

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
: :  
: Case No. PF-U-08-22-E  
: :  
CITY OF NANTICOKE :

**PROPOSED ORDER OF UNIT CLARIFICATION**

On February 19, 2008, the City of Nanticoke (City) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification seeking to exclude the fire chief from a bargaining unit comprised of the City's fire fighters that is represented by the International Association of Firefighters, Local 2655 (IAFF), under the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111).<sup>1</sup> On February 29, 2008, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on April 15, 2008, to determine the issues raised by the petition if the parties were not able to resolve them by then. On April 11, 2008, the hearing examiner, upon the request of the IAFF and without objection by the City, continued the hearing to June 10, 2008. On June 10, 2008, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On July 31, 2008, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. The City employs fire fighters who are represented by the IAFF for the purpose of collective bargaining. (N.T. 10, 34, 46-47)
2. The City has implemented standard operating guidelines for its fire department that cover responses to civilian assists, downed power lines, illegal burning and searching for lost civilians; metal fires; bombs and explosive devices; brush, grass and outside debris fires; electrical emergencies; motor vehicle accidents; vehicle fires; dumpster fires; gas leaks; automatic fire alarms including residential smoke detectors; high rise fires; and structure fires. (N.T. 9-10, 49; Exhibit E-1)
3. The City's fire chief (Michael J. Bohan) "went along with" the standard operating guidelines after members of the fire department submitted them to him for his approval. They would not have been effective without his approval. He did not submit them to the City's director of public safety (Brent Makarczyk) or council for their approval. (N.T. 9-11, 17-18, 49-53, 54-55, 64-65, 71)
4. By memo dated February 15, 2005, Chief Bohan wrote to "All Personnel" about "Facial Hair" as follows:

"The issue of facial hair on fire fighters has long plagued the fire service, specifically when using SCBA in hazardous environments. Safety concerns have centered around the effects of facial hair on the safety and integrity of a face plate seal on SCBA. After reviewing a number of both legal opinions and federal regulations it has been determined that the wearing of beards or other facial hair (other than a well-trimmed moustache) is incompatible with the duties of persons directly involved in operations at an emergency scene where the use of SCBA may be or is required. In order to protect the safety of our firefighters and the best interests of the City of Nanticoke and it[']s Fire Dept. [i]t will be the policy of

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<sup>1</sup>The City also sought to exclude "non-regular part-time fire-fighters" and "non-firefighter employees" from the bargaining unit "to the extent that the City has ever recognized [them] in the bargaining unit." The City did not present any evidence in that regard at the hearing, however. An issue not presented to a hearing examiner is, of course, waived, SSHE, 32 PPER ¶ 32118 (Final Order 2001), so only the status of the fire chief is before the Board.

this department that any person taking part in any fire ground operation that may require the use of SCBA or the potential use of SCBA will be clean shaven except for the option of a well-trimmed moustache. Other hair will be worn in such a"

(Exhibit E-1)

5. Chief Bohan has not changed any programs in the fire department. (N.T. 55, 71-72)

6. Chief Bohan made promotion and hiring recommendations to council that were followed by council. He has not terminated or suspended a fire fighter. (N.T. 14-15, 20-24, 56, 60-61; Exhibit E-3).

7. The City's finance director (Holly Quinn) has to approve purchases by Chief Bohan unless she is not working and an emergency that would impede the safe provision of fire services arises. He authorized the expenditure of "at least a couple thousand dollars" for work on a ladder truck and on the heating and plumbing systems at the fire station when she was not working. He called the City's administrator (Kenneth P. Johnson) before he did so. In the case of the heating system, Mr. Johnson told him, "yeah, do what you need to do." He requested that the City purchase new turn out gear for 2008. The City did not do so. (N.T. 24-25, 30-32, 36-38, 40, 59-60, 68)

8. Chief Bohan submitted to the Department of Homeland Security an application for a grant to fund a vehicle exhaust extraction system for the fire department. The grant required the City to provide \$6,000.00 to \$7,000.00 in matching funds. (N.T. 29-30)

9. Chief Bohan authorized fire fighters on paid time to install in residents' homes and apartments smoke detectors provided by a local television station. (N.T. 12-14, 19, 22, 43)

#### DISCUSSION

The City has petitioned to exclude the fire chief from the bargaining unit as a managerial employe. The City avers that he is a managerial employe because he formulates policy, implements policy, has overall personnel administration responsibility, has an effective role in purchasing and exercises independence in public relations.

