COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILKES-BARRE POLICE BENEVOLENT ASSOCIATION	:	
v.	:	Case No. PF-C-00-40-E
CITY OF WILKES-BARRE	:	

FINAL ORDER

On May 2, 2001, the City of Wilkes-Barre (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated April 12, 2001. In the PDO, the Hearing Examiner concluded that the City committed unfair labor practices in violation of Section 6(1)(a) and (e), but not in violation of Section 6(1)(c), of the Pennsylvania Labor Relations Act (PLRA) and Act 111, by unilaterally transferring parking enforcement duties to non-bargaining unit City employes, as alleged by the Wilkes-Barre Police Benevolent Association (Union). On May 23, 2001, the Union timely filed its brief in response to the City's exceptions. After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDINGS OF FACT:

8. The parking enforcement attendants are currently performing parking enforcement in center city Wilkes-Barre and have been doing so since February 24, 2000. (N.T. 15, 26-27).

20. In 1996, the parties engaged in bargaining for a successor collective bargaining agreement. The City proposed the assignment of parking enforcement duties to non-unit personnel. The parties reached impasse on the issue of assigning parking enforcement duties to non-unit employes. There has been no bargaining between the City and the Union concerning the use of non-bargaining unit personnel to perform parking enforcement duties since the interest arbitration award. A collective bargaining agreement was in effect at the time of the hearing. (Complainant's Exhibit 9, 10; N.T. 13, 14, 15, 18, 22-23).

DISCUSSION

Since 1969, the Union has been the exclusive collective bargaining representative of the City's police officers. Also since that time, only the police officers in the bargaining unit enforced the parking laws within the City limits. On February 10, 1997, the City filed a petition for unit clarification with the Board seeking to include the newly created position of Parking Enforcement Attendant in the white-collar, nonprofessional bargaining unit represented by the Service Employes International Union (SEIU) and certified by the Board at PERA-R-38-C. On April 9, 1997, the Board issued a Nisi Order of Unit Clarification amending the Nisi Order of Certification issued by the Board on November 29, 1971, to include the position of parking enforcement attendant. The Union filed exceptions to the Board's Nisi

Order of Unit Clarification, but then withdrew its exceptions, stating that the withdrawal was without prejudice to its right to file an unfair labor practice over the subcontracting of police bargaining unit work.

Beginning on or about February 24, 2000, the City assigned parking enforcement duties in center-city Wilkes-Barre to the parking enforcement attendants. In 1997, the police department personnel included 79 persons. The department roster currently numbers 66, although this complement has not diminished since the City began utilizing the parking enforcement attendants. The City issues parking tickets for violations of City ordinances and the state motor vehicle code. The City also issues traffic citations, which are generated by a computer, then forwarded to an officer for his or her signature, in the event a violator does not pay a traffic ticket. When a ticket is issued and not paid, the issuing officer is responsible for ensuring that the matter is properly prosecuted, including obtaining and serving a warrant. If an officer were required to attend a hearing during off-duty time, he or she would receive extra compensation. In 1996, the City and the Union conducted bargaining for a successor collective bargaining agreement, but reached impasse. The impasse included disputes over several items, including proposal number 22 on page 10 of the City's proposals:

> Article 17, New Section 4
>
> Amend the collective bargaining agreement to add a new section 4 as follows:
>
> Effective January 1, 1997, non-bargaining unit members shall be able to be utilized for parking enforcement duties. However, bargaining unit members shall still be required to enforce the parking regulations of the City of Wilkes-Barre regardless of the use of non-bargaining unit members to do the same.

(F.F 19). Sometime later in 1996, the City again proposed that non-bargaining unit members engage in parking enforcement work. The dispute between the Union and the City eventually went to binding arbitration. The panel of arbitrators did not include the City's proposal to assign parking enforcement duties to non-police personnel in their award. From that date to the present, there has been no bargaining between the City and the PBA concerning the use of non-bargaining unit personnel to perform parking enforcement duties. Currently, there are two non-police employes performing parking enforcement. If there is an incident involving a parking enforcement attendant, the police officer may be called to aid the enforcement attendant.

As an initial matter, in its brief in opposition to the exceptions, the Union argues that the City's exceptions were not timely filed. Specifically, the Union contends that the Board's holding in International Union of Operating Engineers, Local 542 v. Delaware County Solid Waste Authority, 18 PPER ¶ 18027 (Final Order, 1986), is incorrect because the Board's regulations expressly limit the determination of a filing date of exceptions to actual receipt or the

date the exceptions were deposited with the U.S. Postal Service, as evidenced by a United States Postal Form 3817 Certificate of Mailing.

The PDO was issued on April 12, 2001. The City had twenty (20) days from April 12 to file exceptions. 34 Pa. Code § 95.98(a)(1). Therefore, the filing deadline for the City's exceptions was May 2, 2001. The Board's regulations provide that the exceptions are "deemed received upon actual receipt or on the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions." Id. In Delaware County Solid Waste, supra, the Board held that depositing exceptions with a commercial courier on the last day for filing exceptions constitutes substantial compliance. Here, the City deposited its exceptions with a private courier, i.e., Federal Express, on May 2, 2001.

In Slippery Rock Area Educ. Ass'n v. Slippery Rock Area Sch. Dist., 26 PPER ¶ 26158 (Final Order, 1995), the Board reasoned that there is no meaningful difference between depositing exceptions with the United States Postal Service, accompanied by a U.S. Postal Form 3817 Certificate of Mailing, and depositing the exceptions with a private courier "so long as the transmittal documents themselves indicate a timely date of deposit with the private courier." Id. at 364. Although the Board has followed the mandate of our Supreme Court and held that private postal meter stamps are too unreliable for purposes of establishing a filing deadline, Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 31 PPER ¶ 31036 (Final Order, 2000) (citing Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (2000)), the Board has also held that a cancellation stamp from the United States Postal Service constitutes substantial compliance and "adequately demonstrate[s] the date that the documents were deposited for filing." Fraternal Order of Police, 31 PPER at 87; accord Delaware County Solid Waste, supra. The Board, in Fraternal Order of Police, compared the requirement that a U.S. Postal Form 3817 Certificate of Mailing accompany the documents with the U.S. Postal Service cancellation stamp. Consequently, the Board determined that the cancellation stamp was equally as reliable as the U.S. Postal Form 3817 Certificate of Mailing and stated that "there must be independent evidence that the documents were timely deposited with the United States Postal Service other than the date set by the filing party's meter." Fraternal Order of Police, 31 PPER at 87. The Board, therefore, has consistently interpreted Section 95.98(a)(1) of its regulations to permit filing parties to effectuate filing on the date deposited with both private, commercial couriers and the United States Postal Service, with or without a U.S. Postal Form 3817 Certificate of Mailing, as long as there is sufficient, independent evidence that the documents were deposited with the private courier or the U.S. Postal Service within the twenty-day filing period and that independent, third-party evidence of timely deposit was provided (either by the United States Postal Service or by private courier).

Moreover, in Miller v. Commonwealth, Unemployment Compensation Board of Review, 505 Pa. 8, 476 A.2d 364 (1984), our Supreme Court held that where the Commonwealth Court receives a petition for review after the expiration of the thirty-day appeal period established by Pa. R.A.P. 1512(a)(1) without a United States Postal Form 3817 Certificate of Mailing, as required by that rule, the appellant has substantially

complied with the rule as long as it is "possible to determine the timeliness of a filing from either the face of the document or from the internal records of the court." Id., 476 A.2d at 366. In support of this holding, the Court stated that it has "long refused to give overly technical, restrictive readings to procedural rules, particularly when remedial statutes . . . are involved." Id. The Miller Court also stated that "`[t]he extreme action of dismissal should be imposed by an appellate court sparingly, and clearly would be inappropriate when there has been substantial compliance with the rules and when the moving party has suffered no prejudice.'" Id., 476 A.2d 367. Based on the reasoning and direction provided by our Supreme Court in Miller, supra, and limited to the Board's prior decisions, which have consistently applied the Supreme Court's standard of substantial compliance, the Board again reiterates herein that it will accept exceptions that are filed in substantial compliance with Section 95.98(a)(1) as evidenced by objectively and independently verifiable documentation of mailing on the face of the documents forwarded to the Board. Accordingly, the Board will continue to follow its holding in Delaware County Solid Waste, supra, and the Supreme Court's holding in Miller, supra.

Here, the City deposited its exceptions with a private courier on May 2, 2001, the last day for filing. The date is objectively verifiable on the face of the envelope, which contains a Federal Express computer generated label with the date of deposit and other internal tracking information. The City, therefore, is in substantial compliance with Section 95.98(a)(1) of the Board's regulations within the meaning of Miller, Slippery Rock, and Delaware County Solid Waste. The exceptions were therefore timely filed.

In its exceptions, the City claims that Finding of Fact No. 20 is not supported by the record. The City argues that the evidence presented at the hearing establishes that the parties bargained over the assignment of parking regulation enforcement duties to employes outside the bargaining unit. The City specifically maintains that its witness, Christine Jensen, the City's Human Resources Director, testified that there were discussions and negotiations regarding the assignment of parking enforcement duties to non-bargaining unit employes, and that Finding No. 20 is inconsistent with some of the Examiner's other findings.

Findings of fact must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942); State System of Higher Education v. PLRB, 737 A.2d 313, 315, n.6; Teamsters Local 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997). Substantial evidence is "`relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Kaufman, supra (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)).

Finding of Fact No. 20, as set forth in the PDO, provided "[t]hat there was no bargaining over the City's proposal to have non-bargaining unit individuals perform parking enforcement duties." A review of the hearing testimony as a whole, however, reveals that the witnesses

referred to two different time periods in their testimony regarding bargaining, which is not reflected in Finding No. 20. On page 13 of the notes of hearing testimony, Patrol Officer Robert Hughes, the Union President, identified Exhibit C-9 and testified about the matters contained therein. This Exhibit, dated September 12, 1996, included the City's bargaining proposals, over which the City and the Union were at impasse and which were to be submitted to an interest arbitration panel. Also on page 13 of the notes of testimony, Officer Hughes testified that on page 10 of Exhibit C-9 is the City's proposal No. 22, which proposed that, effective January 1, 1997, non-bargaining unit members will be able to perform parking enforcement duties. On page 14 of the notes of hearing testimony, Officer Hughes identified Exhibit C-10 and testified about the matters contained therein. Exhibit C-10 was the City's final offer. Also on page 14, Officer Hughes testified that proposal No. 18 of C-10 reiterated verbatim the previous proposal that non-bargaining unit employes perform parking enforcement duties. On page 15 of the notes of hearing testimony, Officer Hughes testified that ultimately the Union membership voted against the City's proposal sometime near the end of 1996, the matter went to interest arbitration, and the panel of interest arbitrators did not award the City its request to transfer parking enforcement duties to non-bargaining unit personnel.

The City's witness, Christine Jensen also testified that the City proposed the issue to the Union and that the Union held the position that it would only agree to the proposal if the City agreed to add police officers to the bargaining unit or to have a minimum complement for the entire police department. Ms. Jensen's testimony concluded with her statement that she knew that there were some discussions but that there was no agreement on the issue. Accordingly, both the City's witness and the Union's witness corroborate the fact that the City bargained the assignment of parking enforcement duties to non-unit employes in 1996, but there was no agreement on the issue. Officer Hughes further testified, however, that at no time after the interest arbitration award did the parties bargain over the assignment of parking enforcement duties to non-police personnel.

The Board, therefore, concludes that there is substantial competent evidence that the City engaged in bargaining over assigning parking enforcement duties to non-unit employes in the fall of 1996, which culminated in binding interest arbitration, in support of Finding Nos. 18, 19, 21 and 22. However, the record contains substantial competent evidence that the City did not bargain the issue of assigning parking enforcement duties to non-unit personnel from the date of the interest arbitration award until the present, in support of Finding No. 23. Because Finding No. 20 in the PDO broadly states that there was no bargaining over the City's proposal, without limiting its application to a particular time period, it is inconsistent with Finding No. 18 and 21. Accordingly, Finding of Fact No. 20, as stated in the PDO, is too vague and overly broad to accurately reflect the nature and extent of bargaining conveyed in the record by failing to reference which of two possible time periods. Consequently, the Board will amend Finding of Fact No. 20 to more accurately depict the period before and after the negotiation of the new agreement.

The City also contends that the Hearing Examiner erred by concluding that the City committed unfair labor practices by assigning

parking regulation enforcement duties to non-bargaining unit employes where the Board's April 9, 1997 Nisi Order of Unit Clarification, which included the position of parking enforcement attendant in another bargaining unit, permitted such an assignment and precluded the Examiner's conclusion.

The Union has the burden of proving that the parking enforcement duties transferred were exclusively performed by the bargaining unit. AFSCME Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008 (Final Order, 2000). Both the Commonwealth Court and this Board have consistently held that the transfer of bargaining unit work is a mandatory subject of bargaining under Act 111, and a unilateral transfer of bargaining unit work violates an employer's obligation to bargain in good faith. City of Bethlehem v. PLRB, 621 A.2d 1184 (Pa. Cmwlth. 1992); Youngwood Borough Police Dept. v. PLRB, 539 A.2d 26 (Pa. Cmwlth. 1988); City of Clairton v. PLRB, 528 A.2d 1048 (Pa. Cmwlth. 1987); Fraternal Order of Police, Lodge No. 9 v. City of Reading, 30 PPER ¶ 30139 (Final Order, 1999) (specifically holding that the unilateral assignment of parking enforcement duties to non-police personnel constitutes an unfair labor practice).

An employer may not unilaterally implement changes and disrupt the status quo regarding mandatory subjects of bargaining. PLRB v. Williamsport Area Sch. Dist., 486 Pa. 375, 406 A.2d 329 (1979). An employer possesses a statutory duty to seek out the exclusive representative of its employes and bargain in good faith to resolution, agreement or concession prior to implementing changes in the status quo that affect mandatory subjects of bargaining at any time during an effective collective bargaining agreement, an effective interest arbitration award, following the expiration of an agreement, or during negotiations for a new agreement. Salisbury Township v. PLRB, 672 A.2d 385 (Pa. Cmwlth. 1996); International Association of Firefighters, Local No. 22, AFL-CIO v. City of Philadelphia, 28 PPER ¶ 28100 (Final Order, 1997), aff'd unreported, (1000 C.D. 1997, Pa. Cmwlth. 1998); Bethlehem Star Lodge No. 20, Fraternal Order of Police v. City of Bethlehem, 23 PPER ¶ 23058 (Final Order, 1992), aff'd sub nom, 621 A.2d 1184 (Pa. Cmwlth. 1993); Fraternal Order of Police, Washington Lodge No. 17 v. City of Easton, 22 PPER ¶ 22122 (Final Order, 1991). In City of Bethlehem, supra, the Board stated that "[t]here are only two ways an employer under Act 111 and the PLRA can implement a change in a mandatory subject of bargaining; by agreement with the bargaining representative or pursuant to the provisions of an interest arbitration award." Id. at 135. The Bethlehem Board also stated that, "absent an agreement with the bargaining representative of the employes, the employer's bargaining is not satisfied unless the issue under consideration is submitted to arbitration" and awarded. Id.

The City has not challenged any of the Hearing Examiner's findings of fact except Finding of Fact No. 20. Therefore, all remaining findings are not in dispute. Teamsters Local #430 v. Manchester Ambulance Club, 32 PPER ¶ 32039 (Final Order, 2001). The Examiner found that the police officers in the bargaining unit exclusively performed parking enforcement duties in the entire City between 1969 and February 24, 2000, when those duties were assigned to non-bargaining unit employes. Accordingly, the Union has met its burden of proving that the parking enforcement duties were performed by

the police officers exclusively. The Examiner also found that, in 1996, the City proposed assigning parking enforcement duties in center City to non-bargaining unit employes. (F.F. 18, 19, 21). However, this proposal was not accepted by the Union or the interest arbitration panel. (F.F. 22).

Moreover, the Hearing Examiner found that there has been no bargaining between the parties since the interest arbitration award. (F.F 22). This finding, and the City's failure or inability to challenge this finding, is fatal to the City's position that it met its bargaining obligation. Notwithstanding whether the City engaged in good-faith bargaining prior to the interest arbitration award or the current collective bargaining agreement, the City failed to meet its obligation to seek out its bargaining counterpart after the award and initiate bargaining over the change it sought to effectuate in terms and conditions of employment for the police officers, as consistently required by the Commonwealth Court and this Board. Salisbury Township, supra; City of Easton, supra; City of Bethlehem, supra. The assignment of parking enforcement duties to the non-unit employes, on or about February 24, 2000, constituted a unilateral, mid-term removal of bargaining unit work, which is a mandatory subject of bargaining. City of Reading, supra. Accordingly, the City was precluded from unilaterally assigning parking enforcement duties to the non-unit employes and altering the status quo during the term of an effective collective bargaining agreement without an agreement with or concession from the Union. Salisbury Township, supra; City of Philadelphia, supra; City of Reading, supra; City of Bethlehem, supra; City of Easton, supra.

The fact that this Board entered a unit clarification order in 1997 (Case No. PERA-U-97-90-E), which modified a unit of white-collar nonprofessionals represented by the SEIU to include a newly created position of parking enforcement attendant, does not relieve the City from its duty to bargain over transferring work from the police unit to the white-collar non-professional unit. The City may not unilaterally change the status quo without having met its obligation to bargain in good faith with the Union. Upper Moreland Township v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997); City of Bethlehem, supra. The unilateral removal of bargaining unit work is mutually exclusive of the Board's analysis of whether certain job descriptions may share a community of interest with other positions already in a bargaining unit such that the newly created position should be included in that unit. The Board's unit clarification order merely approved the inclusion of the position of parking attendant in the white-collar nonprofessional unit, if non-police officers were lawfully assigned to perform those duties. The order did not address the manner in which the parking attendants would acquire those duties and responsibilities nor did it sanction the unilateral removal of those duties from the bargaining unit of police officers. The City cites no authority from this Board, nor is there such authority, that would sanction a unilateral removal of bargaining unit work in violation of a duty to bargain merely because another unit includes a position with a job description that includes such duties. If the City wished to assign the work to the SEIU unit, it first needed to satisfy its bargaining duty to the police union and, only if that union relinquished its claim to the work, to then assign the work to the SEIU unit. Therefore, the Board's order of unit clarification, which included the non-police classification of parking attendant in

the PERA white-collar nonprofessional unit, is not a defense to the unilateral removal of bargaining unit work from the police bargaining unit.

After a thorough review of the exceptions and all matters of record, the Board, therefore, concludes that the City committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111 and shall sustain the Proposed Decision and Order of the Hearing Examiner.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111 of 1968, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed, in part, and sustained, in part; and that the Proposed Decision and Order, as amended herein, be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this tenth day of July, 2001. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILKES-BARRE POLICE BENEVOLENT ASSOCIATION	:	
v.	:	Case No. PF-C-00-40-E
CITY OF WILKES-BARRE	:	

AFFIDAVIT OF COMPLIANCE

The City of Wilkes-Barre hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the PLRA and Act 111; that it has rescinded the practice of assigning parking enforcement duties to the parking enforcement attendants; that it has returned to the status quo ante and returned work to the bargaining unit which was previously performed exclusively by the police bargaining unit; that it has posted a true and correct copy of the Proposed Decision and Order as directed therein; that it has posted a true and correct copy of the Final Order in the same manner; and that it has served a copy of this affidavit on the Wilkes-Barre Police Benevolent Association 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