

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On February 6, 2018, the Reading Lodge 9 Fraternal Order of Police (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, and therein alleged that the City of Reading (City) violated Section 6(1) (a) and (e) of the PLRA by unilaterally diverting bargaining unit work and by violating a Memorandum of Understanding (MOU) settling a prior unfair labor practice charge. The Union alleged in its specification of charges that, on January 12, 2018, the City unilaterally transferred the bargaining unit work of placing and maintaining police barricades on streets and sidewalks.

On March 5, 2018, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on June 6, 2018, in Harrisburg, Pennsylvania. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. Both parties presented closing arguments at the hearing, after the record was closed, in lieu of filing post-hearing briefs.

The examiner, based upon witness testimony, admitted documents and all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer and political subdivision pursuant to Act 111 and the PLRA. (N.T. 5)

2. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 5)

3. Charles Menges is a patrol officer on day shift for the City, and he is currently the President of the Union. (N.T. 6-7)

4. Police barricades are wooden saw-horse type barricades. They are white with blue lettering that say, "Police Line." The Traffic Office within the City's Police Department is in command of the placement, removal and maintenance of police barricades. (N.T. 9)

5. Bargaining unit police officers are assigned to work in the Traffic Office. Sergeant Christian Rothermel is in command of the Traffic Office. He has direction and control over the placement of police barricades, and he is a member of the bargaining unit. (N.T. 9-10, 25)

6. 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. They also secure and remove abandoned vehicles. (N.T. 10)

7. Within the City is a large arena for events known as the Santander Center and formerly known as the Reading Arena, located at 7th and Penn streets. A four-block radius includes 10th street. (N.T. 10-11)

8. 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. (N.T. 8; Board Exhibit 1)¹

9. In that charge, the Union alleged that 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.'"² (Board Exhibit 1)

10. The Union further alleged, in charge no. PF-C-15-93-E, that the placement of police barricades on City streets and sidewalks had historically and exclusively been bargaining unit work and that, on November 22, 2015, employees of the Reading Parking Authority performed that work at an event held at the Santander Center. (Board Exhibit 1)

11. The parties settled the charge at Case No. PF-C-15-93-E with a Memorandum of Understanding (MOU). (N.T. 8-9; Union Exhibit 1)

12. The MOU provides, in relevant part, as follows:

2. 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.

(Union Exhibit 1)

13. The MOU was executed by the parties sometime prior to January 12, 2018. On that date, non-unit employees placed police barricades in the 500 block of 10th Street for an event that may have been the "Fire and Ice Show." During the event, police barricades were erected blocking the 500 block of Penn Street on the north and south sides. The event on January 12, 2018 was not held inside the Santander Center or within the curtilage of the Center. 10th Street is a Commonwealth highway. Closing a Commonwealth highway requires a permit from the City and approval from the Commonwealth. The Commonwealth has denied closures of Commonwealth highways in the City in the past. (N.T. 10-13, 20)

¹ I have designated the charge filed at Case No. PF-C-15-93-E as Board Exhibit 1.

² I have independently verified the accuracy of the quoted language from this City ordinance section.

14. A four-to-six block radius from the Santander Center is considered part of the events at the Arena for traffic control purposes. Police barricading and protection has extended well beyond the footprint of the Santander Center as far down as 2nd Street and up to 10th Street, depending on the expected size of the crowd. (N.T. 19)

15. Sergeant Rothermel informed Patrolman Menges that he directed the employees of the Downtown Improvement District Authority ("DID") to erect the barricades blocking the 500 block of Penn Street on January 12, 2018. DID employees are not members of the bargaining unit. Officer Menges observed the DID employees standing around the barricades. 5th Street and Penn Street have been blocked off by police officers erecting barricades in the past prior to January 12, 2018. (N.T. 15, 24)

DISCUSSION

The Union argues that the City unlawfully diverted bargaining unit work and violated the MOU when Sergeant Rothermel directed the DID employees to erect and maintain police barricades on the 500 block of Penn Street on January 12, 2018. The City, however, contends that the specification of charges was limited to violating the MOU. The City further posits that, in the MOU, the City only promised to utilize bargaining unit officers for police barricading at events at the Santander Center and that the event on January 12, 2018 was not an event at that building.

The City also objects to the alleged hearsay testimony of Officer Menges that Sergeant Rothermel told him that he directed the DID employees to erect the police barricades at issue. In this regard, the City further maintains both that Sergeant Rothermel is a bargaining unit employee and not an agent of the City. Therefore, the City is not responsible for the work diversion and there is no evidence that any City managers or administrators even knew of the work diversion. Moreover, the City maintains that, because the only evidence that someone directed the DID employees to erect police barricades on January 12, 2018, is inadmissible hearsay, the Union failed to meet its burden of proving that the City is liable for the work transfer.

The Union, however, contends that Sergeant Rothermel is indeed the employer or an agent of the City because command and control over police barricading and the Traffic Office has been delegated to Sergeant Rothermel. Sergeant Rothermel is the only one with command authority over the bargaining unit work of police barricading on behalf of the City, and it is inconsequential that he is a bargaining unit member.

The Commonwealth Court has held that "a public employer commits an unfair practice when it transfers any bargaining unit work to non-members without first bargaining with the unit." City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis 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 non-unit employees. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). A public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or by varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008, 28-29 (Final Order, 2000) (citing AFSCME, supra).

The PLRA provides that the term employer "includes any person acting, directly or indirectly, in the interest of an employer. . . ." 43 P.S. § 211.3 (c). Moreover, the Board has held that an agency relationship arises where (1) there is a manifestation by the principal that an agent shall act for it; (2) an acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal is in control of the undertaking. AFSCME District Council 87 v. Luzerne County, 43 PPER 140 (Final Order, 2012), *aff'd* 77 A.3d 53 (Pa. Cmwlth. 2013), 111 A.3d 1149 (Pa. 2015).

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.

Consequently, Sergeant Rothermel's statements to Officer Menges, that he directed the DID employees to erect the police barricades on January 12, 2018, is the admission of a party opponent, making the hearsay statement admissible evidence. Similarly, because Sergeant Rothermel is the employer on these facts, the City is liable for the unfair practices of diverting bargaining unit work attributable to him.

I also disagree with the City's positions that the charge was limited to the MOU and that, because the event of January 12, 2018, was not an event at the Santander Center, the City cannot be said to have violated the MOU.

Paragraph 6 of the specification of charges expressly provides as follows:

6. 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.

(specification of charges, ¶ 6). 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. Moreover, even if the specification of charges were limited to the terms of the MOU, the MOU

provides that the City "will bargain with the FOP prior to transferring any bargaining unit work." Accordingly, neither the MOU nor the specification of charges is limited to police barricading for events at the Santander Center.

The record demonstrates that police barricading in the City has been historically and exclusively performed by the City police officers in the bargaining unit. The record also clearly establishes that the City unilaterally transferred police barricading work on January 12, 2018, when Sergeant Rothermel assigned police barricading work in the 500 block of Penn Street to DID employees in violation of the City's bargaining obligation under law and also in repudiation of the MOU. Clearly, the Union did not bargain away its right to protect the bargaining unit work of police barricading throughout the entire City in the MOU where the previous charge settled by the MOU complained of the removal of barricading work generally. That charge was not limited to barricading only at events at the Santander Center simply because such an event gave rise to that charge. Accordingly, the City has engaged in unfair labor practices in violation of Section 6(1) (a) and (e) of the PLRA, as read with Act 111, and the charge is hereby sustained.

CONCLUSIONS

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

1. The City is a public employer and a political subdivision within the meaning of the PLRA as read in pari materia with Act 111.
2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The City of Reading has committed unfair labor practices within the meaning of Section 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 and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the City of Reading shall

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA and Act 111.
2. Cease and desist from refusing to bargain collectively in good faith with an employee representative.

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:

(a) Immediately return 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.

(b) 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; and

(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.

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 and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventeenth day of July, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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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 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