

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: Case No. PF-U-09-19-E
: (Case No. PF-R-82-6-E)
LOWER MERION TOWNSHIP :

PROPOSED ORDER OF DISMISSAL

On February 13, 2009, the Township of Lower Merion, Fraternal Order of Police, Lodge #28 (FOP), filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification to include captains and lieutenants in a bargaining unit comprised of police officers employed by the Township of Lower Merion (Township). On February 26, 2009, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on June 9, 2009, if the parties were unable to resolve the matters raised in the petition. By letter dated March 12, 2009, the FOP requested an earlier hearing date. On March 17, 2009, the hearing examiner denied the FOP's request. Upon the request of the Township and without objection by the FOP, the hearing examiner subsequently continued the hearing. On August 12 and October 19, 2009, the hearing examiner held the hearing and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On January 28, 2010, the FOP filed a brief by deposit in the U.S. Mail. On January 29, 2010, the Township filed a brief by deposit in the U.S. Mail.

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 October 6, 1982, the Board certified the FOP as the exclusive representative of a bargaining unit comprised of all full time and regular part-time police officers employed by the Township, "including but not limited to sergeants, detective and patrolmen; and excluding the superintendent of police, captains and lieutenants and police employes exercising managerial authority by virtue of the [Pennsylvania Labor Relations Act (PLRA)] and Act 111 [of 1968 (Act 111)]." (Case No. PF-R-82-6-E)

2. The Board excluded captains from the bargaining unit as managerial employes pursuant to a stipulation of the parties. (Case No. PF-R-82-6-E)

3. The Board excluded lieutenants from the bargaining unit based on the facts as presented by the parties, finding in relevant part as follows:

"17. That the lieutenants are responsible for, and actively involved in, establishing departmental policies and procedures. (N.T. 38, 126, 133, 135, 140-151, 223-224, 225, 226-227, Township Exhibit 3)

18. That the department's policy regarding the handling of juvenile offenders was developed and written by Lieutenant Sheehan. (N.T. 141, 145, Township Exhibit 4)

19. That the department's policy concerning a Realtor watch program was developed and written by Lieutenant Blum. (N.T. 142, 145 Township Exhibit 5)

20. That the department's policy regarding polygraph examinations was developed and written by Lieutenant Maloney. (N.T. 143, 145, Township Exhibit 6)

21. That the department's policy regarding offender tracking numbers and deceased or injured dogs was developed and written by Lieutenant Daly. (N.T. 146-148, 177-178, Township Exhibit 7, 8)

22. That the department's policy on the collection of evidence in rape cases was developed and written by Lieutenant Sheehan. (N.T. 149, 177-178, Township Exhibit 9)

23. That the Township's crime prevention policy was primarily developed by Lieutenant Malloy. (N.T. 149, 328-329)"

(Case No. PF-R-82-6-E)

4. In 1994, the Township promoted Captain Joseph Daly to be the superintendent of police. During his ensuing 15-year tenure in the position, he held command staff meetings with two captains and five lieutenants to reach a consensus on policies and procedures to govern the operations of the police department. (N.T. 29-30, 70, 92-93, 177-178, 190-194, 209-210, 219, 237-241, 280, 290-293, 348, 350)

5. In 1998, then Lieutenant Michael McGrath recommended to the command staff updated policies and procedures to govern the operations of the police department and new policies covering matters such as the use of force and pursuit. After the command staff reviewed his recommendation, Superintendent Daly included the updated policies and procedures and the new policies in the manual governing the operations of the police department that is still in use by the Township. (N.T. 18-19, 291-292, 428-432, 486-490; FOP Exhibit 1)

6. In 1999, Lieutenant Joseph Arrell updated the manual to comply with applicable accreditation standards. (N.T. 20, 292, 428, 488)

7. In January 2009, the Township promoted then Captain McGrath to be the superintendent of police. Since then, Superintendent McGrath has held command staff meetings with the two captains and the five lieutenants to reach a consensus on policies and procedures to govern the operations of the police department. (N.T. 387-388, 460)

DISCUSSION

The FOP has petitioned to include captains and lieutenants in the bargaining unit.

