

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 85 :  
 :  
 v. : Case No. PF-C-08-169-E  
 :  
 COMMONWEALTH OF PENNSYLVANIA :

**PROPOSED DECISION AND ORDER**

On December 24, 2008, the Fraternal Order of Police, Lodge No. 85 (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania (Commonwealth) violated sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by unilaterally transferring bargaining unit work to non-members of the bargaining unit. On January 13, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 8, 2009. The hearing was held as scheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On May 6, 2009, each party filed a brief.

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

FINDINGS OF FACT

1. The Board has certified the FOP as the exclusive representative of a bargaining unit that includes capitol police officers employed by the Commonwealth. (Case No. PF-R-4-C)
2. On May 28, 2005, the Commonwealth began using capitol police officers to operate scanners (x-ray machines and metal detectors) on an exclusive basis at five buildings in Harrisburg. (N.T. 8-10, 27; Complainant Exhibit 2)
3. Prior to June 2008, the Commonwealth interviewed private security firms to operate scanners at a building in Philadelphia. The FOP's "grievance guy" in Philadelphia (Sergeant Stocket) was present for the interviews and recommended three of the firms interviewed. (N.T. 30-33, 37-38)
4. In August or September 2008, the superintendent of the capitol police (Richard Schaffer) told the president of the FOP (Officer Joseph Shayter) that starting in November 2008 a private security firm would be operating scanners at a building in Philadelphia. (N.T. 23, 39-40)
5. In November 2008, the Commonwealth set up scanners at a building in Philadelphia. Security guards employed by a private security firm (Scotland Yard) have operated the scanners ever since. (N.T. 16-18, 21-22, 37, 39, 44; Complainant Exhibit 1)
6. The Commonwealth did not offer to bargain with the FOP before the security guards began operating the scanners. (N.T. 27-28, 41)

DISCUSSION

The FOP has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111 by unilaterally transferring bargaining unit work to non-members of the bargaining unit. According to the FOP, the Commonwealth did so when it began using private security guards to operate scanners at a building in Philadelphia.

The Commonwealth contends that the charge should be dismissed because (1) it did not transfer bargaining unit work to the security guards when it began using them to

operate the scanners and (2) because it was contractually privileged to use the security guards to operate the scanners. The Commonwealth also contends that if it committed an unfair labor practice any remedy should be limited to an order to bargain upon request.

An employer commits unfair labor practices under sections 6(1)(a) and (e) if it unilaterally transfers bargaining unit work to non-members of the bargaining unit. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Bargaining unit work is work performed by members of the bargaining unit on an exclusive basis over time. Id. If the employer has a sound basis for interpreting an agreement of the parties to mean that it could act as it did, however, then it met its obligation to bargain when it negotiated the agreement and may not be found to have acted unilaterally. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). In such a case, the employer's action is contractually privileged, and the parties' dispute, being contractual in nature, is to be litigated before an arbitrator rather than the Board. Id.

The customary remedy for unfair labor practices involving a unilateral transfer of bargaining unit work to non-members of the bargaining unit includes an order to rescind the transfer of the bargaining unit work to the non-members of the bargaining unit. Pennsylvania State Police v. PLRB, 912 A.2d 909 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 593 Pa. 730, 928 A.2d 1292 (2006). The customary remedy is to be limited to an order to bargain upon request, however,

"when the union otherwise learns of the employer's decision to subcontract and obtains specific information such as bids and specifications that would have permitted the union to make an informed proposal prior to the award of the subcontract but the union did not approach the employer."

Philadelphia School District, 29 PPER ¶ 29085 at 206 (Final Order 1998), citing Garnet Valley School District, 8 PPER 365 (Final Order 1977).

The first question for disposition is whether or not the Commonwealth transferred bargaining unit work to non-members of the bargaining unit when it began using the security guards to operate the scanners at the building in Philadelphia.

The record shows that members of the bargaining unit (capitol police officers) operated scanners on an exclusive basis at five buildings in Harrisburg for several years before the Commonwealth began using the security guards to operate the scanners at the building in Philadelphia (findings of fact 1, 2 and 5), so it is apparent that the Commonwealth transferred bargaining unit work to non-members of the bargaining unit when it began using the security guards to operate the scanners at the building in Philadelphia.

In support of its contention that it did not transfer bargaining unit work to the security guards, the Commonwealth points out that they work at a newly-created post where capitol police officers had never worked before (N.T. 37). The Commonwealth also cites Commonwealth of Pennsylvania, 20 PPER ¶ 20075 (Proposed Decision and Order 1989) (Commonwealth of Pennsylvania I), for the proposition that work at a newly-created post cannot be bargaining unit work. As the Commonwealth construes that case, if members of a bargaining unit have not performed work at a particular post, which is always the case if the post is newly-created, it necessarily follows that non-members of the bargaining unit working at the post following its creation would not be performing bargaining unit work.

The Commonwealth misconstrues Commonwealth of Pennsylvania I. In that case, Hearing Examiner Thomas P. Leonard found that the Commonwealth's use of capitol security officers to perform work at a newly-created post was not in violation of a Board order directing it to rescind the transfer of capitol police officer work to capitol security officers. As Hearing Examiner Leonard explained, because capitol security officers had been performing the work at the post without challenge for some time after the post's creation, it was apparent that they were not performing work that capitol police officers had been performing on an exclusive basis. Notably, however, in reaching that result, Hearing Examiner Leonard focused not on the fact that the post was newly-created but on the fact that capitol security officers had been performing the work at the post without challenge for some time after the post's creation. Thus, Commonwealth of Pennsylvania I does not

stand for the proposition that work performed at a newly-created post cannot be bargaining unit work; rather, it stands for the proposition that work performed at a newly-created post cannot be bargaining unit work if non-members of the bargaining unit have performed the work at the post without challenge for some time after the post's creation.

The Commonwealth also overlooks Commonwealth of Pennsylvania, 29 PPER ¶ 29148 (Final Order 1998)(Commonwealth of Pennsylvania II). In that case, the Board found that the Commonwealth did not transfer capitol police officer work to capitol security officers when it began using capitol security officers at a newly-created post. In so finding, the Board employed the same analysis as Hearing Examiner Leonard in Commonwealth of Pennsylvania I, focusing not on the fact that the post was newly-created but on the fact that capitol security officers were not performing work that capitol police officers had been performing on an exclusive basis over time before the post was created. Implicitly if not explicitly, then, the Board recognized that a transfer of capitol police officer work would have occurred had the capitol security officers been performing work that capitol police officers had been performing on an exclusive basis over time before the post was created. Thus, contrary to the Commonwealth's contention, work at a newly-created post may be bargaining unit work even though members of the bargaining unit had not performed any work at the post prior to its creation.

As noted above, capitol police officers operated scanners on an exclusive basis over time at five buildings in Harrisburg before the Commonwealth began using the security guards to operate the scanners at the building in Philadelphia. Thus, application of the Board's analysis in Commonwealth of Pennsylvania II to the facts of record here leads to the conclusion that the Commonwealth transferred bargaining unit work to non-members of the bargaining unit when it began using the security guards to operate the scanners at the building in Philadelphia.

The next question for disposition is whether or not the Commonwealth acted unilaterally when it began using the security guards to operate the scanners at the building in Philadelphia.

The record shows that the Commonwealth did not offer to bargain before the security guards began operating the scanners at the building in Philadelphia (finding of fact 6), so it is apparent that the Commonwealth acted unilaterally unless it was contractually privileged to use the security guards to operate the scanners.

In support of its contention that it was contractually privileged to use the security guards to operate the scanners, the Commonwealth points out that article 44, section 2, of the parties' collective bargaining agreement, provides as follows:

"Effective July 1, 2000, any and all new posts or assignments which could be staffed by Capitol Police or Commonwealth of Pennsylvania Capitol Security Officers shall not be staffed in a manner that would reduce the current complement of Capitol Police officers."

(Respondent Exhibit 1). According to the Commonwealth, it has a sound basis for interpreting that contractual provision to mean that it could transfer bargaining unit work to the security guards so long as it did not thereby reduce the complement of capitol police officers. The Commonwealth also submits that it acted in conformity with its interpretation of that contractual provision because it did not reduce the complement of capitol police officers when it began using the security guards to operate the scanners. The Commonwealth cites Commonwealth of Pennsylvania, 33 PPER ¶ 33078 (Proposed Decision and Order 2002)(Commonwealth of Pennsylvania III), in further support of its contention. In that case, the hearing examiner reviewed the same contractual provision in finding on the facts of that case that the Commonwealth was contractually privileged to use capitol security officers to perform capitol police officer work.

As the FOP points out, however, article 44, section 2, expressly references capitol security officers but makes no reference to security guards employed by a private security firm as here. Unlike in Commonwealth of Pennsylvania III, then, the Commonwealth does not have a sound basis for interpreting that contractual provision to mean that it

could transfer bargaining unit work to the security guards so long as it did not thereby reduce the complement of capitol police officers. Thus, the Commonwealth was not contractually privileged to use the security guards to operate the scanners.

The last question for disposition is whether or not the customary remedy for the Commonwealth's unfair labor practices should be modified.

The record shows that the FOP had prior knowledge of the Commonwealth's decision to use the security guards to operate the scanners at the building in Philadelphia. As the Commonwealth points out, a representative of the FOP (its "grievance guy" in Philadelphia, Sergeant Stocket) was present when the Commonwealth interviewed firms to operate the scanners at the building in Philadelphia and even recommended three of them (finding of fact 3), while another representative of the FOP (its president, Officer Joseph Shayter) was told by the Commonwealth in August or September of 2008 that a private security firm would start operating scanners at the building in Philadelphia in November 2008 (finding of fact 4).

Standing alone, however, knowledge of the employer's decision to transfer bargaining unit work to non-members of the bargaining unit provides an insufficient basis for modifying the customary remedy. As the Board explained in Philadelphia School District, supra, the customary remedy is not to be modified unless the union also "obtains specific information such as bids and specifications that would have permitted [it] to make an informed proposal prior to the award of the subcontract." 29 PPER at 206. See also Lancaster County, 24 PPER ¶ 24054 (Final Order 1993), 24 PPER ¶ 24071 (Order Denying Motion for Reconsideration 1993)(union's knowledge of the employer's decision to transfer bargaining unit work to non-members of the bargaining unit provided an insufficient basis for modifying the customary remedy where the union did not have bids and specifications that would have permitted it to make a formal proposal prior to the transfer).

The record does not show that the FOP obtained specific information such as bids and specifications that would have permitted it to make an informed proposal prior to the Commonwealth's use of the security guards to operate the scanners at the building in Philadelphia. Thus, there is no basis for modifying the customary remedy.

#### CONCLUSIONS

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

1. The Commonwealth is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The FOP is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has committed unfair labor practices under sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

#### HEREBY ORDERS AND DIRECTS

that the Commonwealth shall:

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

2. Cease and desist from refusing to bargain collectively with the representative of its employes.

3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PLRA as read in pari materia with Act 111:

(a) Rescind the transfer to the security guards of the work of operating scanners at the building in Philadelphia;

(b) Reinstate to the bargaining unit the work of operating scanners at the building in Philadelphia;

(c) 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

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

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 nineteenth day of May 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner