

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INDIANA BOROUGH POLICE :
BENEVOLENT ASSOCIATION :
 :
v. : Case No. PF-C-95-151-W
 :
INDIANA BOROUGH :

FINAL ORDER

On September 15, 1999, Indiana Borough (Borough) filed timely exceptions and a brief in support thereof, with the Labor Relations Board (Board). The Borough excepts to the hearing examiner's proposed decision and order (PDO II) issued August 26, 1999. The Indiana Borough Police Benevolent Association (Association) filed its response and brief in opposition to the Borough's exceptions on October 5, 1999.

The history of this case is summarized as follows. The unfair labor practices arose out of the Borough unilaterally implementing a scheduling system change from fixed or steady shifts to rotating shifts. The steady shift system was in effect from 1991 until June 19, 1995. On May 18, 1995, the Borough posted a schedule that set forth a rotating shift schedule to commence on June 19, 1995. As a result of the change, the officers received less overtime pay and some officers suffered a loss of shift differential pay. In a PDO issued February 21, 1996 (PDO I), the Borough was ordered to rescind the schedule change, to restore the status quo and to make any affected employee whole for any losses in wages, seniority or other benefits. The Board affirmed PDO I in a final order, and the Commonwealth Court affirmed the Board's final order on June 4, 1997. Indiana Borough v. PLRB, 695 A.2d 470 (Pa. Cmwlth. 1997).

After a period of protracted discussion between the parties regarding compliance, on March 5, 1999, the Association alleged that the Borough refused to comply with PDO I, and requested that a compliance hearing be conducted. A compliance hearing was held on June 9, 1999, and both parties submitted post-hearing briefs. The parties disputed the effective date of PDO I and the applicability of the make whole relief granted therein. A second PDO (PDO II) was issued August 26, 1999, to which exceptions have been filed by the Borough which are now before the Board for disposition. In PDO II, the hearing examiner determined that the effective date from which relief was directed was June 19, 1995, the date the rotating schedule changes commenced. He determined that remedial relief was directed from that date through the date the officers were returned to the steady shift schedule. He further concluded that the officers who completed their probation in 1995 should receive compensation as if they were assigned a steady shift from the end of their respective probationary periods. The hearing examiner ordered the Borough to compensate Officers Brian Murphy and Wesley Hite for any lost wages resulting from not being placed on a steady shift schedule following the conclusion of their probationary periods in 1995. He directed that the shift assignment to be used for purposes of their compensation should be the 11 p.m. - 7 a.m. shift, because both officers were eventually assigned to that steady shift in the fall of 1996.

The Borough first excepts to finding of fact 25, which provides that at the time Officer Murphy was hired, all non-probationary officers were assigned to a steady shift. It also excepts to finding of fact 27 that once a probation period was completed for an officer, the officer is assigned to a fixed shift schedule, and that the least senior officer fills in for more senior full-time officers on an as needed basis. The Borough argues that officers of lower rank were not assigned to a steady shift, and relies on the testimony of Ronald Crytzer, former Chief of Police.

At the compliance hearing, Officer Murphy testified that all non-probationary officers were assigned to a steady shift. (N.T. at 22). Officer Hite also testified that it was the past practice to be assigned to a steady shift after probation. (N.T. at 34). The Board's review of the record reveals that the former Chief did not contradict the officers' testimony that non-probationary officers were routinely placed on steady shifts. The majority of his testimony concentrated on the officers' calculations of hours, overtime, and shift differentials for the period of time between June 19, 1995 and September 30, 1996. He testified that he reviewed all of the officers' schedules and time sheets, and that Officers Murphy and Hite had not been working steady shifts prior to the change to rotating shifts. (N.T. at 51-54). He also testified that officers with less seniority could not "bump the other officers out of the permanent shifts" (N.T. at 58). Regardless, it is well-settled that the Board will not reverse credibility determinations of its hearing examiners who were able to observe the manner and demeanor of the witnesses at the hearing, absent compelling reasons. Purchase Line School District, 26 PPER ¶ 26184 (Final Order, 1995); Transport Workers Union v. SEPTA, 17 PPER ¶ 17038 (Final Order, 1986); Bereczky, et al. V. McKeesport Area School District, 17 PPER ¶ 17155 (Final Order, 1986). The mere fact that the hearing examiner chose to credit the officers' testimony is not error. Commonwealth of Pennsylvania State Police, 27 PPER ¶ 27159 (Final Order, 1996). The Board will defer to the hearing examiner's credibility determinations in this matter, and thus dismiss these first two exceptions.

The Borough next excepts to finding of fact 29, which states that Officer Murphy was not permitted to go on a fixed shift at the conclusion of his probationary period, although he requested to do so on several occasions. This finding is fully supported by the evidence. Officer Murphy testified that after the probationary period was over, "I made several verbal requests [to be placed on fixed shifts] to Sergeant Guy Haberl who at that time was the patrol initiative commander, and was responsible for the writing up of the work schedules . . . [i]n April of 1995 . . . I wrote a joint letter . . . and this letter was written to Sergeant Haberl asking to be placed on steady shifts." (N.T. at 23). Officer Murphy was not placed on a steady shift until the fall of 1996, once the unfair labor practices were found and steady shift schedules were returned. (FF 30-31, PDO II at 2). As discussed above, the Board will not reverse credibility determinations of its hearing examiners who were able to observe the manner and demeanor of the witnesses at the hearing, absent compelling reasons. Purchase Line School District, supra.

Further, the Borough does not dispute the truth of this finding, rather it asserts that Officer Murphy was not entitled to a fixed shift. It argues that no evidence was presented that the officers would be entitled to request a shift preference at any time, but rather shift preferences were periodically posted. As the hearing examiner fully explained in PDO II, the officers should receive compensation as if they

were assigned a steady shift from the end of their respective probationary periods. The Commonwealth Court affirmed the Board's determination that "the Borough had a steady shift system in effect during the years in question." Indiana Borough v. PLRB, 695 A.2d at 473. Because the steady shift system was in effect when the officers ended their probationary period, they should be compensated under that system. Officer Hite explained that when their probation periods ended, there were no steady shifts to which he could be assigned because the Borough's schedules through June were already posted, and then the rotating shifts started. (N.T. 40). The fact that the Borough did not post shift preferences during this period is not dispositive. The Board's final order and the Commonwealth Court's opinion affirming that order confirm that the Borough employed steady shifts from 1991 through June of 1995. Id. The Borough did not argue in the earlier proceedings that the officers who were not given the opportunity to select shift preferences were not part of that steady shift practice. The Board's findings as affirmed by the Commonwealth Court are conclusive, and the Borough will not be permitted to challenge those findings at this stage of the proceedings. The officers were bargaining unit members employed by the Borough at the time it utilized a steady shift system. Therefore, the officers are to be compensated under that system, as directed by PDO II. The Borough does not dispute the finding that Officer Murphy was not permitted to go onto a fixed-shift although he requested to do so on several occasions, and therefore, the exception is dismissed.

The Borough's next exception is related to the first three. It excepts to finding of fact 37, which provides that other officers who were hired after Officer Hite started working steady shifts at the end of their probationary periods. The hearing examiner relied on Officer Hite, who testified that Patrolmen Schuller, Butler, and Sherve were hired after him, and that "they've been on steady shifts." (N.T. at 36-37). He explained that Patrolman Sherve "gets bounced around a good bit because he's a junior man. Patrolman Butler has a fairly steady shift, but occasionally . . . get[s] bounced around a little bit." (N.T. at 37). He further explained that the low guy does not have a steady shift, and "that is the guy that bounces around the most and then it goes to the second highest guy and et cetera." (N.T. at 38). The Board finds that there is substantial evidence in the record to support this finding of fact, as required by the Supreme Court in PLRB v. Kaufman Dept. Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942).

In contesting this finding, the Borough directs the Board to Exhibit 1 (1995 roster sheets for the police department). However, the Borough does not reference this exception in its brief, nor does it explain how this exhibit contradicts this finding. The 1995 roster sheets do not dispute Officer Hite's testimony that officers who were hired after him were placed on steady shifts. The 1995 roster sheets do not even list Patrolmen Butler or Sherve, indicating that those officers may have been hired after Officer Hite in 1996, 1997 or 1998. In its brief, the Borough only utilizes the 1995 roster sheets to support its argument that Officers Hite and Murphy worked various shifts during and after their probationary period. That issue was addressed above, and is irrelevant to finding of fact 37. Thus, the board dismisses this exception.

The Borough next asserts that two additional findings of fact should have been made. First, that after completion of the probationary period, officers were not assigned to a steady shift as a matter of course, but

instead, worked multiple shifts. This argument is merely an extension of the first three exceptions, and will likewise be dismissed. Such a finding would be in direct conflict with the findings made by the hearing examiner in PDO II. The findings in PDO II are fully supported by substantial evidence and accurately reflect the underlying facts necessary to decide this case, as required by PLRB v. Kaufmann Dept. Stores, supra. The hearing examiner's failure to find the additional facts proffered by the Borough was not error. In Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 445 (1975) the Supreme Court addressed the claim that a fact finder erred in failing to make findings:

When the fact finder in an administrative proceeding is required to set forth its findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence which are relevant to a decision.

Id., 464 Pa. at 287. See also Birrel v. Workmen's Compensation Appeal Board, 435 A.2d 292 (Pa. Cmwlth. 1981). The Board is satisfied that PDO II included all findings necessary to resolve the issues relevant to the decision, and that all findings were supported by substantial evidence.

Second, the Borough urges that the hearing examiner should have made a finding that "Officers Hite and Murphy did receive shift differential when they were working various shifts and, therefore, would not be entitled to any additional compensation and, therefore, would not have been entitled to the differential for the 11 p.m. to 7 a.m. shifts since they had received differentials on other shifts that they were working." (Borough exception 6). Again, such a proposed finding is in direct conflict with the hearing examiner's determination that the officers should be compensated for any monies they would have received had they been assigned the 11 p.m. - 7 a.m. shift at the end of their respective probationary periods. PDO II does not preclude adjustments being made for shift differentials already paid, it merely orders that the Borough "compensate Officer Murphy and Officer Hite for any lost wages resulting from not being placed on a steady shift schedule following the conclusion of their probationary periods in 1995." (Order 1, PDO II at 3)(emphasis added). The individual calculations are not for the Board to make. This additional finding proposed by the Borough is not necessary to resolve the issues relevant to the decision, and the exception is therefore dismissed. Page's Department Store, supra.

The Borough's next exception concerns a typographical error in the Discussion section of PDO II. The Association also points to this error in its response. In the first full paragraph on page 3 of PDO II, the effective date for relief is described as January 19, 1995, the date that the rotating schedule changes commenced. However, the record indicates that the scheduling changes did not commence until June 19, 1995. The Board agrees that a typographical error was made, and will correct this date to reflect June 19, 1995 as the effective date, consistent with the remainder of PDO II. Thus, the Board sustains this exception.

The Borough's next exception is that the hearing examiner erred when he determined that Officers Murphy and Hite would have been assigned steady shifts rather than various shifts, due to their low seniority based on the records presented. The Borough mischaracterizes the hearing examiner's

determination. The hearing examiner determined, and the record reflects, that at the end of the officers' probationary periods the Borough was scheduling steady shifts. The hearing examiner properly dismissed the Borough's argument that the officers would not have been assigned the steady shifts because of their low seniority. As discussed above, the record does not support the Borough's argument that Officers Murphy and Hite should not have been assigned steady shifts once their probationary periods ended. The Board has thoroughly reviewed the record as affirmed by the Commonwealth Court. The record reflects that preference sheets were posted for officers to sign up for steady shifts, and that these preferences were granted on a seniority basis. (FF 3-5, 7, PDO I at 1). However, the record does not support the contention that officers with little seniority were denied steady shifts altogether.

The Borough again directs the Board to Exhibit 1, the 1995 roster sheets, for support. These roster sheets demonstrate that Officers Murphy and Hite were not assigned to a steady shift when their probationary periods ended. The Board finds this exhibit to be unsupportive and thus irrelevant to the Borough's position. It was in 1995 that the Borough planned its shift system change from steady to rotating shifts; it is therefore not surprising that the officers were not assigned to steady shifts in that year. The fact that the Borough did not assign these particular officers to steady shifts at the end of their probationary periods, does not mean that the officers were not entitled to steady shifts. Further, the record indicates that the steady shift system functioned with the most senior officers receiving preference for their shift choices. This does not lead to the conclusion that officers with less seniority were denied steady shifts entirely. The Board finds full support for the hearing examiner's determination, and thus dismisses this exception.

The Borough next excepts to the hearing examiner's determination that Officers Murphy and Hite are entitled to be compensated for any moneys they would have received had they been assigned to the 11 p.m. to 7 a.m. shift at the end of their probationary periods. The Borough argues that there is no evidence that the officers would have been placed on that shift. The hearing examiner based this determination on the fact that upon completion of the litigation regarding the rotating shift schedules, both Officers Murphy and Hite were in fact assigned the 11 p.m. to 7 a.m. steady shift. This determination is supported by substantial evidence, defined by the Supreme Court in Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 489 Pa. 109, 413 A.2d 1037 (1980). The Board is satisfied that a reasonable mind might accept the fact that the Officers were placed on the 11 p.m. to 7 a.m. shift when the litigation in this case ended, as support for the conclusion that they would have been placed on the same shift under the steady shift system, if it had not been in the process of being changed. However, the Board does not find substantial evidence in the record to support the Borough's position that the officers were not entitled to steady shifts, and therefore the exception is dismissed.

The Borough's final exception concerns the hearing examiner's conclusion that Borough has not fully complied with PDO I. The Borough argues that there is no basis for determining that Officers Murphy and Hite are entitled to any compensation because they did not work steady shifts during their probationary period, did not work steady shifts after their

probationary period, and there were no shift-preference lists issued until a determination was made in the underlying case. The hearing examiner did not order the Borough to pay additional compensation for the time when the officers were in their probationary period, so the first aspect of the Borough's argument will not be addressed. Secondly, as discussed above, the fact that the officers were not placed on steady shifts at the end of their probationary period is nondeterminative. The Borough was operating under a steady shift program until 1995, when it unilaterally implemented a rotating shift system. It is not surprising that the Borough would not assign officers to steady shifts at the time it was implementing rotating shifts. Third, the fact that no shift-preference lists were issued at that time is also non-determinative. As discussed above, the record fully established that the steady shift system was utilized until June 19, 1995. The fact that officers were not given the opportunity to express their preference for shifts does not renounce the hearing examiner's findings, which were affirmed by both the Board and the Commonwealth Court. The hearing examiner had a solid basis for determining that the officers should be compensated as if they were assigned the 11 p.m. to 7 a.m. steady shift at the end of their probationary period. This exception is likewise dismissed. Finally, this Order does not preclude adjustments being made for any additional premiums that were already paid to the officers while they were working various shifts between June 19, 1995 and September 30, 1996.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the exception concerning the typographical error. The Board shall dismiss the remaining exceptions, and make the Proposed Decision and Order final. It is noted that Chairman Markle dissented regarding the merits of the underlying charge of unfair practices in the final order issued June 11, 1996. However, that final order was sustained by the Commonwealth Court and the only matter before the Board at this time is compliance. Accordingly, there is no basis for dissent from the PDO issued August 26, 1999.

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 the Order on page 3 of the proposed decision and order be and the same is hereby made absolute and final.

SIGNED, SEALED, DATED and MAILED this sixteenth day of November, 1999.

PENNSYLVANIA LABOR RELATIONS BOARD

JOHN MARKLE, JR., CHAIRMAN

EDWARD G. FEEHAN, MEMBER

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INDIANA BOROUGH POLICE :
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INDIANA BOROUGH :

AFFIDAVIT OF COMPLIANCE

Indiana Borough hereby certifies that it has compensated Officers Murphy and Hite for any lost wages resulting from not being placed on a steady shift schedule following the conclusion of their probationary periods in 1995, effective from June 19, 1995, commencing through the date they were placed on a steady shift schedule; 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 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