

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE 9 READING :
 :
v. : Case No. PF-C-18-19-E
 :
CITY OF READING :

FINAL ORDER

The City of Reading (City) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on August 6, 2018, from a Proposed Decision and Order (PDO) issued on July 17, 2018, in which the Hearing Examiner found that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968, by unilaterally transferring bargaining unit work. The Reading Lodge 9 of the Fraternal Order of Police (FOP) filed a brief in response to the exceptions on August 24, 2018.

On February 6, 2018, the FOP filed a Charge of Unfair Labor Practices alleging, in part, as follows:

On January 12, 2018, the City repudiated the settlement agreement and permitted non-unit employees to again place, maintain and remove police barriers on the Streets and Sidewalks of the City at public events held at the Reading Arena (Santander Center). The foregoing repudiation and transfer of bargaining unit work were done unilaterally by the City, without fulfilling the bargaining obligation.

On March 5, 2018, the Secretary of the Board issued a complaint and notice of hearing. A hearing was held on June 6, 2018, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and summarized as follows.

The Traffic Office within the City's Police Department is in command of the placement, removal and maintenance of police barricades.¹ Bargaining unit police officers assigned to the Traffic Office coordinate special traffic details and traffic operations throughout the City for events and other occurrences, as security and safety demands require. (FF 4 and 6).

In 2015, the Union filed a charge of unfair labor practices, at Case No. PF-C-15-93-E, against the City regarding the placement and maintenance of police barricades. The FOP alleged in that charge that the placement of police barricades on City streets and sidewalks had historically and exclusively been bargaining unit work and that, on

¹ Police barricades are wooden saw-horse type barricades. They are painted white with "Police Line" in blue lettering. (FF 4).

November 22, 2015, employees of the Reading Parking Authority performed that work at an event held at the Santander Center.² (FF 8 and 10).

Prior to the events at issue in this case (January 12, 2018), the parties had settled the charge at Case No. PF-C-15-93-E with a Memorandum of Understanding (MOU). The MOU provides, in relevant part, as follows:

The City will takes (sic) steps to ensure that the placement, maintenance and removal of police barriers on the streets and sidewalks of the City at public events held at the Reading Arena (Santander Center) continue to exclusively be performed by the members of the FOP and will bargain with the FOP prior to transferring any unit work.

(FF 11 and 12).

On January 12, 2018, Patrolman Charles Menges, President of Reading Lodge 9, observed Downtown Improvement District Authority ("DID") employees³ standing around barricades in the 500 block of Penn Street. On that date, the non-unit DID employees had also placed police barricades on the north and south sides of 10th Street. The barricades were for an event in the City that may have been the "Fire and Ice Show."

The event on January 12, 2018 was not held inside the Santander Center or within the curtilage of the Center. Fifth Street and Penn Street have been blocked off by police officers erecting barricades in the past prior to January 12, 2018, and closing 10th Street, a Commonwealth highway, requires a permit from the City and approval from the Commonwealth.

City of Reading Ordinance 576-104 "permits the Chief of Police or his designee '[i]n case of emergency or to facilitate public works, or in the conduct of parades, processions or public events, to restrict or prohibit traffic and/or parking in limited areas for not more than 72 hours.'" Sergeant Christian Rothermel, a bargaining unit police officer, is in command of the Traffic Office, and in that capacity, has direction and control over the placement of police barricades. (FF 4 - 5, 9). Sergeant Rothermel informed Patrolman Menges that he directed the employees of the DID to erect the barricades in the 500 block of Penn Street and on 10th Street on January 12, 2018. (FF 13 and 15)

Based on the Findings of Fact, the Hearing Examiner concluded in the PDO that the City violated Section 6(1)(a) and (e) of the PLRA on January 12, 2018 by unilaterally transferring the bargaining unit work

² The Santander Center, formerly known as the Reading Arena, is a large arena that is located within the City at 7th and Penn Streets. (FF 7). A four-to-six block radius from the Santander Center is considered part of the event area for traffic control purposes. Police barricading and protection has extended well beyond the footprint of the Santander Center, reaching as far as 2nd Street to 10th Street, depending on the expected size of the crowd. (FF 14).

³ DID employees are not members of the police bargaining unit.

of placing police barricades in the 500 block of Penn Street and on 10th Street to the DID. To remedy the unfair labor practice, the Hearing Examiner directed the City to cease and desist from unilaterally assigning the work of placing and maintaining police barricades to non-members of the police officer bargaining unit.

On exceptions, the City argues that the Hearing Examiner erred in accepting the testimony of Patrolman Menges that Sergeant Rothermel told him that he directed the employees of the DID to erect the barricades in the 500 block of Penn Street and on 10th Street on January 12, 2018. The City argues that the testimony of Patrolman Menges, as to what he was told by Sergeant Rothermel, is inadmissible hearsay. Further, the City argues that Sergeant Rothermel is a bargaining unit employee, and therefore his statements cannot be an admission that the City transferred the work of placing police barricades to the DID.

In this regard, the Hearing Examiner stated as follows:

The Union established on this record that Sergeant Rothermel has been delegated command and control over the Traffic Office and police barricading, as authorized by City Ordinance 576-104. Therefore, he acts directly in the interest and on behalf of the City when he assigns bargaining unit officers and non-bargaining unit personnel to perform traffic and pedestrian control with police barricades, within the meaning of Section 211.3 (c) of the PLRA, as read with Act 111. In a similar vein, Sergeant Rothermel is an agent of the City for purposes of directing and controlling traffic and barricading operations within the City. His command and supervision of the Traffic Office and traffic assignments is a manifestation by the City and police management that Sergeant Rothermel acts on behalf of the City in commanding traffic and pedestrian control operations, an undertaking which he has clearly accepted and which the parties understand to ultimately be under the control of the City and Chief of Police. Accordingly, Sergeant Rothermel satisfies the definitions of both an employer under the PLRA and an agent of the City for purposes of binding the City to statements he has made and actions he has taken on behalf of the City within the purview of his Traffic Office command duties and responsibilities. It is of no moment that he is a member of the bargaining unit.

(PDO at 4). Upon review of the record, the Hearing Examiner did not err in finding that the City had delegated the placement, removal and maintenance of police barricades to Sergeant Rothermel. Therefore, Sergeant Rothermel was acting with the authority, as an agent, of the City in assigning the placement and maintenance of barricades to non-unit DID employees on January 12, 2018.

As a general matter, strict rules of evidence are not controlling in administrative proceedings, and hearsay may be admitted with or without objection. However, unless an exception to the exclusion of hearsay evidence applies, a finding of fact cannot be based solely on uncorroborated hearsay. See Manor Borough, 27 PPER ¶27025 (Final Order,

1995). The Pennsylvania Supreme Court's Rules of Evidence regarding hearsay provides, in relevant part, as follows:

Rule 803. Exceptions to the Rule Against Hearsay....

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(25) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Pa. R.Evid. 803(25).⁴ "For an admission of a party opponent to be admissible under Rule 803(25) (D), the proponent of the statement must establish three elements: (1) the declarant was an agent or employee of a party opponent; (2) the declarant made the statement while employed by the party opponent; and (3) the statement concerned a matter within the scope of agency or employment." Allegheny County Prison Employees Independent Union v. Allegheny County, 47 PPER 62 at 221 (Proposed Decision and Order, 2015) (*citing Harris v. Toys "R" Us - Penn, Inc.*, 880 A.2d 1270 (Pa Super. Ct., 2005)); see also Standard Pennsylvania Practice 2d. §50:13 (same).

All three elements under Pa. R. Evid 803(25) (D) for admission of Sergeant Rothermel's statement to Patrolman Menges are present in the record and in the Hearing Examiner's Findings of Fact.⁵ Sergeant Rothermel is an employee of the City, and was an employee on January 12, 2018. Sergeant Rothermel is in command of the Traffic Office, and in that capacity exercised direction and control over placement, removal and maintenance of police barricades on January 12, 2018. As such, his statement that he directed the DID employees to erect the barricades in the 500 block of Penn Street and on 10th Street on January 12, 2018,

⁴ Adopted May 8, 1998, effective October 1, 1998, as amended.

⁵ The City has not excepted to any enumerated Findings of Fact in the PDO. 34 Pa. Code §95.98(a) (3) ("[a]n exception not specifically raised shall be waived").

concerned a matter within the scope of his employment, and is admissible as evidence in accordance with Pa. R. Evid. 803(25)(D).

The fact that Sergeant Rothermel is also a bargaining unit police officer may be relevant to the weight afforded his statement, but does not affect its admissibility under Pa. R. Evid. 803(25)(D).⁶ Moreover, the Hearing Examiner's acceptance of Sergeant Rothermel's statement that he directed DID employees to erect the police barricades on January 12, 2018, is corroborated by other facts of record. Indeed, City Ordinance 576-104 authorized the Chief of Police or his designee to direct traffic and control pedestrians through placement of police barricades. In accordance with City Ordinance 576-104, Sergeant Rothermel was given command of the Traffic Office that is involved with the placement, removal and maintenance of police barricades. Further, there is no dispute that on January 12, 2018, while Sergeant Rothermel was commanding the Traffic Office, DID employees erected and maintained barricades in the 500 block of Penn Street and on 10th Street. Accordingly, the Hearing Examiner's findings that Sergeant Rothermel has direction and control over the placement of police barricades, and informed Patrolman Menges that he directed the employees of the DID to erect the barricades in the 500 block of Penn Street and on 10th Street on January 12, 2018, (FF 5 and 15), are supported by substantial competent evidence of record, and will not be disturbed.

The City also argues on exceptions that the Charge of Unfair Practices, alleging a repudiation of the MOU, should be dismissed. The City argues that the FOP alleged in the Charge that "[o]n January 12, 2018, the City repudiated the settlement agreement and permitted non-unit employees to again place, maintain and remove police barriers on the Streets and Sidewalks of the City at public events held at the Reading Arena (Santander Center)." The City notes that the MOU provided that "[t]he City will takes (sic) steps to ensure that the placement, maintenance and removal of police barriers on the streets and sidewalks of the City at public events held at the Reading Arena (Santander Center) continue to exclusively be performed by the members of the FOP..." The City contends in its exceptions that the charge of an alleged repudiation of the MOU should be dismissed because the evidence of record does not support the finding that the alleged unilateral transfer of bargaining unit work on January 12, 2018 was in connection with a public event at the Reading Arena (Santander Center).

The Hearing Examiner properly rejected the City's position that the charge was limited to the MOU and that, because the event of January 12, 2018 was not held at the Santander Center, the City cannot be said to have violated the MOU. As noted by the Hearing Examiner, the Charge of Unfair Labor Practices alleged that a "repudiation and transfer of bargaining unit work were done unilaterally by the City, without fulfilling the bargaining obligation." Thus, the Hearing Examiner recognized as follows:

⁶ The weight to be afforded the evidence is a matter within the purview of the Hearing Examiner, and will not be overturned absent the most compelling of circumstances, which are not present on this record. *E.g. Falls Township*, 19 PPER ¶ 19012 (Final Order, 1987).

Paragraph 6 of the specification of charges clearly avers two separate and distinct allegations: (1) a violation of the MOU; and (2) the unilateral transfer of bargaining unit work in violation of the City's bargaining obligations under law.

Accordingly, the City's exceptions that the Charge was limited to the MOU, and did not also allege a unilateral transfer of bargaining unit work must be rejected.

Moreover, with respect to the repudiation of the MOU, the Hearing Examiner correctly found that the MOU provides that the City "will bargain with the FOP prior to transferring any bargaining unit work", and therefore the MOU was not limited to police barricading for events at the Santander Center. Furthermore, nothing in the MOU amounts to a clear, express and unequivocal waiver of the FOP's right to bargain over the transfer of unit work outside the curtilage of the Santander Center. See Bethlehem Star Lodge No. 20, FOP v. City of Bethlehem, 23 PPER ¶ 23058 (Final Order, 1992), *affirmed*, City of Bethlehem v. PLRB, 621 A.2d 1184 (Pa. Cmwlth., 1993). As such, the Charge of Unfair Labor Practices adequately alleged that on January 12, 2018 the City unilateral transferred the bargaining unit work of erecting and maintaining barricades in the 500 block of Penn Street and on 10th Street, in violation of the City's statutory bargaining obligation.

After a thorough review of the exceptions and all matters of record, there is substantial evidence of record supporting the Hearing Examiner's Findings of Fact and conclusion that the City violated Section 6(1)(a) and (e) of the PLRA by unilaterally transferring police bargaining unit work of erecting and maintaining barricades to non-unit DID employees.⁷ Accordingly, the exceptions filed by the City shall be dismissed, and the PDO made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of Reading are hereby dismissed, and the July 17, 2018 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this eighteenth day of December, 2018. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

⁷ Moreover, the Hearing Examiner's remedy, directing the City to return the bargaining unit work of placement, removal and maintenance of police barricades to the police officers, without an award of back pay, is, in essence, a limited remedial cease and desist order within the authority of the Board. See Teamsters Local 429 v. Lebanon County, 30 PPER ¶ 30002 (Final Order, 1998).

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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 placement, removal and maintenance of police barricades throughout the City for any reason including but not limited to events in or around the Santander Center; that it has posted a copy of the final order and 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