The IAFF contends that the petition should be dismissed for lack of clear and convincing evidence that the fire chief is a managerial employe. According to the IAFF, the fire chief's role in policy formulation, policy implementation, overall personnel administration, purchasing and public relations is too limited to warrant a finding of managerial status on his part.

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). It must carry its burden not by clear and convincing evidence, as the IAFF contends, but by a preponderance of the evidence. Elizabeth Township, 30 PPER ¶ 30110 (Proposed Order of Unit Clarification 1999).

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 set forth six criteria of managerial status as follows:

"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 court cast those criteria in the disjunctive, not the conjunctive, so an employe who meets any one of them is managerial. Elizabeth Township, 37 PPER 90 (Final Order 2006).

As explained below, the City established by a preponderance of the evidence that the fire chief meets two of the Star Lodge criteria of managerial status—policy formulation and independence in public relations. Accordingly, even though the City did not establish that the fire chief meets any of the other criteria of Star Lodge, the fire chief must be excluded from the bargaining unit.

#### Policy Formulation

The City contends that the fire chief meets the policy formulation criterion of Star Lodge because the record shows that he approved the standard operating guidelines for the fire department and issued a policy regarding facial hair. See findings of fact 2-4. In Dalton Police Association v. PLRB, 765 A.2d 1171 (Pa. Cmwlth. 2001), the court held that a police chief met the policy formulation criterion of Star Lodge where the standard operating procedures for his department were as recommended by him. Inasmuch as the record shows that the fire chief approved the standard operating guidelines for the fire department and issued a policy regarding facial hair, a finding of managerial status is even more compelling here than it was there. Thus, the same result a fortiori obtains.

In reaching this result, no reliance has been placed on the fact that the fire chief issued a memo regarding scheduling (Exhibit E-4). The City would have the Board find that he thereby formulated policy, but under Star Lodge scheduling is a supervisory, not a managerial, responsibility. Dravosburg Borough, 35 PPER 82 (Order Directing Submission of Eligibility List 2004).

The IAFF contends that there is no basis for finding that the fire chief meets the policy formulation criterion of Star Lodge because the record shows that he was not involved in the process of formulating the standard operating guidelines. As the IAFF points out in its brief at 8, the fire chief “accepted” the standard operating guidelines unchanged after they were “created” by members of the fire department. The IAFF also points out that in Homer City Borough, 26 PPER ¶ 26053 (Order Directing Submission of Eligibility List 1995), a hearing examiner found a police officer not to be a managerial employe where purchases were made by a vote of his fellow police officers. As set forth in finding of fact 3, however, the record shows that the fire chief “went along with” the standard operating guidelines after members of the fire department submitted them to him for his approval, so it is apparent that he was involved in the process of formulating them. Thus, the IAFF’s contention finds no support in the facts.

The IAFF also contends that there is no basis for finding that the fire chief meets the policy formulation criterion of Star Lodge because the record shows that the City’s council has the final say over any standard operating guidelines (N.T. 11). In support of its contention, the IAFF relies on Plains Township, 24 PPER ¶ 24081 (Final Order 1993), where the Board found that a police chief was not a managerial employe because his employer had not adopted standard operating procedures for his department as recommended by him. As the court noted in Star Lodge, *supra*, however, “the mere fact that policy determinations are subject to review by a higher authority does not necessarily negate managerial status.” 522 A.2d at 704. Moreover, Plains Township is distinguishable on the facts in that the standard operating procedures in that case were not effective absent approval from a higher authority, while the standard operating guidelines here were effective upon the fire chief’s approval even though he did not submit them to a higher authority for approval. See finding of fact 3. On a substantially similar record in City of Sharon, 31 PPER ¶ 31067 (Proposed Order of Unit Clarification 2000), a hearing examiner found a chief firefighter to be a managerial employe. In that case, the chief firefighter likewise approved standard operating procedures without submitting them to a higher authority for approval. Thus, the IAFF’s contention finds no support in the law.

## Policy Implementation

The City contends that the fire chief meets the policy implementation criterion of Star Lodge, but the record shows that he has not changed any programs for the fire department. See finding of fact 5. Under the policy implementation criterion of Star Lodge, an employe must develop and change programs in order to be managerial, so there is no basis for finding that the fire chief meets the policy implementation criterion of Star Lodge. The City's contention is, therefore, without merit.

## Overall Personnel Administrative Responsibility

The City contends that the fire chief meets the overall personnel administration criterion of Star Lodge because the record shows that he has made promotion and hiring recommendations to council that were followed by council. See finding of fact 6. As also set forth in finding of fact 6, however, the record shows that he has not terminated or suspended a fire fighter. Moreover, the record does not show that he has been involved in any serious disciplinary matters or dismissals. In order for the Board to find that an employe meets the overall personnel administration criterion of Star Lodge, the record has to show that the employe is effectively involved not only in hiring but also in serious disciplinary actions and dismissals. Hanover Township, 39 PPER 58 (Order Directing Submission of Eligibility List 2007); City of Chester, 38 PPER 50 (Proposed Order of Unit Clarification 2007). Thus, notwithstanding the fire chief's involvement in hiring and promotions, there is no basis for finding him to be managerial under the overall personnel administration criterion of Star Lodge. The City's contention is, therefore, without merit.

In light of the foregoing, there is no need to discuss the IAFF's contention that the fire chief does not meet the overall personnel administration criterion of Star Lodge because his hiring recommendations were not always followed by council and because he did not make the promotion recommendations alone.

## Purchasing Role

The City contends that the fire chief meets the purchasing role criterion of Star Lodge because the record shows that he has the authority to make expenditures on his own and because he has authorized the expenditure of "at least a couple thousand dollars" for work on a ladder truck and on the heating and plumbing systems at the fire station. See finding of fact 7. In support of its contention, the City relies on Sugarcreek Borough, 33 PPER ¶33060 (Proposed Order of Dismissal 2002),<sup>2</sup> where a hearing examiner found that a police chief who was authorized to purchase up to \$300.00 a day was a managerial employe. Notably, however, as also set forth in finding of fact 7, the record shows that the fire chief's purchasing authority is limited to when the finance director is not working, that the fire chief has never exercised his purchasing authority without first calling the City's administrator and that the City did not purchase turn out gear that the fire chief requested. On that record, his involvement with purchasing is too limited to be considered effective. See Berlin Borough, 25 PPER ¶ 25120 (Final Order 1994)(police chief was not a managerial employe because his role in purchasing was too limited to be considered effective). The City's contention is, therefore, without merit.

## Independence in Public Relations

The City contends that the fire chief meets the independence in public relations criterion of Star Lodge because the record shows that he submitted to the Department of Homeland Security an application for a grant to fund a vehicle exhaust extraction system for the fire department that required the City to provide \$6,000.00 to \$7,000.00 in matching funds. See finding of fact 8. On a substantially similar record in Selinsgrove Borough, 34 PPER 146 (Final Order 2004), the Board found that a police chief met the independence in public relations criterion of Star Lodge. In that case, the record showed that the police chief applied for and implemented a grant. The same result as in Selinsgrove Borough therefore obtains. Compare Hanover Township, 39 PPER 58 (Order

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<sup>2</sup> In its brief at 8, the City incorrectly cites this case as Selinsgrove Borough, *infra*.

Directing Submission of Eligibility List 2007)(police chief who obtained grants was not a managerial employe where there was no showing that he committed departmental resources in doing so); Shoemakersville Borough, 35 PPER 127 (Proposed Decision and Order 2003)(same).

