

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

The Commonwealth of Pennsylvania (Commonwealth) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on June 5, 2009 to a Proposed Decision and Order (PDO) of a Board Hearing Examiner issued on May 19, 2009. In the PDO, the Hearing Examiner concluded that the Commonwealth violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by using private security guards to operate scanning equipment at a building that it leases in Philadelphia. The Secretary of the Board granted the Commonwealth's request for additional time to file a brief in support of the exceptions, and the Commonwealth timely filed its brief on July 6, 2009. The Fraternal Order of Police, Lodge 85 (FOP) filed a brief in response to the exceptions on July 28, 2009. After review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

7. The Commonwealth owned property at 1400 Spring Garden Street in Philadelphia. When that property was sold, the Commonwealth leased two properties, one on Arch Street and one on Market Street, to house state offices. (N.T. 25).

8. The Commonwealth and the FOP are parties to an interest arbitration award effective July 1, 2007 through June 30, 2011. The terms of the award incorporate provisions of prior contracts and awards. Article 44 of the parties' 1999-2003 collective bargaining agreement, entitled "Unit Work", is incorporated into the current interest arbitration award. Article 44, Section 2 provides that "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).

DISCUSSION

The facts of this case are summarized as follows. Since May 2005, the Commonwealth used Capitol Police officers to operate scanning equipment (x-ray machines and metal detectors) on an exclusive basis at five buildings in Harrisburg. The Commonwealth also owned property at 1400 Spring Garden Street in Philadelphia. However, no scanning devices were installed at that location.

The Commonwealth and the FOP are parties to an interest arbitration award effective July 1, 2007 through June 30, 2011, which incorporated terms from prior agreements and awards. Article 44 of the parties' 1999-2003 collective bargaining agreement, entitled "Unit Work", is incorporated into the current interest arbitration award. Article 44, Section 2 provides that "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."

When the Commonwealth property on Spring Garden Street in Philadelphia was sold, the Commonwealth leased two properties, one on Arch Street and one on Market Street, to house Commonwealth offices relocated from the Spring Garden Street location. Sometime prior to June 2008, the Commonwealth began interviewing private security firms to operate scanners at the Arch Street property. Sergeant Stocket, the FOP's "grievance guy" in Philadelphia, was present for the interviews and recommended three of the firms interviewed. In August or September 2008, the Superintendent of the Capitol Police advised FOP President Joseph

Shayter that in November 2008, a private security firm would be operating scanners at the Arch Street building in Philadelphia, but did not offer to bargain with the FOP. In November 2008, the Commonwealth set up scanners in the Arch Street Building, and a private security firm (Scotland Yard) has operated the scanners ever since.

The Hearing Examiner found that operation of scanning devices on Commonwealth property was exclusively performed by the Capitol Police, and therefore the Commonwealth violated Section 6(1)(a) and (e) of the PLRA and Act 111 by utilizing private security guards to operate the scanning devices at the Arch Street location. The Hearing Examiner rejected the Commonwealth's claim of a contractual privilege defense, and relied on the FOP's representation of the facts in Commonwealth of Pennsylvania, 33 PPER ¶ 33078 (Proposed Decision and Order 2002), stating that

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 ... 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.

PDO at 4.

In excepting to the PDO, the Commonwealth asserts that the FOP and the Hearing Examiner misconstrued the facts in Commonwealth of Pennsylvania, which, contrary to the contention of the FOP and the Hearing Examiner's discussion in the PDO, did in fact involve the Commonwealth's use of private security guards to perform work that could have been performed by the Capitol Police. According to the Commonwealth, the Hearing Examiner determined in that case that the Commonwealth had a sound arguable basis under Article 44, Section 2 of its collective bargaining agreement with the FOP to assign private security guards to work that could have been performed by the Capitol Police bargaining unit. Because no unfair practice was found in Commonwealth of Pennsylvania, the Commonwealth contends that the same result must be reached here.

In response to the Commonwealth's exceptions, the FOP abandons its claim made to the Hearing Examiner that Commonwealth of Pennsylvania did not involve private security guards. The FOP now argues that Commonwealth of Pennsylvania is nevertheless factually distinguishable because here the Capitol Police operate scanners in other parts of the state, and the Commonwealth is simply relocating its offices from Spring Garden Street to Arch Street. Thus, according to the FOP, the operation of the scanning equipment at the building on Arch Street is not a "new post or assignment" for purposes of Article 44, Section 2 of the parties' agreement, in contrast to the facts in Commonwealth of Pennsylvania.

This case concerns the Board's role when an employer is charged with violating its statutory duty to bargain, and the employer contends that it in fact satisfied its bargaining obligation by agreeing to contract language that authorizes the action alleged to be the unfair practice. In Port Authority Transit Police Association v. Port Authority of Allegheny County, 39 PPER 147 (Final Order, 2008), the Board addressed this issue as follows:

It is well established that a public employer may not unilaterally alter terms agreed to in a collective bargaining agreement. Thus, a clear repudiation of the terms of the collective bargaining agreement is an unfair practice ... Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005). However, a public employer may defend against an alleged bargaining violation arising from changes to a mandatory subject of bargaining by relying on agreed-upon contract language that arguably supports its actions. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER P. 18117 (Final Order, 1987). In assessing whether there is a "sound arguable basis" in the contract, the Board will not endorse one interpretation over another and the employer's interpretation of the contract

need not even be the correct or most accurate interpretation for the contractual privilege defense to apply. ... North Cornwall Township Police Association v. North Cornwall Township, 33 PPER P. 33054 (Final Order, 2002). Where there is language in the contract that supports the employer's claimed right to act unilaterally regarding a specific subject matter, the employer has sustained its burden of proving a "contractual privilege," and the Board will dismiss a charge alleging that the employer violated its bargaining obligation ... Pennsylvania State Troopers Association, supra.

Id. at 513. The Board further stated in Port Authority of Allegheny County, that "[i]nterpretation of the collective bargaining agreement is within the province of the grievance arbitrator, not the Board." Id. at 514 n.2 (citing Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978)).

Upon review of the Hearing Examiner's decision in Commonwealth of Pennsylvania and the entire record in that case, we must agree with the Commonwealth that Commonwealth of Pennsylvania did involve use of private security guards rather than Capitol Security Officers, as stated in the PDO in this case. In Commonwealth of Pennsylvania, the Commonwealth, relying on the same contractual language as in this case, assigned private security guards in the waiting areas on the third and sixteenth floors of the State Office Building in Philadelphia. Capitol Police continued to patrol the hallways in the State Office Building, and the complement of Capitol Police remained unchanged by the use of private security on the third and sixteenth floors. The Hearing Examiner in that case found that because the number of Capitol Police officers was not reduced by the addition of private security guards in the State Office Building, the Commonwealth had a sound arguable basis in Article 44, Section 2 of the collective bargaining agreement to make such an assignment.¹ Thus, Commonwealth of Pennsylvania supports the Commonwealth's assertion that the Hearing Examiner has already found a sound arguable basis in the reliance on Article 44 to support the use of private security guards for work that could have been performed by the Capitol Police bargaining unit.

The FOP's attempt to distinguish Commonwealth of Pennsylvania on the ground that this case does not involve a "new post or assignment" reinforces the determination that the Commonwealth had a sound arguable basis to assign the work to a private contractor. Resolution of whether the assignment in this case is a "new post or assignment" involves contract interpretation, which is a matter for an arbitrator rather than the Board. Port Authority of Allegheny County, supra. The Hearing Examiner has previously determined that the Commonwealth has a sound arguable basis for relying on Article 44 of the contract to employ private security guards for work that could be performed by Capitol Police officers, so long as the complement of the Capitol Police is not reduced.² Commonwealth of Pennsylvania, supra. Because of that prior determination involving the same parties, the same contract language, and the same essential issue, consistent with the contractual privilege defense as discussed in Port Authority of Allegheny County, supra, and the cases cited therein, the Hearing Examiner's finding of an unfair labor practice in this case will be set aside.

After a thorough review of the exceptions and all matters of record, the Board finds that the Commonwealth has fulfilled its bargaining obligation through negotiation of Article 44 of the collective bargaining agreement, and that the Commonwealth has articulated a sound arguable basis for believing that it was contractually privileged to subcontract the operation of scanning equipment in the Arch Street building to Scotland Yard. Accordingly, the Board shall sustain the Commonwealth's exceptions in part,³ and set aside the Proposed Decision and Order consistent with the above discussion.

¹ The FOP did not file exceptions to the Hearing Examiner's decision in Commonwealth of Pennsylvania.

² As in Commonwealth of Pennsylvania, here it is undisputed that the complement of Capitol Police has not been reduced by the use of security guards to operate scanning equipment at the Arch Street property. (FOP's Post Hearing Brief at 6; N.T. 39).

³ Given our dismissal of the unfair labor practice charge on the basis of contractual privilege, we need not address the Commonwealth's remaining exceptions.

CONCLUSIONS OF LAW

CONCLUSIONS numbers 1 through 3, as set forth in the Proposed Decision and Order, are affirmed and incorporated herein by reference and Conclusion number 4 is vacated and set aside and the following additional conclusion is made:

5. The Commonwealth has not committed unfair labor practices under 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 Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Commonwealth of Pennsylvania are hereby sustained in part, and the May 19, 2009 Proposed Decision and Order, be and hereby is vacated and set aside consistent with this order.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the charge of unfair labor practices is dismissed and the complaint issued thereon is rescinded.

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.