

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
 :
 : Case No. PERA-U-14-39-W
 : (PERA-R-21-60-W)
ALLEGHENY COUNTY :

PROPOSED ORDER OF UNIT CLARIFICATION

On January 23, 2014, the Service Employees International Union Local 668 (SEIU or Union) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification pursuant to the Public Employee Relations Act (PERA or Act), seeking to include all full-time 911 Shift Commanders at the Allegheny County (County or Employer) Department of Emergency Services in the first level supervisory meet and discuss unit. On March 12, 2014, the Secretary of the Board issued an Order and Notice of Hearing, designating a March 25, 2014 pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and assigning July 16, 2014, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was necessary and was held on July 16, 2014 before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence.¹ SEIU filed a post-hearing brief in support of its position on September 8, 2014. The County filed a post-hearing brief in support of its position on October 10, 2014.²

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 County is a public employer within the meaning of Section 301(1) of PERA.
2. SEIU is an employe organization within the meaning of Section 301(3) of PERA.
3. The County and SEIU are parties to a Meet and Discuss Memorandum for a first level supervisory unit. The supervisors are organized in a broad unit covering countywide departments. (N.T. 8-10; Union Exhibit 1)
4. The employes in the first level supervisory unit are paid hourly wages. (Union Exhibit 2)
5. The County employs 911 Shift Commanders in its Emergency Services Department, who are responsible for the functions of the 911 call center, including the facilities, equipment, and personnel. The Shift Commanders have a clear obligation to follow a number of County policies, which is consistent with the other supervisors in the County. (N.T. 14; Union Exhibit 3)
6. The Shift Commanders have similar educational requirements as employes in the supervisory unit, as their position requires no additional education beyond the employes under their charge. (N.T. 14-15; Union Exhibit 3)

¹This matter was consolidated and heard at the same time as the case docketed at PERA-U-14-34-W because both cases involved the same parties.

²This matter was significantly delayed due to a problem with the reporting service. On January 12, 2015, I advised the parties that I was requesting the notes of testimony be redone due to multiple errors contained therein. The Board received the corrected notes of testimony on April 29, 2015, which contained the same errors. As a result, I scheduled a teleconference with counsel for both parties on May 5, 2015, during which they were advised to review the corrected notes of testimony and indicate whether they believed the errors materially affected the result of the case or whether they preferred a decision on the transcript as it stands. On June 5, 2015, counsel for both parties advised that they have no objection to the Board rendering a decision on the transcript as it stands.

7. The Shift Commanders follow clear policy on how work is supposed to flow and are directed to refer to that policy regularly. For example, the Shift Commanders provide information regarding police calls to outside agencies, but only to the extent that the information has been approved by management. (N.T. 21; Union Exhibit 3)

8. The Shift Commanders do not answer phones at the 911 call center or dispatch first responders. Those duties belong to the rank and file bargaining unit. (N.T. 21-22)

9. The Shift Commanders are guided by the County policy regarding Media, which provides as follows:

All Media inquiries shall be directed to the Shift Commander. The Shift Commander will treat each request in a professional and non-confrontational manner. The information that can be released is:

- time of incident
- location of incident
- yes, there is a fire, police or EMS activity ongoing
- injuries yes or no
- number of alarms
- roadway blockages

Specific information pertaining to an incident is not to be released.

If a law enforcement agency provides us with a BOLO (be on the lookout) to release to the media, then we will release the BOLO to the media as supplied by the law enforcement agency that provided it to us. We would not add to it, nor paraphrase, nor say the media release is from the Allegheny County 9-1-1 Center. This format would allow the BOLO media release to be in its exact intended state as provided and intended by the law enforcement agency that supplied it.

If a law enforcement agency that provided us with a BOLO didn't specifically state that the BOLO was for media release, then the media should they inquire should not be provided with the contents of the BOLO.

(N.T. 22-23; Union Exhibit 3, p. 16)

10. The Shift Commanders are responsible for the daily operations of the 911 center, which includes scheduling, ensuring the telecommunications officers (TCOs) are answering the phones and dispatches are entered correctly. (N.T. 32)

11. The Shift Commanders have no role in creating or determining policy. Nor do they have any budgetary responsibilities. (N.T. 32)

12. The Shift Commanders are not exempt or salaried employees, meaning that they get paid overtime. (N.T. 33, 47, 77)

13. The Shift Commanders report to a manager, who is on duty and who is on the floor with them or in an office nearby. Generally, if the Shift Commander has to deviate from a policy or procedure, he or she would consult the manager. On occasion, the Shift Commanders will direct a different person to take a call in an emergency. (N.T. 45-47, 58)

14. The Shift Commanders have no authority to enforce codes or regulations. (N.T. 32-33, 46)

15. The County's Department of Emergency Services is organized under the Chief for Emergency Services who is Alvin Henderson, Jr. He has the ultimate role in developing policy. Under Henderson, there is an Assistant Chief 911 Coordinator, who is Gary Thomas, and an Assistant Chief of Administration, who is Ms. Frazier. Both Thomas and Frazier are available for input on policy and procedure. Below the Assistant Chiefs are three

Communications Managers, who also have a role in developing policy. Beneath the Communications Managers are 12 Shift Commanders who oversee the 911 call center, which is staffed with the TCOs who are in the rank and file bargaining unit. (N.T. 53-55; County Exhibit 1)

16. At the 911 call center, the TCO 2 and 3 positions are mixed in on the floor together, while the Shift Commander is located at a podium in the center of the room. (N.T. 58)

17. The Shift Commanders are subject to County policies regarding Emergency Management Details, Hazardous Materials (Hazmat) Team Details, and Special Team Details (K9 Search & Rescue, Strike Team, etc.). Typically, the Shift Commanders must obtain the Chief's authorization prior to dispatching the team. However, in emergency situations, the Shift Commanders will waive the Chief's authorization and just dispatch the team. (N.T. 23, 62; Union Exhibit 3, p. 19)

DISCUSSION

SEIU contends that the Shift Commanders working at the 911 call center should be included in the first level supervisory meet and discuss unit. Specifically, SEIU argues that the Shift Commanders share a community of interest with the employees in the first level supervisory meet and discuss unit and that they are supervisors within the meaning of Section 301(6) of PERA. The County, meanwhile, submits that the Shift Commanders do not share a community of interest with the employees in the first level supervisory meet and discuss unit. In addition, the County posits that the Shift Commanders are managerial employees within the meaning of Section 301(16) of PERA. As a result, the County maintains that the Shift Commanders should be excluded from the first level supervisory meet and discuss unit.

Section 604(3) of PERA provides, in relevant part, as follows:

The board shall determine the appropriateness of a unit which shall be the public employer unit or a subdivision thereof. In determining the appropriateness of the unit, the board shall:

(1) Take into consideration but shall not be limited to the following: (i) public employees must have an identifiable community of interest, and (ii) the effects of over fragmentation...

43 P.S. § 1101.604(3).

In determining whether employees share an identifiable community of interest, the Board considers such factors as the type of work performed, educational and skill requirements, pay scales, hours and benefits, working conditions, interchange of employees, grievance procedures, bargaining history, and employees' desires. **West Perry School District v. PLRB**, 752 A.2d 461, 464 (Pa. Cmwlth. 2000). An identifiable community of interest does not require perfect uniformity in conditions of employment and can exist despite differences in wages, hours, working conditions, or other factors. *Id.* at 464.

In this case, the record demonstrates that the Shift Commanders have an identifiable community of interest with the employees in the first level supervisory meet and discuss unit. First of all, the Shift Commanders work for the same employer as the employees in the first level supervisory meet and discuss unit, which is the County. Likewise, the record shows that the Shift Commanders are not exempt or salaried employees, meaning that they are eligible for overtime pay. This is consistent with the employees in the meet and discuss unit, who are paid hourly wages. Further, the record shows that the Shift Commanders have similar educational requirements as employees in the supervisory unit, insofar as their position requires no additional education beyond that of the employees under their charge. In any event, the County is arguing that the Shift Commanders are managerial employees under Section 301(16) of the Act because they are above the first level of supervision. In doing so, the County has conceded that the Shift

Commanders are supervisors under Section 301(6) of the Act, which definitively establishes an identifiable community of interest with the employees in the supervisory unit, as they all share similar authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances, or to a substantial degree effectively recommend such action, in the interests of the County. See 43 P.S. § 1101.301(6). What is more, if the Shift Commanders are not found to share an identifiable community of interest with the employees in the supervisory unit, then this would result in clear over fragmentation, which is prohibited by the Act.

Next, the County contends that the Shift Commanders should be excluded from the meet and discuss unit because they are managerial employees pursuant to Section 301(16) of the Act. As the party seeking to exclude the Shift Commanders from the unit, the County has the burden of proving by substantial evidence the asserted statutory exclusions apply. **Westmoreland County v. PLRB**, 991 A.2d 976 (Pa. Cmwlth. 2010) *alloc. denied* 17 A.3d 1256 (Pa. 2011). The Board reviews actual job duties and will only consider written job descriptions to corroborate testimony of actual duties. *Id.* at 980.

Section 301(16) of PERA provides that:

“Management level employe” means any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level of supervision.

43 P.S. § 1101.301(16) .

The Board has held that if employes meet only one part of the three-part test set forth in Section 301(16), then those employes are managerial. **Pennsylvania Ass’n of State Mental Hospital Physicians v. PLRB**, 554 A.2d 1021 (Pa. Cmwlth. 1990). In **Horsham Township**, 9 PPER ¶ 9157 (Order and Notice of Election, 1978), the Board stated:

An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the Statute does not include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

The remaining criteria for designating an employe as managerial concerns one “who responsibly directs the implementation (of policy)” and shall include “all employes above the first level of supervision.” We interpret these criterion to include those persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to insure completion of the task. The administration of a policy involves basically two functions: (1) observance of the terms of the policy and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine and ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy. Furthermore, the interpretation of policy would constitute responsible implementation of policy as a continuation of the managerial decision making process.

* * *

In **City of Lebanon**, 4 PPER 24 (1974), we stated that policy formulation and implementation must be distinguished from technical expertise. To define the problem and directly implement the proposed solution to a problem is not the

same as performing a function within a known discipline with competence. The former has to do with policy and the latter deals with technical expertise.

The Commonwealth Court has opined that an employee's decisions are not managerial if they are part of the employee's routine discharge of professional duties. **Municipal Employees of the Borough of Slippery Rock v. PLRB**, 14 A.3d 189 (Pa. Cmwlth. 2011). Rather, in order to be considered a managerial level employee, the employee must be responsible for not only monitoring compliance with a policy, but also for taking action in situations where noncompliance is found. *Id.* at 192. The exercise of authority to take remedial action in the event of noncompliance with governmental regulations is the hallmark of a management level employee. **In the Matter of the Employes of Jefferson Morgan School District**, 31 PPER ¶ 31115 (Proposed Order of Unit Clarification, 2000) *citing School District of Philadelphia v. PLRB*, 719 A.2d 835 (Pa. Cmwlth. 1998).

The record here does not support an exclusion pursuant to the first prong of the test for managerial employees under Section 301(16) of the Act. Indeed, there is no evidence that the Shift Commanders are involved directly in the determination of policy. The County presented evidence that the Shift Commanders brought a problem to their manager regarding TCOs using earbud devices during their shifts and not hearing radio transmissions, which ultimately resulted in a new policy which was explained to the Shift Commanders at a meeting with management personnel. However, this falls woefully short of establishing that the Shift Commanders were involved directly in the determination of policy. There was no evidence that the Shift Commanders had the authority to select among options and put a proposed policy into effect. Nor was there any evidence that the Shift Commanders participated with regularity in the process of policy proposals and decisions. Instead, the record simply shows that the Shift Commanders reported a problem to management on one occasion with TCOs using earbud devices, which resulted in a new policy being issued by other employees. (N.T. 65-67). This is not sufficient to establish an exclusion for managerial status under the Act.

Similarly, the record does not support an exclusion pursuant to the second prong of the test for managerial employees under Section 301(16). The County argues that the Shift Commanders are managerial employees because they have complete responsibility for the operation of the 911 call center during any given shift. Likewise, the County avers that the Shift Commanders implement policy by deviating from policy in emergency situations and developing response plans in the event of an equipment failure at the 911 call center. The County's arguments are unavailing.

First of all, the County cites to **In the Matter of the Employes of Commonwealth of Pennsylvania, Dept. of Corrections**, 21 PPER ¶ 21181 (Proposed Order of Dismissal, 1990) for the proposition that employees are considered managerial if they are responsible for the entire operation of their institutions during their shifts. The County also cites to **Pennsylvania Correctional Institutions**, 15 PPER ¶ 15122 (Final Order, 1984) and **In the Matter of the Employes of Allegheny County**, 28 PPER ¶ 28007 (Final Order, 1996) for the same proposition, and argues that the same result should obtain here because the Shift Commanders are also responsible for the entire call center during their shifts. However, these cases are readily distinguishable from the instant matter. The record here does not support the County's argument in this regard because, unlike the captains and lieutenants in the corrections cases cited above, the Shift Commanders do not control the entire operation of the 911 call center. To the contrary, the Shift Commanders report to a manager, who is on duty and who is on the floor with them or in an office nearby. The fact that Shift Commanders supervise the TCOs at the call center is scant evidence of managerial status. More importantly, the Shift Commanders do not operate with the same discretion as the captains and lieutenants in the corrections cases in that they have to consult with the manager to deviate from policy. In the corrections cases, the employees at issue had the discretion to decide how the employer's policies would be implemented in both emergency situations, such as suicide attempts and major disturbances at the prison, as well as in connection with security operations of the facilities, such as when the line of inmates would begin or changing the time for movement of the line. As a result, the corrections cases cited above are not controlling, and the County's argument in this regard is rejected.

In the same vein, the County's argument that the Shift Commanders implement policy by deviating from policy in emergency situations and developing response plans in the event of an equipment failure at the 911 call center are not persuasive. Assuming these duties could support an exclusion under Section 301(16) of the Act, the County did not present any evidence whatsoever that the Shift Commanders have actually performed these duties. Instead, the record is replete with examples of various hypothetical situations where witnesses appeared to envision this type of authority for the Shift Commanders. This is in stark contrast to actual historical accounts of Shift Managers having performed these job functions. Without specific evidence that the Shift Commanders have actually done these things on the job, I am unable to credit this evidence or find that it supports a managerial exclusion. It is black letter law that employees will not be excluded from bargaining units based on job duties which have not yet been performed. **In the Matter of Employees of Pottstown Borough**, 33 PPER ¶ 33192 (Final Order, 2002).

In any case, such duties amount to nothing more than technical expertise and can hardly be described as managerial in nature. To be sure, the job announcement which the Union submitted specifically requires four years of experience as an Allegheny County 911 TCO, along with meeting the requirements for a call center supervisor as outlined by the Pennsylvania Emergency Management Agency. (Union Exhibit 3). Further, the job announcement indicates that Shift Commanders must be able to pass certification within one year of appointment. (Union Exhibit 3). What is more, the job announcement specifically provides that "due to the nature of public safety operations, the employee is required to be on call 24 hours a day, 7 days a week. **During emergencies the employee will be required to provide support in response to the emergency.**" (Union Exhibit 3) (emphasis added). The record here shows that the Shift Commanders will occasionally direct a different person to take a call in an emergency. I am unable to conclude that this amounts to implementation of the County's policies. To the contrary, the Shift Commanders in doing so are simply providing support in response to an emergency, as required by their job description. They are not changing any County policy. This amounts to technical expertise, and not a managerial function pursuant to Section 301(16) of the Act.

In addition, the Shift Commanders' ability to bypass the Chief's authorization and dispatch Emergency Management Details, Hazmat Team Details, and Special Team Details is not indicative of managerial authority pursuant to Section 301(16). Once again, I find these job duties to be consistent with technical expertise, and not managerial authority. Likewise, these duties are akin to substituting for the Chief in his or her absence. However, the Board has held that substituting for a managerial employee is not indicative of managerial status. **In the Matter of the Employees of Pennbrook Borough**, 43 PPER 13 (Proposed Order of Unit Clarification, 2011). As such, the County has not sustained its burden of proving the Shift Commanders implement policy in accordance with the Act.

Finally, the County maintains that the Shift Commanders should be excluded as managerial employees because they are above the first level of supervision. Specifically, the County argues that the Shift Commanders supervise TCO 3's who are the first level supervisors. The County claims that TCO 3's are supervisory because they effectively recommend discipline through the use of problem acknowledgement forms; they train and evaluate other employees and have the ability to counsel subordinate TCOs; and they schedule, assign duties, and direct the activities of the rank and file TCOs through the development of a seating chart at the beginning of each shift which purportedly matches skill sets to open positions. However, the County has not established that the Shift Commanders are above the first level of supervision.

Section 301(6) of PERA provides as follows:

"Supervisor" means any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.

43 P.S. § 1101.301(6).

In **Abington Heights School District**, 42 PPER 18 (Final Order, 2011), the Board quoted **Luzerne County Community College**, 37 PPER 47 (Final Order, 2006) and opined as follows:

Employees must be excluded from the bargaining unit as supervisory if they have the authority to perform one or more of the functions listed in Section 301(6), actually exercise such authority and use independent judgment in exercising that authority. **McKeesport Area School District**, 14 PPER ¶ 14165 (Final Order, 1983). It must also be noted that Section 604(5) of PERA provides that the Board, in making supervisory determinations, "may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604(5). The Board, with appellate court approval, has looked to the extent to which supervisory duties are performed and concluded that employees who perform some supervisory duties, but do not perform those duties for a substantial portion of their work time, are not supervisors within the meaning of PERA. **West Perry School District v. PLRB**, 752 A.2d 462 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 795 A.2d 984 (2000); **State System of Higher Education v. PLRB**, 737 A.2d 313 (Pa. Cmwlth. 1999); **Independent Association of Pennsylvania Liquor Control Board Employees v. PLRB**, 409 A.2d 532 (Pa. Cmwlth. 1980). Conversely, where the employee performs predominantly supervisory duties, that employee is excluded from the rank and file unit as supervisory. **AFSCME v. PLRB**, 342 A.2d 155 (Pa. Cmwlth. 1975).

As a result, the Board in **Abington Heights School District**, *supra*, went on to hold that, absent evidence an employee spends a majority of his or her time performing supervisory duties, this is not sufficient evidence to show that the position in question should be excluded as supervisory under Section 301(6) of PERA.

In this case, even assuming the alleged job duties support a finding of supervisory status for the TCO 3's, the County has not established that the TCOs at issue spend a majority of their time performing supervisory duties. Indeed, the record is silent as to how much time the TCOs at issue spend performing these alleged supervisory duties. Moreover, the County's own witness, Assistant Chief 911 Coordinator Gary Thomas, readily conceded that TCO 3's are currently included in the rank and file bargaining unit. (N.T. 58). And, there is no pending unit clarification petition seeking to remove the TCO 3's from the rank and file unit. (N.T. 58-59). Further, the County's other witness, Communications Manager Marissa Williams, testified that any recommendation by a TCO 3 is subject to independent investigation with regard to reward or discipline. (N.T. 69-70). This is not sufficient to establish supervisory status for TCO 3's. See **Westmoreland County v. PLRB**, 991 A.2d at 982 (in order for evaluation of employee performance to support a supervisory exclusion, the evaluation must be given controlling weight and result in either an award or sanction). As a result, the County has not established that the TCO 3's are supervisors under the Act. Therefore, the Shift Commanders are not above the first level of supervision.

On this record, the County has not demonstrated that the 911 Shift Commanders are managerial employees under Section 301(16) of the Act.

CONCLUSION

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.
2. SEIU is an employee organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The 911 Shift Commanders share an identifiable community of interest with the employees in the first level supervisory meet and discuss unit.

5. The 911 Shift Commanders are supervisors within the meaning of Section 301(6) of PERA.

6. The 911 Shift Commanders are not managerial employes within the meaning of Section 301(16) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the unit is amended and the 911 Shift Commanders are included in the first level supervisory meet and discuss 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 twenty-fourth day of June, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

JOHN POZNIAK, Hearing Examiner