

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LANSDALE POLICE BENEVOLENT ASSOCIATION :
: :
v. : Case No. PF-C-21-38-E
: :
LANSDALE BOROUGH :

FINAL ORDER

On August 18, 2022, the Lansdale Police Benevolent Association (Association) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Decision and Order (PDO) issued on August 1, 2022. In the PDO, the Board's Hearing Examiner concluded that Lansdale Borough (Borough) did not violate Section 6(1)(a) or (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111 of 1968, when the Borough's Chief of Police denied Officer Nicholas Oropeza's request to engage in outside employment. The Borough filed a response to the exceptions on October 27, 2022.

The facts of this case are summarized as follows. Michael Trail has been a police officer for the Borough for approximately 20 years. On March 1, 2017, he became the acting Chief of Police for the Borough and received his permanent appointment as Chief in March 2018. (FF 5). After his appointment, Chief Trail implemented a series of policy changes in an effort to get the department accredited, including a policy entitled "Outside Employment and Outside Overtime". (FF 6).

Section 1021.2 of the Outside Employment policy provides, in relevant part, as follows:

Members of the Lansdale Police Department shall obtain written approval from the Chief of Police or the authorized designee prior to engaging in any outside employment or outside overtime. Approval of outside employment or overtime shall be at the discretion of the Chief of Police in accordance with the provisions of this policy. Failure to obtain prior written approval for outside employment or overtime, or engaging in outside employment or overtime that is prohibited by this policy, may lead to disciplinary action.

(FF 7). Section 1021.3.2 of the policy states that a written notification of the reason for denial of a request for outside employment should be provided to the requesting officer. (FF 9). Section 1021.3.4 of the policy concerns the appeal process and provides, in relevant part, as follows:

If a member's request for outside employment is denied or if previous approval is revoked or suspended, the member may file a written notice of appeal with the Chief of Police within 10 days of receiving notice of the denial, revocation or suspension.

...

If the member's appeal is denied, he/she may file a grievance as provided in the Grievances Policy.

(FF 10).

Section 1021.4.1 of the policy entitled "Prohibited Outside Employment" provides, in relevant part, as follows:

The Department reserves the right to deny any request for outside employment that involves:

- (a) The use of department time, facilities, equipment or supplies.
- (b) The use of the Lansdale Police Department badge, uniform or influence for private gain or advantage.
- (c) The member's receipt or acceptance of any money or other consideration for the performance of duties or services that he/she would be required or expected to render in the course or hours of his/her employment, appointment or as part of his/her regular duties.
- (d) The performance of duties or services that may later be subject directly or indirectly to the control, inspection, review, audit or enforcement of any other member of this department.
- (e) Demands upon the member's time that would render the performance of his/her duties for this department deficient or substandard.
- (f) Activities that may conflict with any other policy or rule of the Department.
- (g) A pari-mutuel horseracing facility (58 Pa. Code § 165.33).
- (h) Employment in any capacity in or for any establishment that serves or permits alcohol.

(FF 11). Section 1021.4.2 of the policy additionally states that no officer may perform outside employment as a "law enforcement officer, private security guard, private investigator, or other similar private security position." (FF 12).

Chief Trail stated that the purpose of the Outside Employment policy is to allow officers to seek outside employment under certain conditions in a safe manner and to protect the reputation of the Borough's police department from potential conflicts of interests. (FF 25). Chief Trail's role in the approval process is receiving the request from the officers and reviewing it

preliminarily to determine if the requested outside employment would violate the spirit and intent of the policy. (FF 26).

Shortly before Chief Trail amended the policy, Officer George Johnson submitted a request to Chief Trail for outside employment on January 13, 2019. The request was for two positions, the first of which involved AmeriHealth Caritas Family of Company, as an investigator in the company's special investigations unit. The position involved working as a desktop investigator conducting inquiries of assigned cases of alleged fraud against Pennsylvania Medicaid insurance. The second position was working as a driving coach for Streetsafe Driving Academy. Chief Trail approved both requests on January 16, 2019. (FF 22, 29). Chief Trail approved Officer Johnson's request for outside employment with AmeriHealth because the Private Detective Act of 1953¹ has an exemption for people who are engaged in insurance investigations. Further, Officer Johnson had recently returned to the Borough as an officer after an eight year absence at the time of his request and, therefore, Chief Trail concluded that Officer Johnson had not established a reputation as a Borough detective that could pose a conflict. (FF 29).

Chief Trail's changes to the "Outside Employment and Outside Overtime" policy became effective in April 2019. (FF 6). Thereafter, Officer Johnson left his position at AmeriHealth in November 2020, and on December 18, 2020, Officer Johnson submitted a request to Chief Trail for outside employment for a position as a security official at North Penn School District. (FF 23). Chief Trail denied Officer Johnson's request on December 22, 2020, in accordance with the revised outside employment policy. (FF 24).

On March 18, 2021, Officer Nicholas Oropeza submitted a memorandum to Chief Trail requesting outside employment with Intercounty Investigations and Solutions, Inc. performing administrative and marketing duties. (FF 13). On March 24, 2021, Officer Oropeza went to the police department to speak with Chief Trail because he had not received a response to his request for outside employment. On that same date, Chief Trail met with Officer Oropeza and advised that he could not approve the outside employment request because it was for a private security company. (FF 15). By email dated March 24, 2021, Chief Trail confirmed his conversation with Officer Oropeza and indicated that his request for outside employment was denied in accordance with Section 1021.4.2 of the policy concerning the prohibition of security and law enforcement outside employment. (FF 16).

On March 26, 2021, Officer Oropeza submitted an appeal to Chief Trail concerning the denial of his outside employment request. (FF 17). On April 2, 2021, Chief Trail issued a memorandum to Officer Oropeza stating, in pertinent part, as follows:

Nick, I have reviewed your appeal for the denial of outside employment with Intercounty Investigations and Solutions, Inc., and again I must deny your request.

Intercounty Investigations and Solutions is a licensed private investigation firm headquartered in Lehigh County PA. State law does not allow active-

¹ Act of August 21, 1953, P.L. 1273, No. 361, as amended, 22 P.S. §§ 11-30.

duty police officers to be licensed private investigators. While you have not requested to become a licensed private investigator, you have requested to be employed by one to perform, among other things, "Administrative Duties."

Administrative duties are those tasks necessary for the operations of this private investigation firm and in my opinion are too closely aligned with your duties as a Lansdale Borough Police Officer and for that reason your request must be denied.

(FF 19).

Chief Trail testified that he denied Officer Oropeza's request for outside employment for several reasons. First, Chief Trail noted that Intercounty Investigations and Solutions is run by Chad Bruckner, a former Borough detective. He explained that Mr. Bruckner and Officer Oropeza both had reputations in the community for their work as detectives for the Borough. Chief Trail also consulted the Private Detective Act because Intercounty Investigations and Solutions is a private investigation firm. He stated that there was a lot of ambiguity in the definition section of the Private Detective Act about what it means to be engaged in the business of a private investigation firm, and that there is language in that statute indicating that persons who are engaged in the business of private investigations cannot also be active police officers. Chief Trail believed that even if Officer Oropeza did not plan on engaging in investigative activities, his name and reputation as a Borough police detective would carry significant weight and become strongly associated with Intercounty Investigations and Solutions. He concluded that approving the outside employment request would not have been in the best interests of the Borough's police department. (FF 28).

On April 4, 2021, Officer Oropeza filed a grievance concerning the denial of his outside employment request with the Association's Grievance Committee per the parties' grievance procedure. (FF 20). On April 8, 2021, the Association's Grievance Committee issued a recommendation to the Association to not process the grievance under the collective bargaining agreement. (FF 21).

The Association filed its Charge of Unfair Labor Practices on May 12, 2021, alleging that the Borough committed unfair labor practices under Section 6(1)(a) and (e) of the PLRA when Chief Trail "violated a past practice of permitting officers to obtain outside employment in accordance with departmental policy" when he denied Officer Oropeza's request for outside employment with Intercounty Investigations and Solutions. On July 20, 2021, the Secretary of the Board issued a letter dismissing the Charge, stating that Chief Trail's exercise of discretion pursuant to Section 1021.2 of the Borough's Outside Employment policy was not a clear repudiation of the policy. After the filing of exceptions, the Board issued an Order Directing Remand to the Secretary for Further Proceedings on September 21, 2021.

On October 29, 2021, the Secretary issued a Complaint and assigned this matter to a Hearing Examiner. The hearing was held before the Board's Hearing Examiner on February 17, 2022, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine

witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The Hearing Examiner concluded in the PDO that the Borough did not unilaterally change the Outside Employment policy when Chief Trail denied Officer Oropeza's request to work for Intercounty Investigations and Solutions; rather, Chief Trail followed the existing policy and processed Officer Oropeza's request in accordance with the policy. The Hearing Examiner additionally held that the Association failed to present evidence establishing a past practice concerning the Outside Employment policy stating, in relevant part, as follows:

The record is devoid of any evidence whatsoever that the Borough has ever permitted an officer to work for a private investigation firm in any capacity. At most, the Association introduced evidence that the Borough had, on one occasion, permitted an officer to work for AmeriHealth Caritas Family of Company to conduct desktop insurance investigations. But even this predated the current [p]olicy. In any event, the record shows that, since the current [p]olicy was issued in April 2019, the Chief has used it to deny that same officer's request for outside employment to work as a Security Official at North Penn School District.

(PDO at 9). Accordingly, the Hearing Examiner held that the Borough did not violate its duty to bargain under Section 6(1)(a) or (e) of the PLRA, rescinded the complaint and dismissed the Charge of Unfair Labor Practices.

In its exceptions, the Association alleges that the Hearing Examiner erred in concluding that the Borough did not unilaterally change the terms of the Outside Employment policy when Chief Trail denied Officer Oropeza's request to work for Intercounty Investigations and Solutions. Specifically, the Association argues that the language in the policy that "[a]pproval of outside employment ... shall be at the discretion of the Chief of Police in accordance with the provisions of this policy" limits Chief Trail's discretion in denying outside employment requests to only the prohibited positions listed in the policy. However, this argument must fail as the Board's role is to enforce the parties' statutory duty to bargain, not to interpret contracts. Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 389 A.2d 577 (Pa. 1978). Thus, the Board will only find a violation of an employer's duty to bargain if the employer has clearly repudiated express provisions of the agreement. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), *appeal denied*, 641 A.2d 590 (Pa. 1994). Here, as found by the Hearing Examiner, the record establishes that Chief Trail followed the provisions in the Outside Employment policy by reviewing Officer Oropeza's request, issuing his initial denial and reasons for the denial, reviewing Officer Oropeza's appeal and issuing a denial of the appeal.

The Association next asserts that the Hearing Examiner erred in determining that it failed to present evidence establishing a past practice of permitting officers to work for a private investigation firm. Where the charge alleges an established past practice concerning a mandatory subject of bargaining, the complainant has the burden of proving by substantial, credible evidence that the employer has unilaterally changed the practice.

South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), *appeal denied*, 806 A.2d 864 (Pa. 2002); Delaware County Lodge No. 27, Fraternal Order of Police v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997); Fraternal Order of Police Fort Pitt Lodge 1 v. City of Pittsburgh, 37 PPER 84 (Proposed Decision and Order, 2006). In County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1977), the Pennsylvania Supreme Court defined a past practice as follows:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.

Id. at 852 n.12 (emphasis in original). An employer commits an unfair labor practice when it makes a unilateral change in a mandatory subject of bargaining that has been established through a binding past practice. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011); Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 29 PPER ¶ 29041 (Proposed Decision and Order, 1998). Since the Outside Employment policy was unilaterally implemented by Chief Trail in April 2019, more than six weeks prior to the alleged unfair labor practice,² the Association needed to establish here that by consistently applying the policy in a certain manner since April 2019, the employer has established a binding past practice. Commonwealth of Pennsylvania, Pennsylvania State Police, *supra*.

To support its argument of a binding past practice, the Association alleges that Chief Trail permitted Officer Johnson to work at AmeriHealth as a Medicaid fraud investigator. However, Officer Johnson's request was approved in January 2019 under the prior outside employment policy, which although proscribing outside employment where status as a police officer is used in any manner, did not expressly prohibit outside employment with a private investigation firm. See Union Exhibit 1. Moreover, as found credible by the Hearing Examiner, Officer Johnson's outside employment in 2019 was not substantially similar to Officer Oropeza's request to work for Intercounty Investigations and Solutions, as Chief Trail believed Officer Johnson's insurance investigations were exempt from the definitions of investigatory work under the Private Detective Act. Indeed, the Association failed to present any evidence that Chief Trail has approved other requests for outside employment with a private investigation firm under the new Outside Employment policy implemented in April 2019. Therefore, the Association has failed to present evidence to support the finding of an established past practice concerning the Outside Employment policy. See

² 43 P.S. § 211.9(e).

Commonwealth of Pennsylvania, Pennsylvania State Police, supra (no past practice found where the employer did not apply one-year requirement for preference transfers to officers holding positions in internal affairs division); McCandless Police Officers Association v. Town of McCandless, 21 PPER ¶ 21071 (Proposed Decision and Order, 1990) (no past practice found where employer did not consistently apply same method in computing vacation days for officers with twenty years of service); City of Pittsburgh, supra (no past practice found where employer did not consistently award two paid days off to officers working as field training officers).³

Accordingly, the Hearing Examiner properly concluded that the Borough did not violate Section 6(1)(a) or (e) of the PLRA when Chief Trail denied Officer Oropeza's request to engage in outside employment. After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order 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 Lansdale Police Benevolent Association are hereby dismissed, and the August 1, 2022 Proposed Decision and Order 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, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this twentieth day of December, 2022. 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.

³ The Association further alleges that the Hearing Examiner erred in holding that the Borough is not required to bargain over the impact of the Outside Employment policy on the officers wages, hours and working conditions. However, the Association failed to allege in the Charge that it requested impact or effects bargaining and, therefore, this issue is waived. See Teamsters Local Union No. 384 v. Kennett Consolidated School District, 37 PPER 89 (Final Order, 2006) (the Board only has jurisdiction to find the unfair practices alleged in the charge).