

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PF-R-08-67-E
: :
MINERSVILLE BOROUGH :

ORDER DIRECTING SUBMISSION OF ELIGIBILITY LIST

On May 9, 2008, the Minersville Borough Police Officer's Association (Association) filed a petition for representation with the Pennsylvania Labor Relations Board (Board) seeking investigation of a question of representation and certification of a representative designated or selected for the purpose of collective bargaining by an appropriate unit of police officers employed by Minersville Borough (Borough). On May 22, 2008, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on June 26, 2008, if the parties were unable to resolve the matters in dispute by then. The parties required a hearing, but the hearing was continued to August 5, 2008, at which time the parties were afforded a full opportunity to present evidence and to cross-examine witnesses.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. That Minersville Borough is an employer under Section 3 (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111).
2. The Minersville Police Officers Association is a labor organization under Section 3 (f) the PLRA as read in pari materia with Act 111. (N.T. 6-7, 12, 92, Association Exhibit 1)
3. The parties stipulated and agreed that an appropriate unit for the purpose of collective bargaining between the Borough and the Association would be comprised of all full-time and regular part-time police officers, excluding all managerial employees. (N.T. 4)
4. The Association has demonstrated to the satisfaction of the Board the requisite showing of interest as set forth in the PLRA.
5. The Borough employs five full-time police officers: Chief Robert Bergan, Thomas Hoban, Eric Sterner, Jeffrey Bowers and Richard Clink. (N.T. 12-13, Association Exhibit 2)
6. That the Borough employs several part-time police officers, both regular part-time and casual employees. (N.T. 24, 92, Association Exhibit 2)
7. That the parties stipulated and agreed that Ryan Murphy and Thomas Fort are regular part-time officers as that term is defined by the Board. (N.T. 13)
8. That on behalf of the Borough police department, Officer Jeffrey Bowers prepares a schedule for the department each Monday in which the full-time police officers and regular part-time officers are scheduled. The (N.T. 41)
9. That Bowers schedules part-timers on regular basis only on weekends. (N.T. 41,
10. That Bowers schedules part-time officers on Saturday and Sunday, for the first shift (7 a.m. to 3 p.m.), second shift (3 p.m. to 11 p.m) and cover shift (8 p.m to 4 a.m.). (N.T. 14, 40-42, 92, Association Exhibit 2)

11. That for the past three months, Patrolman Brian Pyle has worked every other Saturday on the 8 p.m. to 4 a.m. shift, also known as the "cover shift," designed to have additional coverage in times when a higher police presence is required. (N.T. 15-18, 34, Association Exhibits 2 and 3)

12. That Officer Martin Gilbert covers those shifts for officers on sick leave, vacation time and personal time. He is called as needed, on short notice, and is not on the schedule. (N.T. 21, 34-35, 36)

13. That in 2008, Officer Joseph Kavanaugh only worked 16 hours, on as needed basis and is not on the schedule. (N.T. 33, 48)

14. That Officer Shawn Tray works when called to fill in for officers on vacation and sick leave. Tray had been on the schedule until March of 2008. (N.T. 36-38, 42, 45-46, Association Exhibits 2 and 3)

15. That Officer Raymond Tonkinson works on an as needed basis and is not on the schedule. (N.T. 37, Association Exhibits 2 and 3)

16. That the Borough employs Robert Bergan as Chief. (N.T. 12-13, 93)

17. That Chief Bergan maintains a three ring binder containing the department's rules, regulations and policies. The chief is responsible for seeing that each new police officer receives a copy of the rules, regulations and policies. (N.T. 53-54, 57)

18. That many of the rules, regulations and policies in the binder have been formulated by Chief Bergan. For example, Chief Bergan developed policies on community oriented policing, blood borne pathogens, the use of magnum spike systems and the use of tasers and firearms. Chief Bergan formulated and implemented these policies, without revision or amendment by the Mayor or Council. (N.T. 114-117, 125-26, Association Exhibit 4)

19. That the Borough requires that the Chief approve all purchases for the police department. The chief has full authority to makes purchases, as long as purchases do not exceed the police department budget. Only purchases above \$1,000 require approval of Council. (N.T. 80-81 106, 111)

20. That as examples of Chief Bergan's purchases, he has recently purchased a portable radio and computer equipment. (N.T. 80)

21. That Chief Bergan has applied for the Borough to be part of the DARE (Drug Abuse Resistance Education) program. By becoming a DARE program, the Borough must commit an officer to spend time educating students about the problems with drugs and alcohol. The police visit area schools with an anti-drug abuse message. The officer's DARE work is reimbursed by funds from the Pennsylvania Commission on Crime and Delinquency. (N.T. 107, 108)

DISCUSSION

The Association has petitioned the Board for certification to represent a bargaining unit comprised of the Borough's full-time and regular part-time police officers, excluding the chief of police.

Prior to the hearing, counsel for chief of police Robert Bergan wrote a letter to the Board, moving for Bergan's intervention in the case and to continue the hearing. This examiner denied both requests in a telephone pre-hearing conference with Mr. Bergan's counsel and the counsel for Borough and the Association. (N.T. 4). Individuals have no standing to intervene in Board representation cases. Commonwealth of Pennsylvania. 26 PPER ¶ 26135 (Final Order, 1995)

At the hearing, the Borough raised four issues in the way of objections to the petition that now require disposition.

First, the Borough questioned whether the Association was authorized to file the present petition before the Board. The Borough contended that the Association did not have the consent of a majority of the full time officers in the department and that it was not authorized to represent part-time officers. It is not the Board's function to investigate internal deliberations of a labor organizations preceding the filing of a Petition for Representation. Geistown Borough, 21 PPER ¶ 21074 (Final Order, 1990). To establish jurisdiction to hear a petition, the Board is only required to determine if there has been the appropriate showing of interest of an appropriate unit of employes. The Board has held that in cases seeking PLRB certification of a unit of police officers, under the Board law, the appropriate unit of police officers is a unit of "all full-time and regular part-time officers." Geistown Borough, supra. That is the unit for which the Association has petitioned and which the Board has verified that Association has a showing of interest as required under the law.

Related to this issue is the Borough's second objection. The Borough questions the showing of interest, contending that the Association had not attached the showing of interest authorization cards to the petition. The Borough has no right to see the showing of interest. Rule 95.17 of the Board's Rules and Regulations states,

"The showing of interest submitted will not be furnished to any of the parties. The Board or its agents will determine the adequacy of the showing of interest and such decision will not be subject to collateral attack in a hearing."

34 Pa. Code § 95.17.

The showing of interest is an administrative decision that is not on the record. Old Lycoming Township, 18 PPER ¶ 18059 (Final Order, 1987)

The third issue is which of the part-time officers now employed by the Borough meet the Board's definition of "regular part-time officers?" The parties have agreed that Officers Ryan Murphy and Thomas Fort are regular part-time officers. But five other part-time officers are in question.

The Board has established a test for distinguishing "regular part-time" officers from casual officers. The test first requires an analysis of whether the employes worked on a scheduled basis for the employer as opposed to being called in on short notice. The second part of the test requires that the officers "exhibit a regularity of employment with consistent and repeated service and an expectancy of continued employment." Borough of Whitaker, 14 PPER ¶ 14200 (Order Directing Submission of Eligibility List, 1983), 14 PPER ¶ 14273 (Final Order, 1983). "Merely appearing on the schedule is not sufficient, it is the frequency and regularity of employment which is relevant to a determination that an employe is regular part-time." Borough of Whitaker, supra.

The Association met its burden of showing that Officer Brian Pyle is a regular part-time officer. Officer Bowers, the scheduler, testified that Pyle is regularly scheduled and has repeatedly appeared on the weekend schedule. The fact that Pyle works elsewhere as a police officers is of no consequence to whether he can be regular part-time employe for this employer. Borough of Whitaker, supra.

The other part-time officers whose eligibility is contested are Martin Gilbert, Joseph Kavanaugh, Shawn Tray and Robert Tonkinson. The Association has not met its burden of proving that these officers are regular part-time officers. Some of these officers have worked many hours, but Officer Bowers, the scheduler, testified credibly that they are not regularly scheduled. It appears that they work on an as needed basis for officers who are on sick, vacation and personal leave. Shawn Tray was regularly scheduled until March, 2008, when his circumstances changed so that he had to take himself off the schedule.

Finally, the Borough's fourth issue is its assertion that the Association has improperly sought to exclude the chief from the unit. The Association contends that the chief is a managerial employe.

In FOP Star Lodge No. 20 v. Commonwealth of Pennsylvania, PLRB, 522 A.2d 697 (Pa. Cmwlth. 1987), aff'd per curiam, 522 Pa. 149, 560 A.2d 145 (1989)(Star Lodge), the court held that the performance by a police officer of any of the following six functions is indicative of managerial status:

"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."

522 A.2d at 704.

The party seeking to exclude an employe from a bargaining unit as managerial has the burden of proving that the employe is managerial. North Wales Borough, 39 PPER ¶ 10 (Final Order 2008). In Dalton Police Association v. PLRB, 765 A.2d 1171 (Pa. Cmwlth. 2001), the Commonwealth Court explained that if a position encompasses decisional authority in any of the above-described areas, that position will be identified as managerial. id. at 1175 n.6

The Association has proven that the chief of police is a managerial employe under Star Lodge because his duties meet the criteria of policy formulation, policy implementation, purchasing and independence in public relations.

The Association has demonstrated that the chief has formulated and implemented rules, regulations and policies for the department without amendment or revision by the Mayor and Council. In Dalton Police Association v. PLRB, supra., the court agreed that the Board correctly determined that a chief was a managerial employe because he formulated and implemented policy. In that case, the Board found that the chief met the policy formulation criterion of Star Lodge because he established standard operating procedures for his department, even though some of the procedures were adopted from outside agencies. Id. at 1175-76.

The Association has proven that the chief of police meets the purchasing role criterion of Star Lodge. The Association has demonstrated that he has the authority to make routine expenditures on his own of up to \$1,000. As for actual purchases, the chief recently bought a portable radio and computer equipment for the police department's use.

Finally, the Association has proven that the chief has shown independence in public relations by committing department resources to special programs. The evidence demonstrated the chief has committed the department to being part of the Drug Abuse Resistance Education (DARE) program. This program requires the department to send a police officer into the schools to educate students about the danger of drug abuse.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Borough is an employer under the PLRA as read in pari materia with Act 111.
2. The Association is a labor organization under the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The unit deemed appropriate for the purpose of collective bargaining between the Borough and the Association is a subdivision of the employer unit comprised of all full-time and regular part-time police officers excluding all managerial employes.
5. Chief Robert Bergan is a managerial employe not eligible for inclusion in the unit.
6. That full-time officers Thomas Hoban, Eric Sterner, Jeffrey Bowers and Richard Clink are eligible for inclusion in the unit.
7. That part-time officers Ryan Murphy, Thomas Fort and Bryan Pyle, are regular part-time police officers and are eligible for inclusion in the unit.
8. That Martin Gilbert, Joseph Kavanaugh, Shawn Tray and Raymond Tonkinson are not regular part-time officers and are not eligible for inclusion in the unit.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Borough shall within ten days of the date hereof submit to the Board an alphabetized list of the names and addresses of the police officers eligible for inclusion in the unit set forth above.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b) following the conduct of an election.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this sixteenth day of September 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner