[J-201-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TOWNSHIP OF SUGARLOAF,	:	No. 121 Middle District Appeal Docket 1999
Appellee	:	
	:	Appeal from the Order of the Commonwealth Court dated December
v.	:	31, 1998, at 2134 C.D. 1997, vacating the Order of the Court of Common Pleas of Luzerne County dated July 7, 1997, at No.
ANTHONY R. BOWLING,	:	2804-C of 1997, and Remanding the case to the Court of Common Pleas for further
Appellant	:	findings.
	:	
	:	722 A.2d 246 (Pa. Commw. 1998)
	:	
	:	ARGUED: October 19, 1999

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: October 19, 2000**

I respectfully dissent as I believe that the question of whether appellant Bowling is a "police officer" protected by Act 111 and/or the collective bargaining agreement, as distinguished from a "probationary police officer appointed for a period of one year or less" and therefore not entitled to such protection, is a threshold question of fact to be determined by a trial court. See Police Tenure Act, 53 P.S. § 812; Upper Makefield Township v. Pennsylvania Labor Relations Board, 753 A.2d 803 (Pa. 2000). Thus, before the mandates of Act 111 arbitration come into play, the first order of business must be to establish whether an employee such as Officer Bowling may, under the circumstances, be deemed a permanent police officer.

Officer Bowling was initially hired as a probationary officer for one year. Through that one-year probationary period, his termination fell solely under the ambit of the Police Tenure Act which provides that "policemen appointed for a probationary period of one year or less" are employees at will and not afforded any of the protections reserved for non-probationary officers. 53 P.S. § 812.[1] Thus, as a probationary officer, Bowling does not have access to the grievance procedure of the permanent officers.

Clearly, had Officer Bowling been terminated during his initial one-year probation, § 812 would control. Here, however, Officer Bowling's probationary term was extended beyond the initial one-year period. The question, therefore, is whether, at some point between the expiration of the initial one-year probationary period and his termination, Officer Bowling was no longer considered probationary and therefore entitled to the protection of the Police Tenure Act, Act 111, or the CBA. Until this question is decided -- and decided in favor of Bowling -- no pertinent contract or legislation permits, let alone compels, these parties to arbitrate.

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[1] The Police Tenure Act, applicable to a Township of the Second Class such as Sugarloaf, provides in pertinent part:

> **§ 812. Removals**
>
> No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act, **with the exception of policemen appointed for a probationary period of one year or less,** shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect for violation of any official duty; (3) violating of any law which provides that such violation constituted a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. . . .

53 P.S. § 812 (footnotes omitted)(emphasis added).

The task for the trial court is, then, to decide whether an employee, who at the time of hiring was explicitly a "policeman appointed for a probationary period of one year or less," retains that status when he has worked beyond one year. I would therefore affirm the Commonwealth Court and remand to the trial court for that threshold determination. Only pursuant to a finding that Officer Bowling was no longer a probationary employee pursuant to § 812, would this matter then fall under the ambit of an arbitrator.