

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LABOR RELATIONS BOARD

AFSCME DISTRICT COUNCIL 85 :
 :
 v. : CASE NO. PERA-C-03-504-W
 :
 ERIE COUNTY and BOB MERSKI, SHERIFF :

FINAL ORDER

Erie County (County) and Erie County Sheriff Bob Merski (Sheriff) filed timely exceptions and a supporting brief on October 6, 2004, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued September 16, 2004. In the PDO, the Hearing Examiner concluded that the County and Sheriff had committed unfair labor practices within the meaning of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by denying a more senior bargaining unit employe's attempt to bump into a bargaining unit position in the sheriff's office, thereby repudiating Article 14 of the parties' 2003-2004 collective bargaining agreement (CBA). On September 20, 2004, AFSCME District Council 85 (Union) filed its Answer in Opposition to Exceptions. After the Secretary granted an extension, the Union filed a brief in opposition on November 9, 2004.

The County and the Sheriff take exception to the findings and/or conclusions that 1) the County and the Sheriff satisfied Act 115 of the County Code's consultation requirement, See 16 P.S. § 1620, as amended by Act 115 of 1976,¹ 2) due to his failure to propose amendments to the agreement during negotiations, the Sheriff must comply with the CBA, 3) the Sheriff's previous failure to adhere to Article 14 of the CBA does not establish that the Sheriff retained his absolute right to hire, fire and supervise the employes in the Sheriff's Office, 4) it is the Sheriff's obligation, rather than the Union's, to propose changes to Article 14, 5) the County and the Sheriff's reliance on Article 27² of

¹ Section 1620 of the County Code states that:

with respect to representation proceedings before the Pennsylvania Labor Relations Board or collective bargaining negotiations involving any or all employes paid from the county treasury, the board of county commissioners shall have the sole power and responsibility to represent judges of the court of common pleas, the county and all elected or appointed county officers having any employment powers over the affected employes. The exercise of such responsibilities by the county commissioners shall in no way affect the hiring, discharging and supervising rights and obligations with respect to such employes as may be vested in the judges or other county officers.

16 P.S. § 1620, as amended by Act 115 of 1976.

² Article 27 of the CBA contains the following:

Both parties hereto specifically agree that it is their intent that this Agreement, under all circumstances and in every aspect, shall comply with all applicable statutes,

the CBA is misplaced, as the CBA was negotiated and drafted consistent with Act 115, 6) the Court of Common Pleas' decisions cited by the County and the Sheriff are not controlling, 7) the Sheriff was obligated to adhere to Article 14 of the CBA, 8) the Sheriff's repudiation of Article 14 constituted unfair practices under PERA, and 9) the remedy ordered is appropriate.

The Hearing Examiner's salient findings of fact are as follows. The Union and the County are parties to a CBA reached after ten (10) bargaining sessions over the course of approximately six (6) months. Article 14 of the CBA, which was carried over from the previous agreement, addresses layoffs and provides that an employe subject to layoff or abolishment of his position has "bumping" rights with regard to a:

position which is occupied by an employe of the same classification or an equal or lower paid, less responsible classification with said AFSCME bargaining unit who has less seniority, provided the most senior employee possesses the necessary skills, qualifications, and ability to satisfactorily perform the functions, duties, and responsibilities of the remaining job.

(PDO, Finding of Fact 7). The Sheriff was aware of the ongoing negotiations, was aware of the bargaining provision of Article 14 of the parties' agreement, was present at one (1) or two (2) of the bargaining sessions for a successor agreement and was consulted by the County concerning the proposals applicable to his office. During the negotiations, the Sheriff proposed at least two provisions relating to and limiting his right to hire, fire and supervise his work force: a drug testing policy and a fitness policy. The Sheriff, a former Union steward, is familiar with the entire CBA and never proposed amending Article 14 to limit its application to his office.

In 2003, the County employed Robert Skarupski as chief printer in the printing office. In the Fall of 2003, the County advised Skarupski that it intended to eliminate his position. Pursuant to Article 14, Skarupski informed the County that he wished, pursuant to Article 14, to bump into a security/transport deputy position in the Sheriff's Office. By letter dated October 13, 2003, the Sheriff informed the County that he would not allow Skarupski to bump into the position, because "[a]s an elected official and co-employer with the county, I believe I have the legal right to hire my staff." By letter dated October 16, 2003, the County informed Skarupski that he could not bump into the Sheriff's Office position.

In 1993, the Sheriff's predecessor refused to abide by the seniority-based posting and bidding procedures set forth in Article 13 of the CBA. The Union filed a grievance that proceeded to arbitration. The arbitrator denied the grievance, finding that the dispute was not

governmental regulations and judicial decisions, and if it shall be determined by the proper authority that this Agreement, or any part thereof, is in conflict with said statutes, governmental regulations and judicial decisions, this Agreement shall be automatically adjusted to comply with the said statutes, governmental regulations and judicial decisions.

arbitrable, due to Article 13's alleged conflict with Act 115 of the County Code. The Union's petition to vacate the arbitration award was denied by the Court of Common Pleas of Erie County.

In 1998, the Erie County Clerk of Records refused to comply with the posting and bidding procedures outlined in Article 13. The Union filed a grievance that proceeded to arbitration. The arbitrator issued an award sustaining the grievance, but the award was later reversed by the Court of Common Pleas. The Union thereafter withdrew an appeal of this decision in compliance with a settlement reached with the Clerk of Records.

In 2002, David Orr attempted to bump into a sheriff I position in the Sheriff's Office. The Sheriff advised the Union that he would not permit Orr to bump into that position, but would consider him for a security/transport deputy position. Orr advised the Union that he would prefer the deputy position, and he accepted the position without contesting the Sheriff's failure to comply with Article 14.

The meaning and the application of Act 115 have been extensively litigated since its passage in 1976. Initially, the Board determined that the county commissioners were empowered to negotiate only matters within their control, largely financial terms, and that matters involving hire, fire and direction by row officers were beyond the scope of collective bargaining. See County of Lehigh v. PLRB, 507 Pa. 270, 489 A.2d 1325 (1985). Our Supreme Court expressly rejected the Board's notion that the passage of Act 115 limited the scope of collective bargaining for employees hired, fired and directed by public officials other than county commissioners. The Supreme Court found that the scope of collective bargaining included not only economic matters but also matters that are a function of the right of elected row officials to hire, fire and supervise their work force. See Id.; SEIU Local 585, AFL-CIO, CLC v. Washington County, 18 PEPR ¶ 18026 (Final Order, 1986). The Court stated that it would be contrary to the public interest to bar matters otherwise negotiable for other categories of public employees under PERA simply because of Act 115. By not unreasonably limiting bargaining rights of row office employees and instead requiring, but rather resolving difficulties in the bargaining process by cooperation and consultation between the County Commissioners and other row officials in the bargaining process under Act 115, the Supreme Court balanced the legitimate concerns of the parties to the process.

In County of Lehigh v. PLRB, *supra*, the Supreme Court stated:

[S]ection 1620's proviso that "the exercise of such responsibilities by the county commissioners shall in no way affect the hiring, discharging and supervising rights and obligations with respect to such employees as may be vested in the judges or other county officers" does not limit the permissible subjects of bargaining to purely financial terms. The proviso merely recognizes that, under PERA, matters affecting the hiring, discharge and supervisory powers of a public employer are not subjects of collective bargaining. See 43 P.S. § 1101.702 (selection and direction of personnel not subject to collective bargaining); 43 P.S. § 1101.706 (employer's right to discharge for cause not impaired). Rather, under the

express language of section 701 of PERA, court-appointed employees' "wages, hours and other terms and conditions of employment" are subjects of mandatory bargaining. 43 P.S. § 1101.701.

Lehigh County, 507 Pa. at 277-78, 489 A.2d at 1328-29.

Thus, in Lehigh County, the Supreme Court found that Act 115 does not affect the scope of bargaining for court-related employees. See also PLRB v. Della Vecchia, 517 Pa. 349, 537 A.2d 805 (1988) (holding that the result reached in County of Lehigh was applicable to county row officers). Rather, according to the Court, Act 115 merely designates county commissioners as bargaining agents for row officers, while expressly noting that the row officers retain their managerial right to hire, discharge and supervise their staffs. In PLRB v. AFSCME, District Council 84, 515 Pa. 23, 526 A.2d 769 (1987), the Supreme Court again addressed the impact of Act 115. There it was argued that employee leave (sick leave, funeral leave, jury duty and shift pay differential) was beyond the scope of bargaining because, as a function of the power to direct employees, it was beyond the scope of bargaining by the county commissioners under Act 115. Expressly relying on the above-quoted language from the Court's prior decision in Lehigh County, the Supreme Court held that commissioners' negotiations over sick leave, funeral leave, jury duty and shift differential did not interfere with managerial prerogatives to supervise or direct employees. For example, it could be argued that permitting public employees to arbitrate break times, lunch periods, starting and quitting times, job bidding, discipline and discharge "affects" the managerial prerogative under section 702 of PERA to select and direct personnel. In cases involving other public employees, the Supreme Court has repeatedly rejected the view that a statutory grant of power to elected officials to hire, fire and direct employees (akin to Act 115) makes all matters which flow from this power managerial prerogative, as argued by the County and the Sheriff here. See, e.g., Juniata Mifflin Counties Area Vocational-Technical School v. Corbin, 547 Pa. 495, 691 A.2d 924 (1997); Rylke v. Portage Area School District, 473 Pa. 481, 375 A.2d 692 (1977). In Juniata, the court stated:

This argument is unpersuasive since such an interpretation is overly broad. (citation omitted) (Although 43 P.S. Section(s) 1101.702 provides that public employers are not required to bargain over matters of 'inherent managerial policy,' such terms do not encompass an employee's suspension.

691 A.2d at 928. Similarly, in Rylke, the Supreme Court stated:

In the instant case, we believe that arbitrating the propriety of an individual's suspension has a substantial impact on 'wages, hours and terms and conditions of employment.'...Hence, 702 does not prohibit bargaining on the dispute in the instant case.

473 Pa. at 489, 375 A.2d at 696.

Therefore the law is well established that, "[o]n those occasions where broad ranging managerial decisions filter down in separately identifiable wage, hours or working condition impact the Board has

directed bargaining." Fraternal Order of Police, Jefferson Lodge No. 68 v. Brookville Borough, 27 PPER ¶ 27005 (Final Order, 1995). Clearly, the Sheriff understood this principle, because he proposed two distinct contractual provisions affecting his authority to supervise and direct employes that impacted identifiable working conditions: a drug testing policy and a fitness policy. With regard to the fitness policy, the Sheriff agreed to limit his authority to discipline or discharge employes as follows: "The result of the physical fitness test shall be for informational purposes only to encourage Deputies to remain in good physical condition and shall not affect the employment status of any Deputy." (PDO, Finding of Fact 20).

The Commonwealth Court, in sustaining a Board final order addressing similar facts invoking hire, fire and direction authority of a county row official, summarized the Supreme Court's rulings regarding the scope of Act 115 in Troutman v. PLRB, 735 A.2d 192 (Pa. Cmwlth. 1999), appeal denied, 563 Pa. 624, 757 A.2d 937 (2000). The Court stated:

It is well settled that the county commissioners are the exclusive managerial representatives for purposes of collective bargaining under Act 115, and must consult with...row officers regarding proposals that may affect their powers to hire, discharge and supervise employees. See, e.g., Ellenbogen v. County of Allegheny, 479 Pa. 429, 388 A.2d 730 (1978). Additionally, our Supreme Court stated in County of Lehigh v. Pennsylvania Labor Relations Board, 507 Pa. 270, 489 A.2d 1325 (1985), that bargaining by county commissioners under Act 115 is not limited solely to financial issues within the control of the Commissioners. The Court opined, 'if the rights given to county court employees under PERA are to have any efficacy, those employees **must be permitted to bargain with the county commissioners concerning all of PERA's permissible subjects of collective bargaining.**' Id., 507 Pa. at 279, 489 A.2d at 1330.

Troutman v. PLRB, 735 A.2d at 195 (emphasis added).

It is uncontested that bumping rights fall squarely within Section 701 of PERA's definition of mandatory subjects of bargaining. See Commonwealth of Pennsylvania v. PLRB, 557 A.2d 1112 (Pa. Cmwlth. 1989); Hazleton Area Bus Drivers School Service Personnel Association/PSSPA v. Hazleton Area School District, 15 PPER ¶ 15165 (Final Order, 1984). Consequently, consistent with Lehigh County and Troutman, a union must be permitted to bargain with county commissioners regarding these bargaining matters subject to the right of the row official to consult with his/her agent, the county commissioners, to lawfully represent the row officers' intentions in the matter. Here the record shows the Sheriff in fact consulted with the commissioners regarding the provisions that relate to his office, including those articles that affected his right to hire, fire and direct. Therefore, any exceptions alleging that Act 115 renders illegal all provisions that restrict the Sheriff's power to hire, fire and direct his employes is hereby dismissed.

The County's and the Sheriff's attempt to distinguish this case from Troutman is unavailing. They argue that the "key finding" in

Troutman was that the employer previously abided by the relevant provisions of the collective bargaining agreement. Further, they indicate that in this case, the employer has a history of refusing to comply with articles of the CBA involving hire, fire and direct issues. In essence, the County and the Sheriff argue that their previous non-compliance with the CBA renders those sections of the contract unenforceable. First, the County and the Sheriff incorrectly assert that the employer in Troutman consistently abided by the collective bargaining agreement. In Troutman, the Hearing Examiner made the following findings of fact:

That in 1989, Mr. Troutman hired a secretary without going through the procedure outlined in [the contract]. The Union filed a grievance which alleged at least in part that a more senior employe should have received the position under [the contract]. Mr. Troutman indicated to the Union and to the County's Personnel Director that Mr. Troutman was asserting his statutory rights as Clerk of Courts to hire the person he wished to have for the position. The employe on whose behalf the grievance was filed later obtained another position and the grievance was then discontinued.

That in or about April 1993, the Union filed a grievance under [the contract] concerning the filling of a position in Mr. Troutman's office. At the arbitration hearing, Mr. Troutman appeared and was represented by the County Solicitor's office. At that hearing, the County Solicitor expressed Mr. Troutman's position that Section 1620 of the County Code prohibited the arbitrator from interpreting [the contract] in a manner which would interfere with his right to select employes. The grievance was subsequently withdrawn for reasons unrelated to the issue raised by Mr. Troutman.

See AFSCME, District Council 88 v. Berks County, 27 PPER ¶ 27045 (Proposed Decision and Order), 29 PPER ¶ 29044 (Final Order). Clearly, the row official in Troutman did not consistently abide by the collective bargaining agreement; but rather, like the Sheriff here, claimed immunity from the contract because of Act 115.

Second, it is well settled that a union's acquiescence to an employer's contractual violations do not operate as a waiver to contest future, similar unfair practices. See Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth., 1993); Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995), appeal dismissed, 543 Pa. 482, 672 A.2d 1318 (1996)(citing Johnson-Batemen Co., 295 N.L.R.B. 180 (1989)). As such, the County and the Sheriff's prior conduct do not operate as a waiver for the current contractual repudiation.

Third, according to the Troutman decision, the key factor in determining whether Act 115 has been satisfied is whether or not consultation or the opportunity for consultation has occurred between the commissioners, as the bargaining agent, and the row official. The Hearing Examiner here reached the same result as the Troutman Court, that the consultation requirement was satisfied.

Fourth, since bargaining hire, fire, and supervisory issues is not contrary to Act 115, Article 27 of the CBA is not applicable. Therefore, the County and the Sheriff's reliance on this provision is misplaced.

The County and the Sheriff's exceptions challenge the finding of fact that the Sheriff consulted with the commissioners during the negotiations. A hearing examiner's 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). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942) (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)). The Hearing Examiner's determination that the County and the Sheriff satisfied Act 115's consultation requirements are based on the Sheriff's presence at bargaining sessions leading to the contract, his consultation with the County attorney and chief negotiator and the fact that the Sheriff offered several proposals regarding his hire, fire and direct authority during the negotiations. (PDO, Finding of Fact 20). Further, the Hearing Examiner found as fact that the Sheriff previously served as an AFSCME steward (PDO, Finding of Fact 21), for this unit for eight years and as chief steward for one and a half years (N.T. 31) prior to being elected Sheriff. The Sheriff also testified that he served on the AFSCME negotiating team for three contracts. As such, the Sheriff was familiar with the negotiating process for this unit. Therefore, this conclusion is supported by substantial evidence, and any exception asserting otherwise is dismissed.

The exception challenging the finding that the Sheriff is bound to comply with Article 14 because he never proposed a change during the negotiations is without merit. As discussed above, the Sheriff was familiar with the provisions of the CBA, including Article 14. Additionally, his proposals regarding fitness and drug policies indicate that the Sheriff understood that his rights to hire, fire and direct could be affected by the collective bargaining agreement. Therefore, the Sheriff was aware of the role Act 115 played in the negotiations and was or should have been aware of the ramifications of Article 14 on these rights. Consequently, if the Sheriff desired to amend Article 14 to prevent more senior, qualified bargaining unit employees from bumping into a position in the sheriff's office, it was incumbent on him to so inform the commissioners pursuant to Act 115. Therefore, this exception is dismissed.

The County's and the Sheriff's reliance on AFSCME, District Council 85 v. Erie County, 79 E.C.L.J. 180 (1994) and Erie County Clerk of Records, Erie County v. AFSCME, District Council 85, Civil Action No. 13237-1998 (Anthony J., January 11, 1999) are misplaced. In these cases, the Court of Common Pleas applied the same legal standard initially adopted by the Board, but later reversed by the Pennsylvania Supreme Court. In both instances, the reviewing court determined that Act 115 prevented, as a matter of law, the commissioners from entering into negotiations for row office employees over any working condition matters (otherwise negotiable under Section 701 of PERA). Both decisions were issued before the Commonwealth Court's Troutman decision; accordingly, the Common Pleas Court did not have the benefit

of the later 1999 decision of the Commonwealth Court that clearly determined as a matter of law that Act 115 did not limit the scope of negotiations for row office employes, so as to exclude working conditions such as job posting, bidding and bumping matters.

Finally, in their exceptions, the County and the Sheriff argue that the relief ordered by the Hearing Examiner was inappropriate. Section 1303 of PERA vests the Board with broad remedial powers to effectuate the policies of the Act. See 43 P.S. § 1303; Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). Therefore, since the County and the Sheriff failed to establish a valid defense to their actions, the Hearing Examiner's make whole relief is appropriate and this exception is dismissed.

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

ORDER

In view of the foregoing, and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed in the above-captioned matter be and the same are hereby dismissed and the Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this eighteenth day of January, 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

AFSCME DISTRICT COUNCIL 85 :
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 BOB MERSKI :

AFFIDAVIT OF COMPLIANCE

Erie County and the Erie County Sheriff hereby certify that they have ceased and desisted from their violation of Section 1201(a)(1) and (5) of PERA; that they have complied with the provisions of Article 14 of the collective bargaining agreement; that they have offered Robert Skarupski the security/transport deputy position that he attempted to bump into; that they have made Skarupski whole for any lost wages or benefits due to the failure to afford him his bumping rights under Article 14; that they have posted a copy of the proposed decision and order and final order as directed therein; and that they have served a copy of this affidavit on AFSCME 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