

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LEWISTOWN POLICE ASSOCIATION :
 :
 v. : Case No. PF-C-11-14-E
 :
 LEWISTOWN BOROUGH :

PROPOSED DECISION AND ORDER

On January 24, 2011, the Lewistown Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Lewistown Borough (Borough) 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 refusing to "(1) assume a [collective bargaining agreement the Association negotiated with the Mifflin County Regional Police Department (MCRPD)] and to agree to be bound by its terms and conditions of employment" and "(2) recognize the Association as the exclusive bargaining unit representative of the members of the Borough's Police Department."¹

On January 27, 2011, the Borough urged the Secretary of the Board not to issue a complaint on the charge because a prior Secretary had refused to issue a complaint "on an identical set of facts" in East Rockhill Township, West Rockhill Township, Sellersville Borough, Case No. PF-C-03-4-E (Administrative Dismissal, March 5, 2003).

On February 4, 2011, the Secretary issued a complaint and notice of hearing directing that a hearing be held on March 4, 2011, if conciliation did not resolve the charge by then. On February 28, 2011, the hearing examiner, upon the request of the Association and without objection by the Borough, continued the hearing. On August 2, 2011, the hearing examiner held the hearing, and the parties agreed to submit the charge for decision on stipulated facts (N.T. 17). On August 11, 2011, the parties submitted stipulated facts. On September 28, 2011, each party filed a brief.

The hearing examiner, on the basis of the stipulations presented by the parties, makes the following:

FINDINGS OF FACT

1. On June 30, 1993, the Borough, the Township of Derry and the Township of Bratton entered into an intermunicipal agreement forming the MCRPD to provide police services for them. (Stipulations 3, 5; Joint Exhibit A)

2. Section 11.3 of the intermunicipal agreement provides in pertinent part as follows:

¹The Association also alleged that the Borough violated section 6(1)(c) of the PLRA as read in pari materia with Act 111 by refusing to "apply the terms and conditions of the CBA and fill the positions at the Borough's Police Department with members of the bargaining unit at the MCRPD." At the hearing, however, the Association withdrew that portion of the charge (N.T. 16).

"(a) A municipality which withdraws as a party to this Agreement shall be liable for:

(i) all obligations and liabilities of the Department arising before the effective date of its withdrawal to the same extent as the remaining Municipalities and to the same extent as though it had not withdrawn as a party to this Agreement[.]"

(Stipulation 5, Joint Exhibit 1)

3. Effective January 1, 2008, the Association entered into a three-year collective bargaining agreement with the Borough and the two townships acting by and through the MCRPD. (Stipulation 7, Joint Exhibit B)

4. Section 2.1 of the collective bargaining agreement provides as follows:

"For the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment, the EMPLOYER recognizes the ASSOCIATION as the sole bargaining representative for all POLICE OFFICERS of the Mifflin County Regional Police Department who are within the collective bargaining unit comprised of all regular, full-time POLICE OFFICERS, excluding the Chief of Police and the designated Lieutenant."

(Stipulation 7, Joint Exhibit B)

5. Section 4.1 of the collective bargaining agreement provides in pertinent part as follows:

"The rights of management shall include, but not be limited to, all of the following, subject to the terms of this Agreement which, in the event of any conflict, shall supersede:

* * *

(1.8) Determine and change the number and kinds of POLICE OFFICERS in each department and job, their location and shift, provided however, that no bargaining unit work will be assigned outside the bargaining unit."

(Stipulation 7, Joint Exhibit B)

6. In December 2009 and January 2010, the Borough gave notice that it would be withdrawing from the MCRPD effective at 11:59 P.M. on December 31, 2010. (Stipulations 8-9, Joint Exhibits C-D)

7. On December 17, 2010, the Association requested of the Borough recognition as the exclusive representative of the members of the police department the Borough was going to be operating. The Association also requested that the Borough agree to apply to those members the terms of the collective bargaining agreement the Borough and the two townships acting by and through the MCRPD had negotiated with the Association. The Borough refused the Association's requests. (Stipulations 13-14, 19-20)

8. On December 31, 2010, at 11:59 P.M., the Borough withdrew from the MCRPD, and the two townships remaining in the MCRPD ceased providing police services to the Borough. (Stipulations 10-12)

9. On January 1, 2011, the Borough began operating its own police department. (Stipulation 16)

DISCUSSION

The Association has charged that the Borough committed unfair labor practices under sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111 by refusing to "(1) assume a [collective bargaining agreement the Association negotiated with the MCRPD] and to agree to be bound by its terms and conditions of employment" and "(2) recognize the Association as the exclusive bargaining unit representative of the members of the Borough's Police Department."

The Association contends that support for the first allegation of the charge may be found in the fact that the Borough as a joint employer acting by and through the MCRPD, see Borough of Lewistown v. PLRB, 546 Pa. 669, 735 A.2d 1240 (1999), negotiated a collective bargaining agreement extending recognition to the Association at section 2.1, see findings of fact 3-4, and providing at section 4.1 that "no bargaining unit work will be assigned outside the bargaining unit." See finding of fact 5. Noting that the agreement has expired by its own terms and that the Borough has withdrawn from the MCRPD and begun operating a police department of its own, see findings of fact 3, 8-9, the Association cites Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), City of Scranton v. E. B. Jermyn Lodge No. 2 of the Fraternal Order of Police, 903 A.2d 129 (Pa. Cmwlth. 2006), and IAFF Local 1400, Chester City Firefighters v. The City of Chester, 991 A.2d 1001 (Pa. Cmwlth. 2010), petition for allowance of appeal denied, 14 A.3d 830 (2011), for the proposition that the Borough upon withdrawing from the MCRPD was obligated to apply the terms of the agreement to its own police department in order to maintain the status quo until the parties negotiate a successor agreement or until an interest arbitration panel writes one for them.

In further support of the first allegation of the charge, the Association relies on section 11.3 of an intermunicipal agreement that the Borough and two townships entered into to form the MCRPD. See findings of fact 1-2. In the Association's view, that section obligated the Borough upon withdrawing from the MCRPD and operating its own police department to apply to the members of its police department the terms of the collective bargaining agreement the Association negotiated with the Borough as a joint employer acting by and through the MCRPD.

The Association contends that support for the second allegation of the charge may be found in Milton Borough, Milton Borough Regional Sewer Authority, 34 PPER 159 (Final Order 2003), where the Board found that a successor employer was obligated to bargain with the union that represented the employees of its predecessor. See also Lycoming County v. Commonwealth of Pennsylvania, Department of Labor and Industry, PLRB, 480 A.2d 1310 (Pa. Cmwlth. 1984), where Commonwealth Court held that "[t]he law is clear that a successor employer commits an unfair labor practice if it refuses to bargain with a union that had been certified with the prior employer. NLRB v. Burns

International Security Services, Inc., 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972)." Id. at 1313.

The Borough contends that the charge should be dismissed (1) because it had the managerial right to withdraw from the MCRPD and provide police services through its own police department and therefore was not obligated to apply to the members of its police department the terms of the collective bargaining agreement it and the two townships acting by and through the MCRPD had previously negotiated with the Association and (2) because in withdrawing from the MCRPD and operating its own police department it did not become a successor to the joint employers that formed the MCRPD and therefore was under no obligation to recognize the Association as the exclusive representative of the members of its police department.

In support of the first part of its contention, the Borough cites East Rockhill Township, West Rockhill Township, Sellersville Borough, supra, where a Secretary of the Board refused to issue a complaint on a charge alleging that three municipalities unilaterally transferred bargaining unit work from the bargaining unit when one of them withdrew from a regional police department that all three had formed to provide police services for them. As the Secretary explained,

"[t]he decision of political subdivisions to form, join or withdraw from regional police departments or other forms of cooperative relationships for the purpose of performance of public services is essentially a political decision and lies at the core of managerial decision making for the participating political subdivisions. Red Hill Borough, Case No. PF-C-97-205-E (Decision Declining to Issue Complaint."

As the Secretary further explained,

"when a political subdivision withdraws from a joint employment relationship, it does not have sole employer status such that it bears sole responsibility for negotiating under a removal of bargaining unit work unfair practice theory."

See also Pennsylvania State University (Milton S. Hershey Medical Center), 30 PPER ¶ 30168 (Final Order 1999) (an employer's decision to merge with another employer is a matter of inherent managerial prerogative).

In further support of the first part of its contention, the Borough submits that upon withdrawing from the MCRPD and operating its own police department it never agreed to be bound by the terms of the collective bargaining agreement it and the two townships acting by and through the MCRPD had negotiated with the Association. The Borough also cites Burns, supra, for the proposition that a successor employer is not bound by the terms of a collective bargaining agreement negotiated by its predecessor unless it explicitly or constructively agrees to be so bound.

In support of the second part of its contention, the Borough cites Pennsylvania State University, 32 PPER ¶ 32162 (Final Order 2001), for the proposition that there must be a substantial continuity of identity in the business enterprise in order for a successor employer to be bound by the contractual obligations of its predecessor. According to the Borough, no such continuity of identity in the business enterprise occurred when it withdrew from the MCRPD and began operating its own police department.

The first allegation of the charge must be dismissed. Given that the Borough has withdrawn from the MCRPD and is operating its own police department, it is at best a successor employer insofar as the application to its own police department of the collective bargaining agreement it jointly negotiated by and through the MCRPD is concerned. A successor employer, however, is under no obligation to adopt the terms of a collective bargaining agreement negotiated by its predecessor. Burns, supra. Thus, even assuming without deciding that the Borough is a successor employer, there is no basis for finding that it was under an obligation to "assume [the collective bargaining agreement the Association negotiated with the MCRPD] and to agree to be bound by its terms and conditions of employment."²

Nothing in Pennsylvania State Park Officers Association v. PLRB, supra, City of Scranton, supra, and City of Chester, supra, compels a contrary result as they deal with an employer's obligation to maintain the status quo following the expiration of a collective bargaining agreement covering its own employees. The Association's reliance on those cases is, therefore, misplaced.

Nor does section 11.3 of the intermunicipal agreement compel a contrary result. As a close review of the agreement reveals, it was entered into by the Borough and two townships (finding of fact 1). Thus, it is not a collective bargaining agreement negotiated by the Association. Nor is it any other kind of bargained-for agreement negotiated by the Association. As such, it cannot form the basis for finding that the Township violated sections 6(1)(a) and (e) by refusing to "assume [the collective bargaining agreement the Association negotiated with the MCRPD] and to agree to be bound by its terms and conditions of employment." See PSTA v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000), where Commonwealth Court held that an employer violates sections 6(1)(a) and (e) if it repudiates the provisions "of a collective bargaining agreement, or any bargained-for agreement[.]" Id. at 651.

The second allegation of the charge also must be dismissed. In Milton Borough, Milton Borough Regional Sewer Authority, supra, the Board set forth the analysis to be used in deciding whether or not an employer is a successor as follows:

"As correctly noted by the hearing examiner, the United States Supreme Court stated in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), that the focus in finding a successor relationship is on whether the new employer has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operation.' (quoting Golden State Bottling Company v. NLRB, 414 U.S. 168, 184 (1973)). The factors to consider

²To the extent that the Association is contending that the Borough committed unfair practices by removing bargaining unit work from the bargaining unit upon withdrawing from the MCRPD, it is noted that the charge does not allege as much, leaving the Board without jurisdiction to find any such unfair practices. See Iroquois School District, 37 PPER 167 (Final Order 2006) (the Board only has jurisdiction to find the violations alleged in a charge); Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974) (same). Even if the Board had jurisdiction, the same result as in East Rockhill Township, West Rockhill Township, Sellersville Borough, supra, would obtain in that the facts are the same here as there.

are (1) whether the business of both employers is essentially the same; (2) whether the employes of the new employer are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new employer utilizes the same processes, produces the same products or services, and basically has the same body of customers. Fall River Dyeing & Finishing Corp., 482 U.S. at 43."

34 PPER at 490.

A close review of the record does not show that the police services provided by the Borough are the same as those provided by the Borough and the two townships acting by and through the MCRPD. Nor does it show that police officers of the Borough are doing the same jobs in the same working conditions under the same supervisors. Nor does it show that the Borough utilizes the same processes, produces the same products or services, and basically has the same body of customers. There is, therefore, no basis for finding that the Borough is a successor employer. See also Jefferson-Penn Police Commission and East Taylor Township, 21 PPER 21025 (Final Order 1989) (township that was part of a police commission that disbanded was not the alter ego of the commission); West Hills Regional Police Commission and East Franklin Township, 15 PPER ¶ 15036 (Final Order 1984) (same). Thus, there also is no basis for finding that the Borough was under an obligation to recognize the Association as the exclusive representative of the members of the Borough's police department.

CONCLUSIONS

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

1. The Borough is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The Association 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 Borough has not 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 charge is dismissed and the complaint rescinded.

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 final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fourteenth day of October 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

DAW

Donald A. Wallace, Hearing Examiner

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