

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NORTHAMPTON COUNTY DEPUTY :
SHERIFF'S ASSOCIATION :
 :
v. : Case No. PERA-C-10-413-E
 :
NORTHAMPTON COUNTY :

PROPOSED DECISION AND ORDER

On November 12, 2010, the Northampton County Deputy Sheriff's Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that Northampton County (County), by and through its appointed Sheriff (Sheriff), violated Section 1201(a)(1), (3), (4) and (5) of the Public Employee Relations Act (PERA). The Union specifically alleged that the County retaliated against bargaining unit employes and refused to bargain with the Union when the Sheriff unilaterally rotated sergeants into different primary duty assignments and limited overtime opportunities.

On December 1, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing take place on March 30, 2011, in Harrisburg. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. During the hearing, the Union withdrew its cause of action under Section 1201(a)(4) and represented that the parties resolved the overtime claim. (N.T. 5-6). 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 County is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-04-103-E, ODSEL and Order and Notice of Election (2005); PERA-U-09-375-E, Nisi Order of Unit Clarification, (2010)).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (PERA-R-04-103-E, ODSEL and Order and Notice of Election (2005); PERA-U-09-375-E, Nisi Order of Unit Clarification, (2010)).
3. Randall Miller has been the appointed Sheriff of the County since December 2009. When Sheriff Miller became County Sheriff, he learned that, in the past, covering for absent sergeants was a mixture of several practices. Sometimes the sergeant rank was not filled at all and sometimes a permanent sergeant filled in. Sheriff Miller began the practice of using "acting rank" to fill in for absent sergeants. Acting work was assigned for at least one week so that there were no daily changes. (N.T. 39, 65-66).
4. The Sheriff's Department is comprised of five divisions each providing specialized services. A primary duty assignment (PDA) is a permanent assignment to one of the five divisions of specialized services. Sergeants had been given a PDA to one of those divisions. (N.T. 9-10, 40; Union Exhibit 3, Article 33).
5. In early 2010, one sergeant was promoted to lieutenant and one sergeant retired. Both positions were in the court security section which is the largest section. Soon thereafter, the County prohibited the hiring and promoting of employes and the Sheriff was unable to fill the two sergeant vacancies. (N.T. 14, 50).
6. The parties' collective bargaining agreement (CBA) was executed in August 2008 and was effective from January 1, 2006 through December 2010. The sergeants were clarified into the unit by Nisi Order of Unit Clarification on May 12, 2010. (Union Exhibit 3; PERA-U-09-375-E, Nisi Order of Unit Clarification (2010)).

7. The practice of using acting rank was used sparingly in early 2010 and then frequently in mid-2010 after the County Executive officially ordered the freeze on hiring and promotion. (N.T. 65-67).

8. The County, the Sheriff and the Union engaged in bargaining regarding certain terms and conditions of employment for the sergeants after the inclusion of the sergeants in the bargaining unit in 2010. In March or April, 2010, Sheriff Miller discussed with the Union the use of acting sergeants or acting rank. Between the spring and fall of 2010, the Sheriff selected deputies with experience in a division to be acting sergeant of that division, in the absence of a permanent or "hard-striped" sergeant. In August 2010, the County and the Union tentatively agreed to modify the CBA to include the new agreements. (N.T. 10, 29, 41-48, 50-51; Respondent Exhibit 1)¹.

9. On September 27, 2010, the Union voted to inform the Sheriff that they lacked confidence in the deputies acting as sergeants in charge. On September 28, 2010, the Union President met with the Sheriff and stated that the Union membership voted against the tentative agreements and wanted to take all issues to interest arbitration. The Sheriff expressed disappointment in that the parties had been working for months to avoid arbitration or limit its scope. When the Sheriff was informed of the no-confidence vote on the acting sergeants, he discontinued the use of acting sergeants consistent with Union demands. (N.T. 10-11, 29, 31, 52, 48, 60-61, 75-76; Respondent Exhibits 1 & 3).

10. Eliminating acting sergeants required rotational assignment of hard striped sergeants. This moving of sergeants around meant that supervisory sergeants would be supervising divisions without experience in the duties pertaining to the division. The Sheriff decided to cross train all sergeants for a period of time to prepare them to supervise any division to which they may be assigned. The cross training program was designed to be temporary with the possibility of becoming permanent if it produced good results (N.T. 55-56, 58-59).

11. On October 4, 2010, the Chief Deputy issued a memo on behalf of the Sheriff informing supervisory staff that the Sheriff's Department was initiating a cross training program. The memo provides as follows:

The Northampton County Sheriff's Department is embarking on a program to cross train and reallocate supervisory resources. We will be assigning, on a rotating basis, each of the sergeants to work the various divisions. Each sergeant will also have an opportunity to work courts during court week. This program will increase the involvement of hard stripe sergeants and limit the acting rank opportunities. It will also provide every sergeant the ability and training, to fill in any assigned division.

Beginning the week of October 18, 2010, all sergeants will be assigned the day shift. Exception to this will be the sergeant on "E" Call, who will work the middle shift and be responsible for middle shift supervision. Sergeants may opt to trade away their assigned "E" Call with approval, however will still be required to work the middle shift and supervise that week. The sergeant taking "E" Call for another sergeant will still be assigned day shift for that week. This will enable cross training on the middle shift responsibilities as well.

¹ The Union objected to the admissibility of Respondent Exhibit 1 during the hearing on relevancy grounds, at which time I deferred my ruling. (N.T. 44-46). Respondent Exhibit 1 is a packet of documents containing several tentatively agreed upon terms and conditions of employment signed in August 2010, but not effective until January 1, 2011, after the cross training program was implemented. Having the benefit of the entire record, I agree with the Union and sustain its objection to the extent that Respondent Exhibit 1 was offered to show that the County bargained to agreement matters involving PDAs. The record in this case is clear that the Union membership voted to reject the tentatively agreed upon matters and submit all matters in dispute to interest arbitration. Also, the effective date of the tentative agreement post-dates the unilateral changes made by the County. However, the Exhibit is admissible for the limited purpose of showing that the parties were engaged in negotiations during 2010 over the matters contained in the packet, including PDAs.

This program is on a trial basis and will be reviewed after a period of time to determine its effectiveness and to decide if it will become permanent.

(Union Exhibit 1).

12. The program was implemented and sergeants were rotated out of their PDAs to other assignments. The cross-training program ended by December 6, 2010, after all sergeants were rotated through all the divisions of the Sheriff's Department. The sergeants were then reassigned to their previous PDAs. (N.T. 12-13, 34-35, 59-60, 69-70).

DISCUSSION

The issues remaining for disposition are whether the Sheriff's unilateral implementation of a cross-training program that rotated sergeants' work assignments through all the divisions of the Sheriff's Department was unlawfully motivated and whether it violated the County's duty to bargain. I answer both questions in the negative.

1. Retaliation/Discrimination

In Central York Educ. Ass'n v. Central York Sch. Dist., 40 PPER 29 (Proposed Decision and Order, 2009), the examiner presented the following:

In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employee's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). . . .

Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994).

Central York Sch. Dist., 40 PPER at 134-135. On this record there is no evidence of unlawful or discriminatory motive. Accordingly, the Union did not establish a prima facie case that the cross-training program, and the rotation of sergeants through all divisions, was retaliatory.

2. Duty to Bargain

The Board will find an employer in violation of Sections 1201(a)(5) of the Act if the employer unilaterally changes a mandatory subject of bargaining under Section 701 of the Act. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). If, however, the employer changes a matter of inherent managerial policy under Section 702 of the Act, then no refusal to bargain may be found. PLRB v. State College Area School District, 461 Pa 494, 337 A.2d 262 (1975).

Section 702 of PERA provides, in relevant part, as follows:

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion of policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

In State College Area School District, *supra*, our Supreme Court addressed the relationship between Sections 701 and 702 and therein developed the analysis that the Board must apply in determining whether a matter is bargainable under Section 701 or a non-bargainable managerial prerogative under Section 702. The Court opined that determinations in this area must strike a balance between employees' interests in the terms and conditions of their employment on the one hand and the employer's interests in performing managerial functions on the other. 337 A.2d at 268. "In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." *Id.* The Court, in State College, further held as follows:

[W]here an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours or other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

337 A.2d at 268.

In this case, the County's operational need to maintain proper chain of command by placing a hard-striped, permanent sergeant to supervise each division of the Sheriff's Department far outweighs any interest that the sergeants had in their permanent assignments to a specific division. In order for the County to maintain the chain of command with hard-striped sergeants in all divisions, after the occurrence of two unfillable sergeant vacancies, the Sheriff was forced to assign existing sergeants to cover those vacancies. Sergeant coverage of those vacancies required the movement of sergeants away from their existing assignments at times and share in the coverage of the sergeant vacancies. In this regard, the Sheriff legitimately implemented a cross-training program requiring all sergeants to serve as supervisory sergeant of every division.

Prior to the Sheriff initiating the cross training program, the Sheriff used deputies within the division to serve as acting sergeants to cover the sergeant vacancies in that division. This practice allowed the sergeants primarily assigned to a certain division to remain assigned to that division. However, the Union informed the Sheriff that the members had no confidence in the acting sergeant system. To accommodate the Union's wishes, the Sheriff needed another way to maintain chain of command in the Sheriff's Department using the remaining number of permanent sergeants, which was less than the number of divisions that needed coverage due to the County's hiring and promotional freeze. In this regard, the Sheriff had no choice but to move the existing sergeants around to provide chain of command and supervisory coverage where there was a short or long-term vacancy. Knowing that the remaining sergeants would have to provide coverage in different divisions, it was necessary for the Sheriff to ensure that each deputy was cross trained in the operations of every division. The cross training program, and the external circumstances beyond the Sheriff's control that required it, was necessary for the effective and efficient operation of the public employer's enterprise in this case.

The operation of the Sheriff's Department is absolutely necessary to the effective and proper functioning of the court system in Northampton County. There are many important, dangerous and official duties that must be carried out responsibly and effectively. Inexperienced or ineffective supervision or leadership in effectuating these operations would compromise the court system and public confidence, which is not in the public interest. The Sheriff commendably and properly developed a cross-training program that both accommodated the Union's demands to eliminate the acting rank system and ensured that chain of command was maintained with knowledgeable and experienced leadership within the divisions. Accordingly, Sheriff Miller's cross-training program and rotational assignment of hard striped sergeants constituted a managerial prerogative

under Section 702. Sheriff Miller properly exercised his discretion to develop a program that fulfilled the Department's policy of providing effective service to the court system by directing personnel and temporarily changing the Department's organizational structure in a manner that ensured the effective and safe operation of the County's enterprise.

CONCLUSIONS

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

1. The County is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The County has not committed unfair practices within the meaning of Section 1201(a)(1), (3), (4) or (5).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is 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 sixth day of September, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner