

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 205<sup>1</sup> :  
 :  
 v. : Case No. PERA-C-09-76-W  
 :  
 MUNHALL BOROUGH :

**PROPOSED DECISION AND ORDER**

On February 27, 2009, Teamsters Local Union No. 205 (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Munhall Borough (Borough) violated sections 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by unilaterally changing a mandatory subject of bargaining when it instituted a mandatory snow call out schedule for its public works employees. On March 13, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on June 30, 2009, if conciliation did not resolve the charge by then. On March 23, 2009, the Borough filed an answer alleging that the charge should be dismissed because it instituted the mandatory snow call out schedule "in conformance with the terms and conditions of the [parties'] Collective Bargaining Agreement." The hearing was held as scheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On July 21, 2009, the notes of testimony were filed with the Board. Neither party filed a brief.

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

FINDINGS OF FACT

1. On October 30, 1991, the Board certified the Union as the exclusive representative of a bargaining unit that includes laborers, truck drivers and mechanics employed by the Borough. (Case No. PERA-R-91-418-W)

2. Effective January 1, 2007, the parties entered into a four-year collective bargaining agreement. (N.T. 8; Union Exhibit 1)

3. Article VI of the collective bargaining agreement provides at paragraph A as follows:

"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."

(Union Exhibit 1)

4. Article VIII of the collective bargaining agreement provides at paragraph B as follows:

"The Borough further has the exclusive right and power to manage, control and conduct its business; to plan, supervise and direct its work force, including the

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<sup>1</sup> The caption appears as amended by the hearing examiner to reflect the name of the complainant as set forth in the charge.

right to hire, discipline, discharge for cause, promote, demote, assign, schedule and transfer its employees; and to make rules relating to the work force and the operations of the Borough as it deems advisable with due consideration given past practice(s) where the Borough deems advisable."

(Union Exhibit 1)

5. In early December 2008, the Borough's public works supervisor (Lawrence Billy) scheduled members of the bargaining unit to be on call for snow removal after their regular work day from December 14, 2008, through February 28, 2009. In a posting of the schedule, he wrote 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**."

He expected members of the bargaining unit who were on call to be able to respond within 15 minutes of being called. (N.T. 10-11, 34, 39-41, 44; Union Exhibit 2)

6. The Borough did not bargain with the Union before Mr. Billy posted the schedule. (N.T. 12, 40)

#### DISCUSSION

The Union has charged that the Borough violated sections 1201(a)(1) and (5) by unilaterally changing a mandatory subject of bargaining when it instituted a mandatory snow call out schedule for its public works employes.

The Borough, relying on articles VI and VIII of its collective bargaining agreement with the Union, has answered that the charge should be dismissed because it was contractually privileged to institute the schedule and thus did not act unilaterally.

An employer commits unfair practices under sections 1201(a)(1) and (5) if it unilaterally changes a mandatory subject of bargaining. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978).

No violation of sections 1201(a)(1) and (5) be found, however, if the employer was contractually privileged to act as it did. Port Authority of Allegheny County, 39 PPER 147 (Final Order 2008), citing Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). As the court explained in Pennsylvania State Troopers Association:

"The [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. See [Ellwood City Police Wage and Policy Unit v. Ellwood City Borough], 29 PPER ¶ 29213 (Final Order 1998), aff'd, 736 A.2d 707 (Pa. Cmwlth. 1999)]; Delaware County Lodge #27 of the Fraternal Order of Police on behalf of the Members of the Police Force of the Borough of Prospect Park v. Prospect Park Borough, 27 PPER [¶] 27222 (Final Order 1996); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER [¶] 18117 (Final Order 1987)(quoting NCR Corp., 271 N.L.R.B. 1212 (1984) as saying that 'where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the

[National Labor Relations Board] will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct')."

761 A.2d at 651. In such a case, the employer satisfied its statutory obligation to bargain in good faith when it entered into the collective bargaining agreement and thus may not be found to have acted unilaterally.

There is no dispute that the Borough changed a mandatory subject of bargaining when it instituted the mandatory snow call out schedule.

The dispositive question, then, is whether or not the Borough was contractually privileged to institute the mandatory snow call out schedule and thus did not act unilaterally.

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." See finding of fact 3. According to the Borough, in instituting the mandatory snow call out schedule, it modified the employees' 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 employees 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. See Lincoln University, 37 PPER 173 (Final Order 2006)(a contractual provision that employees may be dismissed for "adequate cause" provided no basis for the employer to argue that it was contractually privileged to otherwise discipline them).

In support of its contractual privilege defense, the Borough also points out that article VIII of the parties' collective bargaining agreement provides that it has the management right "to schedule" employees. See finding of fact 4. According to the Borough, in instituting the mandatory snow call out schedule, it scheduled its employees consistent with its right to do so under article VIII and thus did not act unilaterally.

A close review of article VIII reveals, however, that it is a boilerplate management rights clause. A boilerplate management rights clause will not support a contractual privilege defense. Indiana Borough v. PLRB, 695 A.2d 470 (Pa. Cmwlth. 1997).

As to remedy, the mandatory snow call out schedule has expired by its own terms, so the Borough will not be ordered to rescind it. If the Borough disciplined any member of the bargaining unit for not being available while the schedule was in effect, however, any such discipline is to be rescinded. Members of the bargaining unit are also to be made whole for any losses they may have sustained as the result of the Borough's institution of the schedule.

#### CONCLUSIONS

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

1. The Borough is a public employer under section 301(1) of the PERA.
2. The Union is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. The Borough has committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Borough shall

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in article IV of the 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 hearing examiner finds necessary to effectuate the policies of the PERA:

(a) Rescind any discipline it imposed on members of the bargaining unit for not being available while the mandatory snow call out schedule was in effect;

(b) Make members of the bargaining unit whole for any losses sustained by them as the result of its institution of the mandatory snow call out schedule;

(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 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 order by completing and filing 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 days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this tenth day of August 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner