COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1803, AFL-CIO	:	
	:	Case No. PF-C-96-208-E
v.	:	
CITY OF READING	:	

FINAL ORDER

On March 16, 1998, the City of Reading (City) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO) entered on February 25, 1998. In the PDO, the hearing examiner concluded that the City engaged in unfair practices contrary to Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by unilaterally adopting a personnel code without prior collective bargaining with the International Association of Firefighters, Local 1803, AFL-CIO (Union). The hearing examiner also concluded that the City did not commit an unfair practice by unilaterally adopting an administrative code. Pursuant to an extension granted by the Secretary of the Board, the Union filed a brief in response to the City's exceptions on April 17, 1998. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

15. That the Union did not become aware of the City's adoption of the personnel code until mid-to-late September 1996. (N.T. 24-26; Joint Exhibit 4)

DISCUSSION

The factual background of this case is as follows. The Union is the bargaining representative of a unit of firefighters employed by the City. The Union and the City were parties to a collective bargaining agreement, which was effective from January 1, 1996 through December 31, 1997.

Effective January 1, 1996, the City adopted home rule. The City's home rule charter required enactment of a personnel code within six months of the effective date of the charter.

The City adopted a personnel code in June 1996, and amended the code several months later in September 1996.[1] The City adopted the personnel code without consultation with, or agreement by, the Union. The Union did not become aware of the City's adoption of the personnel code until mid-to-late September 1996.

A provision in the personnel code states that "[c]ollective bargaining agreements and civil service regulations take precedence." The personnel code contains provisions regarding, inter alia, residency,

[1] An amendment was made to the hostile work environment provision in the personnel code (N.T. 34).

smoking, physical examination and drug testing for new applicants, appointment to positions and evaluations of work performance, injury on duty provisions, Family and Medical Leave Act provisions, holidays, annual vacation leave, sick leave, funeral leave, leave of absence, child birth leave, leave of absence for military reserve duty, court appearance and jury duty, pay days for regular pay and overtime pay, payroll deductions, overtime provisions, lunch and break periods, disability removal and a complaint/appeal process for employes.

The City has attempted to apply the no-smoking and residency provisions of the personnel code to members of the bargaining unit. However, the issue of whether a residency requirement may be imposed for unit members has previously been the subject of grievance arbitration between the parties. An arbitrator issued an award sustaining the Union's grievance, which was affirmed by the Court of Common Pleas of Berks County. Prior to its adoption of the personnel code, the City had adopted a disciplinary code for firefighters.

The City initially excepts to the hearing examiner's failure to make certain findings, which may be summarized as follows[2]: (1) that the Union did not take an appeal to common pleas court from the City's enactment of the ordinance adopting the personnel code; (2) that the Union did not challenge the legality of the City's home rule charter, which mandated adoption of a personnel code; (3) that the Union did not grieve the adoption of the personnel code under its collective bargaining agreement (CBA) with the City; (4) that the City has not attempted to modify or alter any terms of the CBA; (5) that the City has not attempted to discipline any employe for violation of the personnel code contrary to the CBA; (6) that both the home rule charter and personnel code contain provisions which indicate that any provisions in conflict with the CBA do not apply; and (7) that the home rule charter contains language which states that none of its provisions "shall affect or impair the rights or privileges of persons who are employed on its effective date with regard to salary, tenure, residence, retirement, employment, leave with pay or other personnel rights. . . ."

With regard to proposed findings (1)-(3), it is well settled that the availability of another means of challenging employer action, such as a grievance procedure, does not oust the Board of jurisdiction over allegations of unfair practices. Millcreek School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993); Commonwealth v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983); PLRB v. General Braddock Area School District, 388 A.2d 946 (Pa. Cmwlth. 1977). Therefore, the findings proposed by the City are not relevant to the outcome here and the hearing examiner did not err by failing to make such findings. Page's Department Stores v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975)(factfinder need only make those findings which are necessary to resolve the issues presented and are relevant to the decision).

Although the home rule charter required the City to establish a personnel code, it did not prevent the City from adopting a code that was consistent with the terms and conditions of employment then in effect for

[2] The seven proposed findings discussed above are a compilation of proposed findings (a)-(m) in the City's exceptions. Separately designated proposed findings presenting the same or similar issues have been combined for purposes of discussion and disposition.

members of the bargaining unit, or from bargaining with the Union over any changes that it desired to make in the existing terms and conditions. Nor did the charter put the Union on notice that the City intended to adopt a personnel code that was inconsistent with the unit members' working conditions. To the contrary, in the home rule charter, the City expressly acknowledged its duty not to establish personnel policies in derogation of its collective bargaining obligation.[3] Therefore, we find no merit in the City's argument that the Union was required to challenge the home rule charter to preserve its right to challenge the personnel code that was subsequently adopted by the City.

The City also argues that the Union may not challenge its enactment of the ordinance adopting the personnel code by means of an unfair practice charge filed with the Board. However, the case law is to the contrary. See, e.g., Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996), appeal denied, 547 Pa. 759, 692 A.2d 568 (1997)(unilateral transfer of bargaining unit work through enactment of local ordinance was an unfair practice); Upper Chichester Township v. PLRB, 621 A.2d 1134 (Pa. Cmwlth. 1993)(unilateral change in police officer pensions through enactment of local ordinance was an unfair practice).[4] As Commonwealth Court stated in rejecting a similar argument in Borough of Geistown:

> "[I]n County of Bucks we held that a public employer could not 'under any guise' avoid its Act 111 duty to bargain. [465 A.2d] at 734. We believe that a local ordinance may not be used as a 'guise' by the Borough to sidestep Act 111 and transfer work from the Union to non-members. Therefore, we hold that the Borough could not defeat the requirements of Act 111 and avoid its duty to proceed to interest arbitration by enacting an ordinance disbanding its police force and contracting with Richland Borough to provide it police services. . . [W]hen the impasse occurred, the Borough could not ignore the Union's request for arbitration or its obligations under Act 111 and take unilateral action to subcontract out its police services."

679 A.2d at 1333-34. Similarly here, the City is not insulated from a finding of unfair practices simply because it altered wages, hours and working conditions otherwise negotiable under Section 1 of Act 111 through enactment of a local ordinance. The Board has exclusive jurisdiction over claims that a public employer has unilaterally changed its employes' working conditions, and such changes are frequently made through enactment of local ordinances.

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[3] The charter states in pertinent part that "[n]o personnel procedures or policies established under the provisions of this Charter shall conflict with acts of the General Assembly providing for collective bargaining and labor agreement administration. Nothing in this Charter or any ordinances passed by City Council shall interfere with any lawful collective bargaining agreement entered into between the City and representatives of its employees" (Joint Exhibit 1 at 21).

[4] The City relies on Plainfield Township Policemen's Association v. PLRB, 695 A.2d 984 (Pa. Cmwlth. 1997), but in that case no unfair practice was found because there was no proof of a unilateral change in a term or condition of employment (arising through contractual agreement or past practice).

With regard to proposed finding (6), the hearing examiner did find that the personnel code and home rule charter contain provisions which indicate that the CBA takes precedence over the personnel code in the event of a conflict (FF 8, PDO at 2; PDO at 3). However, the City's collective bargaining obligation does not apply only with regard to matters that are expressly addressed by the CBA. In addition to abiding by the terms of its contractual agreement with the Union, the City must also refrain from taking unilateral action concerning terms and conditions of employment that have arisen through established practice. City of Reading, 30 PPER ¶ 30012 (Proposed Decision and Order, 1998). Because proposed findings (4) and (5) concern only the question of whether the City has violated the CBA, they are not determinative of the broader issue presented here of whether the City unilaterally changed employe terms and conditions of employment (arising through contractual agreement or established practice). Therefore, the hearing examiner did not err by failing to make such findings.

With regard to proposed finding (7), the personnel code, which is the matter at issue here, does not contain language similar to the provision in the charter stating that it does not affect existing "personnel rights." Also, the charter language only addresses "persons who are employed on its effective date" (January 1, 1996), whereas the bargaining unit represented by the Union includes firefighters hired after that date. Finally, for the reasons already discussed, the personnel code is not consistent with the "personnel rights" which unit members have gained through established practice and other means, such as grievance arbitration. Therefore, once again, the proposed finding would not alter the outcome here and consequently the hearing examiner did not err by failing to make such a finding.

The City also excepts to the hearing examiner's finding that it has attempted to apply certain provisions of the personnel code to members of the bargaining unit (FF 12, PDO at 3). However, our review of the record discloses that this finding is supported by substantial evidence. Therefore, it will not be disturbed.

Moreover, even if the City had not yet had occasion to attempt to enforce the personnel code, that would not change the result here. An unfair practice is established upon proof that the employer has unilaterally adopted new or amended work rules, which effect a change in existing working conditions. See, e.g., Abington Transportation Association v. PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990); City of Philadelphia, 31 PPER ¶ 31023 (Final Order, 1999). Upon review of the record, we find that the Union established that many provisions of the personnel code effect such a change. Therefore, the hearing examiner properly concluded that the City committed an unfair practice.

The City further excepts to the hearing examiner's failure to find that in addition to the items mentioned in the hearing examiner's findings of fact, the personnel code "also includes sections on hostile work environment, drug-free workplace, political activity, equal employment opportunity, sexual harassment, verification of citizenship and Naturalization Service Form I-9, compliance with [the] Pennsylvania Human Relations Act and Family Medical Leave Act of 1993, as well as other rights and protections mandated by state and/or federal law" (exceptions at 2). The City argues that it had "a valid legal interest to protect under State and federal laws in adopting the Personnel Code," and that the hearing

examiner erred in concluding that adoption of the code was an unfair practice (exceptions at 2, 4). In its brief in support of exceptions, the City contends that it had the managerial right and duty to unilaterally adopt the personnel code. The City further excepts to the order in the PDO that it rescind the personnel code as it applies to the bargaining unit represented by the Union.

In its recent decision in City of Philadelphia, supra, the Board stated that the scope of mandatory negotiation for employes covered by Act 111 is determined by application of the following test:

> "An issue is deemed to be a mandatory subject of bargaining under Act 111 if the issue bears a rational relationship to the employes' duties, City of Clairton v. PLRB, 528 A.2d 1048 (Pa. Cmwlth. 1987), but the Board must also consider the public employer's management objectives. City of Philadelphia, 727 A.2d 1187 (Pa. Cmwlth. 1999) (citing Indiana Borough, 695 A.2d 470 (Pa. Cmwlth. 1997)). For an issue to be deemed a managerial prerogative and thus not a mandatory subject of bargaining, the managerial policy must substantially outweigh any impact an issue will have on the performance of the duties of the police. City of Philadelphia, supra (citing Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1991)). . . ."

31 PPER at 58.

Upon application of the above-quoted test and consideration of relevant case law, we find that the following provisions of the personnel code are mandatory subjects of bargaining: Sections 1.05, 1.07, 1.11, 1.12, 1.14, 3.01-3.05, 3.07, 3.09, 4.01-4.02, 5.01-5.09, 7.01, 7.04, 7.06, 7.07, 7.09, 7.12 and 7.14-7.16, and Articles II and VIII. See, e.g., School District of Drummond v. Wisconsin Employment Relations Commission, 121 Wis.2d 126, 358 N.W.2d 285 (1984)(anti-nepotism policy mandatorily bargainable); State of New York (Division of New York State Police), 23 NY PERB ¶ 4563 (1990)(same); Township of Moon v. Police Officers of Township of Moon, 508 Pa. 495, 498 A.2d 1305 (1985)(residency requirement mandatorily bargainable); City of York, 17 PPER ¶ 17016 (Final Order, 1985)(same); University of Hawaii Professional Assembly v. Tomasu, 79 Hawaii 154, 900 P.2d 161 (1995)(certain discretionary aspects of implementation of Drug-Free Workplace Act mandatorily bargainable); Lebanon County, 27 PPER ¶ 27260 (Final Order, 1996)(no-smoking policy mandatorily bargainable); City of Reading, 28 PPER ¶ 28191 (same); City of Pittsburgh, 22 PPER ¶ 22080 (Final Order, 1991)(implementation of non-cause-based drug testing mandatorily bargainable absent proof of existence of drug problem among affected individuals); Moon Township, supra (requirements for employment are mandatorily bargainable if they fall within Section 1 of Act 111); Berks County, 29 PPER ¶ 29044 (Final Order, 1998), aff'd, 735 A.2d 192 (Pa. Cmwlth. 1999)(procedure for filling vacancies, including posting of positions, mandatorily bargainable); City of Reading, 18 PPER ¶ 18126 (Proposed Decision and Order, 1987)(same result regarding terms of probation); City of Allentown, 26 PPER ¶ 26059 (Proposed Decision and Order, 1995)(same); Philadelphia Office of Housing and Community Development, 27 PPER ¶ 27214 (Proposed Decision and Order, 1996)(certain discretionary aspects of implementation of Family and Medical Leave Act mandatorily bargainable); Clarion County Commissioners, 8 PPER 106 (Nisi Decision and Order, 1977)(holidays mandatorily bargainable); Middletown Township, 27 PPER ¶ 27203 (Final Order, 1996)(same result regarding vacation leave); West Norriton Township, 28 PPER ¶ 28163 (Final Order,

1997)(same result regarding sick leave); Richland School District, 2 PPER 195 (Nisi Decision and Order, 1972)(same result regarding funeral leave and compensation for court appearances); City of Wilkes-Barre, 29 PPER ¶ 29041 (Proposed Decision and Order, 1998)(same result regarding method and time of distribution of employe pay); Buckingham Township, 30 PPER ¶ 30006 (Proposed Decision and Order, 1998)(same); Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983)(matters pertaining to employes' break time and use thereof mandatorily bargainable); City of Wilkes-Barre, 29 PPER ¶ 29175 (Proposed Decision and Order, 1998)(same result regarding compensatory time); Fairview Township, 31 PPER ¶ 31019 (Final Order, 1999)(same result regarding matters of employe discipline, disciplinary procedure and contents of personnel file); Fiorelli v. City of Chester, 386 A.2d 1040 (Pa. Cmwlth. 1978)(same result regarding employer responsibility for costs of legal representation incurred by employes because of performance of their duties); U.S. Gypsum Co., 94 NLRB 112, 28 LRRM 1015 (1951), amended, 97 NLRB 889, 29 LRRM 1171 (1951), modified, 206 F.2d 410 (5th Cir. 1953), cert. denied, 347 U.S. 912, 74 S.Ct. 475 (1954)(same result concerning dues deductions); City of Schenectady, 21 NY PERB ¶ 3022 (1988)(same result regarding contents of, and access to, personnel files); City of Harrisburg, 28 PPER ¶ 28091 (Final Order, 1997)(same result regarding use of accrued leave); Penndel Borough, 27 PPER ¶ 27216 (Proposed Decision and Order, 1996)(same result concerning impact of furlough, including potential recall rights); Heck's Inc., 293 NLRB 1111, 131 LRRM 1281 (1989)(same result concerning employer's establishment of alternative grievance procedure to that set forth in CBA, which did not provide for union participation).

Upon application of the above-stated scope of bargaining test and consideration of relevant case law, we find that the following provisions of the personnel code address managerial prerogatives which need not be bargained: Sections 1.06, 1.08, 1.09, 1.13, 3.08, 7.05 and 7.10. See, e.g., Commonwealth, Governor Dick Thornburgh, 13 PPER ¶ 13097, aff'd, 479 A.2d 683 (Pa. Cmwlth. 1984)(code of conduct prohibiting conflicts of interest, requiring completion of financial disclosure form, and restricting political activity managerial prerogative); City of Reading, 29 PPER ¶ 29146 (Final Order)(no duty to bargain over same hostile work environment provision in City's personnel code); New York City Transit Authority, 22 NY PERB ¶ 6601 (1989)(decision whether employes will receive training is managerial prerogative); Township of Wayne, 24 NJ PER ¶ 29040 (1997)(same); Commonwealth, Department of Public Welfare, 18 PPER ¶ 18199 (Proposed Decision and Order, 1987)(same result regarding performance evaluation standards); Commonwealth, Department of Public Welfare, 18 PPER ¶ 18198 (Proposed Decision and Order, 1987)(same); Commonwealth, Department of Public Welfare, 18 PPER ¶ 18194 (Proposed Decision and Order, 1987)(same); City of Wilkes-Barre, 29 PPER ¶ 29240 (Final Order, 1998)(direction of personnel is managerial prerogative, even though it may affect overtime opportunity); City of Reading, 26 PPER ¶ 26165 (Proposed Decision and Order, 1995)(same result concerning dress code for uniformed employes); City of Chester, 22 PPER ¶ 22026 (Proposed Decision and Order, 1990)(same). Therefore, we will amend the relief directed in the PDO and not direct rescission of these provisions of the personnel code.

Finally, the record does not support a determination that the following provisions of the personnel code impact upon the unit members' wages, hours or working conditions: Sections 1.01-1.04, 1.10, 3.06, 7.02, 7.03, 7.08, 7.11, 7.13, 7.17, 7.18 and 9.01-9.03, and Article VI. Many of these provisions concern responsibilities, assignments or other matters

pertaining to persons who are not members of the bargaining unit (Sections 1.02, 3.06, 7.02, 7.03, 7.08, 7.17 and 7.18). Several of these provisions address potential conflicts between the personnel code and the home rule charter or other City ordinances, or concern the effective date of the personnel code or the severability of its provisions if particular provisions are found to be invalid (Sections 1.01 and 9.01-9.03). Other provisions state that collective bargaining agreements take precedence over the personnel code and set forth the grievance procedure for unit members (Sections 1.03 and 9.13), and that the City is committed to providing equal employment opportunity (Section 1.04), or reference the home rule charter or other documents or policies which have not been made part of the record (Sections 1.10 and 7.11 and Article VI). On this record, it is our judgment that the aforementioned provisions do not effect a change in the unit members' terms and conditions of employment.[5] Therefore, we will modify the relief directed in the PDO accordingly.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions in part, sustain the exceptions in part and make the Proposed Decision and Order, as modified herein, final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, 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; that paragraph 3(a) of the Order on page 5 of the Proposed Decision and Order be and the same is hereby modified to only direct the City to rescind application of the following provisions of the personnel code to members of the bargaining unit represented by the Union: Sections 1.05, 1.07, 1.11, 1.12, 1.14, 3.01-3.05, 3.07, 3.09, 4.01-4.02, 5.01-5.09, 7.01, 7.04, 7.06, 7.07, 7.09, 7.12 and 7.14-7.16 and Articles II and VIII; and the Proposed Decision and Order, as modified herein, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-eighth day of March, 2000. 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.

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[5] For example, Article VI of the personnel code simply states "[a] promotional policy to be inserted here" (Joint Exhibit 3 at 18). However, there is no record evidence that the City adopted a promotional policy in accordance with the personnel code, or that a policy was adopted which changes the status quo for unit members.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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	:	Case No. PF-C-96-208-E
v.	:	
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AFFIDAVIT OF COMPLIANCE

The City of Reading hereby certifies that it has ceased and desiste d from its violation of Sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111; that it has rescinded application of the following provisions of the personnel code to members of the bargaining unit represented by the Union: Sections 1.05, 1.07, 1.11, 1.12, 1.14, 3.01-3.05, 3.07, 3.09, 4.01-4.02, 5.01-5.09, 7.01, 7.04, 7.06, 7.07, 7.09, 7.12 and 7.14-7.16 and Articles II and VIII; that it has posted the proposed decision and order and final order as directed; 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