

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE 85, CAPITOL CITY :
 :
 v. : Case No. PF-C-11-89-E
 :
COMMONWEALTH OF PENNSYLVANIA :

PROPOSED DECISION AND ORDER

On June 15, 2011, Pennsylvania State Capitol Police Lodge #85, FOP (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania (Commonwealth) 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 unilaterally transferring bargaining unit work to non-members of the bargaining unit. On June 24, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on August 30, 2011. The hearing examiner held the hearing and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of the FOP's case-in-chief, the Commonwealth moved to dismiss the charge for lack of proof (N.T. 28-29). After the FOP responded to the motion (N.T. 29-30), the hearing examiner took the motion under advisement pending the receipt of any briefs the parties might want to file (N.T. 30). On October 14, 2011, each party filed a brief by hand-delivery.

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

FINDINGS OF FACT

1. The FOP is the exclusive representative of a bargaining unit that includes capitol police officers employed by the Commonwealth. (Case No. PF- R-4-C)
2. "Mechanicsburg school police" and "museum security" are not members of the bargaining unit. (N.T. 19)
3. Prior to May 14, 2011, when the Commonwealth rented the State Museum to private parties for special events, members of the bargaining unit provided on an exclusive basis security to ensure the safety of attendees. (N.T. 11-12, 14-15)
4. On May 14, 2011, "Mechanicsburg school police" were posted around the State Museum making sure that attendees of a prom being held there by a school district safely crossed the streets. "Museum security" was also "on location" there at the time. (N.T. 16-17, 24-26; Union Exhibit 1)

DISCUSSION

The FOP has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111 by unilaterally transferring bargaining unit work to non-members of the bargaining unit. According to the FOP, the transfer of bargaining unit work occurred on May 14, 2011, when "Mechanicsburg school police" and "museum security" provided security at a prom held by a school district at the State Museum.

During its case in chief, the FOP established that when the Commonwealth rented the State Museum to private parties for special events prior to May 14, 2011, members of the bargaining unit provided on an exclusive basis security to ensure the safety of attendees (finding of fact 3). The FOP also established that on May 14, 2011, "Mechanicsburg school police" were posted around the State Museum making sure that attendees of a prom being

held there by a school district safely crossed the streets and that "Museum security" was "on location" there at the time (finding of fact 4).

As noted above, at the conclusion of the FOP's case-in-chief, the Commonwealth moved to dismiss the charge for lack of proof. According to the Commonwealth, the charge should be dismissed because the FOP did not establish during its case-in-chief (1) that "Mechanicsburg school police" and "museum security" had performed bargaining unit work at the prom or (2) that they had performed any such work "at the behest of or under the control of the Commonwealth of Pennsylvania" (N.T. 29).

The FOP responded that the motion should be denied (1) because it established that "Mechanicsburg school police" and "museum security" had performed bargaining unit work at the prom and (2) because "someone from the Commonwealth had to know there was going to be security there" (N.T. 29-30).

For the reasons that follow, the motion must be granted and the charge dismissed.¹

An employer commits unfair labor practices under sections 6(1)(a) and 6(1)(e) if it unilaterally transfers to non-members of a bargaining unit "any" work that members of the bargaining unit had been performing on an exclusive basis. City of Harrisburg v. PLRB, 605 A.2d 440, 442 (Pa. Cmwlth. 1992)(emphasis in original). No such unfair labor practices may be found, however, "if there is no evidence that [the employer] has entered into a quid pro quo with an alternate provider and/or directs non-unit employees in performance of the work at issue." Commonwealth of Pennsylvania (Pennsylvania Historical and Museum Commission), 28 PPER ¶ 28227 at 495 (Final Order 1997). Any finding of an unfair labor practice must be supported by substantial evidence. Commonwealth of Pennsylvania, PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978). Speculation is not substantial evidence. Haverford Township, 27 PPER ¶ 27130 (Final Order 1996), citing Harbaugh v. Commonwealth of Pennsylvania, PLRB, 528 A.2d 1024 (Pa. Cmwlth. 1987).

As noted above, at the conclusion of the FOP's case-in-chief, the record showed that "museum security" was "on location" when a school district held a prom at the State Museum on May 14, 2011. Notably, however, the record did not show what "museum security" was doing while "on location." Thus, any finding that "museum security" was performing bargaining unit work at the time would have to be based on speculation as to what "museum security" was doing while "on location." Speculation, of course, is not substantial evidence. Haverford Township, supra. At the conclusion of the FOP's case-in-chief, then, there was no basis for finding that the Commonwealth transferred bargaining unit work to "museum security" when the school district held the prom at the State Museum. See also Chambersburg Area School District, 42 PPER 6 (Final Order 2011), where the Board would not speculate that an employer's transfer of bargaining unit work to non-members of the bargaining unit was unilateral.

As also noted above, at the conclusion of the FOP's case-in-chief, the record showed that "Mechanicsburg school police" were posted around the State Museum making sure that attendees of the prom safely crossed the streets. The record did not show, however, that the Commonwealth directed them to perform that work, let alone that the Commonwealth even knew that they were there. Thus, at the conclusion of the FOP's case-in-chief, there was no basis for finding that the Commonwealth transferred bargaining unit work to "Mechanicsburg police officers." See Commonwealth of Pennsylvania (Pennsylvania Historical and Museum Commission), supra, where the Board dismissed a charge alleging that the Commonwealth unilaterally transferred park ranger bargaining unit work (responding to 911 emergency calls from the Washington Crossing Historic Park) to nonmembers of the bargaining unit (municipal police officers) because the record did not show that it "ha[d] entered into a quid pro quo with municipal police departments for the performance of such work or that [it] direct[ed] municipal police officers to respond to emergency calls from the Park." 28 PPER at 495. See also Commonwealth of Pennsylvania, Pennsylvania State Police, 38 PPER 96 at 96 (Proposed Decision and Order 2007)(charge

¹The evidence the Commonwealth presented in rebuttal to the FOP's case-in-chief, therefore, need not be considered.

alleging that the Commonwealth unilaterally transferred State Police bargaining unit work (weighing and inspecting superloads) to a nonmember of the bargaining unit (a civilian motor carrier enforcement officer) dismissed because the record did "not show that the Commonwealth directed the civilian motor carrier enforcement officer to inspect and weigh the superload as he did"; Commonwealth of Pennsylvania, 29 PPER ¶ 29011 at 25 (Proposed Decision and Order 1997)(charge alleging that the Commonwealth unilaterally transferred capitol police bargaining unit work (providing security during a disaster recovery exercise) to nonmembers of the bargaining unit (security guards) dismissed because the record did "not show that the Commonwealth entered into an agreement for [the security guards] to [provide security] or directed them in any fashion").

No merit is found in the FOP's contention that the Commonwealth's motion to dismiss should be denied because "someone from the Commonwealth had to know there was going to be security there." Any finding to that effect would be based on speculation, which is not substantial evidence. Haverford Township, supra. Thus, no such finding may be made. See also Commonwealth of Pennsylvania, 26 PPER ¶ 26045 (Final Order 1995), where the Board refused to speculate that capitol police bargaining unit work (admitting non-employees to a Commonwealth building after work hours) must have been performed by a non-member of the bargaining unit because a private contractor who gained admittance to a Commonwealth building over a weekend had not been admitted to the building by a capitol police officer.

CONCLUSIONS

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

1. The Commonwealth is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The PSTA 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 Commonwealth 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 complaint is rescinded and the charge dismissed.

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 eighteenth day of October 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner