COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| BRISTOL BOROUGH POLICE BENEVOLENT ASSOCIATION | : | |
| v. | : | Case No. PF-C-96-226-E |
| BRISTOL BOROUGH | : | |

**FINAL ORDER**

On April 28, 1999, timely exceptions and a supporting brief were interposed by Bristol Borough (Borough) to a proposed decision and order of April 9, 1999. In the PDO the hearing examiner found and concluded that the Borough committed unfair practices in violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968. The hearing examiner further concluded that the Borough did not commit unfair practices in violation of Section 6(1)(b), (c), (d) and (f) of the PLRA and Act 111 as alleged in the charge of unfair practices.

After a review of the exceptions and supporting brief the Pennsylvania Labor Relations Board (Board) makes the following:

ADDITIONAL FINDINGS OF FACT

11. That Officer Reeves understood that the difference between the designation of a bargaining representative of March 2, 1997, and his letter of March 3, 1997 as "one is joining and one is declining the offer to join the PBA just as it states." (N.T. 25)

12. That Officer Tolstoy when asked at the hearing of February 11, 1999, to explain the apparent discrepancy between the February 25, 1997, designation of a bargaining representative and his letter of March 12, 1997, stated that in his view the Bristol Borough Police Benevolent Association, Inc. (Association) does not represent him for purposes of collective bargaining. (N.T. 32)

DISCUSSION

The facts briefly stated for purposes of resolution of the exceptions are as follows. For sometime prior to the filing of the charge of unfair practices, the Association had been voluntarily recognized by the Borough for purposes of collective bargaining under Act 111 in a unit of full-time police employes of the Borough. In the process of negotiations for a successor collective bargaining agreement the Association sought to bargain collectively over the utilization and compensation of part-time police officers, which the Borough refused because part-time police officers had not been included in the unit.

The Association filed a charge of unfair practices with the Board in which it alleged in part that the Borough had unlawfully refused to bargain regarding part-time officers. A hearing on the charge of unfair practices was held on February 25, 1997, at which time the parties entered into a stipulation wherein the Borough agreed that it would recognize part-time police officers as part of the bargaining unit upon the execution of authorization cards from the part-time employes expressing their desire to become a part of the bargaining unit.

Part-time Officers John S. Lancieri and Timothy Reeves executed the follow-

ing on February 25, 1997:

> I, _____, hereby designate the Bristol Borough Police Benevolent Association, Inc., as my collective bargaining representative for purposes of collective bargaining under the provisions of the Act of June 24, 1968, P.L. 237, No. 111, 43 P.S. § 217.1, et seq., Collective Bargaining by Policemen and Firemen, as part of the unit of Full-Time and Part-Time Police Employees in the Police Department of the Borough of Bristol.

(FF 4). Officer Thomas J. Tolstoy executed the same document on March 2, 1997.[1] Also the three officers executed dues check off authorizations on the same date as the designations of a bargaining representative. Thereafter, on March 3 and 4, 1997, Officers Reeves and Tolstoy respectively in writing notified the Borough and Association that they declined to be members of the Bristol Borough Police Benevolent Association. The Borough regarded these written notices (FF 7-8) as resignation from the Association and notice that part-time officers Reeves and Tolstoy did not desire to have the Association represent them for purposes of collective bargaining under Act 111, and again declined to acknowledge a bargaining duty for the part-time officers.

After further efforts to amicably resolve this dispute were unsuccessful, the Association by letter dated July 14, 1998, notified the Board that it regarded the Borough as not in compliance with the February 25, 1997 stipulation and requested that a hearing be scheduled to determine whether the Borough was in compliance with its agreement.

A further hearing was held and concluded on February 11, 1999. At that hearing Officers Reeves and Tolstoy were subpoenaed by the employer and testified regarding the execution of the original authorization cards and subsequent written notices regarding their resignation from the Association. In the PDO issued April 9, 1999, the hearing examiner determined that the part-time officers had indicated their desire to have the Association represent them for bargaining and that the Borough was not in compliance with the prior agreement.

The Borough has filed three exceptions and a supporting brief. It has excepted to findings of fact 9 and 10 as unsupported by the record. It has further excepted to the conclusion of law that it has committed an unfair practice as found by the hearing examiner. Before we address the exceptions, certain preliminary matters should be discussed. Act 111 authorizes voluntary recognition of a bargaining unit of police and fire employes and does not require PLRB certification. The Borough in its brief in support of exceptions (brief at 3) erroneously relies on Article VI of the Public Employe Relations Act (PERA) which conversely requires certification, and the Board and the courts have held that a non-grandfathered bargaining representative must be certified in order to impose an enforceable duty to negotiate on the employer. See, e.g., Professional and Public Service Employees Union Local 1300 v. Trinisewski, et al., 504 A.2d 391 (Pa. Cmwlth. 1986), allocatur denied, ____ Pa. ____, 531 Pa. 1121 (1987). Act 111 on the other hand has been construed as not requiring certification, and an enforceable bargaining obligation may arise and be imposed based on a voluntary extension of recognition. Roof Garden Lodge No. 98, FOP v. PLRB, 685 A.2d 658 (Pa. Cmwlth. 1996). The record shows that the bargaining relationship between the Association and the Borough was initiated by voluntary recognition.

Further, it has been the Board's consistent position under both Act 111 and PERA that where additional classifications are sought to be added to an existing unit in sufficient numbers so as to present a question of representation, an

employer may insist on a requisite showing of union support prior to creating a bargaining obligation for accreted employes. Westmoreland Intermediate Unit, 12 PPER ¶ 12347 (Order and Notice of Election, 1981). In this case, however, at the February 25, 1997 hearing, the parties expressly agreed[2] to permit the Association to provide authorization cards in lieu of a formal election upon which the Borough would recognize the part-time employes as members of the unit.

The procedure agreed upon by the parties, however, foundered when two officers (Reeves and Tolstoy) allegedly rescinded or revoked their support for the Association.

The parties have agreed that there were four part-time officers at the time when the question of representation was raised. Of the four part-time officers three executed authorization cards and question has arisen with regard to the desires of Reeves and Tolstoy due to their subsequent actions. The support of John S. Lancieri for the Association is not contested by the Borough. The other officer apparently does not support the Association and accordingly, Act 111's requirement that the union have fifty (50) percent support depends on at least one of the contested officers supporting the Association so as to bring support of the Association to fifty (50) percent of the four officers.

We first address the exceptions to findings of fact 9 and 10. In those findings the hearing examiner determined that Officers Tolstoy and Reeves desired to have the Association represent them but declined to be members of the Association. These findings are interrelated to findings of fact 4 and 6, regarding the designation of a bargaining agent (FF 4), dues checkoff authorization (FF 6). As noted in finding of fact 7 Officer Reeves on March 3, 1997, stated in writing that after further consideration he declined the offer to join the Association at this time. On March 12, 1997, Officer Tolstoy executed a written resignation from the Association.

Due to confusion over the desires of the officers following the parties' stipulation of February 25, 1997, the Borough informed the Association that it did not regard Officers Reeves and Tolstoy as having designated the Association as their representative. Further hearing was held on February 11, 1999, at which time both Reeves and Tolstoy testified in an attempt to clarify their intentions. The testimony of Officers
Reeves and Tolstoy on February 11, 1997, only served to confuse the issue further. Both officers expressed apprehension about open support of the Association having a potentially negative impact on their prospects of obtaining full-time employment. The Board strongly disapproves of this manner of addressing an issue of representation in large part due to the concern of employes (the basis of which may be real or imagined) that support for a union may place them at risk with the employer. However, as noted above, because the parties expressly agreed to such a process and the testimony has been rendered prior to this matter reaching the Board[3] the Board will consider the evidence from the February 11, 1999 hearing. Officer Reeves stood by his seemingly inconsistent action of March 1997 explaining that the designation of March 2 was joining and the subsequent letter of March 3 was declining to join the Association. At the hearing Officer Tolstoy summarized his actions by stating that the Association did not represent him for purposes of collective bargaining.

Where similar questions have arisen regarding support for a union in the context of irregularly marked ballots in Board conducted elections, the Board has required that ballots demonstrate a "clear and unambiguous intent" of the voter. Luzerne County, 10 PPER ¶ 10227 (1979); Temple University Health Systems v. PLRB, ____ A.2d ____ (No. 2494 Commonwealth Court Docket, May 28, 1999). We apply the

same standard in evaluating the intentions of the part-time employes under the parties' agreement of February 25, 1997. In view of the record evidence as supplemented by the additional findings of fact in this order we cannot say that Officers Reeves and Tolstoy have shown clear and unambiguous intention to designate the Association as bargaining representative. In each case the designation of the Association as representative was shortly followed by resignation from and rejection of the Association in writing. Further, when thereafter questioned about their inconsistent actions, both officers equivocated at the February 11, 1999 hearing as noted above. Therefore, we must sustain the Borough's exceptions to findings of fact 9 and 10 in the PDO and vacate those findings as not supported by substantial evidence of record.

It is important to note at this juncture the Board's long-standing policy to defer to the credibility determination of its hearing examiners. See, e.g., Township of Springfield, 12 PPER ¶ 12354 (Final Order, 1988). Our result here does not disturb this policy. No credibility determination was made by the examiner. No contrary evidence was offered by either party, and the question presented to the hearing examiner and, in turn, to the Board is whether there is substantial evidence to support findings of fact 9 and 10 (that Officers Reeves and Tolstoy respectively designated the Association as bargaining representative). Our review of the record merely leads us to find and conclude that there is not substantial evidence to support these findings.

Last, the Borough excepts to the conclusion that it was in violation of the settlement agreement and, accordingly, Section 6(1)(a) and (e) of PLRA and Act 111. In view of the Board's vacation of findings of fact 9 and 10, the Borough's claim that the Association does not have the requisite support among the part-time officers must be sustained. Only one of three part-time officers (John Lancieri, whose support was not contested) clearly and unambiguously designated the Association as bargaining representative, which falls below the statutory standard. Therefore, the Borough's exception to the conclusion that it committed an unfair labor practice must be sustained and the hearing examiner's order to that effect will be vacated.

CONCLUSIONS

That CONCLUSIONS numbers 1 through 3 and 5 as set forth in the proposed decision and order are hereby affirmed and incorporated herein by reference and made a part hereof. CONCLUSION number 4 is vacated and set aside.

6. That the Borough has not committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the proposed decision and order be and the same are hereby sustained, that findings of fact 9 and 10 be and the same are hereby vacated, that the order on pages 4-5 of the proposed decision and order be and the same is hereby vacated and set aside, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the charge of unfair practices is hereby dismissed and the complaint issued thereon is rescinded.

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-first day of June, 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.

DISSENT BY MEMBER L. DENNIS MARTIRE

I respectfully dissent from the decision of the majority and would find that Officers Reeves and Tolstoy designated the Association as their representative. However, I concur with the majority, that in any event, employes should not be subpoenaed to testify as to their support for an employe organization. Failing other acceptable alternatives as discussed by the majority, a secret ballot election is the appropriate means to resolve a question of representation.

[1] The hearing examiner erroneously states in finding of fact 4 that Tolstoy executed the designation on February 25, 1997.

[2] Although the parties' February 25, 1997 stipulation initially appeared to have amicably established a framework to resolve the issue, it soon revealed itself to be a poor means to resolve the question of representation. It is the Board's firmly held view that the preferable, if not the best, means to resolve a bona fide question of representation is a secret ballot election where employe wishes regarding the designation of a bargaining representative are determined by way of a secret ballot. The subpoenaing of employes to testify as to their support for or against representation normally will not be tolerated. Indeed, as this case amply demonstrates, both Officers Reeves and Tolstoy were obviously very uncomfortable testifying as to their relative support for the Association pursuant to the Borough's subpoenas. However, due to the parties' stipulation, a non-secret means to poll employe wishes was agreed to.

[3] Parties to Board proceedings commonly engage in alternative methods to a secret ballot election for satisfying a union's majority support among the employes (such as card checks by a neutral third party or submission of authorization cards directly to the employer). However, when such an alternative method fails, in no event should employes be subpoenaed to openly testify under oath as to their support for an employe representative. If all suitable alternatives fail, PLRA provides for a secret ballot election.