

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE,
LODGE NO. 28

v.

LOWER MERION TOWNSHIP

:
:
:
:
:
:
:

Case No. PF-C-11-71-E

PROPOSED DECISION AND ORDER

On May 9, 2011, the Fraternal Order of Police, Lodge No. 28, (FOP or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Lower Merion Township (Township or Respondent) violated sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with Act 111 of 1968 (Act 111) by unilaterally transferring bargaining unit work without negotiating with the FOP.

On May 25, 2011, the Secretary of the Board issued a complaint and notice of hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and August 11, 2011 in Philadelphia was scheduled as the time and place of hearing if necessary. The hearing was necessary, but was continued to September 14 and again to November 18, 2011. The location of the hearing was changed to Lower Merion.

The parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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

FINDINGS OF FACT

1. Lower Merion Township is an employer within the meaning of section 3(c) of the PLRA.
2. The Fraternal Order of Police, Lodge No. 28 is a labor organization within the meaning of section 3(f) of the PLRA.
3. The FOP is the exclusive, recognized bargaining representative for a unit of police employees of the Township of the rank of sergeant and below.
4. The Township's police department has several units. The Staff and Inspections Unit (S&I Unit) maintains responsibility for the business side of the police department, dealing with such matters as budget, training, crime prevention, discipline and internal affairs. (N.T. 9, 21)
5. The S&I Unit is comprised of nine employees. Five are in the bargaining unit: four police officers (Gerald Chreiman, Tom Bowman, Joe Haungs and Jay Zeminiski) and one police sergeant, Peter Sharpe (who succeeded Sergeant Arthur Weidle on June 20, 2011). Four employees are outside the bargaining unit: two civilian support staff, Mrs. Dawn Godbold and Ms. Theresa Minahan and two sworn members of the police department, Lieutenant Francis Thomas and Captain John Dougherty. (N.T. 8, 9).
6. In March, 2011, Sergeant Weidle of the S&I Unit notified the Township that he intended to retire from the police department effective March 31, 2011. (N.T. 137)
7. The position of S&I Unit Sergeant remained vacant until June 20, 2011, when Sergeant Peter Sharpe started in the position. The Township did not appoint an Acting Sergeant during this 11 week period. (N.T. 9, 90, 101)

8. In anticipation of Sergeant Weidle's retirement, Lieutenant Thomas directed the Sergeant and the officers in the S&I Unit to prepare a list of their job duties and responsibilities. (N.T. 10)
9. At the direction of Lieutenant Thomas, Sergeant Weidle prepared a document entitled "Staff and Inspections Sergeant's Duties", which was a description of the Sergeant's responsibilities. (N.T. 10, 45, FOP Exhibit 1)
10. In March 2011, Lieutenant Thomas convened a meeting of the S&I Unit and handed out Sergeant Weidle's "Staff and Inspections Sergeant's Duties" to all who were present. Lieutenant Thomas orally read through the Sergeant's Duties and divided the duties identified among the S&I Unit. Some of the Sergeant's duties were assigned to members of the bargaining unit, while others were assigned to individuals outside of the bargaining unit, namely Mrs. Dawn Godbold, Ms. Theresa Minahan, and to the Lieutenant himself. (N.T. 10, 67, FOP Exhibit 1)
11. All of the duties (except where specifically noted were performed by other individuals) were substantially and exclusively performed by Sergeant Weidle prior to his retirement. (N.T. 67)
12. The duties assigned to Mrs. Godbold and Ms. Minahan were in addition to their normal duties. (N.T. 67)
13. The responsibility of opening and locking of the personnel filing cabinets located in the S&I Unit Staff and Inspections, a task previously performed by the sergeant, was now performed by the Lieutenant. (N.T. 13, 14, 68)
14. Prior to his retirement, Sergeant Weidle prepared the S&I Unit attendance sheet daily, which recorded who was present, hours worked, and his/her assignment for the day. (N.T. at 14, 45, 49).
15. After Sergeant Weidle's retirement, Theresa Minahan was assigned the responsibility of completing the S&I Unit attendance sheet and did so, pursuant to the assignment by Lieutenant Thomas. (N.T. 104)
16. Prior to his retirement, Sergeant Weidle prepared the "Department Numerical Strength" which keeps an up to date, electronic list of current employees. The list was updated monthly and emailed so it could be included in the monthly report. Sergeant Weidle trained Mrs. Godbold prior to his retirement so she would be able to complete this responsibility, pursuant to the transfer of this duty to her by Lt. Thomas. Mrs. Godbold assumed this task and completed it monthly until Sergeant Sharpe was appointed and assumed this responsibility. (N.T. 18, 70)
17. At the time of Sergeant Weidle's retirement, the work of completing the Monthly Statistics Report was the Sergeant's responsibility. This required emails being sent to the Superintendent, Crime Prevention officers, Staff and Inspections secretaries, training officers, and the communications center requesting the department's monthly statistics (e.g. training or off duty details). Upon receipt of the data, the Sergeant would complete the tabulations in the monthly report and send the report to the clerk in the auxiliary services unit. However, Mrs. Godbold had previously performed this duty. It was removed from her responsibilities and assigned to Sergeant Weidle by Captain Dougherty. Sergeant Weidle provided Mrs. Godbold the information she would need to complete this responsibility prior to his retirement. After Sergeant Weidle's retirement, Mrs. Godbold completed this task monthly per the assignment from Lieutenant Thomas. (N.T. 50, 51, 71, 72).
18. Sergeant Weidle was responsible for logging discipline into the access database. Mrs. Godbold had previously handled this responsibility but was advised by then Captain McGrath (now Superintendent) that the responsibility of

logging discipline into the access database was the Sergeant's responsibility. After Sergeant Weidle retired, Lieutenant Thomas provided Mrs. Godbold the disciplinary information to log it into the database. After entering the discipline into the summary, Mrs. Godbold would then forward to Superintendent McGrath and place the final copy into the personnel file - all duties that had previously been performed by the Sergeant. (N.T. 73, 74)

19. Prior to Sergeant Weidle's retirement, he logged all of the specialty training and placed the information regarding the specialty training into binders in the S&I Unit. After Sergeant Weidle's retirement, Mrs. Godbold logged all of the specialty training and placed the information regarding the specialty training into binders in the S&I Unit - a task she had never performed previously. (N.T. 76, 77)
20. Prior to Sergeant Weidle's retirement, he received all the Request for Discipline Summaries, which he would forward to Mrs. Godbold. Once Mrs. Godbold had compiled the disciplinary information, Sergeant Weidle would review to ensure that it was accurate prior to sending to the supervisor who requested the summary. After Sergeant Weidle retired, the request for discipline summaries went directly to Mrs. Godbold. Lieutenant Thomas assumed direct supervision of this responsibility. (N.T. 77, 78)
21. Prior to Sergeant Weidle's retirement, he drafted the "Four Platoon Work Schedule" on yellow legal pads and then gave it to Mrs. Godbold to type. After his retirement, Mrs. Godbold was assigned the responsibility of creating the 2012 Four Platoon Work Schedule and typing the schedule for distribution. (N.T. 33, 34, 83, 84)
22. Lieutenant Thomas assumed the normal supervision over the bargaining unit employees as well as the civilian employees previously performed by Sergeant Weidle as those employees now reported directly to Lieutenant Thomas. (N.T. 19, 38, 62)
23. Officers also forwarded information they would normally provide to Sergeant Weidle for review and approval to Lieutenant Thomas, such as training hours and grade advancements. (N.T. 22, 24, 62).
24. When Sergeant Sharpe was appointed to the S&I unit on June 20, 2011, Lieutenant Thomas told Sergeant Sharpe that Sergeant Weidle had prepared "a document of his duties of the unit and the duties of the sergeant" and provided it to him. (N.T. 88, 89)
25. Sergeant Sharpe supervises the S&I Unit, including the work done and the functions performed by the bargaining unit and the civilian staff. (N.T. 94, 95)
26. Sergeant Sharpe reviewed the document and met with the S&I Unit. Based on his experience as Sergeant of the S&I Unit, Sergeant Sharpe testified that Sergeant Weidle's March, 2011 "Staff and Inspections Sergeant's Duties" were a fair and accurate representation of his duties and the duties of the unit as a whole, which he supervises. (N.T. 90)
27. All of the duties (except where specifically noted were performed by other individuals) were substantially and exclusively performed by Sergeant Peter Sharpe after his appointment on June 20, 2011. (N.T. 14, 15, 19, 22, 91).
28. Sergeant Gavin Goschinski, a patrol sergeant in the Police Department and President of the FOP, testified that as President of the FOP, he met with the captain, the Township Manager, and the Superintendent of Police to discuss the transfer of bargaining unit work, namely the S&I Unit Sergeant's duties and responsibilities, to civilians and members of the police department who were outside of the bargaining unit. (N.T. 136, 137, 141)

29. The Township's response to the FOP's concerns about the unilateral transfer of bargaining unit work, as conveyed by Superintendent McGrath and Township Manager Cleland, was that it had the managerial prerogative to transfer work outside of the unit. (N.T. 141)
30. The FOP did not agree to the transfer of the sergeant's duties to individuals who were outside of the bargaining unit. (N.T. 142)

DISCUSSION

The FOP's charge of unfair labor practices alleges that the Township has violated sections 6(1)(a) and (e) of the PLRA as read *in pari materia* with Act 111 by unilaterally transferring bargaining unit work that it had exclusively and historically performed. The FOP charges the Township with transferring bargaining unit work for 11 weeks, from April 1, 2011 to June 20, 2011, the period of time between Sergeant Arthur Weidle's retirement and Sergeant Peter Sharpe's appointment.

The Commonwealth Court has held that "a public employer commits an unfair labor practice when it transfers *any* bargaining unit work to non-members without first bargaining with the unit." **City of Harrisburg v. Pennsylvania Labor Relations Board**, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis in original). In establishing an unfair practice for the removal of bargaining unit work, a union has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-unit employee. **City of Allentown v. Pennsylvania Labor Relations Board**, 851 A.2d 988 (Pa. Cmwlth. 2004).

In judging whether a transfer of bargaining unit work has occurred the Board will analyze the particular components of the work. Even where bargaining unit and non-bargaining unit employees have performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit member exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. **AFSCME, Council 13 v. Pennsylvania Labor Relations Board**, 616 A.2d 13 (Pa. Cmwlth. 1992); **City of Jeanette v. Pennsylvania Labor Relations Board**, 890 A.2d 1154 (Pa. Cmwlth. 2006). Therefore, a public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or varying "the extent to which members and non-members of the bargaining unit have performed the same work." **Wyoming Valley West Education Support Personnel Association v. Wyoming Valley West School District**, 32 PPER ¶ 32008 (Final Order, 2000) (citing **AFSCME, supra**).

The Township raises several defenses. As a threshold matter, the Township argues that the FOP's case must fail because it based on hearsay evidence, FOP Exhibit 1, the list of Sergeant Weidle's duties that were being transferred. The Board cannot rely on hearsay unless corroborated by competent evidence. **Commonwealth of Pennsylvania**, 25 PPER ¶ 25184 (Proposed Decision and Order, 1994), 26 PPER ¶ 26045 (Final Order, 1995). Sergeant Weidle, the maker of Township Exhibit 1, was not present to testify. However, Dawn Godbold, a secretary in S&I for 16 years, who observed how the work was transferred, testified that Lieutenant Thomas described FOP Exhibit 1 at a Staff and Inspections meeting in March, 2011 as Sergeant Weidle's recording of his work and where it was transferred. Lieutenant Thomas is part of the management of the police department. His statements about FOP Exhibit 1, a document that management adopted as its own description of Sergeant Weidle's duties, turns the FOP Exhibit 1 into a management document and not subject to a hearsay objection. Furthermore, Sergeant Peter Sharpe, the appointee to the position, testified credibly that Lieutenant Thomas told him about the meaning of the list of duties. Accordingly, FOP Exhibit 1 is competent evidence of Sergeant Weidle's work before he retired.

The findings of fact lists work that was exclusively performed by Sergeant Weidle before his retirement and then performed by persons outside the bargaining unit for 11 weeks. This is work that should have remained with the bargaining unit but did not because of the Township's delay in filling the vacancy. The transferred work includes the

unlocking personnel filing cabinets at the beginning of the day and locking them at the end of the day; the compilation of the daily attendance sheet; compiling of the Departmental numerical strength list; the logging of discipline; the logging of training; handling requests for disciplinary summaries; creating the 2012 Four Platoon Work Schedule and advertising related to recruitment and testing. Also, the transferred work included Sergeant Weidle's supervision of the employees in the S&I Unit, which was done by Lieutenant Thomas.

The Township argues that FOP is complaining of mere "tasks" being transferred, not the "duties" because they do not appear in the Township's Duties and Responsibilities Manual that is distributed to all police officers. (Township Exhibit 1). However, drawing a distinction between tasks and duties does not address the legal analysis required in transfer of bargaining unit work cases, where the Board looks only at whether "bargaining unit work" has been transferred. **City of Harrisburg, supra** The FOP's evidence satisfies its burden of showing that a bargaining unit employee, Sergeant Weidle, performed the work set forth above and that Township transferred the work outside the bargaining unit.

The Township next argues that because the work at issue is administrative and clerical in nature, the employer can transfer it to non-police employees without bargaining. However, administrative and clerical work can be police bargaining unit work just as much as patrolling a jurisdiction or making arrests. **City of Philadelphia v. Pennsylvania Labor Relations Board**, 759 A.2d 40 (Pa. Cmwlth. 2000), **City of Allentown, supra**. Because the work in this case is bargaining unit work, the Township must first bargain with the FOP prior to transferring the work.

The Township next argues that the FOP cannot satisfy the exclusivity test required by **AFSCME Council 13, supra**. The Township argues that during the window period, no tasks identified in FOP-1 were performed by any individual or in any manner that would not normally be performed by that individual or in that manner if the Sergeant was on vacation, leave or unavailable at any time in the past. In response, the FOP correctly points out that the period of time that the non-bargaining unit employees did the work extended for 11 weeks, which is beyond the traditional time other employees filled in for the Sergeant who was on vacation, leave or unavailable.

The Township further argues a variation on the exclusivity argument, that the work at issue in this case was performed by non-bargaining unit employees in many units throughout the police department. However, the FOP's charge only complains about the transfer of work in the S&I Unit, a portion of the workforce which can be scrutinized for an allegation of an unlawful transfer. A public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or varying "the extent to which members and non-members of the bargaining unit have performed the same work." **Wyoming Valley West Education Support Personnel Association v. Wyoming Valley West School District, supra**. See also, **E.B. Jermyn Lodge No. 2, Fraternal Order of Police v. City of Scranton**, 42 PPER ¶ 36 (Proposed Decision and Order, 2011), 43 PPER ¶ 33 (Final Order, 2011).

The Township next argues that not all the work performed by the replacements was exclusively performed by Sergeant Weidle prior to his retirement. There is merit to this argument for one of the allegations of wrongly transferred work. Completing the monthly statistics had been performed both by Mrs. Godbold and Sergeant Weidle at different times in the past. Accordingly it cannot be said that this work was exclusively that of Sergeant Weidle and that it could serve as the basis for a charge of unfair labor practices.

The Township next argues that it had the managerial right to temporarily assign administrative and clerical work within the S&I Unit in accordance with its past practice while there was a vacancy to ensure the proper and efficient functioning of the police force. The Township cites **City of Jeanette v. Pennsylvania Labor Relations Board**, 890 A.2d 1154, (Pa. Cmwlth. 2006), in which the Commonwealth Court affirmed the Board's final order finding the employer unlawfully assigned the Chief to the 8 PM to 4 AM patrol shift on December 19, 2003 and rejected the managerial prerogative defense. In *dicta*, the Court

said, "That is not to say, however, that the outcome would be the same under a different factual scenario, such as the unavailability of unit members to fill a vacancy occurring in a particular shift." Id at 1159. The Township's suggested use of the *dicta* in **City of Jeanette** is not persuasive for this case, as the transfer of bargaining unit work occurred for 11 weeks, well beyond "a vacancy occurring in a particular shift" of one day.

Finally, the Township argues that charge of unfair labor practices has been rendered moot because the position at issue has since been filled by the Township and the FOP no longer suffers harm. While it is true that the Township has appointed a successor to the sergeant position and that the successor is doing the work of Sergeant Weidle, the Board has jurisdiction to decide the question of whether there was an unlawful transfer of work while the position was vacant. The FOP and its members experienced harm during that period by not having one of its members hold the position. Accordingly, the charge is not moot.

CONCLUSIONS

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

1. Lower Merion Township is an employer under section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. The Fraternal Order of Police, Lodge 28 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 Township has committed unfair labor practices under sections 6(1)(a) and (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 Township shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA as read *in pari materia* with Act 111.
2. Cease and desist from transferring bargaining unit work outside the bargaining unit without bargaining with the Fraternal Order of Police, Lodge 28.
3. Take the following affirmative action:
 - (a) 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 employees and have the same remain so posted for a period of ten (10) consecutive days;
 - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

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 (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifteenth day of May, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner