

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

The North Wales Borough Police Department (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on October 15, 2007 challenging a Proposed Decision and Order (PDO) issued on September 24, 2007.¹ The September 24, 2007 PDO was issued after the Board remanded the case to the Hearing Examiner for receipt of additional evidence following issuance of the initial PDO on December 23, 2006. In the PDO, the Hearing Examiner dismissed the Union's Charge of Unfair Labor Practices filed against North Wales Borough (Borough) for alleged violations of Act 111 and Section 6(1)(a), (b), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA). The Borough filed a timely response to the Union's exceptions on November 5, 2007. After a thorough review of the record, the Board makes the following

ADDITIONAL FINDINGS OF FACT

14. While the negotiations for the successor agreement were ongoing, the Borough furloughed Officers Lynn Custer and Christopher DiPiano on June 14, 2006. Both DiPiano and Custer declined the Borough's offers of part-time non-bargaining unit employment. Officer DiPiano was recalled as a full-time bargaining unit employe with no break in service or loss of pay due to the concurrent retirement of Officer Peter Paul. (Union Exhibits 3,4, 5 and 6; 7/28/06 N.T. 67-68, 105; 8/8/06 N.T. 54-57).

15. Following the furloughs of June 14, 2006, Chief Barry Hackert began scheduling the part-time, non-bargaining unit police officer, James Almo, for shifts that would have otherwise been covered by furloughed bargaining unit police officers. (8/8/06 N.T. 73-75).

16. From June 14, 2006 to July 31, 2006, Officer Almo worked 191.75 hours. During the same period in 2004 and 2005, Officer Almo worked 141 hours and 74.5 hours respectively. (Borough Exhibits 15 and 16; Union Exhibits 36 and 37).

DISCUSSION

The Union's Charge of Unfair Labor Practices, as amended, asserts that the Borough violated Act 111 and Section 6(1)(a), (b), (c) and (e) of the PLRA. The Union alleges that the Borough unlawfully furloughed two bargaining unit members and used a non-unit part-time officer to perform the bargaining unit's work. The Hearing Examiner's Findings of Fact, as augmented herein, are summarized as follows.

Since 2002, the Borough has suffered a substantial decrease in Earned Income Tax revenues and has taken several measures over the years to reduce its operating deficit.² One of those measures was to change the health care plan for its non-uniformed employes

¹ The Union's exceptions are timely because the twentieth day after issuance of the PDO, October 14, 2007, was a Sunday and is excluded from the twenty-day period for filing exceptions. 34 Pa. Code §95.100(b).

² The Hearing Examiner's uncontested finding notes that:

To help compensate for that loss, the Borough has, *inter alia*, 1) increased its property taxes to the maximum level permitted 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. (Finding of Fact 4).

effective January 1, 2005. However, due to an error by Independence Blue Cross, bargaining unit members had their coverage changed along with the non-uniformed employees. The error was promptly brought to the attention of Independence Blue Cross, which apologized and remedied its error, without any bargaining unit member suffering a loss because of the mistake. Additionally, in 2005, the Borough was hampered in its efforts to reduce its operating deficit because the federal grant that it had been receiving since 2002 and used to increase its police force to six full-time and one part-time officer was discontinued.

In July 2005, the Borough and the Union commenced negotiations for a successor contract to the collective bargaining agreement that was set to expire December 31, 2005. During the negotiations, the Borough informed the Union that it was contemplating laying off police officers due to its fiscal constraints. The parties discussed the potential lay-offs, as well as proposals for early retirement for Officer Paul and severance pay for the least senior officer, Custer. Other proposals placed on the bargaining table included the Union's withdrawal of then-pending unfair labor practice charges, as well as a proposal by the Union for a no-layoff clause in the successor agreement. The negotiations for the successor agreement were ongoing when the Borough furloughed Officers Custer and DiPiano from their full-time positions on June 14, 2006. Immediately following their furlough, both DiPiano and Custer were offered part-time employment by the Borough, which offer they declined. Officer DiPiano was recalled as a full-time officer, with no break in service or loss of pay, due to the retirement of Officer Paul. To compensate for the loss in police coverage, Chief Hackert began assigning the part-time non-bargaining unit officer to cover shifts left vacant by the furlough of Officer Custer and retirement of Officer Paul. On October 24, 2006, the Borough and the Union entered into a successor collective bargaining agreement for the years 2006 through 2009.

Following hearings on July 28, and August 8, 2006, the parties submitted post-hearing briefs. Thereafter, on October 26, 2006 the Union requested that the record be reopened for submission of an independent audit dated August 11, 2006. On November 7, 2006, the Borough filed a Motion to Dismiss for Mootness because the parties entered into a successor collective bargaining agreement on October 24, 2006.³

The Hearing Examiner issued the initial PDO on December 23, 2006. With regard to the parties' post-hearing motions, the Hearing Examiner noted that any claims under Section 6(1)(e) surrounding the negotiations were rendered moot by the parties' execution of the successor collective bargaining agreement. The Hearing Examiner also determined that the Union's desire to submit the August 11, 2006 audit did not satisfy the Board's requirements for reopening the record. The Hearing Examiner also concluded that the Union failed to establish that the amount of the part-time officer's work substantially increased, and thus there was no transfer of the bargaining unit work previously performed by the furloughed full-time police officers in violation of Section 6(1)(e) of the PLRA. The Examiner further credited the Borough's assertion that in furloughing the full-time officers, it was legitimately motivated by its economic concerns at the time. Thus, although finding the Section 6(1)(c) claim waived by the Union, the Hearing Examiner found no basis in the record for inferring an unlawful discriminatory motive, nor for finding interference with employees' protected rights with respect to the furloughs. Concluding that the Borough committed no unfair labor practice in its dealings with the Union, the Examiner dismissed the Union's Amended Charge of Unfair Practices.⁴

In its January 11, 2007 exceptions to the December 23, 2006 PDO, the Union argued, *inter alia*, that the Hearing Examiner erred in refusing to reopen the record for the submission of the August 11, 2006 audit performed at the behest of the Borough. In an Order Directing Remand to the Hearing Examiner for Further Proceedings issued on March 20, 2007, the Board found that the Union, in fact, did not waive its claims of discrimination under Section 6(1)(c) as held by the Hearing Examiner. The Board further noted that the request to submit the audit was made prior to the Hearing Examiner's rendering a decision on the merits, and was being proffered as evidence of pretext and

³ On November 20, 2006, the Union filed an Answer to the Borough's motion.

⁴ The Section 6(1)(b) claim was withdrawn by the Union.

discriminatory motive, which would be relevant to a decision on the Union's claims under Section 6(1)(c) of the PLRA. The Board sustained the Union's exception on this issue and granted a remand for submission and consideration of the August 11, 2006 audit.⁵

A hearing on the remand was held on August 10, 2007, during which the Union introduced the August 11, 2006 audit performed by the firm of Major and Masters, which had audited the Borough's finances for fiscal year 2005. The Borough presented the testimony of the auditor, Linda Major. Based upon the evidence presented, the Hearing Examiner found that Ms. Major, by utilizing an accepted modified accrual method of accounting, concluded that the Borough "had a very bad year" in 2005, during which Borough expenditures exceeded revenues by over six hundred thousand dollars. Given the findings of Ms. Major regarding the Borough's financial condition in 2005, the Hearing Examiner found no evidence that the Borough furloughed police officers for other than lawful and legitimate business reasons. Finding no evidence of unlawful union animus, the Hearing Examiner concluded in the September 24, 2007 PDO that the Borough did not violate Section 6(1)(a), (b), (c) and (e) of the PLRA.

In the Union's October 15, 2007 exceptions, the Union reasserts its argument that the Hearing Examiner erred in failing to permit the testimony of Donna Mengel (a local businesswoman) regarding her analysis of the December 13, 2005 and February 14, 2006 budgets prepared by the Borough for fiscal year 2006. However, this exception was fully discussed and dismissed in the Board's March 20, 2007 Remand Order. The Board herein reaffirms its holding that Ms. Mengel's proffered testimony about the December 13, 2005 and February 14, 2006 budgets would be merely cumulative and irrelevant because the budgets themselves were made part of the record. As such, the Hearing Examiner did not abuse his discretion in disallowing Ms. Mengel's testimony, and the Union's exception thereto is again dismissed.

The Union next argues that the Hearing Examiner ignored uncontradicted evidence in the record, which the Union asserts supports its unfair labor practice claims. A Board hearing examiner need not summarize all of the evidence presented, but must make the necessary findings of fact which are relevant to the conclusions reached in the proposed decision and order. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). In rendering the necessary findings, it is the function of the hearing examiner to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). Upon review of the exceptions and record, the Union's proffered facts are either contradicted by other competent evidence found credible by the Hearing Examiner or are irrelevant to the alleged unfair labor practices.

The Union avers that the change to the health coverage for police officers was not an inadvertent mistake by Independence Blue Cross, and that the Hearing Examiner should have taken note that the Borough changed the police officer's dental coverage. However, the alleged change in dental coverage was not charged as an unfair labor practice by the Union. Moreover, the record is replete with substantial evidence supporting the Hearing Examiner's finding that the change to the police officers' health care coverage was indeed an error by Independence Blue Cross that was corrected without any bargaining union member's being adversely affected.

The Union also claims that the Hearing Examiner should have noted that the Borough announced publicly that the Union had refused to agree to re-open the existing collective bargaining agreement to negotiate the changes in the health care plan. The Union proffers that this fact evidences that the actions of the Borough surrounding the furlough of the full-time officers were in retaliation for the Union's protected activity.

⁵ The Borough asserts in its response to the exceptions that the Board erred initially in reopening the record and remanding the case to the Hearing Examiner "without finding that the evidence [the Union] sought to introduce would likely support a different result than that reached by the Hearing Examiner." (Response to Exceptions at 8). However, the Board was not reviewing a request to introduce evidence discovered after a proposed decision and order was issued. Rather, the issue before the Board was whether the Hearing Examiner properly excluded evidence that the Union sought to introduce before the Hearing Examiner rendered a decision.

However, the Hearing Examiner credited the Borough's testimony that the Union's refusal to reopen the health care plan was not the reason for the furlough of the officers, and that the Union's negative response to its request to reopen talks was expected. (Notes of Testimony August 8, 2006 at 164, 169 and 257). Indeed, in Finding of Fact 5, the Hearing Examiner expressly relied on the testimony of Borough Council President Jocelyn Tenney who testified that Borough Council expected the Union to refuse to reopen discussions on health care because "we just realized that ... was the job a union is supposed to do is to protect the interests, and that's what it did." (Notes of Testimony August 8, 2006 at 327). The Borough witnesses testified that the reason for the furlough of the police officers was economic, and the Hearing Examiner credited their testimony. We find no compelling reason to reexamine the Hearing Examiner's decision to credit the Borough's testimony that the furloughs were motivated by economic concerns, and not by union animus. Mt. Lebanon School District, supra.

The Union further takes issue with the Hearing Examiner's failure to note alleged inconsistencies in the Borough budget that the Union claims refutes the Borough's claims of fiscal woes. For instance, the Union points out that in November 2005, the Borough Manager wrote an editorial to the press stating that the Borough had in excess of one million dollars in reserve. The Union also notes that the Borough spent 1.7 million dollars to renovate Borough Hall. The Union claims that the Borough has a history of failing to collect taxes, and failed to adopt and impose new taxes to generate revenue. Additionally, the Union argues that the Borough budget understates revenues, and artificially inflates the expenses for the police department. In sum, the Union claims that the Borough could have avoided the furloughs of bargaining unit police officers.

While the Union believes that the Borough could have taken other action to avoid the furloughs, here the Borough offered substantial credible testimony that the furloughs were imposed because of its fiscal constraints and were not motivated by union animus. The record reveals that the Borough had saved money for years in a separate account, and obtained a grant, to be used exclusively for building renovations so that the Borough Hall could be brought into compliance with the building code. While the Borough did have nearly one million dollars in its reserve fund in or around November 2005, after its earned income tax revenues declined, it expended reserve funds on general operating costs to the point where it had approximately five hundred thousand dollars remaining at the time of the hearing in August 2006 and expected the reserve fund to be totally depleted by 2007. The Hearing Examiner noted that in addition to expending the reserve fund, to further compensate for the substantial loss in earned income tax revenue, the Borough "1) increased its property taxes to the maximum level permitted 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." (Finding of Fact 4). The Hearing Examiner's findings support the conclusion that the Borough's motive for the furloughs was economic, as opposed to union animus.

As regards the Borough's alleged discriminatory motive for the furloughs, the Union claimed that the August 11, 2006 audit of the Borough's financial condition for 2005 would show that the Borough's asserted economic reasons were mere pretext for unlawful union animus. The Hearing Examiner found, however, that the audit revealed that the Borough was actually in financial constraints with an operating deficit of \$600,000.00 in fiscal year 2005. The Hearing Examiner's finding is supported by both the audit and auditor's testimony. Contrary to the Union's claims, the August 11, 2006 audit only confirmed the reasonableness and credibility of the Borough's claimed financial status in 2005 as the basis for the police officers' furloughs. Accordingly, on this record, the Union has not established that the Borough's asserted economic reasons were a pretext for an unlawful discriminatory motive warranting the finding of a violation of Section 6(1)(c) of the PLRA.

As for the allegation of a transfer of bargaining unit work, the Union asserts that the Hearing Examiner erred by comparing the period of January 1 through July 31 for the years 2004, 2005 and 2006 to determine whether the Borough had transferred bargaining unit work to the part-time officer after June 14, 2006. The Union asserts that the appropriate comparison would be June, July and August of 2006, with that same period in 2005.

In American Federation of State, County and Municipal Employees, Council 13 v. Pennsylvania Labor Relations Board, 616 A.2d 135 (Pa. Cmwlth. 1992), the Commonwealth Court upheld the Board's final order "that even in a situation where a bargaining unit has not performed the work in question exclusively, an employer may nevertheless commit an unfair labor practice if the transfer of work outside of the bargaining unit is not consistent with past practice." AFSCME, 616 A.2d at 137. The Court further adopted the Board's reliance on National Labor Relations Board precedent that "found that the employer committed an unfair labor practice by subcontracting bargaining unit work 'in a manner different in quantity and kind from that done previously.'" Id. (quoting Howmet Corporation, 197 NLRB 91, 80 LRRM 1555, 1558 (1972), enforced, 257 LRRM 2572 (7th Cir. 1974). Consistent with AFSCME, the relevant inquiry for a removal of bargaining unit work is whether there has been a change in the distribution of bargaining unit work, in either quantity or kind.

To determine, on this record, whether there had been a transfer of bargaining unit work to the part-time police officer, the relevant inquiry is whether the part-time officer's work schedule was materially affected to compensate for the furloughs on June 14, 2006, when the Borough reduced the bargaining unit positions from six full-time officers to four full-time officers. Chief Hackert offered uncontested testimony that he had altered the part-time officer's schedule after June 14, 2006, to fill in for shifts left vacant by the furloughs of the bargaining unit police officers. Indeed, the Chief testified as follows:

Q. Let me ask you about July's scheduling of Officer Almo. Those dates when he worked in July, were those regular police shifts, as you've described before, six on and two off, and six on and three off?

A. Some of the days, yes, he worked. I don't know if he worked exactly six in a row, but he filled in for a full-time position.

Q. Did he work the same shift that had there not been layoffs, one of your full-time people would have worked?

A. Yes.

Q. Now, have you scheduled him for August?

A. Yes, I have.

* * *

Q. [A]s far as shift work, how has he been scheduled for August?

A. Whenever the full-time officers could not, he was filled in there.

Q. Did he work a regular shift, full time shift?

A. Yes.

* * *

Q. Did he work the regular schedule that a full-timer would have worked had there not been furloughs?

* * *

A. As far as August goes, he's been working, yes. The rest of August, yes, he's going to be working what a full-time officer would have been working...

Q. Well, had you not had layoffs, you would have had your regular schedule of six full-time officers working the shifts that you described, six on, two off, six on, three off, Kelly day?

A. Correct.

Q. Correct. And my question is with regard to Officer Almo, the use of Officer Almo both in July and August, is he working that schedule in place of an officer who has been furloughed?

A. Yes, he is. Yes, he is filling in that position.

Q. When you say filling in, that's what you mean?

A. Yes. He's filling in where one or both of the other full-timers that have gone would have worked, filling in those days.

Q. So is he actually serving as like a fifth position now, as far as hours and shifts go?

A. Yes. I would say yes, he's working as if a full-timer was there.

(8/8/06 N.T. 73-75). Consistent with the Chief's testimony, the parties' exhibits indicate that Officer Almo worked significantly greater hours from the date of the furloughs (June 14, 2006) through July 31, 2006, than he had worked during the same period of time in prior years. (Finding of Fact 16).

Thus, on this record, the Union established under AFSCME, that the Borough's quantity and kind of use of the part-time officer was materially altered after the June 14, 2006 furloughs when it began scheduling the part-time officer to cover bargaining unit shifts left vacant because of furloughed officers. See City of Jeannette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006) (Police chief's covering shift of bargaining unit officer was unlawful removal of work). As such, the Borough's unilateral reassignment of bargaining unit work to the part-time police officer constitutes a violation of Section 6(1)(a) and (e) of the PLRA.

After a thorough review of the exceptions and all matters of record, we find that the Borough has violated Section 6(1)(a) and (e) of the PLRA, in unilaterally removing bargaining unit work. Accordingly, we shall sustain the Union's exceptions, in part, and set aside the Proposed Decision and Orders in part consistent with the above discussion.

CONCLUSIONS

CONCLUSIONS 1 through 3 as set forth in the September 24, 2007 Proposed Decision and Order are hereby affirmed and incorporated herein by reference and made a part hereof.

CONCLUSION 4 is hereby vacated and set aside, and the following additional conclusions are made.

5. The Borough has not committed unfair labor practices in violation of Section 6(1)(b) and (c) of the PLRA.

6. The Borough has committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA.

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 the exceptions filed by the North Wales Borough Police Department are hereby dismissed in part and sustained in part. The Order on page 4 of the September 24, 2007 PDO is hereby vacated and set aside.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.

2. Cease and desist from its removal of bargaining unit work and refusing to bargain collectively with the representatives of its employes.

3. Take the following affirmative action, which the Board finds necessary to effectuate the policies of the PLRA and Act 111:

(a) Make the bargaining unit employes whole for wages lost as a result of the hours the part-time, non-bargaining unit employe worked to compensate for a furloughed full-time bargaining unit police officer;

(b) Post a copy of this final order and the proposed decision and orders within five (5) days of the date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

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 eighteenth day of December, 2007. 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

NORTH WALES BOROUGH POLICE DEPARTMENT :
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AFFIDAVIT OF COMPLIANCE

North Wales Borough hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the PLRA and Act 111; that it has made the bargaining unit employees whole for lost wages as directed; that it has posted the final order and proposed decision and orders as directed; and that it has served a copy of this affidavit on the Union 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