

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 5 :
 :
 v. : Case No. PF-C-08-140-E
 :
CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

A charge of unfair labor practices was filed with the Pennsylvania Labor Relations Board (Board) by the Fraternal Order of Police, Lodge No. 5 (Union) on October 21, 2008, alleging that the City of Philadelphia (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On November 20, 2008, the Secretary of the Board issued a complaint and notice of hearing wherein a hearing was set for January 28, 2009, in Philadelphia, Pennsylvania. After a series of granted continuance requests the hearing was held on October 16, 2009, when both parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Each party filed a post-hearing brief in March of 2010.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Union is a labor organization under Act 111 as read in *pari materia* with the PLRA.
2. The City is a public employer and political subdivision of the Commonwealth of Pennsylvania under Act 111 as read in *pari materia* with the PLRA.
3. Lieutenant Eamon McWilliams was assigned Tow squad responsibilities in 1989. In 1994 he became Police Fleet Liaison. ((N.T. 7, 8).
4. McWilliams's Tow Squad duties included attending special events, such as the Puerto Rican Day parade, the Broad Street Run, and the Philadelphia Marathon. At these special events McWilliams assigned tow trucks to clear parked vehicles that interfere with the event. McWilliams oversaw these trucks and he assigned police officers to accompany tow drivers, in case of altercations. McWilliams also assigned trucks to tow vehicles wanted for evidence in criminal and traffic accident investigation. (N.T. 9-16).
5. As Police Fleet Liaison, McWilliams's duties included, *inter alia*, assigning vehicles to police units, insuring vehicles were properly decaled and outfitted, monitoring vehicle distribution, redistributing vehicles to meet exigent circumstances, monitoring vehicle maintenance schedules, and recommending vehicle specifications. ((N.T. 10, 17).
6. In August of 2008, all Police Fleet Liaison duties were unilaterally removed from McWilliams and assigned to a civilian employe. In September 2008, McWilliams was instructed that he was no longer to attend special events as part of his Tow Squad responsibilities. A civilian employe took over those duties. There was no bargaining with the Union over the removal of these Tow squad duties. ((N.T. 11, 13-15, 17-19, 26, 28, 34, 40, 42).

DISCUSSION

The Union alleges that the City violated PERA as read with Act 111 when it assigned bargaining unit work to non-bargaining unit employes. Specifically, the Union charges

that the City removed the work of the Police Fleet Liaison and the Commanding Officer of the Tow Squad. Both positions were held by McWilliams.

The Union further specified that the work performed in these two positions included fleet management, ensuring that vehicles are repaired in a timely manner, assigning vehicles, and coordinating tow trucks at special events.

The City violated the PLRA when it removed some Tow Squad duties from McWilliams and gave them to a civilian employe. The City also violated the PLRA when it assigned Police Fleet duties to non-bargaining unit employes. A review of the law on bargaining shows why.

An employer commits an unfair labor practice if it unilaterally transfers work exclusively done by the bargaining unit to non-members of the unit. Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Additionally, an employer commits an unfair labor practice if it changes an identifiable portion of shared duties performed by both bargaining unit and non-unit employes, when bargaining unit members have developed an expectation of, and an interest in, retaining those duties. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992).

Here, the City removed bargaining unit work in violation of the PLRA as read with Act 111.

McWilliams Tow Squad job duties included his attending special events throughout the year, such as the Puerto Rican Day Parade, the Broad Street Run and the Philadelphia Marathon to supervise tow truck operators. In conjunction with his attendance at special events, McWilliams also hired Philadelphia police officers to ride with the tow truck operators at those events.

Both of the above-described duties were unilaterally transferred by the City to James Naphys, a civilian, non-bargaining unit member.¹ This unilateral transfer of work previously performed exclusively by the bargaining unit violates Section 6(1)(a) and (e) of the PLRA as read with Act 111. Allentown, supra.²

The record shows that all the Fleet Liaison duties were unilaterally removed from the bargaining unit, and assigned to non-unit employes. McWilliams Fleet Liaison duties included, assigning vehicles, checking vehicle specifications, dealing with maintenance issues, and assuring that vehicles were distributed as events dictated. All these responsibilities were removed from the bargaining unit and placed under the control of Deputy Commissioner Gaitens and performed by civilian employes, who are not bargaining unit members.

The condign remedy is for the City to return all Tow Squad and Fleet Liaison bargaining unit duties to the bargaining unit. The Union asks that I order the City to return the duties to McWilliams, specifically. However I can only order the work returned to the unit, not to a specific employe. The City is free to distribute work within that unit as it sees fit, absent an agreement otherwise between the parties. Pennsylvania Social Services Union, 503 Pa. 236, 469 A.2d 150 (1983).

There is also unrefuted testimony that McWilliams worked some overtime as a result of his attendance at special events. He needs to be made whole for whatever overtime was lost as a result of bargaining unit duties being removed from the unit. The applicable query then becomes how to ascertain that amount.

The City should look at the overtime paid to McWilliams for working special events in the preceding years, and average that amount in computing his overtime. See, City of Philadelphia, 30 PPER ¶ 30204 (Final Order, 1999), (Board adopted the Federal standard for the computation of back pay, including overtime, as set forth in Ellis and Watts Products, 143 NLRB 1269 (1963), *enf'd*, 344 F.2d 67 (6th Cir. 1965)).

¹ Although, there is testimony that other civilian employes may have performed bargaining unit work. ((N.T. 15).

² Even if the City's position were taken as true; that Naphys also did some of the same Tow Squad duties as McWilliams, the PLRA is still violated by materially changing the identifiable proportion of shared duties. AFSCME, supra.

CONCLUSIONS

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

1. The City is a political subdivision under Act 111, and consequently an employer under Section 3(c) of the PLRA.
2. The Union is a labor organization under Section 3(f) of the PLRA, as read with Act 111.
3. The Board has jurisdiction over the parties.
4. The City has committed unfair labor practices under Section 6(1) (a) and 6(1) (e) of the PLRA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the City shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA.
2. Cease and desist from refusing to bargain collectively with the representative of its employes.
3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of the PLRA:
 - (a) Return the Tow Squad and Police Fleet Liaison work to the bargaining unit, and pay McWilliams any overtime money lost as a result of his not attending special events;
 - (b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

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 thirtieth day of December, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Timothy Tietze, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The City hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111; that it has returned the Tow Squad and Fleet Liaison duties to the bargaining unit; that it has paid McWilliams any money owed as a result of lost overtime for attending special events; that it has posted a copy of the proposed decision and order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public