

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
: Case No. PERA-R-11-124-E  
: (PERA-R-777-C)  
:  
COMMONWEALTH OF PENNSYLVANIA :  
OFFICE OF ATTORNEY GENERAL :

**FINAL ORDER**

On August 16, 2011 the Narcotics Agents Regional Committee, Fraternal Order of Police Lodge #74 (FOP) filed an Amended Petition for Representation with the Pennsylvania Labor Relations Board (Board). The FOP alleges in its petition that thirty (30) percent or more of the Special Agents 1, Special Agents 2 and Senior Special Agents employed by the Commonwealth of Pennsylvania, Office of Attorney General (Employer) desire to be represented by the FOP for purposes of collective bargaining. The FOP requested that a hearing be scheduled and that an order be issued for election pursuant to Section 603(c) of the Public Employee Relations Act (PERA).

On August 24, 2011, the Board Secretary issued a letter declining to direct a hearing on the Amended Petition for Representation. Upon investigation of the Petition, the Secretary noted that the Special Agents 1, Special Agents 2 and Senior Special Agents are currently in a bargaining unit of professional employees in the Investigation, Inspection and Safety Unit represented by the American Federation of State, County and Municipal Employees (AFSCME). See Case No. PERA-U-81-352-E (PERA-R-777-C). In dismissing the Petition without a hearing, the Secretary relied upon the Board's long-standing policy of conducting rival representation proceedings in the unit as currently certified.<sup>1</sup>

On September 13, 2011, the FOP filed timely exceptions to the Secretary's decision declining to direct a hearing. AFSCME filed an answer to the exceptions on October 3, 2011. Following an extension of time granted by the Secretary, the FOP timely filed a brief in support of the exceptions on October 13, 2011. AFSCME and the Employer mailed separate briefs in response to the exceptions on November 2, 2011.

In its exceptions, the FOP contends that the Secretary erred in dismissing the Petition without a hearing because a unit of Special Agents and Narcotics Agents would constitute an appropriate unit under PERA. In support of this position, the FOP asserts that both narcotics agents represented by the FOP, and the petitioned-for Special Agents, represented by AFSCME, are law enforcement positions within the Office of Attorney General, and thus share a community of interest. The FOP contends that the Special Agents do not share an identifiable community of interest with the Consumer Protection Agents and Civil Investigators, and thus are inappropriately included in the professional unit represented by AFSCME.

With respect to unit determinations, Section 604(1) of PERA states 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:

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<sup>1</sup> Leading up to the Secretary's dismissal, the FOP had filed the initial Petition for Representation in this case on April 28, 2011. The initial petition sought representation of the Special Agents and Narcotics Agents, and appeared on its face to seek representation of the entire professional unit presently represented by AFSCME. Accordingly, on May 5, 2011, the Secretary issued an Order and Notice of Hearing for further investigation. On May 23, 2011, the FOP filed an Amended Petition clarifying the petition to seek representation of Special Agents (referenced as Special Investigator I, II, and Criminal Investigator I, II, III and Senior Special Agents). An Amended Order was issued on May 27, 2011, to reschedule the hearing. On August 16, 2011, the FOP filed the instant second amendment to the Petition. In its second amendment the FOP sought representation of only the Special Agent 1, Special Agent 2 and Senior Special Agents, and specifically excluded the Civil Investigator 1 & 2, Consumer Protection Agent 1 & 2, Senior Consumer Protection Agent, and Special Investigator 1 & 2 positions that are currently included in the professional unit represented by AFSCME.

(1) Take into consideration but shall not be limited to the following:

(i) public employes must have an identifiable community of interest, and

(ii) the effects of over fragmentation.

43 P.S. § 1101.604(1). The courts have recognized that various unit configurations can be appropriate and have held that the Board need not find the most appropriate unit, but an appropriate unit. County of Allegheny, 11 PPER ¶ 11031 (Court of Common Pleas of Allegheny County, 1979). In establishing an appropriate unit for collective bargaining, differences in job classifications do not necessarily deprive the employes of a community of interest. Indeed, it is well-settled that an identifiable community of interest can exist despite differences among employe classifications. In the Matter of the Employes of Lansdale Borough, 24 PPER ¶ 24053 (Final Order, 1993) (citing Washington Township Municipal Authority v. PLRB, 569 A.2d 402 (Pa. Cmwlth. 1990), appeal denied, 525 Pa. 652, 581 A.2d 575 (1990); Western Psychiatric Institute and Clinic v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1971); Pittston Area School District, 12 PPER ¶ 12180 (Final Order, 1981); Peters Township School District, 16 PPER ¶ 16070 (Order Directing Submission of Eligibility List, 1985); and Neshannock Township School District, 17 PPER ¶ 17153 (Final Order, 1986). Thus, even if the Special Agents 1, Special Agents 2, and Senior Special Agents also arguably share a community of interest with the Narcotics Agents in the nonprofessional unit, that does not mean that the Special Agents are, as a matter of law, precluded from having a community of interest, and being included in the bargaining unit with the professional employes represented by AFSCME. While the FOP asserts differences between the Special Agents and the Consumer Protection Agents and Civil Investigators, the Employer, AFSCME and the Board previously recognized that there are sufficient similarities warranting inclusion of the Special Agents in the professional bargaining unit. (PERA-U-84-300-E and PERA-U-06-2-E).<sup>2</sup> Thus, the professional bargaining unit, as presently certified and represented by AFSCME, is nevertheless an appropriate unit.

In its Petition, the FOP seeks to accrete into the nonprofessional unit, only part of the existing professional bargaining unit presently represented by AFSCME, specifically the Special Agents 1, Special Agents 2 and the Senior Special Agents. However, in furtherance of the policy of PERA, the Board does not splinter off groups of employes from existing units, but conducts rival representation proceedings in the unit as currently certified. Pennsylvania Board of Probation and Parole, supra.; Pennsylvania Office of Attorney General, 31 PPER ¶ 31033 (Final Order, 2000). Thus, the exclusion or inclusion of positions in a unit are not at issue during a rival petition proceeding and the Board is able to conduct an election as quickly as possible. *E.g.* Commonwealth of Pennsylvania, Office of Attorney General, 31 PPER ¶ 31033 (Final Order, 2000). Inclusion or exclusion of positions from the unit may be decided after certification, so as not to overly disrupt the certified union from bargaining with the employer. In this regard, there is less of a disruption in the collective bargaining process by requiring rival representation proceedings in the unit as currently certified. In the face of a rival representation petition, all bargaining must cease between the incumbent union and the employer. Commonwealth of Pennsylvania (Liquor Control Board), 10 PPER ¶ 10031 (Nisi Decision and Order, 1979). Where the rival union is able to garner support from a group of employes in an existing unit, those employes whose positions are not in dispute would be left with no contract and no right to bargain during the rival petition. The Board recently stated as follows:

Simply because the rival union is able to organize among a splinter group of an existing certified unit does not justify the damage to labor stability that would ensue if the Board would allow open season on existing, certified units.

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<sup>2</sup> What the Board noted in Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole, 43 PPER 20 (Final Order, 2011), is equally applicable here, in that "the petitioned-for employes are currently represented in the larger Investigation, Inspection and Safety unit that is governed by a collective bargaining agreement that addresses many of [the] community of interest factors in a uniform fashion."

Pennsylvania Board of Probation and Parole, supra. Accordingly, allowing rival representation proceedings to divide existing bargaining units does not foster the purposes and policies of PERA. As the Board went on to hold in Pennsylvania Board of Probation and Parole:

The Board's policy of conducting rival elections in units already found to be appropriate promotes labor stability, whereas the Association's attempt to cobble together majority status among different classifications of employees from separately certified units undermines PERA's stated policy of promoting orderly and constructive relationships between employers and employees. 43 P.S. §1101.101.

Pennsylvania Board of Probation and Parole, supra.

After a thorough review of the exceptions and all matters of record, the Secretary did not err in relying on the Board policy of conducting rival representation proceedings in the unit as currently certified. The FOP's exceptions, requesting that the Board fragment the existing professional bargaining unit in the context of the FOP's rival representation proceeding, must be denied. Accordingly, the Board shall dismiss the exceptions filed by the FOP and affirm the decision of the Board Secretary declining to direct a hearing on the Petition for Representation.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions are dismissed and the Secretary's decision not to direct a hearing on the Petition For Representation is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and James M. Darby, Member, this twentieth day of December, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.