

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Fraternal Order of Police, Ohio Labor Council, Inc.,

Employee Organization,

and

City of Wilmington,

Employer.

CASE NUMBER: 93-REP-03-0059

OPINION

POTTENGER, Board Member:

The primary issue in this case is whether the newly created position of Chief Detective should be excluded from a bargaining unit of Patrol Officers. For the reasons set forth below, the Board concludes that it is inappropriate for the Chief Detective position to be in the bargaining unit.

I.

In February of 1993, Detective Gary Brannon (Brannon) was officially appointed to the newly created position of Chief Detective.¹ On March 26, 1993, the City of Wilmington (City or Employer), filed with the Board a Petition for Amendment of Certification pursuant to Ohio Revised Code (O.R.C.) §4117.05. On June 3, 1993, the Employer filed an Amended Petition for Amendment of Certification. By its amended petition, the Employer sought to exclude the newly created position of Chief Detective from the currently certified unit of Patrol Officers. The Fraternal Order of Police, Ohio Labor Council, Inc. (FOP or Employee Organization), which is the currently certified exclusive representative for the unit of Patrol Officers, contended that the Chief Detective position should be included in the bargaining unit. The matter was

¹Stipulation of Fact No. 4.

directed to hearing with the hearing officer issuing her recommendation on January 25, 1994, that the Chief Detective be excluded from the bargaining unit. We agree.

II.

Chief Detective Brannon should be excluded from the unit because he is a management level employee within the meaning of O.R.C. §4117.01(K), and therefore, he is not a public employee.

O.R.C. §4117.01(C)(7) excludes management level employees from the definition of public employees. O.R.C. §4117.01(K) defines a management level employee as:

"... an individual who formulates policy on behalf of the public employer, who responsibly directs the implementation of policy, or who may reasonably be required on behalf of the public employer to assist in the preparation for the conduct of collective negotiations, administer collectively negotiated agreements, or have a major role in personnel administration...."

An examination of the record reveals that Brannon squarely meets this definition.

Brannon's duties involve the formulation and implementation of policy. On multiple occasions Brannon has made recommendations to the Employer regarding the Employer's policies and procedures, and these suggestions are often followed. Specifically, Brannon developed and implemented policies regarding mug shots, ticketing, pre-trial and trial notices, evidence collection, case tracking, fingerprint cards.² Brannon also has been assigned the duty of developing overall policies that govern investigations performed by Police Department

²Stipulation Nos. 9, 10, 11.

Detectives.³

Additionally, Brannon has a major role in personnel administration. First, he has taken an active role in developing and implementing personnel policies for the Employer in the areas of discipline and internal investigation.⁴ Brannon also is involved in the application and interpretation of these Employer personnel policies.⁵ Finally, Brannon plays a major role in personnel administration due to the nature of the investigations that he must conduct. Brannon must perform internal investigations of complaints made against City employees, primarily Patrol Officers and Sergeants, which includes making a recommendation to the Chief of Police or other superiors regarding disciplinary or other action to be taken.⁶

Given the policy and personnel administration aspects of his position, Chief Detective Brannon is the type of individual the Legislature sought to exclude from the definition of public employee when it enacted the management level employee exemption in O.R.C. §4117.01(K). Therefore, since he is a management level employee, it would be inappropriate to include Chief Detective Brannon in a bargaining unit.

We are aware that in an earlier decision, In re City of Gahanna, SERB 85-052 (9-30-85), the Board rejected the notion that police and fire supervision below the level of chief should be excluded from collective bargaining as management level employees simply because they responsibly direct the implementation of policy. We agree with the reasoning of the Board in Gahanna that the statute does not anticipate wholesale exclusions in police and fire

³Stipulation No. 10.

⁴Stipulation No. 12.

⁵Id.

⁶Stipulation No. 7.

K

units on the basis of management level status. Such an application would, as Gahanna observes, run counter to the intent of O.R.C. 4117.01(F)(2), which provides:

"With respect to members of a police or fire department, no person shall be deemed a supervisor except the chief of the department or those individuals who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department..."

However, to conclude that police and fire units can never contain management level employees would itself violate an elemental tenet of statutory interpretation; that is, when a special and general provision appears in conflict, the proper interpretation is one that grants both provisions meaning. See O.R.C. 1.51, and Mechanical Contractors Assn. v. State, 64 Ohio St. 2d 192 (1980). If O.R.C. §4117.01(F)(2) is read so broadly that police officers below the rank of chief can never be excluded as management level employees, then O.R.C. §4117.01(K) as applied to police officers is meaningless.

We have before us a case where the unique duties of the Chief Detective require his exclusion as a management level employee. To the extent that Gahanna suggests that such an exclusion is never appropriate in a police or fire unit, it is hereby overruled.

III.

Even if Chief Detective Brannon were not appropriately excluded as a management level employee and thus was a public employee, he should be excluded from the bargaining unit on appropriateness grounds.

When a Petition for Amendment of Certification is filed, the Board must review the factors set out in O.R.C. §4117.06(B) to determine whether the petitioned-for unit is appropriate. A review of these factors leads us to conclude that it is appropriate to exclude

Chief Detective Brannon from the bargaining unit.

O.R.C. §4117.06(B) states:

"The Board shall determine the appropriateness of each bargaining unit and shall consider among other relevant factors: the desires of the employees; the community of interest; wages, hours and other working conditions of the public employees; the effect of overfragmentation; the efficiency of operations of the public employer, the administrative structure of the public employer; and the history of collective bargaining."

In the instant controversy, the desires of the employee is reflected by Brannon's wish not to be in the bargaining unit.⁷ Brannon lacks a community of interest with other bargaining unit members since a significant aspect of his job is investigating alleged misconduct of the bargaining unit members.⁸ Employment terms are likewise dissimilar since Brannon performs additional duties in a work environment not experienced by the other members of the bargaining unit.⁹ The employer and Brannon have submitted uncontradicted stipulated testimony that the experience of Brannon in the bargaining unit has had an adverse impact of the efficiency of operations of the public employer.¹⁰ Finally, the administrative structure of the public employer suggests that exclusion is appropriate since, unlike the other bargaining unit members, Brannon reports directly to the Master Sergeant.¹¹ Therefore, even if Brannon

⁷Stipulation No. 13.

⁸Joint Exhibit B, Stipulation No. 7, Stipulation No. 8, Stipulation No. 13, and Stipulation No. 15.

⁹Stipulation No. 4, Stipulation No. 7. Like the hearing officer, we do not rely on any differential in wage rates between Brannon and other unit employees in concluding that there is insufficient community of interest.

¹⁰Stipulation No. 13, Stipulation No. 16, and Stipulation No. 18.

¹¹Joint Exhibit M and Stipulation No. 18.

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were found to be a public employee, it would be inappropriate to have him remain in the bargaining unit.¹²

Pohler, Chairman and Mason, Board Member, concur.

¹²The factor of overfragmentation is not relevant here. We decline to create a separate bargaining unit comprised solely of the Chief Detective position, since Brannon does not seek representation, and the Employee Organization does not wish to represent him in a single-employee unit. Also, where a newly-created position is at issue, collective bargaining history is not relevant.

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