

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On September 11, 2008, Northampton County Deputy Sheriffs Association (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Northampton County (County) alleging that the County violated Sections 1201(a)(1), (3), (4) and (5) of the Public Employe Relations Act (PERA).

On October 23, 2008, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and December 4, 2008 in Easton was scheduled as the time and place of hearing if necessary.

A hearing was necessary and was held as scheduled, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence

The examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That the parties stipulated and agreed that Northampton County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9)
2. That the parties stipulated and agreed that the Northampton County Deputy Sheriffs Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 9)
3. That the Association was certified by the Board as the exclusive representative of the Northampton County deputy sheriffs on April 19, 2005 at PERA-R-04-103-E. (N.T. 24-25, County Exhibit 2)
4. That in June, 2006, the County and the Association began bargaining for their first collective bargaining agreement. They were unable to reach an agreement so they proceeded to interest arbitration, which resulted in an award on August 15, 2008. The term of the award is January 1, 2006 to December 31, 2010. (N.T. 25, 108, 109, County Exhibit 2)
5. That the County owns the Wolf Building and uses it for several agencies, including Children and Youth Services (CV&YS), Aging, Veterans Affairs and Information Referral/Emergency Services (IRES). The employes at IRES, are involved in Section 302 commitments, investigating child abuse and managing a crisis hotline phone. County employes also refer to IRES as Crisis Intervention. (N.T. 13, 44, 69)
6. That from 1994 to 2008, the County provided daytime security at the Wolf Building by assigning deputy sheriffs to the building. The level of security services varied over the years. This service was either a regularly scheduled shift (i.e. 8:30 to 4:30 pm, Monday through Friday); an assignment for specific days (i.e, days when C&YS had supervised visits) or "calls for assistance." (N.T. 13, 21-23, 43-46, 63-66)

7. That since 2002, the County did not assign a deputy sheriff to the Wolf Building on a daily basis. (N.T. 64-65)

8. That night security at the Wolf Building was done by a watchman, never by a deputy sheriff. (N.T. 47)

9. That Ross Marcus, the County Director of Human Services, is responsible for the operation of the Wolf Building. He assumed this position in February 2006. In May, 2008, Mr. Marcus re-instated full-time security services at the Wolf Building. He did this in order to comply with a provision in the County-PSSU CBA, effective October, 2007, that "a trained security person will be stationed at the Wolf Building and any future Human Services Building on a full-time basis." (N.T. 13, 70-74, 113, County Exhibit 1)

10. That there were no full time security employes at the Wolf Building from October, 2007 to May, 2008. (N.T. 71-72)

11. That Patrick Crivellaro became president of the Association in 2008. That on or about May 12, 2008, Mr. Crivellaro discovered that there were two Manpower security officers working at the Wolf Building. (N.T. 12-13)

12. That on June 16, 2008, the Association requested that the County bargain or revert to the status quo of assigning sheriffs deputies to do security work at the Wolf Building. (N.T. 18, 68, Association Exhibit 3)

13. That the County's explanation for employing Manpower security officers at the Wolf Station instead of deputy sheriffs was that it wanted to avoid intimidating clients who visited the departments in the Wolf Building. The County's Human Services Director, Ross Marcus, explained that he believed an unarmed security person who did not resemble police officers would provide a security presence without intimidating visitors. (N.T. 74, 12)

14. That the deputy sheriffs are also able to provide a less intimidating security presence as the Manpower security. The deputy sheriffs have uniforms called Class E uniforms, which include a sport coat that allow them to carry a concealed weapon. The County's director of human services, Mr. Marcus, was not aware of this possibility until the hearing in this matter. (N.T. 77)

15. That Connie Sutton-Falk, County Director of Human Resources, testified that the matter of subcontracting security at the Wolf Building was bargained as reflected in the interest arbitration award. Specifically, the assignment of the work to Manpower security officers was justified by the Management Rights clause allowing subcontracting, which states, in pertinent part,

"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 employes 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."

(N.T. 111, County Exhibit 2, p. 10)

16. That each of the Manpower employe works 32 hours a week. Each works four days a week, with Tuesday, Wednesday and Thursday being the overlap days. One is present on Monday. Both are present on Tuesday, Wednesday and Thursday. One is present on Friday. (N.T. 83)

17. The Manpower officers are uniformed. They wear a white shirt. However, they wear no badges or patches. (N.T. 84)

18. That since May, 2008, there have been three episodes at the Wolf Building where the Manpower security employes have called sheriffs deputies for assistance. (N.T. 84-85)

19. That deputy sheriffs are also responsible for holding and serving warrants. That in Northampton County, at any time, there are approximately 2,500 outstanding criminal warrants, plus additional domestic relations warrants. The overwhelming percentage of the warrants are bench warrants or fugitive warrants directing a defendant to appear in court. (N.T. 31-32)

20. That the warrant is issued by the Northampton County Court of Common Pleas to the sheriff. The sheriff keeps the actual hard copy of the warrant. The sheriff makes copies of the warrant for the 911 dispatch center. This distribution of copies to the 911 center began before June 11, 2008. (N.T. 37-38, 51-52)

21. That when an out of county or out of state police department arrests someone, they may also learn of an outstanding Northampton County warrant on the National Crime Information Center (NCIC), supervised by the FBI, or the Commonwealth Law Enforcement Assistance Network (CLEAN), supervised by the Pennsylvania State Police. This process is known as a warrant hit. (N.T. 32)

22. That when the arresting police officer puts a name and birth date of an individual in the NCIC or CLEAN system those systems can indicate that an individual with that name and birth date is subject to a warrant from a particular jurisdiction, indicated by an Originating Agency Identifier (ORI). If it turns out that the ORI is Northampton County, s, the arresting officer calls the Northampton County 911 Center to verify the existence of a warrant on file. In most cases, there is no discrepancy between the NCIC or CLEAN file and the warrant file in the 911 center, simply by use of the ORI. However, a scenario for a discrepancy could exist when an individual in the NCIC file with the same name and same date of birth as an individual in the Northampton County warrant file may not be the individual actually subject to a warrant because of other identifiers that are not in the NCIC or CLEAN system, for example the identifiers of race, height, weight and color of eyes. (N.T. 32-33, 34-35, 88-90)

23. That there are serious implications in carrying out a warrant, especially the risk of picking up and jailing the wrong person. Because of this, some requesting agencies will not accept a warrant confirmation from an employe who is not a sworn law enforcement officer who cannot verify the existence of the actual warrant itself. (N.T. 53, 98-99)

24. The information in the 911 dispatch center is a file of the data from the warrant. That with technological advances, the 911 center began keeping a digital file of warrants. It is not the actual warrant. (N.T. 33-35, 54, 87)

25. That on a busy day, weekends for instance, the deputy sheriffs would receive six to eight calls for warrant hit confirmations from the 911 center. (N.T. 50)

26. That over the years, because of technological advances, the deputy sheriffs' involvement in confirming warrant hits has evolved, especially for night and weekend

calls. In the past, sheriffs deputies took home a 4 inch thick file containing all the outstanding bench warrants. If a call from an arresting officer or an out of state officer came into Northampton County at night (or on the weekends) the Deputy Sheriffs could refer to this file to verify that the person arrested was the same person who was on the warrant. (N.T. 90, 93-94)

27. That prior to June 11, 2008, civilian dispatchers in the 911 Center called the deputy sheriffs for all warrant confirmations, whether they be simple or complex or present some sort of discrepancy. (N.T. 40-43, 87, 92 and 100-101)

28. That on June 11, 2008, the County Department of Administration Director, Jennifer Enstrom, issued a memorandum announcing a change in the handling of warrant hit confirmations during nighttime and weekends. The memorandum read, in pertinent part:

During nighttime (2200-0830 hrs) and weekends (Fridays from 2200-Mondays 0830 hrs), we will handle the confirmations as we have in the past, without involvement from the A-Call deputy as long as there are no discrepancies regarding identification of the wanted person. Valid confirmation will be justified by 1) a hard copy of the warrant on file, 2) an active entry in NCIC/CLEAN **and** 3) matching identifiers: also consider extradition criteria. Hit confirmation handled during this time period will require you to complete the "green sheet" and leave a message on the answering machine for NCSO.

(emphasis in original)

(N.T. 17, 68, Association Exhibit 1)

29. That the Sheriff Jeffrey Hawbaker admitted that current technology would allow a deputy sheriff who was at home on night or weekend warrant hit duty to use either a laptop or a blackberry to access CLEAN or NCIC to do the work that has been transferred to the 911 County dispatch workers. (N.T. 98-100)

30. That on June 16, the Association requested the County to bargain or revert to the status quo over the issue of assigning the work of warrant hit confirmations. (N.T. 18, 68, Association Exhibit 2)

31. That the County did not bargain or revert to the status quo over the issue of assigning the work of warrant hit confirmations. (N.T. 19)

32. That the interest arbitration award for the deputy sheriffs that was effective August 15, 2008, resolved the issue of compensation for deputy sheriffs being on call to answer warrant hits. Article XVI, On-Call Pay, eliminated the automatic two hours for every call and replaced it with a flat \$210 for the week of being on call plus the time actually worked. (N.T. 109-110, County Exhibit 2, p. 22)

33. That under the Northampton County Home Rule Charter, the Sheriff of Northampton County is not an elected officer. Rather the Sheriff is appointed by the County Executive. He is the only sheriff of the 67 sheriffs in the Commonwealth of Pennsylvania who is appointed and not elected. (N.T. 97)

DISCUSSION

The Association's charge of unfair practices alleges that the County violated its duty to bargain by unilaterally transferring bargaining unit work done by deputy sheriffs in two instances: providing security at a county office building and confirming to police departments the validity of a Northampton County warrant.

The Board will find an employer in violation of Section 1201(a)(5) of the Act if the employer unilaterally transfers bargaining unit work. See PLRB v. Mars Area School District, 480 Pa. 295, 389 A. 2d 1073 (1978). The burden of proving an unfair practice

charge in on the complainant. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977).

Security at the Wolf Building

The Association's first allegation is that the County in 2008 began using Manpower security services at the Wolf Building in place of the deputy sheriffs.

The County raises several defenses. The first defense is that security work at the Wolf Building has not always been exclusively that of the deputies. The county points out that from 2002 to 2008, the security work was not even done on a full time basis, but only on an as needed basis for emergencies or for those weeks when domestic relations custody trials were being held. The County points out that full-time coverage only resumed in 2008 when the recently ratified County-PSSU collective bargaining agreement required that there be security at the Wolf Building.

If an employer permanently ceases providing a service, it is under no duty to bargain this decision. Youngwood Borough Police Department v. Youngwood Borough, 539 A.2d 26 (Pa. Cmwlth. 1988). Conversely, if an employer has not permanently and effectively gone out of the business of providing the service, but only reduced the level of service, it cannot transfer the work to non-unit workers. County of Bucks v. Commonwealth, PLRB, 465 A.2d 731 (Pa. Cmwlth. 1983) See also City of Philadelphia 27 PPER ¶ 27048 (Proposed Decision and Order, 1996).

In the present case, the facts reveal that there was a period of time when the county did not assign full time deputy sheriffs to perform daily security at the Wolf Building. However, in this period, the county deployed deputy sheriffs to the Wolf Building to respond to emergencies. The County also scheduled the deputy sheriffs for domestic relations hearings. Under these facts, it cannot be concluded that the County permanently went out of the business of providing security at this site. The county is therefore precluded from the using the defense that the security work was not exclusively that of the deputy sheriffs. Given these facts, the County must show that it has fulfilled its duty to bargain with the Association over the transfer of Wolf Building security services to non-unit employees.

The County contends that it has satisfied its duty to bargain by participating in the interest arbitration proceedings for a first collective bargaining agreement. The County acknowledges that subcontracting was an issue before the interest arbitrator, since the Association put forward a proposal to prohibit subcontracting. The County asserts that having participated in interest arbitration, it was permitted in May, 2008, to subcontract while it waited for the award to be rendered. However, this argument runs contrary to the principle that employers must maintain status quo while the parties are negotiating a first collective bargaining agreement following certification. Bucks County Security Guards Association v. Bucks County, 38 PPER ¶ 99 (Final Order, 2007), citing Lawrence County Housing Authority, 5 PPER ¶ 39 (Final Order, 1974). The County was not privileged to change the status quo in this period while it waited for an interest arbitration award. Therefore, for the period of May, 2008 to August 15, 2008, the County had engaged in unfair practices by unilaterally transferring the security work at the Wolf Building to Manpower.

The County next argues that its decision to transfer the work was justified by contractual privilege, i.e. that the interest arbitration award did allow subcontracting. The county argues that Management Rights clause in the recently approved interest arbitration award provides it with a sound arguable basis for its position that the assignment of the security work at the Wolf Building was contractually privileged.

In Fraternal Order of Police v. SEPTA, 35 PPER 73 (Final Order, 2004), the Board articulated the defense of contractual privilege in the following manner:

In Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212, 117 L.R.R.M. 1062 (1984) and Vickers, Inc., 153 N.L.R.B. 561, 59 L.R.R.M. 1516

(1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 28 PPER ¶ 28200, at 433 (Final Order, 1997). The Commonwealth Court has sanctioned the Board's adoption and application of the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB (PSTA I), 804 A.2d 1291 (Pa. Cmwlth. 2002); Pennsylvania State Troopers Ass'n v. PLRB (PSTA II), 761 A.2d 645 (Pa. Cmwlth. 2000). "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." PSTA II, 761 A.2d at 651. "An employer's interpretation need not necessarily be the correct interpretation in order to provide a valid defense, so long as there is a 'sound arguable basis' for its interpretation and a 'substantial claim of contractual privilege.'" Jersey Shore, 28 PPER at 340. In this regard, the Board "will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." Id. at 341 (quoting NCR Corp., 117 L.R.R.M. at 1063).

SEPTA, 35 PPER at 229.

The County's defense of contractual privilege has merit. The sound arguable basis for the County's argument is found in Article V, Management Rights, Section 1(p) which allows subcontracting if it did not involve work "previously and regularly performed by employes in the bargaining unit." This case therefore raises a contract interpretation question more properly addressed by an arbitrator, whether the work history of the deputy sheriffs at the Wolf Building in the past six years constitutes security work "regularly performed by employes in the bargaining unit." Accordingly, the allegation that the County violated its duty to bargain by transferring the Wolf Building security work beyond August 15, 2008 is dismissed.

The County's final defense is that this decision was not a mandatory subject of bargaining under Section 701 of PERA. The County argues that the decision fell under Section 702 of PERA, because the plan to present a less intimidating security presence at the Wolf Building security was a decision about "standards of service," and thus not a mandatory subject of bargaining. This argument, as the Association points out, ignores the fact that the deputy sheriffs could have provided the same less intimidating appearance had they been asked to do so, since they can work with concealed weapons and in a uniform that was less threatening. Accordingly, this defense is dismissed.

June 11, 2008 Order Changing Warrant Hit Procedure

The Association's second allegation is that the County transferred the work of confirming warrant hits to civilian 911 dispatchers. Warrant hit confirmation is the procedure of verifying to agencies outside Northampton County that the warrants showing up on NCIC or CLEAN data files were in fact the same ones issued by the Northampton County courts.

As a threshold matter, the County argues that its June 11, 2008 order did not change past procedure or the distribution of work. The County asserts that its order simply put into writing the practice of the 911 dispatchers handling confirmations by using the digital file of warrants and only calling deputy sheriffs for confirmations where there were discrepancies. As for warrant hits without discrepancies ("plain vanilla warrants"), the County argues that some time earlier it had ceased calling in deputy sheriffs at nights or weekends on overtime basis to confirm these warrants.

Sergeant David Ruberry and Sheriff Jeffrey Hawbaker testified on this point. Sergeant Ruberry's testimony was clear, direct and emphatic that prior to June 11, 2008, deputy sheriffs confirmed all warrant hits, those with and without discrepancies. Mr. Hawbaker gave testimony that eventually agreed with Sergeant Ruberry that prior to June 11, 2008, the deputy sheriffs were called to confirm all warrant hits. Accordingly, it must be concluded that the June 11, 2008 order constituted a change in the distribution of work in that it transferred all warrant confirmation work at night and on weekends.

The County goes on to argue that the change is permissible because an improvement in technology allowing copies of warrants to be kept on a computer file in the 911 center made it unnecessary for the deputy sheriffs to be called on weekends to verify the validity of warrants. The change of technology does not remove the duty of bargaining. In City of Philadelphia, 27 PPER ¶ 27161 (Final Order, 1996) the Board ruled that the city violated its duty to bargain with the police union over the addition of non-police security guards, despite the advanced technology that the security guards brought to the task, reasoning "the Board readily agrees that the introduction of technology is generally a matter of managerial prerogative. The issue is obviously not whether the Employer can introduce advanced technology in the workplace, but who will perform the duties associated with the essential function and goals, which have not changed." 27 PPER at 369

Accordingly, the Association has proven that the County has violated its duty to bargain by transferring the night and weekend warrant hit confirmation from the deputy sheriffs to civilian 911 center dispatchers. The bargaining that occurred over the wages to be paid to deputy sheriffs on-call and that resulted in Article XVI, On-Call Pay, did not satisfy the duty to bargain over the transfer of the work.

Finally, the Association has alleged that the transfer of bargaining unit work was done in a way that was coercive and retaliatory and that it was evidence of anti-union discrimination. The facts do not support such allegations. Accordingly the charges alleging a violation of Sections 1201(a)(3) and (4) are dismissed.

CONCLUSIONS

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

1. That Northampton County is a public employer within the meaning of Section 301(1) of PERA.
2. That the Association is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the County has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.
5. That the County has not committed unfair practices in violation of Sections 1201(a)(3) or (4) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that the County shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA.
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of PERA:

(a) Rescind the transfer of the warrant hit confirmation work to the 911 dispatch center employes;

(b) Reinstate that work to the bargaining unit;

(c) Post a copy of this decision and order within five (5) days from the date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this twelfth day of June, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner