

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
 :  
 : Case No. PERA-R-99-483-E  
 : (PERA-R-80-42-E)  
PHILADELPHIA HOUSING AUTHORITY :

**FINAL ORDER**

On October 11, 2000, Philadelphia Housing Authority (Employer) filed timely<sup>1</sup> exceptions with the Pennsylvania Labor Relations Board (Board) to a Nisi Order of Certification issued on September 22, 2000 certifying the Fraternal Order of Housing Police (Union) as the exclusive bargaining representative under the Public Employee Relations Act (PERA) of a bargaining unit comprised of all full-time and regular part-time security guards including but not limited to Housing Patrolmen and Patrolwomen, Detectives and Corporals. The exceptions were accompanied by a request for an extension of time in which to file a brief in support of the exceptions. That request was granted by the Board Secretary and the Employer filed its brief in support of its exceptions on November 13, 2000. After the Union requested and was granted a similar request for an extension of time to file its brief, the Union filed its brief in opposition to the Employer's exceptions on December 12, 2000.

The Nisi Order of Certification incorporated findings of fact and conclusions of law contained in an Order and Notice of Election issued by the Board Representative on August 18, 2000, which in turn incorporated findings of fact and conclusions of law from an Order Directing Submission of Eligibility List issued by a Board Hearing Examiner on July 11, 2000. In its ten separately enumerated exceptions, the Employer challenges various findings of fact made by the Hearing Examiner and also contends that the Hearing Examiner erred in failing to make other findings of fact. The Employer further argues that the Hearing Examiner erred in concluding that (1) the Corporals are not supervisory employees within the meaning of PERA and (2) the Detectives share an identifiable community of interest with the patrol officers included in the existing bargaining unit.

With respect to the Hearing Examiner's findings of fact, a thorough review of the record reveals that those findings are supported by substantial and legally credible evidence on the record and accurately reflect the job duties and functions of both the Corporals and Detectives. Accordingly, those findings will not be disturbed or amended. The Employer challenges the Hearing Examiner's decision not to credit certain aspects of the testimony of the Employer's Staff Services Officer. However, it is axiomatic that absent the most compelling circumstances, which the Board does not find present on this record, the Board will not disturb findings made by the Hearing Examiner, who presided over the hearing and observed the demeanor of the witnesses. Township of Springfield, 12 PPER ¶ 12354 (Final Order, 1981);

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<sup>1</sup> The exceptions were actually received by the Board on October 13, 2000, but contained a United States Postal Service postmark of October 11, 2000, the last day upon which exceptions to the Nisi Order of Certification were timely.

Transport Workers Union v. SEPTA, 17 ¶ PPER 17038 (Final Order, 1986). Additionally, the Hearing Examiner's failure to make findings of fact as proffered by the employer was not error. In Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975), the Pennsylvania Supreme Court stated as follows regarding a claim that the fact finder erred in failing to make findings inconsistent with the facts as actually found:

"When the fact finder in an administrative proceeding is required to set forth his findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence which are relevant to a decision."

464 Pa. at 287, 346 A.2d at 561.

The record reveals that the Employer employs three corporals, two of whom are assigned to the police department's radio room and the third, the "DARE corporal" coordinates the police department's program to promote drug awareness. The Employer's DARE program was created in or about August 1999 and at the time of the hearing, although the DARE corporal had reviewed applications for DARE officer positions and conducted some interviews, no DARE patrol officer positions had been filled. The other two corporals are assigned to the Employer's radio room, which receives and dispatches police calls, 911 emergencies calls, maintenance calls and other types of calls involving the Employer's employes, management and executive staff. The chain of command in the radio room begins with the Commander of Support Services, followed by the Lieutenant of Communications, three sergeants, two corporals, and a group of dispatchers. The dispatchers are either civilian dispatchers or patrol officers on light or restricted duty. The radio room provides 24-hour coverage over the course of three shifts with approximately 5 dispatchers working on each shift. The Hearing Examiner found that the radio room corporals do not assign dispatchers to the various functions of police dispatch, emergency dispatch, monitoring alarms and receiving calls. Rather, the dispatchers voluntarily rotate between these assignments by way of mutual agreement. The radio room corporals ensure that the dispatchers are properly performing their duties of receiving and dispatching calls. The calls are prioritized based on the seriousness of the crime and are dispatched to the patrol vehicle in the appropriate sector if available. If a patrol vehicle is unavailable, the dispatcher refers the call to the corporal, who attempts to contact a supervising sergeant or lieutenant in the field to ensure that the call is handled in some manner. If a supervising sergeant or lieutenant in the field is not available, the call is referred to the Philadelphia Police Department. The radio room corporals may intervene in the dispatch of a call if the dispatcher fails to properly prioritize the call or fails to dispatch the call to the appropriate patrol vehicle. Ms. Warthen testified that when she was a corporal, she was part of the three-member panel that reviewed applications for vacancies in the radio room and the panel made a joint recommendation regarding whom to hire. The radio room corporals complete performance evaluation forms at the conclusion of a dispatcher's probationary period and on an annual basis following the dispatcher's completion of probation. The performance evaluations are submitted to a supervising sergeant for review. Warthen testified that while she was a corporal only one civilian was terminated. Warthen filed a complaint against the civilian for being intoxicated on the job, but was not asked for an opinion regarding whether the employe should be terminated. The employe was subsequently fired for other violations that occurred before Warthen was assigned to the radio room. Radio room corporals follow established department policy in reporting dispatchers for being absent without leave and

must recommend day-to-day suspension based upon the number of days that the employe is absent. In order to maintain dispatch staffing levels if dispatchers are unable to report to work, the corporal may ask the personnel on duty if they are willing to work overtime and must report such overtime to the supervising sergeant.

The Employer contends that the corporals exercise supervisory responsibility in filling out the performance evaluations, effectively recommending discipline, assigning work, assigning overtime and arranging for coverage of absent employes, approving requests for time off and adjusting grievances. The term "supervisor" is defined in Section 301(6) of PERA 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 employes 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). The Board has held that the burden of proof is on the party seeking to exclude a position as supervisory. Philadelphia School District v. PLRB, 719 A.2d 835 (Pa. Cmwlth. 1998). It should be noted that while the Employer's exceptions contend that all corporals are supervisory, the findings of fact clearly reveal that the DARE corporal has not performed any of the alleged supervisory duties upon which the Employer relies. Indeed, the Employer has yet to hire subordinate employes that would fall under the supervisory control of the DARE corporal.

The Employer argues that the corporals exercise supervisory authority over the civilian dispatchers through the preparation of initial and annual performance evaluations. In order for performance evaluations to support a supervisory exclusion, they must be given controlling weight and normally result in either reward or discipline. State System of Higher Education, 29 PPER ¶ 29234 (Final Order, 1998), aff'd, State System of Higher Education v. PLRB, 737 A.2d 313 (Pa. Cmwlth. 1999). The Employer failed to prove how much weight the corporals' performance evaluations are afforded. While Warthen testified that she prepared the initial evaluation of a probationary employe and the sergeant agreed with her evaluation, the Hearing Examiner correctly noted that the testimony did not indicate whether the sergeant deferred to her opinion or independently arrived at the same conclusion. The Hearing Examiner discredited the testimony of the Employer's Staff Services Officer who testified that the corporals' performance evaluations are given controlling weight by the sergeants. The Hearing Examiner noted that the Staff Services Officer's testimony lacked the proper foundation in that the Employer failed to establish how the Staff Services Officer would be aware of how much weight the sergeant accorded the corporals' evaluations because the Staff Services Officer does not supervise either the sergeants or the corporals. The Hearing Examiner also characterized the Staff Services Officer's testimony as conclusory, speculative and providing little or no detail regarding the corporals' alleged exercise of supervisory authority. Accordingly, the Employer's reliance upon the corporals' performance evaluations of the dispatchers is insufficient to support a supervisory exclusion.

The Employer also argues that the corporals effectively recommend discipline and notes instances in which the corporals instigated disciplinary action against employes for sick abuse or absences. However, in order to evidence supervisory authority, such disciplinary authority must involve the exercise of independent judgment. With respect to unexcused absences, the record reveals that the corporals must recommend the day-to-day suspension based upon the number of days that the employe was absent in accordance with the Employer's established policies. The Employer failed to substantiate that the corporals exercise independent judgment in recommending disciplinary actions against employes for being absent without leave. Further, with respect to sick leave abuse, the Employer failed to adduce any testimony that the corporals do any more than report suspected sick leave abuse, with no additional input into what disciplinary action should be taken. The Employer further relies upon the alleged disciplinary action taken by Warthen against the dispatcher who was ultimately terminated. However, the record reveals that Warthen filed a complaint against that individual for being intoxicated on the job, but was not asked for her opinion on whether the employe should be terminated. The mere reporting of employe misconduct, without more, is insufficient to support a supervisory exclusion. West Perry School District, 29 PPER ¶ 29110 (Final Order, 1998), aff'd, West Perry School District v. PLRB, 30 PPER ¶ 30159 (Court of Common Pleas of Perry County, 1999), aff'd, 752 A.2d 461 (Pa. Cmwlth. 2000), pet. for allowance of appeal denied, \_\_\_ Pa. \_\_\_, \_\_\_ A.2d \_\_\_ (2000). Further, Warthen's reporting activity with respect to that employe cannot support a supervisory exclusion because the employe was ultimately terminated for reasons unrelated to any action taken by Warthen.

The Employer's reliance on the corporal's assignment of duties is similarly misplaced. The record reveals that the radio room corporals do not assign dispatchers to the various functions of police dispatch in the radio room; rather the dispatchers voluntarily rotate between these assignments by way of mutual agreement. Further, the corporal's oversight of the dispatchers is to ensure that they are properly performing their duties in receiving and dispatching calls in accordance with the established policy of the Employer which requires that the calls are prioritized based on the seriousness of the crime and are dispatched to the patrol vehicle in the appropriate sector if available. If that vehicle is not available, the dispatcher refers the call to a corporal who attempts to contact a supervising sergeant or lieutenant in the field. The Hearing Examiner correctly characterized this function as routine in nature and not requiring the use of independent judgment. See West Perry School District, supra. It should be additionally noted that Section 604(5) of PERA permits the Board to take into consideration the extent to which supervisory duties are performed. State System of Higher Education v. PLRB, supra. The Employer failed to establish that the alleged supervisory duties that it relies upon, even if found to support a supervisory exclusion, constitute a significant portion of the corporals' work for the Employer. For example, Warthen worked in the radio room for over a year, but yet never effectively recommended disciplinary action against any of the employes that she allegedly supervised. Accordingly, the Hearing Examiner's determination that the corporals are not supervisory with in the meaning of Section 301(6) of PERA must be affirmed.

The record also supports the Hearing Examiner's determination that an identifiable community of interest exists between the detectives and the patrol officers. The Employer contends that the internal affairs role of the detectives in conducting investigations that may target patrol officers

places their interest in direct conflict with the interest of those patrol officers so as to destroy any identifiable community of interest between the two groups of employees. While the Employer admits that the internal affairs duties of the detectives do not rise to the level of supervisory duties under PERA, the Employer nonetheless argues for a separate unit for detectives.

The Employer's argument misapprehends the "community of interest" standard under PERA. That standard examines whether the employees exhibit a community of interest in wages, hours and working conditions, which are the only matters mandatorily negotiable under Section 701 of PERA. The community of interest standard takes into consideration such factors as ". . . the employees' skills, their duties, areas of work, working conditions, interchange of employees, supervision, grievance procedures, hours of work, trade requirements, pay scales, and employee desires." Allegheny General Hospital v. PLRB, 322 A.2d 793, at 797 (Pa. Cmwlth. 1974); Fraternal Order of Police, Conference of Pennsylvania Liquor Control Board Lodges v. PLRB, \_\_\_ Pa. \_\_\_, 735 A.2d 96 (1999)(FOP). The community of interest standard in PERA attempts to assure that the bargaining units in the public sector are organized in a manner that permits the smooth and efficient negotiation of collective bargaining agreements and to "assure that an employe group neither embraces employees having a substantial conflict of economic interest nor omits employees showing an unity of economic interest. . ." Pittston Area School District, 12 PPER ¶ 12180, at 279 (Final Order, 1981).

The Board has addressed and rejected a similar argument involving the inclusion of assistant public defenders and assistant district attorneys in the same bargaining unit in light of their professional adversarial position in the administration of justice. Bucks County Public Defender's Office, 13 PPER ¶ 13109 (Final Order, 1981), aff'd, 15 PPER ¶ 15062 (Bucks County Court of Common Pleas, 1984). In doing so, the Board stated that the argument against the inclusion of those two classifications in the same bargaining unit "misapprehends both the professional duties of attorneys and the function of collective bargaining. Although there are, no doubt, certain hostilities between the assistant district attorneys and assistant public defenders because of their positions as advocates, there is no clear reason why that conflict should manifest itself in their relationship with their employer or with each other personally and collectively." 13 PPER at 197. The Court of Common Pleas agreed, stating, "The Union's position tends to confuse the APDs' and ADAs' lawyering roles with their bargaining roles. Although these groups are adversaries in the courtroom, in the labor context at bar they share identical objectives, such as higher wages and better working conditions." 15 PPER at 147 (footnote omitted). So too here, the detectives' internal affairs duties do not create a conflict of economic interest in collective bargaining with the patrol officers so as to destroy the identifiable community of interest otherwise found by the Hearing Examiner.<sup>2</sup>

The Employer's notion that the detectives must be excluded from the bargaining unit containing patrol officers merely because they conduct fact-finding investigations involving patrol officers misconstrues this potential conflict of interest with the destruction of an identifiable community of interest in wages, hours and working conditions, i.e., bargainable issues

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<sup>2</sup> The Board has certified units of police officers under Act 111 since 1977 and has not certified a separate unit for the various police departments' internal affairs divisions and bargaining under Act 111 has proceeded unabated.

under PERA. While specifically requiring separate units for groups of employes such as security guards and first level supervisors, and exclusion of confidential employes where alleged conflicts are statutorily identified, PERA does not contain similar restrictions on employes involved in activities relied on by the Employer. However, PERA does contain a provision requiring the Board to take into consideration the deleterious affects of the overfragmentization of bargaining units so that units under PERA be as few as possible. See 43 P.S. § 1101.604(1); Western Psychiatric Institute & Clinic v. PLRB, 330 A.2d 257 (Pa. Cmwlth. 1974), pet. for allowance of appeal denied, February 28, 1975. The certification of two separate bargaining units in the same department of the Employer must be based only upon a logical statutory or practical collective bargaining justification which we do not find here.

Finally, the Hearing Examiner's determination that an identifiable community of interest exists between the detectives and the patrol officers so as to include them in the same bargaining unit is also supported by the record. The Hearing Examiner determined that both detectives and patrol officers are involved in the general function of law enforcement, are paid by the hour, are issued a gun and a badge and make pedestrian stops and arrests. The detectives and patrol officers also work a similar number of hours per day and per week and, in recent years, detective vacancies have been filled by patrol officers, indicating that the essential prerequisite for becoming a detective is the set of skills that are possessed by patrol officers through work experience in the patrol officer position. Some of the detectives routinely work in the same building as patrol officers, have daily contact with them and frequently work with them on crimes in progress or backup patrol. Additionally, certain of the detectives and patrol officers are supervised by the same lieutenant and report to the same command level position. The Employer's reliance upon FOP is misplaced. In that case, the two groups of employes that were found not to have an identifiable community of interest were performing different functions for different agencies within the Commonwealth of Pennsylvania at different work locations and had different working conditions and grievance procedures. The Commonwealth Court rejected the Board's reliance upon the similarity in wages and benefits in that case because the two groups of employes had previously been a single classification. In this case, the patrol officers and detectives are performing the same general law enforcement function, work in similar locations and the skills required of each of these positions is substantially similar. In this case, unlike FOP, the detective position represents a promotional opportunity for the patrol officers and the ranks of detectives are filled with employes who have previous experience as a patrol officer. Accordingly, an identifiable community of interest exists between the patrol officers and detectives and the Employer's exceptions in that regard must be dismissed.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions filed by the Employer and affirm the Nisi Order of Certification.

#### 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 filed by Philadelphia Housing Authority are hereby dismissed and the Nisi Order of Certification is made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this thirteenth day of February, 2001. 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.