COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 9 READING	:	
v.	:	Case No. PF-C-09-139-E
CITY OF READING	:	

DECISION AND ORDER

On December 4, 2009, Reading Lodge No. 9, Fraternal Order of Police (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the City of Reading (City) violated sections 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111). On January 22, 2010, the Secretary of the Board issued a complaint and notice of hearing. On May 20, 2010, the FOP requested seven witness subpoenas and one subpoena duces tecum. On May 21, 2010, the Board issued the subpoenas as requested. On July 9, 2010, the City filed motions and a brief to dismiss the charge on the ground that it did not state a cause of action and to quash the subpoenas as irrelevant, unduly burdensome and/or subject to the deliberative process privilege. On August 9, 2010, the FOP filed a brief in opposition to both motions.

On August 27, 2010, the hearing examiner, construing the charge to be that the City committed unfair labor practices when it "filed an Application with Pennsylvania's Department of Community and Economic Development seeking relief under the Municipalities Financial Recovery Act, Act 47 of 1987, P.L. 246; 53 P.S. § 11701.101 *et seq*," because "[t]he retaliatory action taken by the City was motivated by anti-union animus in reaction to the protected activities of the bargaining unit members," issued a proposed decision and order granting the motion to dismiss the charge. Given that disposition of the charge, the hearing examiner found it unnecessary to address the motion to quash the subpoenas.

On September 13, 2010, the FOP filed exceptions with the Board.

On November 16, 2010, the Board issued an order directing remand to hearing examiner for further proceedings. In agreement with the hearing examiner, the Board explained that "had this case dealt exclusively with the City's decision to apply for Act 47 status or DCED's decision to declare the City a distressed municipality, there would have been no cognizable unfair labor practice alleged, and thus no Complaint issued." Construing the charge as including a further allegation "that the City 'interfered with, restrained, or coerced all members of the bargaining unit' when the City's Mayor stated that '[t]he whole reason for going into Act 47, number one, so we can negotiate contracts without having mandated arbitration,'" however, the Board remanded for a hearing "to determine whether, under the totality of circumstances, the Mayor's statement that the City 'can negotiate contracts without having mandated arbitration' would tend to coerce, interfere or restrain a reasonable employe in pursuing Act 111 interest arbitration." The Board also directed that "in light of the scope of this limited remand, the Hearing Examiner should review the relevancy of outstanding subpoenas as they pertain to the remaining alleged unfair labor practice under Section 6(1)(a) of the PLRA."

On November 19, 2010, the hearing examiner gave the parties 30 days to file supplemental briefs in support of or in opposition to the motion to quash the subpoenas.

On December 22, 2010, the City filed a supplemental brief in support of the motion to quash the subpoenas.

Upon review of the outstanding subpoenas in light of the Board's limited remand, the motion to quash the subpoenas must be denied in part and granted in part.

The outstanding subpoenas are for Mayor Thomas McMahon, Ryan Hottenstein, Chris Kanezzo, Vaughn Spencer, Deputy Chief Mark Talbot, Thomas J. MacDougal IV and Barry Rambo to testify and for Mayor McMahon to produce the following documents:

> "1. List of all uncashed checks found in 2009-2010 including the date of the check, the name of the individual or entity who issued or endorsed the check (not the banking institution), to whom the check was payable, and the amount;
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> 2. Listing of all uncollected tax revenue from January 1, 2004 to present;
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> 3. Copies of all Audited Financial Statements for the years 2000 through 2009;
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> 4. Complete copy of the City's Act 47 application;
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> 5. All electronic mail authored or received by Mayor McMahon regarding Act 47 and the unions;
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> 6. All electronic mail authored or received by Ryan Hottenstein regarding Act 47 and the unions;
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> 7. All electronic mail authored or received by Carl Geffken regarding Act 47 and the unions;
>
> 8. All electronic mail authored or received by Chief William F. Heim regarding Act 47 and the unions."

The subpoena of Mayor McMahon to testify is enforceable because the statement at issue in the remand was allegedly made by him, making his testimony relevant. The City admits as much in its Supplemental Brief at 5. Thus, the motion to quash the subpoenas is denied insofar as the subpoena for Mayor McMahon to testify is concerned.

None of the other subpoenas is enforceable, however. According to the FOP, the other "subpoenas for witnesses and documents will provide highly relevant additional evidence of anti-union animus that will show that the Mayor's statement was purposeful and clear," Brief at 9, but the Board has found that the charge does not state a cause of action to the extent that the FOP alleges retaliation motivated by anti-union animus. Additional evidence of anti-union animus is, therefore, irrelevant. Thus, the motion to quash the subpoenas is granted insofar as the other subpoenas are concerned.

Support for quashing the other subpoenas may be found in UGSOA, 35 PPER 53 (Final Order 2004), where the Board explained the law regarding the enforceability of subpoenas as follows:

> "In PHRC v. Lansdowne Swim Club, 515 Pa. 1, 526 A.2d 758 (1987), our Supreme Court stated that a party must satisfy the following three-part conjunctive standard to demonstrate the enforceability of an administrative subpoena: (1) the inquiry is within the authority of the agency, (2)the demand is not too indefinite; and (3) the information sought is reasonably relevant. See also, Lunderstadt v. Pennsylvania House of Representatives Select Comm., 513 Pa. 236, 519 A.2d 408 (1986). In York v. Public Utility Comm'n, 281 A.2d 261 (Pa. Cmwlth. 1971), the Commonwealth Court affirmed the Commission's denial of subpoenas duces tecum requesting a mass of papers to be supplied for the purpose of gathering evidence. Quoting from Supreme Court, the York Court stated that "`[a]nything in the nature of a mere fishing expedition is not to be encouraged.'" Id. at 278 (quoting American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 535, 70 A. 867, 869 (1908)).
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> The National Labor Relations Board (NLRB) observes a similar policy in its administration of the National Labor Relations Act (NLRA). Section 102.66(c) of the NLRB's Rules and Regulations provides that 'the regional director or hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under

investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid.' 29 C.F.R. § 102.66(c). Moreover, pursuant to these rules and regulations, the NLRB has employed an 'unduly burdensome' standard. Groton Piping Corp., 246 N.L.R.B 99 (1979)."

35 PPER at 166.

Given the foregoing disposition, the City's contention that the subpoena duces tecum also should be quashed because producing the subpoenaed documents would be unduly burdensome and because the documents are subject to the deliberative process privilege[1] need not be addressed.

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 subpoena of Mayor McMahon to testify is enforced, that the subpoenas of Ryan Hottenstein, Chris Kanezzo, Vaughn Spencer, Deputy Chief Mark Talbot, Thomas J. MacDougal IV and Barry Rambo to testify are quashed and that the subpoena duces tecum of Mayor McMahon is quashed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that any exceptions to this procedural order may be filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days after the hearing examiner issues a proposed decision and order pursuant to 34 Pa. Code § 95.91(k)(1).

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirteenth day of January 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

[1] The deliberative process privilege applies to "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice," of legislative or quasi-judicial officers. Fraternal Order of Housing Police, 35 PPER 2 at 3 (Decision and Order 2004), citing Commonwealth of Pennsylvania v. Vartan, 557 Pa. 390, 733 A.2d 1258 (1988); see also SSHE (Cheyney University), 19 PPER ¶ 19200 (Decision and Order 1988)(same).