

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PERA-R-04-283-E
:
COMMONWEALTH OF PENNSYLVANIA :
(DEPARTMENT OF CORRECTIONS) :

FINAL ORDER

On March 18, 2005, the Pennsylvania Commissioned Officers Association (Association) filed timely exceptions and a supporting brief to a Proposed Order of Dismissal issued on February 28, 2005, in which a hearing examiner of the Pennsylvania Labor Relations Board (Board) dismissed a Petition for Representation filed by the Association seeking to represent a unit of Correctional Officer 3's (Lieutenants) employed by the Commonwealth of Pennsylvania (Commonwealth) as first level supervisors for the purpose of meeting and discussing pursuant to the provisions of the Public Employee Relations Act (PERA). On April 11, 2005, the Commonwealth filed its Brief in response to the Association's exceptions.

The Association's petition is the Association's third attempt to demonstrate that Lieutenants employed by the Commonwealth in its correctional institutions are supervisors under Section 301(6) of PERA and eligible for inclusion in a "meet and discuss" unit. In the previous two attempts, the Board found that the Lieutenants are management level employees within the meaning of Section 301(16) of PERA and are accordingly excluded from any unit under PERA. Commonwealth of Pennsylvania (Commonwealth Correctional Institutions), 15 PPER ¶ 15122 (Final Order, 1984); Commonwealth of Pennsylvania, Department of Corrections, 21 PPER ¶ 21181 (Proposed Order of Dismissal, 1990). Under Section 301(16) of PERA, a management level employe is defined as any individual who 1) is involved directly in the determination of policy on behalf of the employer, 2) responsibly directs the implementation of policy on behalf of the employer, or 3) is above the first level of supervision. Pennsylvania Association of State Mental Hospital Physicians v. PLRB, 554 A.2d 1021 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 590, 575 A.2d 119 (1990). In the two previous cases, the Board concluded that the Lieutenants were management level employees because they responsibly directed the implementation of policy on behalf of the Commonwealth as a result of 1) their performance as shift commanders in which they were responsible for the overall operation of their correctional institutions and 2) their responsibilities for otherwise ensuring that their institutions were operated in compliance with the Commonwealth's policies and procedures.

In the Proposed Decision and Order, the hearing examiner correctly noted that once the Board excludes a class of employees from a unit in a case in which the question of unit eligibility has been litigated, a party to that proceeding must thereafter show that there has been a material change in the job duties before the Board will revisit the issue of whether or not that class of employees should remain included or excluded from the unit. Gateway School District v. PLRB, 470 A.2d 185 (Pa. Cmwlth. 1984). The hearing examiner went on to conclude that in order for the Association to prevail in this case, the Association had the burden to prove that as a class the Lieutenants no longer performed any of duties for which they had previously been excluded as management level, i.e. that they no longer act as shift commanders responsible for the overall operation of their institutions and 2) that they are no longer responsible for ensuring that their institutions are operated in compliance with the Commonwealth's policies and procedures. The hearing examiner concluded that the Association failed to carry its burden to prove that the Lieutenants no longer are responsible for ensuring that their institutions are operated in compliance with the Commonwealth's policies and accordingly, because the test for management level employe under PERA is a disjunctive test, the Lieutenants remain management level employees excluded from any unit under PERA.

In so doing, the hearing examiner made findings of fact regarding the Lieutenants' responsibilities in ensuring that their institutions are operated in compliance with the Commonwealth's policies. The hearing examiner found as fact that the Lieutenants, acting

as "zone lieutenants" (referred to in the previous cases as "area commanders"), are still responsible for ensuring the policies and procedures relating to security are followed in a zone within their institutions and for securing their zone if there is a problem. The hearing examiner also found as fact that the Lieutenants, acting as "tool/key control lieutenants", are responsible for ensuring that anyone handling tools or keys in their institutions follow the procedures and policies regarding the use of tools and keys. Lieutenants acting as "security lieutenants" are responsible for enforcing all of the procedures in the institution's security manual, including ensuring compliance with the risk program, running the midnight selection program and making sure the security tech groups are monitored effectively. "Training lieutenants" are responsible for ensuring that the training procedures and policies are implemented at their institutions and the correction emergency response lieutenants are responsible for ensuring that their teams follow policies in responding to emergencies at their institutions. The "emergency preparedness coordinator lieutenants" are responsible for ensuring that their institutions adhere to emergency preparedness policies for responding to matters such as escapes, disturbances or interruptions of major utilities. Finally, the hearing examiner found as fact that the "restricted housing unit lieutenants" are responsible for the overall operation of the restricted housing units for inmates at their institutions, including directing subordinate staff to ensure that inmates housed in those units receive the provisions that they are supposed to receive. The hearing examiner did not make findings of fact or conclusions of law regarding whether the Lieutenants continue to be assigned as shift commanders, responsible for the overall operation of their institutions, or whether the Lieutenants are involved directly in the determination of policies.

The Association initially excepts to all of the findings of fact made by the hearing examiner. The Association contends that the findings of fact are not supported by substantial evidence and that the hearing examiner's failure to make other findings of fact disregards material evidence. The hearing examiner's findings are annotated to the notes of testimony and exhibits where evidence to support each finding of fact can be found. In its brief in support of exceptions the Association does not directly challenge any specific finding of fact made by the hearing examiner. The Board has examined those findings of fact and finds that they are amply supported by evidence on the record. Accordingly, those findings of fact will not be disturbed. The Association's further contention that the hearing examiner failed to make additional findings of fact that it contends support its position in this case is without merit. In Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975), the Pennsylvania Supreme Court stated as follows:

"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 and which are relevant to a decision."

464 Pa. at 287, 346 A.2d at 561; see also Birriel v. Workman's Compensation Appeal Board 435 A.2d 292 (Pa. Cmwlth. 1981). The hearing examiner made findings of fact that relate to the Lieutenants' duties in ensuring compliance with the Commonwealth's policies regarding the management of the Commonwealth's correctional institutions. The hearing examiner found that, as in the previous two cases in which the Lieutenants were found to be management level employees, the Lieutenants continue to perform those duties in ensuring compliance with the Commonwealth's policy that were relied upon in those previous two cases. Accordingly, the hearing examiner correctly reasoned that because the test for management level status is a disjunctive one, neither findings of fact nor conclusions of law were necessary regarding the remaining issues raised by the Association. Findings of fact and conclusions of law regarding those additional issues would not have changed the hearing examiner's determination that the Association failed to carry its burden to prove that the Lieutenants no longer performed any of the management level duties that resulted in their exclusion in the previous cases.¹

The Association also contends in its brief that the hearing examiner erred when he concluded that if any of the Lieutenants engaged in management level duties that all

¹ It should be noted that although not necessary to the resolution of this case, there was uncontradicted testimony adduced that the Lieutenants are still regularly assigned as Shift Commanders on all shifts at two of the institutions (N.T. 142, 153) and that at another institution, Lieutenants are serving as Shift Commander approximately 1/7 of the time (N.T. 122).

Lieutenants are management level employees. This contention ignores the case law regarding bargaining unit determinations of classes of employees and the requirements necessary for exclusion of a classification as a result of the exercise of management level duties. In PLRB v. AFSCME, 342 A.2d 155 (Pa. Cmwlth. 1975), the Commonwealth Court affirmed the Board's policy in deciding whether or not a large class of employees is eligible for representation under PERA, that the employees in that class could be treated the same even though there might be some variation in the individual duties which they perform. It must also be noted that the Commonwealth Court has determined that the extent to which managerial duties are performed is not determinative of a management level exclusion, i.e. if any managerial duties are performed the position is management level. Employes of Carlynton School District v. Carlynton School District, 277 A.2d 1033, (Pa. Cmwlth. 1977). The hearing examiner's findings of fact clearly revealed that the Lieutenants acting as zone lieutenants, tool/key control lieutenants, security lieutenants, training lieutenants, corrections emergency response team lieutenants, emergency preparedness coordinator lieutenants and restricted housing unit lieutenants continue to responsibly direct the implementation of the Commonwealth's correctional institution policies. Indeed the witnesses who testified at the hearing, even the Association's own witnesses, confirmed that the Lieutenants serving as zone commanders and specialty Lieutenants were responsible for ensuring compliance with policy within their zones of responsibilities. The Association had the burden to prove that the Lieutenants no longer performed any of those duties that previously resulted in their exclusion as management level employees. Gateway School District v. PLRB, supra. In the Association's most recent attempt to represent the Lieutenants in a meet and discuss unit, the Board relied, in part, upon the Lieutenants' responsibilities as area commanders and found as fact that "[a]s area commanders, the corrections officers III (lieutenants) are responsible for insuring that designated areas of their institutions operate in conformity with established procedures." Commonwealth of Pennsylvania, Department of Corrections, supra, 21 PPER at 460. In this case, the hearing examiner made a virtually identical finding (Finding of Fact 2) regarding the Lieutenants' responsibilities as zone commanders and supplemented that finding with findings that the Lieutenants exercised similar responsibilities in assuring compliance with the Commonwealth's policies with respect to the specialty lieutenants listed above. The Association has failed to carry its burden to prove that the Lieutenants no longer exercise the responsibilities upon which a management level exclusion was based in the prior proceedings. Accordingly, the Association is bound by those previous determinations and the hearing examiner was correct in dismissing the Association's petition. ²

The Association also contends that a remand to the hearing examiner is necessary to explore whether the duties relied upon by the hearing examiner to support the management level exclusion of the Lieutenants were duties that the Lieutenants were performing while they were acting as Correctional Officer 4's (Captains). The Board has reviewed the record and there is simply no support for the argument that the zone lieutenants, tool/key control lieutenants, security lieutenants, training lieutenants, corrections emergency response team lieutenants, emergency preparedness coordinator lieutenants or the restricted housing unit lieutenants were performing the management level duties relied upon when they were filling in for or acting as Captains. The Association is essentially requesting that the Board reopen the record to adduce additional testimony to support the notion that the duties relied upon by the hearing examiner were performed by the Lieutenants when they were acting as Captains. Unless the proffered evidence sought to be introduced is 1) new; 2) could not have been obtained at the time of hearing; 3) relevant and non-cumulative; 4) not offered for the purposes of impeachment; and 5) likely to compel a different result, the Board will not exercise its discretion to reopen the record. Pennsylvania State Troopers Association v. Pennsylvania State Police, 33 PPER ¶ 33011 (Final Order, 2001). The Board will not reopen the record on exceptions merely to allow a party to introduce evidence it had in its possession and could have presented to

² The Association also cites School District of Philadelphia v. PLRB 719 A.2d 835 (Pa. Cmwlth. 1998) for the proposition that the Lieutenants' duties in this case were not managerial because they were merely the Lieutenants' routine discharge of professional duties and had no impact on the Commonwealth's managerial policies. That case is inapplicable here because the employees at issue in that case, unlike the Lieutenants here, were professional employees as that term is defined in Section 301(7) of PERA. Further, the Association is bound by the previous determinations unless the Association was able to prove a change in facts from those previous proceedings. Gateway School District v. PLRB, supra. Since the Association has failed to carry that burden, the hearing examiner correctly dismissed the Association's petition.

the hearing examiner. Slavanish v. Service Employees International Union, AFL-CIO, Local 585, 18 PPER ¶ 18056, (Final Order, 1987). In its brief in support of exceptions, the Association does not even contend that the evidence it seeks to adduce complies with the requirements to support a remand to reopen the record and accordingly, the request for a remand must be denied.

After a through review of the exceptions and all matters of record, the Board shall dismiss the exceptions filed by the Association and affirm the Proposed Order of Dismissal issued by the hearing examiner.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Order of Dismissal in the above captioned matter being the same or hereby dismissed and that the Proposed Order of Dismissal is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this sixteenth day of August, 2005. 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.

DISSENT OF CHAIRMAN MARTIRE

I respectfully dissent from the opinion of the majority for the reasons stated in my dissenting opinion in Commonwealth of Pennsylvania (Commonwealth Correctional Institutions), 15 PPER ¶ 15122 (Final Order, 1984) and would, accordingly, conclude that the Lieutenants are first level supervisory employees eligible to be represented in a meet and discuss unit.