

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

On March 12, 2010, the International Association of Fire Fighters, Local 22 (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Order of Unit Clarification (POUC) issued on February 22, 2010. In the POUC, the Board Hearing Examiner granted the Petition for Unit Clarification filed by the City of Philadelphia (City) and concluded that Fire Service Paramedics (FSPs) are not fire fighters under Act 111 and the Pennsylvania Labor Relations Act (PLRA) and therefore are properly excluded from the fire fighter bargaining unit represented by the Union. Pursuant to an extension of time granted by the Secretary of the Board, the Union filed a brief in support of its exceptions on April 14, 2010. On May 4, 2010, the City filed a response to the exceptions and a supporting brief. Additionally, on May 26, 2010, the Union filed a Motion to Dismiss the City's Unit Clarification Petition for mootness. Pursuant to an extension of time granted by the Secretary, the City filed a brief in response to the Union's motion on June 17, 2010.

The Hearing Examiner's Findings of Fact are summarized as follows. The Union is a labor organization that represents over two thousand uniformed Fire Department personnel, including about two hundred FSPs, for collective bargaining. The Department deploys sixty engine companies, thirty ladder companies and thirty medic units from sixty locations throughout the City. 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 small portion of the call volume for the Department.

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. 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.

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 are injured in the fire. The rehabilitation station is set up to monitor the condition of fire fighters who are taking a break from actively fighting the fire at hand. 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 them 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.

Fire fighters are cross-trained so they may seamlessly move between engine and ladder companies as needed. FSPs, by contrast, are not interchangeable with fire fighters, and cannot be assigned to engine or ladder companies. 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.

Because Act 111 applies to "policemen" or "firemen", but does not define those terms, the Board and the courts have developed a two-part conjunctive test whereby in order to be covered by the Act, an employe must 1) be legislatively authorized to act as a police officer or fire fighter; 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 applying the two-part test, the Hearing Examiner concluded that there is no legislative authority for FSPs to engage in fire fighting and thus they cannot be Act 111 employes as a matter of law. The Hearing Examiner also rejected the Union's argument that FSPs are fire fighters based on their occasional performance of duties associated with fire fighting, which the Union itself admitted was *de minimis*. The Hearing Examiner reasoned that FSPs do not effectively act as fire fighters because:

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.

(POUC, p. 5.)

In its exceptions, the Union challenges the Hearing Examiner's failure to make certain findings of fact, as well as the Hearing Examiner's conclusion that the FSPs do not meet either prong of the two-part test under Act 111 and therefore are not fire fighters for purposes of the Act. In its Motion to Dismiss, the Union argues that FSPs now have the legislative authority to engage in fire fighting because on May 6, 2010, the Philadelphia City Council passed the following amendment to the City Fire Code:

The fire department official in charge at the scene of a fire or other emergency involving the protection of life or property or any part thereof, shall have the authority to direct uniformed Fire Department personnel, including but not limited to Firefighters and Fire Service Paramedics, to engage in such actions that are necessary in order to complete the assignment, including but not limited to fire rescue, fire abatement, and emergency medical services. Because of their legislative authority to act and actual participation in such operations, Fire Service Paramedics shall continue to be considered firemen for the purposes of the act of June 24, 1968 (P.L.237, No.111), referred to as the Policemen and Firemen Collective Bargaining Act.

Philadelphia Fire Code, § F-104.2. Although the Mayor vetoed this amendment, the City Council overrode the Mayor's veto on May 20, 2010. Based on the passage of the amendment, the Union argues that it is now clear that FSPs have the legislative authority to act as fire personnel and thus they meet the first part of the test set forth in County of Lebanon. Further, the Union argues that the Hearing Examiner's acknowledgement that FSPs perform *de minimis* fire fighting activity is sufficient to meet the second prong of the test, citing the Supreme Court's decision in Commonwealth v. PLRB, 502 Pa. 7, 463 A.2d 409 (1983) (Capitol Police) as support for that proposition.

With regard to the Union's proposed additional findings of fact, the Hearing Examiner is not required to make findings summarizing all of the evidence presented. Rather, the Hearing Examiner need only make those findings that are necessary to resolve the issues presented and are relevant to the decision. Page's Department Store v. Velardi, 464 Pa. 276, 287, 346 A.2d 556, 561 (1975) ("When the fact finder in an administrative proceeding is required to set forth his findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence and which are relevant to a decision."). The findings proposed by the Union are not necessary or relevant to the decision herein, and would not change the result. Accordingly, the Hearing Examiner did not err by failing to make these findings.

In response to the Union's reliance on the above-quoted amendment to the Fire Code, the City contends that City Council lacks authority to authorize the FSPs to act as fire

fighters. However, we need not resolve the parties' dispute on this issue because even assuming, *arguendo*, that the FSPs do meet the first part of the test for Act 111 employees, they clearly do not meet the second part of the test.

In support of its argument that the FSPs effectively act as fire fighters, the Union cites to Capitol Police, *supra*. However, Capitol Police does not support the Union's argument. The Supreme Court did indicate in Capitol Police that police status under Act 111 is not based on frequency of exercise of police powers. However, the Court noted that when a police response is required on state property, it is the Capitol Police who provide such a response:

We are not persuaded that the status of the Capitol Police as "police" is to depend upon frequency of acts. Frequency of performance may be a function of the relative infrequency of disruptive activity in and around state buildings as compared to the community at large and thus does not diminish the power or eliminate the duty of the Capitol Police, but merely reduces the necessity of exercising those powers and duties. In the event of need, they possess the ability, capacity and authority to interpose in any situation requiring police intervention ...

463 A.2d at 412. The Supreme Court went on to state as follows:

Capitol Police are required "and their duty shall be" to enforce order on state property, to arrest persons in breach of the law, and "to carry the offender before the proper alderman, justice of the peace [or] magistrate and prefer charges against him under the laws of the Commonwealth." 71 P.S. § 646. The performance of these duties is statutorily mandated and is not merely incidental to the responsibilities of the Capitol Police. Cf. Venneri v. County of Allegheny, 12 Pa. Commonwealth Ct. 517, 316 A.2d 120 (1974) [Venneri II]....

Id. at 412-413.

Thus, the Supreme Court drew a distinction between the Capitol Police and the Allegheny County deputy sheriffs in Venneri II, who perform some duties associated with police officers, but are not police officers under Act 111 because the police-like duties that they perform are merely incidental to their primary court-related duties. The Commonwealth Court recently reiterated its holding regarding the Allegheny County deputy sheriffs in Allegheny County Deputy Sheriffs' Association v. PLRB, 990 A.2d 86 (Pa. Cmwlth. 2010), petition for allowance of appeal granted, ___ Pa. ___, ___ A.2d ___ (No. 84 WAL 2010, filed August 12, 2010). The Commonwealth Court again held that deputy sheriffs do not meet the second part of the test for police status under Act 111 because their duties remain primarily related to the operation of the courts and not law enforcement. Similarly here, the FSPs' primary duties are the provision of emergency medical services, and any performance of duties associated with fire fighting is merely incidental to their primary duties.¹

The Capitol Police were found to be police officers under Act 111 because whenever a police response is required on state property, it is the Capitol Police who perform this function. Similarly, in City of Arnold, 20 PPER ¶ 20124 (Final Order, 1990), affirmed in unreported decision, 21 PPER ¶ 21096 (Pa. Cmwlth. 1990), the Board determined that dispatchers act as fire fighters 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.

This case is distinguished from Capitol Police and City of Arnold because it is undisputed that fire fighting is not the primary duty of the FSPs and they only rarely perform fire fighting functions. Rather, the FSPs' performance of duties associated with fire fighting is merely incidental to their primary duty of responding to medical

¹ Importantly, the deputy sheriffs were found not to be police officers under Act 111 despite the fact that they received full police office training identical to the training received by Act 111 police officers and performed duties identical to those of a police officer when not engaged in their primary court-related duties. Here, the FSPs do not receive the same training as firefighters and, when they do rarely engage in *de minimis* firefighting activity, they do not perform the full range of duties that firefighters perform. Rather, their activity is limited to moving hoses and "footing" ladders rather than direct fire suppression.

emergencies. Accordingly, unlike the Capitol Police and the dispatchers in City of Arnold, the FSPs do not meet the second part of the two-part conjunctive test for employee status under Act 111. Therefore, the Hearing Examiner properly granted the City's petition to clarify the firefighter bargaining unit to exclude the FSPs.

After a thorough review of the exceptions, the Motion to Dismiss, the responses thereto and all matters of record, the Board shall dismiss the Union's exceptions, deny its Motion to Dismiss, 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, the Union's Motion to Dismiss be and the same is hereby denied and the Proposed Order of Unit Clarification be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania 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 September, 2010. 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.

CHAIRMAN L. DENNIS MARTIRE DISSENTS.

I must respectfully dissent from the majority's opinion. Fire Service Paramedics (FSPs) have been members of the firefighter bargaining unit since the FSP position was created in the early 1980s. Despite the fact that FSPs have been included in the firefighting bargaining unit for decades, the City of Philadelphia (City) never challenged the FSPs' status as firefighters until the City filed a petition for unit clarification on March 12, 2009 seeking to remove the FSP position from the firefighter bargaining unit. Significantly, this petition was only filed after the FSPs were successful in litigation in Federal court wherein they alleged that the City violated the overtime requirements of the Fair Labor Standards Act (FLSA). See Lawrence v. City of Philadelphia, 527 F.3d 299 (3rd Cir. 2008).

Following its defeat in Federal Court, the City now argues that FSPs are not firefighters for purposes of Act 111 because they do not meet the two-part test set forth in 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). However, the FSPs clearly meet this test because they are both 1) legislatively authorized to act as fire fighters and 2) actually engage in fire fighting activity.

As to the first part of the test, the City is authorized by the Philadelphia Home Rule Charter to create a fire department. Pursuant to that legislative authority, the City created a department with a new recruit training academy that specifically trains FSPs in fire abatement. Furthermore, the City Council has recently amended the Philadelphia Fire Code to specifically authorize a fire department official in charge of the scene at a fire to direct FSPs to engage in fire abatement. Simply put, if the Philadelphia Home Rule Charter authorizes the City to create a fire department, the FSPs are trained to engage in fire suppression and the Fire Department has the authority to direct them to engage in fire suppression, the FSPs are legislatively authorized to act as firefighters and therefore meet the first part of the County of Lebanon test.

As to the second part of the test, the City Fire Department has increasingly expanded the range of emergency services that it provides. As such, when called to an emergency scene, employees of the fire department all work together to save lives and support each other in the emergency relief effort. Thus, a "firefighter" not only fights fires, but performs many other important duties that contribute to the public safety and welfare. When

these emergency responders are called to an incident, they have to be trained and ready to handle any situation. In fact, the record contains testimony from FSPs that they have engaged in activity related to fire abatement, including "footing" ladders, moving hoses, establishing water connections, hosing down debris and providing other support critical to the mission of fighting fires. Testimony at the hearing further revealed that, even before the Fire Code was amended by City Council, FSPs could be ordered to engage in fire abatement activity by an incident commander and they would be duty-bound to follow such an order. It is clear, then, that FSPs have a duty to engage in fire abatement when ordered to do so. Therefore, because FSPs are extensively involved in the Fire Department's life-saving activities, they effectively act as firefighters for the City.

The duties of City fire fighters and FSPs have evolved over the years. In previous years, fire fighters were also trained as emergency medical technicians. They responded to fires to perform both fire suppression and emergency medical treatment as part of the Fire Department's unified response. Today, given the need for more highly trained medical services, the FSPs are utilized to respond to every fire, in addition to their response to medical-only emergencies. However, fire fighters also respond to non-fire medical emergencies and, indeed, the vast majority of firefighter calls are of the non-fire variety. Yet there can be no serious argument that the fire fighters are not covered by Act 111 even though the vast majority of their work does not involve fighting fires. When a fire is reported, the fire fighters respond. Much like the fire fighters, the FSPs respond to every reported fire, are subject to the orders of the incident commander and are trained and have assisted in the fire suppression effort.

The City, citing Commonwealth v. PLRB, 502 Pa. 7, 463 A.2d 409 (1983) (Capitol Police), argues that it is not the "primary duty" of an FSP to engage in fire abatement. However, the primary duty of FSPs, as evidenced by the testimony, can change depending on the emergency situation. FSPs are trained, are able, and actually do engage in fire abatement activity, even if only on a *de minimis* basis. Further, the primary duty and responsibility of an FSP, and indeed any member of the Fire Department, is to respond to myriad types of emergency situations and to follow the order of the incident commander at that situation, who could order any department employe to assist in fire suppression and other rescue efforts. Thus, Capitol Police does not support the City's argument.

In order to become an FSP for the City, it is mandatory that FSP recruits attend the City fire academy and successfully complete training in both fire abatement and emergency medical care. If FSP recruits fail to successfully complete the training in fire abatement, they will not be hired as FSPs by the City. In summary, FSPs are 1) trained in fire abatement, 2) must successfully complete training in fire abatement, 3) are specifically authorized to engage in fire abatement, 4) are required to engage in fire abatement if given a direct order to do so by an incident commander and 5) actually do engage in activity related to fire abatement. As such, they should remain in the Act 111 firefighter unit where they have been for decades. Accordingly, I would hold that the Hearing Examiner erred by granting the City's petition for unit clarification.