

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :  
FORT PITT LODGE 1 :  
 :  
v. : Case No. PF-C-05-41-W  
 :  
CITY OF PITTSBURGH :

**PROPOSED DECISION AND ORDER**

On March 3, 2005, the Fraternal Order of Police, Fort Pitt Lodge # 1 (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the City of Pittsburgh (City) violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally changing a past practice that police officers would receive two A/P days for each month they worked as a field training officer (FTO). On May 27, 2005, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on July 15, 2005, if conciliation did not resolve the charge by then. The hearing examiner thereafter continued the hearing to give the conciliator additional time to meet with the parties. On May 11, 2006, the parties submitted stipulated facts. On June 12, 2006, the FOP filed a brief. On June 16, 2006, the City filed a brief.

The hearing examiner, on the basis of the stipulated facts, makes the following:

FINDINGS OF FACT

1. The FOP is the exclusive representative of a bargaining unit that includes police officers employed by the City. (Stipulations 1-2)
2. In the 1980's, the City began using experienced police officers as FTOs to provide on the job training and supervision to probationary police officers. The City paid FTOs four hours of overtime pay for each two-week period they worked as a FTO. (Stipulations 3-7, 9)
3. In 1993 and 1995, the City paid FTOs "no incentive or reward of any kind." (Stipulation 10)
4. In 1997, the City's chief of police (Robert W. McNeilly) gave permission to the commander of the City's training academy (Regina McDonald) to award FTOs up to two A/P days for each 30-day period they worked as a FTO. (Stipulation 17)
5. An A/P day is a paid day off from work. (Stipulation 18)
6. In 1997, 2000 and 2001, FTOs "generally" received two A/P days for each 30-day period they worked as a FTO. (Stipulation 22)
7. In 2001, a FTO (Roland Livermore) received one A/P day for working as a FTO for one month, and a FTO (Robert Collasius) received two A/P days for working as a FTO for 2.5 weeks. (Stipulations 23-24)
8. By email dated January 24, 2005, Sergeant Michael Rieber advised FTOs "that officers who are acting as FTOs will be given one A/P day per month of Field Training." (Stipulation 31)

DISCUSSION

The FOP has charged that the City committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA by unilaterally changing a past practice that police officers would receive two A/P days for each month they worked as a field training officer (FTO). According to the FOP, the unfair labor practices occurred on January 24,

2005, when the City informed FTOs that they would only be given one A/P day per month of field training. The FOP would have the Board find that the City was under an obligation to bargain before it so informed the FTOs because the provision of A/P days for working as a FTO is a mandatory subject of bargaining.

The City contends that the charge should be dismissed as untimely filed because any change in past practice occurred more than two years before the FOP filed the charge. The City also contends that the charge should be dismissed in any event because there was no past practice that FTO's would be given two A/P days for each month they worked as a FTO and because the provision of A/P days for working as a FTO is a managerial prerogative.

In order to be timely, a charge must be filed within six weeks of when the charging party knew or should have known of the unfair labor practices charged. Dormont Borough v. PLRB, 794 A.2d 402 (Pa. Cmwlth. 2002). The FOP has charged that the City committed unfair labor practices as of January 24, 2005, when it informed FTOs that they would only be given one A/P day per month of field training. The record shows that the charge was filed on March 3, 2005, which is less than six weeks thereafter. Accordingly, the FOP timely filed the charge within six weeks of the unfair labor practices charged.

The City contends that the charge is untimely filed because any change in past practice occurred more than two years before the FOP filed the charge. The City points out that on January 3, 2003, its chief of police (Robert W. McNeilly) issued an order directing as follows:

"Commanders and Chiefs will authorize A/P days only when used to change an officer's scheduling in order to comply with the collective bargaining agreement requiring an officer to have 16/64 hours off duty between shifts/pass days. Only the Chief of Police and the Deputy Chief of Police will authorize the award of A/P days for any other reason."

(Stipulation 26). According to the City, the six-week limitation period for the filing of the charge began to run at that time. The record does not show, however, that the FOP knew or should have known that Chief McNeilly ever issued the order. Thus, the six-week limitation period for the filing of the charge did not begin to run on January 3, 2003. The City's contention is, therefore, without merit.

An employer commits unfair practices under sections 6(1)(a) and 6(1)(c) if it unilaterally changes a mandatory subject of bargaining, City of Jeanette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006), but not if it unilaterally changes a managerial prerogative. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002). As set forth in section 1 of Act 111, police officers "have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation[.]" As set forth in findings of fact 4-8, the record shows that the City awarded A/P days to FTOs as compensation for working as a FTO. As a matter of compensation, then, the provision of A/P days for working as a FTO is a mandatory subject of bargaining under the express terms of section 1 of Act 111. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order 2002)(a sick leave donation policy provided compensation for police officers and therefore was a mandatory subject of bargaining under the express terms of section 1 of Act 111); City of Wilkes-Barre, 29 PPER ¶ 29175 (Proposed Decision and Order 1998)(a compensatory leave policy provided compensation for police officers and therefore was a mandatory subject of bargaining under the express terms of section 1 of Act 111). Thus, if the City unilaterally changed a past practice when it informed FTOs that they would only be given one A/P day per month of field training, then the City committed unfair labor practices as charged.

The City contends that the provision of A/P days for working as a FTO is a managerial prerogative because the cost of providing A/P days for working as a FTO has a substantial impact on its ability to ensure public safety. The City points out that a shortage of police officers resulting from its dire financial condition already has adversely affected its ability to ensure public safety (stipulations 25, 27-28, 32-35). The City posits that the balancing test set forth in Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa.Cmwlth. 1991), to determine whether a matter is a mandatory subject of

bargaining or a managerial prerogative should be applied to find that the provision of A/P days for working as a FTO is a managerial prerogative under the circumstances because its dire financial condition will only get worse if it has to provide FTOs with two A/P days for working as a FTO. The balancing test set forth in Township of Upper Saucon has no application here, however, because section 1 of Act 111 expressly provides that police officers have the right to bargain over their compensation and because an A/P day is compensation for working as a FTO. The City's contention is, therefore, without merit.

Moreover, even if the balancing test set forth in Township of Upper Saucon were to be applied here, the result would be the same. Under that test, a matter is a managerial prerogative if the employer's interest in the matter substantially outweighs the employees' interest in the matter. A matter that fundamentally relates to the level of services an employer provides is a managerial prerogative under that test, City of Philadelphia v. PLRB, 588 A.2d 67 (Pa. Cmwlth. 1991), appeal denied, 528 Pa. 632, 598 A.2d 285 (1991), but the compensation of employees is not such a matter regardless of the tangential effect the costs involved may have on the level of services the employer provides. As the Board explained in City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order 2002):

"While recognizing that cost savings are indeed a legitimate concern, the Board and the Commonwealth Court have held that financial concerns are not core managerial functions that would outweigh actions rationally related to employees' terms and conditions of employment. Plumstead [Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998)]. Under the City's claim, core Section 1 matters such as wages, which are clearly negotiable, could be unilaterally altered by the public employer merely because the employer was motivated to save money."

33 PPER at 193. Thus, as a matter of compensation, the provision of A/P days for working as a FTO is a mandatory subject of bargaining under the balancing test set forth in Township of Upper Saucon regardless of the tangential effect the costs involved may have on the level of services the City provides.

In order to prove its charge, however, the FOP had to present substantial evidence that the City changed a past practice involving the provision of A/P days for working as a FTO. In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the court defined a past practice as follows:

"A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the [parties] involved as the *normal* and *proper* response to the underlying circumstances presented."

476 Pa. at 34 n. 12, 381 A.2d at 852 n. 12 (emphasis in original). As set forth in findings of fact 2-3 and 6-8, the City paid FTOs four hours of overtime pay for each two-week period they worked as a FTO in the 1980's, paid FTOs "no incentive or reward of any kind" in 1993 and 1995, "generally" provided FTOs with two A/P days for each 30-day period they worked as a FTO in 1997, 2000 and 2001, provided one FTO with one A/P day for working as a FTO for one month in 2001 and provided another FTO with two A/P days for working as a FTO for 2.5 weeks in 2001. The record shows, then, that the City has not consistently provided FTOs with two A/P days for each month they worked as a FTO. Thus, no past practice of providing FTOs with two A/P days for each month they worked as a FTO is apparent on the record. Clarks Summit Borough, 29 PPER ¶ 29216 (Final Order 1998)(no past practice found where the employer did not consistently increase the pay of employees upon the completion of a probationary period); Pennsylvania State Police, Bureau of Liquor Control Enforcement, 24 PPER ¶ 24171 (Final Order 1993)(no past practice found where the employer did not consistently follow seniority for the selection of vacation periods). Accordingly, the charge must be dismissed for that reason alone.

The FOP contends that in deciding whether or not there was a past practice of providing FTOs with two A/P days for each month they worked as a FTO the Board should focus on what happened since 1997 and ignore whatever happened before 1997. The FOP points out that the City only formalized its FTO program in 1997 when it entered into a federal consent decree requiring it to "encourage highly qualified candidates to apply for instructor and FTO positions" (stipulations 11-12). The FOP also cites City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order 2002), for the proposition that a past practice may be found even though the practice occurred infrequently in the past. Under the test set forth in County of Allegheny, supra, however, whatever happened before 1997 is relevant to the determination of whether or not there was a past practice of providing FTOs with two A/P days for each month they worked as a FTO. The FOP's contention is, therefore, without merit.

Moreover, even if the Board were to ignore what happened before 1997, the result would be the same. As noted above, the City did not provide all FTOs with two A/P days for each month they worked as a FTO in 2001, so no past practice of providing FTOs with two A/P days for each month they worked as a FTO may be found based on what happened after 1997.

In order to prove its charge, the FOP also had to present substantial evidence that the City acted unilaterally. The record does not show that to be the case, however. Accordingly, the charge must be dismissed for that reason as well. City of Philadelphia, 23 PPER ¶ 23152 (Final Order 1992)(unilateral change charge dismissed where there was no showing that the employer acted unilaterally).

#### CONCLUSIONS

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

1. The City is an employer under section 3(c) of the PLRA.
2. The FOP is a labor organization under section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties.
4. The City has not committed unfair labor practices under sections 6(1)(a) and 6(1)(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 complaint is rescinded and the charge dismissed.

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirtieth day of June 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

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June 30, 2006

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CITY OF PITTSBURGH  
Case No. PF-C-05-41-W

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE  
Hearing Examiner

Enclosure

cc: City of Pittsburgh  
Pittsburgh Regional Office