

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 OF THE :
FRATERNAL ORDER OF POLICE :
 :
v. : Case No. PF-C-09-97-E
 :
CITY OF SCRANTON :

PROPOSED DECISION AND ORDER

On August 6, 2009, Fraternal Order of Police, E.B. Jermyn Lodge 2 (FOP or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Scranton (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by unilaterally transferring the work of processing arrested persons to Lackawanna County employees.

On August 13, 2009, the Secretary, upon review of the Specifications of Charges, declined to issue a complaint and dismissed the charge. On September 4, 2005, the Union filed timely exceptions and on November 17, 2009, the Board issued an Order Directing Remand to Secretary for Further Proceedings directing the Secretary to issue a complaint. On December 9, 2009, the Secretary of the Board issued a Complaint and Notice of hearing in which the matter was assigned to a conciliator for the purpose of resolving the dispute by mutual agreement of the parties and February 11, 2010 in Scranton was assigned as the time and place of hearing, if necessary.

The hearing was necessary, but was continued to July 28, 2010 and again to September 16, 2010, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The hearing examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That the City of Scranton is an employer within the meaning of Section 3(c) of the Pennsylvania Labor Relations Act.
2. That the Fraternal Order of Police, E.B. Jermyn Lodge 2 is a labor organization within the meaning of Section 3(f) of the Pennsylvania Labor Relations Act.
3. That the Union is the exclusive bargaining representative of police officers employed by the City, and is party with the City to a collective bargaining agreement that was in effect at all times relevant to this case.
4. For many years, the processing of prisoners obtained as the result of arrests by the Scranton Police Department has been performed exclusively by those same police officers. Detective Sergeant Robert Martin, FOP President, testified that this has been the case since at least 1985 when Martin was hired. (N.T. 8)
5. As Martin explained, the process operated as follows. Individuals who were arrested on the street were transported to headquarters. The individual would then be searched and the booking process would begin. The individual would be photographed, fingerprinted, and formally charged. (N.T. 9)
6. Once the charges were completed, the magistrate would be contacted and an appointment made. The Scranton police would then transport the prisoner to the magistrate, where the prisoner would be arraigned. (N.T. 9)
7. Depending on the magistrate's determination, the prisoner would either be detained, released on bail, or released on his own recognizance. (N.T. 9)
8. If the prisoner was detained, or could not post bail, he was then transported to Lackawanna County prison by the Scranton police. (N.T. 9)

9. In those situations, not less than three days or more than ten days after the arraignment the Scranton police would return to the prison and transport the prisoner back to the Lackawanna County courthouse for his preliminary hearing. (N.T. 9-10)

10. Even after the hearing, Scranton police were responsible for transporting the prisoner back to the prison. (N.T. 10)

11. All of this work was performed exclusively by bargaining unit employees in the Scranton police department. (N.T. 10)

12. In 2005, the Scranton police began to make use of another facility, the Lackawanna County Processing Center ("CPC") located in the Lackawanna County Courthouse. The CPC had much of the same equipment as Scranton police headquarters for the processing of prisoners, including automated fingerprint systems and photo machines. (N.T. 11)

13. Initially, Scranton police officers began to use the CPC equipment for fingerprinting and photographing from Fridays at 4:00 p.m to Sundays at 4:00 a.m. Scranton police officers continued to be solely responsible for the processing of prisoners. (N.T. 12-14)

14. At some point, fingerprinting and photography work on this weekend period only began to be performed by County employees. The "weekday" work continued to be performed exclusively by Scranton police officers. (N.T. 14-16)

15. In July 2008, the City stopped processing prisoners on weekends at the CPC, and all weekend processing was again performed at Scranton police headquarters exclusively by Scranton police officers. (N.T. 16, 61-63)

16. On December 31, 2008, without the union's knowledge, and without the benefit of negotiation or discussion with the union, Chief David Elliott entered into a memorandum of understanding with the Lackawanna County District Attorney to engage in and use the CPC and the CPC employes for the processing of prisoners in accordance with the policies set forth in the CPC Manual. (N.T. 22, 60, Respondent's Exhibit 5)

17. Chief Elliott admitted he was under no obligation to enter into the memorandum. (N.T. 59-60)

18. On July 1, 2009 Chief Elliott issued Order 09-022 regarding the CPC. It stated:

Effective Wednesday, July 1, 2009, the Scranton Police Department will be utilizing the Lackawanna County Processing Center from 8:00 a.m. Wednesday's until Sunday's at 8:00 a.m

When an arrest is made in the City of Scranton the arresting officer will have their prisoner transported to police headquarters. At headquarters the transport officer will be required:

1. to complete a booking sheet
2. Search the prisoner and turn over any contraband seized to arresting officer:
3. Complete a property record of the prisoner
4. Detain prisoner in cell area until charges are complete, and when needed, any interview by the arresting officer(s) are complete.

Once the prisoner has all paperwork complete, the transport officer will take the prisoner to the Lackawanna County Processing Center. Upon arrival at the processing, the transport officer will have the receiving officer at the Center or Supervisor of Center sign a transfer of custody form (08-040). Once the form has been signed the transport officer is free to return to service.

If an arrest is made by an officer for a summary violation (i.e. Public Drunkenness) and the arresting officer has a copy of the booking sheet with them, they may complete the form and issue the citation to the offender. Once the paperwork is complete they may take the offender to the processing center,

however a transfer of prisoner form (08-040) must be completed and signed by Processing Center personnel before going back in service.

(N.T. 18, 34, Union Exhibit 1)

19. Chief Elliott's July 1, 2009 memorandum was issued without any discussion or negotiation with the FOP. (N.T. 60)

20. Subsequently, the City of Scranton's use of the CPC for the processing of arrested individuals was expanded to include all times. (N.T. 22)

21. On May 3, 2010, the Lackawanna County Court of Common Pleas issued an Order requiring all prisoner processing to be done at the CPC, "said requirement being consistent with the policies set forth in the Operations and Procedures Manual for the Lackawanna County Central Processing Center[.]" (N.T. 41, 66, Respondent's Exhibit 2)

22. The Manual states that the CPC is staffed with employes of the Lackawanna County Sheriff and District Attorney. (N.T. 43, 66, Respondent Exhibit 3, page 7)

DISCUSSION

The FOP's charge of unfair labor practices alleges that the City of Scranton violated sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111 by unilaterally removing work which had traditionally and exclusively been performed by bargaining unit members. The FOP alleges that the City transferred the work of processing prisoners after arrest to employes at the Lackawanna County Central Processing Center (CPC).

The Commonwealth Court has held that "a public employer commits an unfair labor practice when it transfers any bargaining unit work to non-members without first bargaining with the unit." City of Harrisburg v. Pennsylvania Labor Relations Board, 605 A.2d 440 (Pa. Cmwlth. 1992) (emphasis in 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 a non-unit employe. City of Allentown v. Pennsylvania Labor Relations Board, 851 A.2d 988 (Pa. Cmwlth. 2004).

In judging whether a transfer of bargaining unit work has occurred the Board will analyze the particular components of the work. Even where bargaining unit and non-bargaining unit employes have performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit member exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13 v. Pennsylvania Labor Relations Board, 616 A.2d 13 (Pa. Cmwlth. 1992); City of Jeanette v. Pennsylvania Labor Relations Board, 890 A.2d 1154 (Pa. Cmwlth. 2006). Therefore, a public employer commits an unfair practice by altering the manner in which work has been traditionally assigned or varying "the extent to which members and non-members of the bargaining unit have performed the same work." Wyoming Valley West Education Support Personnel Association v. Wyoming Valley West School District, 32 PPER ¶ 32008 (Final Order, 2000) (citing AFSCME, supra).

In recent years the City has tried at different times to use the CPC and its employes to process arrested persons. The Chief testified that the use of the CPC in the Lackawanna County Courthouse would free officers from waiting to fingerprint and photograph arrested persons and allow police to return to street patrol. In 2005, the City began using the CPC on the weekends, from Friday at 4:00 p.m to Sunday at 4:00 a.m. The City police officers used the CPC equipment. Eventually, the CPC employes did the fingerprinting and photographing. However, in 2008 the city stopped using the CPC altogether and brought all the processing work back to the city police officers so that the Chief could resolve some procedural issues. Then on July 1, 2009, the Chief directed that the police officers should again use the CPC and its employes for processing prisoners, this time for an expanded period of Wednesday at 8:00 a.m to Sunday at 8:00 a.m.

It was this 2009 decision that caused the FOP to file the present charge of unfair labor practices. The evidence of record shows that the employer made this decision without bargaining with the FOP.

The City defends the charge by first arguing that the charge is barred by the statute of limitations. Under the PLRA, "no petition or 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 petition or charge." 43 P.S. § 211.9(e). Greater York Professional Fire Fighters and EMTS v. Spring Garden Township York Area United Fire and Rescue Department, 41 PPER 5, (Final Order, 2010). The six week statute of limitations begins to run from when the complainant knows or should have known about the facts or circumstances giving rise to the cause of action. Norwegian Township Police Department v. Norwegian Township, 42 PPER 93 (Proposed Decision and Order, 2010), citing Dormont Borough v. PLRB, 794 A.2d 402 (Pa. Cmwlth. 2002).

The City contends that the FOP should have been aware of the change to using the CPC in 2005. Because the FOP did not file a charge of unfair labor practices at that time it is now barred by the statute of limitations. However, the FOP's knowledge of 2005 decision is irrelevant. In 2008, the City decided to bring all the work back to the police bargaining unit represented by the FOP, thereby re-establishing the FOP's exclusive claim to the work. The statute of limitations defense will be dismissed.

The City next contends that it has a managerial right to determine what duties to assign to police officers. Chief Elliott testified that the City's use of the CPC freed officers from processing duties to allow them to return to patrol. The managerial right of the direction of police has been raised as a defense by other public employers and rejected by the Board. The Board has held that the employer must first bargain with the exclusive representative over the transfer of bargaining unit work, even where the employer can demonstrate the transfer allows more efficient direction of police employees. City of Harrisburg v. PLRB, *supra*. (Unilateral transfer of park patrol to non-police employees violates duty to bargain); City of Clairton v. PLRB, 528 A.2d 1028 (Pa. Cmwlth. 1986) (Emergency proclamation that a firefighter would replace police officers at the dispatcher's desk to free police for street duty during an upsurge in crime violates duty to bargain). The managerial rights defense will be dismissed.

Finally, the City contends that its decision to transfer the work to the CPC has not resulted in the police officers being laid off or losing overtime and only caused a *de minimis* change. In Bethlehem Star Lodge No. 20 v. City of Bethlehem, 22 PPER ¶ 22231 (Proposed Decision and Order, 1991), 23 PPER ¶ 23085 (Final Order, 1992) the Board held that the city violated its duty to bargain by unilaterally assigning a nonunit civilian to supervise police communications personnel where evidence showed that the supervision was previously performed by a police sergeant. The Board rejected the employer's defense that the loss of bargaining unit work was only a *de minimis* change. "We refuse now to sanction violations of the Act merely because the transgressor characterizes them as "miniscule.'" Id. at 136. Therefore, the defense is dismissed as well.

Accordingly, the City will be found to have committed an unfair labor practice for its 2009 unilateral decision to transfer the work of processing arrested persons to the CPC employes.

The traditional remedy would be to order the employer to cease and desist from the transfer and to order a return to the status quo, which in this case would be for the police employes to resume performing all the duties associated with the processing of arrested persons. However, a subsequent event in this case necessitates a different remedy. After this charge was filed, on May 3, 2010, the Lackawanna Court of Common Pleas issued an order directing that all of the police departments in the county use the Central Processing Center all the time for the purpose of processing prisoners.

In Ellwood City Police Wage and Policy Unit v. Pennsylvania Labor Relations Board, 731 A.2d 670 (Pa. Cmwlth. 1999) the Commonwealth Court affirmed the PLRB's ruling that the employer did not violate its duty to bargain where it gave the District Justice the officers' schedules so that the district justice could schedule court appearances for police officers when they were on duty, thereby reducing overtime payments to the police. The Board reasoned that the district justice was a third party that the Borough did not control, thereby making the Borough not responsible for the change in scheduling and overtime opportunities for the employes.

Likewise, the May 3, 2010 Lackawanna County Court of Common Pleas Order did not issue from the City of Scranton, the employer of the police. Therefore, any effect on the work of the bargaining unit after May 3, 2010 was not caused by the City. Accordingly, the appropriate remedy is not for the City to return the work of processing prisoners to the bargaining unit, but simply to post this order that the 2009 decision violated the City's duty to bargain.

CONCLUSIONS

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

1. That the City of Scranton is an employer within the meaning of Section 3 (c) of the PLRA.
2. That the E. B. Jermyn Lodge 2, Fraternal Order of Police, is a labor organization within the meaning of Section 3(f) of the PLRA.
3. That the Board has jurisdiction over the parties hereto.
4. That the City of Scranton has committed unfair labor practices in violation of Sections 6(1) (a) and (e) of the Pennsylvania Labor Relations Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the City shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the Act.
2. Cease and desist from refusing to bargain collectively in good faith with a labor organization which is the exclusive representative of employes in the police unit.
3. Take the following affirmative action:
 - (a) 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 employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (b) 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fifth day of March, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner