

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PF-U-07-98-E
:
CITY OF ERIE :

PROPOSED ORDER OF UNIT CLARIFICATION

On June 20, 2007, the City of Erie (City) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification alleging that its chief fire box inspector and its fire box inspectors should be excluded from a bargaining unit of its fire fighters who are represented by the International Association of Fire Fighters, Local 293 (IAFF),¹ under the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111). On July 11, 2007, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on October 4, 2007. On October 3, 2007, the hearing examiner continued the hearing because the parties were going to stipulate to the facts. On April 15, 2008, the hearing examiner rescheduled the hearing for May 28, 2008, because the parties had been unable to stipulate to the facts.

The hearing was held as rescheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of the hearing, the hearing examiner set a briefing schedule of two weeks after the parties' receipt of the notes of testimony or as they otherwise might agree (N.T. 112).

The City thereafter informed the hearing examiner on four occasions that the parties had agreed to an extension of the briefing schedule, lastly to November 21, 2008. On February 20, 2009, the City filed a brief as though the parties had agreed to another extension of the briefing schedule to then. On March 16, 2009, the hearing examiner, having determined that the IAFF had not filed a brief because it thought the matter may have settled, gave the IAFF 30 days to verify any such settlement and so notify the hearing examiner or to file a brief. The IAFF did not notify the hearing examiner of a settlement or file a brief.

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. On August 28, 1996, the Board, pursuant to a joint request of the parties, certified the IAFF as the exclusive representative of a bargaining unit comprised of "all full-time and regular part time fire fighters" of the City, including "Chief Fire Box Inspector" and "Fire Box Inspector." (Case No. PF-R-96-178-W)

2. The chief fire box inspector and the fire box inspectors work as electricians. They maintain and repair electrical circuits for a fire alarm system known as the Gamewell system that used to carry alarms from fire boxes throughout the City to dispatchers until the City removed the fire boxes in 1996 and that currently carries alarms from the dispatchers to fire stations. They also maintain and repair street lighting, crosswalk signals and traffic signals, including the traffic light system known as the Wellco or Radolite system that allows fire fighters to drive fire trucks through intersections without encountering a red light. (N.T. 18-21, 23-24, 34-36, 58-63, 73-80, 84-94, 100-101, 103-106; Respondent Exhibit 1)

¹ The City also petitioned to include the chief fire box inspector and the fire box inspectors in a bargaining unit represented by General Teamsters Local 397 (Teamsters). The City did not provide an address for the Teamsters, however, so the Board never served an order and notice of hearing on the Teamsters. Thus, whether or not the chief fire box inspector and the fire box inspectors should be included in a bargaining unit represented by the Teamsters is not before the Board and will not be addressed.

3. The City has never dispatched the chief fire box inspector or the fire box inspectors to the scene of a fire. (N.T. 18, 52-53, 111)

4. The City is a third class city. (Pennsylvania Manual, Volume 116, Section 6-47)

DISCUSSION

The City has petitioned to exclude its chief fire box inspector and its fire box inspectors from a bargaining unit represented by the IAFF under a certification from the Board pursuant to the PLRA as read *in pari materia* with Act 111. According to the City, the chief fire box inspector and the fire box inspectors should be excluded from the unit because they do not have an identifiable community of interest with fire fighters included in the unit. In support of the petition, the City points out that the chief fire box inspector and the fire box inspectors are subject to supervision different from that of the fire fighters. The City also points out that the chief fire box inspector and the fire box inspectors are subject to a pension plan different from that of the fire fighters.

The IAFF contends that the petition should be dismissed for three reasons: (1) because the job duties of the chief fire box inspector and the fire box inspectors have not changed since the Board certified the unit, (2) because the City was unsuccessful in attempting to remove the chief fire box inspector and the fire box inspector from the unit during the parties' last three rounds of collective bargaining and therefore is estopped from petitioning for their removal now and (3) because the chief fire inspector and the fire box inspectors share an identifiable community of interest with the fire fighters despite the differences in supervision and pension plan.

Employees who share an identifiable community of interest are to be included in the same Act 111 bargaining unit. Commonwealth of Pennsylvania, Fish Commission, 19 PPER ¶ 19154 (Order Directing Remand to Hearing Examiner for Further Proceedings 1988); Whitaker Borough, 14 PPER ¶ 14273 (Final Order 1983). In order to be included in such a unit, however, the employees must be covered by Act 111 in the first place. Oakmont Borough, 24 PPER ¶ 24176 (Order Directing Submission of Eligibility List 1993). If they are not, it necessarily follows that they do not have an identifiable community of interest with employees who are. Id. Thus, as a threshold matter, it must be decided if the employees are covered by Act 111.

In County of Lebanon v. PLRB, 873 A.2d 859 (Pa. Cmwlth. 2005), appeal denied, 585 Pa. 691, 887 A.2d 1243 (2005), our Commonwealth Court reiterated the test for deciding whether or not employees are covered by Act 111, explaining as follows:

"Act 111, as read *in pari materia* with the [PLRA], does not define 'policemen or firemen.' Our courts, however, have developed a conjunctive, two-part inquiry to decide whether employees are police officers or fire personnel: (1) whether the employees are legislatively authorized to act as police officers or fire personnel; and (2) whether the employees, in effect, act as police officers or fire personnel. Narcotics Agents Regional Committee v. Pennsylvania Labor Relations Board, 833 A.2d 314 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 577 Pa. 729, 847 A.2d 1290 (2004)."

873 A.2d at 862-863 (footnote omitted).

The chief fire box inspector and the fire box inspectors do not meet either part of the test. Thus, they are not covered by Act 111 and must be excluded from the unit accordingly.

No authority has been cited or found for the proposition that the chief fire box inspector and the fire box inspectors are legislatively authorized to act as fire personnel. As a third class city (finding of fact 4), the City is governed by the Third Class City Code, section 2101 of which authorizes it to organize a fire bureau. 53 P.S. § 37101. A close review of section 2101 of the Third Class City Code, however, reveals no legislative authorization for the chief fire box inspector or for the fire box inspectors to act as fire personnel. Rather, in authorizing the City to organize a fire bureau,

section 2101 of the Third Class City Code only makes mention of "officers" belonging to the fire bureau. Id. Thus, the chief fire box inspector and the fire box inspectors do not meet the first part of the test for deciding whether or not employees are fire personnel under Act 111. Accordingly, they are not eligible for inclusion in the unit for that reason alone. See County of Lebanon, supra (hazmat employees were not legislatively authorized to fight fires and therefore were not fire personnel under Act 111); Springettsbury Township, 13 PPER ¶ 13107 (Final Order 1982)(ambulance attendants who assisted fire fighters on occasion were not fire personnel under Act 111).

Even if the chief fire box inspector and the fire box inspectors were legislatively authorized to act as fire personnel, the result would be the same. Although the record shows that they perform electrical work that enables fire fighters to better fight fires (finding of fact 2), it does not show that they in effect act as fire fighters. To the contrary, it shows that the City has never dispatched them to the scene of a fire (finding of fact 3). Thus, they do not meet the second part of the test for deciding whether or not employees are fire personnel under Act 111 either. Accordingly, they are not eligible for inclusion in the unit for that reason as well. Compare City of Arnold, 20 PPER ¶ 20124 (Final Order 1989)(dispatchers who drove fire trucks to fires and operated water pumps at fires in effect acted as fire personnel).

None of the IAFF's defenses to the petition has merit.

In Gateway School District v. Commonwealth of Pennsylvania, PLRB, 470 A.2d 185 (Pa. Cmwlth. 1984), our Commonwealth Court observed that the analytical framework to be applied in disposing of a petition for unit clarification is as follows:

"It is Board policy that positions which were *litigated* during the original certification proceedings, as opposed to *stipulated*, will not be relitigated at a later date absent a showing of changed duties. On the other hand, the Board will review the question of inclusion in a particular collective bargaining unit without a showing of changed duties where the position was *stipulated* during certification proceedings and a year has passed since the stipulation was agreed upon. See Northeastern Educational Intermediate Unit 19, 11 Pa.P.E.R. ¶ 11232 (1980), *aff'd*, 13 Pa.P.E.R. ¶ 13264 (1982) and North Manheim Township, 10 Pa.P.E.R. ¶ 10251 (1979)."

Id. at n. 3 (emphasis in original). See also Elizabeth Township, 36 PPER 133 (Proposed Order of Dismissal 2005), reversed on other grounds, 37 PPER 90 (Final Order 2005); Sugarloaf Borough, 33 PPER ¶ 33060 (Proposed Order of Dismissal 2002); Pymatuning Township, 32 PPER ¶ 32017 (Proposed Order of Dismissal 2001), where Hearing Examiners Timothy Tietze, Thomas P. Leonard and Peter Lassi respectively employed that very analytical framework in disposing of petitions for unit clarification as here.

Notably, the Board included the chief fire box inspector and the fire box inspectors in the unit pursuant to a joint request of the parties (finding of fact 1). Thus, their status as Act 111 employees has not been litigated before the Board. Under the analytical framework set forth in Gateway School District, then, the City was under no obligation to show a change in job duties in order for the Board to exclude them from the unit now.

In Plains Township, 24 PPER ¶ 24081 (Final Order 1993), the Board reasoned that a petitioner "may appropriately file a unit clarification at any time." 24 PPER at 212. Employing that reasoning, the Board rejected an employer's contention that a labor organization was estopped from filing a petition for unit clarification because the parties had recently executed a collective bargaining agreement defining the bargaining unit. In light of that reasoning, there is no basis for finding that the City is estopped from filing the instant petition because it unsuccessfully sought to exclude the chief fire box inspector and the fire box inspectors from the unit during the parties' last three rounds of negotiations.

Given that the chief fire box inspector and the fire box inspectors do not meet the test for deciding whether or not employees are fire personnel under Act 111 and that they therefore are not eligible for inclusion in the unit, it necessarily follows that they do

not they have an identifiable community of interest with the fire fighters. See Oakmont Borough, supra (Hearing Examiner Leonard excluded a code enforcement officer not covered by Act 111 from a bargaining unit of police officers).

CONCLUSIONS

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

1. The City is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The IAFF is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The chief fire box inspector and fire box inspectors are not fire personnel under section 1 of Act 111.

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 chief fire box inspector and the fire box inspectors are excluded from the unit.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this first day of May 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner