

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LIMERICK TOWNSHIP POLICE OFFICERS :
ADAM MOORE :
 :
v. : Case No. PF-C-04-15-E
 :
LIMERICK TOWNSHIP :

FINAL ORDER

Adam Moore, on behalf of the Limerick Township Police Officers, (Union), filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on July 11, 2005, to a Proposed Decision and Order issued June 22, 2005, dismissing the amended charge of unfair labor practices alleging that Limerick Township (Township) violated Act 111 and Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA). The Township filed a brief in response to the exceptions on July 29, 2005.

After a thorough review of the exceptions, and record, the Board makes the following

ADDITIONAL FINDING OF FACT

9. While recognizing that it is the Board of Supervisors that has the ultimate adjudicatory authority over discipline and discharge under the Police Tenure Act, Section 1 of Township Resolution No. 94-26 provides that

[t]he interim procedure for the administration of Police discipline and discharge under the Police Tenure Act is hereby established as follows: the authority to administer discipline and discharge of Police Officers shall vest in the Township Manager who shall exercise said authority for discipline and discharge of Police Officers only after full investigation is made by the Chief of Police of the charges and a recommendation of discipline and discharge is made by the Chief of Police to the Township Manager. (Joint Exhibit 5).

DISCUSSION

Officer Moore was issued a Notice of Violation of the Township's disciplinary code on November 20, 2003, charging him with two separate counts of conduct unbecoming an officer.¹ W. Douglas Weaver, Chief of Police, recommended, *inter alia*, a total of seven days suspension without pay.² Officer Moore was further advised that he has the right to appeal the suspension pursuant to the Police Tenure Act, and that "[i]f you exercise your appellate privilege a hearing will be held with the Board of Supervisors acting as a tribunal. The [Board of Supervisors] has the option of modifying this suspension which could result in a five day suspension for the first offense and a ten day suspension for the second offense." The November 20, 2003 notice issued by the Chief of Police was also "Acknowledged" by Walter C. Zaremba, Jr., Township Manager.

On November 25, 2003, Officer Moore filed an appeal of the suspension pursuant to the Police Tenure Act. The Township sought outside labor counsel to assist with Moore's appeal of his suspension. After reviewing Officer Moore's personnel file, labor counsel believed that the November 20, 2003 notice was legally defective, and advised the Township to re-issue the notice. He further suggested that under the Township's disciplinary guidelines the appropriate penalty for Officer Moore's alleged misconduct be a fifty day unpaid suspension. Pursuant to labor counsel's advice, Mr. Zaremba

¹ The first offense involved altering a photograph to insinuate inappropriate conduct between a sergeant and another township employe. The second offense involved placing an advertisement in the local newspaper also suggesting an inappropriate relationship between the same two co-workers. Both referenced co-workers resigned their positions afterwards.

² Specifically, the Chief stated in the November 20, 2003 notice that

Based on the totality of the circumstances I am recommending the following.

- a. You will serve an unpaid suspension of two days for the first offense.
- b. You will serve an unpaid suspension of five days for the second offense.
- c. You shall insure by sworn affidavit that you have destroyed any existing copies and/or originals of those items created and or published that have been specifically referenced in this document and also insure by sworn affidavit that your ability to reproduce any item by any means is nonexistent.
- d. You will offer a written apology and explanation to those individuals referenced, which shall include the police department and Board of Supervisors.

issued a Notice of Violation to Officer Moore on December 10, 2003, suspending him for fifty days without pay. The December 10, 2003 notice again reiterated “that the hearing officer, sitting for the Township’s Board of Supervisors pursuant to the Police Tenure Act, possesses the unfettered authority to modify my recommended discipline of a 50-day suspension. This authority ranges from ruling that no misconduct occurred up to terminating your employment.”

Officer Moore’s Police Tenure Act hearing was held on December 22, 2003, before Lois Campana, hearing officer. Ms. Campana issued a decision on December 30, 2003, wherein she reduced the Township’s recommended discipline to a forty-five day suspension without pay. Officer Moore served his suspension from January 9, 2004, to April 4, 2004, during which the length of his daily shifts varied between eight and twelve hours.

Officer Moore filed a charge of unfair labor practices with the Board on behalf of the Union, as amended on January 27, 2004, alleging that the Township violated Section 6(1)(a), (c) and (e) of the PLRA by discriminatorily increasing the length of his suspension, and unlawfully altering the disciplinary process by issuing a second notice of violation that increased his suspension. Upon hearing the testimony and considering the documentary evidence, the hearing examiner issued a PDO on June 22, 2005, finding no unlawful union animus or discriminatory intent, and dismissed the claim under Section 6(1)(c) of the PLRA.³ With regard to the Union’s charge under Section 6(1)(e) of the PLRA, the hearing examiner concluded that the Township did not unilaterally alter a mandatory subject of bargaining by issuing the revised notice of violation. The hearing examiner also rejected the Union’s claim that past practice mandated that a suspension is served based on an eight-hour workday. Accordingly, the hearing examiner dismissed the Union’s charge, *in toto*, and rescinded the complaint.

The Union principally contends in its exceptions that the Township unilaterally altered a mandatory subject of bargaining, by deviating from the interim disciplinary process set forth in Resolution 94-26. In this regard, the Union asserts that Resolution 94-26 and past practice require that discipline be imposed solely pursuant to the Chief’s recommendations, and do not allow the Township to issue a second notice of violation increasing penalties for the same offense.

Initially, for a past practice to be subject to negotiation it must address a mandatory subject of bargaining. South Park Township Police Association v. Pennsylvania Labor Relations Board, 789 A.2d 874 (Pa. Cmwlth. 2002). In determining whether a matter, such as Resolution 94-26, is a negotiable past practice, the particular subject must bear a rational relationship to the employees’ duties, and will be found not mandatorily negotiable where the specific topic is more reasonably related to managerial interests and policy concerns. Fraternal Order of Police, Lodge #9 v. City of Reading, 27 PPER ¶127259 (Final Order, 1996).

The ability of the employer to establish and carry out a disciplinary policy for its police officers is far more rationally related to the employer’s managerial concerns than the police officer’s duties. Whether the Township in its discretion considers recommendations for discipline from the chief of police, outside labor counsel, or even an “advisory committee” (see FOP, Lodge No. 5, supra.), does not affect the duties that the police officer must perform on a daily basis, nor the process the employe must engage to challenge the discipline once imposed. Thus, Resolution 94-26 does not involve a mandatory subject of bargaining.

Furthermore, the same rationale applies to the Township’s ability to revise a notice of discipline within its guidelines. Binding an employer to a legally deficient, or erroneously issued disciplinary notice, is counter-intuitive to the public employer’s managerial interests in directing a competent and efficient police force, and is not rationally related to the employe’s duties as a police officer. The issuance of the December 10, 2003 notice does not hinder Officer Moore’s ability to challenge the proposed discipline, and in fact, preserved Officer Moore’s appeal under the Police Tenure Act. Accordingly, the issuance of the December 10, 2003 notice of discipline in this case does not touch on a matter subject to negotiations. Simply stated, the employer’s decision about who will conduct the investigation and who will decide discipline is a managerial prerogative not subject to collective bargaining.⁴

Even assuming *arguendo* that a mandatory subject of bargaining was involved, the Township here made no change to Resolution 94-26 in revising the Notice of Violation issued to Officer Moore. While the Resolution 94-26 does require the Chief of Police to investigate and make a recommendation, the Resolution vests exclusive authority over the

³ No exceptions have been filed by Moore from that determination.

⁴ Similarly, we reject the Union’s contention that the Township choice of words for a disciplinary notice is a mandatory subject of bargaining. Rightly or wrongly, the Township asserted, for the first time, in the notices issued to Officer Moore, that an appeal of the discipline under the Police Tenure Act may subject him to increased penalties at the discretion of the Board of Supervisors. Absent an unlawful reference to protected activity (of which none is alleged here), the idiom of the employer is undoubtedly within the purview of management.

imposition of discipline in the Township Manager. There is nothing in Resolution 94-26 limiting the Township Manager's ability to question the Chief's recommendation and independently evaluate the level of discipline to be imposed.

The Union also claims that the Township somehow altered a past practice of basing suspensions on an eight-hour workday. In this regard, Chief Weaver testified that he was mindful that when the guidelines were issued, the number of days suspended for a violation was based on an 8-hour workday. Therefore, when recommending the length of a suspension, Chief Weaver indicated that he would use hours rather than days in calculating the length of suspensions.⁵

However, the hearing examiner did not credit Chief Weaver's testimony offered by the Union to establish a past practice where the Township would reduce the number of days of a suspension to accommodate an employee's ten or twelve hour workday. It is the function of the hearing examiner, not the Board, to weigh the evidence, and it is within the purview of the hearing examiner to accept or reject the testimony of a particular witness. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

There is, however, substantial, credible evidence of record to support the finding that employees served suspensions in days regardless of the length of their shift.⁶ A summary of prior suspensions introduced by the Township revealed that, in the past, where an employee was suspended for a given number of days, those days were served regardless of whether the employee was working an eight, ten, or twelve hour shift. Based on the hearing examiner's credibility determinations and the evidence of record, the Union has failed to sustain its burden of establishing a past practice that based the length of a suspension on an eight-hour workday.

After a thorough review of the exceptions and all matters of record the Township has not violated its bargaining obligations by unilaterally altering a mandatory subject of bargaining. Accordingly, the hearing examiner did not err in dismissing the Union's charge under Act 111 and Section 6(1)(a) and (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that exceptions filed by Adam Moore on behalf of the Limerick Township Police Officers are hereby dismissed, and the June 22, 2005 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this twentieth day of September, 2005. 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.

⁵ For example, guidelines calling for a 5-day suspension amounted to a forty hour suspension, thus if the officer was currently working a 10-hour shift, he would recommend a suspension of four days, not five.

⁶ A hearing examiner's findings will not be disturbed where supported by substantial evidence. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as supporting a conclusion. Pennsylvania State Troopers Association v. Commonwealth, Pennsylvania State Police, 36 PPER 67 (Final Order, 2005).