

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF
NORRISTOWN BOROUGH

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: Case No. PF-U-10-170-E
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PROPOSED ORDER OF UNIT CLARIFICATION

On November 18, 2010, the Borough of Norristown (Borough) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification seeking to exclude three lieutenants and one captain from the bargaining unit of police officers. On November 30, 2010, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on April 15, 2011, in Harrisburg. The hearing was continued once, due to the unavailability of a Union witness, and rescheduled for September 14, 2011, in the Borough. During the hearing on that date, the Borough and the Norristown Fraternal Order of Police, Lodge 31 (Union) were afforded a full and fair opportunity to present evidence and cross-examine witnesses. The Union and the Borough presented closing arguments instead of filing 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. 5).
2. The Union is a labor organization within the meaning of Act 111 and the PLRA. (N.T. 5).
3. The parties stipulated and agreed that the Union is the exclusively recognized bargaining representative for the police officers and that the bargaining unit consists of all full-time police officers, excluding the Chief of Police. There are no part-time police officers employed by the Borough. (N.T. 5-6).
4. The Chief of Police in the Borough is Chief Russell J. Bono. (N.T. 11; Employer Exhibit 1).
5. Lieutenant Hetrick is the commander of the patrol division of the Borough's Police Department (Department). The patrol division consists of four platoons. Three platoons rotate shifts. The fourth platoon is a steady midnight shift. Lt. Hetrick evaluates the patrol officers and ensures compliance with Department rules and regulations. (N.T. 14-15; Employer Exhibit 1).
6. Lieutenant Shannon is in charge of staff services. He is in charge of the records room. He collects, categorizes and files reports. He runs the parking enforcement division. He oversees the civilian school guides as well as the civilians who watch the prison cells, enter data, and answer informational telephone calls. (N.T. 17-19; Employer Exhibit 1).
7. The Department is accredited through the Pennsylvania Law Enforcement Accreditation Commission (PLEAC). The accreditation took two years to obtain. There are approximately 200 standards that the Department had to satisfy to obtain the accreditation. (N.T. 20, 56).

8. Departmental policies are issued as general orders. Lt. Shannon develops all general orders to ensure compliance with PLEAC standards. Since 2003, Lt. Shannon has been responsible for creating the standards and policies to obtain and maintain PLEAC accreditation. Lt. Shannon is the resident expert on PLEAC requirements. Chief Bono is not familiar with PLEAC standards. (N.T. 20-21, 50).

9. Lt. Shannon referred to model policies offered through PLEAC and the Pennsylvania Chiefs of Police Association website. Lt. Shannon modified the policies to meet the needs of the Norristown Police Department. Lt. Shannon drafts a policy and sends it to the Chief. The Chief reviews and signs each policy. Chief Bono has never changed one of Lt. Shannon's policy drafts. The Chief has discussed policies with Lt. Shannon. The Chief defers to Lt. Shannon's judgment where there is disagreement. (N.T. 21-23, 51-53; Union Exhibit 1).

10. PLEAC requires a policy to exist for a subject matter. PLEAC does not dictate how the policy is developed or how its standards are met. (N.T. 51, 68).

11. Lt. Shannon developed and drafted many policies for the Department without input from or changes by Chief Bono or Captain Richet. Lt. Shannon drafted the policy regarding unbiased policing, embodied in General Order 2006-1, dated March 1, 2006. This policy was reviewed by Captain Richet in 2007, 2009 and 2011. (N.T. 23, 28; Employer Exhibit 2).

12. Lt. Shannon developed the policy regarding mobile video and audio recorders embodied in General Order 2006-2, dated May 10, 2006. Captain Richet reviewed this policy on January 20, 2011. Chief Bono did not change this policy before signing it. (N.T. 25; Employer Exhibit 3).

13. Lt. Shannon drafted the policy regarding Tasers embodied in General Order 2006-3, dated November 2, 2010. Chief Bono did not change the drafted policy, which may have included input from the Department's Taser instructors. (N.T. 26-27; Employer Exhibit 4).

14. Lt. Shannon developed the Bicycle patrol policy embodied in General Order 2007-1, reviewed by Captain Richet in 2009 and 2011, without input or changes by Chief Bono. (N.T. 28; Employer Exhibit 5).

15. When the Chief receives notice of an incident involving an officer, he will direct the sergeant or head of detectives to investigate and give him a report. After reviewing the report, the Chief calls a command staff meeting to review whether and what type of discipline to impose. A command staff meeting, also referred to as "Tribal Council" consists of the Chief, the Captain and the three lieutenants. (N.T. 31-32, 36, 38-39; Employer Exhibit 6).

16. Chief Bono follows the consensus decision of the command staff in determining the discipline to impose. The Chief has never overridden the consensus of the command staff. (N.T. 59-60, 87-88).

17. When an officer is to be disciplined, the Chief typically holds a meeting in his office with the officer and Union President Deorizo. During the meeting, Chief Bono clearly explains that he has met with his command staff regarding the imposition of discipline. (N.T. 75-76).

18. Hiring a police officer is a civil service process. The Captain and the lieutenants, in various combinations, hold oral interviews for entry level patrol officers. After the candidates pass a written examination, they advance to the oral interview stage. Some questions asked at the oral interview are developed by the command staff officers and others are provided by the Civil Service Commission. Sometimes command staff officers modify the Civil Service Commission questions. (N.T. 39-41).

19. Each individual command staff officer scores the candidate based on the candidate's answers to questioning during the oral interview. Each candidate must receive a score of seventy or higher on each question to proceed to the next level in the hiring process. Chief Bono has no input into the interviewing or scoring process. (N.T. 40-41).

20. If any officer on the command staff interviewing panel gives a failing score, the candidate is eliminated from consideration. Each officer on the panel has the ability to eliminate any candidate. (N.T. 41).

21. The lieutenants hire for civilian positions within the Department along with the human resources manager. The Chief has no input into civilian hiring. Lieutenant Shannon has suspended civilian employees without input from anyone else. (N.T. 42, 61).

DISCUSSION

The Borough has the burden of proving the managerial status of the Captain and three lieutenants. In the Matter of the Employees of Elizabeth Township, 37 PPER 90 (Final Order, 2006). In Elizabeth Township, the Board reiterated the test for determining the managerial status of a position as follows:

In order to meet its burden of establishing the managerial status of the . . . position, the [employer] was required to prove that the actual job duties satisfy one of the following criteria: that 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.

Elizabeth Township, 37 PPER at 291.

1. Policy Formulation and Implementation

In Elizabeth Township, *supra*, the Board relied on Dalton Police Ass'n v. PLRB, 765 A.2d 1171 (Pa. Cmwlth. 2001) and held that a deputy chief was a managerial employee because he selected which policies and procedures from other police departments to adopt for the Elizabeth Township Police Department. The Board stated: "It is not significant in the development of the manual for his department that Black 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." Elizabeth Township, 37 PPER at 291. 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. As stated by the examiner in In the Matter of the Employees of Indian Lake Borough, 40 PPER 39 (Order Directing Submission of Eligibility List, 2009), "these cases require the Board to determine with whom lays the real responsibility for setting and approving the policies contained in the draft procedures manual." Indian Lake Borough, 40 PPER at 173.

On this record, Lieutenant Shannon is a managerial employee. Since 2003, he has been responsible for creating the policies to obtain and maintain PLEAC accreditation. Although Lt. Shannon referred to model policies offered through PLEAC and the Pennsylvania Chiefs of Police Association website, his selection of which policies to adopt as well as his modification of those policies to meet the needs of the Norristown Police Department, demonstrates independent judgment and discretion in the area of policy formulation within the meaning of Dalton and Elizabeth Township. Lt. Shannon drafts a policy and sends it to the Chief. The Chief reviews and signs each policy, but Chief Bono has never changed one of Lt. Shannon's policy drafts.

The fact that the Chief reviews Lt. Shannon's policy formulations does not, by itself, negate the Lieutenant's managerial status. Star Lodge, 522 A.2d at 704 (emphasizing that "the mere fact that policy determinations are subject to review by a higher authority does not necessarily negate managerial status"). The Chief defers to Lt. Shannon's judgment where there is disagreement because Lt. Shannon knows PLEAC, not the Chief. Lt. Shannon developed and drafted many policies for the Department, without input from or changes by Chief Bono or Captain Richet, including the following: the policy regarding unbiased policing, mobile video and audio recorders, Tasers and Bicycle patrol. Lt. Shannon is genuinely responsible for formulating many Departmental policies.

The record indicates that Lieutenant Hetrick, as commander of the four platoons in the patrol division, evaluates officers and ensures their compliance with Department rules and regulations. However, there are no specific, historical facts in the record either supporting what amounts to a legal conclusion regarding policy implementation or explaining the manner in which evaluations are performed and rule compliance is achieved. With the exception of their involvement in effectuating discipline, which will be addressed *infra*, the record is devoid of sufficient evidence to conclude that the Captain and the lieutenants implement policy.

2. Personnel Administration

A. Discipline

The Borough also argues that the three lieutenants and the Captain are involved in overall personnel administration, as evidenced by their effective involvement in hiring and discipline. In Star Lodge, *supra*, the Court affirmed the Board's exclusion of captains from a police bargaining unit because of their involvement in policy formulation. Star Lodge, 522 A.2d at 704. The Star Lodge Court stated the following:

In this case, the Board correctly pointed out that the hearing examiner's decision excluding captains from the bargaining unit, by treating them as managerial, was based upon the captains' job duties 'which included the formulation and implementation of policy in the budget.'

As noted in the Board's decision, ***the unique aspect here is that policy was promulgated through the consistent development of a consensus among the captains and the police commissioner.***

Star Lodge, 522 A.2d at 704 (emphasis added).

In the case, In the Matter of the Employees of Lower Merion Township, 41 PPER 22 (Proposed Order of Dismissal, 2010), Hearing Examiner Wallace applied the above quoted holding in Star Lodge to very similar facts and concluded that captains who reach consensus at command staff meetings regarding policy were managers. Examiner Wallace concluded as follows:

[S]ince 1982 superintendents of police have held command staff meetings with two captains and five lieutenants to reach a consensus on policies and procedures to govern the operations of the police department and that current policies of the police department are as

recommended by two lieutenants to the command staff and approved by the superintendent of police in 1998 and 1999.

Given that captains as members of the command staff reach consensus on the policies and procedures to govern the operations of the police department and that current policies of the police department are as recommended by two lieutenants to the command staff and approved by the superintendent of police, it is apparent that based on their job duties captains are managerial employes under the policy formulation criterion of Star Lodge. Indeed, on a substantially similar record in Star Lodge, the court held that captains were managerial employes, explaining that "policy was promulgated through the consistent development of a consensus among the captains and the police commissioner." 522 A.2d at 704.

Given that lieutenants as members of the command staff reach consensus on the policies and procedures to govern the operations of the police department and that current policies of the police department are as recommended by two lieutenants to the command staff and approved by the superintendent of police in 1998 and 1999, it also is apparent that lieutenants still are involved in establishing policies and procedures as in 1982.

Lower Merion Township, 41 PPER at 81 (emphasis added).

Certainly, if involvement in command staff meetings to reach consensus on policy formulation is sufficient for managerial status then the same result must obtain for employes involved in command staff meetings to reach consensus on discipline. In this case, the record demonstrates that the command staff consists of the Chief, the Captain and the three lieutenants. A command staff meeting regarding discipline is also known as "Tribal Council." The Captain and three lieutenants all have input into serious disciplinary decisions. Chief Bono follows the consensus decision of the command staff in determining the discipline to impose, and he has never overridden one of those decisions.

Although the Union argues that the Chief is the only person ultimately responsible for determining and imposing serious discipline, the record establishes that the Chief has shared and delegated much of that managerial authority among his command staff. When an officer is to be disciplined, the Chief holds a meeting in his office with the officer and Union President Deorizo. Chief Bono clearly explains that he has met with his command staff regarding the imposition of discipline. Although Union President Deorizo testified that, during these disciplinary meetings, the Chief has emphasized that the discipline is his decision, that testimony does not rebut the fact that the Chief's decision is also the consensus of the command staff. Also, Lieutenant Shannon has suspended civilian employes without input from anyone else.

Correcting intolerable behavior and deterring such future behavior is a core managerial function because it ensures that officers conduct themselves in a manner established by management for the effective and efficient operation of the enterprise. The meaningful involvement in effectuating serious discipline is also a component of policy implementation as well as overall personnel administration. Often discipline follows from a determination that a rule or regulation has been violated by an officer's behavior. Correcting the violative behavior is the necessary corollary to implementing the policy or rule violated by the officer. The Captain and the three lieutenants, therefore, are involved in policy implementation by meting out serious discipline for violating Department policies.

B. Hiring

The record also shows that the Captain and the three lieutenants are all significantly involved in the hiring process. Hiring a police officer is governed by the

local civil service commission. Under the civil service process, a candidate must submit to an oral interview after they pass a written examination. The Captain and the three lieutenants, in some combination, hold oral interviews for entry level patrol officers. The command staff officers ask questions that they have composed as well as questions developed by the Civil Service Commission. Command staff officers also have modified Civil Service Commission questions.

Each individual command staff officer scores the candidate based on the candidate's answers to the questions during the oral interview. Each candidate must receive a score of seventy or higher on each question to proceed to the next level in the hiring process. Chief Bono has no input into the interviewing or scoring process. If any officer on the command staff interviewing panel gives a failing score, the candidate is eliminated from consideration, which means that each officer on the panel has the power and authority to eliminate any candidate. The ability to eliminate a candidate from consideration for employment as an officer at the Department constitutes a significant involvement in the hiring process, which is a managerial function under Star Lodge. Additionally, the Lieutenants hire for civilian positions within the Department along with the human resources manager. The Chief has no input into civilian hiring.

Accordingly, the Captain and the three lieutenants are managerial employees whose positions are excluded from the bargaining unit because they are all significantly involved in the hiring and disciplinary process. As a consequence of effectuating discipline, the members of the command staff are also involved in policy implementation. Moreover, Lieutenant Shannon develops and formulates policies for the Department.¹

CONCLUSION

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

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 three positions of lieutenant at the Borough Police Department are managerial positions and are properly excluded from the bargaining unit.
5. The position of Captain at the Borough Police Department is a managerial position and is properly excluded from the bargaining unit.

ORDER

¹ Based on the conclusions reached herein, I need not address the Borough's position that Captain Richet commits resources of the Department to public groups.

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 Captain and the three Lieutenants are excluded from 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 twentieth day of October, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner