COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MCCANDLESS POLICE OFFICERS ASSOCIATION	:	
	:	
v.	:	Case No. PF-C-09-3-W
	:	
TOWN OF MCCANDLESS	:	

PROPOSED DECISION AND ORDER

On January 15, 2009, the McCandless Police Officers' Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Town of McCandless (Town) violated sections 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) when its chief of police would not permit Officers Ellen Allias and Jason Evey to switch shifts on December 31, 2008. On February 4, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 28, 2009. On February 23, 2009, the Township filed an answer and new matter raising contractual privilege, deferral, inherent managerial prerogative and the statute of limitations as affirmative defenses to the charge. On April 23, 2009, the hearing examiner, upon the request of the Association and without objection by the Town, continued the hearing for settlement discussions.

On June 15, 2009, the Association amended the charge to allege that the Town committed additional unfair practices under sections 6(1)(a), (c), (d) and (e) of the PLRA as read in pari materia with Act 111 when it "began denying shift switches to officers where the switch would change an officer's court appearance from an on-duty appearance to an off-duty appearance." On June 26, 2009, the Secretary issued an amended complaint and notice of hearing directing that a hearing on the charge as amended be held on October 28, 2009. On July 20, 2009, the Town filed an amended answer and new matter raising contractual privilege, deferral, inherent managerial prerogative and the statute of limitations as affirmative defenses to the amended charge. The hearing examiner subsequently continued the hearing upon the request of the Town and without objection by the Association.

On February 3, 2010, the hearing examiner held a hearing on the charge and the amended charge and afforded the parties a full opportunity to present evidence and to cross-examine witnesses. The hearing examiner would not defer processing of the charge or the amended charge as no grievance had been filed (N.T. 14). See Hazleton Area School District, 29 PPER ¶ 29180 (Final Order 1998)(if no grievance is pending, then there is no basis for deferral). At the conclusion of the Association's case-in-chief, the Town moved to dismiss the amended charge as untimely filed (N.T. 195-197). The hearing examiner took the motion under advisement pending the receipt of briefs (N.T. 197). On March 19, 2010, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. The Town has recognized the Association as the exclusive representative of a bargaining unit that includes police officers employed by the Town. The chief of police is excluded from the bargaining unit. (N.T. 52; Joint Exhibit 1)

2. Effective January 1, 2007, the parties entered into a four-year collective bargaining agreement providing in relevant part at article V (a) as follows:

> "Shift assignments for each month or four (4) week period shall be posted on the first day of the previous schedule for an eight week period. Once posted, the Town will not change shift assignments except as follows:
>
> * * *

(2) By mutual consent of two Police Patrol Officers involved in the exchange of their respective shift assignments with the prior knowledge and approval of the Chief of Police or his designee[.]"

(N.T. 18; Joint Exhibit 1)

3. By interoffice memorandum to Sergeant Larry Itri dated November 24, 2008, Officer Jason Evey requested that his shift pass days for 3-11 P.M. on Friday, January 2, 2009, and Saturday, January 3, 2009, be exchanged with Officer Ellen Allias's shift pass days for 3-11 P.M. on Wednesday, December 31, 2008, and Thursday, January 1, 2009. Officer Evey wrote, "Off Evey requests switch to have off Jan 1." (N.T. 45-46, 94-95, 125, 128-129, 138; Association Exhibit 3, Town Exhibit 1)

4. On December 2, 2008, Chief Gary Anderson responded by writing, "I don't see a reason for this. 1-1-09 is available as a holiday pass. Explain" (N.T. 125-126, 212; Association Exhibit 3, Town Exhibit 1)

5. Officer Evey told Sergeant Itri that he meant to say that he requested the exchange with Office Allias to have December 31, 2008, off. (N.T. 126-127, 137, 164)

6. Sergeant Itri wrote to Chief Anderson, "Officer Evey wants New Year's Eve off 12/31/08. He made a mistake with 1/1/09." (N.T. 164, 212; Town Exhibit 1)

7. By memorandum dated December 4, 2008, Chief Anderson wrote to Officers Allias and Evey as follows:

"I am reluctant to grant this schedule exchange without a clear understanding that there will be no discretionary leave used on December 31, 2008. Should sick leave or any other absence occur because of Allias, Evey the officer originally assigned to work the shift must report for duty, which would then nullify the exchange of shift assignments for the week. I will not complete the exchange without a written response."

(N.T. 51, 96, 127, 139, 164, 212-213; Town Exhibit 1)

8. By memorandum dated December 7, 2008, Officer Allias wrote to Chief Anderson as follows:

"I am responding to your memo as requested. I hope that you are not in any way implying that I would intentionally schedule a shift exchange and then short the shift with an absence. I have worked here for over 29 years, and I have never done such a thing. I provide you with a doctor's excuse for nearly every sick day that I take whether it is required or not. I have no[] intention to take a personal day or a sick day for December 31 and January 1. I can not of course, nor can you, foresee the future. There are no[] guarantees in this life. I have no medical procedures scheduled and I do not believe that I will miss work for any reason. If we have unexpected snow fall or inclement weather, I will stay with my parents in Shaler. If I have an unexpected illness, I will notify Officer Evey as soon as possible if I were unable to fill the shifts. I do not believe there should be a problem, God willing."

(N.T. 96, 127, 213; Town Exhibit 1)

9. By memorandum dated December 9, 2008, Officer Evey wrote to Chief Anderson as follows:

"This is a response to your memo dated December 4, 2008. The reason I am requesting to switch pass days with Officer Allias is that I was planning to be out of town on Dec. 31, 2008. Due to this, if something unforeseen would happen, and Officer Allias would call off on December 31, 2008 due to illness or injury, I cannot agree that I would be able to report for duty on such short notice."

(N.T. 132, 139-141, 214; Town Exhibit 1)

10. Between December 9 and 30, 2008, Chief Anderson denied Officer Evey's request to exchange shift pass days with Officer Allias for December 31, 2008. Chief Anderson denied the request because he had a limited number of officers available to work on December 31, 2008, was anticipating a busy holiday weekend, was concerned about providing adequate coverage if Officer Allias did not report to work that day and had no assurance from Officer Evey as to his availability that day. Chief Anderson did not deny the request because Officers Allias and Evey were officers of the Association or because members of the bargaining unit had filed grievances. (N.T. 169-171, 207-213, 236-237)

11. In March 2009, Chief Anderson noted that officers who had exchanged shifts with his approval were being paid overtime for appearing in court on days they were not working but were originally scheduled to work. (N.T. 238-240)

12. On April 24, 2009, Chief Anderson in an attempt to save on additional overtime for court appearances posted a revised schedule for May 3, 2009, through May 30, 2009, under which officers who had exchanged shifts with his approval were to work their original schedules on days they were to appear in court. (N.T. 101-102, 115-117, 136-137, 174-177, 189-190, 235-236, 241-244, 261; Association Exhibit 16, Town Exhibits 3-4)

13. On May 4, 2009, the Association's president (Officer Richard Hart, Jr.) became aware that Chief Anderson had scheduled officers who had exchanged shifts with his approval to work their original schedules on days they were to appear in court. Officer Hart so informed the Association's vice president (Officer Allias) the same day. (N.T. 16, 68-69, 99-100, 112, 147-150)

DISCUSSION

The charge

The Association has charged that the Town committed unfair labor practices in violation of sections 6(1)(a), (c) and (e) when Chief Anderson would not permit Officers Allias and Evey to switch shifts on December 31, 2008. The Association alleges that Chief Anderson's refusal to permit the switch (1) was "in direct retaliation for Officers Allias and Evey having engaged in protected activity" and "in reaction to the protected activities of the bargaining unit members" and (2) unilaterally changed a "longstanding, well-established practice, which would permit two members of the bargaining unit to switch shifts with one another for a particular day and time with advanced notice to the Chief of Police."

The Town contends that the charge should be dismissed because Chief Anderson would not permit the switch for legitimate operational reasons (ensuring adequate overage over a busy holiday), was contractually privileged to deny the switch and had the inherent managerial prerogative to deny the switch.

During its case-in-chief, the Association established that Officers Allias and Evey engaged in protected activity by being officers of the Association (N.T. 16, 50, 121-122, 135) and that members of the bargaining unit, including Officer Allias, engaged in protected activity by filing grievances (N.T. 17-18; Association Exhibits 5-15). The Association also established that Chief Anderson knew that Officer Allias was its president and Officer Evey its vice president when he denied a request by Officer Evey to exchange shift pass days with Officer Allias for December 31, 2008 (N.T. 169). The Association did not establish, however, that Chief Anderson was motivated by anti-union animus when he denied the request. Thus, the Association did not present a prima facie case of discrimination. See Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004)(anti-union animus is a necessary element of a discrimination charge).

As to motivation, the Association alleged in the charge that Chief Anderson "voiced anti-union sentiment during his service as the managerial representative," but the only testimony it presented at the hearing was that he had never required other officers to provide written assurance that they would be able to cover the shifts involved in a shift exchange as he did with Officers Allias and Evey for December 31, 2008 (N.T. 51, 131-13, 166, 168). Close timing between an employe's protected activity and the employer's conduct coupled with the employer's disparate treatment of similarly situated employes

may support an inference that the employer's conduct was motivated by anti-union animus. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). Notably, however, the record does not show that any other police officers ever requested an exchange of shifts for the evening before a holiday (New Year's Day) as Officers Allias and Evey did. There is, therefore, no basis for finding that Officers Allias and Evey were similarly situated with any other police officers. Thus, there is no basis for inferring that Chief Anderson was motivated by anti-union animus. See Erie City School District, 40 PPER 12 (Final Order 2009)(retaliation charge alleging disparate treatment dismissed where there was no showing that the employer treated the alleged discriminatee any differently from any similarly situated employe).

In any event, Chief Anderson credibly testified in rebuttal to any prima facie case the Association may have presented during its case-in-chief that he denied Officer Evey's request for legitimate operational reasons: because he had a limited number of officers available to work on December 31, 2008, was anticipating a busy holiday weekend, was concerned about providing adequate coverage if Officer Allias did not report to work that day and had no assurance from Officer Evey as to his availability that day (N.T. 207-213). He also credibly testified that he did not deny the request because Officers Allias and Evey were officers of the Association or because members of the bargaining unit had filed grievances (N.T. 236-237). Thus, the charge as filed under sections 6(1)(a) and (c) must be dismissed for lack of proof. See Duryea Borough Police Department, supra (a valid non-discriminatory reason for an employer's conduct may rebut any inference that the employer was motivated by anti-union animus).

The Association contends that Chief Anderson's testimony was not credible for two reasons: (1) because he never had a problem ensuring coverage in the past and (2) because he was "rude and abrupt" when Officers Allias and Evey attempted to ask him why he had denied the request. Brief at 21. Neither reason has merit. As noted above, the record does not show that Chief Anderson ever had to consider a request to exchange shifts under similar circumstances in the past, so his concern about ensuring adequate coverage here is unexceptional. Moreover, the record shows at best that Chief Anderson was "rude and abrupt" by telling Officer Evey to leave his office after Officer Evey asked him what he was going to do (N.T. 133-134, 170-172) and by telling Officers Allias and Evey that he did not have to give them a reason for denying Officer Evey's request (N.T. 50, 134-135). Being "rude and abrupt" to that extent is hardly indicative of anti-union animus, however.

The charge as filed under sections 6(1)(a) and (e) also must be dismissed. An employer may defend against a refusal to bargain charge by showing that it had a sound basis for construing an agreement of the parties to support the action it took. As the court explained in Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000):

> "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 [respondent]'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')."

Id. at 651.

A close review of the record shows that the parties agreed in article V (a)(2) of their current collective bargaining agreement that "the Town will not change shift assignments except . . . with the prior knowledge and approval of the Chief of Police or his designee" (finding of fact 2). Given the express reference to approval by the chief of police for any shift change and the absence of any limitation on his ability to withhold his approval, the Town has a sound arguable basis for interpreting the collective bargaining agreement to mean that Chief Anderson had the contractual right to deny Officer Evey's request because Officer Evey was not able to provide assurance that he would be available to work on December 31, 2008, if Officer Allias was not. Thus, there is no basis for finding that the Town acted unilaterally when Chief Anderson denied Officer Evey's request.

Even if the Town acted unilaterally when Chief Anderson denied Officer Evey's request, the result would be the same. A change to a past practice is only actionable before the Board where a mandatory subject of bargaining is implicated. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002). An employer has the managerial prerogative to change the schedules of individual employes for operational reasons. Commonwealth of Pennsylvania, Pennsylvania State Police, 39 PPER 77 (Final Order 2008); Leesport Borough, Maidencreek Township and Ontelaunee Township, 37 PPER 109 (Final Order 2006). Thus, the Town was under no obligation to bargain with the Association when Chief Anderson denied Officer Evey's request.

The amended charge

The Association has charged that the Town committed additional unfair labor practices in violation of sections 6(1)(a), (c), (d) and (e) when it "began denying shift switches to officers where the switch would change an officer's court appearance from an on-duty appearance to an off-duty appearance." The Association alleges that Chief Anderson's denial of the shift switches (1) was because the Association filed the charge and (2) unilaterally changed a "longstanding practice and working condition wherein officers are allowed to utilize shift switches under such circumstances."

The Town contends that the amended charge should be dismissed because Chief Anderson denied the shift switches for a legitimate business reason (saving on additional overtime for court appearances), was contractually privileged to deny the shift switches and had the inherent managerial prerogative to deny the shift switches. The Town also contends and, as noted above, has moved that the amended charge should be dismissed as untimely filed.

A charge is timely if filed within six weeks of when the charging party knew or should have known that the employer committed the unfair practice(s) charged. Dormont Borough v. PLRB, 794 A.2d 402 (Pa. Cmwlth. 2002). The Association presented testimony by its president (Officer Hart) and vice president (Officer Allias) that they first learned that Chief Anderson had revoked shift exchanges to make off-duty court appearances on-duty when Officer Hart was so informed by fellow police officers on May 4, 2009 (N.T. 68-69, 99-100, 147-150). The record does not show that they should have been aware of the same any time sooner. The record also shows that the Association filed the amended charge six weeks thereafter on June 15, 2009. Thus, the amended charge is timely filed, and the Town's motion to dismiss it is denied.

The Town contends that Officer Hart's testimony was not credible. According to the Town, it is more than a coincidence that the Association filed the charge exactly six weeks after the date on which Officer Hart testified that he first learned that Chief Anderson was denying shift exchanges to make off-duty court appearances on-duty. As the Town also points out, Officer Hart admitted that he looked at a revised schedule incorporating the denials when Chief Anderson posted it on April 24, 2009 (N.T. 152-153), which is more than six weeks before the filing of the charge. Chief Anderson testified, however, that a review of the revised schedule he posted would not in and of itself disclose that he had denied shift exchanges to make sure that officers attended court during their regularly scheduled hours (N.T. 177-180). The hearing examiner has credited Officer Hart's testimony accordingly.

The Town further submits that the Association knew before May 4, 2009, that Chief Anderson was denying shift exchanges to make off-duty court appearances on-duty because Chief Anderson testified without rebuttal that he explained as much to another police officer (Corll) during April 2009 (N.T. 193). The record does not show, however, that Officer Corll was an officer of the Association at the time. To the contrary, it shows that he was not (N.T. 50-51). Thus, whatever Officer Corll knew may not be imputed to the Association. See Commonwealth of Pennsylvania, Department of Military Affairs, 22 PPER ¶ 22205 (Final Order 1991)(notice to an employe does not constitute notice to the union).

During its case-in-chief, the Association established that after it filed the charge on January 15, 2009, Chief Anderson posted a revised schedule for May 3, 2009, through May 30, 2009, under which officers who had exchanged shifts with his approval were to work their original schedules on days they were to appear in court (finding of fact 12). Apart from the timing of events, the Association presented no evidence to show that Chief Anderson was discriminatorily motivated by the filing of the charge. The timing of events alone, however, will not support a discrimination charge. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005). Thus, the Association did not present a prima facie case.

In any event, Chief Anderson credibly testified in rebuttal to whatever prima facie case the Association may have presented that he was motivated by a valid non-discriminatory reason: saving additional overtime for court appearances (N.T. 241). Thus, the amended charge as filed under sections 6(1)(a), (c) and (d) must be dismissed for lack of proof. See Duryea Borough Police Department, supra (a valid non-discriminatory reason for the employer's conduct may rebut any inference that the employer was discriminatorily motivated).

The amended charge as filed under sections 6(1)(a) and (e) must be dismissed as well. Again, given the express reference in article V (a)(2) of the collective bargaining agreement to approval by the chief of police and the absence of any limitation on his ability to withhold his approval, the Town has a sound arguable basis for interpreting the collective bargaining agreement to mean that Chief Anderson had the right to deny shift exchanges. Thus, there is no basis for finding that the Town acted unilaterally when Chief Anderson scheduled officers who had switched shift pass days to work their original schedules on days they were to appear in court. See Pennsylvania State Troopers Association, supra (contractual privilege is a defense to a refusal to bargain charge).

Given the foregoing disposition, there is no need to address the Town's contention that the amended charge also should be dismissed because Chief Anderson had the inherent managerial prerogative to make off-duty court appearances on-duty.

CONCLUSIONS

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

1. The Town is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.

2. The Association is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.

3. The Board has jurisdiction over the parties.

4. The Town has not committed unfair labor practices under sections 6(1)(a), (c), (d) or (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 as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 thirty-first day of March 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner