has no authority to purchase anything within the department's budget. Nor does she have authority to utilize petty cash for purchases. She must obtain approval from the Chief to make any purchases. The Chief has the sole authority to make purchases for the department. Finally, the record is devoid of any evidence to show that the Lieutenant exercises the independent authority and judgment to commit departmental resources in dealing with public groups to support an exclusion under the independence in public relations criteria. Accordingly, the Petition for Unit Clarification must be dismissed.

CONCLUSIONS

The 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 and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The Lieutenant position is not a managerial employe and is properly included in the bargaining unit.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Petition for Unit Clarification is dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 93.31 and 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 12th day of January, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner