

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILKES-BARRE POLICE :
BENEVOLENT ASSOCIATION :
 :
v. : Case No. PF-C-09-148-E
 :
CITY OF WILKES-BARRE :

PROPOSED DECISION AND ORDER

On December 29, 2009, the Wilkes-Barre Police Benevolent Association (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111, and therein alleged that that the City of Wilkes-Barre (City) violated Section 6(1)(a) and (e) of the PLRA by unilaterally transferring exclusively performed bargaining unit work to non-unit employes. The Union specifically alleged that the City reassigned bargaining unit patrol functions when it launched a video surveillance system with non-unit, civilian monitors.

On January 21, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 28, 2010, in Wilkes-Barre. A second day of hearing was held on July 26, 2010, in Harrisburg. During the hearing on those two dates, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The City is a public employer and political subdivision under Act 111, as read in pari materia with the PLRA. (N.T. 6).
2. The Union is a labor organization under Act 111, as read in pari materia with the PLRA. (N.T. 6).
3. The City's police department is divided into a patrol division and a detective division. The City is divided into six regions. Patrol officers are assigned to patrol the six regions on foot, bicycle, or in motor vehicles. (N.T. 9-11).
4. When a patrol officer observes a crime, his or her responsibility is to report it to a supervising officer and other officers in the vicinity. Only sworn members of the police department patrol the City. (N.T. 11-12).
5. Sometime between 2006 and 2008, the City deployed approximately nine video cameras at the intermodal garage. The intermodal cameras provided surveillance inside the garage and exterior areas including intersections. When those cameras were deployed, no one was assigned to monitor them. (N.T. 28-29, 46, 57, 64-66, 68-69).
6. The screens displaying the intermodal camera images were located in the dispatch area of the police department. The dispatch area was in the front lobby of the police department behind glass. The janitor, civilian records clerk and civilian information officer as well as sworn police officers had access to the dispatch area. (N.T. 66-67).
7. There was no protocol for the use or operation of the intermodal camera system. The Chief hoped that common sense would dictate camera operations and responses. (N.T. 68).
8. The police department had two closed-circuit cameras that were fixed on the entrances to the police headquarters. These camera images were presented on monitors in

the radio dispatch room where civilian dispatchers worked. These cameras/monitors were installed when the police department headquarters building was constructed in 1979 and were no longer used after 1993. The purpose of these cameras was to identify individuals entering police headquarters. These were not City surveillance cameras. No civilian or sworn personnel were ever assigned to monitor the video feeds from either the closed-circuit or the intermodal cameras. (N.T. 49, 58-59, 85-87).

9. On September 12, 2008, the City created a Pennsylvania non-profit corporation named Hawkeye Security Solutions to enhance public safety in the City through the implementation of a video monitoring system. (N.T. 65, 69-71, 90, 147; City Exhibit 4).

10. On November 20, 2008, the City authorized "the proper City officials" to apply for a grant from the Department of Community and Economic Development in the amount of \$100,000 for the surveillance camera project. (N.T. 70; City Exhibit 3).

11. On April 7, 2009, the City authorized the transfer of 2 million dollars of funds, granted to the City from the 2008-2009 Department of Community and Economic Development Gaming Funds, to Hawkeye Security Solutions for the design, deployment and implementation of the citywide video camera security system. (N.T. 90-91; City Exhibit 4).

12. The Hawkeye camera surveillance project is a system of cameras mounted throughout the City on utility poles and traffic signals to monitor intersections, parks, playgrounds and schools, primarily in the downtown area. (N.T. 12-13, 26-27, 73).

13. Some of the Hawkeye cameras are wired and some are wireless. Some are fixed and some are operational in three planes. The moveable cameras are called "PTZ" cameras because they can pan, tilt and zoom. The PTZs can be locked in a fixed position. (N.T. 111-112; 119-122, 124-125).

14. The Hawkeye camera surveillance system became operational on or about November 30, 2009. The Hawkeye camera surveillance system is a separate system from the 9 cameras at the intermodal garage. At that time, two civilian employees were assigned to operate the cameras and monitor the screens in a video monitoring room at police headquarters. Hawkeye leases the video monitoring room from the City. The City did not bargain the use of civilian camera monitors/operators with the Union. (N.T. 23, 74, 76, 91-92, 95-96, 153-154).

15. The civilian camera operators work for a subcontractor of Hawkeye called Legion Security. The contract between Legion and Hawkeye requires Legion employees to provide video monitoring services to Hawkeye. The Legion employees were directed to contact 911 to report observed criminal activity. The 911 call center would dispatch the police department. The initial contract was modified twice limiting Legion employees' duties. (N.T. 74-75, 148-150, 154 158; Union Exhibit 1).

16. On February 12, 2010, the Chief issued a camera surveillance program policy. The policy states that it is temporary and that civilians will no longer actively monitor cameras. It also provides that at least one officer per shift will be assigned to the video monitoring room, and the Chief designated the position as a modified work assignment. (N.T. 51-54; City Exhibits 1 & 2).

17. On February 14, 2010, the Hawkeye Board issued a statement as follows:

As a result of the labor dispute, the Hawkeye Board is hereby instructing Legion that as of Monday, February 15, 2010 at 6 a.m., Legion personnel on site at the Command Center shall function solely in an advisory role and assist any Police officer or officers present only as reasonably requested by them. Such officer or officers shall have sole responsibility for monitoring the Surveillance Camera System. Legion is relieved of its monitoring responsibilities under Paragraph A.1(a) of Exhibit A to the Monitoring Agreement until further notice.

(City Exhibit 5).

18. On February 15, 2010, a police officer was assigned to the video monitoring room. The duties of police officers assigned to the video monitoring room are basically the same as the November 2009 duties of the Legion employees, with the exception that they are sworn officers. The officer works with two Legion employees every shift. (N.T. 19, 74, 78-79, 82, 91-92, 110, 115, 133-136).

19. As of February 15, 2010, Legion employees are not supposed to actively monitor the cameras. They have no duty to alert the officer of any activities on the monitors. Legion employees' duties are limited to checking and testing camera and computer equipment. This diagnostic test is performed every four hours and takes approximately one-half hour. The Legion employees make and keep records of the camera operations. There are approximately 146 cameras throughout the City in the Hawkeye system. (N.T. 80-81, 83-84, 116-119, 136, 143-144, 157, 162-163, 169; City Exhibit 9).

20. As of February 15, 2010, only police officers stationed in the video monitoring room are supposed to contact 911 or directly contact patrol officers on the police radio. (N.T. 128).

21. After February 15, 2010, Legion employees have moved cameras and changed views. Officer Francis Dahaut has observed Legion employees watching movies, sleeping, doing puzzles and reading magazines, books and newspapers. (N.T. 122, 137).

22. One of the terms of the Legion-Hawkeye contract modification was that Legion employees would remain available to the police department to assist the police with anything they would need. (N.T. 155).

23. After February 15, 2010, Legion employees have alerted and advised officer Dahaut that they observed criminal or suspicious activity on one of the monitors and directed officer Dahaut's attention to a particular image. Legion employees have asked Officer Alan Gribble to observe suspicious activity on the Legion employee's monitor. (N.T. 129-131, 138).

24. During the course of an eight-hour shift, some Legion employees perform some monitoring of the cameras. Legion employees cannot leave the video monitoring room except for bathroom and other breaks. (N.T. 139, 165).

25. The vice president of Legion Security believes that Legion employees have a moral obligation to notify the police if they observe criminal activity on the monitors. (N.T. 165-166).

DISCUSSION

The Union argues that the City unlawfully transferred bargaining unit work in November 2009 when it unilaterally assigned the work of monitoring the Hawkeye cameras to civilian Legion employees in the video monitoring room because sworn police officers had historically and exclusively patrolled the City. (Union's Brief at 6-7). The Union also maintains that the City failed to cure its unfair practice after February 15, 2010 by prohibiting the Legion civilian employees from monitoring the cameras because those employees continue to monitor criminal activity on the monitors and actively move and operate the cameras to search for such activity. (Union's Brief at 7-9). The Union further contends that the operation of the intermodal and closed-circuit cameras does not interfere with the exclusivity of police surveillance and patrol because no one was assigned to monitor those video feeds. (Union's Brief at 7, n.1).

The City argues in defense that the screens for the closed-circuit camera system were monitored by civilians and the intermodal camera screens were located in the dispatch area where all police department employees, including civilians in another bargaining unit, had access to this area. (City's Brief at 2-4, 14-15). Accordingly, contends the City, the work of monitoring video screens was not exclusively performed by members of the police bargaining unit and, therefore, it does not constitute bargaining unit work.

The City further maintains that, without conceding that the work of monitoring video screens for City surveillance is bargaining unit work, after February 15, 2010, the work of

Legion employes does not constitute bargaining unit work because they simply perform diagnostic tests and provide tech support for the camera and computer equipment. They are no longer required to monitor the Hawkeye System cameras and they have no responsibility to notify police officers of suspicious activities. (City's Brief at 9-11, 15-17).

1. BARGAINING UNIT WORK

The Commonwealth Court and the board have held that a public employer commits an unfair labor practice when it transfers any bargaining unit work to non-unit members without first bargaining with the unit's exclusive bargaining representative. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992); Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman Sch. Dist., 37 PPER 56 (Final Order, 2006). The union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employe(s). City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). The Union can establish exclusivity where both unit and non-unit personnel perform similar duties by proving that the bargaining unit members exclusively performed an identifiable portion of the shared duties such that the bargaining unit members have developed an expectation of retaining that amount of work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); City of Jeanette v. PLRB, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006). An employer, therefore, commits an unfair practice by altering the manner in which work has been traditionally assigned or by varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing AFSCME, supra). The Board has also held that an employer has a managerial prerogative to introduce new technologies into the work place to improve the efficiency of operations and quality of services, however, that right is not a license to unilaterally transfer bargaining unit work to non-unit personnel. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 144 (Final Order, 2005). The record is clear, and the City does not dispute, that the City did not bargain with the Union regarding the assignment of video monitoring duties to civilians.

The Board has repeatedly held that monitoring video screens is a form of surveillance and patrol exclusively performed by the police bargaining unit. Fraternal Order of Police, Lodge No. 9 v. City of Reading, 40 PPER 100 Proposed Decision and Order, 2009), aff'd, 41 PPER 10 (Final Order, 2010); Fort Pitt Lodge No. 1 v. City of Pittsburgh, 22 PPER ¶ 22150 (Final Order, 1991). The City does not dispute that general principle. The City contends that video monitoring in the City is an identifiable proportion of patrol work and surveillance that has not been exclusively performed by the bargaining unit because civilian employes have had access to video surveillance monitors in past years (i.e., Between 1978 and 1993 for the closed-circuit cameras and since 2006 for the intermodal garage cameras). The City, accordingly, posits that it did not engage in unfair labor practices when it permitted Hawkeye to assign civilian employes of Legion to actively monitor the Hawkeye cameras in the video monitoring room on or about November 30, 2009.¹

Although the record demonstrates that civilians indeed have had access to closed circuit and intermodal video monitors, the record is also clear that neither civilians nor bargaining unit members were assigned to watch those monitors or were responsible for reporting what was depicted on them. There were no identifiable duties or responsibilities that involved video monitoring as a subset of patrol and surveillance. In fact, there was no protocol in place regarding those camera systems. Accordingly, video monitoring did not become a set of quantifiable, assigned duties until the Hawkeye System became operational and those duties were specifically assigned to certain personnel who were responsible for fulfilling those duties. At that point, video monitoring became an identifiable subset of traditional patrol and surveillance,

¹ The City does not argue that it is not liable for the unfair labor practice because Hawkeye is responsible for the civilian work assignment. The Board and the courts of this Commonwealth have stated that matters not raised before the Hearing Examiner are waived. Commonwealth, Department of Public Welfare, 17 PPER ¶ 17042 (Final Order, 1986); AFSCME v. PLRB, 415 A.2d 255 (1986). However, the record shows that high-ranking City officials knew of the work transfer. The City's acquiesce in permitting the transfer of exclusively performed bargaining unit work places responsibility on the City, otherwise public employers could easily create alter egos in the form of non-profits or agencies to escape their bargaining obligations. "Condonation in these circumstances is equivalent to positive action." PLRB v. Westmoreland Intermediate Unit 7, 13 PPER ¶ 13231 (Proposed Decision and Order, 1982).

exclusively performed by sworn police officers in the unit. City of Reading, supra; City of Pittsburgh, supra. Additionally, the closed-circuit camera system is not part of a crime surveillance or patrol system. Those cameras were fixed on the entrances and certain interior spaces at police headquarters. The purpose of those cameras was to identify individuals at police headquarters and not to surveil for criminal activity in the City. Therefore, even if civilians had been specifically assigned to monitor those screens, such monitoring would not be considered a City surveillance or patrol function.

Accordingly, the city engaged in unfair labor practices, on or about November 30, 2009, when it assigned Legion employes to actively monitor Hawkeye screens, manipulate the cameras and report observed suspicious activity.

2. BARGAINING UNIT WORK AFTER FEBRUARY 15, 2010

The charge of unfair labor practices in this case was filed on December 29, 2009. The changes made by Hawkeye and the Chief of Police between February 12th and 15th 2010 are not relevant to determining whether an unfair labor practice was committed prior to the filing of the charge. However, the question of whether the City stopped engaging in unfair labor practices by ordering the civilian Legion employes to cease actively performing their monitoring and reporting duties in the video monitoring room, while remaining in the video monitoring room, is relevant to determining the prospective remedy.

