

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DUNCANNON POLICE OFFICERS ASSOCIATION :
 :
 v. : Case No. PF-C-08-127-E
 :
 DUNCANNON BOROUGH :

PROPOSED DECISION AND ORDER

On September 22, 2008, the Duncannon Borough Police Officer's Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Duncannon Borough (Borough) 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 refusing to comply with its mayor's resolution of a grievance involving Officer Eric Beyer at step two of a grievance procedure set forth in the parties' collective bargaining agreement.¹ On October 27, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on December 5, 2008. On November 12, 2008, the Borough filed an answer averring, among other things, that it was under no obligation to comply with its mayor's resolution of the grievance. The hearing was held as scheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On January 12, 2009, each party filed a brief by hand-delivery.

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. On February 21, 2002, the Board certified the Association as the exclusive representative of a bargaining unit that includes police officers employed by the Borough. (Case No. PF-R-01-145-E)
2. Effective January 1, 2006, the parties entered into a five-year collective bargaining agreement that includes a multi-step procedure under which grievances are to be presented to the Borough's mayor or his designee for a decision at the second step. (N.T. 6; Association Exhibit A; Borough Exhibit 7)
3. By letter dated July 17, 2008, the Association's president (John L. Bruno, Jr.) wrote to the Borough's mayor (the Honorable Kraig Nace) as follows:

"On behalf of the, Duncannon Police Officers Assn. and, Ofc. Eric Beyer, I am submitting a GRIEVANCE according to Article XXIII, Step 2 of the Collective Bargaining Agreement between the Association and the Borough of Duncannon dated and signed on October 18, 2005.

Specifically the Association is grieving the dismissal of, Ofc. Eric Beyer, Badge #28-4 by Borough Council on, Tuesday July 15, 2008. According to, Article XXII, Bill of Rights, Section 5, the officer under interrogation shall have the right to be represented by counsel of his choice and/or a FRATERNAL ORDER OF POLICE representative who shall be present at all times during the interrogation. Also under the WEINGARTEN RIGHTS (420 U.S. 251, 88 LRRM 2689) which is the right of an officer to have a union representative present when an officer is summon[ed] to meet his employer if the action or answers given by the officer may lead to disciplinary actions.

¹ The Borough also averred that it did not violate the parties' collective bargaining agreement or Officer Beyer's right to union representation under NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), when it terminated him. The Association has not charged that the Borough committed any unfair labor practices when it terminated him, however, so the Borough's additional averment need not be addressed.

This GRIEVANCE is being submitted within the 30 day time table as established by the Collective Bargaining Agreement Article XXIII."

(N.T. 6; Association Exhibit B)

4. By letter dated July 24, 2008, Mayor Nace wrote to President Bruno as follows:

I am in receipt of the Grievance dated July 17, 2008 by the Duncannon Borough Police Department's Police Officers Association regarding the BOROUGH COUNCIL'S July 15, 2008 termination of Part-Time Patrolman and Association Member Eric B. Beyer.

As it is no secret from the official record of the meeting and the press coverage received, I believe that Patrolman Beyer's dismissal was not and is not in the best interest of the Borough of Duncannon, its residents, and the businesses and properties herein on several levels. I also concur with your concerns with Patrolman Beyer's Bargaining Agreement Rights under the Article XXII of the Duncannon Borough Police Department's 2006-2010 Collective Bargaining Agreement/Contract, stated as the Bill of Rights and I believe that these processes and Rights were ignored or circumvented by the Duncannon Borough Council and Community Policing Committee. In the letters to Patrolman Beyer of which I received Carbon Copies, it does not appear as though Patrolman Beyer was granted the opportunity to 'be represented by counsel of his choice and/or a FRATERNAL ORDER OF POLICE representative who shall be present at all times during the interrogation.' (as stated in ARTICLE XXII, Section 5 of the agreement.) Additionally, no reference was made during any correspondence or in any discussion with committee or the Borough Council (to which I was made aware) that the Patrolman Beyer's Weingarten Rights were being considered.

I do feel strongly that this action of the BOROUGH COUNCIL was not made in conjunction with Patrolman Beyer's performance of job functions and duties and is, to some degree, personal in nature with members of the Duncannon Borough Council. As a reminder to all parties involved, Patrolman Beyer has absolutely no negative comments, reprimands, or indications of discipline in his personnel file. Patrolman Beyer served the Borough of Duncannon in the execution of his law enforcement duties with professionalism, honesty, pride, fidelity, integrity, and honor. These are the attributes I would expect, without fail, from all appointed AND ELECTED public officials.

Finally, only one request and one date/time was presented by the Community Policing Committee for a meeting with Patrolman Beyer. He stated in his written response that he was unable to attend this requested 'fact finding interview' due to, among other reasons, his full-time work schedule. Additionally, as I stated [to] the full Borough Council at the July, 2008 Meeting, Patrolman Beyer was given less than one week's notice of the meeting request and I, as the elected official responsible for the operations of the police department (the Borough's Executive Branch of Government), was not included in the preparation of questions or specific points/facts to be [] discovered at this requested 'interview' (aka interrogation.) This specifically disregards the COUNCIL-ADOPTED Chain of Command Communications Chart established by Council President Hammaker in 2007 for all elected and appointed Duncannon Borough Officials and Staff. I also believe that this is yet another council action to circumvent the Mayor's powers in conjunction with the administration, supervision and management of the Borough's Police Department as stated by the Borough Code of the Commonwealth of Pennsylvania. It is apparent, however, that this is interpreted differently by the Borough Council's hired legal advisor.

At best, I believe that this entire process was sloppy and indecent on the behalf of the Council of the Borough [o]f Duncannon. I am disappointed, disgusted, and disheartened by yet another rash and short-sighted action of this group of elected leaders. Once again, I am not proud of my hometown's elected legislators and do not support their action of termination."

(N.T. 6; Association Exhibit C)

5. By letter dated July 29, 2008, President Bruno wrote to the chairman of the personnel committee of the Borough's council (Patrick Brunner) as follows:

"I am in receipt of a response to a Grievance filed with the, Mayor, dated July 24, 2008. The Grievance was in accordance with the Collective Bargaining Agreement/Contract 2006-2010, Article XXIII, Step 2.

The Mayor's letter is in agreement with the Grievance that was file[d] on Officer Beyer's behalf. The Duncannon Police Officers Assn. cited, Article XXII, paragraph 5 and the Weingarten Rights. Both state that at the request of any police officer under interrogation, shall have the right to be represented by counsel of his choice and or a Fraternal Order of Police representative who shall be present at all times.

Officer Beyer, did respond to a letter addressed to his attention by the Community Policing Committee. The officer had conflicting scheduling with his full-time police position at Reading Township. The officer responded by requesting to meet at an agreeable date and time for both parties.

The Union's position is that, Officer Beyer was never giv[en] appropriate time to request representation nor the opportunity to present his response to any alleged allegations.

Since, Mayor Nace, has addressed the Grievance at Step 2, and agreed with the Union's position, we respectfully request that, Officer Eric Beyer, is reinstated immediately without prejudice and any discipline noted in his personnel file is expunged."

(N.T. 6; Association Exhibit D)

6. By letter dated August 13, 2008, Mr. Brunner wrote to President Bruno as follows:

"This letter responds to the grievance of Officer Beyer as stated in your July 29, 2008 letter.

As stated in your letter, the grievance claims that Officer Beyer was denied the following right: 'a police officer shall have the right to be represented by counsel of his choice or under a Fraternal Order of Police representative.'

Officer Beyer is an employee of the Borough. On a personnel matter, Officer Beyer was directed to meet with members of the Borough Council's personnel and police committees. It was not an interrogation. Officer Beyer was never denied the opportunity to consult with or be accompanied by counsel or the FOP on this personnel matter."

(N.T. 6; Association Exhibit E)

DISCUSSION

The Association has charged that the Borough committed unfair labor practices in violation of sections 6(1)(a) and (e) by refusing to comply with its mayor's resolution of a grievance involving Officer Beyer at step two of a grievance procedure set forth in the parties' collective bargaining agreement. According to the Association, the Borough was under an obligation to comply with the mayor's resolution of the grievance because as its representative at step two of the grievance procedure he had the authority to bind the Borough.

The Borough has answered that it was under no obligation to comply with the mayor's resolution of the grievance. According to the Borough, under section 1121 of The Borough Code, 53 P.S. § 46121, only its council has the authority to appoint and remove police officers, so it is not bound by the mayor's resolution of the grievance even though he sits at step two of the grievance procedure.

As set forth in finding of fact 2, the record shows that the parties' collective bargaining agreement includes a multi-step grievance procedure under which grievances are to be submitted to the mayor at the second step. As set forth in finding of fact 3, the record shows that the Association filed with the mayor at step two of the grievance procedure a grievance alleging that the Borough terminated Officer Beyer in violation of the collective bargaining agreement. As set forth in finding of fact 4, the record shows that the mayor in resolution of the grievance at step two of the grievance procedure implicitly directed that Officer Beyer be reinstated. As set forth in finding of fact 5, the record shows that the Borough has not reinstated Officer Beyer.

As a general rule, an employer commits unfair labor practices under sections 6(1)(a) and (e) if it refuses to comply with a grievance as resolved by one of its representative under a grievance procedure set forth in a collective bargaining agreement. West Norriton Township, 29 PPER ¶ 29182 (Final Order 1998); Zelienople Borough, 27 PPER ¶ 27024 (Final Order 1995), citing Moshannon Valley School District v. PLRB, 597 A.2d 229 (Pa. Cmwlth. 1991). As an exception to the general rule, however, when the representative lacks the statutory authority to resolve the grievance, the employer is not bound by the representative's resolution of the grievance. Somerset Borough, 18 PPER ¶ 18085 (Final Order, 1987). See also Jefferson County, 36 PPER 140 (Final Order 2005), aff'd sub nom. Jefferson County Court Appointed Employees Association v. Jefferson County, 912 A.2d 894 (Pa. Cmwlth. 2006), appeal granted, 595 Pa. 402, 938 A.2d 985 (construing analogous provisions of the Public Employe Relations Act).

As the Borough points out, under section 1121 of the Borough Code, the statutory authority to appoint and remove police officers resides with its council, not its mayor. Thus, the mayor had no statutory authority to reinstate Officer Beyer. Under Somerset Borough, then, the Borough was not bound by the mayor's resolution of the grievance. Accordingly, the charge must be dismissed. Accord Jefferson County, supra (charge alleging that a county refused to comply with its court's resolution of a grievance under a grievance procedure set forth in a collective bargaining agreement was dismissed where the grievance involved a matter over which the court had no authority).

In support of the charge, the Association contends that Somerset Borough is not controlling. According to the Association,

"[i]n this case, unlike Somerset, the resolution of grievances by the Mayor at the second step of the grievance procedure is a matter 'over which the employer ha[s] lost discretion because the term [is] embodied in the contract.' Somerset, supra, citing Scranton School Board v. Scranton Federation of Teachers, 365 A.2d 1339. The contract in this case specifies that officers have 'the right to grieve discipline and discharge pursuant to the grievance procedure set forth in this Agreement.' Article XXVII, Section 3 (emph. added). That grievance procedure makes the Mayor the arbiter, without limitation, of grievances at Step 2. The contract was signed October 18, 2005 and effective January 1, 2006, well after the Somerset decision."

Brief at 3.

Somerset Borough is, however, directly on point. In that case, the Board dismissed a charge alleging that a borough refused to comply with its mayor's resolution of a grievance at the second step of a grievance procedure set forth in a collective bargaining agreement. Noting that the grievance alleged that the borough's council violated the parties' collective bargaining agreement when it passed an ordinance restricting the number of hours its police officers were to work and that the borough's council rather than its mayor had the statutory authority to set the number of hours its police officers were to work, the Board reasoned that the borough was not bound by the mayor's resolution of the grievance. As the Board explained,

"[t]he mayor, supervisor of the police department, is designated in the grievance procedure as the second step. It is a recognition by the parties that the person who has 'full charge and control of the chief of police and the police force' should have the opportunity to resolve problems which arise from this area of responsibility. This does not, however, constitute a delegation of legislative

authority by the Borough Council to the mayor allowing him to exercise responsibilities assigned to the Borough Council by statute. By granting to the mayor the right to assign overtime in an emergency, the Borough Council, in Ordinance 1204, intimated that such a delegation might be possible. Such extensive authority has not, however, been delegated. Borough Council made a limited delegation to the mayor to provide flexibility in case of emergency but it has not thereby abandoned the right to exercise its statutory mandate on an ongoing basis. The Board believes that Borough Council would have to make a clear and unequivocal delegation of its statutory authority before the mayor could properly act. Merely including the mayor in the grievance procedure is not such a clear and unequivocal delegation. Without that mandate from Borough Council, the mayor may not resolve this grievance using powers which by statute are not his and are expressly reserved to Borough Council."

18 PPER at 251-252 (footnote omitted). As noted above, the mayor here similarly had no statutory authority to resolve the grievance before him, so the same result as in Somerset County must obtain.

The Association also relies on Wilkes-Barre Township, 35 PPER 137 (Final Order 2004), aff'd sub nom. Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005), where the Board found that an employer committed unfair labor practices by unilaterally changing the employe contribution rate for a pension plan contrary to the terms of a collective bargaining agreement. As the Association points out, in so finding, the Board explained that

"[t]he law is well established that 'a provision to which the township voluntarily agreed during the bargaining process cannot now be objected to by the township on the basis of its illegality.' Upper Chichester Township, 621 A.2d at 1135; see Fraternal Order of Police v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982). As a matter of law and labor policy, the Township is bound by its prior agreement with the Association despite its alleged illegality[.]"

35 PPER at 431. As the Association also points out, the Board further explained that in Borough of Ellwood City v. Ellwood City Police Department Wage and Policy Unit, 573 Pa. 353, 825 A.2d 617 (2003),

"[c]iting a wealth of prior cases, the Supreme Court stressed the general rule that once the employer agreed to a term in a collective bargaining agreement, it may not later unilaterally alter that term on the claim that the law requires otherwise. E.g. Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 481 Pa. 66, 391 A.2d 1318 (1978); Grottenthaler v. Pennsylvania State Police, 488 Pa. 19, 410 A.2d 806 (1980). Quoting from Pittsburgh Joint Bargaining Committee, the Supreme Court stated that

To permit an employer to enter into agreements and include terms such as grievance arbitration which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions on the basis of its lack of capacity would invite discord and distrust and create an atmosphere wherein a harmonious relationship would virtually be impossible to maintain.

Good faith bargaining would require that questions as to the legality of the proposed terms of collective bargaining agreement should be resolved by the parties to the agreement a[t] the bargaining stage.

Ellwood City, 573 Pa. at 360-361, 825 A.2d 621 (quoting Pittsburgh Joint Bargaining Committee, 481 Pa. at 74-75, 391 A.2d at 1322-23). The Supreme Court also noted the reasoning in Grottenthaler, that '[t]o permit the Commonwealth to ignore its [statutory] mandate with impunity in two successive bargaining contracts following the promulgation of Section 5955 [of the State Employees' Retirement Code], and then to assert it as a bar to a claim for recovery under the bargaining agreement would be manifestly unfair; the demoralizing effect of such a result on the relationship between employer and employee in the public sector is readily

apparent.' Ellwood City, 573 Pa. at 362, 825 A.2d at 622 (quoting, Grottenthaler, 488 Pa. at 26, 410 A.2d at 809)."

Id.

The Association's reliance on Wilkes-Barre Township is, however, misplaced. Notably, Wilkes-Barre Township did not involve the resolution of a grievance beyond the authority of a mayor as here and as in Somerset County. Wilkes-Barre Township is, therefore, inapposite. Moreover, to the extent that Wilkes-Barre Township may be inconsistent with Somerset County, it is noted that the Board cited Somerset County with approval in Jefferson County, *supra*, after it decided Wilkes-Barre Township. Under the circumstances, it is apparent that the Board still regards Somerset County as controlling in a case of this nature.

CONCLUSIONS

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

1. The Borough is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.

2. The Association 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 Borough has not committed unfair labor practices under sections 6(1)(a) or (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 charge is dismissed and the complaint 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twentieth day of January 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner