COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF	:	
	:	
	:	Case No. PF-U-07-98-W
	:	(PF-R-96-178-W)
	:	
CITY OF ERIE	:	

FINAL ORDER

On May 19, 2009, the International Association of Fire Fighters, Local 293 (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Unit Clarification (POUC) issued on May 1, 2009. In the POUC, the Board Hearing Examiner granted the Petition for Unit Clarification filed by the City of Erie (City) and concluded that Chief Fire Box Inspectors and Fire Box Inspectors (collectively referred to as "Inspectors") are not firefighters under Act 111 of 1968 and the Pennsylvania Labor Relations Act (PLRA) and therefore are properly excluded from the firefighter bargaining unit represented by the Union. The City did not file a response to the Union's exceptions.

The Hearing Examiner's uncontested Findings of Fact are summarized as follows. On August 28, 1996, the Board certified the Union as the exclusive representative of a bargaining unit stipulated to by the City and the Union and comprised of all full-time and regular part time firefighters, including the Inspector positions. The Inspectors work as electricians. They maintain and repair electrical circuits for a fire alarm system known as the Gamewell System that previously carried alarms from fire boxes throughout the City to dispatchers until the City removed the fire boxes in 1996. The system now carries alarms from the dispatchers to the fire stations. The Inspectors 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 firefighters to drive fire trucks through intersections without encountering a red light. The City has never dispatched the Inspectors to the scene of a fire.

In its exceptions, the Union challenges the Hearing Examiner's conclusion that the Inspectors are not firefighters under Act 111. The Union further argues that the City's Petition for Unit Clarification should not have been granted because it was filed during the term of a collective bargaining agreement covering the Inspectors and because the City did not show that the duties of the Inspectors had changed since the bargaining unit was certified in 1996.

Because Act 111 applies to "policemen" or "firemen", but does not define those terms, the Board and the courts have developed a two-part test whereby in order to be covered by the Act, an employe must 1) be legislatively authorized to act as a police officer or firefighter; and 2) in fact effectively act in that capacity. County of Lebanon v. PLRB, 873 A.2d 859 (Pa. Cmwlth. 2005), petition for allowance of appeal denied, 585 Pa. 691, 887 A.2d 1243 (2005).

In this case, it is undisputed that the Inspectors do not respond to any calls involving firefighting. Although Inspectors play an invaluable support role which allows firefighters to more effectively perform their jobs, the Inspectors do not actually fight fires. In this way, Inspectors are similar to dispatchers, who also play a critical support role for police officers and firefighters, but are not included in Act 111 bargaining units based on their dispatching duties. See City of Johnstown, 22 PPER ¶ 22093 (Final Order, 1991) (dispatchers who do not act as police officers are covered under the Public Employe Relations Act, not Act 111 and the PLRA). When dispatchers who also work as firefighters are included in Act 111 bargaining units, it is only because they are authorized to fight fires and actually perform firefighting duties. See City of Arnold, 20 PPER ¶ 20124 (Final Order, 1990), affirmed in unreported decision, 21 PPER ¶ 21096 (Pa. Cmwlth. 1990) (dispatchers act as firefighters for purposes of Act 111 because they drive

a pumper truck to all reported fires and operate the pumper to supply water to hoses used to fight fires).

If the Board were to accept the Union's argument here, a similar argument for inclusion in an Act 111 unit could be made for mechanics who service fire equipment and maintenance employes who repair and maintain firehouses because they play critical roles which, if not performed, would interfere with the ability of firefighters to suppress fires. However, these types of employes are not included in Act 111 bargaining units because their jobs do not involve fire suppression. Likewise, the Inspectors are not directly involved in fire suppression and do not effectively act as firefighters. Contrary to the Union's assertions, the duties of the Inspectors are not comparable to the duties of ranking fire officers who direct fire suppression at the scene of the fire. Those ranking officers, who are routinely included in Act 111 firefighter units, are directly involved in the fire suppression effort unlike mechanics, dispatchers, maintenance workers and the Inspectors at issue in this case. Accordingly, the Inspectors do not meet the second part of the test for Act 111 firefighter status and are appropriately excluded from the Act 111 unit.[1]

The Union further argues that it would be inappropriate to exclude the Inspectors from the firefighter bargaining unit during the term of the current collective bargaining agreement. This argument was recently rejected in Temple University Health System, 40 PPER ¶ 3 (Final Order, 2009). In that case, the Board cited Chambersburg Area School District, 20 PPER ¶ 20149 (Final Order, 1989), in which the Board explained its adherence to the policy of processing unit clarification petitions at any time as follows:

> While it is true that the Board may look to NLRB precedent as a guide in deciding cases under the Public Employe Relations Act (PERA), Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978), it is equally true that the Board is not bound by federal precedent. AFSCME v. PLRB, 108 Pa. Commonwealth Ct. 482, 529 A.2d 1188 (1987); PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975).
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> ... [I]t should be pointed out that nothing in the statute or in the Board's Rules and Regulations would require the dismissal of such a petition. The Board has been since the inception of PERA in 1970, processing unit clarification petitions at any time during the contract period with no indication that the processing of such petitions causes inordinate disruption of the collective bargaining relationship. In view of the Board's twenty years of experience processing these unit clarifications, we see no need to now restrict the rights of parties to raise unit determination issues at any time. The adoption of the NLRB policy would leave employes entitled to representation under PERA without the benefit of the rights granted by the statute and may work to deny them these rights altogether since their rights may be bargained away in the negotiating process.
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> ... PERA places the exclusive authority to determine the appropriateness of bargaining units upon the Board, Association of Pennsylvania State College and University Faculties v. PLRB, 34 Pa. Commonwealth Ct. 239, 383 A.2d 243 (1978), see also 43 P.S. § 1101.604, while the federal statute allows for recognition of bargaining units with no involvement of the NLRB. The NLRB policy is premised upon the notion that an employer may voluntarily recognize an employe representative and may enter into an agreement with the union concerning the scope of the bargaining unit. That agreement can then be interpreted by an arbitrator to include or exclude classifications from the unit. Under PERA, the Board is charged with [the] duty to determine the appropriate bargaining unit and an arbitrator may only decide whether employes fall within the unit as described by [the] Board. See Northwest Tri-County Intermediate Unit No. 5

[1] Having determined that the Inspectors do not effectively act as firefighters, we need not address the Union's arguments challenging the Hearing Examiner's determination that the Inspectors are not legislatively authorized to act as firefighters.

> Education Association v. Northwest Tri-County Intermediate Unit No. 5, 77 Pa. Commonwealth Ct. 92, 465 A.2d 89 (1983). Accordingly, the Board, in applying its expertise to a different statutory scheme, has properly chosen to process unit clarification petitions at any time.

Id. at 405-406 (footnote omitted). The Board reached the same conclusion in Plains Township, 24 PPER ¶ 24081 (Final Order, 1993). In that case, the union filed a petition for unit clarification seeking to include the position of fire chief in the unit. The hearing examiner found that the fire chief was not a managerial employe and was appropriately included in the unit. In its exceptions to the Board, the employer argued that the union was estopped from filing a unit clarification petition because the parties had recently entered into a collective bargaining agreement which excluded the fire chief. The Board disagreed and, citing Chambersburg, stated that the union could file a unit clarification petition at any time. As in Temple University Heath System, Chambersburg and Plains Township, we reach the same result in this case and find that the City was not precluded from seeking the removal of the Inspectors from the firefighter bargaining unit during the term of the collective bargaining agreement.

Finally, the Union argues that the duties of the Inspectors have not changed since the unit was certified in 1996 and that absent a showing by the City that their duties have changed, removing them from this Act 111 unit would be improper. However, as noted by the Hearing Examiner, the long-standing policy of the Board is that if the inclusion or exclusion of a certain classification of employe has actually been litigated before the Board, then the party seeking to alter that result must show changed circumstances in order to prevail on a unit clarification petition. However, where the parties stipulate to the composition of the bargaining unit, either party may raise the issue of whether certain employes should be included or excluded from a unit without showing changed job duties when one year has passed since the effective date of the certification. See Gateway School District v. PLRB, 470 A.2d 185, 188 n.3 (Pa. Cmwlth. 1984). Here, because the parties stipulated to the inclusion of the Inspectors in this unit, the City was not obligated to allege or prove that the duties of the Inspectors had changed in order to prevail on its petition seeking to remove them from the bargaining unit.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the Union’s exceptions and make the Proposed Order of Unit Clarification final.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Order of Unit Clarification be and the same are hereby dismissed and the Proposed Order of Unit Clarification be and the same 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 twenty-first day of July, 2009. 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.