

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
 :  
 : Case No. PF-U-22-27-E  
 :  
 MORTON BOROUGH :

**PROPOSED ORDER OF DISMISSAL**

On May 12, 2022, Morton Borough (Borough) filed with the Pennsylvania Labor Relations Board (Board) a Petition for Unit Clarification under the Pennsylvania Labor Relations Act and Act 111 of 1968 (collectively "the Acts") seeking to exclude the position of Chief of Police from the bargaining unit of police officers employed by the Borough's Police Department (Department) and represented by Delaware County Lodge No. 27, Fraternal Order of Police (Union). On June 10, 2022, the Secretary of the Board issued an Order and Notice of Hearing (ONH) directing that a hearing be held on Wednesday, July 13, 2022, in Harrisburg. I continued the hearing at the request of the Union and without objection from the Borough and rescheduled the hearing for Monday, November 7, 2022, in Harrisburg. The parties agreed to conduct the hearing via Microsoft Teams. During the video hearing on November 7, 2022, both parties in interest had a full and fair opportunity to present testimony and exhibits and to cross-examine witnesses. On February 3, 2023, the Borough filed its post-hearing brief. On April 28, 2023, the Union filed its post-hearing brief.

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

**FINDINGS OF FACT**

1. The Borough is a public employer and political subdivision within the meaning of the Acts. (N.T. 5)
2. The Union is a labor organization within the meaning of the Acts. (N.T. 5)
3. John Miller is a Borough Council Member, and he is the Chairman of the Borough's 3-member Safety Committee, which oversees the Police Department. The Borough presented Mr. Miller as its only witness throughout the proceeding, and the Union did not present any witnesses. The Borough currently has an Acting Chief of Police, who is 1 of 3 full-time officers, and approximately 7-8 part-time officers. The Borough currently has no Sergeant. (N.T. 12-16, 33)
4. Mr. Miller testified that, to his knowledge, the Chief of Police would draft policies for the Department based on the Chief's knowledge of the Department and the officers. (N.T. 14-15)
5. The Former Chief of Police, the Acting Chief of Police, and the Mayor of the Borough did not testify at the hearing. The Former Chief of Police, now retired, was present and available at the hearing. (N.T. 10, 12-51)

6. In the past 5 years that Mr. Miller has been on Borough Council, he has not observed any change to the officers' uniforms. The parties' Collective Bargaining Agreement (CBA) contains a provision requiring the Borough to provide bullet-proof vests and replace them in accordance with the manufacturer's recommendation or warranty. (N.T. 40, 47; JX-1)

7. At some point during the past 5 years that Mr. Miller has been on Borough Council, he observed that officers temporarily grew beards as part of a charitable community campaign, when typically officers did not grow beards. Council was not advised about nor did it approve the officers' temporary beard growth. The record does not indicate whether the Chief or the Mayor authorized officers to temporarily grow beards or if such authorization was required. (N.T. 41, 47)

8. Certain budgetary items, such as expenses for pension, vacation and sick time as well as other fringe benefits, which are governed by the parties' CBA, are not within the discretion of the Chief or the Mayor. The Former Chief had set the officers' schedules based on the CBA and the necessary complement for police coverage, when there was no longer a sergeant. (N.T. 16-17, 19-20, 45)

9. The Former Chief learned of a grant to pay for body cameras. Borough Council approved the purchase of body cameras with the grant money. (N.T. 18-19, 41)

10. Applicants considered for full-time police officer positions in the Borough are first evaluated and interviewed by the Civil Service Commission. The candidates recommended by the Civil Service Commission are then interviewed and hired by Borough Council. The Chief is not involved. (N.T. 21-22, 43-44)

11. The Safety Committee and the Chief interview applicants for part-time positions. The Committee and the Chief jointly select a candidate. When the hiring decision has been between two comparable candidates, the Safety Committee Members asked for the Chief's recommendation regarding which candidate would best fit the needs of the Department. (N.T. 22-23, 43-44)

12. The Chief has presented proposed line items for Department budgets to the Borough Council at its budget hearings. Council compares each line item to those of past budgets and makes some adjustments, after which Council approves the Department budget. Line items are carried over from budget year to budget year. Council has full authority to reduce, increase, or eliminate any budgetary line item. Council Member Miller testified that "to [his] knowledge" the Former Chief had handled the Department budget preparation for Council review. (N.T. 24-28, 44)

13. The Chief has the authority to purchase items identified in the approved budget, such as uniforms. The Chief needs Council's approval before purchasing an item for an amount that exceeds the line-item amount designated in the approved budget. Only Council has the authority to purchase vehicles, and Council members sign the leases for the vehicles. The Chief has recommended the type of vehicle and vehicle equipment. Council has disagreed with the Chief over the type of vehicle, e.g., SUV or sedan. Council approves other large purchases as well. Council approved the use of bicycles for bike patrol as part of the community policing initiative. Council approved the uniform modification for the bike patrol officers. Council Member Miller

testified that "we as [C]ouncil talked about it, and [the Chief] stepped up . . . as far as getting the bikes, the uniforms, and things of that nature." (N.T. 20-21, 29-30, 42, 45-47)

14. Both the Police and Fire Departments participate in the "Ice-cream Social," the "National Night Out," and "Trunk or Treat," which is a community event at Halloween time. Council approved all these activities. (N.T. 30-31)

## DISCUSSION

The Borough argues that the position of Chief of Police is a managerial employee. (Borough Brief at 5). The standard for determining whether a position in a police department is managerial is set forth in Fraternal Order of Police Star Lodge No. 20 v. PLRB, (Star Lodge) 522 A.2d 697 (Pa. Cmwlth. 1987). The Star Lodge test lists 6 areas of discretion and authority for determining whether a police department position is managerial. Those 6 criteria are as follows: (1) Policy formulation through initiation of policies and directives; (2) Policy implementation through program development; (3) Overall personnel responsibility and administration through effective involvement in hiring and disciplinary action; (4) Budget formulation; (5) Purchasing decisions; or (6) Independence in public relations. Significantly, the Star Lodge test is disjunctive. Independent discretion and authority make the manager under the Star Lodge factors. Dalton Borough v. PLRB, 765 A.2d 1171 (Pa. Cmwlth. 2001); In the Matter of the Employes of Indian Lake Borough, 40 PPER 39 (ODSEL, 2009).

In a unit clarification matter, the Board makes determinations about position placement by evaluating substantial, competent evidence of actual job duties. Washington Township Municipal Authority v. PLRB, 569 A.2d 402 (Pa. Cmwlth. 1989); Dormont Borough, 41 PPER 66 (Proposed Order of Unit Clarification, 2010); Indian Lake Borough, *supra*. Moreover, a witness testifying about job duties must have first-hand knowledge about the actual job duties of the position in question for that evidence to be deemed competent. Allentown Education Association v. Allentown City School District, 48 PPER 39 (PDO, 2016). The witness, therefore, must hold the position alleged to be a manager or must be one who directly observes, supervises and/or manages that alleged manager so as to have a first-hand understanding of the independent, discretionary authority, or lack thereof, exercised by the alleged manager.

Under the new consolidated Borough Code, "Council shall designate the ranks in the police department and the duties of each rank and may designate one of the police officers as chief of police." 8 Pa. C.S.A. § 1121(a)(3). However, the Borough Code also provides that "The mayor shall have full charge and control of the chief of police and the police force. . . ." and that "the mayor shall direct the time during which, the place where and the manner in which the chief of police and the police force perform the duties of their rank. . . ." However, the mayor may also "delegate to the chief of police or other officer supervision over and instruction to subordinate officers in the manner of performing their duties." 8 Pa. C.S.A §1123.1, Act of April 18, 2014, P.L. 432, No. 37, § 1, effective June 17, 2014. (emphasis added). "A borough council may organize a police force, but the mayor controls its day-to-day operations," Hoffman v. Borough of Macungie, 63 A.3d 461 (Pa. Cmwlth. 2013) (citation omitted) (emphasis added), unless delegated to the chief by the mayor.

In Indian Lake Borough, supra, the borough's mayor exerted his full statutory authority and control over the police department, as vested in him by the Borough Code. In that case, the examiner concluded that the police chief was at most a supervisor because she did not exercise any discretion that was independent of the mayor and that her decisions were dictated by the parameters established by the civilian leadership, i.e., the mayor and council. Indian Lake, supra. The Indian Lake Borough conclusions were based on testimony from both the mayor and the chief of police. In this regard, determining the alleged managerial status of a police chief depends on testimony from the chief and/or the mayor about the independent discretion and authority, if any, as actually exercised by the chief, as a result of mayoral delegation.

At the hearing in this case, the Borough offered only the testimony of John Miller, who is a Borough Council member and the Chairman of the Borough's Safety Committee, which oversees the Police Department. Mr. Miller is a knowledgeable, credible, and dedicated public servant and Borough Council Member. His testimony demonstrated that he has an extensive command and depth of understanding of Borough operations, as a Council Member. However, Mr. Miller's testimony also demonstrated a lack of first-hand knowledge of the Former Chief's or Acting Chief's alleged discretionary authority to independently initiate, develop, implement, or execute the Star Lodge functions on his own without acting at the direction or under the authority of the Mayor.

The Borough offered neither the testimony of the position holder, i.e., the Acting or Former Chief, or the direct manager/supervisor of the Chief and the Police Department, i.e., the Mayor. Although Council Member Miller credibly testified that the Chief recommended certain changes to the Council, which Council adopted, and that the Chief made recommendations for the police budget, the record does not show what involvement the Mayor had in those decisions. In fact, Mr. Miller was only able to testify that "to his knowledge" the Chief drafted Department policies. The record does not clearly establish that the Chief exercises independent authority and discretion over any of the factors listed in the Star Lodge test, or whether the Mayor exercises that authority, as the statutory manager of the Police Department. On this record, the Former or Acting Chief may have simply presented Department changes and budgets that were developed by the Mayor or with extensive Mayoral input.

The record is devoid of evidence related to the interaction between the Chief and the Mayor or which one of them actually exercises managerial authority over the Police Department. Only the Mayor and the Chief have first-hand knowledge of the decision-making authority of the Chief, and neither one of them testified about the Chief's actual duties and his exercise of discretion in this case. Council Member Miller was certainly competent to testify concerning the Borough Council's adoption of certain policies, budgets, or purchases recommended and presented to Council by the Chief. However, through no fault of his own, Mr. Miller lacked first-hand knowledge of how the decisions regarding policies, purchases, or budgets were made or who made them before the Chief presented them to Borough Council.

As the Union also argues in its brief, Council Member Miller testified that he had not discussed with the Mayor the authority and discretion of the Chief or Acting Chief prior to the hearing. (N.T. at 32-33). Council member Miller also stated that he did not obtain any documents that would reflect

the Mayor's interaction with the Chief or Acting Chief of Police or that would reflect the possibility that the Mayor may have delegated authority and control over the police department to the Acting or Former Chief. (N.T. at 32-33). Therefore, the Borough was unable to present, through Council Member Miller, statements or documents from the Mayor supporting the alleged managerial discretion and authority of the Chief. The Borough also did not present, through Council Member Miller, copies of any of the policies which the Chief may have allegedly initiated, developed, modified, or implemented.

The parties' CBA was admitted into the record as Joint Exhibit 1. As the Union emphasized in its brief, the CBA governs many terms and conditions of employment thereby dictating most personnel matters and removing them from the discretion of the Mayor, the Former Chief, or the Acting Chief. Also, although the Former Chief had told Council Member Miller that he scheduled the officers, the Board has held that scheduling does not involve managerial discretion; it rather involves duties of a routine and clerical nature usually performed by a lead worker, such as a sergeant. However, this Borough does not have a sergeant, so some of the Chief's duties involve routine lead worker or supervisory duties, which include overtime distribution, scheduling, vacation approval and accrual, etc.

Also, the Chief is not effectively involved with the hiring of officers applying for full-time positions at the Borough. Applicants for full-time positions are evaluated and interviewed by the Civil Service Commission. Then only the candidates recommended by the Civil Service Commission are hired by Borough Council. The Chief is not part of this hiring process.

Council Member Miller testified that the Chief determines when the Borough needs to hire a part-time officer. However, Council Member Miller does not know whether the Chief approaches Council for part-time hires at the direction of the Mayor. The Safety Committee and the Chief interview applicants for part-time positions. The Committee and the Chief come to a consensus on selecting a candidate. Sometimes the decision was between two candidates and the Safety Committee Members would then seek the Chief's recommendation regarding which candidate would best fit the needs of the Department.

The record does not establish that the Chief is vested with managerial authority to independently select candidates without the involvement of Safety Committee members throughout the interview and hiring process. The record does not show that Council adopts the Chief's independent and predetermined decisions about candidates. A chief with effective, managerial involvement in hiring within the meaning of Star Lodge completes the candidate interviews, independently selects the candidate, and presents that selection to his/her borough council which adopts the chief's selection. In Morton Borough, Council is influencing the hiring process and the hiring determination from beginning to end. On this record, the Chief lacks effective involvement in the hiring of officers. Also, the Chief sets officers' schedules based on the CBA and the necessary complement for adequate coverage without discretion. Accordingly, the record lacks substantial, competent evidence that the Chief exercises overall personnel responsibility and administration, within the meaning of Star Lodge.

Council Member Miller testified that the Chief has presented proposed Department budgets to the Borough Council. Council compares each line item to those of past budgets and makes some adjustments, after which Council approves the Department budget. Council has full authority to reduce,

increase, or eliminate any budgetary line item. There is no testimony from the Chief or the Mayor indicating whether the Chief collaborates with the Mayor to develop a budget for the Department, whether the Mayor has overridden the Chief's recommendations during that process, or whether the Chief solely develops the budget for the Department. Again, Mr. Miller could only state that "to his knowledge" the Chief handled budget preparation for Council review. Budgetary line items are carried over from budget year to budget year. Although there is no discretion in identifying annually carried-over line items, there may be discretion in increasing the budgetary allocation for a given line item based on changing needs or increased costs for an upcoming budget year. But again, the record does not identify whether the Chief or the Mayor exercises that discretion, even though the Chief may be the liaison who presents the budget to Council.

Council approved the use of grant money to purchase body cameras for officers. The former Chief identified the grant. The use of body cameras by officers in the Department would constitute a change in Department policing policy. However, the record does not indicate whether the Mayor initially sought and/or approved the acquisition and use of body cameras for the officers before the Former Chief presented the grant to Borough Council. The record does not indicate whether the Mayor or the Chief effectively developed a body camera policy either together or separately or whether the Chief solely initiated and developed the acquisition and use of body cameras. There is no evidence indicating whether the Former Chief modified the Standard Operating Procedures to establish protocols governing the use of the body cameras in the field.

The Chief has purchased items identified in the approved budget, such as uniforms. Replenishing low or depleted supplies and equipment that are repeatedly repurchased does not require the exercise of managerial discretion, which is why line items for such purchases are repeatedly carried over in the Department's budget and approved by Council from year to year, again without managerial discretion. The Chief needs Council's approval before purchasing an item for an amount that exceeds the line-item amount designated in the approved budget. Only Council has the authority to purchase vehicles, and Council members sign the leases. The Chief has recommended the type of vehicle and vehicle equipment. Council has disagreed with the Chief over the type of vehicle, e.g., SUV or sedan.

The record does not indicate whether the Chief determines when it is time to lease or purchase a new vehicle or whether Council is required to purchase or lease new vehicles when a lease term ends. The record lacks substantial evidence demonstrating whether the decision to purchase or lease a newer vehicle for the Department involves the Chief's discretion, the Mayor's discretion, or whether the decision is a routine and recurring act triggered by lease terms and vehicle age. The record is silent regarding the necessary details of vehicle purchases.

Council approved the use of bicycles for patrol as a positive move in the direction of effectuating Council's community policing initiative. Initiating and implementing bicycle patrols in the Borough constitutes a change in policing protocols. However, the record does not clearly show whether the Chief, the Mayor or Council initiated the idea of implementing a bicycle patrol. Council Member Miller testified that "we as [C]ouncil talked about it, and [the Chief] stepped up . . . as far as getting the bikes, the uniforms, and things of that nature." Mr. Miller's testimony seems to indicate that Council talked about the bicycle patrol, as part of its

community policing initiative, and the Chief "stepped up" as far as obtaining the bicycles and uniforms. Also, the record does not indicate whether the Chief directed officers to complete training on bicycle patrolling, that the Chief assigned certain officers to bicycle patrol over others, or that the Chief determined that certain areas of the Borough were better suited for bicycle patrol.

Both the Police and Fire Departments participate in the "Ice-cream Social," the "National Night Out," and "Trunk or Treat," which is a community event at Halloween time. Council approved allocating resources for these events for both departments. The record does not show that the Police Chief independently decided to use money from the Police Department's budget to host these events. Therefore, the Chief did not exercise independent discretion or authority in committing Department resources to these activities. Although Mr. Miller indicated that the Chief is present at community and social events, he did not indicate whether he observed the Chief speaking about Police Department business with authority on behalf of the Mayor and the Department.

On this record, the Borough did not establish that the Chief of Police or Acting Chief of Police in Morton Borough exercises independent managerial authority within the meaning of Star Lodge. Absent testimony from the Former Chief, the Acting Chief or the Mayor, Council Member Miller's testimony is not sufficient to establish the source of discretion and authority regarding policy formulation through initiation of policies and directives; policy implementation through program development; overall personnel responsibility and administration through effective involvement in hiring and disciplinary action; budget formulation; purchasing decisions; or independence in public relations. The record does not show that the Mayor relinquished statutory authority and managerial control over daily Department operations to the Chief of Police or Acting Chief of Police. Accordingly, the positions of Chief and/or Acting Chief are properly included in the bargaining unit of police officers.

#### **CONCLUSIONS**

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 public employer and political subdivision within the meaning of the Acts.
2. The Union is a labor organization within the meaning of the Acts.
3. The Board has jurisdiction over the parties.
4. The positions of Chief of Police and Acting Chief of Police are not management level positions in the Borough and are properly included in the police bargaining unit.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

**HEREBY ORDERS AND DIRECTS**

that the Petition for Unit Clarification filed by the Borough is hereby dismissed.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED AND MAILED this seventeenth day of May 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner