

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LACKAWANNA COUNTY DEPUTY SHERIFFS :
ASSOCIATION AND CHESTER CIPILEWSKI :
 :
v. : Case No. PERA-C-10-199-E
 :
LACKAWANNA COUNTY :
JOHN SZYMANSKI :

PROPOSED DECISION AND ORDER

On June 7, 2010, the Lackawanna County Deputy Sheriffs' Association (Association) and Chester Cipilewski (Deputy Sheriff Cipilewski) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Sheriff of Lackawanna County (Sheriff) and the County of Lackawanna (County) violated sections 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA) by refusing to reinstate Deputy Sheriff Cipilewski and make him whole for lost wages and benefits pursuant to the terms of an unconditional offer of reinstatement they made in a March 18, 2010, letter to him and that the County committed additional violations of those sections by refusing to reinstate him with lost wages and benefits as set forth in a settlement agreement it presented at a hearing in Case No. PERA-C-09-331-E on March 25, 2010.

On June 18, 2010, the Secretary of the Board issued a complaint and notice of hearing on the charge.

On July 16, 2010, the Sheriff filed a motion to dismiss the complaint.

On September 1, 2010, the hearing examiner issued a proposed decision and order granting the motion to dismiss and directing that the complaint be rescinded and the charge dismissed. Noting that a close review of the March 18, 2010, letter, which was attached to the charge as Exhibit A, revealed that the unconditional offer of reinstatement was made "on behalf of Lackawanna County," the hearing examiner explained that the charge did not state a cause of action against the Sheriff as he did not make the offer. Noting that under section 1620 of the County Code the Sheriff has the exclusive right to hire and fire his employees, the hearing examiner also explained that the charge did not state a cause of action against the County as it had no authority to reinstate Deputy Sheriff Cipilewski. See Blair County, 32 PPER ¶ 32049 (Final Order 2001).

On September 17, 2010, the Association and Deputy Sheriff Cipilewski filed exceptions to the proposed decision and order.

On November 16, 2010, the Board issued an order directing remand to hearing examiner for further proceedings. Finding that "there is a factual dispute over whether the County had the authority to make the unconditional offer of reinstatement to Deputy Sheriff Cipilewski on behalf of the Sheriff," Slip Opinion at 3, the Board sustained the exceptions, vacated the proposed decision and order and remanded "for further proceedings on the limited issue of whether the County had the authority to make the unconditional offer of reinstatement to Deputy Sheriff Cipilewski on behalf of the Sheriff." Id.¹ Citing County of Fayette, 36 PPER 126 (Final Order 2005), the Board explained that "if an agreement has been negotiated by the county commissioners with the consultation and consent of the row official, the row official's refusal to comply with such agreement would constitute a violation of section 1201(a)(1)." Slip Opinion at 3.

On November 18, 2010, the hearing examiner scheduled a hearing for March 10, 2011. On February 8, 2011, upon the request of the Association and Deputy Sheriff Cipilewski

¹ The Sheriff contends that the Board erred in finding that the County made the offer "on behalf of the Sheriff." The hearing examiner, however, is bound by a finding of the Board and has proceeded accordingly.

and without objection by the County or the Sheriff, the hearing examiner continued the hearing. On March 17, 2011, the hearing examiner held the hearing and afforded all parties a full opportunity to present testimony and to cross-examine witnesses. On September 23, 2011, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, based upon the evidence presented by the parties at the hearing and from all other matters of record, makes the following

FINDINGS OF FACT

1. The Association is the exclusive representative of a bargaining unit that includes deputy sheriffs employed in the County. (Case No. PERA-R-92-30-E)

2. On July 28, 2009, the Sheriff (John Szymanski) discharged Deputy Sheriff Cipilewski. (N.T. 15-16, 41, 66, 74)

3. On August 17, 2009, the Association and Deputy Sheriff Cipilewski filed a charge alleging that the Sheriff committed unfair practices when he discharged Deputy Sheriff Cipilewski and that the County committed unfair practices by refusing "to reverse the discharge action." The Board docketed the charge to Case No. PERA-C-09-331-E. (Charging Party Exhibit 1)

4. The County and the Sheriff both retained Alexia Kita Blake, Esquire, to represent them in Case No. PERA-C-09-331-E. (N.T. 18, 41, 75)

5. On September 19, 2009, Ms. Blake entered her appearance as counsel for the County and for the Sheriff in Case No. PERA-C-09-331-E. (Case No. PERA-C-09-331-E)

6. Prior to March 18, 2010, Ms. Blake met with the Sheriff and his solicitor (Robert A. Cecchini, Esquire) to ask if the Sheriff was willing to offer reinstatement to Deputy Sheriff Cipilewski.² The Sheriff told her, "Absolutely not." She also sent to Mr. Cecchini a draft of an unconditional offer of reinstatement for Deputy Sheriff Cipilewski.³ Mr. Cecchini told her that the Sheriff would not agree to the offer. (N.T. 76-78, 82-83, 85, 89-91, 94-95; Sheriff Exhibit 1)

7. On March 18, 2010, Ms. Blake, upon the authority of two of the County's commissioners (Corey O'Brien and Michael Washo), sent to private counsel for Deputy Sheriff Cipilewski (Barry H. Dyller, Esquire) and to then counsel for Deputy Sheriff Cipilewski and for the Association (Robert D. Mariani, Esquire) a letter of that date as follows:

"On behalf of Lackawanna County, I hereby extend an unconditional offer of reinstatement to Chester Cipilewski to return to his former position as Deputy Sheriff, on the same shift and with the same job responsibilities, compensation, and benefits as he enjoyed during his employment with Lackawanna County prior to his termination on July 28, 2009. Lackawanna County is prepared to reinstate him immediately. Mr. Cipilewski is free to continue to pursue any and all legal claims against the County regarding his termination, and he is not required to sign a release or give up any of his legal rights as a condition of reinstatement. Moreover,

² The record contains conflicting testimony as to whether or not the chief of staff for the County's commissioners (Maria Elkins) was at the meeting (compare N.T. 68 and 72 with N.T. 77). No attempt has been made to resolve the conflict in the testimony, however, because disposition of the remand does not depend on whether or not she was at the meeting.

³ The County objected to the admission of the draft (Sheriff Exhibit 1) into evidence, arguing that it was privileged attorney work product of Ms. Blake as counsel for the Sheriff (N.T. 91-92). The hearing examiner overruled the objection after the Sheriff waived the privilege (N.T. 92). The County then noted that it was not waiving the privilege and renewed the objection (N.T. 92-94). The hearing examiner overruled the objection again (N.T. 94). In its brief at n. 2, the County raises the objection for a third time. In and of itself, an offer to settle a charge is not privileged attorney work product. Cf. City of Philadelphia, 43 PPER 25 (Proposed Decision and Order 2011), where Hearing Examiner Thomas P. Leonard noted that under Pa.R.C.P. 4003.3 the attorney work product privilege is to protect "disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Thus, to the extent that the draft reflects that it is an offer to settle the charge, it is not subject to the attorney work product privilege, and the objection is overruled accordingly.

while we do not admit any liability in connection with his termination, we have been and remain committed to insuring that Mr. Cipilewski will not be subject to any retaliation if he returns to work. We are willing and available to discuss any questions or concerns which Mr. Cipilewski may have regarding his return to work.

Please provide Mr. Cipilewski's response as soon as possible in order to expedite his reinstatement."

(N.T. 20, 41-42, 75; Charging Party Exhibit 3)

8. By letter dated March 19, 2010, Mr. Cecchini wrote to Ms. Blake as follows:

"I am in receipt of your correspondence of March 16, 2010 with regard to the unconditional offer of reinstatement to former Deputy Sheriff Cipilewski. As I have indicated to you, notwithstanding the County's offer of reinstatement to Mr. Cipilewski, the Sheriff is not relinquishing his statutory and constitutional right and authority, to hire, fire and discipline his employees.

It is my understanding that this offer is being made on behalf of the County to terminate any further claims Mr. Cipilewski would have going forward. We fully understand the County's concern regarding same. In the event that Mr. Cipilewski, by and through his counsel, contacts you as to his willingness to return to work, as I have noted, this will necessitate out meeting with County officials to discuss the matter further."

(County Exhibit 1)

9. On March 24, 2010, Ms. Blake withdrew her appearance as counsel for the Sheriff in Case No. PERA-C-09-331-E. (Charging Party Exhibit 2)

10. On March 25, 2010, at a hearing on the charge in Case No. PERA-C-09-331-E, Ms. Blake and Mr. Mariani presented a settlement agreement under which Deputy Sheriff Cipilewski is to be reinstated to his former position with no loss of seniority and made whole for lost wages and benefits less unemployment compensation. The Sheriff did not appear at the hearing. (Charging Party Exhibit 4)

11. In late March to late May 2010, Ms. Blake and Ms. Elkins met with the Sheriff to obtain his consent to the agreement. The Sheriff would not consent to the agreement. (N.T. 68-73, 84-85)

12. Neither the County nor the Sheriff has implemented the agreement. (N.T. 27, 55-56)

DISCUSSION

Pursuant to the Board's remand, the question before the hearing examiner is "whether the County had the authority to make the unconditional offer of reinstatement to Deputy Sheriff Cipilewski on behalf of the Sheriff."

As the Board set forth in the remand, "if an agreement has been negotiated by the county commissioners with the consultation and consent of the row official, the row official's refusal to comply with such agreement would constitute a violation of section 1201(a)(1)."

The record shows that the County offered to reinstate Deputy Sheriff Cipilewski (1) on March 18, 2010, as set forth in a letter of that date (finding of fact 7) and (2) as set forth in an agreement it presented in settlement of a charge at a hearing on March 25, 2010, in Case No. PERA-C-09-331-E (finding of fact 10).⁴ The record also shows (1)

⁴ The Sheriff objected to testimony about events post-dating March 18, 2010, as irrelevant, arguing that the remand was for the limited purpose of determining whether or not the County had the authority to make the offer as of March 18, 2010 (N.T. 22, 30-33, 55). In the remand, however, the Board not only referenced the offer made on March 18, 2010, but also the result "if an agreement has been negotiated by the county commissioners with the consultation and consent of the row official." Thus, the remand seemingly covers events post-dating March 18, 2010, as well. The hearing examiner overruled the Sheriff's objections accordingly (N.T. 22, 31, 33, 55).

that before the County presented the offer to Deputy Sheriff Cipilewski on March 18, 2010, the Sheriff would not agree to it (finding of fact 6) and (2) that before the County presented the agreement at the hearing on March 25, 2010, the Sheriff would not agree to it (finding of fact 8).

On that record, there is no basis for finding that the County had the authority to make the offer to reinstate Deputy Sheriff Cipilewski on behalf of the Sheriff. There also is no basis for finding that the County negotiated the agreement to reinstate Deputy Sheriff Cipilewski with the consent of the Sheriff. Accordingly, the Sheriff may not be found in violation of section 1201(a)(1) of the PERA.

The Association and Deputy Sheriff Cipilewski do not contend otherwise; rather, they would have the Board find the County in violation of section 1201(a)(5) of the PERA for having made the offer and negotiated the agreement in bad faith. Citing Gold & Company, Inc. v. Northeast Theater Corporation, 421 A.2d 1151 (Pa. Super. 1980), for the proposition that one of two parties to a joint venture may be bound by an agreement it makes without the other party, the Association and Deputy Sheriff Cipilewski submit that the County should be ordered to pay him until the Sheriff reinstates him. The remand, however, did not include direction to reconsider the charge as filed against the County, which the hearing examiner previously dismissed. Thus, the hearing examiner has no authority to find the County in violation of section 1201(a)(5) of the PERA.

Even if the remand included a direction to reconsider the dismissal of the charge against the County, the result would be the same as the Association's and Deputy Sheriff Cipilewski's reliance on Northeast Theater Corporation is misplaced in light of relevant Board precedent.

In County of Fayette, supra, the Board dismissed a charge alleging that a county should be found in violation of 1201(1)(a)(5) of the PERA for refusing to arbitrate grievances involving a unit of probation officers. Noting that the court of common pleas had the exclusive right under section 1620 of the County Code to supervise the probation officers and that the charging party had not alleged that the county obtained the consent of the court in negotiating the collective bargaining agreement under which the charging party filed the grievances, the Board dismissed the charge without hearing. The charging party argued that under an estoppel theory the County should be bound to the collective bargaining agreement, but the Board disagreed. As the Board explained,

"our view of the voluminous law decided under Section 1620 reveals that ordinary estoppel principles do not apply to negotiations under Section 1620. County Commissioners are mere statutorily designated agents of judges and row officials and cannot bind them without adequate consultation prior to entry into collective bargaining agreements."

36 PPER at 365.

County of Fayette is directly on point. Thus, even assuming without deciding that the County made the offer and negotiated the agreement in bad faith, inasmuch as the County had no authority to make the offer or to negotiate the agreement, there is no basis for finding the County in violation of section 1201(a)(5) of the PERA.⁵

CONCLUSIONS

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

1. The Sheriff is a public employer under section 301(1) of the PERA.
2. Deputy Sheriff Cipilewski was a public employe under section 301(2) of the PERA.

⁵ The County contends that it made the offer and negotiated the agreement in good faith, but given the disposition of the charge against it, its contention need not be addressed.

4. The Association is an employe organization under section 301(3) of the PERA.
5. The Board has jurisdiction over the parties.
6. The Sheriff has not committed an unfair practice under section 1201(a)(1) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, 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 thirtieth day of September 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner