

6. The civilian video monitoring personnel watch monitors for approximately twenty-five cameras. They program the cameras to perform automatic sweeps on a 360-degree rotation as well as to remain fixated on certain locations for predetermined amounts of time before proceeding to the next fixed position. The VSU employees can override the programmed camera performance and assume manual control with a joystick to investigate suspicious activity. The VSU employees can manually zoom in or out. They can zoom in on a license plate and follow a subject from one camera range to another. VSU civilians generate and maintain written logs of suspicious activity observed on the monitors. In the logs, VSU employees detail the type of suspected activity, location, time and camera number. VSU civilians will also respond to requests from bargaining unit officers for copies of video recordings for specific locations and times to aid in the investigation of criminal activity. (N.T. 24-27, 55, 80-81, 86-87; Union Exhibit 1; City Exhibits 2, 3 & 7).

7. The City also installed separate monitors in the vice unit and in the criminal investigations unit so the bargaining unit police detectives and officers could utilize the camera system. Bargaining unit police officers, detectives and investigators take precedence over the civilians when they wish to assume manual control of a camera. The vice unit and the criminal investigations unit received monitors several months after the initial installation of monitors in the VSU monitoring room. (N.T. 84-85, 102).

8. The City and the Union stipulated and agreed that the City did not bargain the assignment of surveillance camera monitoring, operating and reporting duties to non-bargaining unit civilian City employees. (N.T. 66).

9. Prior to December 15, 2008, only City police officers looked for and responded to criminal activity. (N.T. 51).

10. Prior to the Fall of 2008, video cameras were used only by police officers to document specific crime scenes or by the vice division officers to surveil specific locations suspected of illegal activity. (N.T. 51-52).

11. Also, before the Fall of 2008 installation of cameras and the hiring of civilians, police officers surveilled Tenth and Franklin streets where there had been an abundance of drug and gang activity. Officers monitored screens depicting images of Tenth and Franklin Streets to determine whether police presence was required at that location. (N.T. 54-55).

12. The police department operates a mobile command vehicle. The mobile command vehicle is a modified Winnebago equipped for police command operations. The vehicle is marked with a police logo and operated as a mobile command center for bicycle patrol officers in different parts of the City. (N.T. 63).

13. The mobile command vehicle contains video camera surveillance capabilities. The video camera on the vehicle is operated with a joystick to pan and tilt the camera as well as zoom in and out. (N.T. 63).

14. The bargaining unit police officers have used the mobile command vehicle camera to conduct video surveillance. (N.T. 63-64).

15. The new camera surveillance equipment performs similar functions as the video surveillance equipment in the mobile command vehicle. (N.T. 64).

DISCUSSION

The Union argues that the City engaged in unfair labor practices "when it unilaterally assigned the operation of videotaping and surveillance equipment which had previously been exclusively performed by [Union] members to civilian personnel." (Union Brief at 3). The City defends on several grounds. The City maintains that the monitoring duties assigned to the civilians in the VSU do not constitute bargaining unit work for the following reasons: The duties do not rise to the legal definition of police work; the City utilizes civilians in other passive police related functions; and the bargaining unit has not historically performed the monitoring work at issue. (City Brief at 11-13). The City additionally contends that it will likely discontinue the camera program if the Board determines that the work

assigned to the civilian monitors belongs in the police bargaining unit. The City further argues that it provided the cost differences on the record to show that it would not have undertaken the program and likely cannot afford to continue the program if it is ordered to pay the police officers to perform the work. (City's Brief at 19).

The Board, in Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman Sch. Dist., 37 PPER 56 (Final Order, 2006), articulated the following legal analysis for determining whether an employer unlawfully removed bargaining unit work:

The Commonwealth Court has held that "a public employer commits an unfair practice when it transfers any bargaining unit work to non-members without first bargaining with the unit." City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis original). In establishing an unfair practice for the removal of bargaining unit work, a union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employe(s). City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Even where bargaining unit and non-unit employes have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); City of Jeanette v. PLRB, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006). Therefore, a public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or by varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing AFSCME, supra).

Lake Lehman, 37 PPER at 179. A public employer has a managerial prerogative to introduce new technologies. However, the right of the employer to do so is not a license to unilaterally transfer bargaining unit work to non-unit personnel. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 144 (Final Order, 2005).

The essential function of the work at issue is at the heart of a removal case. The City's characterization of the work as "passive monitoring" suggests that zooming in for a close-up of the details in operating the new equipment is the appropriate approach to analyzing the case. (City Brief at 11). With such a view, however, I am unable to identify a picture of the essential function. Zooming out to a less restrictive view with a broader focus reveals an identifiable image in context that accurately depicts the nature of the work. Applying Commonwealth Court and Board precedent to the work assigned to the civilian VSU employes yields the conclusion that the civilian monitors are unlawfully performing bargaining unit monitoring and surveillance work.

1. The Civilian Monitors Are Performing Bargaining Unit Work.

There is no dispute in this case that the City did not bargain with the Union when it assigned the monitoring duties to civilians on December 15, 2008. (F.F. 8). Prior to that time, only City police officers looked for and responded to criminal activity. The use of cameras to look at activities on City streets is a form of surveillance and patrol historically performed by police officers. The City's camera technology has simply enhanced the patrol work already performed by police officers. Although the City attempted to identify differences in the work by narrowly characterizing it as "passive monitoring" with new equipment, the Board has rejected this approach and opined as follows:

In determining whether an employer has unlawfully transferred bargaining unit work to non-unit personnel, the "key inquiry" is not whether the non-unit employes perform exactly the same tasks formerly performed by the bargaining unit employes, but "whether bargaining unit work is being performed by non-bargaining unit persons who are under the direction or control of the employer."

FOP, Fort Pitt Lodge No. 1 v. City of Pittsburgh (Pittsburgh 1), 21 PPER ¶ 21111 (Final Order, 1990)(quoting Youngwood Borough, 18 PPER ¶ 18006 (Final Order, 1986), aff'd, 539 A.2d 26 (Pa. Cmwlth. 1988)).

In Fort Pitt Lodge No. 1 v. City of Pittsburgh (Pittsburgh 2), 22 PPER ¶ 22150 (Final Order, 1991), the City of Pittsburgh owned and operated a public safety training academy. Historically, police officers on light duty guarded the academy and when light duty officers were unavailable, the City of Pittsburgh assigned other police officers to guard the academy on an overtime basis. Then, the City of Pittsburgh subcontracted with a private security firm to guard the academy when light duty police officers were unavailable. The subcontractor installed an electronic security system at the academy which signaled an employe of the subcontractor when activated. The subcontractor next contacted the City of Pittsburgh dispatch center to send a police officer to investigate. In Pittsburgh 2, the public employer argued, as the City of Reading argues here, that the work performed by the subcontractor was not identical to the work previously performed by the police bargaining unit. The employer maintained that the work performed by the subcontractor differed "in great degree" because the subcontractor only monitored the academy building, and it did not monitor the grounds which were patrolled by the police officers; it did not perform any observation or protective functions as the officers had performed; and the employes of the subcontractor were not armed like officers who were authorized to use firearms. The City of Pittsburgh essentially argued that the subcontractor's work constituted "passive monitoring." Despite the employer's attempt to identify differences in the work based on the technology, the Board held as follows:

[T]he fact remains that prior to the [c]ity's entering into the subcontract, police officers on overtime performed the work function of monitoring the public safety training academy of intruders when officers on light duty were not available. This work is now performed by employes of the subcontractor. Although the employes of the subcontractor rely on an electronic security system rather than their own observations (as did the police officers), they now perform the function of monitoring the academy building which was previously performed by police officers. Therefore, the [c]ity was obligated to bargain before subcontracting this work.

Pittsburgh 2, 22 PPER at 342. The City similarly argues here that the work of the civilian VSU employes, who sit in a room watching monitors and notify officers of suspicious activity, is substantially different than the patrol work of police officers who are physically present in the City and capable of responding to illegal conduct with police force. However, in Pittsburgh 2 the Board rejected that position and held that electronic monitoring of a location is the same work as physically observing the location by being present. Pursuant to the holding in Pittsburgh 2, there is no meaningful difference between an officer observing a City street corner from his police cruiser one hundred yards away and a person observing that same street corner from the VSU monitors on the other side of the City. The camera equipment has not changed the fundamental nature of the work of monitoring activity. The City's police officers have historically and exclusively monitored and patrolled the City.

The Board has also held that, where the introduction of new technology changed the manner in which police dispatching was effectuated, the fundamental duties of dispatching--albeit with new equipment--remained bargaining unit work. In Pittsburgh 1, supra, both the public employer and the union representing the civilian employes who were assigned the new dispatching duties argued that the new centralized dispatching system displaced the dispatching duties as previously performed by bargaining unit members and that the "dispatching function changed qualitatively from the time the dispatching job was performed by police officers." Pittsburgh 1, 21 PPER at 278. In rejecting this position, the Board held that, as long as the public employer continues to provide the **basic function** of dispatching, the new manner by which that function is provided does not eliminate the work or transform it into work that was never performed by the bargaining unit. Pittsburgh 1, 22 PPER at 278-279.

Similarly, in Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 36, PPER 8 (Proposed Decision and Order, 2005),

aff'd, 36 PPER 144 (Final Order, 2005), aff'd, sub nom., 912 A.2d 909 (Pa. Cmwlth 2006), the State Police utilized Troopers to supervise civilian dispatchers at eighty-one different State Police barracks throughout the Commonwealth. Through the introduction of new technology, the Commonwealth consolidated all dispatching to five high-technology dispatch centers thereby increasing the efficacy with which it delivered and performed this function. The new dispatching service was provided and performed by utilizing computers and GPS technology. When the Commonwealth opened its first consolidated dispatch center, it assigned the duties of supervising dispatchers to a civilian and the Pennsylvania State Troopers Association filed a charge.

The Commonwealth argued that the supervisory work in the consolidated dispatch center was not equivalent to the supervisory duties at the various barracks because the introduction of new technology changed the duties and required advanced training. Hearing Examiner Wallace, then the Board and then the Commonwealth Court all concluded that the Commonwealth unlawfully transferred bargaining unit work. The Board recognized that the public employer "may certainly introduce new technology as part of its core managerial function to improve police services with advanced . . . equipment and techniques." Commonwealth, 36 PPER at 413. However, the Board held that "[t]he new technology did not displace the need for supervisors performing essential supervisory functions," id., and continued to opine that "where non-unit personnel perform work through use of new technology that is substantially equivalent to work previously performed by the bargaining unit on an exclusive basis, the Board will find a duty to bargain over assignment of such work out of the unit." Id. The Commonwealth Court agreed and held that "[w]hile the manner of performing the work has changed at the consolidated dispatch centers because it is more high tech and requires additional training and certification, the record reflects that the **essential functions and purpose of the supervisory responsibilities have not changed.**" Pennsylvania State Police v. PLRB, 912 A.2d 909 at 914 (emphasis added).

The same result obtains in the matter sub judice. The City introduced new camera technology that improved, rather than initiated, the essential function of conducting surveillance in the City. When new equipment is used to perform a function, the specific details of performing that function will change. Those types of changes are inherent in using different equipment. That is the reason why the Commonwealth Court has approved the Board's policy of evaluating the essential function being performed (e.g., monitoring or dispatching). Commonwealth, supra. Under the Board's policy, it will not zoom in too closely to examine only the minute details of operating the new equipment. Rather the Board will examine the work associated with essential function that the equipment is meant to facilitate. The essential function of monitoring the City with cameras in the VSU is the same as the essential function of monitoring the City with police officers on patrol even though the details of operating the equipment in the VSU may differ than those of operating a police cruiser. Accordingly, the non-unit civilian personnel in this case are performing work that is "substantially equivalent to the work previously performed by the bargaining unit," id., and the City engaged in unfair practices by unilaterally transferring the work out of the bargaining unit.

2. The Bargaining Unit Members have historically and Exclusively Performed Video Surveillance.

Whether the civilian monitors' duties are substantially equivalent to an identifiable portion of duties performed by the officers in the unit notwithstanding, the actual work of monitoring video surveillance is identical to work historically and exclusively performed by the bargaining unit. The record shows that, indeed prior to the hiring of civilian video monitors, video cameras were used only by police officers to document and monitor criminal or suspicious activity. Officers utilized cameras to document specific crime scenes and they were used by vice division officers to surveil specific locations suspected of illegal activity. Also, before the hiring of civilians, police officers surveilled Tenth and Franklin Streets where there had been an abundance of drug and gang activity. Officers monitored screens depicting video of Tenth and Franklin Streets.

Moreover, the police department operates a mobile command vehicle. The mobile command vehicle is a modified Winnebago equipped for police command operations. The vehicle is marked with a police logo and operates as a mobile command center for bicycle

patrol officers in different parts of the City. The mobile command vehicle contains video camera surveillance capabilities. The video camera on the vehicle is operated with a joystick to pan and tilt the camera as well as zoom in and out, like the manual operations for the new camera surveillance system. The bargaining unit police officers have used the surveillance capabilities of the mobile command vehicle camera to choose various specific locations to conduct video surveillance. The new camera surveillance equipment performs substantially equivalent if not identical functions as the video surveillance equipment in the mobile command vehicle. Accordingly, the bargaining unit performed the identical duties as the civilian monitors are currently performing and the City unlawfully transferred that work out of the bargaining unit.

3. Economic Hardship is not a Valid Defense.

The City emphasized the cost differences between City police officers and civilians. In this vein, the City argues that it may discontinue the camera surveillance program before it pays extra money for police officers to monitor the video feeds. However, the Commonwealth Court many years ago rejected this argument and has consistently held that economic hardship is not a valid justification for unilaterally removing bargaining unit work. In Commonwealth v. PLRB, 568 A.2d 730 (Pa. Cmwlth. 1990), the Court affirmed the Board's final order concluding that the contracting of laundry services at one of the Commonwealth's hospitals for the purpose of saving money and qualifying for an increase in federal funding from the increased space constituted an unfair practice. The Court also agreed with the Board that, because the employer continued performing the same function, albeit without its own employees, the employer did not effectuate a change in policy or core managerial functions. Id.

In Midland Borough Sch. Dist. v. PLRB, 560 A.2d 303 (Pa. Cmwlth. 1989), a school district suffering from severe multi-year economic distress sent its junior and senior high school students to another school district for five years without bargaining the transfer of unit work of teachers. The Commonwealth Court emphasized that "[t]here has been an unflagging consistency in judicial approval of the PLRB's view that unilateral removal of work from a bargaining unit and transfer of that work to others **for economic reasons**, without collective bargaining, is an unfair labor practice." Midland Borough, 560 A.2d at 305 (emphasis added). In City of Jeanette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006), the Court affirmed the Board's reliance on Midland, supra, and its position that the "courts have consistently approved the view that a unilateral removal of work from the bargaining unit for economic reasons without bargaining with the union constitutes an unfair labor practice." Id. at 1159; accord, Snyder County Prison Bd. v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006) (same). Other than discriminatory motives, the economic reasons are exactly what motivate an employer to subcontract or remove bargaining unit work to less expensive employees or unpaid volunteers. For the City to argue that the cost savings of using civilians is a valid defense ignores many years of consistent precedent and the prevailing motive in removal cases. Accordingly, the cost savings of using civilians rather than police officers to monitor video feeds is not a valid defense for removing the bargaining unit work. Otherwise, public employers across the Commonwealth could unilaterally remove any bargaining unit work they wanted by showing a cost savings, which is so easily demonstrated that it could also serve as a pretextual basis for subcontracting or removing work.

4. Bargaining Unit Work is Mutually Exclusive of Police Work.

The City maintains that the monitoring duties do not rise to the legal definition of police work. However, bargaining unit work is work performed by the bargaining unit. The employees in the bargaining unit have an interest in keeping and maintaining the work they perform regardless of whether it constitutes police work. There is no requirement in the law that all the work performed by a police unit be police work. There are many related duties to police work that, in isolation, would be considered clerical or civilian in nature, such as the paperwork associated with reporting arrests and issuing tickets for summary offenses. These ancillary duties performed by police officers constitute bargaining unit work because they are performed by the officers. The City may not unilaterally determine what constitutes police work or civilian work and then remove the work from the unit. If such were the case, an employer could remove bargaining unit work by declaring the work civilian in nature.

In City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004), the Commonwealth Court expressly rejected the position taken by the City here--that a public employer may unilaterally remove work from a police bargaining unit that it decides is not police work. Id. at 990. In the Allentown case, the employer unilaterally reassigned the duties of the Court Liaison Officer (CLO) to a civilian. The CLO was responsible for coordinating with the district attorney's office and other agencies to schedule the appearance of police officers in various court proceedings. The Court stated that the city employer "misconstrues the law," in arguing that "because the work of the CLO consisted solely of clerical duties not attendant to any law enforcement functions and required no specialized law enforcement training or certification, the union failed to prove that the [c]ity unilaterally removed 'police work' from the bargaining unit." Id. at 990. Instead, the Court agreed with the Board and quoted from the Board's final order as follows:

As the PLRB stated, "determining whether job duties constitute **bargaining unit work** is mutually exclusive of whether those same job duties constitute **police work**." Here, the work of the CLO position became "bargaining unit work" in 1989 when the [c]ity assigned a member of the bargaining unit to the CLO position.

Id. at 990 (emphasis original)(citations omitted). In State Police, supra, the Commonwealth Court recognized that only the Board may determine what positions are in a bargaining unit and the proper procedure for invoking the Board's jurisdiction to do so is through the filing of a Petition for Unit Clarification with the Board. The State Police Court relied on City of Clairton v. PLRB, 528 A.2d 1048 (Pa. Cmwlth. 1987) and stated as follows:

In affirming the Board, [in Clairton,] we agreed with the Board's position that while the [c]ity could file a unit clarification request to bring the dispatcher role before the Board, it could not unilaterally redefine the bargaining unit by removing positions or functions, and such a proceeding, at a minimum, had to include the union which presently represented the employes performing the work.

State Police, 912 A.2d at 914. Accordingly, Board and Court case law is clear that bargaining unit work in a police unit is **any** work exclusively and historically performed by that police unit, and it is not relevant that the work at issue is civilian or clerical in nature. The public employer does not have the right to remove bargaining unit work unilaterally under the guise that it is not police work. If an employer, such as the City here, wishes to remove a position from the bargaining unit (because the employer suspects that the duties of the employe(s) holding that position do not constitute police work), then the employer must file a Petition for Unit Clarification.

Also, in a related argument the City asserts that it utilizes civilians in other passive police related functions. This bald assertion fails to support the City's position that any so-called non-police work may be unilaterally removed from the police bargaining unit based on the City's unilateral determination about the nature of the work. The assertion also fails to indicate whether that work was ever in the bargaining unit and, if so, whether it was removed with Union approval after bargaining or unilaterally removed with Union acquiescence. Therefore, the City's claim that other civilians perform law enforcement related duties is not determinative of anything under consideration here.

Accordingly, the City has engaged in unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111.

CONCLUSIONS

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

1. The City is a public employer and a political subdivision within the meaning of Act 111 as read in pari materia with the PLRA.

2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.

3. The Board has jurisdiction over the parties hereto.

4. The City of Reading has committed unfair labor practices within the meaning of 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 the PLRA and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the City of Reading shall

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA.

2. Cease and desist from refusing to bargain collectively with the exclusive bargaining representative of its employes.

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:

(a) Immediately rescind the transfer to the civilian City employes in the VSU the work of monitoring and operating video surveillance equipment in the VSU, of generating logs and duplicate video recordings and of notifying police officers of suspicious or illegal activity;

(b) Immediately return the work and duties delineated in 3(a) above to the police bargaining unit;

(c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit 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 with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of September, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 9 READING :
 :
 v. : Case No. PF-C-08-164-E
 :
CITY OF READING :

AFFIDAVIT OF COMPLIANCE

The City of Reading hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act as read in pari materia with Act 111; that it has returned to the bargaining unit of police officers the duties of monitoring and operating video surveillance equipment in the VSU, of generating logs and duplicate video recordings and of notifying police officers of suspicious or illegal activity; that it has discontinued assigning those duties to the civilians in the VSU; that it has posted a copy of the proposed decision and order in the manner prescribed therein; and that it has served a 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