The record does not support the City's contention that the civilian Legion employes are no longer performing bargaining unit work and that, after February 15, 2010, they simply perform diagnostic tests and provide tech support for the camera and computer equipment. After February 15, 2010, Legion employes have moved cameras and changed views, even though they have been instructed not to do so. Legion employes have alerted and advised officer Dahaut that they observed criminal or suspicious activity on one of the monitors and directed officer Dahaut's attention to a particular image, after February 15, 2010. Legion employes have asked officer Gribble to observe suspicious activity on the Legion employe's monitor. During the course of an eight-hour shift, some Legion employes perform monitoring of the cameras simply because they cannot leave the video monitoring room, except for bathroom and other breaks. Although Officer Dahaut has observed Legion employes watching movies, sleeping, doing puzzles and reading magazines, books and newspapers, he has also witnessed them actively manipulating and monitoring camera images. Indeed, the vice president of Legion Security believes that Legion employes have a moral obligation to notify the police if they observe criminal activity on the monitors.

In Firefighters Local 737 v. City of Williamsport, 22 PPER 22196 (Proposed Decision and Order, 1991), the union filed a charge alleging, inter alia, that the City of Williamsport unilaterally reduced the number of firefighters on the Rescue 1 team. The City presented evidence that the firefighters assigned to Rescue 1 were not expected to attempt a search and rescue alone but rather were to observe the standard operating procedure for Rescue 1, which provides that they work as a team. The record in that case also showed that the City knew that a majority of its firefighters would attempt a search and rescue alone, without backup, and that the firefighters assigned to Rescue 1 were occasionally the first to reach a fire. Examiner Wallace concluded that the City of Williamsport engaged in unfair labor practices because it was obvious to the employer that a firefighter arriving at a fire alone would continue into the fire without waiting for help, thereby presenting a bargainable safety issue.

Similarly, here, the record shows that, not only do the civilian employes in fact manipulate and monitor the Hawkeye cameras in the video monitoring room, but also they have a moral obligation, as did the firefighters in City of Williamsport, to respond to and report an observed criminal act. The record establishes that a civilian remaining in the video monitoring room for eight hours will at some point watch the monitors, and when he/she sees something suspicious on one of the screens, he/she reports it to officer in the room.

Also, one of the terms of the Legion-Hawkeye contract modification was that Legion employes would remain available to the police department to assist the police department in anything they would need. This provision at least implies that when an officer needs help monitoring the cameras, the civilians would be available to do so. The record is

silent regarding camera and monitor coverage when the one officer in the video monitor room takes a bathroom break and leaves the room. The Legion-Hawkeye contract modification seems to permit the officer to assign monitoring duties to the civilians in that situation. Additionally, the Chief's February 12, 2010 memo provides that the new policy, where Legion employees would no longer actively monitor Hawkeye cameras, is temporary and subject to change. By its own terms, the Chief can reassign monitoring duties to the civilians any time as long as they are stationed in the video monitoring room. Therefore, the Legion employees must be removed from the video monitoring room.

Accordingly, the City has engaged in unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA, as read in pari materia with Act 111.

CONCLUSIONS

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

1. The City is a public employer and a political subdivision within the meaning of Act 111, as read in pari materia with the PLRA.

2. The Union is a labor organization within the meaning of the PLRA, as read in pari materia with Act 111.

3. The Board has jurisdiction over the parties hereto.

4. The City of Wilkes-Barre has committed unfair labor practices within the meaning of Section 6(1)(a) and (e) of the PLRA, as read in pari materia with 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 City of Wilkes-Barre shall

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA.

2. Cease and desist from refusing to bargain collectively with the exclusive bargaining representative of its police employees.

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111, as read in pari materia with the PLRA:

(a) Immediately rescind the transfer to the civilian Legion employees in the video monitoring room the work of monitoring and operating video surveillance equipment in the video monitoring room and of notifying police officers of suspicious or illegal activity;

(b) Immediately and permanently return all the work and duties delineated in 3(a) above to the police bargaining unit;

(c) Immediately and permanently remove the civilian employees from the video monitoring room;

(d) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days; and

(e) 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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fifth day of March, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILKES-BARRE POLICE BENEVOLENT :
ASSOCIATION :
v. : Case No. PF-C-09-148-E
CITY OF WILKES-BARRE :

AFFIDAVIT OF COMPLIANCE

The City of Wilkes-Barre hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act, as read in pari materia with Act 111; that it has returned to the bargaining unit of police officers the duties of monitoring and operating video surveillance equipment in the video monitoring room and of notifying police officers of suspicious or illegal activity; that it has permanently discontinued assigning those duties to the civilians in the video monitoring room; that it has permanently removed the civilian employees from the video monitoring room; that it has posted a copy of the proposed decision and order in the manner prescribed therein; and that it has served a 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