COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE #24

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v. : Case No. PF-C-04-24-W

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CITY OF JEANNETTE

FINAL ORDER

On March 11, 2005, the City of Jeannette (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), issued February 22, 2005. In the PDO, the Hearing Examiner concluded that the City committed unfair labor practices in violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally removing bargaining unit work. On March 30, the Fraternal Order of Police, Lodge No. 24 (Union) timely filed a response to the City's exceptions.

The captain, two lieutenants, two sergeants and all patrolmen are members of the bargaining unit. The Chief is not a member of the unit. The patrol schedule includes three daily shifts with a fourth shift from 8 p.m. to 4 a.m. on Friday and Saturday nights only. Patrolmen work all four shifts on a twelve-week rotating schedule. In addition to maintaining a presence in the City, patrolmen respond to emergency dispatches from the Westmoreland County 911 Dispatch Center. Calls rotate among officers on a given shift, and the officer who receives the call remains with any related investigation. The captain and the lieutenants are supervisors and work all shifts except the 8 p.m. to 4 a.m. shift. Sergeants are included in the patrol schedule, unless they substitute for a higher-ranking officer on the supervisory schedule. In recent years, all bargaining unit members from the captain down to patrolmen have performed patrol duties and have responded to 911 calls.

The City's current police chief, Jeffery Stahl (Chief), was appointed in November, 2003. He mainly works Monday through Friday on the daylight shift (7 a.m. to 3 p.m.). He is not part of the patrol schedule, and he does not respond to 911 dispatches. On December 19, 2003, and at times subsequent, Chief Stahl worked a patrol shift in place of a scheduled patrol officer in the unit who was unable to work the shift. Before working that shift, Chief Stahl did not attempt to substitute the vacancy with a member of the bargaining unit. For the past fifteen years, the City filled a patrol shift by first offering it to patrol officers who were scheduled off, followed by sergeants, lieutenants or captains who were scheduled off, followed by patrol officers who were already working other shifts that day and who were willing to work another shift. The Chief did not work a patrol shift in place of a patrolman, sergeant, lieutenant or captain in the past fifteen years. The City did not bargain with the FOP before the Chief worked the patrol shift on December 19, 2003 and subsequent shifts thereafter.

In its exceptions, the City challenges Findings of Fact numbers 6, 11, 12, 15, 17 and 18-20. Findings of fact must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942); State System of Higher Education v. PLRB, 737 A.2d 313, 315, n.6 (Pa. Cmwlth. 1999); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997). Substantial evidence is "`such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Kaufman, supra (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)). A review of the Examiner's citations to the record reveals substantial evidence supporting the challenged findings of fact and, therefore, those findings will not be disturbed.

The remainder of the City's exceptions address two issues. (City's brief at 4). The City first argues that the work in question was not exclusively performed by the bargaining unit. The City contends that the Examiner erred in finding, inferring or implying that the duties of patrolmen were less than the full panoply of authorized statutory duties of a

police officer under the Third Class City Code. In this regard, the City maintains that the Chief, as a police officer, is not only statutorily authorized to perform all the duties of a police officer, but the record shows that past chiefs have in fact performed those same duties. The City maintains that the Examiner's erroneous conclusions preclude the Chief from performing police work, which is contrary to statutory requirements that the Chief, as a police officer, enforce the laws of the City and the Commonwealth.

In its charge, the Union alleged that the City engaged in unfair labor practices when the Chief unilaterally inserted himself, a non-unit member, into the fourth shift on December 19, 2003 and on subsequent occasions, which negatively affected bargaining unit employes' hours, overtime wages and their interest in retaining bargaining unit work. Although the City's arguments have focused on the nature of the work, the City overlooks the simple fact that, by taking a shift away from the bargaining unit, the Chief unilaterally reduced the hours of work, and therefore compensation, of bargaining unit members in violation of Section 1 of Act 111, which expressly provides that "compensation" and "hours" constitute mandatory subjects of bargaining. 43 P.S. § 211.1. This is not a circumstance where preservation of the parties' past practices would have resulted in insufficient staffing consistent with the City's public safety needs as argued by the employer, but a simple circumstance where the City did not follow the past practice of affording a patrol officer the additional work.

Additionally, "a public employer commits an unfair practice when it transfers any bargaining unit work to non-members without first bargaining with the unit." City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992)(emphasis original). In establishing an unfair practice for the removal of bargaining unit work, a union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employe(s). City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Although the City's prior police chiefs may have spent their own shift performing patrol duties, the City did not show that the Chief or his predecessors inserted themselves into bargaining unit patrol shifts before the Chief altered that practice unilaterally in December, 2003. Even where bargaining unit and non-unit employes have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992). Therefore, a public employer can commit an unfair practice by varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing AFSCME, supra).

The substantial evidence of record establishes that the Chief's shift is separate from and in addition to the number of shifts allocated to bargaining unit members. The patrol schedule is posted in advance, and the Chief, on this record, had sufficient opportunity to substitute a bargaining unit member in the vacant fourth shift on December 19, 2003. By inserting himself in a bargaining unit shift, he assigned work to himself, a non-unit member and thus transferred work and hours from the unit. Although the Chief is clearly empowered under the law to perform police work, the Chief must also honor the City's collective bargaining duty to its employes in assignment of work to available bargaining unit employes under the existing scheduling practice. In affirming the PLRB, the Court in Harrisburg held that where non-unit employes "are fulfilling some of the former duties of [unit] officers, the [unit] officers are not doing all the work for which they bargained. Thus, the unit lost work and there was a demonstrable impact on the unit." Harrisburg, 605 A.2d at 442. A public employer may not unilaterally remove bargaining unit work even where, as argued here, the employer removes the work due to important economic concerns. Commonwealth of Pennsylvania (Ebensburg) v. PLRB, 568 A.2d 730 (Pa. Cmwlth. 1990); Midland Borough Sch. Dist. v. PLRB, 560 A.2d 303, 305 (Pa. Cmwlth. 1989)(stating that "there has been an unflagging consistency in judicial approval of the PLRB's view that unilateral removal of work from a bargaining unit and transfer of that work to others for economic reasons, without collective bargaining, is an unfair labor practice"); City of Clairton v. PLRB, 528 A.2d 1048 (Pa. Cmwlth. 1987)

 $^{^{1}}$ The Chief testified that he prepared the schedule for that date at least one or two weeks in advance. (N.T. 74).

(holding the mayor committed unfair labor practices when he unilaterally assigned firefighters to perform police dispatching duties formerly performed by the police bargaining unit even though the mayor was motivated by the city's fiscal problems and public safety concerns to deploy more police officers); Borough of Geistown v. PLRB, 679 A.2d 1330, 1335 (Pa. Cmwlth. 1996)(unilateral subcontracting for economic savings constitutes an unfair practice, citing Ebensburg, supra); Harrisburg, supra (relying on Clairton, supra, and holding that the unilateral transfer of some of the police unit work of issuing citations for park violations is unlawful even where motivated by public safety and welfare concerns in the deployment of police officers). Accordingly, as long as the Chief has taken a shift away from the bargaining unit, it matters not that the Chief is otherwise authorized to perform police work, that the unit retains most, but not all of the work or that the department would save money. However, it would significantly matter that a legitimate business reason existed requiring the Chief to perform bargaining unit work (such as the unavailability of the bargaining unit members to perform the shift).

Also, the City's argument that the work was not exclusively performed by the bargaining unit is without merit. The Union established on the record that the unit exclusively performed police duties on each of the four shifts with the Chief consistently working an extra day shift. The Chief's shift did not affect the two officers exclusively assigned to the day shift during any given day or week. Accordingly, the Union established that the bargaining unit has an interest in retaining that quantum of work.

The Chief testified that chiefs, in the past, have occasionally issued citations and assisted the patrol officers. By its very nature this evidence establishes that the chiefs have performed police work in addition to the police work of the patrol officers and not in lieu of it. In Wyoming Valley, supra, the Board relied on AFSCME, supra, and held that where the union established a past practice that the bargaining unit performed an identifiable proportion of work at certain times (in Wyoming, the work involved cleaning the school district's stadium, on certain shifts, even though the unit shared those duties at other times with volunteers) the District could not assign the overtime hours traditionally given to the unit employes to the volunteers. In this case, the record demonstrates that the Chief performed police duties in addition to the unit employes. The past chiefs may have worked evenings, but they did not establish a practice or policy of taking hours from unit members. As in Wyoming Valley, although chiefs occasionally performed police work with the unit employes, when the Chief assigned a shift to a non-unit member, i.e. himself, he removed work and hours from the unit exclusively performed by the unit. Accordingly, although past chiefs simultaneously performed police work at different hours of the 24-hour clock along side the unit, the unit consistently worked the six shift positions during the week and the seven shift positions on Friday and Saturday night, due to the fourth shift. The Chief unilaterally removed one of those identifiable shift positions from the unit, which is inconsistent with past practice and well established law of the Board and the courts. Although the Chief testified that he wanted to observe the night operations of the officers on duty and working the fourth shift allowed him to observe as many as four officers, (N.T. 70-72), the Chief unlawfully displaced a bargaining unit member, which was unnecessary to conduct his observations and perform his managerial police work. Indeed, if he had worked the same hours and filled the vacant fourth shift with a bargaining unit member, he could have observed as many as five officers.

The City also contends that the Examiner's decision violates the City's managerial prerogative to direct the assignment of work and personnel and to establish hours and adequate staffing levels. The Examiner's decision, argues the City, erroneously requires the City to provide mandatory overtime and minimum staffing levels and precludes the Chief from performing police work he has always performed when there is a vacancy in the schedule. As stated above, the Board's decision in no way affects the Chief's ability to perform police work. Also, the record contradicts the City's argument that the Chief always performed police work when there was a vacancy in the schedule. The record clearly shows that patrol vacancies were filled with bargaining unit members instead of the Chief. (F.F. 17). The chiefs' past performance of police work was outside the bargaining unit schedule and the minimum expected hours of bargaining unit work. The City did not prove that the deviations from the scheduling practice was necessitated by the unavailability of bargaining unit members to perform the work. For example, the Chief did not, at any time during a one-to-two week period in December 2003, attempt to contact or schedule any bargaining unit members. (F.F. 15).

The Board agrees that the City possesses a managerial prerogative to direct the assignment of work and establish hours and staffing levels to ensure adequate public service. However, the law is well established that managerial prerogative does not authorize an employer to remove work from the bargaining unit, and the City may not disguise its action here as part of those core managerial functions. The Court in Harrisburg held that a public employer's unilateral transfer of officers' work bears a rational relationship to the officer's duties and is therefore bargainable. Harrisburg, Supra. Here, the City unilaterally transferred hours and work to a non-unit member, the Chief, and thereby violated its bargaining obligations.

After a thorough review of the exceptions and all matters of record, the Board, therefore, concludes that the City committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111 and shall sustain the Proposed Decision and Order of the Hearing Examiner.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111 of 1968, 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 and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this seventeenth day of May, 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.

COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

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v. : Case No. PF-C-04-24-W

CITY OF JEANNETTE

AFFIDAVIT OF COMPLIANCE

The City of Jeannette hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111; that it has rescinded its use of the police Chief to fill patrol shifts without first offering bargaining unit members the opportunity to work the shift; that it has made bargaining unit employes whole for any wages lost due to its use of the police chief to fill a patrol shift on December 19, 2003; that it has posted the proposed decision and order and the Final Order as directed; and that it has served a copy of this affidavit on the FOP 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