

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 OF THE :  
FRATERNAL ORDER OF POLICE :  
 :  
v. : Case No. PF-C-05-131-E  
 :  
CITY OF SCRANTON :

**PROPOSED DECISION AND ORDER**

On September 23, 2005, the Fraternal Order of Police, E.B. Jermyn Lodge 2 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Scranton (City) violated Sections 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111.

On November 30, 2005, the Secretary of the Board, issued a complaint and notice of hearing in which the matter was assigned to a hearing on January 26, 2006 in Scranton before Thomas P. Leonard, Esquire, a hearing examiner of the Board. The hearing was continued to June 6, 2006, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. An additional day of hearing, in the way of a deposition, was held on July 6, 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 Scranton is an employer within the meaning of Section 3(c) of the Pennsylvania Labor Relations Act.
2. That the Fraternal Order of Police, E.B. Jermyn Lodge 2 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 that was in effect at all times relevant to this case. (N.T. 10, 64, Complainant's Exhibit 1)
4. That the city's police department has 152 members in the bargaining unit. (N.T. 9)
5. That Article 21 and Article 22 of the CBA provide that members of the city's police department are entitled to bid for positions, which will be awarded according to seniority. (N.T. 10, 64 Complainant's Exhibit 1)
6. That Appendix A to the Agreement also provides for rules and regulations governing seniority and the bidding process and specifies that "[b]idding will be department-wide for all positions, except those excluded by past contracts, past arbitration awards, and the present contract." (N.T. 10, 64 Complainant's Exhibit 1)
7. That the union designates certain agents or officers to administer the seniority system and the bidding process. Those individuals are called "bid officers" or grievance officers. They are similar to stewards. At any given time, there are four bid officers: one for A shift; one for B shift; one for C shift and one for non-uniformed employees. (N.T. 11)
8. The bid officer's primary function is to make sure that the proper person gets bid for a position according to seniority. (N.T. 11-12)

9. That in general, once a year, bids are posted for available positions, days off, and vacations. Bargaining unit members have a certain amount of time to bid for these options. If a position vacancy occurs during the year (for reasons such as long-term injury, retirement, voluntary quitting) it is the bid officer's job to post the position. (N.T. 13)

10. That bids are posted on a public bulletin board and officers have a certain amount of time to bid for the position. (N.T. 13, 26).

11. That after the closing of the bidding period, the bid officer determines who should receive the bid according to seniority. The bid officer then forwards the determination to the chief. If the chief has a disagreement with the determination made by the bid officer, he can contact FOP President Ann Marie Stulgis. Stulgis testified that she is available at all times, simply a phone call away. (N.T. 17-18)

12. That relevant to this proceeding, police officer Kyle Kemp was the bid officer appointed by the union for the B shift. (N.T. 14)

13. That at the time of the hearing in this matter, Kemp had been a police officer with the city for about three and a half years and was a member of the bargaining unit represented by the union. (N.T. 20)

14. That on September 13, 2005, a vacancy arose for the position of the S car on the B shift in the south sector of the city's police department. According to the union president, because this position was a temporary vacancy, it would remain on the shift and be bid among members of the shift under the parties' agreement. (N.T. 13)

15. That at first, Kemp was unsure how to post the bid so he conferred with President Stulgis to make sure he posted the bid accurately and in accordance with the parties' agreement. (N.T. 22)

16. That President Stulgis confirmed to Kemp that the bid should be posted only for the shift, as opposed to a department-wide posting. (N.T. 22-23).

17. That Kemp then posted the bid accordingly and the bid was successfully bid upon by an Officer Perry. (N.T. 23)

18. That when Kemp forwarded the bid determination to Chief Elliott, the chief took issue with Stulgis' directions regarding the method in which the bid was to be posted. (N.T. 23)

19. That Kemp was first informed in a conversation with his shift Lieutenant, Martin Crofton, and his patrol captain, Carl Graziano, that the bid should have been a department-wide bid instead of a shift bid. They additionally informed him that they would be taking the issue to the chief. (N.T. 24)

20. That Officer Kemp then attended a meeting with Chief Elliott, Captain Graziano and Lieutenant Crofton to discuss the correct contractual interpretation to be used. (N.T. 24-25)

21. That at that meeting, Officer Kemp told the chief that he was directed by the Union president to post it as shift bid. The Chief disagreed with him and informed him that the bid should be posted department-wide. (N.T. 25)

22. That Kemp informed the Chief that it was an argument between the union president and the chief. (N.T. 26)

23. That the chief then stated to Kemp that the "union can't do anything to you, I can. I'm ordering you to re-post the bid at department wide." (N.T. 26)

24. That the chief also told Kemp, "Even if a grievance is filed on the bid, it'll be a new bid year by the time it's resolved anyway." (N.T. 27)

25. That Lt. Crofton reiterated to Kemp that the Chief gave him a direct order to post the bid department-wide and that he should follow the order. Officer Kemp felt that he would be punished if he did not post the bid as the Chief demanded and feared for his job. Therefore, he re-posted the bid. (N.T. 27-28)

26. That the meeting over the bid lasted no more than 10 minutes. (N.T. 48-52)

27. That Kemp notified Union President Stulgis that he was ordered by the Chief to post the bid department-wide and that he was threatened with discipline if he did not follow his orders. Fearing that Kemp would be subject to discipline as threatened, Stulgis sought to protect Kemp and, thus, removed him from his position as bid officer. President Stulgis then appointed herself as bid officer since she could not be disciplined by the chief as she was not an active police officer. (N.T. 16)

28. That the officer who had successfully bid on the position in the department wide bidding was the same officer who had successfully bid on the shift for the shift wide bidding. (N.T. 56-57)

29. That the dispute over the scope of the bidding for a temporary vacancy was eventually settled by an agreement between the union and the city. (N.T. 45)

#### DISCUSSION

The union's charge of unfair labor practices alleges that the city violated the PLRA and Act 111 when Chief of Police David Elliott threatened Kyle Kemp, a bid officer, for his failure to follow the Chief's order to post a vacancy for department-wide bidding rather than shift-wide bidding.

The City contends that the Union has not met its burden of proving any of the allegations as required by law. Pennsylvania Labor Relations Board v. Kaufman Department Stores, 345 Pa. 3998, 29 A. 2d 90 (1942).

Beginning with the alleged Section 6(1)(a) violation, an employer commits an unfair labor practice within the meaning of this section if it takes action that, in light of the totality of the circumstances, tends to be coercive of employees in the exercise of their rights, regardless of whether the employees in fact have been coerced. City of Wilkes-Barre, 33 PPER 33087 (Final Order, 2002)

The city contends that the union has failed to offer evidence to support the allegations in paragraphs 6 and 7 of the specification of charges that the chief had one person in mind to fill the vacancy, a person who would not otherwise be appointed if the union's shift-wide bidding was the manner of selection. The Union failed to offer proof of such a specific person's existence. Accordingly, no finding of fact will be made about such a person or that the chief was motivated by the existence of such a person.

Next, the city contends that the union's evidence offered to support the allegations in paragraphs 8, 9 and 10 is not worthy of belief compared to the city's evidence. Judging the merits of this defense requires deciding what happened in a brief meeting that came about when Lt. Crofton and Capt. Graziano told Kemp that Chief Elliott had rejected the officer who successfully bid on the position and directed Kemp to see the Chief in his office. At that meeting, with the Chief, Lt. Crofton and Capt. Graziano present, Kemp was told by the Chief that Kemp was to post a temporary vacancy on the desk on a department wide opening. Kemp had been advised by the FOP President Stulgis that the vacancy should have been posted as a vacancy for the shift. As for the ensuing exchange, Officer Kemp had one version of what happened. The city's witnesses had a different version of what happened. Accordingly, it is necessary to assess the credibility of the witnesses.

Having observed the demeanor of all the witnesses who were present in the chief's office on September 13, 2005, I am convinced that chief Elliott said to Kemp, "The Union can't do anything to you, I can." I am also convinced that the chief told Kemp that "even if a grievance is filed on the bid, it'll be a new year by the time it is resolved

anyway." Officer Kemp testified clearly and with confidence as to what happened in the time leading up to the meeting and during the meeting itself. Kemp's testimony is deserving of credit.

The city next argues that even if Kemp's testimony is believable, the chief's statement described in such testimony does not violate the PLRA. The city argues that in this particular workplace setting, a paramilitary organization, the orders of command must be followed if the organization is to function properly. The city argues that the chief was merely giving Kemp an order that had to be obeyed for the good of the organization and that the city should not be found to have committed an unfair labor practice.

It is true that police departments must operate like a military organization and it is also true that employees must follow orders for the good of the organization. However, in this fact setting, Kemp was in the chief's office primarily because of his union role. The chief's warning to Kemp that he should carry out the order, because the chief could discipline Kemp while the union could not, sent Kemp a message that was demeaning to the union and that was inherently coercive. The Chief's comparison of his power to that of the union was unnecessary to carry out his command responsibilities for the good of the police department's mission. This unnecessary, additional comment will be found to be an unfair labor practice

The chief's statement will also be found to be section 6(1)c violation in that it was a coercive statement directed at Kemp because of his exercise of protected activity. But for Kemp's union activity, he would not have been in the chief's office in the first place and been on the receiving end of the coercive warning. See City of Wilkes-Barre, supra.

The union also argues that the incident also constituted a violation of the duty to bargain in good faith in violation of Section 6(1)(e) of the PLRA. The Commonwealth Court has held that an employer commits an unfair labor practice within the meaning of Section 6(1)(e) of the PLRA by refusing to bargain collectively with the representatives of its employees over a mandatory subject of bargaining. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). A matter is a mandatory subject of bargaining if it "bears a rational relationship with the employees' duties. Id. at 733. The Board has specifically found that job posting and bidding procedures are mandatory subjects of bargaining. Fraternal Order of Police State Conference of Liquor Law Enforcement Lodges v. Commonwealth of Pennsylvania, 32 PPER 32083 (Final Order, 2001).

In the present case, the chief's statement that Kemp's filing of a grievance over the bidding procedure for this vacancy would be a vain act demonstrated a disregard for the grievance procedures the parties negotiated in their collective bargaining agreement. This disregard, on top of his unilateral interpretation of the method of bid posting, constitutes a violation of the city's duty to bargain in good faith.

#### 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 Scranton is an employer within the meaning of Section 3(c) of the PLRA.
2. That the Fraternal Order of Police E.B. Jermyn Lodge #2 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 committed unfair labor practices within the meaning of Sections 6(1)(a), (c) 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 City shall:

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

2. Cease and desist from discriminating in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization.

3. Cease and desist from refusing to bargain collectively in good faith with the labor organization which is the exclusive representative of the employes in an appropriate unit, including but not limited to discussing of grievances with the exclusive representative.

4. Take the following affirmative action:

(a) Post a copy of this Decision and Order within five (5) days from the effective 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

(b) 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.

(c) Serve a copy of the attached affidavit of compliance upon the union.

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 first day of March, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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THOMAS P. LEONARD, Hearing Examiner