

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF	:	
	:	
	:	Case No. PF-U-11-4-E
PENNBROOK BOROUGH	:	(PF-R-05-69-E)
	:	

**PROPOSED ORDER OF UNIT CLARIFICATION**

On January 5, 2011, the Pennbrook Police Association (Union) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification seeking to include the position of lieutenant in the bargaining unit of police officers in Pennbrook Borough (Borough). On January 11, 2011, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on April 18, 2011, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. The Union and the Borough did not file post-hearing briefs.

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

**FINDINGS OF FACT**

1. The Borough is a political subdivision within the meaning of Act 111 as read with the Pennsylvania Labor Relations Act (PLRA). (N.T. 3).

2. The Union is a labor organization within the meaning of Act 111 and the PLRA. (N.T. 3).

3. On October 4, 2010, the Borough created the position of lieutenant within the police department. (N.T. 8; Employer Exhibit 5).

4. Stephen Mowery was appointed to fill the newly created position of lieutenant. He began working in that position in early January 2011. (N.T. 12-14, 27).

5. Lieutenant Mowery fills in for Chief of Police David E. Hiester when the Chief is not present or available. (N.T. 15, 29-30, 46-47, 69).

6. Before the creation of the lieutenant position, the Chief would create a special order designating an officer in command. (N.T. 17).

7. The ordinance that created the position of lieutenant also created the position of sergeant. The ordinance provides that the lieutenant shall act in the place of the Chief in his absence or when the Chief designates the lieutenant to do so. The ordinance also provides that the sergeant is third in command and shall act in place of the Chief in his absence and in the absence of the lieutenant. (Employer Exhibit 5).

8. On February 7, 2011, Lieutenant Mowery signed an agreement written and presented by the Central Dauphin School District. The agreement expresses certain responsibilities involving police events on buses and at bus stops within the Borough. (N.T. 17-18, 23, 60; Employer Exhibit 1).

9. Lieutenant Mowery did not consult with the Chief when deciding whether to sign the agreement with Central Dauphin School District. Lieutenant Mowery has not signed any other agreements. (N.T. 17-18, 24-25, 61).

10. The Chief has signed the same or similar agreements with the Central Dauphin School District in years past. (N.T. 18-19).

11. Lieutenant Mowery assigns and schedules officers for training courses. Prior to becoming lieutenant, patrolman Mowery was the training officer in charge of scheduling patrol

officers for training. Patrolman Mowery proposed the schedule for training to the Chief for review. The Chief then authorized the training. Lieutenant Mowery is no longer required to obtain the Chief's approval for sending an officer to training. (N.T. 19-21, 57-59).

12. The Chief develops the budget for the police department. Lieutenant Mowery does not develop or determine the training budget. (N.T. 22, 59, 79).

13. When an officer is at training, another officer may have to be scheduled for patrol to cover his absence. Both the officer in training and the replacement officer are paid for the day. In assigning officers to training, Lieutenant Mowery ensures that money allocated for training in the training budget is available. (N.T. 33-35, 75, 79).

14. On Friday, March 4, 2011, Lieutenant Mowery issued an e-mail informing officers that mandatory CPR and first-aid training was being held on Thursday, March 24, 2011, in the Borough Building. The e-mail further stated as follows:

All officers must attend this training unless you have provided satisfactory proof, to the Chief of police, that you have received this training else where. If you do not attend this training you will be required to obtain CPR and First Aid on you[r] own. If you do not attend this training and you are not certified in First Aid and CPR in a time[ly] fashion, your MPOETC status may be suspended.

((N.T. 35; Employer Exhibit 2)).

15. Sometime on or before Monday, March 7, 2011, Lieutenant Mowery issued an e-mail to the officers indicating that he had become aware of officers not refueling their patrol vehicles. The e-mail further provided as follows:

It is your responsibility to fuel patrol vehicles when the gas gauge is NEAR or AT 1/2 tank. There is no reason why you can not get gas when the fuel gauge is near or at 1/2 a tank when you have only a couple of calls. That means if the gas gauge [sic] is between 3/4 and 1/2 and you have not been busy, you need to fuel the vehicle. If there is a reason why you could not get gas when the fuel gauge is near or 1/2 a tank (e.g. numerous calls or a late call) you must notify the on com[ing] shift that the vehicle is going to need fuel.

(Employer Exhibit 4).

16. The car refueling e-mail memorialized a previous practice that was verbally instituted by the Chief. (N.T. 57, 63).

17. Lieutenant Mowery is investigating a citizen complaint against a Borough officer alleging theft and misconduct against the officer. Lieutenant Mowery has not had time to complete his investigation. Lieutenant Mowery has not issued any discipline to anyone. (N.T. 56-57).

18. Lieutenant Mowery has not changed or developed any departmental programs or policies. He has not made changes to the department policy manual. He has not hired any department employees. He has not made purchases and has had no dealings with the media. (N.T. 63-64).

## **DISCUSSION**

The Union has petitioned to include the position of lieutenant in the bargaining unit. The Borough, however, opposes the petition on the grounds that the position of lieutenant is managerial. In FOP Star Lodge No. 20 v. Commonwealth of Pennsylvania, PLRB, 522 A.2d 697 (Pa. Cmwlth. 1987), aff'd per curiam, 522 Pa. 149, 560 A.2d 145 (1989) (Star Lodge), the Commonwealth Court set forth six criteria of managerial status for firefighters and police officers under Act 111. Under Star Lodge, the Borough, as the party seeking the exclusion, has the burden of proving the following:

[T]hat the [employee in the position] has authority to initiate departmental policies, including the power to issue general directives and regulations; he [or she] has the authority to develop and change programs of the department; he [or she] engaged in overall personnel administration as evidenced by effective involvement in hiring, serious disciplinary actions and dismissals; he [or she] effectively prepared budgets, as distinguished from merely making suggestions; he [or she] effectively engaged in the purchasing process, as compared to merely providing suggestions; or he [or she] has the authority to commit departmental resources in dealing with public groups. [Fraternal Order of Police Lodge No. 20 v. PLRB (Star Lodge), 522 A.2d 697, 704 (Pa. Cmwlth. 1987, aff'd, 522 Pa. 149, 560 A.2d 145 (1989)]. Significantly, the test for managerial status under Act 111 is disjunctive and not conjunctive, such that the performance of any of the above functions results in a finding of managerial status.

In the Matter of the Employees of Elizabeth Township, 37 PPER 90 at 291 (Final Order, 2006) (citing Star Lodge, supra).

During the hearing, the Union objected to the admission of post-petition evidence. Given the very close timing between the date that Lieutenant Mowery began working in the position of lieutenant and the filing of the petition (within one week), the Union's position would preclude all of the evidence of Lieutenant Mowery's duties in this case. In the case, In the Matter of the Employees of Westmoreland County, 40 PPER 35 (Final Order, 2009), aff'd, sub. nom., 991 A.2d 976 (Pa. Cmwlth. 2010), appeal denied, \_\_\_ Pa. \_\_\_, 17 A.2d 1256 (2011), the Board reversed my ruling that evidence of post-petition job duties is inadmissible. The Westmoreland Board stated the following:

The Hearing Examiner cited Elizabeth Township, 33 PPER 33053 (Final Order, 2002 in refusing to consider Ms. Angelo's testimony regarding her post-petition job duties as the Domestic Relations Establishment/Case Initiation Supervisor. The policy set forth in Elizabeth Township is designed to deter an employer from assigning job duties to an employee after a petition is filed simply to justify the employee's inclusion or exclusion from the unit. Because there is no reason to believe that there is any such concern in this case, Elizabeth Township is not applicable here.

Westmoreland, 40 PPER at 154. In affirming the Board, the Commonwealth Court approved of the Board's consideration of post-petition evidence "where the record lacked evidence showing the County changed the duties of the position after filing of the Petition in order to justify its inclusion or exclusion from the bargaining unit." Westmoreland County, 991 A.2d at 979.

However, in other cases, the Commonwealth Court has espoused a more bright-line rule that categorically prohibits consideration of post-petition evidence. North Hills School District v. PLRB (North Hills I), 722 A.2d 1155 (Pa. Cmwlth. 1999); North Hills School District v. PLRB (North Hills II), 762 A.2d 1153, 1156 n.9 (Pa. Cmwlth. 2000). In North Hills I, the Commonwealth Court held as follows:

The Board's refusal to address Ms. Dougherty's post-petition activities was proper. The Board has a longstanding policy to view post-filing activities relating to the confidential status of the employee as highly suspect. This policy is rooted in the belief that confidential activities will be assigned to an employee after a petition is filed to obfuscate an attempt to include certain employees in a bargaining unit.

North Hills I, 722 A.2d at 1159. More recently, the Commonwealth Court again followed the bright-line rule excluding post-petition evidence in Neshannock Educational Support Professionals v. PLRB, 1657 C.D. 2010, Decided June 14, 2011). The Neshannock Court stated "we may not consider an employee's involvement in collective bargaining after the filing of a petition for unit clarification." Neshannock, at 2 n.2 (emphasis original).

Therefore, reading Westmoreland with Neshannock and North Hills I and II, there are two different rules regarding the admissibility and consideration of post-petition

evidence in unit clarification matters. Selecting the proper rule is determined by the nature of the position in question. The Board's and the Court's Westmoreland standard permits the admission and consideration of post-petition evidence where the employer has created a new position or reorganized its enterprise necessitating a change in duties occurring post-petition. The prohibition against post-petition evidence applies when a position has existed in the same form for some time and the employer changes the job duties post-petition indicating an attempt to manipulate the Board's petition determination and to justify the employee's inclusion in or exclusion from the unit.

In this case, the Westmoreland rule applies because the position of lieutenant at the Borough police department is a newly created position resulting from a department reorganization. Also, the petition was filed within days of Lieutenant Mowery beginning his lieutenant responsibilities. Although this situation may also lend itself to employer manipulation, the inability to compare pre-petition job duties to post-petition job duties presents an inadequate record from which to infer employer manipulation of the Board's determination on the petition.

However, after evaluating and considering all the post-petition job duties of record performed by Lieutenant Mowery, I conclude that the Borough failed to establish that those job duties satisfies any of the elements of Star Lodge. Lieutenant Mowery has not changed, developed or implemented any departmental programs, policies or regulations. He has not made any changes or proposed changes to the department policy manual. He has not hired any department employees. He has not made any purchases and has had no dealings with the media. Lieutenant Mowery has not imposed any discipline, let alone serious discipline. The police vehicle refueling e-mail that he distributed to the officers did not constitute a change in or the development of policy, rules or behavior. Rather it was a writing that reminded officers of the existing unwritten policy established by the Chief.

Lieutenant Mowery's duties regarding the training of officers are largely the same as they were when he was a patrolman except that now he can approve the expenditure himself without the Chief's review and approval. The scheduling of officers for training, in light of the roster and considering vacation schedules and officer availability, remains the same. As far as approving the expenditure, Lieutenant Mowery does not create or develop the training budget. He works within the training budget he is given and approves training based on the money remaining in the training budget. Accordingly, Lieutenant Mowery is not allocating department resources when approving training; he is using the money already allocated for such expenditures in the budget developed by the Chief and approved by the civilian leadership. Additionally, Lieutenant Mowery has not made any purchases or contracted for any major capital expenditures.

The source of the March 4, 2011 e-mail requiring officers to attend mandatory training for CPR and first aid is unclear. Although the e-mail was distributed by Lieutenant Mowery, the Chief may have directed the Lieutenant to apprise the officers of the training in this manner. Also, the e-mail establishes that the Chief, and not Lieutenant Mowery, makes the ultimate decisions about whether an officer has satisfactorily completed the required CPR and first aid training. Although Lieutenant Mowery fills in for the Chief in the Chief's absence, the Board has held that substituting for a managerial employee does not make one a managerial employee. Moreover, the ordinance creating both the lieutenant and sergeant positions provides that the person in the position of sergeant equally substitutes for the Chief when both the Chief and the lieutenant are absent.<sup>1</sup>

Lieutenant Mowery's signing the memorandum of agreement with Central Dauphin School District does not establish that he established a policy or allocated departmental resources within the meaning of Star Lodge. The agreement had been repeatedly signed in previous years in similar form by the Chief of Police. A review of the agreement reveals that the department has merely agreed to perform those duties that it has an obligation to perform within its jurisdiction. In other words, the Borough police department already has an obligation to investigate and address any of the criminal, violent, drug-related activities at bus stops or on buses within the Borough, whether it agrees to or not. The

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<sup>1</sup> There is no officer currently in the position of sergeant at this time.

agreement, therefore, does not create an additional commitment or allocation of department resources; it does not involve the development or implementation of policy where the duties and obligations articulated in the agreement are, and have been, part of the normal continuous operation of the department. Indeed, the fact that the agreement or the decision to sign the agreement with the School District was not reviewed and approved by the civilian leadership (i.e., the Mayor or Council or both), as would be a policy manual or a budgetary change, supports the conclusion that the agreement did not involve the allocation of resources or a change in policy.

Accordingly, the newly created position of lieutenant at the Borough police department is not a managerial position and is properly included within the bargaining unit of police officers.

#### **CONCLUSION**

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

1. The Borough is a political subdivision within the meaning of Act 111 as read with the PLRA.
2. The Union is a labor organization within the meaning of Act 111 as read with the PLRA.
3. The Board has jurisdiction over the parties.
4. The position of lieutenant at the Borough police department is not a managerial position and is properly included in the bargaining unit of police officers in the Borough police Department.

#### **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 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 final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this twenty-seventh day of June, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner