

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
SCHUYLKILL-CARBON LODGE 13 :
 :
v. : Case No. PF-C-12-71-E
 :
TAMAQUA BOROUGH :

FINAL ORDER

The Fraternal Order of Police, Schuylkill-Carbon Lodge 13 (FOP) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on June 14, 2012. The FOP's exceptions challenge a May 25, 2012 decision of the Secretary of the Board declining to issue a complaint and dismissing the FOP's Charge of Unfair Labor Practices filed against Tamaqua Borough (Borough).

The FOP alleged in its Charge that the Borough violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968 by failing to bargain over the Borough's implementation of a modified duty policy and its impact upon bargaining unit members. The Secretary declined to issue a complaint on the Charge, stating that the FOP failed to state a cause of action under Section 6(1)(c) because it did not allege facts that would support a finding that the Borough's action was in retaliation for protected activity by the bargaining unit members. The Secretary further stated that the FOP failed to allege sufficient facts to support a finding of a violation of Section 6(1)(a). The Secretary also noted that the Borough's creation of a modified duty policy is a managerial prerogative that is not subject to bargaining, citing **Lackawanna County Detectives' Association v. PLRB**, 762 A.2d 792 (Pa. Cmwlth. 2000); **Plains Township Police Officers Association v. Plains Township**, 40 PPER 103 (Final Order, 2009); **Amity Township Police Association v. Amity Township**, 39 PPER 131 (Final Order, 2008); **Ambridge Police Officers and Policy Unit v. Ambridge Borough**, 30 PPER ¶ 30218 (Final Order, 1999) and **Shillington Borough Police Officers Association v. Shillington Borough**, 21 PPER ¶ 21195 (Proposed Decision and Order, 1990), 22 PPER ¶ 22074 (Final Order, 1991). The Secretary further indicated that the FOP had failed to allege facts demonstrating that the Borough's modified duty policy has a severable impact on the wages, hours or terms and conditions of employment. Therefore, the Secretary dismissed the FOP's Charge.

In determining whether to issue a complaint, the Board assumes that all facts alleged are true. Issuance of a complaint on a charge of unfair labor practices is not a matter of right, but is within the sound discretion of the Board. **Pennsylvania Social Services Union, Local 668 v. PLRB**, 481 Pa. 81, 392 A.2d 256 (1978). A complaint will not be issued if the facts alleged in the charge could not support a cause of action for an unfair labor practice as defined by the PLRA. **Hamburg Police Officers Association v. Borough of Hamburg**, 37 PPER ¶ 121 (Final Order, 2006).

In its exceptions, the FOP acknowledges that the Borough's implementation of a modified duty policy is a managerial prerogative. However, the FOP contends that the Secretary erred in dismissing the Charge concerning the Borough's alleged refusal to bargain over the impact of its modified duty policy.¹

The law is well established that the creation of, and assignment to, a light or modified duty position is within a public employer's managerial prerogative. **Lackawanna County Detectives' Association, supra**; **Plains Township, supra**; **Amity Township, supra**; **Ambridge Borough, supra**; **Shillington Borough, supra**. Where a public employer is charged with violating its duty to bargain under Section 6(1)(e) of the PLRA over the impact of implementation of a managerial prerogative, the employe representative must demonstrate that (1) the employer lawfully exercised its managerial prerogative; (2) there is a demonstrable, severable impact on wages, hours or working conditions as a result of implementation of the managerial prerogative; (3) the employe representative made a demand to bargain over the demonstrable impact; and (4) the employer refused the employe

¹ The FOP does not challenge the Secretary's dismissal of the Charge under Section 6(1)(c) of the PLRA.

representative's demand to bargain. **Lackawanna County, supra; Plains Township, supra; Amity Township, supra.** The FOP's original Charge did not allege a violation of Section 6(1)(e), only a violation of Section 6(1)(a) and (c). The FOP's exceptions also fail to specifically allege that the Borough violated Section 6(1)(e) of the PLRA. Further, the FOP's allegation in its specification of charges that the Borough violated its duty to bargain over the impact of its modified duty policy is insufficient to adequately charge a violation of Section 6(1)(e) of the PLRA where the FOP failed to check off a violation of Section 6(1)(e) on the charge form and failed to reference that provision in its specification of charges. **Greater York Professional Fire Fighters and EMTs v. Spring Garden Township**, 41 PPER 5 (Final Order, 2010).

Even if the FOP had specifically alleged a violation of Section 6(1)(e) in its exceptions, that allegation would be untimely. Section 9(e) of the PLRA provides that no charge shall be entertained which relates to acts which occurred or statements which were made more than six weeks prior to the filing of the charge. 43 P.S. § 211.9(e). Section 93.14(b) of the Board's Rules and Regulations provides that a complaint may be amended at any time before the issuance of a final decision and order if no new cause of action is added after the statute of limitations has run. 34 Pa. Code § 93.14(b). The Board has consistently determined that amending a charge of unfair labor practices to include an additional clause adds a new cause of action and, therefore, such an amendment must be made prior to the expiration of the six week statutory limitations period. **Id.; see also PSSU Local 668, AFL-CIO v. Commonwealth of Pennsylvania, Department of Labor and Industry**, 30 PPER ¶ 30090 (Final Order, 1999); **New Kensington Police Department Bargaining Unit v. City of New Kensington**, 29 PPER ¶ 29024 (Final Order, 1997); **McAuliffe v. West Norriton Township**, 28 PPER ¶ 28114 (Final Order, 1997); **Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania**, 34 PPER 32 n.2 (Proposed Decision and Order, 2003). The FOP's Charge alleges that the Borough implemented its modified duty policy on April 10, 2012. The FOP's exceptions were filed on June 14, 2012, which was more than six weeks after the implementation of the modified duty policy. Therefore, even if the FOP had alleged a violation of Section 6(1)(e) in its exceptions, that allegation would have been untimely.

Additionally, the FOP has not made any further factual allegations in its exceptions concerning its Charge under Section 6(1)(a) of the PLRA. Absent new factual allegations, the FOP has failed to state an independent violation of Section 6(1)(a). Although a violation of Section 6(1)(e) of the PLRA would also be a derivative violation of Section 6(1)(a), no derivative violation of Section 6(1)(a) may be found for the Borough's alleged refusal to bargain because the FOP failed to timely charge a violation of Section 6(1)(e). **Spring Garden Township; supra; City of New Kensington; supra.** Accordingly, the Secretary did not err in declining to issue a complaint and dismissing the Charge.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Secretary's decision declining to issue a complaint.

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 Fraternal Order of Police, Schuylkill-Carbon Lodge 13 are dismissed and the Secretary's May 25, 2012 decision not to issue a complaint be and the same is hereby 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, Member, and Robert H. Shoop, Jr., Member, this twenty-eighth day of August, 2012. 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.