COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| IN THE MATTER OF THE EMPLOYES OF | : | |
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| | : | Case No. PERA-U-02-407-E |
| | : | (PERA-R-13,396(a)-C) |
| BERKS COUNTY | : | |

**FINAL ORDER**

On September 30, 2003, the Pennsylvania Labor Relations Board (Board) received timely exceptions filed by Berks County (County) to a Proposed Order of Unit Clarification issued on September 11, 2003, in which a hearing examiner of the Board concluded that the positions of Chief Deputy Coroner, First Deputy Coroner and Second Deputy Coroner were neither supervisory nor management level within the meaning of the Public Employe Relations Act (Act) and were accordingly included in a bargaining unit represented by the American Federation of State, County and Municipal Employees, District Council 88, AFL-CIO (Union). After two extensions of time in which to file its brief in support of exceptions were granted by the Board, the Board received the County's brief in support of its exceptions on November 19, 2003.[1] On December 9, 2003, the Board received the Union's brief in opposition to the County's exceptions.

In its exceptions, the County contends that the hearing examiner erred in (1) failing to conclude that the Chief Deputy Coroner, First Deputy Coroner and Second Deputy Coroner are supervisory or management level employes, and (2) concluding that the Union had not bargained away its right to seek the inclusion of these positions in the bargaining unit by way of unit clarification.

The County initially excepts to the hearing examiner's determination that the Chief Deputy Coroner (Bostard), the First Deputy Coroner (Reardon) and Second Deputy Coroner (Wesner) are not management level employes within the meaning of the Act. Section 301(16) of the Act defines management level employe to include "any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employes above the first level supervision." 34 P.S. § 1101.301(16). In Commonwealth of Pennsylvania (Attorney Examiner I), 12 PPER ¶ 12131 (Final Order, 1981), the Board stated as follows:

> "The statute may be read to state a three-part test in determining whether an employe will be considered managerial. Those three parts are (1) any individual who is involved directly in the determination of policy; (2) any individual who directs the implementation of policy; or (3) employes above the first level of supervision."

[1] The County's brief included a U.S. Postal Service Form 3817, which indicated that the brief in support of exceptions was timely placed in the United States mail on November 17, 2003.

12 PPER at 203.

In Horsham Township, 9 PPER ¶ 9157 (Final Order, 1978), the Board interpreted the policy determination part of the test of management level status as follows:

> "An individual who is involved directly in the determination of policy would include not only a person who has the authority or responsibility to select among options and put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. Our reading of the Statute does not include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal."

9 PPER at 327. The Board went on to interpret policy implementation to include the following:

> "[T]hose persons who have a responsible role in giving practical effect to and ensuring the actual fulfillment of policy by concrete measures, provided that such role is not of a routine or clerical nature and bears managerial responsibility to ensure completion of the task. The administration of policy involves basically two functions: (1) observance of the terms of the policy and (2) interpretation of the policy both within and without the procedures outlined in the policy. The observance of the terms of the policy is largely a routine and ministerial function. There will be occasion where the implementation of policy will necessitate a change in procedure or methods of operation. The person who effects such implementation and change exercises that managerial responsibility and would be responsibly directing the implementation of policy."

Id. With respect to Bostard's status as a management level employe, the County relies upon Bostard's effective recommendations regarding office supplies, body bags and other equipment, his preparation of time sheets for Coroner office employes and his representing the Coroner's office to the public and law enforcement agencies in the absence of the Coroner.[2] The County objects to the hearing examiner's failure to rely upon Bostard's purchasing and time sheet responsibilities because the decisions that Bostard makes are subject to review by the Coroner. We

[2] With respect to the County's argument that the duties of the Chief Deputy Coroner, First Deputy Coroner and Second Deputy Coroner in filling in for the Coroner in his absence substantiate either a management level exclusion or a supervisory exclusion for those positions, that argument was specifically rejected by the Board and the Court of Common Pleas in Berks County, 27 PPER ¶ 27110 (Final Order, 1996), aff'd, 28 PPER ¶ 28234 (Court of Common Pleas of Berks County, 1997), and provides no basis for overturning the determinations made by the hearing examiner.

agree with the County that the hearing examiner erred when he discounted the Chief Deputy Coroner's effective recommendations regarding significant office purchases simply because those recommendations were subject to the approval or veto of the Coroner. Employees of Carlynton School District v. Carlynton School District, 337 A.2d 1033 (Pa. Cmwlth. 1977); Pennsylvania Association of State Mental Hospital Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1989). However, a more fundamental question is whether these duties are at all indicative of management level status under the specific definition of management level employe in the Act. The mere filling out of time sheets for Coroner office employes does not amount to either the determination or the implementation of policy as interpreted by the case law noted above, but represents the observance of existing policy. The effective recommendation of office purchases also fails to support a management level exclusion. In Pennsylvania Association of State Mental Hospital Physicians v. PLRB, supra., The Commonwealth Court agreed with the Board that the mental health physicians at issue were management level employes because of their participation in the overall budget of the institution and not merely making recommendations regarding the purchase of equipment. We believe that the participation in the budgetary process must go beyond purchasing of equipment and must extend to the overall budget in order to substantiate a management level exclusion under PERA. Accordingly, the hearing examiner's determination that Bostard is not a management level employe will be affirmed.

With respect to Reardon's management level status, the only relevant evidence proffered by the County to support a management level exclusion is the crime scene investigation duties such as determining whether the Coroner's office has jurisdiction and whether an autopsy is required. However, the Board and the Court of Common Pleas of Berks County previously rejected similar duties cited by the County as evidence of managerial status in the previous case that rejected management level status for the Chief Deputy Coroner and Deputy Coroners. Berks County, supra. Accordingly, the crime scene investigation duties do not substantiate a management level exclusion for any of the employes at issue here.

With respect to the Second Deputy Coroner's duties in compiling office procedures, we agree with the hearing examiner that those duties do not rise to the level of management level employe. The record reveals that the Second Deputy Coroner copied portions of the policy manual from state statutes and County policies, reduced already existing policies to writing or used merely common sense (in the creation of the vehicle policy). Those policies as set forth in the procedures manual were approved and occasionally changed by the Coroner. There is simply no evidence on this record that the Second Deputy Coroner had such involvement in the determination of policy to substantiate a management level exclusion.

The County also relies upon the Second Deputy Coroner involvement in the training of new employes evidences policy implementation meeting the second part of the test for management level status in Section 301(16) of the Act. There is nothing in the Second Deputy Coroner's training duties that transcends merely educating new employes about the existing policies in the Coroner's office. The Second Deputy Coroner observes existing policy in both orienting new employes in the office

and the on-the-job training that occurs during the death scene investigations. There was no evidence that in the course of her duties in this regard, the Second Deputy Coroner was ever called upon to interpret a policy both within and without the procedures outlined in the policy or required a change in the procedures or methods of operation. Accordingly, the Second Deputy Coroner's training responsibilities do not support a management level exclusion.

The County next argues that Bostard, Reardon and Wesner are supervisory employes within the meaning of the Act. Section 301(6) of the Act provides 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 stated that "the right to order the workforce and the ability to effect reward or sanction are what distinguishes a 'supervisor' from a 'task leader'." Danville Area School District, 8 PPER at 196 (Order and Notice of Election, 1977). An employe who lacks the authority to effect reward or sanction simply cannot be excluded from a bargaining unit as a supervisor. The County in this case has failed to substantiate that Bostard, Reardon or Wesner have any authority whatsoever in effecting reward and sanction involving other employes. Further, the record does not substantiate that the arguably supervisory duties offered by the County constitute anything but a minor part of their job functions. Section 604(5) of the Act states that "...[i]n determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed." 43 P.S. § 1101.604(5). Accordingly, the positions are not supervisory within the meaning of Section 301(6) of the Act.

The County finally argues that the Union is estopped from filing a petition for unit clarification seeking the inclusion of these various positions in the bargaining unit because the Union agreed in its most recent collective bargaining agreement that those specific positions were excluded from the bargaining unit. The agreement that the County relies upon expired on December 31, 2003. Accordingly, the County's argument that the Union is estopped by the collective bargaining agreement from seeking the inclusion of these positions in the bargaining unit by way of a petition for unit clarification is moot. Even if the argument is not moot, the Board has rejected the notion that a clause in a collective bargaining agreement that excludes specific positions from the bargaining unit is a clear and unmistakable waiver of the bargaining representative's right to file a unit clarification seeking a Board determination on the inclusion of those positions. Chambersburg Area School District, 20 PPER ¶ 20149 (Final Order, 1989); Plains Township, 24 PPER ¶ 24081 (Final Order, 1993). Further, the County's reliance upon FOP v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982) is misplaced because that case involved the inability

of a party to argue the illegality of an agreed-upon provision in a collective bargaining agreement to avoid having to comply with that provision. Here, the Union is merely seeking to prospectively include the petitioned-for positions in its unit after having agreed to their exclusion. Township of Sugarloaf v. Bowling, 563 Pa. 237, 759 A.2d 913 (2000) is similarly inapposite because that case involved the jurisdiction of an arbitrator to interpret the scope of an agreed-upon collective bargaining unit to determine whether a grievance filed on behalf of a disputed employe is arbitrable. Here, the Union is not requesting an interpretation of a collective bargaining agreement, but merely whether the positions at issue should be included in the bargaining unit prospectively.

After a thorough review of the exceptions and all matters of record, the exceptions shall be dismissed and the Proposed Order of Unit Clarification shall be made 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 to the Proposed Order of Unit Clarification in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Order of Unit Clarification is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member, and Anne E. Covey, Member, this sixteenth day of March, 2004. 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.