## COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

NAZARETH BOROUGH POLICE ASSOCIATION :

:

v. : Case No. PF-C-08-42-E

:

NAZARETH BOROUGH

#### FINAL ORDER

On April 15, 2009, Nazareth Borough (Borough) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to an April 1, 2009 Proposed Decision and Order (PDO). The Borough's exceptions challenge the Board Hearing Examiner's determination that the Borough violated Act 111 of 1968 (Act 111) and Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally changing its police officers' twelve-hour shift schedule to an eight-hour rotating shift schedule without bargaining with the Nazareth Borough Police Association (Association). The Association filed a timely brief in response to the exceptions on May 6, 2009. The facts relevant to the exceptions have been found by the Board Hearing Examiner and are summarized as follows.

The Borough and the Association are parties to a May 31, 2006 interest arbitration award, effective January 1, 2006 to December 31, 2008. The interest arbitration award established a scheduling committee made up of equal members of the officers and management to "deal with the scheduling issues...." After issuance of the award, the scheduling committee met and agreed upon a twelve-hour shift schedule to be worked by bargaining unit members, which was implemented by the Borough in July of 2006. The twelve-hour shift schedule was in place nearly nineteen months, until February 12, 2008, when the Borough unilaterally implemented an eight-hour rotating shift schedule.

It is well-established that the bargainable subject of "hours", as set forth in Section 1 of Act 111, includes the shift system for police officers. <a href="Upper Saucon Township v. PLRB">Upper Saucon Township v. PLRB</a>, 620 A.2d 71 (Pa. Cmwlth. 1993); <a href="Indiana Borough v. PLRB">Indiana Borough v. PLRB</a>, 695 A.2d 470 (Pa. Cmwlth. 1997). As such, a change in the length or type (steady or rotating) of shift schedules that affects the bargaining unit police officers is a mandatory subject of bargaining. <a href="Id">Id</a>. This is not to say, however, that an employer cannot schedule or direct a police officer to work needed hours, so long as it maintains the negotiated regular shift schedule. The employer cannot simply rescind the shift schedules established by contract, interest arbitration, or past practice under the guise of direction of personnel, but must negotiate over any unit-wide change to the employes' shift schedules. <a href="Town of McCandless v. McCandless Police Officer's Association">Town of McCandless v. McCandless Police Officer's Association</a>, 952 A.2d 1193, 1197 (Pa. Cmwlth. 2008) (assigning a single officer to work for needed police coverage is a managerial prerogative, while "[o]n the other hand, implementation of a system-wide change in officer scheduling is a subject of mandatory bargaining"); <a href="Upper Saucon Township">Upper Saucon Township</a>, <a href="Supper Supper S

The Hearing Examiner found that the Borough unlawfully changed the agreed-upon shift schedules for all bargaining unit police officers, and rejected the Borough's assertion that a series of police officer resignations during January and February of 2008 created an emergency situation that excused the Borough from having to engage in collective bargaining with the Association before implementing an eight-hour, rotating shift schedule. Accordingly, the Hearing Examiner concluded that the Borough violated Act 111 and Section 6(1)(a) and (e) of the PLRA by unilaterally implementing an eight-hour rotating shift schedule for police officers on February 12, 2008.

In its exceptions, the Borough principally argues, as it did before the Hearing Examiner, that the change from a twelve-hour shift schedule to an eight-hour rotating shift for police officers was a managerial prerogative because it was necessitated by an emergency created by the resignations of several police officers and the need for adequate police coverage. In additional exceptions, the Borough appears to claim that the Hearing Examiner erred in failing to find that the twelve-hour shifts agreed to by the

Borough and the Association through the standing committee was only a temporary arrangement, and was not a past practice. The Borough also asserts that the Association waived bargaining over shift scheduling, without reference to any contractual language demonstrating a clear and unmistakable waiver of the Association's bargaining rights. Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983)

To support its notion that the twelve-hour shift schedule was only temporary and could not be a past practice, the Borough offered an undated and unsigned "agreement" between the Borough and the Association that was authored by the Borough and purports to be a scheduling agreement between the parties. (Borough Exhibit 4). The "agreement" characterizes the twelve-hour shift schedule implemented on July 2, 2006 as "experimental". It further provides that the twelve-hour shift schedule will "extend for a period of ninety (90) days," and claims that implementation does not constitute a past practice. Even if this "agreement" were executed, it cannot overcome the fact that the twelve-hour shift schedule extended beyond the "experimental" time period and lasted for an additional sixteen months before the Borough's unilateral action. Such an extended period of time of accepted conduct by both the Borough and the Association, establishes the status quo from which the Borough was obligated to bargain with the Association before implementing its change in the shift scheduling arrangement.

Moreover, the Borough's claims that the twelve-hour shift schedule was a temporary arrangement, not a past practice, and that bargaining over shift scheduling was waived, are rebutted by the interest arbitration award. The interest arbitration award establishes a scheduling committee made up of equal members of the officers and management to deal with the scheduling issues. The effect of this provision is that during the life of the interest arbitration award, any changes to police officer shift schedules must be dealt with through the scheduling committee. Indeed, scheduling issues were not "waived" in the award, but to the contrary, the arbitration panel directed that scheduling issues were to be bargained through the scheduling committee. Thus, even if the Borough had offered credible evidence that the twelve-hour shift schedule was understood to be only temporary, the interest arbitration award directs that for the life of the award, the Association and the Borough are to resolve scheduling issues through the scheduling committee, and not by the Borough unilaterally imposing its desired shift schedule.

As regards a public employer's obligation to bargain shift schedules, we note that generally, an employer has at its disposal the managerial prerogative to assign police officers based on workload and need. However, the ability to direct individual employes does not give an employer free reign to unilaterally implement indefinite, unit-wide changes to previously agreed upon hours or working conditions. Town of McCandless, supra; Fraternal Order of Police v. City of Jeannette, 36 PPER 68 (Final Order, 2005), affirmed sub nom. City of Jeannette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006). The record here does not support the Borough's argument that it attempted to exercise its managerial prerogative to direct police officers to respond to work for emergency coverage as needed while maintaining the agreed upon twelve-hour shifts. To the contrary, what is evident from the record is that the Borough, instead of directing police officers as needed, unilaterally implemented a bargaining unit-wide change from the agreed upon twelve-hour shifts in violation of its statutory bargaining obligation. Upper Saucon Township, supra; Indiana Borough; supra.

Moreover, as for the Borough's perceived emergency, no cognizable exigent circumstance existed here which would have excused the Borough's unilateral change from a twelve-hour to an eight-hour rotating shift schedule. An exigent circumstance may serve as a defense to a failure to bargain charge, but only where the employer establishes that it has made reasonable efforts to avert the situation, and where it is proven that compliance with the collective bargaining agreement, interest arbitration award, or collective bargaining obligations, would be impossible and cause the employer to be unable to timely perform an essential public function. Mifflin County Educational Support Personnel Association ESPA/PSEA/NEA v. Mifflin County School District, 38 PPER 37 (Final Order, 2007) (school district established exigent circumstances where the district was required by law to have a sign language interpreter by the start of the school year, but after failed attempts to fill the position through the contractual bidding process, and reasonable efforts to hire an interpreter at the contractual rate of pay, the district

was constrained to accept the wage demands of a qualified interpreter in time for the start of school year); City of Jeannette, supra (the employer was not excused from removal of bargaining unit work under the claim of exigent circumstances where the city did not first offer bargaining unit employes the ability to work a vacant shift consistent with past practice).

As the Hearing Examiner stated:

The chief testified that "it's very difficult" to get part-time officers to work twelve-hour shifts, and that "[i]t was easier to cover [eight hour shifts]...for scheduling purposes." (N.T. 48). Inconvenience, however, does not excuse the Borough from bargaining with the Union over a schedule change, even one supposedly in response to an immediate exigency. Moreover, the Borough did schedule officers for twelve-hour shifts on the weekends (N.T.51-52), undercutting the implied argument that twelve-hour shifts were impossible to fill.

(PDO at 4).

As recognized by the Hearing Examiner, the Borough did not prove that it could not have maintained the agreed upon twelve-hour shifts. Upon review of the testimony and documentary evidence, there is no credible proof offered by the Borough that compliance with the interest arbitration award, and its bargaining obligation, was impossible. While the Borough's Chief of Police testified broadly that there was "an ongoing effort" to hire full-time police officers (N.T. 49), the Borough failed to proffer evidence of reasonable efforts to maintain the existing twelve-hour shift scheduling agreement or attempts to comply with its bargaining obligation owed to the Association. As such, on this record, the Borough failed to sustain its burden of establishing an exigent circumstance defense for its unlawful unilateral change to the police officers' shift schedules. Mifflin County School District, supra; City of Jeannette, supra.

After a thorough review of the exceptions and all matters of record, we agree with the Hearing Examiner's conclusion that the Borough's bargaining-unit wide unilateral change from a twelve-hour to eight-hour rotating shift schedule is a violation of Act 111 and Section 6(1)(a) and (e) of the PLRA. Accordingly, the Borough's exceptions shall be dismissed and the Proposed Decision and Order made final.

#### ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

#### HEREBY ORDERS AND DIRECTS

that the exceptions filed by Nazareth Borough are hereby dismissed, and the April 1, 2009 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this sixteenth day of June, 2009. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

JAMES M. DARBY, MEMBER, DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION IN THIS CASE.

# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

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### AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111; that it has returned officers to the twelve-hour shift schedule; that it has posted a copy of the final order and proposed decision and order as directed; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

	Signature/Date
	Title
SWORN AND SUBSCRIBED TO before me	
the day and year first aforesaid.	

Signature of Notary Public