The City also contends that the fire chief meets the independence in public relations criterion of Star Lodge because the record shows that he authorized fire fighters on paid time to install in residents' homes and apartments smoke detectors provided by a local television station. See finding of fact 9. In Star Lodge, *supra*, the court held that an employe who commits departmental resources in dealing with public groups is managerial under the independence in public relations criterion. In so holding, the court cited Township of Lower Merion, 13 PPER ¶ 13276 (Final Order 1982), with approval, explaining that the record in that case showed that the lieutenants who were found by a hearing examiner to be managerial "appeared before governmental and civic groups as departmental spokesmen 'with authority to make commitments of the manpower and resources of the department.'" 322 A.2d at 703. The court also cited City of Coatesville, 14 PPER ¶ 14058 (Proposed Order of Unit Clarification 1983), with approval, explaining that in that case "a lieutenant was classed as managerial when he had 'instituted educational programs' and had 'the authority to commit police manpower and resources' to such programs." *Id.* In addition, the court cited Cranberry Township, 16 PPER ¶ 16149 (Order Directing Submission of Eligibility List 1985), with approval, explaining that in that case the hearing examiner found a lieutenant to be a managerial employe because the lieutenant, "independent of control by the chief, established a Crime Prevention Program and oversaw the expenditure of thousands of dollars for that program." *Id.* The fire chief's authorization of fire fighters on paid time to install in residents' homes and apartments smoke detectors provided by a local television station similarly committed departmental resources within the meaning of Star Lodge, so the same result as in Township of Lower Merion, City of Coatesville and Cranberry Township obtains. See also City of Easton, 33 PPER ¶ 33098 (Proposed Order of Dismissal 2002)(deputy fire chief who agreed to conduct annual fire inspections for a local college was a managerial employe because he thereby committed departmental resources); Baden Borough, 32 PPER ¶ 32086 (Proposed Order of Unit Clarification 2001)(police chief who agreed to provide traffic control for neighboring boroughs in the event of a catastrophe was a managerial employe because he thereby committed departmental resources).

In reaching this result, no reliance has been placed on the fact that the fire chief has assigned fire fighters on paid time to teach fire awareness at local elementary schools (N.T. 11-12), the fact that he has authorized the use of fire trucks to lead parades (N.T. 16-17) or the fact that he has authority over the fire department's website (N.T. 45-46, 50, 53). As noted above, in Star Lodge, *supra*, the court held that an employe must commit departmental resources in dealing with public groups in order to meet the independence in public relations criterion of managerial status. In so holding, the court cited Town of McCandless, 10 PPER ¶ 10071 (Final Order 1979), for the proposition that merely acting as a liaison with public groups is not indicative of managerial status. The court also cited City of Bethlehem, 16 PPER ¶ 16146 (Final Order 1985), for the proposition that merely making speeches at schools is not either. Thus, it is apparent that the fire chief's assignment of fire fighters to the schools is not reflective of managerial status on his part. The fire chief's authorization of the use of fire trucks in parades is similar in nature and therefore likewise not reflective of managerial status on his part. The fire chief's authority over the fire department's website provides no better basis for finding him to be managerial because the record does not show that in exercising that authority he ever committed departmental resources within the meaning of Star Lodge.

The IAFF contends that there is no basis for finding that the fire chief meets the independence in public relations criterion of Star Lodge because "there is no evidence that the installation [of the smoke detectors] has resulted in payment of overtime or other 'extra' money on the part of the City[.]" Brief at 13.<sup>3</sup> No authority has been cited or found for the proposition that an employe must commit departmental resources beyond

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<sup>3</sup> In its brief, the IAFF actually raises this contention with respect to the purchasing criterion of Star Lodge, but under Star Lodge a matter of this sort implicates the independence in public relations criterion, so the IAFF's contention has been construed as having been made with respect to the independence in public relations criterion.

the regular pay of employes in order to meet the independence in public relations criterion of Star Lodge, however. Moreover, in Township of Lower Merion, supra, City of Coatesville, supra, Cranberry Township, supra, City of Easton, supra, and Baden Borough, supra, where employes were found to have committed departmental resources under the independence in public relations criterion of Star Lodge, there was no showing that any of their commitments required the payment of overtime or other monies beyond the regular pay of employes. Thus, the IAFF's contention finds no support in the law.

The IAFF also contends that there is no basis for finding that the fire chief meets the independence in public relations criterion of Star Lodge because he was not aware that applying for the grant would commit departmental resources.<sup>4</sup> The record does not show that to be the case, however. Thus, the IAFF's contention finds no support in the facts.

CONCLUSIONS

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

1. The City is an employer under the PLRA as read in pari materia with Act 111.
2. The IAFF 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 fire chief is a managerial employe.

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 fire chief is excluded from the bargaining unit.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this twenty-first day of August 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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DONALD A. WALLACE, Hearing Examiner

<sup>4</sup> See footnote 3.