COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NORTH WALES BOROUGH POLICE DEPARTMENT	:	
	:	
v.	:	Case No. PF-C-06-107-E
	:	
NORTH WALES BOROUGH	:	

PROPOSED DECISION AND ORDER

A charge of unfair labor practices was filed with the Pennsylvania Labor Relations Board (Board) by the North Wales Police Department (Union) on July 3, 2006 alleging that North Wales Borough (Borough) violated Section 6(1)(a), (b), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111. On July 13, 2006, the Secretary of the Board issued a complaint and notice of hearing wherein a hearing was set for July 28, 2006, in Norristown, Pennsylvania. A hearing was held on that date during which the Union sought to amend its charge, necessitating another day of hearing, which was scheduled for August 8, 2006.

On August 2, 2006, the Union filed an amended charge alleging a violation of Section 6(1)(a) and (e) of the PLRA as read with Act 111.[1] On August 30, 2006, the Secretary of the Board issued an amended complaint. Another day of hearing was held on August 8, 2006. Both parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence on the two hearing dates. Both parties filed post-hearing briefs.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Borough is a political subdivision of the Commonwealth and an employer.

2. The Union is a labor organization.

3. The Borough enacted an Earned Income Tax (EIT), effective fiscal year 1994. The EIT required Borough residents and certain non-residents who work in the Borough to pay one percent of their income to the Borough. The first year after the EIT became effective the Borough generated approximately eight hundred fifty thousand dollars. In each succeeding year through July 2002, the Borough generated approximately one million dollars from the EIT. Consequently, the Borough was able to fund and complete major infrastructure improvement projects, replace worn-out equipment, and create well-funded capital improvement and reserve funds, while gradually decreasing property taxes and freezing its licensing and other fee schedules. As a direct result of these increased revenues, and a seventy-five thousand dollar grant from the federal government, the Borough increased the size of its police force by three full-time officers, to a total of six. The federal funding for the additional police officers was gradually reduced over three years until it stopped in 2005. (N.T. 240-244)[2].

4. Effective July 2002, North Penn School District began exercising its right to collect fifty percent of the income generated through the EIT. Consequently, the Borough's annual revenues decreased by approximately five hundred thousand dollars or thirty-five percent of its operating budget. To help compensate for that loss, the Borough has, *inter alia*, 1) increased its property taxes to the maximum level permitted

[1] The Borough waived the five-day notice requirement as set forth in Section 8(b) of the PLRA. 43 P.S. § 211.8(b).

[2] There are two volumes of transcripts from two days of hearing, July 28 and August 8, 2006. Despite being specifically requested to do so, the reporting company neglected to serially paginate the transcripts. All references in this proposed order are to the August 8 transcript, unless otherwise noted.

by law, 2) enacted an emergency services tax, 3) raised its licensing and other fees, and 4) declined to fill a position that opened in its public works department. In addition, the Borough has: reduced its general operating costs, excluding employee salary and benefits, by two percent in each Borough department; borrowed two hundred fifty thousand dollars against anticipated tax revenues; and expended reserve fund dollars on general operating costs. The Borough has also applied to have its administrative costs and operations audited by the Department of Economic and Community Development. This audit will evaluate how efficiently and economically the Borough's administration is operating. Further, several members of North Wales Borough Council have declined to accept a salary for their service on the Council. (N.T. 115, 186, 197, 198, 240-247, 320; Borough Exhibit 8).

5. Since 2002, the Borough's reserve fund has decreased from over one million dollars to approximately five hundred thousand dollars at the time of the hearing. The Borough manager anticipates that the fund will be wholly depleted by 2007. In 2006, the Borough provided its non-uniformed employees lower pay increases than they received in previous years and changed their health care plan, which resulted in increased doctor visit and prescription co-pays for the employees and significant cost savings for the Borough. The Borough's non-uniformed employees began contributing three percent of their health care premiums. The Borough repeatedly requested that the Union switch to cheaper insurance plans and contribute to their health insurance premiums, but the Union declined these requests. The refusal came as no surprise to the Borough Council, because they understood that any givebacks for items enumerated in the collective bargaining agreement had to be negotiated at the bargaining table. Council President Jocelyn Tenney testified that the Council anticipated the Union's refusal: "I think we just realized that was the job a union is supposed to do is to protect the interests, and that's what it did."." (N.T. 247-251, 254, 257, 258, 327, 328, 334; Union Exhibit 11).

6. The Borough and the Union were parties to a collective bargaining agreement that expired December 31, 2005. The parties initiated collective bargaining for a successor labor agreement in July 2005. Representatives from the Borough and the Union held numerous bargaining sessions from July 2005, through April 2006. Thereafter, bargaining occurred primarily through the exchange of e-mail. At many of the early negotiation sessions, the Borough's bargaining representatives informed the Union that the Borough was contemplating the lay-off of police officers. The Borough repeatedly reiterated the contingency that a police officer might be furloughed for economic reasons. (7/28 N.T. 17, 19; Union Exhibit 15, 16, 21-23, Borough Exhibit 1-6, 14).

7. The parties have bargained over and entered into a successor collective bargaining agreement on October 24, 2006. The contract, by its terms covers the calendar years 2006, 2007, 2008, and 2009. (Borough's "Motion to Dismiss for Mootness" filed November 7, 2006; Union's "Answer to Motion to Dismiss for Mootness" filed November 20, 2006).

8. In negotiations the parties discussed various issues, including several permissible subjects of bargaining. Specifically, the parties discussed the potential for officer furloughs, as well as possible early retirement incentives for then Officer Peter Paul and severance pay for Officer Lynn Custer. At different times in bargaining, both sides offered proposals that required the other to concede on non-mandatory subjects of bargaining. One Borough proposal included the Union's withdrawal of outstanding unfair labor practice charges, and the Union at some point hinged its acceptance of contract proposals on the Borough's acquiescence to no-layoff provisions and other discrete issues regarding Officers Custer and Paul. (7/8 N.T. 81, 85; 8/8 N.T. 281, 283; Union Exhibit 15, Borough Exhibit 1-4, 14).

9. As a cost reduction, the Borough sought to change the health plan for only its non-uniformed employes by asking its broker to have Independence Blue Cross change coverage to a "flex plan" effective January 1, 2005. Because of an internal error, Independence Blue Cross changed both the non-uniformed and uniformed employes to the flex plan. Independence Blue Cross corrected the error and apologized to the Borough. No officers

suffered any pecuniary loss due to this error, and the police were reinstated to their original coverage. (N.T. 94, 262-264; Borough Exhibit 11, 12).

10. At least since 2004, the Borough has employed one non-bargaining unit, part-time officer. From January 1, 2004, to July 31, 2004 that part-time officer worked 412.5 hours. For the same period in 2005, he worked 189.5 hours; and for the same period in 2006 he worked 305.25 hours. (N.T. 284-286; Borough Exhibit 15, 16).

DISCUSSION

In the original charge the Union alleged the Borough violated Section 6(1)(a), (b), (c) and (e) of the PLRA.

The Section 6(1)(a) portion of the charge is dismissed because the Union did not prove a prima facie case.

The Section 6(1)(b) portion of the charge was abandoned by the Union in its brief. (Union brief at 34).[3] Moreover, even if the Union had not abandoned this portion of the charge, it has not proved a prima facie case.

The Section 6(1)(c) portion of the charge is dismissed because it was abandoned by the Union in its brief. (See footnote 2). Moreover, even if the Union had preserved this portion of its charge it did not prove that the Borough was motivated by either union animus or acted in retaliation for employes' participation in protected activities.

The Section 6(1)(e) portion of the original charge is rooted in factual allegations concerning the Borough's bargaining tactics during the negotiation process. This portion of the charge is moot because the parties have signed a successor agreement.

In its amended charge the Union asserts that the Borough violated Section 6(1)(a) and (e) of the PLRA when it gave a portion of the patrol shifts the laid-off, full-time officer would have worked, to the part-time, non-bargaining unit officer. The part-time officer worked fewer hours than in a previous year and, therefore, the identifiable proportion of the shared duties has not changed. Since there was no change in the proportion of shared duties, this allegation is also dismissed.

In its brief, the Union first argues that the Borough violated the PLRA by transferring bargaining unit work to a non-bargaining unit employe, i.e. the part-time officer. According to the Union the Borough violated the PLRA because "the police department was required to make use of its part-time officer as a full-time officer who assumed the schedule and hours of a discharged bargaining unit member, including the assignment of some overtime." (Union brief at 22).

The applicable legal precedent for shared work is set forth in AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992) where the Court opined that an employer commits an unfair labor practice when it varies the extent to which members and non-members of the bargaining unit have performed the same work. The part-time officer here, for the applicable period in 2006, worked 305.25 hours. For the same period in 2005 he worked 189.5 hours, and in 2004 he worked 412.5 hours. Given this varying history of work allotted outside the unit, it cannot be said that the Borough has increased the amount of work (i.e. number of hours) that is performed by non-bargaining unit members. The work in question is patrol duty. The extent to which that work is divided between unit and non-unit employes is measured in total hours worked by each group.

The Union argues that the reason for the vacancy in the specific shifts the part-timer now fills is the factor which determines a change in the distribution of work between unit and non-unit employes. The Union further asserts that since the part-time officer now works shifts previously worked by the laid-off, full-time officer, the

[3] The Union submitted one brief for both this case and the companion case at No. PF-C-06-8-E. One of the Union's submitted conclusions of law is "[t]hat the Borough has committed unfair labor practices within the meaning of Section 6(1)(a) and (e) of the PLRA." (Union brief at 34).

distribution of work has changed. Using that criterion, however, leads to the analytical quagmire of constantly trying to predict whether a full-time officer could have worked the hours worked by the part-timer, and if the full-time officer was not working those hours, why wasn't he working? Such an analysis does not really answer the query of whether a greater portion of the work is being given to non-unit officers than before. It is the amount of work changing hands rather than the reason for the change that determines a violation in the shared work situation. Insofar as the Union charges the Borough with violating Section 6(1)(a) and (e) of the PLRA because the part-time officer was assigned some shifts previously worked by the laid-off officer, the charge is dismissed.

Insofar as the Union also argues that the Borough's offer of part-time hours to the newly laid-off, full-time officers violates the PLRA, the same result applies. Only if, and when, the hours worked by part-time officers materially exceeded the number of hours historically worked by part-time officers could there be a violation of the PLRA. It is not the number of part-time officers that determines the violation, but rather whether there has been a change in the distribution of the work, as measured by total hours worked by each group.

The Union next argues that the Borough's "furlough of two (2) police officers was done in bad faith and for purposes other than economic." (Union brief at 24). Despite this argument heading, the Union, in its brief, only asks the Board to find violations of Section 6(1)(a) and (e) of the PLRA. Consequently, this allegation is analyzed as an asserted independent 6(1)(a) violation.

An employer violates Section 6(1)(a) of the PLRA where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable bargaining unit employe, regardless of whether any one particular employe was actually coerced. See Pennsylvania State Corrections Officers Association v. Pennsylvania, Commonwealth of (Department of Corrections, Pittsburgh SCI), 35 PPER 97 (Final Order, 2004). The analysis under Section 6(1)(a) of whether an employer's conduct would tend to coerce employes is objective, and does not involve a question of the employer's motives.[4] Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transportation Authority, 17 PPER P.17038 (Final Order, 1986).

Looking at the totality of the circumstances includes considering all the evidence, not just the Borough's reducing the police complement by two officers. The record shows that the Borough increased property taxes to the statutory maximum; enacted an emergency services tax; raised its fee schedules; replaced a deceased full-time public works employe with two part-time employes; reduced its operating costs by two percent in each department; requested that the Department of Economic and Community Development conduct an audit of its operations with an eye toward any further possible savings; provided its non-uniformed employes with a 1.5 percent raise instead of the historical 2.4 percent raise and; changed the non-uniformed employes health plan to one less expensive for the Borough, and instituted a 3% employe contribution. Additionally, some Borough council members forwent their council salaries and the Borough stopped contributions to the reserve fund.

Given those other measures it is unlikely that the Borough's furlough of two officers would tend to coerce or interfere with the protected activities of a reasonable bargaining unit employe.

Additionally, even if the Borough had preserved its alleged violation by the Borough of Section 6(1)(c), it has not proved it. For the Union to prevail it would have to prove that the Borough reduced the budget 2% across the board, gave the non-uniformed employes a smaller raise, had those employes contribute a co-pay for insurance and had several council members forgo their stipends, all just to mask the Borough's union animus because the police refused mid-contract givebacks, and engaged in serious bargaining.

[4] In its brief the Union argues the bad motives of the Borough in reducing the police compliment by two officers. Such evidence is not relevant to the sections of the PLRA pursued by the Union in this case.

Next the Union, in its brief, urges that the Borough "has failed to collective bargain [sic] in good faith and has interfered with and coerced bargaining unit members in the exercise of their protected rights." (Union brief at 29). From this wording it appears that the Union is charging the Borough with an independent violation of Section 6(1)(a), along with a violation of Section 6(1)(e). For the reasons that follow, this portion of the charge is dismissed as moot.

The Union sets forth in its brief a litany of transgressions committed by the Borough which the Union asserts violate Section 6(1)(e) of the PLRA. The alleged misconduct attributed by the Union to the Borough is rendered moot by the parties' subsequently negotiated successor collective bargaining agreement.[5] See United Transportation Union Local 1594 v. SEPTA, 37 PPER 119 (Final Order, 2006)(charges that involve bargaining tactics which do not result in affirmative relief to employes, but rather simply cease and desist orders, are mooted by successor agreement); AFSCME District Council 33 and AFSCME Local 159 v. City of Philadelphia, 36 PPER 158 (Final Order, 2005)(same). Since the Union's alleged violations would merely result in a cease and desist order, they are moot.

One final issue must be addressed. On October 26, 2006, the Union filed a letter motion to reopen the record and admit after acquired evidence.[6] The evidence the Union seeks to admit is an independent auditor's report for 2005 that the Union asserts was dated August 11, 2006. According to the Union, this report came into its possession on October 13, 2006.

In support of its motion, the Union argues that the report is trustworthy because it was done by an independent auditor; that the audit covers the very time period in question; that the audit supports the Union's view of the case; that the audit may affect the credibility of some witnesses; and finally, that the audit, submitted along with additional briefs by the parties, would not delay the process.

The legal criteria for allowing after acquired evidence into the record are fairly straightforward. Such evidence is allowed where that evidence is new; could not have been obtained with due diligence beforehand; is relevant and non-cumulative; is not for the purpose of impeachment; and must be likely to compel a different result. In the Matter of the Employes of Pottstown Borough, 33 PPER ¶ 33192 (Final Order, 2002). Moreover, all five elements of the conjunctive standard must be met. Id.

The Union's averment that it did not receive this audit until October of 2006 does not establish the contents of this document as new and not obtainable beforehand by the Union. The Borough's entire budget was admitted at the hearing in this case. To the extent that the independent audit is an examination of those figures, the Union was free to have its own audit performed. To the extent the audit will affect witness credibility, it is of no moment. Since the only section of the PLRA which the Union preserved in its brief was Section 6(1)(a) and (e), the introduction of the audit is unlikely to compel a different result. Clearly then, the Union has not established the five mandatory criteria in its pleading. Therefore, the motion is denied.

The charge of unfair labor practices alleging violations, by the Borough, of Section 6(1)(a), (b), (c) and (e) of the PLRA is dismissed in its entirety. The Union's motion to re-open the record is denied, and the Borough's motion to dismiss for mootness the Section 6(1)(e) portion of the charge is granted.

CONCLUSIONS

[5] The Borough filed a motion to dismiss the 6(1)(e) portion of this charge on November 2, 2006. That motion averred that the parties have reached a successor agreement. That agreement was attached to the motion. The Union's responsive pleading, filed on November 20, 2006, admitted that a new collective bargaining had, indeed been reached, and that the agreement was as attached to the Borough's motion.

[6] While the motion appears only to argue that it is applicable to this case, the caption also includes case No. Pf-C-06-08-E. The Borough's response is captioned with only this case number.

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Borough is an employer within the meaning of section 3(c) of the PLRA as read with Act 111.

2. The Union is a labor organization within the meaning of section 3(f) of the PLRA as read with Act 111.

3. The Board has jurisdiction over the parties.

4. The Borough has not committed unfair labor practices within the meaning of sections 6(1)(a), (b), (c) and (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code §95.98(a) within twenty (20) days of the date hereof, this Decision and Order shall become absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania this twenty-second day of December, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner