

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: Case No. PERA-U-01-358-E
: (PERA-R-84-31-E)
:
:
POTTSTOWN BOROUGH :

FINAL ORDER

On August 19, 2002, Pottstown Borough (Borough) timely filed with the Pennsylvania Labor Relations Board (Board) exceptions and a supporting brief to a Proposed Order of Dismissal (POD) issued July 29, 2002. In the POD, the Hearing Examiner dismissed the Petition for Unit Clarification filed by the Borough and concluded that the position of Executive Secretary to the Chief of Police is not confidential within the meaning of Section 301(13) of the Public Employe Relations Act (PERA) and shall remain in the Borough's nonprofessional bargaining unit represented by AFSCME, District Council 88 (Union). In the exceptions, the Borough requested the Board to reverse the POD and find the position of Executive Secretary to be confidential or in the alternative to remand the matter for further hearing pursuant to the Borough's claim in the exceptions that subsequent to the closing of the record, the Chief of Police has engaged in collective bargaining negotiations conducted under Act 111 of 1968 and as a consequence of the Executive Secretary's close continuing relationship with the Chief, she would be excluded from the bargaining unit under Section 301(13)(ii) of PERA.

On September 10, 2002, the Board Secretary issued a letter to the Borough's attorney requesting that Chief Flanders submit an affidavit supporting the Borough's request for a remand and stating with particularity the alleged post-hearing activities engaged in by the Chief to determine the implications of those alleged activities on the alleged confidentiality of the Executive Secretary and to resolve the conflict between the record and the Borough's allegations in their exceptions. On September 27 2002, the Borough filed the Affidavit of Mark D. Flanders averring the following: that negotiations for a successor police contract will not commence until the summer of 2003; that anticipated mid-contract bargaining relating to expected workplace changes did not occur during the summer of 2002, as alleged in the Borough's exceptions; and that the Chief has an expectation that he will participate in negotiations during the summer of 2003. On September 6, 2002, the Union filed its response to the Borough's exceptions and, on October 17, 2002, filed a response in opposition to the Borough's affidavit in support of its request to reopen the record.

After a thorough review of the District's exceptions, the responses thereto and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

6. The current collective bargaining agreement between the Borough and its police bargaining unit expires December 31, 2003. At the time of the March 7, 2002 hearing, no collective bargaining negotiations were in progress or scheduled for a successor contract. (N.T. 19).

DISCUSSION

Lori Lynn Skulski holds the position of Executive Secretary to the Chief of Police, and she is currently included in the Borough's nonprofessional, certified collective bargaining unit under PERA (PERA-R-84-31-E) represented by AFSCME. In June of 2000, the Borough appointed Mark D. Flanders to the position of Acting Chief of Police. In March of 2001, he was promoted to Chief, retroactive to January of 2001. The position of Chief of Police is not included in the Act 111 police bargaining unit.

In its exceptions, the Borough first claims that Finding of Fact No. 5 "ignores record evidence that (1) the [C]hief's executive secretary has been asked to prepare documents containing collective bargaining proposals and that (2) the Chief is actively engaged in drafting proposals and positions for use in collective bargaining with the police bargaining unit this [2002] summer." (Borough Exceptions at 1-2).

Finding of Fact No. 5 provides as follows:

5. The Chief has not requested his secretary type any documents which contain collective bargaining proposals. There have been no contract negotiations with Act 111 employes since the Chief assumed his current position. The Chief does not attend negotiations for the AFSCME contract. The Chief does, however, have some connection with the AFSCME contract negotiations as a consultant. (N.T. 13, 14, 17, 19, 25, 27, 31, 35).

(POD at 1). To the extent that the Borough claims that the Examiner ignored record evidence, a review of the record reveals that there is no evidence to support a finding that the Chief's Executive Secretary has prepared or has been asked to prepare collective bargaining proposals or that the Chief attended contract negotiations. Indeed, the Borough's assertion ignores the contrary substantial, competent evidence cited by the Examiner in support of Finding of Fact No. 5. The Board, therefore, concludes that there is substantial evidence of record relied upon by the Hearing Examiner to support Finding of Fact No. 5, which shall not be disturbed. PLRB v. Kaufmann Department Stores, 345 Pa. 398, 29 A.2d 90 (1942)(stating that substantial evidence is relevant evidence as a reasonable mind might accept as adequate to support a conclusion); Appeal of Cumberland Valley Sch. Dist., 483 Pa. 134, 394 A.2d 946 (1978) (stating that findings of the Board that are supported by substantial evidence are conclusive).

The Borough also asserts that Chief Flanders has been actively engaged in drafting proposals for use in collective bargaining with the police bargaining unit this summer (i.e., the summer of 2002). In conjunction with this claim, the Borough requests that the Board remand the case to the Examiner to admit post-hearing evidence regarding events that occurred following the March 7, 2002 hearing. The Board may remand a matter to introduce after-discovered evidence as long as the evidence (1) is new; (2) could not have been obtained at the time of hearing through the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purpose of impeachment; and (5) is likely to compel a different result. Minersville Area Sch. Dis. v. Minersville Sch. Serv. Personnel Ass'n, 518 A.2d 874 (Pa. Cmwlth. 1986); AFSCME, District Council 13 v. SSHE (Edinboro University), 32 PPER ¶ 32080 (Final Order, 2001); Middletown Township Police Benevolent Ass'n

v. Middletown Township, 24 PPER ¶ 24167 (Final Order, 1993). All five elements of the conjunctive standard must be met.

The Borough, however, has failed to offer proof of the factual predicate for its claims that Chief Flanders engaged in post-hearing collective bargaining with the police unit during the summer of 2002. Accordingly, the Borough simply has advanced no new evidence that could change the result reached by the Examiner and therefore fails to satisfy at least two of the required elements of Minersville. Chief Flanders testified that there were no negotiations scheduled or in progress for a successor agreement and the current agreement does not expire until December 31, 2003. The statutory timetable under Section 3 of Act 111 for negotiations for a successor contract is not less than six months (i.e., summer 2003) before the start of the fiscal year coinciding with contract expiration. To reconcile the apparent discrepancy between the Borough's claim of negotiating activity "this summer" in its exceptions and the record, the Board Secretary requested an affidavit from Chief Flanders, in the nature of an offer of proof which would support the requested remand. In his Affidavit, Chief Flanders averred that negotiations for a successor police contract will not commence until the summer of 2003; that anticipated mid-contract bargaining relating to expected workplace changes did not occur during the summer of 2002, as alleged in the Borough's exceptions; and that the Chief has an expectation that he will actively participate in the upcoming negotiations during the summer of 2003. The law is well established that employees will not be excluded from bargaining units based on job descriptions not yet performed by the employee. Washington Township Municipal Auth. v. PLRB, 20 PPER ¶ 20031 (Court of Common Pleas of Franklin County, 1988), aff'd, 569 A.2d 402 (Pa. Cmwlth. 1990); North Hills v. PLRB, 762 A.2d 1153 (Pa. Cmwlth. 2000). Under such circumstances, the party seeking the determination based on new job duties must await actual performance of the duties to seek that determination from the Board. Therefore, the Board concludes that a remand at this time, premised on anticipated participation in the bargaining process would be inappropriate. Accordingly, the Board will not grant the Borough's request for a remand.

The Borough also excepts to Conclusion No. 4 which states that "[t]he position of Executive Secretary to the Chief of Police is not confidential within the meaning of Section 301(13) of the Act." (POD at 3). The Borough argues that Conclusion No. 4 ignores the same facts that it identified as ignored by the Examiner in its first exception, i.e., that Ms. Skulski has prepared documents containing bargaining proposals and that Chief Flanders is actively engaging in drafting proposals for use in bargaining for the summer of 2002. This position is without merit for the reasons stated above.

The Borough next argues that Conclusion No. 4 of the POD ignores case law supporting Ms. Skulski's exclusion from her bargaining unit in like circumstances. The Borough relies on North Hills, supra, to support this position. However, the facts of North Hills are not analogous. Also, the Examiner did not ignore North Hills, indeed he included it in his analysis. In North Hills, the Commonwealth Court held that, under Section 301(13)(ii) of PERA, a secretary was a confidential employee and thereby excluded from the bargaining unit because she worked in a close continuing relationship with the assistant superintendent who was a member of the school district's negotiation team, was an active participant at the bargaining table and formulated labor policy. Id. at 1158-59. This record, however, demonstrates that Chief Flanders was not part of any of the Borough's negotiating teams and had, at best, only a tenuous association with the bargaining process.

Accordingly, the Examiner properly applied the North Hills rule in this case and concluded that, because Chief Flanders was not an active participant at this time in negotiations on behalf of the Borough and he does not formulate or implement labor policy, his Executive Secretary is not a confidential employe. In PLRB v. Altoona Area Sch. Dist., 480 Pa. 148, 389 A.2d 553 (1978), the Supreme Court expressly held that secretaries working for school principals, who were not part of the district's negotiation team or directly involved in formulating labor policy, were not confidential within the meaning of 301(13)(ii) of PERA. This case is factually consistent with Altoona. Accordingly, the position of Executive Secretary to Chief Flanders is not confidential warranting exclusion from the bargaining unit and the denial of the rights and protections afforded by PERA.

The Borough claims that the Chief prepares a variety of reports, memoranda and other paperwork related to collective bargaining with the assistance of the Executive Secretary. In support of this claim, however, the Borough refers to a single instance where the Chief prepared a mid-contract memorandum, typed by the Executive Secretary, recommending to the Borough Manager that police officers change to 12-hour shifts to save money and potentially prevent the planned layoff of a police officer. In Altoona, supra, the Supreme Court stated that "[i]t was not the purpose of [Section 301(13)] to exclude every employee even remotely associated with collective bargaining." Id., 389 A.2d 557. Rather that Section is "best read so as to exclude only those employes whose inclusion in the bargaining unit would seriously impair the employer's ability to bargain on a fair and equal footing with the union." Id. The Chief's sporadic involvement in isolated matters, that eventually may be negotiated at the bargaining table, does not constitute the active role in bargaining and labor policy formulation contemplated by Section 301 such that his Executive Secretary should be deprived of her rights under PERA and excluded from the unit. The Supreme Court, in Altoona, rejected the same argument offered by the Borough here and recognized that a secretary who types or sees an isolated document relating to budget concerns and/or shift changes, which may or may not become an issue in bargaining, would not impair the employer's ability to bargain on an equal footing. In Reynolds School District, 22 PPER ¶ 22098 (Final Order, 1991), the Board stated that "[t]he confidential exclusion is limited to those employes who become privy to the employer's collective bargaining strategy as a result of their access to collective bargaining information in the regular course of their duties." Id. at 224 (emphasis added). The Borough has not met its burden of proving that the Executive Secretary is privy to the Borough's bargaining strategy during the course of her regular duties.

The Borough next argues that the Chief's secretary is a confidential employe within the meaning of Section 301(13)(i) of PERA because she works in the Borough's personnel offices and has access to information subject to use by the Borough in collective bargaining. The Borough contends that Chief Flanders' office constitutes a personnel office because he makes hiring and discharge decisions regarding members of the police force and civilian employes in the police department. However, the Chief's duties regarding the hiring of police officers and the handling of grievances and disciplinary matters do not transform his office into a "personnel office." Otherwise, the office of every public sector supervisor who has authority to hire, fire and discipline would be a personnel office within the meaning of PERA. The Board rejects such an expansive view of the term "personnel offices." Moreover, the Borough has presented no evidence that any documents relating to collective bargaining strategy, negotiations or labor policy are

maintained in the Chief's office or that the Executive Secretary has access to any such documents.

The Borough also contends that the Executive Secretary's duties include the maintenance of personnel files, processing grievances and disciplinary investigations. In Altoona, the Supreme Court stated the following:

The Board properly concluded that the handling of grievances is not part of the "formulation, determination, or effectuation" of an employer's labor policy. The only possible connection these secretaries might have had with the handling of grievances would be the typing of correspondence in regard to the grievance process. The NLRB experience is again helpful. It has consistently held that the typing of materials relating to grievances is not sufficient to render an employe confidential, on the rationale that working with a person who handles grievances is not working with someone who is responsible for the formulation or effectuation of management's labor relations policy. ITT Grinnell Corp., 212 NLRB No. 105, 87 LRRM 1404 (1974); Wyerhaeuser Co., 173 NLRB 1170, 69 LRRM 1553 (1968).

Altoona, 480 Pa. 148, 389 A.2d at 558. The Borough refers to Ms. Skulski's hearing testimony wherein she stated, "I assume that everything I type is confidential." (N.T. 28). However, the term "confidential" as used in PERA has a more limited meaning than the manner in which that term is used in common parlance. In In the Matter of the Employees of Jeanette City Sch. Dist., 14 PPER ¶ 14213 (Final Order, 1983), the Board held that the following factors are significant in determining whether an employe is confidential due to access to such information: (1) whether the employe actually types or reviews collective bargaining proposals, (2) whether the employe knows of the employer's proposals prior to their presentation to the union at the bargaining table or (3) whether the employe attends bargaining sessions dealing with negotiations. Also, in Cheltenham School District, 32 PPER ¶ 32052 (Proposed Order of Unit Clarification, 2001), aff'd, 32 PPER ¶ 32098 (Final order, 2001), the Board held that an employe is not confidential under Section 301(13) where there is no proof that she was exposed to information revealing the employer's collective bargaining strategy. The Board, in Cheltenham, supra, rejected the argument that handling personnel records, processing grievances or having access to budgetary matters contributes to a finding of confidential status. An employer's bargaining position can only be compromised by the employe if that employe has access to the employer's bargaining strategy or its labor policies before they are presented to the union. The Borough has failed to satisfy, on this record, any of these factors or requirements.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the Borough's exceptions and make the Proposed Order of Dismissal, as amended herein, final.

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 in the above-captioned matter are hereby dismissed and the Proposed Order of Dismissal, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle, Jr., Chairman, and Members L. Dennis Martire and Anne E. Covey, this nineteenth day of November, 2002. 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.