In 1982, pursuant to a stipulation of the parties, the Board excluded captains from the bargaining unit as managerial employees (findings of fact 1-2). Based on the facts presented by the parties as to the job duties of lieutenants, the Board also excluded lieutenants from the bargaining unit as managerial employees (findings of fact 1 and 3). Id. The Board adopted the analysis of the hearing examiner in that case, who explained as follows:

"The lieutenants are responsible for, and actively involved in, establishing departmental policies and procedures. As unit commanders, they each submit a departmental budget to the staff and inspections commander and have an ongoing responsibility during the fiscal year to monitor their respective units to assure that they are staying within their approved budget. In regard to disciplinary action, the lieutenants investigate cases of alleged misconduct by officers, initiate disciplinary action and represent the department both in preparation for and by testifying at hearings before the civil service commission. Their recommendations to their superiors regarding serious discipline (i.e. suspension, dismissal) are accepted approximately ninety-nine (99) percent of the time. Among the normal and regular responsibilities of a lieutenant is appearing before various governmental organizations and civic groups as the department's spokesman, with the authority to make commitments of manpower and resources of the department. The lieutenant[']s salaries are included within the Township's schedule for management and professional staff."

Lower Merion Township, 13 PPER ¶ 13198 at 363 (Order Determining Appropriateness of Unit and Canvassing and Counting of Impounded and Challenged Ballots 1982), 13 PPER ¶ 13276 (Final Order 1982).

According to the FOP, captains and lieutenants should be included in the bargaining unit now because they

"are no longer an essential and integral part of the management of the police department as they are not directly involved in the formulation and implementation of managerial programs. Their inclusion in the bargaining unit would not unreasonably interfere with the management and operation of the police department. The operation of the police department has so changed since 1982 that the findings made by the Hearing Examiner at that time no longer reflect reality. There is no longer a 'management team' in which the lieutenants and captains are fully in charge of the units. To the contrary, lieutenants and captains lack real authority in areas such as the determination and implementation of policy, personnel

administration, committing manpower and department resources, and the department's budget. Lieutenants and captains do not have authority to make decisions in regard to such matters and all control over such matters rests solely with the Superintendent of Police and/or Township Administration."

Attachment to petition at 1. The FOP further posits that

"[a]t the time of the Labor Relations Board Decision which defined the current bargaining unit, the lieutenants and captains were actively involved in determining police policy and were directly responsible for policy implementation. Presently, lieutenants and captains may be consulted about policies - just as patrol officers and sergeants are sometimes involved; however, the lieutenants and captains can no longer determine policy. The Superintendent of Police sets policy and all officers in the chain of command must follow the policies. Lieutenants and captains have no discretion to deviate from the policies, directives, orders, and procedures that are established by the Superintendent of Police."

Id.

The Township contends that the petition should be dismissed because based on their job duties captains and lieutenants are managerial employes and because lieutenants continue to perform the same job duties they performed when the Board excluded them from the bargaining unit as managerial employes in 1982.

As noted above, the Board's exclusion of captains from the bargaining unit in 1982 was based on a stipulation of the parties that captains were managerial employes, while the Board's exclusion of lieutenants from the bargaining unit in 1982 was based on the facts the parties presented as to the job duties of the lieutenants. When the Board excludes a position from a bargaining unit pursuant to a stipulation of the parties, the stipulation is binding on the parties for one year, after which either party may petition the Board to include the position in the bargaining unit regardless of whether or not the job duties of the position may have changed. City of Erie, 40 PPER 69 (Final Order 2009), citing Gateway School District v. PLRB, 470 A.2d 185 (Pa. Cmwlth. 1984). By contrast, when the Board excludes a position from a bargaining unit based on the job duties of the position as presented by the parties, neither party may petition the Board to include the position in the bargaining unit unless the job duties of the position have materially changed. Id.¹ Thus, depending on their job duties, captains may be included in the bargaining unit regardless of whether or not their job duties have changed since the Board excluded them from the bargaining unit in 1982, but lieutenants may not be included in the bargaining unit unless their job duties have materially changed since the Board excluded them from the bargaining unit in 1982.

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 for Act 111 employes 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."

¹The same analysis applies if there has been a change in the law. William Penn School District, 34 PPER 112 (Final Order 2003). The FOP, however, has only alleged a material change in the facts.

522 A.2d at 704. The court cast those criteria in the disjunctive, not the conjunctive, so an employee who meets any one of them is managerial. Elizabeth Township, 37 PPER 90 (Final Order 2006).² The court also held that "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.

As set forth in finding of fact 2, the record shows that in excluding lieutenants from the bargaining unit as managerial employees in 1982 the Board found as fact that they "are responsible for, and actively involved in, establishing departmental policies and procedures." As set forth in findings of fact 4-7, the record also shows that since 1982 superintendents of police have held command staff meetings with two captains and five lieutenants to reach a consensus on policies and procedures to govern the operations of the police department and that current policies of the police department are as recommended by two lieutenants to the command staff and approved by the superintendent of police in 1998 and 1999.

Given that captains as members of the command staff reach consensus on the policies and procedures to govern the operations of the police department and that current policies of the police department are as recommended by two lieutenants to the command staff and approved by the superintendent of police, it is apparent that based on their job duties captains are managerial employees under the policy formulation criterion of Star Lodge. Indeed, on a substantially similar record in Star Lodge, the court held that captains were managerial employees, explaining that "policy was promulgated through the consistent development of a consensus among the captains and the police commissioner." 522 A.2d at 704.

Given that lieutenants as members of the command staff reach consensus on the policies and procedures to govern the operations of the police department and that current policies of the police department are as recommended by two lieutenants to the command staff and approved by the superintendent of police in 1998 and 1999, it also is apparent that lieutenants still are involved in establishing policies and procedures as in 1982. Thus, there is no basis for finding that they no longer are managerial employees, much less that their job duties have materially changed since the Board excluded them from the bargaining unit as managerial employees in 1982.

As noted above, in support of the petition, the FOP posits that lieutenants are no longer actively involved in the establishment of policy as they were in 1982. According to the FOP, although lieutenants are presently consulted about policy, the superintendent of police sets policy and issues general directives in his own name, leaving lieutenants with no discretion to deviate from policy. The FOP overlooks, however, that the superintendent of police only sets policy as recommended to him on a consensus basis by the command staff, which includes lieutenants (findings of fact 4, 7), and that as a matter of law "the mere fact that policy determinations are subject to review by a higher authority does not necessarily negate managerial status." Star Lodge, 522 A.2d at 704. Thus, there is no basis for finding that lieutenants are no longer actively involved in the establishment of policy as they were in 1982.

The FOP similarly posits that captains are not managerial employees because policy is set by the superintendent of police and because captains are consulted about policy but have no discretion to deviate from policy once set by the superintendent of police. Again, however, the FOP overlooks that the superintendent of police only sets policy as recommended to him on a consensus basis by the command staff, which includes captains as well as lieutenants (findings of fact 4, 7), and that as a matter of law "the mere fact that policy determinations are subject to review by a higher authority does not necessarily negate managerial status." Id.

The FOP also relies on City of Pittsburgh v. Commonwealth of Pennsylvania, PLRB, 556 A.2d 928 (Pa. Cmwlth. 1989), where the court held that captains, battalion chiefs and deputy chiefs in a fire department were not managerial employees. As the court explained in that case,

² The court cited Lower Merion Township, supra, as authority for the first criterion of managerial status, 522 A.2d at n. 1, so it is apparent that there has been no change in the law in that regard since the Board found lieutenants to be managerial employees.

"[t]he fire captains, functioning primarily as the supervisors of single firefighting vehicles, are clearly field supervisors rather than managers. Although their frontline importance in leading the firefighters, who confront and subdue fires and catastrophies, is undisputed, the captains have no role in budgetmaking, personnel hiring and dismissals or in the formulation and implementation of policy. Like other supervisors, their relationship to public relations, purchasing and budgetmaking involves making recommendations, not an exercise of any power to make commitments with respect to budget or public relations.

Examination of the functions of the battalion chiefs and deputy chiefs reveals that they too function essentially as field supervisors, directing firefighting operations as they affect fire scenes and other portions of the city, although on a broader scale than the operational duties of the captains."

Id. at 932. Notably, however, the record in that case did not show that policy was promulgated through the consistent development of a consensus among the captains, battalion chiefs, deputy chiefs and higher ups in the chain of command as was the case with the captains in Star Lodge and as is the case with the captains and the lieutenants here. Thus, that case is distinguishable on the facts, and the FOP's reliance on it is misplaced.

Inasmuch as captains and lieutenants meet the policy formulation criterion of Star Lodge, they must be excluded from the bargaining unit as managerial employees regardless of whether or not they meet any of the other criteria of managerial status under Star Lodge. See Elizabeth Township, supra (an employe need only meet one of the Star Lodge criteria in order to be managerial). Thus, whether or not captains and lieutenants meet any of the other criteria under Star Lodge is not dispositive and therefore need not and will not be addressed.

CONCLUSIONS

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

1. The Township is an employer under the PLRA as read in pari materia with Act 111.
2. The FOP is a labor organization under the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. Captains and lieutenants are managerial employees.

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 petition is dismissed.

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-sixth day of February 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

DONALD A. WALLACE, Hearing Examiner