COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELLWOOD CITY POLICE WAGE AND POLICY UNIT	:	
v.	:	Case No. PF-C-04-75-W
ELLWOOD CITY BOROUGH	:	

FINAL ORDER

Ellwood City Borough (Borough) filed timely exceptions and a Brief in Support on April 13, 2005, with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued March 29, 2005. In the PDO, the Hearing Examiner concluded that the Borough committed unfair labor practices within the meaning of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), by changing the number of police officers used to transport male prisoners without bargaining the change with Ellwood City Police Wage and Policy Unit (Union). The Borough filed an affidavit of compliance with the PDO on April 19, 2005. After being granted an extension of time by the Board Secretary, the Union filed a Brief in Response on May 17, 2005.

In its exceptions, the Borough asserts that the Hearing Examiner erred by reaching the following factual determinations: 1) as of September 1999, the Borough had a policy of using two police officers to transport prisoners to and from any location except when a second officer was unavailable, 2) during transports, prisoners have become violent without advance notice and have injured police officers and 3) having two police officers present deters prisoners from acting violently. Further, the Borough claims that the Hearing Examiner erred in not determining that Finding of Fact 3, concerning the management rights provision, provided conclusive support for the Borough's contractual privilege defense. Finally, the Borough asserts that the Hearing Examiner erred as a matter of law in failing to find that the number of police officers assigned to transport a prisoner is a managerial prerogative and not a mandatory subject of collective bargaining.

The Hearing Examiner's salient findings of fact are as follows. During transports, prisoners have become violent without advance notice and have injured police officers. Having two police officers present during a transport deters prisoners from acting violently. In September 1999, the Borough began assigning two police officers to transport prisoners to and from any location, except on rare occasions when a second police officer was unavailable. By memorandum dated April 21, 2004, the Borough's Chief of Police William R. Betz, Jr. informed "All Officers" about the subject of "TRANSPORT POLICY" in pertinent part as follows:

> The following procedure is effective immediately!
>
> 1) Male prisoners being transported directly from the Lawrence or Beaver County Jails to the Ellwood City Police Dept. or D.J. Battaglia's Office shall be

> transported by one officer. Transport of male prisoners shall be by one officer to the Lawrence or Beaver County Jails from D.J. Battaglia's Office[] or the Ellwood City Police Department.

The Borough did not bargain with the Union before Chief Betz issued the memorandum.

In its exceptions, the Borough asserts that the Hearing Examiner erred by reaching the following factual determinations: 1) as of September 1999, the Borough had a policy of using two police officers to transport prisoners to and from any location except when a second officer was unavailable, 2) during transports, prisoners have become violent without advance notice and have injured police officers and 3) having two police officers present deters prisoners from acting violently. A hearing examiner's findings must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Substantial evidence is "'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Id. (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)). After reviewing the testimony and exhibits cited by the Hearing Examiner, including testimony from the Borough's witness directly corroborating the second two findings, (See N.T. 52-53, 57), the Board finds that there is substantial evidence to support these findings.

The Borough next argues that the Hearing Examiner misapplied Finding of Fact 3, concerning the management rights provision of the parties' collective bargaining agreement. The Borough asserts that a reasonable interpretation of this provision would permit the Borough to unilaterally implement its new transport policy, thereby establishing an affirmative defense of contractual privilege. In Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212 (1984) and Vickers, Inc., 153 N.L.R.B. 561, (1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Fraternal Order of Transit Police v. SEPTA, 35 PPER 75 (Final Order, 2004). The Commonwealth Court has subsequently sanctioned the Board's adoption and application of this affirmative defense of contractual privilege, stating:

> The "sound arguable basis" defense is a defense to charges of unfair labor practices developed by the NLRB and adopted by the Board. Essentially, an employer will not be charged with unfair labor practices if the employer shows that it had a sound arguable basis for ascribing a particular meaning to the parties' contract, and the actions taken by that employer coincide with its interpretation of the contract.

Cheltenham Township v. PLRB, 846 A.2d 173, 179 n.14 (Pa. Cmwlth. 2004)(citation omitted). Furthermore, an employer's interpretation need not necessarily be the correct interpretation to provide a valid defense, so long as there is a "sound arguable basis" for its interpretation and a "substantial claim of contractual privilege."

Jersey Shore Area Education Association v. Jersey Shore Area School District, 28 PPER at 340.

In order to sustain a claim of contractual privilege, the Borough "must show by language in the agreement that its actions at issue have a sound arguable basis from the agreement." Palmerton Area Education Support Personnel Association v. Palmerton Area School District, 33 PPER ¶ 33163 (Final Order, 2002). Accordingly, the issue becomes whether there is language in the parties' agreement that supports the Borough's unilateral change to the transport policy. The Board and the Courts have held that a boilerplate management rights clause in a collective bargaining agreement provides no defense to a refusal to bargain claim. Indiana Borough v. PLRB, 695 A.2d 470 (Pa. Cmwlth. 1997). The provision at issue provides in pertinent part:

> 1. Management rights shall include but not be limited to the following:
>
> * * *
>
> b. The determination of the governmental services to be rendered.
> c. The determination of the employer's financial budgetary, accounting and organization policies and procedures.
> d. The continuous overseeing of personnel policies, procedures and programs.
>
> * * *
>
> i. The right to determine the methods, means and number of personnel by which the department is to operate.
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> * * *
>
> k. The right of selection, direction, assignment and scheduling.
> l. The right to establish continue or abolish practice and procedures for the conduct of the Borough police operations.

(PDO, Finding of Fact 3). Clauses i, k and l generally address the Borough's overall right to manage the department akin to the dichotomy between managerial rights of the employer on one hand and employes' right to negotiate employe safety and working conditions on the other, consistent with the distinction found by the Commonwealth Court in IAFF Local 669 v. City of Scranton, 429 A.2d 779 (Pa. Cmwlth. 1981), discussed below. If the Borough is correct here that the clauses in the management rights provision of the contract override the employes' right to negotiate safety issues under the "rational relationship" test followed by the Board and the Courts in deciding scope of bargaining issues under Act 111, then boiler plate managerial rights clauses eclipse employes' ability to negotiate over basic employe safety "working conditions" expressly negotiable under Section 1 of Act 111.

Finally, the Borough asserts that the Hearing Examiner erred as a matter of law in failing to find that the number of police officers assigned to transport a prisoner is a managerial prerogative and not the subject of collective bargaining. The Borough cites to IAFF Local 669 v. City of Scranton, *supra*, to support its argument that the number of police on the force is not a mandatory subject of bargaining. Closer examination of City of Scranton shows that in fact it supports the Union's position and not that of the Borough. The Hearing Examiner's

order directs the Borough to reinstate a policy that required two police officers to transport a prisoner, but the order does not require the Borough's police department to employ a set minimum or maximum number of officers on the police force. As the Commonwealth Court stated when dealing with an analogous issue relating to firefighters in City of Scranton:

> The courts that have dealt with this issue have drawn a *very* fine line in distinguishing between the total number of persons on the force [not a mandatory subject of bargaining], and the number of persons on duty at a station, or assigned to a piece of equipment, or to be deployed to a fire [all mandatory subjects of bargaining because they are rationally related to the safety of the fire fighters].

IAFF Local 669 v. City of Scranton, *supra* at 781. The number of officers assigned to transport a prisoner is clearly more analogous to the total number of firefighters assigned to an apparatus than to the total number of firefighters employed by the fire department. As the Court observed, the number of firefighters assigned to a particular apparatus is a safety issue, as is the officers assigned to prison transport (as demonstrated by the record here). Therefore, the issue is a mandatory subject of bargaining as described in City of Scranton, and the Borough committed an unfair practice when it unilaterally changed the existing transport policy. Accordingly, this exception is dismissed.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions filed by the Borough and make the Proposed Decision and Order final.

ORDER

In view of the foregoing, and in order to effectuate the policies of Act 111 of 1968 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the above case number be and the same, are hereby dismissed, and the Proposed Decision and Order is hereby made absolute and final.

SIGNED, SEALED, DATED and MAILED this twenty-first day of June, 2005.

PENNSYLVANIA LABOR RELATIONS BOARD

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L. DENNIS MARTIRE, CHAIRMAN

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ANNE E. COVEY, MEMBER

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violations of sections 6(1)(a) and 6(1)(e) of the PLRA, that it has rescinded the April 21, 2004, memorandum insofar as it relates to the transport of male prisoners, that it has posted the proposed decision and order and final order as directed therein and that it has served a copy of this affidavit on the Union.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public