

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PF-R-10-71-W
: (PF-R-83-30-W)
SOMERSET BOROUGH :

ORDER

On May 3, 2010, Teamsters Local Union No. 205 (Teamsters or Union) filed with the Pennsylvania Labor Relations Board (Board) a rival petition for representation. The Union is seeking to have the Board investigate a question of representation and certification of a collective bargaining representative for an appropriate unit of Somerset Borough (Borough) police officers. The current exclusive certified collective bargaining representative of Borough police officers is the Somerset Borough Police Department (Incumbent).

On May 11, 2010, the Secretary of the Board issued an order and notice of hearing directing that a hearing be held on May 26, 2010 to determine issues that may be raised by the petition. On May 13, 2010, the Secretary of the Board issued an amended order and notice of hearing directing that a hearing be held on May 17, 2010. Prior to the hearing, the attorney for the Borough filed a letter with the Board requesting a continuance and stating that he and his client would not attend the May 17, 2010 hearing. The hearing proceeded on May 17, 2010 without the attendance of the Borough and the Incumbent Union. At the close of the hearing, the Teamsters waived oral argument and a post-hearing 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. The Borough is a political subdivision of the Commonwealth within the meaning of Act 111 of 1968 (Act 111) as read in pari materia with the Pennsylvania Labor Relations Act (PLRA). (Board Exhibit 2).

2. The Incumbent is a labor organization within the meaning of Act 111 as read in pari materia with the PLRA. (Board Exhibit 2).

3. Carl Bailey is a full-time business agent with Teamsters. On behalf of Teamsters and its membership, Mr. Bailey represents multiple police departments. Teamsters Local 205 maintains a business address at 1184 Long Run Road, White Oak, Pennsylvania, 15131. Mr. Bailey, in his capacity as Teamsters business agent, circulated and collected authorization cards. He was responsible for filing the cards and the rival petition with the Board to seek an election among police officers of the Borough to choose the Teamsters as their exclusive bargaining representative. (N.T. 4-5, 18).

4. The Union seeks to represent the same bargaining unit of Borough police officers as is already certified by the Board at PF-R-83-30-W. The position of chief of police is already excluded from the bargaining unit. (N.T. 6-7; Board Exhibits 2 & 4; Petition).

5. The Board has already determined that the Borough police officers in the bargaining unit, as certified by the Board at PF-R-83-30-W, and as proposed by the rival petition, share an identifiable community of interest. (Board Exhibits 2 & 4).

6. On May 11, 2010, a Board agent held a telephone conference with Mr. Bailey and the Borough's attorney. During the phone conference, the Borough's attorney alleged that the Borough was in the process of promoting officers to sergeants and lieutenants. (N.T. 5-6).

7. On Wednesday, May 12, 2010, Mr. Bailey had another conversation with the Borough's attorney without the involvement of the Board representative. During this

conversation, the Borough's attorney agreed to recognize Teamsters and file a joint petition on condition that Teamsters agree to delay the filing until June 16, 2010. (N.T. 8).

8. Mr. Bailey did not agree to the Borough's proposed recognition or joint request because the delay would result in a Board certification beyond the Act 111 deadline for preserving the right to request interest arbitration. (N.T. 8-9).

9. Both the Incumbent and the Union have agreed to hold an election on either June 2 or June 3, 2010. The Incumbent representative, Officer Phillip Staib, agreed not to attend the May 17, 2010 hearing. (N.T. 15-16, 24).

10. On Friday, May 14, 2010, the Board agent held another telephone conference with the Borough attorney and Mr. Bailey. Officer Staib also participated in that telephone conference. (N.T. 11).

11. During the May 14, 2010 telephone conference, the Borough's attorney again stated that he wanted to delay certification. The Board agent indicated that delay was unacceptable and that he wanted to move forward with a hearing and election immediately. (N.T. 12).

12. The Borough's attorney admitted to Mr. Bailey on several occasions that his goal was to delay certification because the Borough did not want to have the threat of interest arbitration during negotiations. (N.T. 12-13).

13. The Borough's attorney was adamant that he did not want Mr. Bailey and Teamsters to meet the timeframes under Act 111 so that they would be unable to proceed with arbitration this year, if necessary. (N.T. 14, 17).

14. At no time during the multiple telephone conversations with Mr. Bailey, after the May 11, 2010 conference call, did the Borough's attorney raise any factual or legal issues requiring resolution at a hearing before an election; he had also abandoned the allegations that the Borough was promoting officers. During the May 14, 2010 conference call, Officer Staib stated that the Borough was not promoting any officers. At this time there are no sergeants or lieutenants working for the Borough. At no time did the Borough's attorney contest the existence of a community of interest among the Borough police officers. (N.T. 16-17, 21-23).

15. On May 14, 2010, the Borough's attorney wrote a letter and filed it with the Board, via facsimile transmission and regular mail. The letter, in pertinent part, provides as follows: It will not be possible for me or for my client [Borough] to attend the hearing on such short notice." The letter further provides that "[t]he Borough will not be in attendance at the hearing on Monday. The Borough is formally requesting a continuance and is strenuously objecting to the lack of notice and due process of scheduling a hearing with virtually no notice to the parties." The letter does not refer to any possible factual or legal issues requiring resolution at hearing. (Board Exhibit 3).

16. The Borough has filed with the Board a list of Borough police employees eligible to vote in the election. Teamsters representative, Carl Bailey, agrees with the list of eligible voters. (N.T. 20; Board Exhibit 1).

DISCUSSION

The rival petition filed by Teamsters in this case is commonly referred to as a "window" filing because a rival union has a specific and brief window of opportunity to file the petition and seek to replace the Incumbent. Act 111 does not provide for a contract bar and a window filing like its cousin, Act 195. Accordingly, as a result of the pari materia construction between Act 111 and the PLRA, the Board adopted the contract bar from the PLRA and created a window filing through case law. The principles of Act 111 window filings are functions of the interest arbitration timelines mandated by Act 111 and not the expiration of the collective bargaining agreement, as is the case under Act 195. O'Hara Township, 9 PPER 9073 (Final Order, 1978).

In O'Hara Township, the Board opined that "the focal point of contract bar under Act 111 shall not be the expiration of the a pre-existing contract, but rather the date when collective bargaining must begin as set forth in Section 3 of the Act." O'Hara, 9 PPER at 142. Section 3 of Act 111 provides as follows:

Collective bargaining shall begin at least six months before the start of the fiscal year of the political subdivision or of the Commonwealth, as the case may be and any request for arbitration, as hereinafter provided, shall be made at least one hundred ten days before the start of said fiscal year.

Act of June 24, 1968, P.L. 237, No. 111, 43 P.S. 217.3. When the fiscal year coincides with the calendar year, a union must initiate collective bargaining by July 1st to preserve its right to request interest arbitration (if the parties do not have an agreement) one hundred ten days before the start of the new fiscal year (approximately September 13th depending on weekends). Bivighouse v. Borough of Telford, 445 A.2d 561 (Pa. Cmwlth. 1982).

The O'Hara Board further held as follows:

The Board will expedite petitions for representation filed under Act 111 so that thirty days will be sufficient time for us to receive a petition for election, conduct the election, and certify the results of the election. With this in mind, we think it appropriate that petitions for election be filed with the Board not sooner than sixty days before that date when collective bargaining is required to begin and not later than thirty days before that date when collective bargaining is required to commence. It is our belief based on our experience in representation matters that questions of representation of employes, can be resolved within the sixty to thirty day period which we set forth. This is especially applicable to police and fire units which are for the most part smaller and less complex than other units of employes in both the public and private sectors.

O'Hara Township, 9 PPER at 142. In Conference of Pennsylvania College Police Lodges v. PLRB, 719 A.2d 1122 (Pa. Cmwlth. 1998), the Commonwealth Court reiterated its approval of the Board's decision in O'Hara.

Under the requirements of O'Hara, the earliest that Teamsters could have filed their rival petition for representation was May 3, 2010 (i.e., sixty days prior to July 1, 2010).¹ Indeed, Teamsters filed their petition on that date. The significance of O'Hara is that the Board therein expressed, which the Commonwealth Court has since approved, a policy of expediting rival petitions filed during the window period so as not to deprive the employes of their statutory right to interest arbitration for the year, while two labor organizations compete for the position of exclusive bargaining representative.

Moreover, the Board's policy in cases involving rival representation petitions is to hold an election in the same unit that the Board previously certified. In the Matter of the Employes of Midwestern Intermediate Unit IV, 15 PPER ¶ 15178 (Final Order, 1984); Greater Johnstown School District, 13 PPER ¶ 13155 (Board Representative, 1982). Again, the Board's Court-approved policy is to expedite the election and certification process so as to maintain the bargaining rights and obligations of the parties under the strict timeline of Act 111. Therefore, the exclusion or inclusion of positions in the unit are not at issue, as a matter of law, during a rival petition proceeding. If an employer legitimately wishes to exclude a position, it may file a petition for unit clarification after the certification or should have done so prior to the window period.

In this regard, there are limited legitimate legal and factual issues that would require a pre-election hearing. As an example, the question of whether the rival union qualifies as a labor organization under the statute may be one such issue. The Borough in this case raised no legitimate legal or factual issues requiring a hearing. The Borough did not contest whether the Union qualifies as a labor organization. Instead, the Borough

¹ Sixty days prior to July 1, 2010 was Sunday, May 2, 2010, so the first filing date became Monday, May 3, 2010.

sought to undermine the Board's express policy of expediting the election and certification process to preserve the employees' right to interest arbitration. After rightfully abandoning its claim that the status of promotions needed to be resolved, the Borough's attorney admitted that it had no legitimate issues requiring a hearing and simply sought to deprive the police officers of interest arbitration for the year.

The raisons d'être of the Board is the effectuation and enforcement of the Commonwealth's collective bargaining statutes and the policies contained therein. The Board simply cannot sanction the deliberate attempt to deprive employees of their right to interest arbitration. There were no issues for hearing, yet the Borough and its attorney forced a pre-election hearing, by refusing to stipulate to a timely election, for the sole purpose of delaying the certification process. The Borough's attorney did not even attempt to veil his tactics.²

With unclean hands in the context of this dilatory conduct, the Borough's attorney filed a letter with the Board claiming that the Board was denying his client due process by providing short notice of a hearing. It is difficult to comprehend how the Borough was denied access to a process that was not due. A pre-election hearing was unnecessary and unwarranted. The so-called "due process" of which the Borough and its attorney claim to have been deprived by the Board, is not the same due process that lawyers and judges preserve and protect and that American citizens understand and appreciate. Rather, the Borough's idea of due process is more like delay process designed to distract attention away from the Borough's intent to stall certification in derogation of the rights this Board is charged with protecting and enforcing. But we already know what is inside this Trojan horse. Its sinister designs foiled, the Borough now uses a due process argument to suggest that it has become a victim of Board action. However, the Borough has not been prejudiced or adversely affected in any way because there was no reason for a hearing in the first place.

The Board has an accurate and legitimate list of Borough police employees eligible to vote, which also corresponds to the Board certified definition of the bargaining unit and which has met the Teamsters' approval. Accordingly, there is no reason to order the Borough to submit an eligibility list at this time because it has already done so. Therefore, without further delay and in the interest of preserving the Act 111 mandatory time tables for bargaining and interest arbitration for the police employees of the Borough, an order for an immediate election is appropriate.

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 political subdivision within the meaning of Act 111 as read in pari materia with the PLRA.
2. The Incumbent is a labor organization within the meaning of Act 111 as read in pari materia with the PLRA.
3. The Teamsters Local Union No. 205 is a labor organization within the meaning of Act 111 as read in pari materia with the PLRA.
4. The Board has jurisdiction over the parties.
5. The Borough police officers share an identifiable community of interest.

² Rule 3.1 of the Rules of Professional Conduct provides, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." 3.1 Pa. R.P.C. In this case, the Borough's counsel sought to use Board processes as a sword for subverting Act 111. He made no claims at all, let alone a good faith one based in law and fact. By intentionally causing delay and forcing a hearing without any legitimate issues to raise or defend, the Borough's attorney has arguably run afoul of Rule 3.1.

6. The Board has received an accurate list of police officers eligible to vote in an election under the definition of the bargaining unit as previously certified by the Board.

7. The Borough unlawfully sought to delay the Board certification process to deprive Borough police officers of their statutory right to interest arbitration.

8. The unit deemed appropriate for the purpose of collective bargaining is a subdivision of the employer unit comprised of all full-time and regular part-time police officers, excluding the Chief of Police and any other management level employees.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111, as read in pari materia with the PLRA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that an election is to be held immediately among the Borough police officers in the unit set forth above as directed by the Board Representative who shall set a date, time and location for the election.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this order may be filed to the order of the Board's Representative to be issued pursuant to 34 Pa. Code § 95.96(b) following the conduct of an election.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this nineteenth day of May 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner