

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE NO. 85 :
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 v. : Case No. PF-C-08-99-E
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 COMMONWEALTH OF PENNSYLVANIA :

PROPOSED DECISION AND ORDER

On August 12, 2008, the Fraternal Order of Police Lodge No. 85 (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania (Commonwealth) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111. In its charge, the Union specifically alleges that, on July 18, 19 and 20, 2008, the Commonwealth unilaterally assigned non-unit personnel to perform traffic direction duties on Commonwealth Avenue which were exclusively and historically performed by the Capitol Police bargaining unit. On August 28, 2008, the Secretary of the Board (Secretary) issued a complaint and notice of hearing directing that a hearing be held on Monday, October 6, 2008 in Harrisburg, Pennsylvania. After two continuances, the hearing was held on January 8, 2009. During the hearing, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and cross-examine witnesses. Both the Commonwealth and the Union filed their post-hearing briefs on March 13, 2009.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Commonwealth is a public employer within the meaning of Act 111 and PLRA. (N.T. 4).
2. The Union is a labor organization within the meaning of Act 111 and PLRA. (N.T. 4).
3. The Capital Police routinely perform traffic direction and control duties within the Capital Complex in the City of Harrisburg. The Capital Complex is generally defined by the western boundary of Third Street, the eastern boundary of Seventh Street, the Northern boundary of Forster Street and the Southern boundary of Walnut Street. The Capital Police also perform full police duties within the Capital Complex as well as various other locations throughout the City of Harrisburg. (N.T. 8-13).
4. The Capital Police perform traffic control duties Monday through Friday at designated traffic control posts. (N.T. 12; Union Exhibit 1).
5. The Capital Police perform traffic control duties for events at the Forum Building. They also help handicapped individuals cross the street to the parking garages during those events. (N.T. 12-13; Union Exhibit 1).
6. The Capital Police perform traffic control duties at Commonwealth buildings during medical emergencies, fire drills and building evacuations. (N.T. 13, 17; Union Exhibit 1).
7. Some years ago, the statue of "Ms. Penn" was removed from the Capitol dome by a helicopter. The Capital Police closed all streets that the helicopter overflew with the statue. (N.T. 13, 19, 200).
8. The Capital Police have directed vehicular and pedestrian traffic and closed streets for the helicopter removal of air conditioners from the Harristown Building and the Labor and Industry Building. (N.T. 13-14, 40; Union Exhibit 1).

9. The Capital Police annually perform traffic duties and close streets for downtown parades. (N.T. 14-15).

10. The Capital Police performed traffic duties in the area of the Capitol Building for the removal of its elevator cars and for roof repair. (N.T. 14-15; Union Exhibit 1).

11. The Capital Police also performed traffic duties during the PennDOT Building fire and demolition. (N.T. 15-16; Union Exhibit 1).

12. The Capital Police have directed traffic and closed Commonwealth Avenue during an AFL-CIO rally, NASCAR Day, political events, military events, road repairs and snow removal. (N.T. 16-18; Union Exhibit 1).

13. The examiner takes administrative notice of the following map representation provided by Google Map:



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14. On July 18, 2008, the Union received an e-mail notification from the Commonwealth's Office of Administration that Commonwealth Avenue would be closed between Forster and North Streets, from 7:00 p.m. on Friday, July 18, 2008 to Sunday evening July 20, 2008, to permit Mascaro Construction Company (the prime general contractor for the Judicial Center construction project) to disassemble and remove the Tower Crane at the Judicial Center. (N.T. 22, 43; Union Exhibit 2).

15. This e-mail also indicated that Mascaro Construction and All Crane Rental Company will use flag personnel on Commonwealth Avenue to direct traffic. The Office of Administration e-mail stated that traffic north bound on Commonwealth Avenue will be directed to turn left onto North Street. (N.T. 22; Union Exhibit 2).

16. Attached to the e-mail was the Mascaro Street Closing Plan. The attachment provided a more detailed explanation of the Plan for the staging and loading of trucks as well as the closing of Commonwealth Avenue and the directing of traffic. (N.T. 23; Union Exhibit 3).

17. Commonwealth Avenue was closed during the weekend of July 18, 2008 and the Tower Crane was disassembled and trucked away. Civilian flag personnel directed traffic flowing north on Commonwealth Avenue to turn left and west onto North Street when truck traffic was clear of North Street. The flag personnel actually barricaded Commonwealth Avenue and began directing traffic early Saturday morning, July 19, 2008, and worked all day Saturday and Sunday. North Street between Seventh Avenue and Commonwealth Avenue has been permanently closed to any pedestrian or vehicular traffic during the construction. (N.T. 25, 56, 60, 71).

18. Mascaro flag personnel assisted truck drivers in backing into position at the Judicial Center job site to load pieces of the Tower Crane. There were 15-18 trucks for loading and carting the pieces away. (N.T. 59).

19. During the Judicial Center construction project, Mascaro used its own flag personnel to stop traffic on Seventh Street to let construction vehicles enter and exit the construction site. (N.T. 60).

20. At one point during construction, the Seventh Avenue gate to the construction site was closed, and Mascaro flag personnel directed traffic on Commonwealth Avenue to allow trucks to enter the site from that street.

21. Capital Police were involved with traffic controls duties relating to the Judicial Center construction site for two to three weeks when there were steel deliveries to the site. The purpose of utilizing Capital Police for steel deliveries was to provide added safety for voluminous truck deliveries during the work week. (N.T. 63, 67).

22. The "Front End" specifications are incorporated into all construction contracts with the Commonwealth Department of General Services. The Front End specifications require that safety and security on the construction site are the responsibility of the prime contractor and that "[e]ach Prime Contractor requiring delivery vehicles to enter and exit the site, shall be responsible to provide traffic control." (N.T. 76-77; Commonwealth Exhibit 1, ¶ 1.14(A)(1)).

23. Commonwealth Avenue is included within the physical boundaries of the construction site as defined by the construction contract, although it is not permanently closed to vehicular traffic behind a construction fence, as is North Avenue between Seventh and Commonwealth. When Commonwealth Avenue is closed for construction work on the Judicial Center, the prime contractor is exercising control over that part of the construction site. (N.T. 77, 83-84).

DISCUSSION

The Union argues that the bargaining unit has exclusively performed traffic control duties for "all types of situations and events in the Capit[a]l Complex." These events include parades and the helicopter removal of the Ms. Penn statue and elevator cars from the Capitol Building as well as the air conditioning units from the Labor and Industry Building and the Harristown Building. (Union Post-hearing Brief at 3). The Union contends that directing traffic at street closures is work that has been exclusively performed by the Capital Police. The Commonwealth committed unfair labor practices, maintains the Union, by permitting Mascaro Construction to use flag personnel on the weekend of July 18, 2008, during the closure of Commonwealth Avenue, to direct traffic onto North Street while trucks loaded and removed the Tower Crane at the Judicial Center. (Union Post-hearing Brief at 4). The record does not support the Union's position.

In Lebanon County Detectives Association v. Lebanon County, 29 PPER ¶ 29005 (Final Order, 1997), The Board stated it "has long held under Act 111 and the Public Employee Relations Act (PERA), that a public employer must satisfy its collective bargaining obligation to a bargaining unit of its employees prior to its decision to remove work from the bargaining unit and arrange for the performance of that work by an alternative provider." Id. at 11. In Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman Sch. Dist., 37 PPER 56 (Final Order, 2006), the Board relied on the following:

The Commonwealth Court has held that "a public employer commits an unfair practice when it transfers any bargaining unit work to non-members without first bargaining with the unit." City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis original). In establishing an unfair practice for the removal of bargaining unit work, a union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employe(s). City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Even where bargaining unit and non-unit employes have both performed similar duties, a union can

satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); City of Jeanette v. PLRB, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006). Therefore, a public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or by varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing AFSCME, supra).

Lake Lehman, 37 PPER at 179.

The Union, in this case, did not meet its burden of proving that the work at issue has been exclusively and historically performed by members of the bargaining unit. The Union characterizes the nature of the bargaining unit work in broad terms to include traffic direction and control during street closures for parades and helicopter removal of building parts. However, the facts here involve a different history of traffic control unique to Commonwealth building construction sites. The Commonwealth established with substantial, credible evidence that the Commonwealth Department of General Services historically requires all prime contractors to be responsible for the ingress and egress of delivery trucks onto their construction site and to control the site. The Commonwealth established that Commonwealth Avenue is within the boundaries of the construction site for the Judicial Center. The Commonwealth also established that, as part of the construction site, Commonwealth Avenue is under the care, custody and control of the prime contractor when that contractor exercises such control to effectuate necessary construction work on the Judicial Center construction site.

Directing traffic to safely effectuate the complex logistical and coordinated task of bringing eighteen tractor-trailers onto the construction site for the removal of the Tower Crane was within the jurisdiction of the prime contractor, as evidenced by the Front End specifications. By operation of the Front End specifications, the Commonwealth, Department of General Services relinquished control of traffic direction on Commonwealth Avenue when the prime contractor deemed that construction demands required closure of the road to bring it within the physical boundaries of the construction site proper, as was permanently done with North Street between Seventh and Commonwealth. There is no difference between the prime contractor's using its own flag personnel to control traffic on the closed section of North Street, which is permanently within the construction site, and using them on Commonwealth Avenue when Mascaro Construction closed it on July 18, 2008.

The Union's reliance on the helicopter removal of building parts is not analogous. The Judicial Center construction site is under the control and responsibility of the prime contractor. The prime contractor exercises control over the streets contractually included within its site and the truck traffic entering and exiting the site. Where helicopters were utilized to remove building parts, there were no prime contractor employees present on the ground and in control of a contractually defined geographic area that has been relinquished by the Commonwealth to the contractor. In other words, the Commonwealth remains in control of the safety of pedestrian and vehicular traffic on the streets around buildings having parts removed by helicopter.

Also, the Commonwealth remains in control of public streets that have been closed for parades within the Capital Complex and that are adjacent to the Forum Building during concert events. The Commonwealth does not relinquish control of streets to parade organizers. Rather the safety of the general public that is allowed into the closed areas remains within the responsibility of the Commonwealth and/or the City of Harrisburg. When the prime contractor in this case exercised its right to close Commonwealth Avenue, and thereby bring it within the physical boundaries of the construction site proper, the company and not the Commonwealth was responsible for traffic control over public and construction vehicles on the expanded site. The Capital Police conduct traffic control on public streets that are not within the physical boundaries of a construction site and thereby within the traffic control authority of the private contractor. Accordingly, the

Union has not established that it has exclusively and historically performed traffic control duties at a street closure that is part of a construction site.

The Commonwealth proved on this record that it is not (and has not been) in the business of providing traffic control services relating to construction sites under the control of a prime contractor with its own personnel on the ground controlling the site. Also, the Commonwealth has not provided traffic control for the ingress and egress of construction and delivery vehicles to and from the site or construction, whether the adjacent streets are open or closed to the general public. The Commonwealth routinely and historically makes the prime contractor responsible for controlling the construction, the site and construction related traffic. Although the Capital Police were involved with traffic duties relating to the Judicial Center construction site for two to three weeks when there were steel deliveries to the site, this one instance does not establish that these duties were exclusively and historically performed by the bargaining unit in light of the record evidence that civilian flag personnel have also performed these duties. The use of the Capital Police to help direct traffic for steel deliveries was the exception rather than the rule because the steel deliveries required a constant, voluminous stream of truck traffic arriving during the busy work week and not on the weekends. The operation simply required more personnel than the contractor had available for directing vehicular, pedestrian and construction traffic during the deliveries.

Accordingly, the Union did not show that the work was removed from the unit because it did not show that the work was exclusively performed by the unit, which is the sine qua non in a cause of action alleging the unlawful removal of bargaining unit work. Therefore, the Commonwealth has not engaged in unfair labor practices in violation of Section 6(1) (a) and (e) of the PLRA.

CONCLUSIONS

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

1. The Commonwealth is a public employer within the meaning of Act 111 as read in pari materia with the PLRA.
2. The Union is a labor organization within the meaning of Act 111 as read in pari materia with PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth has not committed unfair labor practices within the meaning of Section 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 and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded and that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirtieth day of March, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner