

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE 9 :
 :
v. : Case No. PF-C-04-124-E
 :
CITY OF READING :

PROPOSED DECISION AND ORDER

On July 6, 2004, the Fraternal Order of Police, Lodge 9 (Union or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Reading (City or Respondent) violated Sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111.

On November 9, 2004, the Secretary of the Board, issued a complaint and notice of hearing in which the matter was assigned to a hearing on January 13, 2005 in Reading. The hearing was continued to February 1, 2006 and again to February 8, 2006, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union submitted a brief on March 23, 2006 and the City submitted a brief on May 15, 2006.

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

FINDINGS OF FACT

1. That the City of Reading is an employer within the meaning of Section 3(c) of the Pennsylvania Labor Relations Act.
2. That the Fraternal Order of Police, Lodge 9 is a labor organization within the meaning of Section 3(f) of the Pennsylvania Labor Relations Act.
3. That the Union is the exclusive bargaining representative of police officers employed by the City, and is party with the City to a collective bargaining agreement (CBA) that was in effect at all times relevant to this case. (N.T. 4, 136, Respondent Exhibit 1)
4. That the CBA at Article III, Section 1, includes a management rights clause that states in relevant part, "the City retains the exclusive right to manage the business of the Department of Police, including, but not limited to, the right to direct the work force, the right to hire, promote, retain, transfer, and assign employes in positions,..... the right to determine schedules for work..." (N.T. 4, 136, Respondent Exhibit 1)
5. That the police department is comprised of two (2) major divisions - patrol and special services. Patrol works within a fixed shift system of four Platoons assigned to either a 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., 11:00 p.m. to 7:00 a.m. or 7:00 p.m. to 3:00 a.m. shift. Officers within the patrol division bid for one of these shifts annually. (N.T. 8, 9, Complainant Exhibit 1)
6. That within the special services division, there are two sections - community and support and investigations. (N.T. 9-10, Complainant Exhibit 1)
7. That the members of the community and support section work a fixed Monday through Friday daylight shift. (N.T. 10)
8. That the only officers within the department to work a rotating shift are those assigned to the Criminal Investigations (CI) Section. (N.T. 10)

9. That the Criminal Investigation section is comprised of 18 Criminal Investigators (CIs), two sergeants, an inspector and a captain. Only the CIs and the sergeant are in the bargaining unit. (N.T. 90, 136, Complainant Exhibit 2, Respondent Exhibit 6, 8)

10. That for at least fifteen (15) years prior to July, 2004, the work schedule for CIs was a rotation between two shifts - one (1) week of nights (3:00 p.m. to 11:00 p.m. or 4:00 p.m. to 12:00 a.m.) and one week of days. When a major crime or a juvenile crime occurred after 11:00 pm or midnight or on a Sunday when no CIs were scheduled, the department would call one to four CIs, depending on the seriousness of the crime. (N.T. 21-23, 25, 85, 86, 130-131)

11. That the call-in was done by a patrol officer, who carries the title Officer of the Day (OD), holding the rank of lieutenant. The OD would contact either Captain Drexler or the Criminal Investigation Sergeant. (N.T. 32-33, 152-153 Respondent Exhibits 6, 7)

12. That under the CBA, when a juvenile (a person 18 or under) is involved in a crime, the City is required to assign a CI to the case to accompany the juvenile through the adjudicative process. If a CI not available, the juvenile will be released. (N.T. 94, Respondent Exhibit 3)

13. That when a CI is not promptly available, their skills, experience and training are lost to the patrol officers who need their assistance. The Union's witnesses admitted the desirability of having CIs on the scene of serious crimes. (N.T. 16, 38)

14. That for some time, Captain Francis Drexler, the commander of the Criminal Investigation section observed problems with the arrangement of having to call-in CIs. The department had a hard time getting the necessary CIs to the scene of crimes. There were delays in getting the CIs to respond and begin to gather evidence and pursue leads. It could take as long as an hour and a half to get a CI to a crime scene. The burden of responding to call-ins was being carried by only a few of the CIs. Some CIs never responded to calls. (N.T. 29, 99, Respondent Exhibits 5, 8)

