

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF :
FIREFIGHTERS, LOCAL 840 :
 :
v. : Case No. PF-C-05-34-E
 :
EDWARDSVILLE BOROUGH :

FINAL ORDER

Edwardsville Borough (Borough) filed exceptions with the Pennsylvania Labor Relations Board (Board) on May 22, 2006, asserting that the May 1, 2006 Proposed Decision and Order (PDO),¹ in which the Hearing Examiner declared the Borough's fire department's chief engineer a supervisor and concluded that the Borough violated Act 111 and Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) in connection with events surrounding the removal of two reclining chairs (recliners) from the firefighter office. The Secretary of the Board granted the Borough an extension of time to file its brief in support of its exceptions, which was timely filed June 19, 2006. The International Association of Firefighters, Local 840 (IAFF) also timely filed its brief in opposition to the exceptions on July 10, 2006.

The facts found by the hearing examiner, relevant to the Borough's exceptions, pertain to the Borough's removal of two donated recliners from the firefighter office without first bargaining with the IAFF, and the directive given by Chief Engineer, Richard Konefal, to firefighter, George Tomasak, to use instead a broken highback chair. Richard Konefal is the Chief Engineer for the Borough's fire department, (F.F. 9) and, while he is also a bargaining unit member, he is also the first step in the firefighters' grievance process. (F.F. 20). While the Chief Engineer generally performs the same duties as other firemen in the department, (F.F. 9), he also directs the other bargaining unit firefighters to perform the daily work assignments for the Borough's fire department.

During remodeling of the Borough building in August 2004, Konefal informed Tomasak that the Borough had authorized new chairs for the firefighters' office. In response to Tomasak's suggestion of recliners, Konefal told Tomasak to get whatever he wanted. Tomasak obtained two recliners through private donations to the fire department. (F.F. 12). After Tomasak installed the recliners, the Borough became concerned because the recliners were serving as an attraction for non-firefighters to congregate in the office. At the direction of Borough Council, and without notice to the IAFF, Konefal removed the recliners from the firefighter office on January 25, 2005. (F.F. 14). Tomasak questioned Konefal about the removal of the recliners, to which Konefal, pointing to a broken desk chair, directed Tomasak to "sit in that f_____ chair for eight hours." (F.F. 18 and 19). When Tomasak presented a grievance to Konefal over the removal of the recliners and his direction to Tomasak to sit in the broken chair, Konefal warned Tomasak that if he continued to file grievances the Borough would "get rid of him." (F.F. 21).

Given the above course of events, the Hearing Examiner found that Konefal was a supervisor, acting on behalf of the Borough, for purposes of the unfair labor practices presented, and thus concluded that Konefal's directive to Tomasak to use the broken desk chair, and his motivation for the directive, i.e. Tomasak's filing of grievances, interfered with Tomasak's exercise of protected activity and discriminated against him in violation of Section 6(1)(a) and (c) of the PLRA. The Examiner also concluded that the Borough violated Act 111 and Section 6(1)(a) and (e) of the PLRA by unilaterally removing the recliners from the firefighters' office, without first negotiating their removal with the IAFF.

The Borough excepts to the Examiner's conclusion that Konafel was a supervisor, and therefore the Borough could be held liable for his direction of Tomasak to sit in a broken

¹ The twentieth calendar day after issuance of the PDO fell on Sunday May 21, 2006, 34 Pa. Code 95.98(a), therefore the exceptions were timely filed the next business day, Monday, May 22, 2006. 34 Pa. Code 95.100(b).

chair. In this regard, the Borough contends that finding of Fact No. 9, that Konafel assigns tasks and "directs" the other firefighters, is unsupported in the record. Each Finding of Fact made by the hearing examiner must be supported by such relevant evidence in the record as a reasonable mind might accept as adequate to support that conclusion. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Upon review of the record, the Examiner's finding that Konafel directed the other firefighters is supported by substantial evidence. Specifically, Konafel testified that he previously had a problem with one part-time firefighter who was terminated from employment after he became confrontational when Konafel asked him to do some work. (N.T. 88-89). The Examiner's finding that Konafel directed the other firefighters, and thus was supervisory, is supported in the record and will be sustained.

As aptly noted in Pennsylvania State Troopers Association v. Commonwealth, Pennsylvania State Police, 30 PPER ¶30132 (Proposed Decision and Order, 1999),

[o]nly those Act 111 employes who meet the criteria set forth in FOP, Star Lodge No. 20 v. Commonwealth, PLRB, 104 Pa. Commonwealth Ct. 561, 522 A.2d 697 (1987), aff'd, 522 Pa. 149, 560 A.2d 145 (1989) are precluded from bargaining unit membership. Act 111 has no provision to keep supervisors out of the bargaining unit.

Pennsylvania State Police, 30 PPER at 287. Simply put, an employer cannot place an employe in the position of representing its interest and then, whenever convenient for the employer, simply disavow that employe the authority to do so after the fact. "An employer is responsible for the acts of its supervisor when he commits an unfair practice." Id. (quoting Duquesne City School District, 3 PPER 351b at 352 (Nisi Decision and Order, 1973)).

The Borough also excepts to Finding of Fact 12, that the Borough authorized Tomasak to acquire "La-Z-Boy recliners". The Borough asserts that the record does not support such a finding. The record reflects that Konafel told Tomasak "that council said for us to get whatever we want in the room in the way of chairs." (N.T. 37). In response to Tomasak's suggestion of reclining chairs, Konafel responded, "Council said get whatever you want to get." (N.T. 37). Tomasak installed the recliners in September, where they remained in full view of, and for use by, the Borough council, until removed three months later. Indeed, the Examiner's conclusion is indistinguishable from that reached by the Board in Pennsylvania Labor Relations Board v. City of Reading, 13 PPER ¶13105 (Final Order, 1982). In City of Reading, the city provided funds to its volunteer fire companies, who in turn used that money to purchase bed linens for the city's paid firefighters. The Board noted that the city had acquiesced to the volunteer fire companies' use of the money to supply bed linens, and found an unfair labor practice where the city directed the volunteer fire companies to discontinue providing free bed linens to paid firefighters. Similarly here, Council's direction to the firemen to "get whatever they want", coupled with the period of acquiescence in the recliners following their installation, leads to the Examiner's reasonable conclusion that Borough council had authorized and acquiesced to use of the recliners for the firefighters' office.

The Borough next excepts to the conclusion that recliners for use by the firefighters at the station house was a mandatory subject of bargaining, therefore the Borough's unilateral removal of them from the firefighters' office was not an unfair labor practice. It must first be noted that there is no *de minimus* standard for negotiable matters under Pennsylvania's labor statutes, and "[i]f a matter constitutes a mandatory subject of bargaining, the Board will not embark on a second inquiry or substitute its judgment as to the alleged sufficiency, importance, triviality, or reasonableness of the matter at issue." Dormont Borough Police Association v. Dormont Borough, 32 PPER ¶32100 (Final Order, 2001), affirmed sub non, Dormant Borough v. Pennsylvania Labor Relations Board, 794 A.2d 402, 408 (Pa. Cmwlth. 2002).

To determine whether a particular subject matter is negotiable under Act 111, the Board applies a "rational relationship" test. Township of Upper Saucon v. Pennsylvania Labor Relations Board, 620 A.2d 71 (Pa. Cmwlth. 1993). An issue is deemed bargainable if it bears a rational relationship to the employe's terms and conditions of employment. Dormont Borough, *supra*. However, even though a subject may affect employe wages, hours or working conditions, employers are not required to bargain subjects where the employer's managerial concerns over the subject matter substantially outweigh the interests of the employes. Reading Fraternal Order of Police Lodge #9 v. City of Reading, 30 PPER ¶30121 (Final Order, 1999).

In rendering this analysis the Examiner found as fact "[t]hat the chairs were used by the firefighters while on duty, when their chores were completed ... [and] were positioned to

allow the firefighters to watch both the commercial television set and the closed circuit monitor for the prison cellblock." (F.F. 13). The Examiner also credits the Borough's testimony in finding "that the reason for the council's order removing the recliners was concern that the recliners were serving as an attraction for non-firefighters to congregate in the office." (F.F. 15). In balancing these findings, the Examiner concluded that

recliners are rationally related to the duties of the firefighters. When firefighters are not fighting fires, they spend the vast majority of their time in the station, either in the work bay or the office. When all their assigned chores are done, the firefighters are still required to remain in the fire station, prepared to respond to the next fire alarm. Waiting to respond to the next fire alarm is an inherent part of their duties.

* * *

The Borough removed the recliners because the council members believed they were an attraction for non-firefighters to gather in the offices, not because the firefighters' use of the recliners hampered the performance of their duties. The concern about visitors, certainly valid on its face, could have been satisfied by a simple, more narrowly tailored order to restrict visitors from loitering in the office. The Borough has not presented managerial concerns about the recliners that would substantially outweigh the firefighters' interests in having the recliners.

(PDO at 4). Further, the record does not show that the presence of more comfortable seating in the firefighters' office in any way detracted from the performance of the firemen's functions. Indeed, the provision of bed linens (City of Reading), lockers for storage of work and civilian gear, equipment and clothing allowances (Dormont Borough), and the like are working conditions and/or compensation matters appropriately within the scope of bargaining for public safety employes who are required to spend long hours at the station house prepared to timely respond to public safety emergencies.

The Borough's reliance on County of Allegheny, 13 PPER ¶13258 (Proposed Decision and Order, 1982) is misplaced, as the issue in that case involved the scope of bargaining for judicial employes under PERA² and Section 1620 of the County Code. The PDO in Allegheny County finds that many mandatory matters, well within the scope of collective bargaining for non-judicial employes, were excluded from negotiations between unions and county commissioners under Section 1620 of the County Code because of constitutional concerns over separation of powers. No such concerns exist on this record. Further, neither the employer nor union in County of Allegheny pursued the negotiability of posture-supporting chairs for court reporters beyond the proposed decision and order. Pennsylvania Labor Relations Board v. American Federation of State, County and Municipal Employees, District Council 84, 515 Pa. 23, 526 A.2d 769 (1987); see Fraternal Order of Police, Star Lodge 20 v. Pennsylvania Labor Relations Board, 522 A.2d 697 (Pa. Cmwlth. 1987), *affirmed* 522 Pa. 149, 560 A.2d 145 (1989) (Board is not bound by a hearing examiner decision).

Indeed, the Board has on many occasions previously recognized that employe comfort in the work environment is a recognized interest of the employes in terms and conditions of their employment. PSSU, Local 668 v. Commonwealth, Department of Public Welfare, 31 PPER ¶31,020 (Final Order, 1999). Accordingly, Tomasak's testimony that the recliner provided a place for him to relax after his chores were completed, while he was awaiting the next fire call, and attending the monitor for the cell block, satisfied the IAFF's burden of showing that the recliners were related to the firefighters' terms and conditions of employment.

With regard to the Borough's managerial interests, as aptly noted by the Examiner, the Borough provided no testimony or documentary evidence that it was the recliners that had interfered with the firefighter's performance of their duties or its managerial interests in directing the firefighters. To the contrary the Borough expressed only a concern that people were congregating in the firefighters' office. Moreover, while there

² Whether a matter is deemed negotiable under PERA is determined by a balancing of interests test as articulated in Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975).

was uncontradicted testimony (N.T. 98) that two residents had witnessed the recliners in the firefighters office (on election night 2004), there is no evidence from the Borough that firefighters were required as part of their duties to regularly interact directly with the public in the office, such that the appearance of the office and staff would be directly related to the employer's managerial concerns and substantially outweigh the employees' concerns. See Department of Public Welfare, supra. To the contrary, the Borough's concern was that too many people, firefighters and non-firefighters, were congregating in the office. Indeed, as recognized by the Examiner, the Borough's appropriate response pursuant to its managerial rights is to direct employees (and others) who have no duties or responsibilities in that office not to congregate / loiter there and for employees to perform their jobs at their work locations. There was no testimony or evidence of record presented by the Borough that firefighters' use of the recliners in the office interfered with the performance of the firefighters' duties. Accordingly, the Borough's exception to the Examiner's conclusion that it had violated Section 6(1)(a) and (e) of the PLRA by unilaterally removing the recliners from the firefighters' office is dismissed.

However, upon review of all matters of record, and in consideration of the Borough's exception to Finding of Fact 12, a modification of the Hearing Examiner's remedial relief is warranted. The PDO directs the Borough to offer to the union to purchase two new La-Z-Boy recliners. The evidence of record is that the Borough told the firemen to "get whatever they wanted", and the IAFF acquired two donated recliners. Even if the Borough allowed the IAFF to install donated recliners, there is no testimony or evidence that the Borough would have funded the acquisition of the recliners. The *status quo ante* for purposes of this case, then, is authorization for the IAFF to acquire two recliners through the donation process as previously done. This remedial relief is consistent with what the Board awarded in City of Reading, supra, where in a compliance proceeding, the Board recognized that its prior order did not direct the city, at its expense, to provide bed linens, but only to cease restricting volunteer companies from providing that benefit to the paid firefighters. Pennsylvania Labor Relations Board v. City of Reading, 14 PPER ¶14016 (Final Order, 1982). Similarly, the Borough, having previously permitted the firefighters discretion to install chairs, the Borough cannot prospectively deny the IAFF permission to restore the same or similar recliners in the firefighters office.

Accordingly, after a thorough review of the exceptions and all matters of record the Hearing Examiner did not err in finding that the Borough violated Section 6(1)(a), (c) and (e) of the PLRA, by discriminating against Tomasak and unilaterally removing the recliners from the firefighters' office, and accordingly the Borough's exceptions are dismissed in part. However, the Borough's exceptions are granted to the extent that the remedial relief will be amended accordingly to reflect restoration of the *status quo ante* through acquisition of donated reclining chairs by the IAFF.

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 Edwardsville Borough are hereby dismissed in part, and sustained in part, and the May 1, 2006 Proposed Decision and Order, be and hereby is made final as amended. The Board

HEREBY FURTHER ORDERS AND DIRECTS

Paragraph 4(a) of the Order on Page 7 of the May 1, 2006 Proposed Decision and Order, is hereby amended as follows to direct that the Borough:

Has ceased and desisted from preventing the Union from replacing the same or similar donated reclining chairs in the firefighters' office

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 fifteenth day of August, 2006. 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

INTERNATIONAL ASSOCIATION OF :
FIREFIGHTERS, LOCAL 840 :
 :
v. : Case No. PF-C-05-34-E
 :
EDWARDSVILLE BOROUGH :

AFFIDAVIT OF COMPLIANCE

Edwardsville Borough hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a), (c) and (e) of the PLRA and Act 111, that it has ceased and desisted from preventing the Union from replacing the same or similar donated chairs in the firefighters' office; that it has posted a copy of this final order and the proposed decision and order as directed and that it has served an executed copy of this affidavit on the International Association of Firefighters, Local 840 at its current address.

Signature/Date

Title

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

Signature of Notary Public