

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: PERA-U-18-134-W
: (PERA-R-16-153-W)¹
ERIE REGIONAL AIRPORT AUTHORITY :

PROPOSED ORDER OF DISMISSAL

On June 18, 2018, the Erie Regional Airport Authority (Authority or Employer) filed a Petition for Unit Clarification with the Pennsylvania Labor Relations Board (Board) seeking to exclude the lieutenant and sergeant positions from a unit of nonprofessional employes, represented by Teamsters Local Union No. 397 (Teamsters or Union), as supervisory employes, pursuant to Section 301(6) of the Public Employee Relations Act (PERA or Act).

On July 17, 2018, the Secretary of the Board issued an Order and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on October 17, 2018, if necessary.

After two continuances, the hearing ensued on June 5, 2019, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties both filed post-hearing briefs in support of their respective positions on August 7, 2019.

The Examiner, on the basis of the evidence presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Authority is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7)

3. The Union is the exclusive bargaining agent for a unit of police officers employed at the Authority. (Employer Exhibit 6)

4. The Union and the Authority are parties to a collective bargaining agreement (CBA) effective January 1, 2018 through December 31, 2019. (Employer Exhibit 6)

5. The current bargaining unit consists of six police officers, including one sergeant, one lieutenant, and four rank and file officers. The police officers work a continuous 24-hour operation patrolling and providing protective services at the Airport. (N.T. 11, 25, 71, 94-95, 155-156, 165-166; Employer Exhibit 1)

6. Ian Bogle is the Director of Public Safety and Facilities at the Authority and functions as the Police Chief. Bogle has basic law enforcement responsibilities, in addition to overseeing the Transportation Security

¹ The caption appears as amended by the hearing examiner.

Administration (TSA) security requirements, construction and repair projects, and the various tenants of the facility. (N.T. 11-12)

7. Jason Morell has been employed as a Lieutenant at the Authority for approximately eight or nine years. Morell previously served as a sergeant and has been employed as a police officer at the Authority for 18 years. (N.T. 158-159)

8. Jeremy Ricketts has been employed as a Sergeant at the Authority for approximately six years. Ricketts has been a police officer at the Authority for approximately 11 years. (N.T. 122)

9. Morell and Ricketts have occasionally issued discipline to other police officers in the form of Employee Written Corrective Action Notices and Records of Verbal Counseling. (N.T. 127-129, 133-138, 168-170, 174-176; Employer Exhibit 2, 3)

10. Morell and Ricketts conduct yearly evaluations of the other officers in the bargaining unit, which typically takes approximately two hours during one day to complete. (N.T. 129, 139, 180-182; Employer Exhibit 4, 5)

11. Morell and Ricketts spend the vast majority of their time, approximately 95 percent, performing the same duties as the other officers in the bargaining unit. These duties include conducting routine patrols of the terminal, terminal checks, vehicle patrols, monitoring traffic, making arrests, and sitting at checkpoints with the TSA staff. (N.T. 130-131, 140, 165-168, 172)

12. Ricketts is also responsible for posting the schedule, which requires him to print it and verify that the dates and shifts are filled. He performs this task every few weeks and posts copies on an internal board for three or four weeks in advance. The 24-hour schedule is already determined. Every year in April, the officers bid in seniority order, in accordance with the CBA, for which shifts they want to work, and Ricketts assigns the officers to shifts based on their seniority. When officers submit leave requests, Ricketts posts the open shifts on the schedule and submits the requests to the Chief for his approval. Ricketts has been in charge of scheduling since before he was promoted to sergeant. (N.T. 122-126, 147-148; Employer Exhibit 10, 13)

13. Ricketts has been the Authority's firearms instructor since 2011 or 2012, which was prior to his promotion to sergeant. He became the firearms instructor after he obtained a certification. His responsibilities in this role include training officers and making sure they are certified with their duty weapon, patrol rifle, and up to date on their Taser training, which requires approximately four days out of the year, as well as keeping track of paperwork. As part of his duties as firearms instructor, Ricketts also recommended updates to the Authority's firearms policy in 2017, which were approved. (N.T. 53-55, 102-105, 123, 126-127, 148-149; Employer Exhibit 9)

14. By memo dated November 7, 2014, Morell indicated the following, in relevant part, to the other officers of the Authority:

We are in the process of rolling out a newAWN [Airport Warning Notice] Program that will be implemented after its approval by

TSA. Due to the number of recent security violations we are implementing interim security procedures effective immediately. Security and access control need to be one of our everyday top priorities. The following will be the new procedures moving forward. This will include reporting requirements to TSA.

[sic] An incident/violation occurs an officer will respond immediately to the situation.

Immediately any person in violation of the Awn program will have their ID, Touch tag or effects seized.

If a person is found to be in violation of circumventing or being in the secured area they [sic] will be escorted immediately out of the area.

If this incident is a violation of our security plan (Security Breach, Awn Violation, Suspicious Activity, Prohibitive Items, Incidents that Impact Aviation, Threats to Aviation or others) [sic] Positive notification needs to be made to TSA Regulatory Inspector Carol Snyder...In the event she cannot be reached you are to call the PITT COM Center...If the violation is deemed to be potentially a national issue notification also needs (sic) made to TSOC (Transportation Security Operations Center)...

An immediate investigation will take place (this will be a chance for you to collect all the facts of the incident [sic]. This should not be rushed [sic] remember they violated the procedures. This includes checks of the Awn log for repeat offenders.

Contact needs [sic] made to either the Airport Security Coordinator (Chief Ian Bogle) or Alternate Airport Security Coordinator (LT. Jason Morell). It will be the determination of the Security Coordinator along with the input of the officer as to the outcome of the Awn.

You will be then required to immediately type up an incident report in full and submit it to the Executive Director, Airport Security Coordinator and Alternate Security Coordinator.

The Security Coordinator will be responsible for forwarding the final findings to TSA.

(Employer Exhibit 8)

15. In early 2017, the Erie County District Attorney's (DA) Office received a grant to furnish all the local law enforcement departments with Narcan or Naloxone, which is a drug administered to suspected opioid overdose victims. The DA's office required the Authority's police department to adopt a policy in order to receive the Narcan without any cost. Morell received an email from Bogle with sample policies, one of which Bogle received from the DA's office. Bogle asked Morell to review the policy to make sure it fit their needs. Morell reviewed the sample policy from the DA's office, made a couple minor changes, which reflected Morell to be the manager of supplies, consistent with the Authority's needs, and returned it back to Bogle for his approval. Morell is the Naloxone Manager under the policy. (N.T. 100-101, 106-107, 162-165, 180, 190-194; Employer Exhibit 7, 12)

DISCUSSION

The Authority has petitioned to exclude the Sergeant and Lieutenant positions from the bargaining unit on the basis that they are supervisory employees under Section 301(6) of PERA. The Union opposes the petition and submits that the Authority has not sustained its burden of proving the exclusions. As the party seeking to exclude the positions from the unit, the Authority 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(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, the Authority argues that the Sergeant and Lieutenant positions should be excluded from the unit because they investigate allegations of misconduct by other officers, determine if officers have violated Authority policy, issue discipline against officers, conduct formal evaluations, formulate and implement policy, interpret policy including the CBA, schedule officers for shifts, and make purchases and/or budgeting proposals. The Authority further contends that the Sergeant and Lieutenant positions should be excluded from the unit because they have a conflict of interest between their duties for the Authority and their alleged allegiance to the Union. The Authority's arguments have no merit.

First of all, the majority of these alleged duties involving misconduct investigations, determining whether officers violated a policy, formulating, implementing, and/or interpreting policy, including the CBA, and making purchasing or budgeting recommendations are not indicia of supervisory status under Section 301(6) of the Act. Further, even assuming these alleged duties supported a supervisory exclusion under Section 301(6) of the Act, the Authority did not present any credible evidence to show that the Sergeant and/or Lieutenant spend a majority of their time performing these tasks. In fact, the record shows the opposite to be true, i.e. that Ricketts and Morell spend the vast majority of their time, approximately 95 percent, performing the same duties as the other officers in the bargaining unit. These duties include conducting routine patrols of the terminal, terminal checks, vehicle patrols, monitoring traffic, making arrests, and sitting at checkpoints with the TSA staff.² As a result, even the duties which do support supervisory status under Section 301(6) of the Act, such as disciplining other officers and conducting evaluations, are not sufficient to warrant an exclusion from the bargaining unit, given that the Sergeant and Lieutenant perform them in such a limited fashion. Likewise, the Authority has not demonstrated that the Sergeant's responsibility for scheduling is anything other than routine or clerical in nature, and which also represents a miniscule fraction of his overall duties.

The Authority's claim that there is an alleged conflict of interest between the Sergeant and Lieutenant positions and the rest of the rank and file officers due to an alleged supervisory role that the Sergeant and Lieutenant have over the other officers is equally untenable. As previously set forth above, Section 604(5) of the Act provides that "...[i]n determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604(5). Thus, the Act expressly contemplates the inclusion of employees with some role of supervisory authority being included in a unit with more traditional rank and file employees. As a result, the Authority's argument in this regard must fail.

To the extent the Authority raises alleged duties of formulating and/or implementing policy, as well as budgeting and/or purchasing recommendations, by the Sergeant and Lieutenant, these represent indicia of managerial status under Section 301(16) of the Act. While the Authority does not expressly argue that the Sergeant and/or Lieutenant meet the definition of managerial employees under Section 301(16), the Authority's arguments for an exclusion

² In this regard, the testimony of Ricketts and Morell has been specifically credited over that of Bogle.

citing these factors must be understood as an argument that the Sergeant and Lieutenant satisfy the statutory definition for managerial employes. However, the Authority's argument in this regard must also fail.

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 employe's decisions are not managerial if they are part of the employe'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 employe, the employe 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 employe. In the Matter of the Employees 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).³

In this case, the record shows that, as part of his duties as firearms instructor, Ricketts recommended updates to the Authority's firearms policy in 2017, which were approved. Similarly, the record shows that Morell circulated a November 7, 2014 memo outlining the new Airport Warning Notice program pending its approval by TSA, consistent with his role of Alternate Airport Security Coordinator. The record further shows that in early 2017, Morell reviewed a sample Naloxone policy from the DA's office, made a couple minor changes, which reflected his status as the Naloxone Manager, and returned it to Bogle for his approval. However, the performance of these isolated job duties does not rise to the level of managerial status for either the Sergeant or the Lieutenant under Section 301(16) of the Act.

In PASSHE (Edinboro University), 49 PPER 53 (Proposed Order of Unit Clarification, 2017), Hearing Examiner Jack Marino described the law as follows:

The Board has also held that making decisions that effectuate the responsibilities of the position is not synonymous with managerial policy formulation or implementation. In the Matter of the Employees of Pennsylvania State University, 19 PPER ¶ 19156 (Final Order, 1988). The Penn State Board held that a nurse practitioner's formulation of medical protocols was the result of professional expertise and not indicative of managerial authority. The Penn State Board relied on General Dynamics Corp., 1013 NLRB 851 (1974) and opined as follows:

Judgments of professional employes which transcend the technical discipline of professionals should be distinguished from those instances where the natural and normal performance of professional duties may affect the employer's policy merely by the specialized nature of the professional's normal tasks.

Penn State, 19 PPER at 378. When the only policies developed by the person holding the position in question are policies entirely

³ Of course, the test for managerial status for police officers under PERA is dramatically different from the test for police and fire employes under Act 111.

within the expertise of the position and applicable to the duties of the position, such policies are not considered managerial, even though there may be some indirect impact on operations or managerial policy. *Id.* In Abington Heights Sch. Dist., 42 PPER 18 (Final Order, 2011), the Board affirmed a hearing examiner's determination that a behavioral specialist position was not managerial where the policy developed by the behavioral specialist was a policy entirely within the professional expertise of the position. The Board further held that the behavioral specialist's policy implementation also fell within his professional expertise in fulfillment of the responsibilities of his position. As such, making those decisions was not sufficient to substantiate the position as managerial.

49 PPER at 223-224.

Similarly, in this matter, the only policies developed by the Sergeant and Lieutenant are policies entirely within the expertise of their positions and applicable to their positions, and therefore, these policies cannot be considered managerial. Indeed, the Sergeant recommended updates to the Authority's firearms policy in 2017, as part of his duties as the firearms instructor for the department, a position he held long before he became Sergeant. And, the Lieutenant assisted the Chief by making minor changes in language to a sample policy provided by the DA's office, which comported with his role as the Naloxone Manager for the department and the Chief's designee. Further, insofar as the Airport Warning Notice program can be construed as policy, the Lieutenant simply drafted a memo in 2014 outlining security procedures to follow in the event of an incident pending approval from TSA, which directly related to, not only his general duties of providing security and protective services at the airport, but also his specific role as the Alternate Airport Security Coordinator in conjunction with his position as Lieutenant. These examples of isolated job duties spanning the last five years were clearly within the technical expertise of the Sergeant and Lieutenant positions and cannot be found to transcend the judgments of such expertise.

Finally, the Authority maintains that the Sergeant and Lieutenant should be excluded from the unit because they have both developed budgets and made purchasing decisions. Specifically, the Authority points to the Sergeant's involvement with purchasing Tasers and the Lieutenant's involvement in purchasing a security camera. (N.T. 62, 84-85; Employer Exhibit 11). However, it is now well settled that mere purchasing authority is not implementation of the general budget for purposes of determining management level status under the second prong of Section 301(16) of PERA. Cumberland Township, supra, citing In the Matter of the Employes of East Mead Township, 47 PPER 46 (Order Directing Remand to the Examiner for Further Proceedings, 2015). Indeed, the Cumberland Township Board reiterated the rule that once a general budget has been adopted by a public employer, an employee's purchases in accordance with the budget are not implementation of budget policy under the second prong of the test. *Id.* The Authority has not presented any credible evidence to show that the Sergeant or Lieutenant have actually compelled the reallocation of funds for purposes of demonstrating a change in policy sufficient to justify an exclusion from the bargaining unit. 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 Authority is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Sergeant and Lieutenant positions are not supervisory or managerial within the meaning 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 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 § 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 September, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner