COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

DORMONT BOROUGH POLICE ASSOCIATION :
AND DORMONT DESK OFFICERS/FIRE :
APPARATUS OFFICERS :

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v. : Case Nos. PF-C-00-5-W : PF-C-00-6-W

DORMONT BOROUGH :

FINAL ORDER

On January 12, 2001, Dormont Borough (Borough) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated December 21, 2000. In the PDO, the Hearing Examiner concluded that the Borough violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111, as alleged by the Dormont Borough Police Association (Case No. PF-C-005-W) and Dormont Desk Officers/Fire Apparatus Officers (Case No. PF-C-00-6-W) (collectively "Union"), by unilaterally installing smaller police lockers in the Borough's new municipal building with less usable storage space than the larger police lockers previously maintained in the former municipal building and by unilaterally refusing to provide the desk/fire officers with locker space as previously provided in the former municipal building. By letter dated February 20, 2001, the Board Secretary granted the Borough's request for a 20-day extension to file its brief in support of its exceptions. On February 12, 2001, the Borough timely filed its brief. On March 5, 2001, the Union timely filed its brief in response to the Borough's exceptions. After a thorough review of the exceptions and the record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

- 31. The design and construction drawings did not provide dimensions or specifications for the police lockers (N.T. 59, 68, 70-71, 93, 111-112). Although Sergeant Joyce had visited the new building during its construction, he did not become aware of the size of the lockers until their installation in or about early December 1999. (N.T. 67).
- 32. Between September and December 1999, the Borough solicited the opinions and recommendations of the police officers regarding the interior design of the new building. There was an ongoing exchange of ideas between the employes, the Borough and the architect regarding the final interior design of the new building. Based on this open dialogue, design changes were made. (N.T. 78, 104-107).
- 33. Wearing a uniform while off duty identifies an employe as an officer. So identified, the off-duty officer can become a target for criminal activity and can be expected to respond to emergency situations without the benefit of proper equipment to protect the off-duty officer or facilitate an appropriate response to the situation. (N.T. 18-21).
- 34. Each police officer possesses a significant amount of equipment and gear necessary to properly perform and meet the demands of their job duties in all kinds of weather. Accordingly, the police officers use their lockers to store equipment; several uniforms, in case the individual became

soiled on duty; complete change of clothes to commute home or to other events; gun and gun belt; boots; jackets and other protection from inclement weather; ballistic vest; etc. (N.T. 19-35).

DISCUSSION

The Borough employs a police chief, thirteen police officers and desk/fire officers. The desk/fire officers perform dispatching and clerical duties for the police department but do not exercise police powers. The desk/fire officers are included in a separate Act 111 bargaining unit because they perform firefighting duties with the fire department. The Dormont Borough Police Association, however, bargains for both units.

In December 1999, the Borough completed construction of a new municipal building. The police department was relocated to the new building on December 13, 1999. In the basement of the old municipal building, the police officers had access to a locker room where they could change clothes, equipment and uniforms. Several officers had their own lockers and the remaining lockers were shared by two police officers. The chief of police did not use the locker room in the old municipal building. The Borough's police officers are expected to wear a clean uniform while on duty, and are responsible for cleaning of their uniforms. The desk officers are also required to wear uniforms. When the Borough hires police officers, it provides them with \$1000 to purchase the uniforms and equipment that they will need to perform their duties. The officers also receive a uniform and equipment allowance of \$550 per year. The officers are personally responsible for uniform and equipment costs that exceed these allowances. Some officers traveled to and from work in uniform, but others did not. Some police officers placed locks on their lockers in the old municipal building, but others did not. Each desk/fire officer had his or her own locker in the hallway outside the locker room in the old municipal building.

The lockers assigned to the desk/fire officers in the old building were not as large as the lockers assigned to the police officers. However, both types of lockers were deep enough to contain clothes hung on hangers, such as clean and pressed uniforms and civilian attire. The lockers in the old municipal building were used to store such items as equipment, uniforms, personal effects and a change of clothes. Sergeant Joyce is the president of the Union, and he had his own locker in the old municipal building. The items which he kept in that locker included the following: three or four jackets, several uniform shirts and pants, several pairs of footgear, a shaving kit, his gun and gun belt, and an extra set of civilian clothes. The police officers wear different types of footgear while on duty, due to the weather and other factors, including shoes, different types of boots and rubbers for inclement weather. Each police officer has been provided with his or her own locker in the locker room in the new municipal building. However, these lockers are not deep enough to store clothes hung on hangers or certain types of footgear. Moreover, although these lockers have hooks upon which clothing may be hung, without hangers, one jacket hung in this manner essentially occupies all of the available space.

The desk/fire officers have not been provided with lockers in the new municipal building. Rather, they have been assigned a desk drawer, which is too small to store their uniforms. Consequently, the desk officers are now required to wear their uniforms to work. On November 25, 1999, Brant Bertha, a desk officer and member of the Desk Officer's bargaining committee, sent an e-mail to Borough Manager, Deborah Grass. In this e-mail, Mr. Bertha stated that he was informed that desk/fire officers would not receive lockers in the

new building. This e-mail also informed Ms. Grass of the nature and extent that the desk officers use their lockers. On November 27, 1999, Ms. Grass responded via e-mail and informed Mr. Bertha that there would be no lockers for desk/fire officers because, as fire apparatus operators, their uniforms and equipment should be stored at the firehouse across the street. Grass's response also explained that the desk officers would have access to the showers available in both the police locker room and the fire house locker room and that each desk officer will be assigned a 12"x12"x18"(deep) non-securable mail box that is wall mounted in the police desk area and a coat rack for the storage of jackets and raincoats. In the same e-mail, Ms. Grass opined that desk officers should not need securable locker space in a police department. Accordingly, any personal effects should remain at home and any non-personal effects belong to the Borough. The only reason why police officers need securable lockers, according to Ms. Grass, is to secure weapons. Ms. Grass's e-mail concluded by informing Mr. Bertha that the old lockers would not be moved and that the desk/fire officers would not have access to the new police lockers. The new firehouse "lockers", to which the manager referred in her e-mail, are made of wire mesh, and do not have opaque doors or storage compartments that can be locked.

On December 3, 1999, Sergeant Joyce sent an e-mail to Ms.Grass asserting that the insufficiency of the new lockers was an issue of safety and collective bargaining. This e-mail also asserted that the new police lockers have less storage space and the desk officers have no lockers to store their gear or uniforms in the new building. The e-mail concluded by requesting a remedy to the issue of insufficient locker space. Later that same day, Ms. Grass sent Sergeant Joyce an e-mail response, which stated that nothing would be done regarding the locker areas prior to the move to the new facility and enumerated several reasons for taking that position, which are quoted verbatim in Finding of Fact No. 27 in the PDO. At some point after the police officers complained about the size of the lockers in the new municipal building, the Township placed three lockers in the hallway outside the locker room. These lockers are as wide as the police lockers in the old municipal building, are somewhat taller than those lockers, and are deep enough to contain clothes hung on hangers. However, four to five officers were assigned to each locker.

In the first and third of its eleven exceptions, the Borough contends that the Union's charge of unfair labor practices was filed beyond the sixweek limitations period of the PLRA and Act 111 and argues that the Hearing Examiner erred by failing to make findings of fact that would support the conclusion that the Union's charge was time-barred. Specifically, the Borough maintains that it provided the employes with access to the design and construction drawings of the facility as early as February 21, 1999, provided tours of the new building throughout construction and solicited comments and suggestions from the Union and the employes regarding construction. The Borough argues that these facts were established and corroborated by the testimony of Union President, Sergeant Joyce; Borough Manager, Debra Grass; and Police Chief, Russel McKibben. In its brief, the Borough cites to pages 67 and 85 of the hearing transcript to support its proposed findings of fact and the conclusion that both charges were untimely filed.

In Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556, 561 (1975), the Pennsylvania Supreme Court stated that "[w]hen the fact finder in an administrative proceeding is required to set forth his findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence and which are relevant to a decision." $\underline{\text{Id.}}$ The Board has consistently followed the $\underline{\text{Velardi}}$ rule

concluding that its hearing examiners need to make only those findings necessary and relevant to the resolution of the issues presented. Ford City Borough, 19 PPER ¶ 19117 (Final Order 1988); Police of the City of Chester, Fraternal Order of Police v. City of Chester, 18 PPER ¶ 18,084 (Final Order, 1987); Jenkins v. Commonwealth, Dep't of Labor and Indus., Office of Vocational Rehabilitation, 18 PPER ¶ 18141 (Final Order, 1987).

After a thorough review of the record and the applicable case authority, the Board concludes that the Hearing Examiner made all the relevant findings of fact that were necessary to support his decision that the unfair labor practice charge in this case was timely filed. The issue in this case was whether the Borough unilaterally changed the terms and conditions of employment by installing lockers in the new municipal building that are inadequate to serve the police officers' needs because of the conformation and dimensions of the new individual lockers and by failing to provide any locker space for the desk/fire officers where both the police and the desk officers had access to adequate locker space in the old municipal building.¹

The relevant facts that are necessary to resolve this issue are governed by the requirements of the applicable case law. With respect to the police lockers, the Union's cause of action arose when it knew or should have known that the dimensions of the new lockers were inadequate to serve the needs of the police officers and constituted a change in the conditions of their employment. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 31 PPER ¶ 31036 (Final Order, 2000). Although there is support in the record for the Borough's proposed findings, the record also reveals that these proposals are not relevant to the disposition of the timeliness issue because they fail to place the Union on actual or constructive notice that the new lockers failed to provide adequate useful space for the officers. The Borough provided the employes, including Union officials, with access to the design and construction drawings of the facility as early as February 21, 1999, provided tours of the new building throughout construction and solicited comments and suggestions from the Union and the employes regarding construction. However, the record also shows that the Borough failed to produce the design specification and construction drawings at the hearing, and its witnesses were unable to testify that the drawings contained locker dimensions. Also, the Union's president, Sergeant Joyce, testified that the drawings did not provide dimensions or specifications for the police lockers. This witness further testified that, although he had visited the new building during its construction, he did not become aware of the size of the lockers until their installation in or about early December 1999. Under these circumstances, the Union could not have known, either actually or constructively, of the changed conformation of the lockers until they were installed in early December. Neither the construction drawings nor the exposure to the actual construction of the new municipal building revealed the size or dimensions of the new lockers until they were installed. Therefore, the Hearing Examiner did not err in failing to make any of the Borough's proposed findings because those proposals do not establish when the Union knew or should have known that either the Borough's plan to install new lockers or the actual installation of them constituted a change in the terms and conditions of employment. Accordingly, although the Borough's proposed findings may support its theory of the case or its proposed disposition of

¹ Although evidence was presented that the Borough unilaterally provided some additional shared locker space after the charge was filed, the Board does not consider an employer's post-charge behavior for purposes of resolving the charge, which is based on pre-charge events.

the timeliness issue, they are not necessary to support the conclusion reached by the Examiner, which is the only relevant inquiry when reviewing a matter for failure to find necessary facts. AFSCME, District Council 84 v. Commonwealth Dep't of Pub. Welfare, 18 PPER \P 18028 (Final Order 1986).

In its brief, however, the Borough cites to testimony indicating that the Union had actual notice that the new lockers were too small for the police officers' use before November 27, 1999, which would render the Union's charges time-barred. Accordingly, the Borough directs the Board's attention to the following testimony of Sergeant Joyce on cross-examination:

- Q. When was the first time you raised your concerns with the Borough?
- A. When I actually physically inspected the ---got an e-mail from the Chief saying hey, they're almost done with this building and if you want to go take a look at it it's open at night, go ahead. I went over and looked at it and actually, physically saw the lockers, and said, hey, this is a problem.
- Q. When was that?
- A. I guess, December 3rd is on my e-mail so a couple weeks approximately before then.

(N.T. 58-59). The Borough also directs this Board's attention to the following testimony of Borough Manager, Deborah Grass:

- Q. When was the first time that they [the Union] raised the issue of dimensions of the lockers and dimensions of the locker room as an issue to the Borough?
- A. My recollection is that it was sometime in November of 1999. We were actually meeting on another issue and Sgt. Joyce raised that issue to me.

Then later that month I got the e-mail regarding the desk officer situation and the fact that we were not going to put lockers at the new facility, we were going to put them in the fire house, which there never was a separate facility for the fire house.

(N.T. 85). The e-mail regarding the "desk officer situation" was dated November 25, 1999. Therefore, Ms. Grass' testimony seemingly asserts that Sergeant Joyce had actual knowledge of the new locker dimensions before November 25, 1999, which is more than six weeks prior to the filing of the charges. Also, the testimony of Sergeant Joyce, that he inspected the new lockers and discovered the "problem" approximately two weeks prior to his December 3, 1999 e-mail also seemingly implies that Sergeant Joyce possessed actual knowledge that his cause of action arose before November 27, 1999, which is six weeks prior to the filing of the charge.

Converse to the Borough's argument, however, there is substantial, legally competent evidence in the record, which was credited by the Hearing Examiner, that supports a contrary conclusion. Sergeant Joyce testified on cross-examination in the following manner:

- Q. Just speak up a little bit. Do you recall when you went to the facility to view the new construction?
- A. Well, at different points during the construction, I visited it. When I became aware of the locker room set up size, size of the lockers, shortly sometime around early December of 1999 where I could actually see what was going on.
- Q. So you're saying that the lockers and the locker room wasn't under construction during the periods that you went to view the facility?
- A. It probably was. It was not something that you could see take shape as far as what is going to end up like. The lockers themselves didn't go in until, I guess, December of '99 or around that time.

(N.T. 67). Consequently, the Hearing Examiner made a finding on page six of the PDO, which is supported by this testimony, that the Union President did not become aware of the size of the new lockers until they were installed in early December 1999. "It is the function of the Hearing Examiner to resolve conflicts in evidence and decide issues of credibility." Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987). In AFSCME, supra, the Board held that "[I]t is the longstanding policy of the Board not to disturb on exception, [f]indings of [f]act made by a [h]earing [e]xaminer deciding issues of credibility of witnesses absent compelling reasons." AFSCME, 18 PPER at 88. The Board is not required to reveal or set forth conflicts in the evidence nor is it required to make findings that are contrary or irrelevant to the findings made by the examiner. AFSCME v. Philadelphia Office of Housing and Community Development, 31 PPER ¶ 31055 (Final Order, 2000). Moreover, the fact that a witness makes seemingly inconsistent or contradictory statements does not make that witness incompetent, although it may affect the credibility of the witness. Commonwealth v. Morin, 237 Pa. Super. 533, 352 A.2d 189 (1975). The Borough has failed to offer or demonstrate any compelling circumstances that could justify reversing the Hearing Examiner's credibility determinations or his resolution of the conflicts in evidence.² Therefore, the Hearing Examiner's determination that the Union became aware of the locker sizes in early December 1999 is supported by substantial, legally competent evidence, and the earliest date in December, i.e., the first, is within the six-week period prescribed by the applicable statute of limitations.

The Borough also argues that the desk officers knew that they were not receiving any locker space in the new municipal building on or before November 25, 1999, as evidence by the e-mail of that date from Brant Bertha, a member of the desk officers' bargaining committee, to Ms. Grass, the Borough Manager. The November 25, 1999 e-mail states that Chief McKibben advised Brant Bertha "again" that the desk officers would not receive locker space in the new building. However, the Chief was not speaking on behalf of

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² The Board notes that, by arguing in favor of the testimony given by Sergeant Joyce on page 58 and 59 of the hearing transcript, which is seemingly favorable to the Borough's position, they are indeed supporting the credibility of Sergeant Joyce's testimony. Additionally, the Board is not concluding that Sergeant Joyce contradicted himself. The general, non-descriptive phraseology used by Sergeant Joyce to explain when he became aware that the new lockers were too small is arguably consistent throughout his testimony. The Board has merely assumed a contradiction for purposes of resolving the exceptions presented.

the Borough. The Borough did not notify the desk/fire officers' bargaining unit that the Borough was unilaterally eliminating locker space for the desk officers in the new building until Ms. Grass, the Borough Manager, responded to Mr. Bertha's e-mail via e-mail on November 27, 1999. As previously discussed herein, the charge was filed on January 10, 2000, which is within six weeks of November 27, 1999.

The consolidated charges in this case alleged a unilateral change in the physical conditions of employment for police officers and desk officers due to inadequate or no locker space respectively. The Board will dismiss a charge as premature if the employer's unilateral action has not actually effectuated a change in the employes' conditions of employment or if the charge has been filed before the effect of such a change can be determined. Cheltenham Educators' Association v. Cheltenham School District, 19 PPER \P 19011 (Final Order, 1987). In Cheltenham, the Board reasoned that the effect of a unilateral change on the employes cannot be speculative, rather it must be demonstrated by historical facts on the record. Id. See also Association of Pennsylvania State College and University Faculties v. PLRB, 661 A.2d 898 (Pa. Cmwlth. 1995). In Plumstead Township Police Benevolent Association v. Plumstead Township, 28 PPER ¶ 28220 (Final Order, 1997), the Board concluded that an employer's dissemination of written notice of a change in policy did not necessarily constitute the implementation of that policy. Id. Rather, the date that the change went into effect was the date that the employer implemented the policy that constituted a unilateral change in the conditions of employment. Id. In Fraternal Order of Police, Queen City Lodge No. 10 v. City of Allentown, 19 PPER¶ 19190 (Final Order, 1988), the Board stated that "[p]rior to its actual implementation . . . a 'plan' is subject to modification or total reconsideration." Id. at 459. Because of the physical nature of the unfair labor practice alleged in the instant case, the unilateral change in the conditions of employment could not have occurred until the police officers' lockers were installed and, for the desk/fire officers, when they moved into the new municipal building. A charge of this nature would have been premature for the police officers before Sergeant Joyce inspected the newly installed lockers and premature for the desk/fire officers before they moved into the new building on December 13, 1999. Unlike a charge that arises from the unilateral implementation of a policy on a date certain, the conditions of employment could not have changed here until the physical conditions actually changed because the Union had no way to know whether the Borough officials would change their minds. Pennsylvania Nurses Association v. Commonwealth, Department of Public Welfare, 24 PPER \P 24083 (Final Order, 1993); Mt. Lebanon Education Association v. Mt. Lebanon School District, 30 PPER ¶ 30043 (Proposed Decision and Order, 1999).

The Borough undermines its own argument regarding timeliness when it relies on the following statement of the Borough Manager: "plans were available for 18 months for review and employees were requested to submit comments or suggestions. No comments from the Police Association were submitted to management until two weeks before the move. The lockers are already installed." (Borough's Brief at 4). It is precisely because the interior design of the new building was just a plan that was subject to changes resulting from the comments and suggestions of the employes that the availability of such design plans did not constitute the requisite implementation or effectuation of the subject unilateral change in working conditions in this case. In fact, Chief McKibben, the Borough's witness, testified that, between September and December 1999, the Borough solicited the opinions and recommendations of the police officers regarding the interior design of the new building. Accordingly, there was an ongoing cooperative effort between the employes and the Borough regarding the final

interior design of the new building, which was subject to changes until the end of construction. Therefore, the statute of limitations did not begin to run for the desk officers' unfair labor practice charge until they moved into the new municipal building on December 13, 1999, and it could not begin to run for the police officers until their lockers were physically installed in early December. The charges were filed on January 10, 2000, which is within the six-week limitation period for both.

The Borough excepts to the Hearing Examiner's conclusory statement on page seven of the PDO that "the Borough does not specifically argue that it need not bargain over provision of locker space." The Borough argues that it consistently held the position, at every stage of litigating this case, that it was not legally obligated to bargain over locker space. There were no post-hearing briefs filed by either party and the Borough did not file an answer to the complaint on the charges of unfair labor practices. Accordingly, the extent to which the parties preserved their respective positions before the Hearing Examiner is limited to the hearing transcript. In his opening statement before the Hearing Examiner, the Borough's attorney stated, in relevant part, the following: "It's the Borough's contention that no change in the working conditions were caused by the construction of this new facility that would necessitate bargaining." (N.T. 74). By this statement and the elicitation of the testimony that followed, the Board agrees with the Borough and concludes that it adequately argued and preserved its position that it did not have a duty to bargain the issue of whether the new municipal building provided adequate usable locker space.

The Borough also excepts to the conclusion that providing locker space in the new building that the officers can use in the same manner in which they used the lockers in the old building is a mandatory subject of bargaining within the meaning of the PLRA and Act 111. The Borough argues that the Hearing Examiner improperly applied the case law cited in the PDO to the facts of the case. The relevant case law, argues the Borough, actually supports the Borough's position that bargaining was not legally mandated. Accordingly, the Borough maintains that, when a municipality constructs a new municipal facility, providing locker space is a matter of employe comfort, which does not come within the meaning of "terms and conditions of employment". The General Assembly, contends the Borough, did not intend the difficult and complex process of designing, financing and constructing a municipal facility to be further burdened by requiring municipalities to interrupt or cease construction until employee comfort issues, as the union may choose to raise, can be negotiated or resolved by interest arbitration.

During his cross-examination of Sergeant Joyce, the Borough's attorney agreed with Sergeant Joyce that the issue was not the overall size or availability of locker space. Rather it was the nature and configuration of the space that affected the manner in which the locker space could be used. Accordingly, the Borough's attorney elicited the following testimony:

- Q. So would you agree with me that the real issue in this case is not the amount of storage space, but how it's being set up and how it's designed.
- A. Sure. And that and ---yeah.
- Q. The layout?

A. Almost to sum it up the problem is, hey, I can't hang my shirt, coat and jacket in my locker to get changed in one place. That's the biggest problem.

(N.T. 57). The record, therefore, reveals a mutual understanding between the parties that the Union is not disputing the size of the lockers, with respect to the police officers, but their conformation and the concomitant inability to hang uniforms and store boots and other equipment. Yet the Borough exhaustively argues in its brief that the issue is locker and locker room size. The Borough argues that the Union failed to meet its burden of proving the elements of its charge because the record shows that there is more locker and locker room space than in the old municipal building. However, this abstruse argument is without merit because the Borough previously demonstrated an understanding that the quantity or size of lockers and locker room space is not the subject of the dispute and any evidence establishing that the new lockers and locker room provide more space is not relevant to the resolution of this dispute. Page's Department Store, supra; Ford City Borough, supra; Police of the City of Chester, Fraternal Order of Police, supra.

The Borough's argument is belied by its conduct in inviting the officers to visit the building and review plans in an effort to appropriately involve them in decisions regarding employe working conditions. Our problem however with the Borough's approach to this situation is (1) review of the plans did not disclose the fitness of the proposed locker space to the needed purpose as provided in the old building and (2) visitation of the building after installation of the lockers was too late to allow employe input through collective bargaining.

In support of its position that the new lockers are merely a matter of comfort instead of a change in working conditions subject to bargaining, the Borough relies on two Michigan cases: Wayne County Government Bar Association v. County of Wayne, 3 MPER 21025 (Decision and Order 1989); and Southfield Police Officers Ass'n v. City of Southfield (Police Department), 6 MPER 124024 (Decision and Order, 1993). These two cases, however, support the Hearing Examiners determination, not the Borough's position. In Wayne County, supra, the Michigan Employment Relations Commission (Commission) concluded that the "size, conformation, and amenities of [the employes'] offices constituted changes in their conditions of employment." Wayne County, 3 MPER at 69. The Commission further concluded the following: "we do not believe that Respondent has demonstrated that the size, conformation and amenities of employee offices are decisions which are fundamental to its function, or that imposing a duty to bargain over these matters would severely restrict its ability to function effectively." Id.

In <u>Southfield</u>, the police department opened a new police station. As here, the police officers in <u>Southfield</u> were encouraged to visit the new location. Also, the union president visited the new station and offered suggestions such as bullet resistance material around the desk area. However, there were some differences between the new station and the original main station. The main station had full locker facilities including showers, separate locker rooms for male and female officers, and a fully equipped weight room. The new station had an open space between two locker areas with a refrigerator and a microwave; there were no shower facilities. The union

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³ Although not at issue here, a unilateral change in working conditions that bestows a benefit or improvement on employes is still a unilateral change that can constitute a bargaining violation.

charged a unilateral change in working conditions. The Commission adopted the Administrative Law Judge's (ALJ) order, which relied on Wayne County, supra, that "the physical conditions of the work space affect [an] employee's ability to perform his or her job and thus are mandatory subjects of bargaining." Id. at 59. The Southfield decision also stated that "[w]hile lounge and locker facilities are removed from the actual work space, they are a part of the total working environment." Id. The Commission and the ALJ, however, concluded that, although there was a change in the terms and conditions of employment, "the change was of a de minimus nature," Id., and bargaining was not required.

This Board, however, has never adopted a de minimus standard regarding bargaining. Section 1 of Act 111 requires public employers to bargain with their employes' bargaining representative "concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits." Act 111 places equal significance on wages and hours as it does on working conditions. If a matter constitutes a mandatory subject of bargaining, the Board will not embark on a second inquiry or substitute its judgment as to the alleged sufficiency, importance, triviality, or reasonableness of the matter at issue. Working conditions are statutorily treated the same as wages. Accordingly, the end result in Southfield was governed by the application of a de minimus standard not recognized by this Board, and the ultimate holding of that case is inapposite here. The Board, however, is persuaded by the analysis of the Commission in both Wayne County and Southfield, and concludes that the physical conditions of the work-space, including the conformation and size of lockers and locker rooms, are mandatory subjects of bargaining. The size, conformation and provision of locker spaces, while removed from the actual work required of police and desk/fire officers, are part of the total working environment and constitute conditions of employment that cannot be changed unilaterally. Also, the conformation, size and provision of locker spaces are not fundamental to the Borough's function and imposing a bargaining obligation upon the Borough over these matters would not restrict the Borough's ability to function effectively or effectively operate and manage its police department.

Moreover, in Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993), the Commonwealth Court of Pennsylvania clearly articulated the test for determining whether a matter constitutes a term or condition of employment, within the meaning of Section 1 of Act 111, and thus a mandatory subject of bargaining. The Upper Saucon Court stated that, in the Act 111 context, "the 'rational relationship' test is applicable and that an issue is deemed bargainable if it bears a rational relationship to employees' duties." Id. at 73. Although the Upper Saucon Court opined that, when analyzing whether an issue is a mandatory subject of bargaining under Act 111, the public employer's objectives and concerns must be given consideration, Id., "`a managerial policy concern must substantially outweigh any impact an issue will have on the employes for that issue to be deemed a managerial prerogative.'" Id. (citations omitted)(emphasis original). The Board has repeatedly followed and applied this standard. International Ass'n of Firefighters v. City of Reading, 31 PPER ¶ 31057 (Final Order 2000); Fairview Township Police Ass'n v. Fairview Township, 31 PPER \P 31019 (Final Order 1999); FOP Rose of Sharon Lodge No. 3 v. City of Sharon, 28 PPER ¶ 28218 (Final Order 1997). Moreover, the Commonwealth Court has recognized that "the courts have repeatedly held that we must defer to the PLRB's interpretation of its own statute against competing interpretations. This is so because the need for expertise and judgment in drawing the line between negotiable and non-negotiable proposals is ultimately within the unique

jurisdiction of the [Board]." Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995), appeal dismissed, 543 Pa. 482, 672 A.2d 1318 (1996). Accord Joint Collective Bargaining Committee of the PA Social Services Union v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983); Appeal of Cumberland Valley Sch. District, 483 Pa. 134, 394 A.2d 946 (1978); City of Harrisburg, 28 PPER ¶ 28091 (Final Order).

The record evidence in this case establishes that the police and desk officers are required to wear clean uniforms while on duty. Although some officers traveled to and from work in their uniforms, some did not. Sergeant Joyce testified that wearing a uniform while off duty identifies an employe as an officer. So identified, the off-duty officer can become a target for criminal activity or can be expected to respond to emergency situations without the benefit of proper equipment to protect them or to facilitate an appropriate response to the situation. The police and desk officers, therefore, have an interest in changing into and out of their uniforms at the municipal building when they begin and end their shifts. Also, each police officer possesses a significant amount of equipment and gear necessary to properly perform and meet the demands of their job duties in all kinds of weather. Accordingly, the police officers use their lockers to store the following items: equipment; several uniforms, in case the individual became soiled on duty; a complete change of civilian clothes; gun and gun belt; boots; jackets and other protection from inclement weather; ballistic vests; etc. Although some of the police officers shared lockers with one other officer in the old municipal building, the individual lockers were large enough to store each officer's uniforms, boots, civilian clothes and other police equipment. Moreover, the lockers were deep enough to store boots and clean, pressed uniforms on hangars. Based on the rationale in the cases cited by the Borough and the application of the Upper Saucon test, the Board concludes that unilaterally changing the conformation and provision of locker space of the police and desk/fire officers constituted a unilateral change in working conditions.

Moreover, as noted by the Hearing Examiner, one of the Board's hearing examiners previously concluded, under the balancing standard of Upper Saucon, that locker space for police officers constitutes a mandatory subject of bargaining. In City of Reading, 28 PPER ¶ 28056 (Proposed Decision and Order, 1997), the hearing examiner concluded that a public employer that unilaterally provides the benefit of locker space to its police officers who previously did not have such a benefit unilaterally changed the terms and conditions of their employment. In arguing against the applicability of the City of Reading case, which resolved several issues, the Borough focuses on those aspects of the Reading case that are inapplicable here. The Borough's limited rendition of Reading states that the "facts involved the union's allegation that the city had changed its past practice of allowing police officers to maintain their own locks on city-issued lockers (a benefit given to sergeants and lieutenants) when it refused to make the same provision available to patrol officers." Also, the Borough reports that "[i]n assessing whether the interest of the union substantially outweighed the interest of the city, the hearing examiner stated that the union's interest was an officer's expectation of privacy in his locker under the Fourth Amendment." (Borough's Brief at 13).

The Borough, however, failed to recognize that, in $\underline{Reading}$, "[t]he FOP charge[d] that the City committed unfair labor practices by unilaterally implementing a policy for newly provided police patrol officers' lockers in violation of Act 111 and Section 6(1)(a) and (e) of the PLRA." Although other issues were present in the Reading case, the hearing examiner resolved

this issue by "conclud[ing] that the expansion of the locker benefit to a wholly new class of employes is a change in working conditions to this class of employes." Reading, 28 PPER at 122. The Board, therefore, concludes that Reading is indeed applicable here, and the Hearing Examiner properly relied on Reading for the resolution of the case.

The Borough also excepts to the conclusory statement on page eight of the PDO that "[t]he Borough has advanced no managerial policy concern for its actions that substantially outweighs the impact on the employes." The Borough maintains that, under the facts of record, which include the Borough's construction and notice of construction of the new building, the Hearing Examiner improperly required the Borough to prove that its actions and concerns substantially outweighed the interests and concerns of the employes because the Union failed to meet its burden of proving the elements of its claim that the locker space was a mandatory subject of bargaining. The Union adequately demonstrated the working condition interest in the matter and then the burden shifted to the Borough to prove that its interests as an employer substantially outweigh those of the employes. Upper Saucon, supra, City of Clairton; 528 A.2d 1048 (Pa. Cmwlth. 1987); FOP, Lodge No. 5 v. City of Philadelphia, 27 PPER ¶ 27208 (Proposed Decision and Order, 1996). Under the well-established precedent of the Commonwealth Court and the Board, the Union has met its burden when it proves that the employer's unilateral change in working conditions was rationally related to the employes' interests or the performance of their duties. Upper Saucon, supra. The Union adequately demonstrated that a unilateral change in the conformation of the locker space and the unilateral termination of locker provisions were rationally related to the interests and duties of the police and desk/fire officers because the locker space is an amenity that bears on the manner in which they conduct themselves at work and perform their duties. The Board, therefore, concludes that the Hearing Examiner properly determined that the burden shifted to the Borough to prove that its interests substantially outweighed those of the employes.

Alternatively, the Borough argues that the Hearing Examiner improperly concluded that the Borough failed to prove that its interests in constructing a new building, which by its very nature could not be exactly the same as the old building, did not substantially outweigh the employes' interests in locker provisions and a certain type of locker space. However, the conformation and provision of locker space does not relate to or impact the manner in which the Borough either delivers police service to the public, preserves the integrity and reliability of the police department and its operations, or the manner in which it manages the police department. Council 13, AFSCME v. PLRB (Thornburgh), 479 A.2d 683 (Pa. Cmwlth. 1984); Reading Fraternal Order of Police, Lodge 9 v. City of Reading, 30 PPER ¶ 30121 (Final Order, 1999); Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 29 PPER ¶ 290000 (Final Order, 1997); Plumstead Township Police Benevolent Association v. Plumstead Township, 28 PPER ¶ 28220 (Final Order, 1997), aff'd, 713 A.2d 730 (Pa. Cmwlth. 1998); Indiana Borough v. PLRB, 28 PPER \P 28187(Pa. Cmwlth. 1997). The conformation and provision of locker spaces are not core managerial concerns that are fundamental to the Borough's function. Southfield, supra. Therefore, imposing a bargaining obligation upon the Borough over these matters would not restrict the Borough's ability to effectively operate and manage its police department, and the Borough's concerns do not substantially outweigh the impact of this change on the employes and their job duties.

The Borough also argues that the long-term implications of the Hearing Examiner's decision renders the construction of new public facilities

infinitely more difficult and complex than it is already. The Borough argues that too many details are involved in constructing new buildings and every detail would have to be bargained before the completion of construction, which would effectively prohibit such public projects. The Borough questions whether details such as the type of carpet or ceiling tiles should be bargained; whether the effectiveness of the HVAC system or water temperature should be bargained. The Borough, however, is itemizing details to suggest that the Hearing Examiner's decision creates a slippery slope and that the conformation and provision of locker space for officers in the police department is a construction detail that should not have to be bargained. This argument is merely a diversion from the relevant inquiry. Where, as here, an Act 111 employer makes a unilateral change in the terms or conditions of the employment of its Act 111 employes through new construction that does not relate to or involve the employer's core managerial interest in effectively performing its public function, that employer commits a bargaining violation. The Borough cannot, under the guise of exercising its managerial prerogative to construct a new municipal building, unilaterally change the working conditions of its employes.4

The Borough also excepts to the Hearing Examiner's failure to conclude that it discharged its bargaining obligation. Section 2 of Act 111 requires "collective bargaining in good faith". In <u>Upper Moreland Township Sch. Dist. v. PLRB</u>, 695 A.2d 904 (Pa. Cmwlth. 1997), the Commonwealth Court opined that the term "good faith" "means that the parties must make 'a serious effort to resolve differences and reach a common ground.'" <u>Id.</u> at 908 (quoting <u>Appeal of Cumberland Valley Sch. Dist.</u>, 483 Pa. 134, 142, 394 A.2d 946, 950 (1978)). Although counterproposals and concessions are not necessary, <u>Id.</u> at 909; <u>Morrisville Sch. Dist. v. PLRB</u>, 687 A.2d 5,9 (Pa. Cmwlth. 1996), the <u>Upper Moreland</u> Court also stated that "good faith" requires, at a minimum, that "each party must present an identifiable target for the adversary to shoot at which will result in a least a tentative agreement, if reached." <u>Upper Moreland</u>, 695 A.2d at 909. <u>Accord Mt. Lebanon Educ. Ass'n v. Mt. Lebanon Sch. Dist. (PERA-C-97-668-W). 5</u>

In support of its position that it discharged any bargaining obligation regarding the conformation and provision of locker space, the Borough refers to the portion of the hearing transcript where Ms. Grass and Chief McKibben testified about the timeline of events involved in the construction of the new building. Nowhere in any of this testimony or anywhere else in the record is it demonstrated that the Borough and the Union discussed the conformation and provision of locker space for the police and desk/fire employes. There is no evidence that the parties made "a serious effort to resolve differences and reach a common ground" regarding lockers. The fact that the employes and Union officials toured the new building during different phases of construction and had design plans available to them does

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⁴ By way of response to the Borough's inquiries, depending on the facts and circumstances of a given case, the water temperature and HVAC may have to be bargained if the employer constructed a building without adequate systems as compared to what was previously available.

⁵ Although the cases cited for the definition of "good faith" are PERA cases, the "good-faith" requirement is mandated by both PERA and Act 111. In Township of Sugarloaf v. Bowling, ____ Pa. ___, 759 A.2d 913 (2000), the Pennsylvania Supreme Court stated that "[w]hile PERA and Act 111 are separate, distinct acts, we have stated that where Act 111 does not give explicit direction on an issue, we may examine how the same issue arising under PERA is handled in order to aid us in our determination." <u>Id.</u> at ____, 759 A.2d at 915, n.4 (citation omitted).

not constitute good-faith bargaining concerning the unilateral change in working conditions here, i.e, the conformation and provision of locker space, within the meaning of Act 111. In fact, the specific matter in dispute was not addressed until late November for the desk/fire officers, and early December, for the police officers, where the only identifiable target presented was that of the unilateral change. The Borough, therefore, did not satisfy its duty to bargain in good faith.

The Borough also argues that the Union failed to demand bargaining. In making this argument, however, the Borough overlooks the simple reality of the bargaining process that it is the party seeking to change or alter the status quo with regard to a mandatory subject of bargaining which bears the burden of initiating bargaining. This Board has consistently stated that a party, here the public employer, has a burden to seek out its bargaining counterpart and initiate bargaining. Fraternal Order of Police, Lodge 5 v. Philadelphia, 21 PPER ¶ 21041 (Final Order, 1990); PLRB v. Garnet Valley Sch. Dist., 8 PPER 365 (Final Order, 1977). More specifically, a public employer cannot unilaterally implement terms and conditions of employment and present its employes with a fait accompli and force them to negotiate out from under changed mandatory bargaining subjects. International Association of Firefighters, Local 713 v. Easton, 20 PPER ¶ 20098 (Final Order, 1989); Teamsters Local 429 v. Lebanon County, 30 PPER ¶ 30002 (Final Order, 1998).

The Borough also excepts to the Hearing Examiner's "conclusion" that police officers are responsible for cleaning their uniforms and for uniform and equipment costs that exceed the allowance provided by the Borough to the extent that the conclusion implies that the uniform allowance provided by the Borough is insufficient to cover the uniform and equipment costs which are necessary to perform police services. The Borough argues that nothing in the record supports the conclusion that any amounts spent by the officers above the allowance is necessary for police services. The conclusion referred to by the Borough is actually Finding of Fact No. 9. After a thorough review of the record as a whole and the references made by the Hearing examiner to support this Finding, the Board concludes that Finding of Fact No. 9 is indeed supported by substantial, competent evidence. PLRB v. Kaufman Department Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942). Moreover, Although the hearing Examiner is entitled to draw inferences from his findings and the record as a whole, Id., any implication that the uniform and equipment allowance provided by the Borough is insufficient to cover that which is necessary to properly perform police services did not, in any way, enter into or support the Hearing Examiner's analysis or conclusions. Rather, the Hearing Examiner relied upon Finding of Fact No. 9 to support his conclusion, on page 8 of the PDO, that private securable locker space was rationally related to the performance of the officers' duties. Additionally, the feared implication is not relevant or necessary to the resolution of the issues before the Hearing Examiner. Therefore, the Hearing Examiner's Findings are not in error, and he properly ignored the feared implication, which is not relevant to the resolution of the issues presented. Page's Department Store, supra.

The Borough finally excepts to conclusion No. 4 of the Hearing Examiner's PDO that it committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111. This exception, however, has been adequately addressed and resolved by the preceding analysis.

After a thorough review of the exceptions and all matters of record, the Board, therefore, concludes that the Borough 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 seventeenth day of April, 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

DORMONT BOROUGH POLICE ASSOCIATION :
AND DORMONT DESK OFFICERS/FIRE :
APPARATUS OFFICERS :

:

v. : Case Nos. PF-C-00-5-W

: PF-C-00-6-W

DORMONT BOROUGH

:

AFFIDAVIT OF COMPLIANCE

Dormont Borough hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the

Pennsylvania Labor Relations Act and Act 111 of 1968; that it has made a written offer to the Dormont Borough Police Association and Dormont Desk

Officers/Fire Apparatus Officers to bargain over the conformation and provision of locker space for the police officers and the desk officers; 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 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