

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NORTHAMPTON COUNTY DEPUTY :
SHERIFFS ASSOCIATION :
 :
v. : Case No. PERA-C-08-350-E
 :
NORTHAMPTON COUNTY :

FINAL ORDER

The Northampton County Deputy Sheriffs Association (Association) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on July 1, 2009, to a Proposed Decision and Order (PDO) issued on June 12, 2009. In the PDO, the Board Hearing Examiner found that Northampton County (County) violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by removing work from the bargaining unit of deputy sheriffs without prior negotiation with the Association. Specifically, the Hearing Examiner found that the County committed unfair practices by subcontracting security work at the County's Wolf Building, and by transferring warrant verification duties to dispatchers in the 911 center. The Hearing Examiner directed the County to restore the work of verifying warrants to the deputy sheriffs, and limited the remedy for the subcontracting of security in the Wolf Building to a cease and desist order. The County did not file exceptions to the finding of unfair practices, and filed an Affidavit of Compliance on June 30, 2009. Nor has the County filed a response to the Association's exceptions. The facts relevant to the Association's exceptions are summarized as follows.

The Association was certified as the exclusive representative of the deputy sheriffs on April 19, 2005. The County and the Association began bargaining for their first collective bargaining agreement, and after failing to reach an agreement, proceeded to interest arbitration.

The County owns the Wolf Building and uses it for several agencies, including Children and Youth Services, Aging, Veterans Affairs and Information Referral/Emergency Services. The County has a bargaining obligation for employees in the Wolf Building who are represented by the Pennsylvania Social Services Union (PSSU). A provision in the October 2007 collective bargaining agreement between the County and PSSU provided that "a trained security person will be stationed at the Wolf Building and any future Human Services Building on a full-time basis." The County, however, has not stationed deputy sheriffs in the Wolf Building on a daily, full-time basis since 2002. However, since 2005, deputy sheriffs have responded to emergencies in the Wolf Building, and have been called by Children and Youth Services to assist with supervised visitations. The frequency of the emergencies and the supervised visitations is not revealed in the record. To comply with the agreement with PSSU, the County did not assign the full-time security work in the Wolf Building to the deputy sheriffs. Instead, in May 2008, the County began utilizing two full-time private security officers from Manpower. Between May and December 2008, there have been three episodes where the Manpower security employees have called deputy sheriffs for assistance at the Wolf Building.

Although the County and the Association had already invoked interest arbitration, on June 16, 2008, the Association requested that the County bargain or revert to assigning deputy sheriffs to perform the security work at the Wolf Building that was being performed by the Manpower employees. Thereafter, on August 15, 2008, an interest arbitration award between the County and the Association was issued. The award is retroactive to January 1, 2006 and expires on December 31, 2010. Connie Sutton-Falk, County Director of Human Resources, testified that the matter of subcontracting was bargained during the collective bargaining and interest arbitration proceedings, and that the assignment of providing security at the Wolf Building to Manpower was justified by the Management Rights clause in the August 15, 2008 award. The Management Rights clause of the award addresses subcontracting, in pertinent part, as follows

"Article V Management Rights,

Section 1---The County retains all the customary, usual and exclusive rights, decision-making prerogatives, functions and authority connected with or in any way incident to its responsibility to manage the affairs of the County or any part of it. The rights of employees in the bargaining unit and the Association hereunder are limited to those specifically set forth in this Agreement and the County retains all prerogatives, functions and rights not specifically limited by the specific terms of this Agreement.

Without limitation, but by way of illustration, the exclusive prerogatives, functions, and rights of the County, if not specifically limited by the specific terms of this Agreement, shall include the following:

* * *

(p) To contract or subcontract work as may be determined by the County, provided that such work does not include work that substantially comprises work previously and regularly performed by employees in the bargaining unit. The exercise of any management prerogative, function, or right which is not specifically modified by this Agreement is not subject to the grievance procedure or arbitration."

Given these facts, the Hearing Examiner found that before May 2008, deputy sheriffs had exclusively provided security at the Wolf Building. Accordingly, the Hearing Examiner determined that by unilaterally assigning security work at the Wolf Building to non-bargaining unit Manpower employees in May 2008, the County unlawfully removed bargaining unit work in violation of Section 1201(a)(1) and (5) of PERA. The Hearing Examiner also found, however, that with the issuance of the interest arbitration award, the County had a sound arguable basis for claiming that it was contractually privileged to subcontract the work of security at the Wolf Building, and therefore could not be found to have violated PERA with respect to the removal of the security work after August 15, 2008. Therefore, the Hearing Examiner did not direct the County to reinstate the work of providing security at the Wolf Building to the deputy sheriffs, but limited the remedy to a cease and desist order for the unfair practice committed in May 2008.

The dispute raised by the Association's exceptions concerns the Hearing Examiner's remedy for the County's subcontracting of security at the Wolf Building in violation of PERA. The Association claims that the Hearing Examiner's cease and desist order is inadequate, and requests that the deputy sheriffs be made whole for the County's unlawful subcontracting of the security work at the Wolf Building and that the County be directed to cease assigning the work to Manpower.

The Board's typical remedy for an employer having unlawfully subcontracted the work of the bargaining unit without first having fulfilled its bargaining obligations with the union is to restore the *status quo ante* by requiring the employer to rescind the subcontract, restore the work to the bargaining unit, and make the bargaining unit employees whole for any lost wages and benefits. Upper Moreland Township School District v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997). However, fashioning the appropriate remedy for a particular unfair practice is a matter reserved to the discretion of the Board. PLRB v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948). In exercising this discretion the Board has, in rare circumstances, deviated from its typical remedy in subcontracting cases, and limited the remedy to a cease and desist order directing bargaining over subcontracting without first requiring the employer to rescind the subcontract. American Federation of State, County and Municipal Employees v. Office of Administration, 20 PPER ¶20005 (Final Order, 1998), affirmed 568 A.2d 730 (Pa. Cmwlth. 1990), petition for allowance of appeal denied, 527 Pa. 625, 598 A.2d 46 (1991). As set forth below, we find that the unique facts of this case are one of those rare instances warranting tailoring of the remedy as directed by the Hearing Examiner in the PDO.

Here, no deputy sheriff was laid off because of the addition of private security guards in the Wolf Building, and there is no allegation that any deputy sheriff's wages or hours were actually reduced as a result of Manpower providing full-time security in the

Wolf Building. Indeed, since 2002, (before there was a bargaining unit), no deputy sheriffs were stationed on a full-time basis in the Wolf Building, and the use of full-time private security guards at that location in May 2008 did not displace any deputy sheriffs from those positions. Although there was testimony that deputy sheriffs continued to be called to the Wolf Building when their assistance was needed, there is no record evidence that since May 2008 there were any supervised visitations where Children and Youth Services used private security guards instead of deputy sheriffs. On this record, it would be purely speculative to direct a specific award of back pay to any given deputy sheriff arising from the May 2008 violation of 1201(a)(1) and (5) of PERA. York City Employees' Union v. City of York, 37 PPER 122 (Final Order, 2007) (remedial relief cannot be fashioned based on speculation about employes' lost wages and benefits); City of Philadelphia v. Pennsylvania Labor Relations Board, 759 A.2d 40 (Pa. Cmwlth. 2000) (same).

Moreover, the Hearing Examiner found that under the August 15, 2008 interest arbitration award, the County has a sound arguable basis for claiming that it has a contractual privilege to subcontract security work in the Wolf Building. The Association argues that the County's ex post facto contractual privilege cannot negate its violation of PERA in May 2008. We agree that the subsequent interest arbitration award does not negate the fact that the County committed an unfair practice in May 2008 by subcontracting the security work in the absence of an agreement to do so.¹ However, whether the County would be contractually privileged to subcontract bargaining unit work under the interest award is surely a relevant consideration in fashioning the appropriate remedy.

Where a collective bargaining agreement or interest arbitration award addresses the employer's action, the Board will find that the employer has fulfilled its statutory bargaining obligation and reserve interpretation of the agreement or award for a grievance arbitrator. This is known as a "contractual privilege" or "sound arguable basis" defense to a claimed unilateral change. Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER ¶18117 (Final Order, 1987); Pennsylvania State Troopers Association v. PLRB, 804 A.2d 1291 (Pa. Cmwlth. 2002). To sustain a claim of a contractual privilege, the employer must establish that its actions are in furtherance of its understanding of the contract terms by showing that it has a sound arguable basis for ascribing a particular meaning to contract language. Id.

The Association asserts that the County cannot rely on language that would allow the County to subcontract work not "previously and regularly performed by employes in the bargaining unit" where the Hearing Examiner found that security work in the Wolf Building had been exclusively performed by deputy sheriffs. However here, where the bargaining unit did not provide full-time security in the Wolf Building since 2002 (before the bargaining unit was certified), the County has an argument to present to an arbitrator that full-time security in the Wolf Building was not "previously and regularly performed by employes in the bargaining unit" within the meaning of the interest arbitration award.² As such, for purposes of PERA, the County has fulfilled its statutory bargaining obligation to negotiate with the Association over the issue of subcontracting. It is up to an arbitrator to determine if the County violated the parties' interest arbitration award by subcontracting work "previously and regularly performed" by bargaining unit members. Pennsylvania State Troopers Association, supra.³ Accordingly, we agree with the Hearing Examiner's assessment that under the August 15, 2008 award (that is retroactive to January 1, 2006), the County would have a sound arguable basis defense to a charge of unfair practices alleging a refusal to bargain the assignment of full-time security guards in the Wolf Building.

¹ The County's act of subcontracting bargaining unit work is a singular discrete act that occurred in May 2008 and not at a later date when it merely continued its use of non-unit personnel. See PLRB v. Borough of Frackville, 14 PPER ¶ 14139 (Final Order 1983) (employer's abolishment of meterman position was not a continuing violation).

² The employer's interpretation of the agreement or interest arbitration award does not necessarily need to be correct for it to establish a sound arguable basis defense to a charge of unfair practices. North Cornwall Township Police Association v. North Cornwall Township, 33 PPER ¶33054 (Final Order, 2002); Ellwood City Police Wage and Policy Unit v. Ellwood City, 28 PPER ¶28200 (Final Order, 1997).

³ If the arbitrator finds that the County violated the interest arbitration award by subcontracting the security work to Manpower, the arbitrator can direct an appropriate remedy, including rescission of the subcontract and make-whole relief.

In light of our finding of an unfair practice herein, we would have the discretion to direct make whole relief from May 2008 to August 15, 2008. However, since there is no showing that any deputy sheriff suffered reduced wages or hours, or was furloughed or removed due to the County's assignment of security work at the Wolf Building to Manpower, no such relief would be appropriate here. As set forth above, the County fulfilled its obligation to bargain with the Association over subcontracting, albeit after the fact. On these unique facts, we find sufficient circumstances warranting the Hearing Examiner's tailoring the remedy in this case to the issuance of a cease and desist order for the County's violation of Section 1201(a)(1) and (5) of PERA. Accordingly, after a thorough review of the exceptions and all matters of record, the Association's exceptions shall be dismissed, and the PDO made final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Northampton County Deputy Sheriffs Association are hereby dismissed, and the June 12, 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, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of September, 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.