COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF	:	
	:	
	:	Case No. PF-U-01-47-W
	:	(PF-R-93-54-W)
	:	
ELIZABETH TOWNSHIP	:	

FINAL ORDER

On November 12, 2001, Elizabeth Township (Township) timely filed with the Pennsylvania Labor Relations Board (Board) exceptions and a supporting brief to a Proposed Order of Unit Clarification (POUC) issued October 24, 2001. In the POUC, the Hearing Examiner sustained the Petition for Unit Clarification filed by the Teamsters, Local No. 205 (Union) and concluded that the recently created position of Deputy Chief of Police is not a management level position and therefore the Township improperly declared the position to be outside the bargaining unit.

In its exceptions, the Township objects to Findings of Fact numbers 5-8, 10, 12, and 13-17, and argues that the hearing examiner "failed to weigh the substantial evidence presented." (Township's Exceptions at 1; Brief at 1). Specifically, the Township contends that "[a] review of the evidence presented presents substantial evidence to the contrary" of the Hearing Examiner's determination that the "Deputy Chief has no role in developing policy, hiring, discipline, budget preparation, purchasing, or committing the police department's resources." (Brief at 1). The fact finder in an administrative agency is required to set forth in an adjudication only those facts that are necessary and relevant to support the decision. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556, 561 (1975). Ford City Borough, 19 PPER ¶ 19117 (Final Order 1988); Police of the City of Chester, Fraternal Order of Police v. City of Chester, 18 PPER ¶ 18084 (Final Order, 1987); Jenkins v. Commonwealth, Dep't of Labor and Indus., Office of Vocational Rehabilitation, 18 PPER ¶ 18141 (Final Order, 1987). Accordingly, the Board is not required to make unnecessary findings or make findings that would support another decision even if there is substantial evidence to support such a finding. Page's Department Store, supra. Here, the Township is merely claiming that the Hearing examiner erred because he did not find facts favorable to the Township's position and proposed conclusion. After reviewing the record, the POUC and the exceptions, the Board finds that the Hearing Examiner's Findings of Fact are supported by substantial evidence and his conclusion that the Deputy Chief of Police is not a managerial employe was appropriate.[1]

The Township also argues that, at the time of the July 17, 2001 hearing, Robert Wallace was in the Deputy Chief position for only 47 days,

[1] The Township has not challenged any findings of fact as being unsupported by substantial evidence. Accordingly, the Hearing Examiner's Findings of Fact are conclusive. 34 Pa. Code § 95.98(a)(3); Fraternal Order of Police, Lodge No. 5 v. PLRB, 727 A.2d 1187 (Pa. Cmwlth. 1999).

which was not enough time to demonstrate an independent involvement in activities such as imposing serious discipline or developing a budget. The Township alternatively requests the Board to reopen the record for additional evidence, if the Board does not reverse the POUC.

The Board has exclusive authority to determine the appropriateness of a bargaining unit. Gateway Sch. Dist. v. PLRB, 470 A.2d 185 (Pa. Cmwlth. 1984); Community College of Beaver, 21 PPER ¶ 21166 (Final Order, 1990), aff'd, 24 PPER ¶ 24110 (Beaver County Court of Common Pleas, 1993). This function is a continuing one that is fulfilled through the Board's unit clarification procedure. Gateway, supra; In the Matter of the Employes of the Public Utility Comm'n, 20 PPER ¶ 20047 (Final Order, 1989) (PUC). In Gateway, the Court stated that it "has recognized the necessity of unit clarification proceedings as a means to insure flexibility in the composition of the bargaining unit as new positions are created or existing positions are changed." Gateway, 470 A.2d at 188. Accordingly, the removal of employes from an established unit can only be accomplished through the Board's unit clarification process after the Board determines that the position in question should be excluded, and the employer commits an unfair labor practice by unilaterally removing an employe from the bargaining unit before a determination is made by the Board. Beaver County, supra; Wage Policy Committee of the City of New Kingston Paid Fire Dep't. v. City of New Kingston, 18 PPER ¶ 18023 (Final Order, 1986). As such, a newly created position remains in the bargaining unit until the employer meets its burden of proving that the position should be excluded from the unit.

The Commonwealth Court and the Board have consistently held that determining whether an employe should be excluded from the bargaining unit, and thereby denied rights granted by the statute, requires an examination of the actual job functions performed by that employe, not a written job description or alleged prospective job functions. School Dist. of the Township of Millcreek v. Millcreek Educ. Ass'n, 440 A.2d 673 (Pa. Cmwlth. 1982); PUC, supra. Otherwise, employers could undermine a union and its majority status by merely creating new job titles or positions with written job descriptions even though employes have not in fact performed the duties in the job description.

The Township here seeks to have the Board reopen the record based upon post-petition evidence because there was an insufficient amount of time before the hearing for Wallace to exercise recognized managerial functions. As regards the Township's request to reopen the record, the Commonwealth Court has held that the Board properly refuses to consider post-petition evidence. North Hills Sch. Dist. v. PLRB, 722 A.2d 1155 (Pa. Cmwlth. 1999). This policy is designed to deter an employer from assigning activities to an employe after a petition is filed simply to create the appearance that the employe should be excluded from the unit. Id. The law, however, is clear that the evidence sought to be introduced by the Township is inadmissible, and the Township's request to reopen the record must be denied. However, because the Board possesses a continuing obligation to determine the appropriateness of bargaining units, the Township subsequently may file a petition for unit clarification and demonstrate that circumstances have, in fact, changed and that Deputy Chief Wallace actually exercises managerial functions in addition to merely possessing the authority delineated in his written job description and the ordinance that created his position. North Hills, supra; Gateway, supra. Thus the interests of the Township are not permanently fixed by this

proceeding but are protected by its ability to file a timely request to amend the unit when it can demonstrate the actual performance of the duties identified in Fraternal Order of Police, Lodge No. 20 v. PLRB, 522 A.2d 697 (Pa. Cmwlth. 1987), aff'd, 522 Pa. 149, 560 A.2d 145 (1989) (Star Lodge II).

The Township also argues that the Hearing Examiner's decision is inconsistent with the decision of another hearing examiner in In the Matter of the Employes of South Park Township, 31 PPER ¶ 31144 (Proposed Order of Unit Clarification, 2000). Specifically, the Township directs the Board's attention to findings of fact numbers 8, 9 and 10 in the South Park case and argues that the deputy police chief in South Park performed similar functions as Deputy Chief Wallace performed in this case. The South Park case, however, is distinguishable. In that case, the deputy chief position was created eight months before the hearing whereas the deputy chief position here was created merely three months before the hearing. In South Park, the greater time period, which included the passage of a new budget, enabled the deputy chief in that case to actually perform recognized managerial functions in satisfaction of four of the six criteria set forth in Star Lodge II. The six criteria relevant to determining whether a police officer is a managerial employe excluded from the bargaining unit are the following:

> Policy Formulation - authority to initiate departmental policies, including the power to issue general directives and regulations;
>
> Policy Implementation - authority to develop and change programs of the department;
>
> Overall Personnel Administration Responsibility - as evidenced by effective involvement in hiring, serious disciplinary actions and dismissals;
>
> Budget Making - demonstrated effectiveness in the preparation of proposed budgets, as distinguished from merely making suggestions with respect to particular items;
>
> Purchasing Role - effective role in the purchasing process, as distinguished from merely making suggestions;
>
> Independence in Public Relations - as evidenced by authority to commit departmental resources in dealing with public groups."

Id. at 704. In this record, owing perhaps to the short passage of time between the creation of the position and this proceeding, the Township, unlike the employer in South Park, was unable to demonstrate the actual performance of managerial authority by Deputy Chief Wallace.

The Star Lodge II Court specifically held that the actual imposition of serious discipline is a managerial factor. Id. at 703. The Court also stated that "hiring is undoubtedly an element in the `overall personnel administration' function because the hiring function helps to determine the very identity of the persons who shall constitute the bargaining unit."

Id. The Court further stated that "an effective advisory role in budget-making, as well as in the companion fiscal function of purchasing, serves usefully to identify the police commander whose status is managerial." Id. at 704. The Star Lodge II Court also concluded that, in light of the fact that all the criteria of managerial status are seldom present in any one case, the Board does not err in relying on some but not all indicia of managerial authority as controlling. Id. The factors for determining the managerial status of an employe are not to be weighed or balanced. In the Matter of the Employees of Carlynton Sch. Dist. v. Carlynton Sch. Dist., 377 A.2d 1033 (Pa. Cmwlth. 1977).

Accordingly, the Hearing Examiner here concluded that "the assistant [deputy] chief has no role in developing policy, hiring, discipline, budget preparation, purchasing, or committing the police department's resources." (POUC at 3). Therefore, contrary to South Park, where the deputy chief's actual job performance satisfied four of the six Star Lodge criteria, Deputy Chief Wallace's actual job performance of record fails to satisfy any of the Star Lodge II criteria. Therefore, the Hearing Examiner's decision is consistent with the decision in South Park, supra.

The Township has also submitted a written request for oral argument before the Board. In support of its request, the Township states that it "believes that Oral Argument would enable the Township to demonstrate more fully its position." However, the Board will deny such a request absent a showing that the exceptions present novel issues of law or fact. In the Matter of the Employes of City of Harrisburg, 25 PPER ¶ 25000 (Final Order, 1993); In the Matter of the Employes of Conestoga Valley Sch. Dist., 24 PPER ¶ 24142 (Final Order, 1993); Midland Educ. Ass'n v. Midland Borough Sch. Dist., 19 PPER ¶ 19036 (Final Order, 1988). There are no novel issues of law or fact presented in this case, and the Board fully understands the Township's position. Accordingly, the Township's request for oral argument is denied.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the Township's exceptions and make the Proposed Order of Unit Clarification final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed in the above-captioned matter be and the same are hereby dismissed and the Proposed Order of Unit Clarification be and the same 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 Edward G. Feehan, this nineteenth 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.