15. That Captain Drexler compiled a list of responses for the period from January, 2003 through April, 2004 (except for November and December), 2003 showing 380 calls to CIs with 49 accepted calls. (N.T. 91, 92, Respondent Exhibit 6)

16. That the department issues cell phones to CIs so they can be reached for call-ins. The CIs also have answering machines on their home phones. Despite this technology, the department often goes through the entire list of 18 CIs without getting an officer to accept the call. As an example, there were three times in June, 2002 when no CI responded to a call. (N.T. 93-94, Respondent Exhibit 7)

17. That over the last ten years, Captain Drexler has noticed an increase in major crimes, including homicides, occurring between the hours of 11:00 p.m. and 7:00 a.m. (N.T. 129-130)

18. That a survey conducted for the union for the period from April to August, 2004, indicated that during that period 147 serious crimes occurred, with 50 of these occurring after midnight. (N.T. 142)

19. That on April 1, 2004, Captain Drexler announced that starting July 1, 2004, the CIs would be assigned to work a midnight shift. (N.T. 102-103, Respondent Exhibit 2)

20. That on July 1, 2004, Captain Drexler changed the two (2) shift rotation for CIs to a three (3) shift rotation by adding a week of working from 11:00 p.m. to 7:00 a.m. approximately three (3) times a year for each investigator, every 18 weeks. (N.T. 38-39, 51-52, 102)

21. That the July 1, 2004 change has led to the following benefits: an improvement in the availability of the CIs for investigating crimes; an improvement in their response

time to crimes and a decrease in the likelihood that witnesses are lost due to a CI not being there. (N.T. 101-102)

22. That under the new system of scheduling CIs, the net effect of the addition of the midnight shift for the CIs was that each CI would be scheduled for the midnight shift three weeks a year. (N.T. 39)

23. That another impact upon members of the unit included a reduction in the overtime opportunities for some of them. Because of the change, CIs are called out less, and as a result, earn less in overtime than they would have before. However, the CBA provides a four (4) percent shift differential for working the third shift (N.T. 24, 45, 49, 72, 78)

24. That another impact on the CIs is the physiological adjustment required of them when they return to the other shift after the week of being on the midnight shift. (N.T. 61, 68-72 and 74)

25. That another impact on the CIs is that the Investigators who are conducting investigations into crimes from the first and second shifts may not be able to work on these cases during the midnight shift, which could cause their work to back up. However, the CIs can also catch up on paper work from their earlier shifts during the midnight shift. (N.T. 64-65, 69, 107)

26. That employees are not unilaterally assigned to the Criminal Investigations division. There is an application and selection process for this sought-after position that entails not only different duties, but a pay differential as well. One of the reasons the Investigations section was attractive to them was the two-shift rotation without a mandatory midnight shift. (N.T. 28, 68)

27. That the City did not bargain with the Union over the change, and this charge followed. (N.T. 19, 30-31, 37)

DISCUSSION

The Union's charge of unfair labor practices alleges that the City violated its duty to bargain when it changed from a call-in system for criminal investigators needed on the midnight shift to a system whereby each CI would be scheduled every eighteen weeks on the midnight shift, approximately 3 weeks a year.

Under Act 111 and the PLRA, terms and conditions of employment that constitute mandatory subjects of bargaining must be bargained over before they are changed. City of Bethlehem v. Pa. Labor Relations Board, 621 A.2d 1184 (Pa. Cmwlth. 1993). Any modification to a mandatory subject of bargaining must be bargained over both as to the change and its impact, prior to that change. City of Harrisburg v. Pa. Labor Relations Board, 605 A.2d 440 (Pa. Cmwlth. 1992). If such action is taken without fulfilling the bargaining obligation, it is an Unfair Labor Practice in violation of Section 6(1)(a) and (e) of the PLRA and Act 111. County of Bucks v. Pennsylvania Labor Relations Board, 465 A.2d 731 (Pa. Cmwlth. 1983).

Section 1 of Act 111 identifies those matters which are to be considered mandatory subjects of bargaining and includes, "...compensation, hours, working conditions, retirement, pensions and other benefits..." 43 P.S. § 217.1. In interpreting this section, it has been recognized by the Court that scheduling is a mandatory subject under the Act. Township of Upper Saucon v. Pennsylvania Labor Relations Board, 620 A.2d 71 (Pa. Cmwlth. 1993) where the Court held that schedule assignments related closely to "hours" under Act 111, and therefore an employer's decision to change the department's schedule was a mandatory subject of bargaining.

However, in City of Reading, 30 PPER ¶ 30121 (Final Order, 1999) the Board held that where a schedule change affects only part of the unit and where the employer puts forth a managerial policy concern justifying the change which substantially outweighs the interest of employees the employer has a managerial prerogative to make a unilateral

schedule change. In City of Reading, supra., the Board found that the employer had a managerial prerogative to change the schedule for a periodic supervisory patrol that regularly worked 8 am to 4 pm, Monday through Friday, to work an eight-hour patrol shift one day each month. The Board agreed that the City's reasons for changing the patrol assignments, to increase police visibility on the street and provide better police service, were management policy concerns that substantially outweighed the minimal impact on employe interests.

Applying the City of Reading test to the present case, it is apparent that the change affected only a part of the unit, the criminal investigation division, and not the entire department. Accordingly, the schedule change meets the first part of the test.

As for the second part of the test, whether the city's managerial policy concerns substantially outweigh the interests of the employes, it is necessary to look at the respective interests of the city and the employes.

As for the City's interests, the change promoted several managerial policies. The new system guarantees the prompt appearance of a criminal investigator at a crime scene for those crimes taking place after 11:00 pm. The prior system depended on officers volunteering to take a call-in for a crime investigation. That system was time consuming. Also, on several occasions, not a single CI of the 18 on the list responded favorably. Under the revised system, there is now less risk that a criminal investigation will fall apart or witnesses be lost due to the absence of a qualified investigator. If the criminal activity involves a juvenile, there is an even more critical need to have the prompt appearance of a CI because under the CBA the processing of a juvenile suspect is the exclusively reserved work of the CIs. The department can now provide better protection of the public because of the enhanced capacity of gathering evidence and leads.

On the other side of the balance are the employes' interests as set forth by the Union. The change in the schedule means that some CIs will lose the overtime opportunities they had under the old system when they chose to respond to a call-in. However, the CBA gives them a four (4) percent shift differential for the midnight shift. The officers are subjected to physiological adjustments and some disruption in their personal lives. The CIs' pending investigations from the other shifts may not receive the same attention if they are unable to contact a witness who may only be reached during the day or evening.

The interests of the employes are not trivial. However, on balance, weighing the respective interests at issue in the schedule change, it must be concluded that the interests of the employer in furthering important policies substantially outweigh the interests of the employes in maintaining the schedule the way it was. Given the demonstrated increase in serious crime occurring after midnight in the City of Reading, and given the inadequacies of the old call-in system, the City has a valid interest in mustering all available law enforcement resources to confront this threat to the public welfare. The City's change in the CI schedule of adding a midnight shift three weeks a year does not rise to the level of a mandatory subject of bargaining under the PLRA and Act 111.

CONCLUSIONS

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

1. That the City of Reading is an employer within the meaning of Section 3(c) of the PLRA.
2. That the Reading Fraternal Order of Police, Lodge 9 is a labor organization is a labor organization within the meaning of Section 3(f) of the PLRA.
3. That the Board has jurisdiction over the parties hereto.

4. That the City has not committed unfair labor practices within the meaning of Sections 6(1)(a) and (e) of the PLRA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices is dismissed and the complaint issued thereon is rescinded.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of April, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner