

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

CHAMBERSBURG POLICE OFFICERS ASSOCIATION :  
 :  
 v. : Case No. PF-C-10-166-E  
 :  
 CHAMBERSBURG BOROUGH :

**PROPOSED DECISION AND ORDER**

On November 8, 2010, the Chambersburg Police Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Borough of Chambersburg (Borough) violated section 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by unilaterally "implement[ing] a new 'Borough Cell Phone and Landline Use Policy.'"<sup>1</sup> On December 1, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on March 29, 2011, if conciliation did not resolve the charge by then. On December 17, 2010, the Borough filed an answer admitting that it had implemented "a Borough Cell Phone and Landline Use Policy" but denying that it "materially change[d] the terms and conditions of employment" when it did so. The Borough also filed new matter alleging that it was contractually privileged to implement the policy, that it had the managerial prerogative to implement the policy and that the Association had waived any right to bargain it may have had. The hearing examiner held the hearing as scheduled and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On May 12, 2011, the Borough filed a brief by deposit in the U.S. Mail. On May 16, 2011, the Association filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

**FINDINGS OF FACT**

1. The Association is the exclusive representative of a bargaining unit that includes police officers employed by the Borough. (Pleadings)

2. In January 2010, Jeffrey Stonehill began working for the Borough as the borough manager. Upon discovering that the Borough had no written cell phone policy, he decided to "promulgate in the form of a written policy a document which reflected the existing use of Borough-owned equipment, as well as the existing policy of reimbursing certain cell phones that are owned by employees." In keeping with applicable Internal Revenue Service regulations and after meeting with the Borough's department heads, including the chief of police, he prepared and presented to them a draft of "the way the cell phones were always understood to be used" as follows:

"Section M: Borough Cell Phone and Landline Use Policy

**I. Introduction:**

Telephones and cell phones are important business tools. Almost every employee will have access to a Borough land line phone to perform their duties. For many positions, cell phone access will be considered to be mandatory. Of course, phones can also be used to for non-business purposes. This can lead to legal and ethical problems if a phone purchased by the Borough for work is also used for personal reasons. In order to minimize these difficulties, the following policy is promulgated.

**II. Cell Phones:**

A. The Department Head will be responsible for determining which employees in their department are required to have a cell phone.

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<sup>1</sup> The Association also filed the charge under section 6(1) (a) of the PLRA as read in pari materia with Act 111. In its Brief at n. 1, however, the Association has withdrawn that portion of the charge, so it will not be addressed.

B. If an employee wishes to use their cell phone for personal reasons, they must do so during their own personal time (breaks or off-duty).

C. The Three Options of Cell Phone Use:

When the Borough requires an employee to have a cell phone, the Department Head may choose to provide them with that phone under either option 1 or option 2 below. Alternatively, if both the Department Head and the employee mutually agree, option 3 below may also be chosen.

1. The Borough will provide a cell phone to the employee and pay all costs; however, the employee may not use the cell phone for any personal business. If the employee who chooses this option wishes to have a cell phone for personal use they must purchase a second cell phone and pay all associated costs.

2. The employee can be provided with a phone by the Borough, and all expenses will be paid by the Borough with the exception of personal calls. The employee will then be responsible for keeping track of all personal calls and paying the Borough 10 cents per minute for each personal call. (To facilitate this, the employee will be presented with a monthly bill and be required to identify which calls were personal in nature). This option is currently being utilized by most Borough employees.

3. If the Department Head and the employee mutually agree, the employee may choose his own cell phone and plan. All expenses will be paid by the employee, but the Borough will pay the employee a monthly subsidy of \$30 per month to help offset expenses. The employee receiving this subsidy will be required to carry the phone during work hours and stand-by hours if applicable, or at all times if a management employee.

### III. Landline Use for Personal Calls

[omitted as irrelevant]

IV. Any employee found to be abusing the cell phone or landline usage policy may have their phone privileges revoked or altered and/or be subject to disciplinary action."

(N.T. 10-11, 14-15, 19-23, 25-30, 32-33, 35-39; Exhibit A)

3. By memorandum dated September 15, 2010, the chief of police informed the police officers of a "new cell phone policy" under which they had to pick one of three options by October 1, 2010. The options were as follows:

"1. Option 1 - Keeping the current service (Borough Cell Phone) making no change. Employee will be responsible for personal calls that will need to be reimbursed to the Borough.

2. Option 2 - Turning in the Borough Cell Phone and choosing another provider or same provider **with a different phone number**. If employee chooses any provider other than Sprint/Nextel - they just need to set up an account and provide the Borough with the new phone number so that they can be reimbursed for the \$36.00 monthly for using a personal phone for company business. If they choose Sprint/Nextel have them contact Sue Morgenthal at [phone number omitted] for the switch. Either way, I will need to know what the new number is.

3. Option 3 - Turning in the Borough Cell Phone and choosing another provider or same provider **and keeping the current phone number**. If employee chooses any provider other than Sprint/Nextel - they will need to have the provider call me [phone number omitted] during business hours to release that phone number from our account. Again, if they choose Sprint/Nextel they should contact Sue at [phone number omitted] to set up an appointment for the change."

(N.T. 28, 31; Exhibits A and B)

4. Mr. Stonehill thereafter included in the personnel handbook for police officers the draft he prepared for the department heads, with one exception: he changed from \$30.00 to \$36.00 the monthly reimbursement for police officers using a personal cell phone for Borough business. (N.T. 13, 29-32, 39-40)

#### DISCUSSION

The Association has charged that the Borough committed an unfair labor practice under section 6(1)(e) of the PLRA as read in pari materia with Act 111 by unilaterally "implement[ing] a new 'Borough Cell Phone and Landline Use Policy.'" According to the Association, the Borough changed two mandatory subjects of bargaining when it implemented the policy: (1) the rate by which police officers are to reimburse the Borough for personal calls made on cell phones provided by the Borough and (2) the rate by which police officers are to be reimbursed by the Borough for using their own cell phones for Borough business. Brief at 6.

The Borough admits in its answer that it implemented "a Cell Phone and Landline Use Policy" but denies that it "materially change[d] the terms and conditions of employment" when it did so. Citing the management rights and zipper clauses in the parties' collective bargaining agreement (Exhibit C), the Borough also contends that it was contractually privileged to implement the policy. Citing City of Butler, 41 PPER 116 (Final Order 2010), the Borough further contends that it had the managerial prerogative to implement the policy unilaterally. Citing testimony that the Association did not request bargaining after the Borough provided it with a draft of the policy (N.T. 16), the Borough additionally contends that the Association waived any right to bargain it may have had.

An employer commits an unfair labor practice under section 6(1)(e) of the PLRA as read in pari materia with Act 111 if it unilaterally changes a mandatory subject of bargaining. Borough of Ellwood City v. PLRB, 998 A.2d 589, 2010 Pa. LEXIS 1532 (2010). An employer does not, however, violate that section if it was contractually privileged to act as it did, Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000), or if the change was to a managerial prerogative rather than a mandatory subject of bargaining. Cheltenham Township v. Cheltenham Township Police Department, 312 A.2d 835 (Pa. Cmwlth. 1973). Nor does an employer violate that section by reducing an unwritten policy to writing without change even if the policy is a mandatory subject of bargaining. Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 101 (Final Order 2005); City of Philadelphia, 31 PPER ¶ 31023 (Final Order 1999). Any waiver of the right to bargain must be clear and unmistakable. Township of Upper Merion v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993). "[B]road language in a management rights clause will not support a waiver." Id. at 75-76.

In support of the charge, the Association presented evidence that the Borough's chief of police gave its police officers three options to choose from under "a new cell phone policy" (Exhibit B). The first option was "[k]eeping the current service (Borough Cell Phone) making no change. Employee will be responsible for personal calls that will need to be reimbursed to the Borough." Id. The second option included a reimbursement of "\$36.00 monthly for using a personal phone for company business." Id. The Association also presented evidence that under the "new" cell phone policy the reimbursement rate for making a personal call with a Borough cell phone was 10 cents per minute (Exhibit A). Noticeably absent from the record, however, is any evidence that the reimbursement rates for making a personal call with a Borough cell phone and for using a personal phone call for company business changed when the chief of police gave the police officers the three options from which to choose. At best, the record shows that the Borough reduced an unwritten cell phone policy to writing. See finding of fact 2. Thus, regardless of whether or not the "new" policy is a mandatory subject of bargaining, the charge must be dismissed for lack of proof that anything changed under the "new" policy. See Commonwealth of Pennsylvania, Pennsylvania State Police (an employer does not commit an unfair labor practice by reducing an unwritten policy to writing without change); City of Philadelphia (same).

The Association cites New Britain Township, 33 PPER ¶ 33069 (Final Order 2002), for the proposition that "any new condition of employment is subject to negotiation, even where there was no change." Brief at 4. In that case, the Board found that an employer violated section 6(1)(e) by unilaterally implementing a mandatory subject of bargaining (a heart and lung policy). Crucial to the Board's analysis, however, was the fact that no such policy had existed before. Indeed, absent that fact, there would have been no basis for the Board to find that the employer had changed a mandatory subject of bargaining when it implemented the heart and lung policy. As noted above, evidence of change is absent here, so no finding of a change as in New Britain Township may be made. The Association's reliance on that case is, therefore, misplaced.

Given the foregoing disposition of the charge, the Borough's contentions that it was contractually privileged to implement the cell phone policy, that it had the managerial prerogative to implement the cell phone policy and that the Association waived any right to bargain that it may have had need not be addressed.

#### **CONCLUSIONS**

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

1. The Borough is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The Association is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Borough has not committed an unfair labor practice under section 6(1) (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 as read in pari materia with Act 111, the hearing examiner

#### **HEREBY ORDERS AND DIRECTS**

that the charge is dismissed and the complaint rescinded.

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 ninth day of June 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner