

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
:
: Case No. PF-U-09-25-E
:
CITY OF PHILADELPHIA :

PROPOSED ORDER OF UNIT CLARIFICATION

On March 1, 2009, the City of Philadelphia (City) filed with the Pennsylvania Labor Relations Board (Board) a petition for unit clarification alleging that its Fire Service Paramedics (FSPs) should be excluded from a bargaining unit of its fire fighters who are represented by the International Association of Fire Fighters, Local 22 (Union), under the Pennsylvania Labor Relations Act (PLRA) as read in *pari materia* with Act 111 of 1968¹ (Act 111). On March 31, 2009, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on May 20, 2009, in Philadelphia, Pennsylvania.

Hearings were actually held on July 16, September 2, and October 20 and 29, 2009. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. Both parties filed post-hearing briefs.

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

FINDINGS OF FACT

1. The Union is a labor organization that represents about two-thousand two-hundred uniformed fire personnel, including fire fighters and about two-hundred FSPs, for collective bargaining. (N.T. 283, 284).
2. The City's Fire Department deploys sixty engine companies, thirty ladder companies and thirty medic units from sixty locations throughout the City. (N.T. 132, 249, 283).
3. The Department responds to virtually all life-safety emergencies citizens may encounter, including structural collapses, vehicular and industrial accidents, and hazardous materials spills. Fire emergencies make up only a minute portion of the call volume for the Department. (N.T. 259, 349, 392, 393, 592-594; City Exhibit 22, Union Exhibit 5).
4. The Department operates and staffs a fire academy that must be attended by both fire fighters and FSPs. The training for each group at the fire academy, however, is materially different. FSPs receive significantly less training in fire suppression than do fire fighters. FSPs are required to have their paramedic certificate when hired by the Department. FSPs have mandatory annual training in emergency medical issues as required by the Commonwealth of Pennsylvania in order to retain current licensure. (N.T. 63, 64, 76, 79, 80, 222-225, 295-297, 299-301, 303, 305, 388, 389, 600, 601, 645, 646, 738-743, 745, 746; City Exhibit 18, 19, 20).
5. An FSP's primary duty is to provide emergency medical services to members of the public. The vast majority of the FSP's work is done in a non-fire, emergency setting because most of their responses are to non-fire related emergencies. In contrast, fire fighters engage in fire fighting and rescue work while controlling and extinguishing fires. To those ends fire fighters operate nozzles; control hose lines; direct streams of extinguishing agents to control fire; put standpipe and hydrant systems into service; and connect, assemble and regulate the operation of deluge guns, ladderpipes and sundry other equipment. (N.T. 157-159, 160, 161, 238-240, 312, 313, 376, 405, 406, 420, 437, 438, 455; City Exhibit 1, 2).

¹ 43 P.S. § 217.1-217.12

6. At a fire scene, FSPs are tasked with establishing both a first aid station and a rest and rehabilitation station. Both are for potential medical treatment. The first aid station is established in close proximity to the fire itself in order to render speedy medical care to fire fighters and civilians who fall victim to the conflagration. The rehabilitation station is to monitor the condition of fire fighters who are taking a respite from actively fighting the fire at hand. (N.T. 163, 226-228, 306, 307, 309, 400, 404, 448, 449, 455, 494, 508).

8. FSPs respond to vehicle accident scenes. At vehicle accident scenes, the FSP's primary role is to assess the condition of victims and render care to those victims until they can be removed from the scene and transported to a medical facility. The FSPs do not operate the "jaws of life," or other equipment used for extrication. (N.T. 232, 233, 440, 562, 580, 622).

9. Fire fighters are cross-trained so they may seamlessly move between engine and ladder companies as needed, and in fact, do so. FSPs, by contrast, are not interchangeable with fire fighters, and cannot be assigned to engine or ladder companies. (N.T. 310-312).

10. FSPs who wish to become fire fighters must take and pass the fire fighter test to secure a place on the eligibility list. Once chosen from the list, the FSP must resign his or her FSP position and enter the fire academy as a new cadet. The former FSP may no longer render advanced life support services in his or her capacity as a fire fighter. (N.T. 252, 253, 277, 278, 301, 523-525, 600, 601, 723, 724, 740- 742).

DISCUSSION

The City filed this petition for unit clarification seeking to remove the classification of FSP from the fire fighters' bargaining unit represented by the Union. The bases for the City's petition are that the FSPs are not employees as defined by Act 111; that a Federal Court has ruled that the FSPs are not firefighters; and that the FSPs do not share a community of interest with the other bargaining unit members so as to be properly in the Act 111 unit.²

The Union eloquently parries these allegations with the counter-arguments that, the FSPs are "fire personnel" within the meaning of Act 111 because they "engage fully in accomplishing the common mission of the Fire Department"; because the FSPs perform "fire suppression" as defined in nationally created standards; because the City's definition of firemen under Act 111 is too narrow; and because the FSPs "directly engage in fire abatement." (Union's post-hearing brief, 28, 30, 34, 40, 42).

While the Union's arguments are certainly fervid and emotionally evocative, they do not carry the day. FSPs are not employees under Act 111 because they are not statutorily authorized to fight fires. Moreover the FSPs do not perform firefighting activities, but rather, provide emergency medical services.

We will first briefly touch on the Board's unit clarification responsibilities, and then we will examine the two-part test that determines whether a municipal employe is covered by Act 111.

Even for pre-existing, non-certified, but recognized bargaining units, the Board has an ongoing duty to entertain unit clarification petitions. City of New Kensington, 18 PPER ¶ 18023 (Final Order, 1986); City of Philadelphia, 19 PPER ¶ 19201 (Decision and Order, 1988).

Act 111 is the aphoristic legislation that gives bargaining rights to police officers and fire fighters. Interestingly, the two-part test that determines whether a

² I have not considered any arguments made by the City, or depositions introduced by the City, from the federal decision in Lawrence, et al v. City of Philadelphia, Pennsylvania, 527 F.3d 299 (3rd Cir. 2008), because that case involved a different issue, litigated by different parties. (City Exhibit 3).

municipal employe is covered by Act 111 comes not from that legislation, but from judge made law. That's because Act 111 is so epigrammatically written that it does not define the terms "policemen" and "firemen." Courts have, in order to fill that definitional vacuum, established a two-part test.

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 two-part test for deciding whether or not employes 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).

We will first examine whether there is any statutory authorization for FSPs to work as "firemen," as the term is used in the Philadelphia Home Rule Charter. If there is no statutory authorization for the FSPs to work as "firemen," the fact that they might, on occasion, perform acts associated with fire fighting, is simply of no moment. Statutory authorization must bestow explicit fire fighting authority upon the group in question. *See, County of Lebanon v. PLRB, supra.* Historically, when the legislature has granted statutory authority to Act 111 employes, "it has done so with a fair degree of specificity." Delaware County Lodge No. 27, FOP v. Commonwealth, PLRB, 690 A.2d 754 at 756 (Pa. Cmwlth. 1997).

The Philadelphia Home Rule Charter, Article V, Chapter 4, §5-400, authorizes the City to create a fire department. That authorizing document, however, makes no mention of FSPs. *A fortiori*, it does not grant them the authorization necessary to meet the first prong of the two-part test. Moreover, the Philadelphia Code, Title 5, captioned, Fire Code, has been repealed. Similar amended provisions have been incorporated into Title 4, Subcode F. This Subcode does not mention, and therefore cannot give, statutory authorization to FSPs to fight fires, either.

FSPs are, in fact, paramedics who have received some fire academy training. With that in mind, we must also examine the enabling statute for paramedics to see if it grants them any statutory, fire-fighting authorization.

Paramedics are defined and their duties are set forth in the Emergency Medical Services Act, 35 P.S. § 6921-6938. Section 6923 sets forth the definition of "EMT-paramedic."³ Certification requirements and scope of practice are set forth in Section 6931(d) and (e). None of this trine makes any mention of fire fighting authority.

Finding legislative authority "is of substantial concern in determining status of employes for applicability of Act 111." Commonwealth v. PLRB, 502 Pa. 7 at 14, 463 A.2d 409 at 413 (1983).

Therefore, since there is no statutory authority for FSPs to engage in fire fighting, the FSPs cannot be Act 111 employes, as a matter of law. An inquiry into the duties performed by employes purported to be Act 111 employes is necessary only after their statutory authority has been established. Delaware County Lodge No. 27, FOP v. Commonwealth, PLRB, 690 A.2d 754 at 757 (Pa. Cmwlth. 1997). Nevertheless, we will examine whether FSPs "in effect act as. . .fire personnel." County of Lebanon v. PLRB, 873 A.2d 859 at 863 (Pa. Cmwlth. 2005).

³ This statute refers to "emergency medical technician-paramedics (EMT-paramedics)" as differentiated from mere "emergency medical technicians."

It is certainly possible to frame the argument with concinnity, as the Union does, that everyone at the fire scene "perform[s] work at emergency scenes in order to satisfy the mission of the Fire Department, which, as understood by its employees, is to save lives." (Union's post-hearing brief at 29). Performing work to save lives, however, while truly a palmary goal is not the legally accepted definition of an Act 111 fire fighter. Rather, the Board has opined that "[s]ince the employes at issue are hired with the authority to fight fires and *do in fact fight fires*[,] they are firemen within the meaning of Act 111." City of Arnold, 20 PPER ¶ 20124 at 339 (emphasis added)(Final Order, 1989).

Obvious as it may seem, actually fighting fires, then, is the benchmark task of a fire fighter. The FSP's mission at the fire scene is not to fight fires, but rather, to render emergency medical aid to both fire fighters and civilian casualties of the conflagration. While it is a matter of record that on occasion FSPs do render some assistance ancillary to the fire-fighting effort, that assistance is by far either of a secondary nature, or concomitant to the FSP's rendering emergency medical aid.

Moreover, while the FSPs do receive some training in fire suppression, and both organization and etiquette at the fire scene, this training is merely to allow a more seamless interface between fire fighters and FSPs, and not to prepare FSPs to fight fires themselves.

Not surprisingly, the Union finds the above definition too parochial, and suggests that, "the most logical understanding of what it means to be a 'fireman' is whether the duties and/or functions performed by an employee are ones generally performed by fire departments." (Union's post-hearing brief at 30). The legal definition of what it means to be a fireman is considerably more stenotic than what the Union proposes. In point of fact, the Union's definition puts the rabbit in the hat, because it creates a syllogism with a faulty major premise.⁴ Such a patulous definition would negate the two-part test of who is an Act 111 employe.

The Union also argues that because the FSPs have, on occasion done such things as move and hold ladders, establish water connections, move hoses, and direct water on "burning material at fire scenes," that the FSPs are firemen under Act 111. Admitting that these events are *de minimis*, the Union argues that "the frequency with which an employee performs acts of police or fire personnel is not relevant to the consideration of their inclusion within an Act 111 bargaining unit." (City's post-hearing brief at 43). In support of that contention, the Union cites City of Arnold v. PLRB, 21 PPER ¶ 21096 (Pa. Cmwlth. 1990), and Commonwealth v. PLRB 502 Pa. 7, 463 A.2d 409 (1983).

Albeit, these two cases clearly put employes under the aegis of Act 111, even though those employes only occasionally performed the duties of police officer or fire fighter. There is, however, one determinative difference; in both the above cases *the employes had the statutory authority to perform those duties*. Such is not the case here with the FSPs. Therefore, since the FSPs have no statutory authority to fight fires, the fact that they may, on rare occasions, perform some *de minimis* duties associated with fire fighting, is of no moment.

As the hearing examiner so simply wrote in Springettsbury Township, "The record indicates that the [public employer] has hired firemen to fight fires and ambulance attendants to provide emergency medical care." 12 PPER ¶ 12381 at 578 (Proposed Order of Dismissal, 1981). Such is the case here with the fire fighters and the FSPs.

One final point deserves discussion. Obvious throughout the Union's brief is the leitmotif that there is a strong *esprit de corps* in the Fire Department that spans any gap between the duties of firefighters and FSPs. And an unstated, but clearly implied concern is that removing the FSPs from the auspices of Act 111 will somehow detrimentally affect that necessary sense of dependence on each other that people who work together in grave danger often rely. The decision to remove the FSPs from under Act 111 need not in any way affect the ability of FSPs and fire fighters to perform those integrated tasks

⁴ And, that faulty major premise is: Fire fighters are employes whose duties and functions are those performed by fire departments. For our purposes, fire fighters are employes who do, in fact, fight fires.

necessary to saving lives and property. It is clear from the witnesses at this hearing that the men and women who currently constitute the Philadelphia Fire Department, even in two separate bargaining units, will continue to display the selfless dedication to the task at hand that has given them the outstanding reputation they deserve, and now enjoy.

CONCLUSIONS

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

1. The City is an employer within the meaning of the PLRA and Act 111.
2. The Union is a labor organization within the meaning of PLRA and Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The position of Fire Service Paramedic is not a position properly included under the PLRA and Act 111.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the position of Fire Service Paramedic is not properly included in the recognized Act 111 bargaining unit of Fire Fighters for the City of Philadelphia, represented by the International Association of Fire Fighters, Local 22.

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 (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania this twenty-second day of February, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner