# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 205

:

v. : Case No. PERA-C-09-76-W

:

MUNHALL BOROUGH

#### FINAL ORDER

Munhall Borough (Borough) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on August 24, 2009, challenging an August 10, 2009 Proposed Decision and Order (PDO). In the PDO, the Hearing Examiner found that the Borough violated Section 1201(a)(1) and (5) of the Public Employe Relations Act by implementing a mandatory snow call out schedule for its public works employes without bargaining with the certified bargaining representative, Teamsters, Local Union No. 205 (Teamsters). The Teamsters filed a response to the exceptions on August 28, 2009. For purposes of addressing the exceptions, the Hearing Examiner's Findings of Fact are summarized as follows.

The Borough and the Teamsters are parties to a four-year collective bargaining agreement effective January 1, 2007. Article VI, paragraph A, of the collective bargaining agreement provides that:

The regular work week for all employees covered by this Agreement shall consist of either five (5) consecutive eight (8) hour days with two (2) days off, or four (4) consecutive ten (10) hour days with three (3) days off; where such schedule is practical. A regular work day shall consist of eight (8) consecutive hours of work (for those employees assigned to work a five-day work week) or ten (10) consecutive hours of work (for those employees assigned a four-day work week), inclusive of a one half (1/2) hour paid lunch period. A work day with a split shift shall not be permitted at any time. The Employer retains the right to modify an employee's regular work week in cases where the Employer feels that the service delivery needs require such a modification.

Article VIII of the collective bargaining agreement further provides that "[t]he Borough ... has the exclusive right and power to manage, control and conduct its business; to ... supervise and direct its work force, including the right to ... schedule ... its employees...." In early December 2008, Lawrence Billy, the Borough's public works supervisor, posted a notice scheduling bargaining unit employes to be on call for snow removal after their regular work day from December 14, 2008, through February 28, 2009. The notice read as follows:

DUE TO THE UNSUCCESSFUL ATTEMP[T] TO REACH BOROUGH EMPLOYEE[]S AFTER THE 3:00 P.M.[] TIME PERIOD, MANAGEMENT HAS BEEN FORCED TO MAKE A 'CALL OUT SCHEDULE' FOR THE AFTER 3:00 P.M.[] TIME PERIOD.

THE EMPLOYEE[]S ON SCHEDULED WEEK WILL BE RESPONSIBLE FOR CALL-OUT DUTY, FOR THE [REMAINDER] OF THE SNOW REMOVAL SEASON.

ALL EMPLOYEE[]S FOR THE SCHEDULED WEEK WILL MAKE THEMSELVES AVAILABLE.

ANY EMPLOYEE NOT ADHERING TO THE SCHEDULE WILL BE REPRIMANDED.

(emphasis in original). The Borough did not bargain with the Teamsters before Mr. Billy posted the mandatory snow call out schedule.

Based on the evidence and testimony of record, the Hearing Examiner found that the collective bargaining agreement did not address mandatory call out scheduling for

employes, and that neither Article VI nor Article VIII of the contract provided a sound arguable basis for the Borough to unilaterally implement a mandatory snow call out schedule. Accordingly, the Hearing Examiner concluded that the Borough violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing a mandatory snow call out schedule in December 2008.

The Borough argues on exceptions that the Hearing Examiner exceeded his role by interpreting the contract in rejecting its sound arguable basis defense to the charge. In Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000), the Commonwealth Court approved the Board's dismissal of a charge of unfair practices alleging a unilateral change in working conditions, based on the employer's "sound arguable basis defense" stating that:

[t]he [Board] has recognized 'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a refusal to bargain in good faith. The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible under the agreement.

Id. at 651. Contrary to the Borough's exceptions, the Commonwealth Court noted that "application of the sound arguable basis analysis allows the [Board] to determine whether the employer fulfilled its collective bargaining obligation ... without taking on the role of an arbitrator." Id. Indeed, the Commonwealth Court has recognized that in addressing the employer's sound arguable basis defense, "[t]he Board properly reviews the terms of the [collective bargaining agreement] to the extent necessary to resolve the ... unfair labor practice charges." Wilkes-Barre Township v. PLRB, 878 A.2d 977, 983 (Pa. Cmwlth. 2005).

In this regard, we agree with the Hearing Examiner's analysis of the Borough's alleged contractual privilege or sound arguable basis defense, in which the Hearing Examiner stated as follows:

In support of its contractual privilege defense, the Borough points out that article VI of the parties' collective bargaining agreement provides that "[t]he Employer retains the right to modify an employee's regular work week in cases where the Employer feels that the service delivery needs require such a modification." ... According to the Borough, in instituting the mandatory snow call out schedule, it modified the employes' regular work week consistent with its right to do so under article VI and thus did not act unilaterally.

A close review of article VI reveals, however, that it is silent as to any obligation on the part of employes to work after the end of their regular work day. In light of that silence, article VI provides no basis, much less a sound arguable one, for the Borough to contend that it was contractually privileged to institute the mandatory snow call out schedule.

PDO at 3.

Additionally, we agree with the Hearing Examiner's rejection of the Borough's reliance on Article VIII and the Borough's managerial right to "schedule" employes, as a basis to unilaterally create a mandatory snow call out schedule. As appropriately recognized by the Hearing Examiner, "[a] boilerplate management rights clause will not support a contractual privilege defense." PDO at 4. Indeed, if general boilerplate management rights clauses are afforded broad application to allow employers to implement specific changes in employe wages, hours and working conditions, they will effectively eclipse the employes' statutorily afforded right to bargain. Ellwood City Police Wage and Policy Unit v. Ellwood City, 36 PPER 89 (Final Order, 2005). Accordingly, the Board has recognized that where the employer is arguing, as here, that the union has vested it with

<sup>&</sup>lt;sup>1</sup> The Hearing Examiner found that "[T]here is no dispute that the Borough changed a mandatory subject of bargaining when it instituted the mandatory snow call out schedule." (PDO at 3). Not only did the Borough effectively concede before the Hearing Examiner that the schedule change was a mandatory subject of bargaining, but the Borough makes no claim to the contrary in its exceptions to the PDO.

the right to make unilateral changes through a management rights clause, the employer's argument is based on an alleged waiver of the union's right to bargain. <u>Fairview Township</u> <u>Police Association v. Fairview Township</u>, 31 PPER ¶31019 (Final Order, 1999). However, as the Board stated in Fairview Township:

The law is clear that a "waiver of bargaining rights will not be lightly inferred." <a href="Crawford County v. PLRB">Crawford County v. PLRB</a>, 659 A.2d 1078, 1082 (Pa. Cmwlth. 1995). In order to find a waiver of bargaining rights, the language relied upon must show a clear and unmistakable waiver. Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993).

<u>Id</u>. at 46. Here, there is absolutely no evidence of record that the Association clearly and expressly waived its right to bargain over a mandatory snow call out schedule.

Accordingly, we agree with the Hearing Examiner's finding that the collective bargaining agreement is silent with respect to a mandatory snow call out schedule, and therefore the Borough lacked a sound arguable basis in the contract to create one. Additionally, the Borough's general managerial right to schedule employes does not amount to a waiver of the Teamsters' right to insist on negotiation of a mandatory snow call out schedule for the employes. As the snow call out schedule is a mandatory subject of bargaining, we concur in the Hearing Examiner's conclusion that the Borough violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing such a schedule for employes in December 2008.

The Borough further argues that the Hearing Examiner should have been cognizant of the fact that it was having difficulty contacting employes to report for work when needed to clear snow from the roadways. In this regard, the case is similar to Nazareth Borough Police Association v. Nazareth Borough, 40 PPER 51 (Final Order, 2009). In Nazareth Borough, due to the resignation of several police officers, the employer had difficulty obtaining enough officers to work ten-hour shifts under the contract to have adequate coverage for the Borough. The employer claimed its alleged inability to schedule adequate coverage created an emergency that justified its unilateral implementation of an eighthour shift schedule. The Board noted that any inconvenience the employer had in trying to schedule employes under the existing ten-hour work schedule did not excuse the employer from fulfilling its statutory bargaining obligation to negotiate implementation of an eight-hour scheduling system. Similarly here, the Borough's difficulty in contacting employes to work overtime is no justification for unilaterally implementing a unit-wide mandatory call out schedule in contravention of the employer's statutory collective bargaining obligation. Accordingly, the Hearing Examiner did not err in failing to make findings regarding the Borough's alleged inability to contact employes for snow removal. International Brotherhood of Painters and Allied Trades Local Union 1968 v. Erie City School District, 40 PPER 12 (Final Order, 2009) (a hearing examiner need not make a finding of fact that would be irrelevant to the outcome).

The Borough correctly notes that where there is an emergency necessitating snow removal, it would be within its managerial prerogative to schedule employes to work overtime. Indeed, the Board has recognized that an emergency situation may arise that requires the employer to unilaterally implement what would otherwise be bargainable in order to address an isolated and imminent exigent circumstance. See e.g.: Mifflin County Educational Support Personnel Association ESPA/PSEA/NEA v. Mifflin County School District, 38 PPER 37 (Final Order, 2007). As noted in Nazareth Borough, while the employer may direct employes to report to work for a specific emergency situation, the employer may not use the emergency as an excuse to unilaterally, and prospectively, impose a new scheduling system or repudiate an agreed upon system of scheduling. As the Board stated in Nazareth Borough:

[G]enerally, an employer has at its disposal the managerial prerogative to assign [employes] based on workload and need. However, the ability to direct individual employes does not give an employer free reign to unilaterally implement ... unit-wide changes to previously agreed upon hours or working conditions.

40 PPER at 212. Accordingly, an employer's defense to a charge of unfair practices based on an emergency or exigent circumstance arises:

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.

<u>Id</u>. Here, as in <u>Nazareth Borough</u>, the Borough has failed to offer substantial, credible evidence that compliance with its obligation to negotiate the mandatory snow call out schedule with the Teamsters was impossible. Indeed, the mandatory snow call out schedule was posted in early December, 2008, and did not commence until December 14, 2008. Moreover, there is no evidence that if the Borough had attempted to negotiate with the Teamsters to address coverage issues it would have affected a specific incident of snow removal. In fact, the Borough acknowledges that it had the opportunity to meet with the Teamsters about the matter. However, it only did so after its unilateral implementation of the mandatory snow call out schedule. (N.T. 36)

The Borough also argues that the Hearing Examiner erred in awarding make-whole relief to affected employes, postulating that the Teamsters are seeking overtime pay for the time employes were on the snow call out schedule but were not called out. Notably, in its answer to the exceptions, the Teamsters asserts that "[it] has never sought monetary compensation for any alleged loss." The remedy for an unfair practice is discretionary with the Board, and make-whole relief is remedial in nature and not punitive. 43 P.S. \$1101.1303; In re Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). With the Teamsters' admission and the law in mind, once the Borough has complied with the relief directed in the PDO, the Teamsters may pursue additional proceedings before the Board if it wishes to challenge the Borough's compliance. See PLRB v. North Hills School District, 8 PPER 208 (Court of Common Pleas of Allegheny County, 1977) (disputes regarding whether party failed to comply with relief directed by Board are litigated at the compliance stage of the proceedings, if necessary); PLRB v. Northeastern Educational Intermediate Unit, 18 PPER ¶18203 (Final Order, 1987) (same).

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the Borough violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing a mandatory snow call out schedule in December 2008. Accordingly, the Board shall dismiss the Borough's exceptions and make PDO 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 Munhall Borough are hereby dismissed, and the August 10, 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 twentieth day of October, 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.

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TEAMSTERS LOCAL UNION NO. 205

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MUNHALL BOROUGH

### AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of PERA, that it has rescinded any discipline it imposed on members of the bargaining unit for not being available while the mandatory snow call out schedule was in effect, that is has made them whole for any losses sustained by them as the result of its institution of the mandatory snow call out schedule, that it has posted the Proposed Decision and Order and Final Order as directed, and that it has served an executed copy of this affidavit on the Teamsters.

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

Signature of Notary Public