

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE,
E. B. JERMYN LODGE NO. 2

v.

CITY OF SCRANTON

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Case No. PF-C-11-56-E

PROPOSED DECISION AND ORDER

On April 18, 2011, the Fraternal Order of Police, E. B. Jermyn Lodge No. 2 (Union), filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Scranton (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111. The Union specifically alleged that the City unilaterally removed bargaining unit work when City Police Chief Daniel Duffy arrested an individual for possessing drugs and drug paraphernalia on March 20, 2011.

By letter dated May 18, 2011, the Secretary of the Board declined to issued a complaint and notice of hearing and therein notified the Union that "[t]he Board has held that an employer's action that would constitute a bargaining violation will be dismissed where the activity complained of was a reasonable means to fulfill the employer's statutory duty to provide public services during an emergency or exigent circumstances not of its own creation." On June 2, 2011, the Union filed with the Board exceptions to the Secretary's dismissal letter. On August 16, 2011, the Board remanded the matter to the Secretary to direct further proceedings. On August 29, 2011, the Secretary issued a complaint and notice of hearing directing that a hearing be held before Donald A. Wallace, Esquire on Tuesday, November 1, 2011.

The matter was continued several times throughout 2011. On December 8, 2011, the Union filed an amended charge of unfair labor practices. In the amended charge, the Union alleged that Chief Duffy performed bargaining unit work on November 8, and November 9, 2011. The Union also alleged that Chief Duffy informed the Union that he would continue to perform bargaining unit work into the future. Also on December 8, 2011, I informed the parties that the matter was reassigned to me, and I scheduled a hearing for July 2, 2012. After several more granted continuance requests, the hearing was held on October 12, 2012. On October 9, 2012, the Board received a letter from the City's Solicitor, Paul A. Kelly Jr., Esquire informing the Board that no representative from the City would attend the hearing. Mr. Kelly posited that "the underlying case has been mooted since former Chief Duffy has left the City employment" and "the City is not in the financial position to expend the monies on this matter." By letter dated October 10, 2012, I informed the City's and the Union's attorneys that the hearing would proceed as scheduled. At the start of the hearing on October 12, 2012, I telephoned Mr. Kelly's office and confirmed that neither he nor anyone from the City was attending the hearing. During the hearing on that date, only the Union presented evidence; there was no cross-examine of 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. **Fraternal Order of Police, E.B Jermyn Lodge No. 2 v. City of Scranton**, 43 PPER 33 (Final Order, 2011).
2. The Union is a labor organization under Act 111 as read in **pari materia** with the PLRA. **Fraternal Order of Police, E.B Jermyn Lodge No. 2 v. City of Scranton**, 43 PPER 33 (Final Order, 2011).

3. Neither management representatives from the City nor the City's attorney appeared for the hearing. The City and its attorney received due notice of the hearing. (N.T. 7).
4. By letter dated October 09, 2012, the City informed the Union and the Board that it would not attend the hearing scheduled for October 12, 2012. (N.T. 7-8; Board Exhibit 1; Union Exhibit 1).
5. By letter dated October 10, 2012, transmitted by fax only, I informed the City's and the Union's attorneys that the hearing would proceed as scheduled. (N.T. 7-8; Board Exhibit 2).
6. At the start of the October 12, 2012 hearing, I telephoned the office of the City's attorney, and his assistant advised that, indeed, the City's attorney was not attending the hearing in this matter and he was instead attending a deposition in another legal matter. By letter dated October 12, 2012, I informed the City's attorney of the briefing schedule and transcript ordering information. By letter dated November 1, 2012, I informed the City's attorney that the Board had received the transcript and that the City's post-hearing brief was due on November 30, 2012. (N.T. 7-8; Board Exhibits 3 & 4).
7. Daniel Duffy became the Chief of Police for the City in September 2010, and he resigned in July 2012. (N.T. 9, 21-22, 57; Union Exhibit 6).
8. The daily duties of police officers in the bargaining unit include, but are not limited to, the following: Conducting traffic stops; patrolling, investigating cars and drivers for drugs and alcohol use and possession; executing search and arrest warrants; providing full protective and security services twenty-four hours per day, seven days per week; and conducting crime scene investigations. (N.T. 11-12).
9. Officers in the bargaining unit include patrol officers and officers of increasingly higher rank up through and including the Detective Captain. Only the Chief of Police is excluded from the bargaining unit. The Chief was removed from the bargaining unit by order of the Board in 2002. (N.T. 13-15; Union Exhibit 4).
10. Historically, the Chief has not performed bargaining unit work. The Chief did not perform bargaining unit work before he was removed from the unit by the Board. Historically, the Chief has not engaged in patrol activities. The Chief's duties are managerial. The Chief's responsibilities focus on the Police Department's financial and operational needs; i.e., the repair, maintenance and purchase of equipment and supplies as well as personnel administration and discipline. The Chief only works the daylight shift between 8 a.m. and 4 p.m. (N.T. 15; Union Exhibit 4).
11. A March 2011 newspaper article revealed that Chief Duffy conducted off-duty arrests in response to citizen complaints about possible drug activity in a City neighborhood. (N.T. 16-17; Union Exhibit 5).¹
12. Bargaining unit police officers' duties include completing incident reports for any police activities in which they are involved. (N.T. 18).
13. The Chief completed an incident report for the arrest reported in the March 2011 newspaper article. The Chief made the arrest on Sunday, March 20, 2011 at 4:30 p.m. Sunday is the Chief's day off. (N.T. 18-19; Union Exhibit 6).

¹ The newspaper article and the information contained therein was admitted for the limited purpose of demonstrating notice to the Union and the effect on the Union President which was that the article motivated the Union President to contact his labor attorney and to further investigate the Chief's activities by obtaining Police Department arrest reports.

14. According to the Chief's report, he was patrolling the City's West Side when he encountered a man with whom he had past police activity. He contacted the Communications Center to perform a warrant check and learned that there was an outstanding warrant for the man's arrest. He then approached the suspect at which time the suspect discarded drugs. Chief Duffy arrested the man for drug possession and the outstanding arrest warrant. (N.T. 18-19, 20-22).
15. Bargaining unit members, and not the Chief of Police, historically and exclusively perform patrols, confront persons of interest to investigate criminal activity and perform warrant checks. (N.T. 20-21).
16. In the past, Chiefs of police contacted a bargaining unit police officer to make the arrest, barring exigent circumstances. There were no exigent or emergency circumstances involved in Chief Duffy's March 20, 2011, arrest. (N.T. 21-22).
17. Chief Duffy continued to patrol, initiate police contact with persons of interest and arrest individuals often after the March 20, 2011, incident. Indeed, Chief Duffy escalated his patrolling and police contacts even after the initial charge was filed. Chief Duffy engaged in these activities a couple of times per week and, in some weeks, every day. (N.T. 22-23).
18. On November 8, 2011, Chief Duffy executed a criminal arrest warrant issued by Dunmore Borough and took the named individual into custody. Historically, the City's Police Department would direct a patrol officer to accompany and assist a Dunmore patrol officer in executing the warrant within the City's police jurisdiction. Historically, bargaining unit officers exclusively execute arrest warrants. This warrant did not involve exigent circumstances. (N.T. 24-26; Union Exhibit 7).
19. On January 5, 2012 at 11:35 p.m., Chief Duffy was patrolling with Lackawanna County Detective John Munley in the area of the Turkey Hill on the West Side of the City. Chief Duffy was off duty at 11:35 p.m. Chief Duffy called for a patrol car to pull nose-to-nose with a suspicious parked car. After the patrol car blocked the suspect's car, Chief Duffy engaged the driver in conversation during which the owner consented to a vehicle search. The search yielded the discovery of heroine, a needle and a needle cap. The patrol officer did not engage in the vehicle search. (N.T. 33-38; Union Exhibit 9).
20. Chief Duffy's patrol, confrontation, search, discovery of contraband and arrest constituted police activity that is historically and exclusively performed by bargaining unit members. Historically, when a chief or other member of the command staff encounters a non-emergency situation, the commanding officer calls for a patrol officer to take police action. (N.T. 37-38).
21. On January 5, 2012, Chief Duffy was conducting an off-duty patrol of a high drug traffic area, which has been historically and exclusively patrolled by bargaining unit officers. Historically the City's police chiefs have not performed patrols. There were no exigent circumstances on January 5, 2012. (N.T. 38-39).
22. On Saturday, February 4, 2012, at 2:45 p.m., Chief Duffy received a call from County Detective John Munley reporting a drug deal involving a known user on Hyde Park Avenue. Chief Duffy responded and confronted the occupants of a car at the cemetery. Chief Duffy called for a canine unit which made a drug indication. Chief Duffy then found packets of heroine inside the car door. Chief Duffy made the arrest himself. (N.T. 40-43; Union Exhibit 10).
23. Historically, calls, like the February 4, 2012 call from Detective Munley, were directed to the patrol division no matter who received the call and the police

activity was conducted by bargaining unit patrol or drug unit officers. Arrests are historically and exclusively made by bargaining unit members. The circumstances involved with the Chief's February 4, 2012 police activity were not exigent. (N.T. 40-41, 43).

24. Chief Duffy executed an affidavit of probable cause in support of a criminal complaint against the individual arrested at the cemetery on February 4, 2012. Bargaining unit officers, i.e., arresting officers, historically and exclusively execute affidavits of probable cause. (N.T. 44-45; Union Exhibit 11).
25. On Sunday, February 19, 2012, at 9:43 p.m., Chief Duffy and County Detective Munley were patrolling together when they observed a vehicle stopped on Hampton Street and South Main Avenue. They observed the vehicle occupant enter an establishment, known for distributing bath salts and synthetic marijuana, purchase an item and return to his vehicle. The Chief is off duty at 9:43 p.m. Chief Duffy and Detective Munley drove alongside the vehicle and observed a green leaf substance on a paper on the occupant's lap. The Chief removed the occupant from the vehicle. The occupant surrendered two packets of "Cloud 9," which is a type of bath salt. (N.T. 46-48).
26. The patrolling and other police action taken by Chief Duffy on February 19, 2012 is work that historically and exclusively has been performed by bargaining unit police officers. Historically, the City's chiefs of police call for a patrol unit to confront the occupant after detaining the driver. (N.T. 46-48).
27. On Thursday, April 12, 2012, at 1:40 p.m., Chief Duffy, in the company of Captain Graziano and Code Enforcement Officer Mark Seitzinger, observed a man on a payphone, which is indicative of drug activity. The Chief approached the man and noticed that the inspection sticker on his vehicle had expired. The Chief noticed that the man's eyes were thinned and his complexion was pale and gray, which are indications of heroin use. The Chief also observed track marks on the man's arms and discovered a needle cap in his pocket. The Chief arrested the man for violating probation. In exchange for the opportunity to smoke a cigarette, the man consented to a vehicle search and told Chief Duffy where to find his needles. Captain Graziano is in the bargaining unit. The Captain did not approach, inspect, search or arrest the suspect. There was no emergency at this police event. (N.T. 49-51; Union Exhibit 13).
28. The approaching of a suspected drug user in a non-emergency situation, the searching of that person and his vehicle and the arrest of that person have historically and exclusively been bargaining unit duties. (N.T. 51).
29. Chief Duffy executed an affidavit of probable cause to support a criminal complaint against the man arrested on April 12, 2012. (N.T. 52; Union Exhibit 14).
30. On April 25, 2012 at 8:30 p.m., Chief Duffy, Officer Stelmak and Inspector Monahan were arresting someone at Valley View Apartments when a vehicle passed with no tail lights. Chief Duffy conducted a traffic stop and searched the vehicle. Officer Stelmak found heroin on the passenger. The driver was wanted on a warrant. The Chief participated in the arrest of both the driver and the passenger. (N.T. 53-55; Union Exhibit 15).
31. The traffic stop, search, and arrest are duties historically and exclusively performed by bargaining unit officers. Previous Chiefs have not made traffic stops without exigent circumstances. There was no emergency requiring the Chief to make the traffic stop on April 25, 2012. (N.T. 53-55).
32. Chief Duffy executed an affidavit of probable cause to support a criminal complaint against the passenger arrested during the April 25, 2012 traffic stop

for possession with the intent to deliver heroin. Executing such affidavits is bargaining unit work. (N.T. 56).

33. Chief Duffy performed bargaining unit work numerous times per week. No off-duty officers would have had to have been called to perform the bargaining unit police work that was performed by Chief Duffy. (N.T. 57-58).

DISCUSSION

The Union argues in its post-hearing brief that "Chief Daniel Duffy consistently performed work that had solely and exclusively been performed by members of the bargaining unit." (Union's Post-hearing Brief at 12). The City offers three defenses. First, the City maintains that the charge has been mooted by the post-charge resignation of Chief Duffy. (City's Post-hearing Brief at 3). The City also contends that the Union cannot meet its burden of proof because Chief Duffy will no longer perform bargaining unit work because he is no longer employed by the City. (City's Post-hearing Brief at 3). Third, the City argues that "Chief Duffy was a certified sworn police officer . . . and he was simply acting upon the unpredictability of police work." (City's Post-hearing Brief at 3). The City posits that "[w]hen the opportunity presented itself, he was compelled to take action by his oath of office . . . and he was fulfilling his employer's duty to provide public services during an emergency or exigent circumstances not of his own creation in each instance." (City's Post-hearing Brief at 3-4).

1. Post-charge Conduct

In **Pennsylvania Department of Transportation**, 19 PPER ¶ 19137 (Final Order, 1988), the Board held that, where the overall course of conduct at issue in a charge concludes after the charge is filed, the Board has jurisdiction to remedy the employer's post-charge conduct. In this case, the initial charge was filed on April 18, 2011, and therein alleged that the City unlawfully removed bargaining unit work when Chief Duffy performed that work on March 20, 2011. On December 8, 2011, the Union filed an amended charge alleging that Chief Duffy again performed bargaining unit work on November 8, 2011 and November 9, 2011. In the amended charge, the Union additionally alleged that, as of the time of the amended filing, "Chief Duffy has indicated that he is going to continue to perform work usually and customarily performed by bargaining unit members, and there will be continuing violations of the Act by his doing so." (Amended Charge, Specification of Charges ¶ 10).

The allegations in Paragraph ten of the amended charge explicitly placed the City on notice that the Union was preserving its right to include any and all of Chief Duffy's post-charge performances of bargaining unit work. The allegations also established adequately delineated boundaries for the City to easily determine the specific post-amended-charge conduct that the Union deemed violative of the PLRA and Act 111. Moreover, the charges alleged an ongoing and persistent course of conduct thereby placing the City on notice that the Union would seek to remedy the post-charge course of conduct. Indeed, the record demonstrates that Chief Duffy performed bargaining unit work several times per week after the filing of the amended charge. Requiring the Union to file a separate charge for each and every occurrence to preserve its right to remedy those alleged violations would be overly burdensome for the Union and administratively unnecessary.

The City had the same access to the police reports, affidavits of probable cause and Chief Duffy as the Union for the purpose of investigating the Chief's alleged post-charge performance of bargaining unit work. With notice in the amended charge that future instances of the Chief's performance of bargaining unit work would be claimed, the City was on notice to access available records and interview the Chief (both during and after his employment with the City) to determine the nature of the alleged post-charge violations. The Chief's alleged post-charge performance of bargaining unit work concluded a course of conduct that was adequately explained in and preserved by the two charges, within the meaning of the **Department of Transportation** case. Accordingly, I have admitted the post-charge conduct of Chief Duffy.

2. Removal of Bargaining Unit Work

The Board and the Commonwealth Court have held that the removal of **any** bargaining unit work constitutes an unfair labor practice. **Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman Sch. Dist.**, 37 PPER 56 (Final Order, 2006); **City of Harrisburg v. PLRB**, 605 A.2d 440 (Pa. Cmwlth. 1992); **City of Allentown v. PLRB**, 851 A.2d 988 (Pa. Cmwlth. 2004). In **Lake Lehman Sch. Dist.**, the Board reiterated the legal analysis for determining whether an employer unlawfully removed bargaining unit work as follows:

The Commonwealth Court has held that "a public employer commits an unfair practice when it transfers **any** bargaining unit work to non-members without first bargaining with the unit." **City of Harrisburg v. PLRB**, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis original). In establishing an unfair practice for the removal of bargaining unit work, a 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). Even where bargaining unit and non-unit employes have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in 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). Therefore, a public employer 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**).

Lake Lehman, 37 PPER at 179. The essential function of the work at issue is at the heart of a removal case. **Fraternal Order of Police, Reading Lodge No. 9 v. City of Reading**, 41 PPER 4 (Final Order, 2010); **FOP, Fort Pitt Lodge No. 1 v. City of Pittsburgh**, 21 PPER ¶ 21111 (Final Order, 1990); **Fort Pitt Lodge No. 1 v. City of Pittsburgh**, 22 PPER ¶ 22150 (Final Order, 1991).

The Union met its burden of proving that the following duties have been historically and exclusively performed by the members of the bargaining unit, absent emergencies or exigent circumstances: patrolling, investigating, initiating police contact with and confronting suspects, arresting executing arrest and search warrants, executing affidavits of probable cause, writing and submitting police reports of police contact and other police activities, conducting vehicle stops and searches, responding to civilian and non-civilian complaints of illegal activities. The record clearly establishes that, on the following dates, Chief Duffy collectively performed all of the aforementioned bargaining unit duties: March 20, 2011, November 8, 2011, January 5, 2012, February 4, 2012, February 19, 2012, April 12, 2012, April 25, 2012. The record also clearly establishes that on none of these occasions were there emergencies or exigent circumstances requiring the Chief to act immediately and perform bargaining unit work to ensure public safety.

Additionally, the City's three defenses must be dismissed. The fact that Daniel Duffy is no longer the individual holding the position of Chief of Police does not render the charge of unfair labor practices moot. A statutory violation for removing bargaining unit work is not mooted because the management person who removed the work is no longer employed by the public employer charged with unfair labor practices. Under the City's logic, an employer could avoid liability for unfair labor practices simply by transferring or rotating management personnel responsible for the removal of bargaining unit work. Under the PLRA, "[t]he term "employer" includes any person acting, directly or indirectly, in the interest of an employer." 43 P.S. § 211.3(c). Therefore, the City is liable for the acts of its managers, in this case the Chief of Police, regardless of the whether the individual managerial actor responsible remains in that position or remains

employed by the City. Chief Duffy's departure did not cure or moot the statutory violation for which the City is vicariously liable based on actions taken by the Chief while he was a manager employed by the City.

Furthermore, the City's mootness argument ignores one of the two exceptions to the mootness doctrine. In **APSCUF V. PLRB**, 607 Pa. 461, 8 A.3d 300 (2010), our Supreme Court stated that it has "reviewed moot matters, in [its] discretion, when the issue presented is one of great public importance or is one that is capable of repetition yet evading review." **Id.** at 470, 8 A.3d at 305. Under the City's own argument in support of mootness, the matter is capable of repetition yet likely to evade review anytime an employe engaging in unfair practices leaves City employment.

Chief Duffy held his position as Chief for less than two years. Although the tenure of future chiefs is indeterminable, short tenures are understandably **capable** of repetition. To dismiss the Union's claims and the City's liability simply because Daniel Duffy no longer works for the City would set a precedent contrary to the policies of the PLRA, as read with Act 111, by unnecessarily restricting a union's right to challenge an employer's removal of bargaining unit work where the employe responsible is no longer employed by that employer.

The City's final argument (that Chief Duffy was simply acting upon the unpredictability of police work and that he was fulfilling his employer's duty to provide public services during emergencies or exigent circumstances not of his own creation in each instance) is not supported by the record. The record clearly establishes that there were no emergencies or exigencies during any of the acts or occurrences relied upon in the findings of fact contained in this order.²

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 Scranton 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

² The record contains an instance on November 8, 2011, involving an emergency where the parties agree that the Chief was acting in the interest of public safety to stop and remove a driver who was driving erratically under the influence of opiates. (N.T. 28-29). However, that instance has not been included in the findings of fact nor relied upon for the disposition of this case because there were multiple other occasions during which the Chief performed bargaining unit work in the absence of any emergencies or exigencies.

HEREBY ORDERS AND DIRECTS

that the City shall

1. Cease and desist from interfering, 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 exclusive bargaining representative of its employes.
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) Direct the Chief of Police or Acting Chief of Police to refrain from performing bargaining unit work.
 - (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 the bargaining unit 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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fourth day of January, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
E. B. JERMYN LODGE NO. 2 :
v. : Case No. PF-C-11-56-E
CITY OF SCRANTON :

AFFIDAVIT OF COMPLIANCE

The City of Scranton hereby certifies that it has ceased and desisted from violating Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act as read in **pari materia** with Act 111 by removing bargaining unit work; that it has ordered the Chief of Police or Acting Chief of Police to refrain from performing bargaining unit work; 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