COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OFFICERS OF NORTH WALES BOROUGH POLICE DEPARTMENT	:	
v.	:	Case No. PF-C-99-36-E
NORTH WALES BOROUGH	:	

FINAL ORDER

On March 29, 1999, the Officers of North Wales Borough Police Department (Union) filed a charge of unfair labor practices against the Borough of North Wales (Employer) alleging violation of Section 6(1)(a), (b), (c), (d) and (e) of the Pennsylvania Labor Relations Act (PLRA). In support of the charge the Union alleged that the parties had negotiated a collective bargaining agreement which included a provision for physical examinations at the expense of the Employer which had been in place since 1994. The Union alleged that the Employer by letter dated March 1, 1999, unilaterally changed the contract provisions regarding physical examinations; that Acting Police Chief Peter Paul responded on behalf of the Union to the Employer's notification that the employes were "postponing" the physical examinations referenced in the Employer's letter; that thereafter the Employer relieved Officer Paul from the duties of acting chief in response to Officer Paul's notification that he, on behalf of the Union, was postponing the physicals as directed by the Employer.

After review of the charge of unfair labor practices the Secretary by letter dated April 30, 1999, informed the Union that a complaint would not be issued on the charge of unfair labor practices. The Secretary identified two issues. First, the Secretary addressed the Union's claim that the Employer's notification regarding the physicals constituted unilateral action in violation of the Employer's bargaining obligation over an alleged mandatory subject of bargaining. The Secretary determined that the imposition of physical examinations by a police employer constituted a matter of managerial prerogative pursuant to the decision of the Commonwealth Court in City of Sharon v. Rose of Sharon Lodge No. 3, 315 A.2d 355 (Pa. Cmwlth. 1973). Second, the Secretary determined that Officer Paul's notification to the Employer that he was, on behalf of the Union, postponing the physicals did not constitute protected activity under the PLRA and therefore the Employer's removing Officer Paul as acting chief did not constitute a retaliation or discrimination for engaging in protected activity under PLRA.

On May 20, 1999, the Union filed timely exceptions to the Secretary's decision declining to issue a complaint. Initially, it is noted that for purposes of issuance of a complaint the Board will assume as factual the allegations set forth in the charge of unfair labor practices and supporting documentation. PSSU Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978). The provision which appeared in the parties' collective bargaining agreements from 1994 provides as follows:

> Physical Examination. Effective January 1, 1994, the Borough shall provide each Officer at Borough expense with a physical examination each year at a time that is designated by the Borough with a medical or osteopathic doctor designated by the Borough. The Borough shall also provide each Officer with an HIV test conducted by a medical or osteopathic doctor of the Officer's selection, at Borough expense, upon an Officer's request not more often than annually and upon the occurrence of any incident which, in the determination of the Borough, places the Officer at risk of contracting HIV virus. The Borough's expense for an HIV test conducted by a medical or osteopathic doctor of the Officer's selection shall not exceed the expense which would otherwise be incurred if the medical or osteopathic doctor designated by the Borough had conducted such HIV testing. Such examinations and tests shall take place while the Officer is off duty.

Charge of unfair labor practices, Exhibit A. The Borough was allegedly acting pursuant to an ordinance adopted after the contract language above quoted was agreed upon, which provided as follows:

> Since Council deems it necessary for the protection of the public safety and welfare and for the protection of the individual officers of the Police Department that all officers be physically capable to continue in service as a police officer, each and every officer of the Police Department must annually undergo a physical examination by a qualified physician selected by the Borough Council at the expense of Council. Said annual physical examination shall be given no later than February 28 of each year. The results of the physical examination shall be made available to the Mayor, Borough Council and the respective officer and shall be used only for the purpose of determining the physical capability of the officer to continue in the satisfactory performance of police duties.

Charge of unfair labor practices, Exhibit C. Our review and comparison of the contractual language relied on by the Union and the provisions of the ordinance relied on by the Employer discloses that both provisions provided for Employer supplied physical examinations at a time designated by the Borough with a doctor supplied by the Borough. The subsequently enacted ordinance further provides that the results of the physical examination shall be made available to the Employer for the purpose of evaluating the particular officer's continued fitness for duty. This latter requirement was not set forth in the previously negotiated contract language and constitutes a new employment condition. The Union initially contends that the Secretary erred in determining that the ordinance and notice to employes under the ordinance constituted a matter of managerial prerogative.

The Board and the Commonwealth Court have previously determined that physical examinations for police officers to determine fitness for duty is ordinarily a matter of managerial prerogative and not subject to mandatory bargaining under Act 111 of 1968 and PLRA. City of Sharon, supra; FOP v. City of Easton, 20 PPER ¶ 20095 (Proposed Decision and Order, 1989). The Board has similarly determined under the Public Employe Relations Act that

fitness for duty testing by an employer is similarly a matter of managerial prerogative and not subject to mandatory bargaining. Commonwealth of Pennsylvania (PennDOT), 17 PPER ¶ 17193 (Proposed Decision and Order, 1986), 18 PPER ¶ 18136 (Final Order, 1987). The Union argues that this case authority is distinguishable because the contract language previously agreed by the parties provides employe physicals as an employe benefit rather than a fitness for duty test imposed by the Employer. To the extent that the Employer agreed to provide a physical examination for employes by the employes' physicians as an employe benefit because the health care insurance company would not pay for annual physical examinations, a contractual agreement to provide such physicals cannot be unilaterally rescinded. Health care benefits are a mandatory subject of collective bargaining and cannot be unilaterally altered by the public employer. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978).

However, our review of the prior contract language, the ordinance and the differences between the two leads us to the conclusion that the Secretary properly determined that the Employer's alleged March 1, 1999, notice to employes was not a unilateral change of a mandatory subject of bargaining. As above noted, our review indicates that the distinction between the prior contract language and the ordinance pertained to the provision that the results of the physical examination would now be made available to the Employer to determine the police officers' fitness for duty. Under City of Sharon and above quoted PLRB decisions, managerial determination for fitness for duty for physically demanding positions by employe testing is a matter of managerial prerogative. To the extent that the ordinance preserves the provision of employer supplied physical examinations, the ordinance did not unilaterally change that which was provided by the previously negotiated contract language. The change which was occasioned by the ordinance pertained to the management prerogative aspects of physical examinations for employes in physically demanding jobs rather than the alleged employe benefit aspects of employer supplied physical examinations.

The Union contends that the fact that the parties previously negotiated over employer supplied physical examinations cast the matter into the mold of a negotiable term and condition of employment preventing the Employer from unilaterally acting. In so arguing the Union essentially contends that once the Employer provides for physical examinations as a benefit to employes in a collective bargaining agreement, the employer essentially waives its interest in fitness for duty physical examinations as a legitimate exercise of its managerial prerogative in the provision of safe and efficient police services. We find these two matters are mutually exclusive and may legitimately coexist despite the fact that physical examinations for employes may constitute an employe benefit on one hand and a fitness for duty issue for public safety employes. The relative negotiability of the employer's action depends on the nature of the alleged unilateral action. Our review of the charge of unfair labor practices and supporting documentation discloses that the ordinance on its face was an attempt by the Employer to utilize results of a physical examination as a means of determining employe fitness for duty in addition to whatever employe benefit the physicals provided to the police employes.

Accordingly, we cannot accept the Union's contention that the previously negotiated contract language essentially constituted a waiver of the Employer's interest in fitness for duty for its police officers. The

fact that the parties may have negotiated regarding physical examination previously in the context of an employe benefit, can constitute a waiver of the Employer's managerial interest in fitness for duty only if the contract language constitutes a clear, express and unequivocal waiver by the Employer in the managerial prerogative aspects of fitness for duty physical examinations. Commonwealth of Pennsylvania v. PLRB, 74 Pa. Commonwealth Ct. 1, 459 A.2d 452 (1983). Neither party to the bargaining process waives its legitimate interest in matters which are mandatorily negotiable or managerial prerogative unless a waiver is expressly stated, clear on its face and in terms not subject to differing interpretation. Accordingly, we find that the Secretary did not err in determining that the Employer's action taken in support of the ordinance was a matter of managerial prerogative and not subject to mandatory bargaining.

The Union advances a narrower argument that the Employer committed an unfair practice by repudiating a contract provision in violation of its collective bargaining duty. In addition to finding the action taken to be a matter of managerial prerogative, the Board further finds in the absence of such a determination, the complained of action did not constitute a repudiation of previously agreed contract language. Both the contract and the ordinance provide for a physical examination at employer expense at a time designated by the Employer with a doctor designated by the Employer. The Union argues that in practice police officers were not required to submit to physical examinations and were permitted to use their personal physicians for physical examinations. The Union argues that in practice, the physical examinations differed not only with the complained of ordinance but also the parties' contract language. It is not the Board's policy to delve into matters of contract interpretation and past practice which are matters reserved to the parties' grievance and arbitration mechanism. Further, the Board has consistently determined that an employer is contractually privileged where its action complained of is derived from a sound arguable interpretation of the parties' agreement. Jersey Shore School District, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987). To the extent that the contract language relied on by the Union expressly provides for physical examinations at times designated by the Employer by physicians designated by the Employer, the Union's present argument that personal physicians were previously used and other practices grew out of the contract language does not constitute a basis for issuance of a complaint for alleged repudiation of the parties' contract language. The remaining matters including the alleged mandatory nature of the physical examinations and the use of the results constituted matters of managerial prerogative and were not mandatorily negotiable. We therefore find that any action undertaken by the Employer based on alleged practices inconsistent with the parties' agreed on contract language, does not constitute a cause of action for repudiation of the parties' agreement. The essential determination of a finding of contractual privilege is that the complained of action is consistent with the parties' agreement regardless of any alleged inconsistency with existing practices.

The Union further alleges that the Secretary erred in determining that the Employer's removal of Officer Paul as acting chief did not warrant issuance of a complaint. In view of our analysis above, particularly that the Employer was acting in furtherance of its managerial prerogative, Officer Paul's actions did not constitute protected activity and therefore the Employer's actions cannot be deemed unlawful retaliation for engaging in protected activity. Where the employer legitimately exercises managerial prerogative and directs fitness for duty physical examinations,

the affected police employes cannot refuse to participate with impunity. It is the accepted norm in the employe-employer relationship that employe self help contrary to managerial direction of personnel is not a viable alternative:

> Many arbitrators have taken the position that employees must not take matters into their own hands but must obey orders and carry out their assignments, even if believed to violate the agreement, then turn to the grievance procedure for relief.

How Arbitration Works, Elkouri & Elkouri, 5th Ed. pp. 283-284. Accordingly, we find that Officer Paul was not engaging in protected activity when he allegedly informed the Employer that the employes were "postponing" participation in the physicals as directed by the Employer. Further, we find the Union's argument that the Secretary erred in characterizing Officer Paul's activity as a refusal rather than a postponement to be an illusory distinction. Whether the countermanding of the Employer's direction was purported to be temporary or permanent does not alter its character as unprotected.

Accordingly, after a thorough review of the charge of unfair labor practices and supporting documentation and exceptions to the decision of the Secretary declining to issue a complaint, we shall affirm the Secretary's decision that the charge of unfair labor practices as amended in the exceptions does not state a cause of action under the cited provisions of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the examiner

HEREBY ORDERS AND DIRECTS

that the exceptions be and the same are dismissed and the Secretary's decision not to issue a complaint be and the same is 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 seventeenth day of August, 1999. 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.