

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 85 :
 :
v. : Case No. PF-C-11-123-E
 :
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF GENERAL SERVICES :

PROPOSED DECISION AND ORDER

On September 16, 2011, the Fraternal Order of Police, Lodge 85 (FOP or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania, Department of General Services (Commonwealth or Respondent) violated sections 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with Act 111 of 1968 (Act 111

On October 13, 2011, the Secretary of the Board issued a Complaint and Notice of Hearing in which January 12, 2012 in Harrisburg was assigned as the time and place of hearing. The hearing was held as scheduled, at which time the parties were given an opportunity to present testimony, cross examine witnesses and introduce documentary evidence. A second day of hearing was held on February 10, 2012.

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

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of General Services is an employer within the meaning of Section 3(c) of the PLRA
2. The Fraternal Order of Police, Lodge 85 is a labor organization within the meaning of Section 3(f) of the PLRA.
3. The FOP Lodge 85 is the exclusive representative of the police employees in the Capitol Police. (N.T. 49, Commonwealth Exhibit 3)
4. In March, 2010, the Department of General Services (DGS), Bureau of Police and Safety (Bureau), began the process to fill a vacancy for the position of administrative lieutenant in the Capitol Police. (N.T. 99, Commonwealth Exhibit 6)
5. There were five applicants for the position: Sergeant Kevin Brown; Sergeant David DeLellis; Sergeant Barry Barns; Lieutenant Richard Shaw and Lieutenant William Turner. (N.T. 135, 157 Commonwealth Exhibit 1)
6. Sergeant DeLellis is the FOP Lodge 85 president and Lieutenant Shaw is an FOP executive board member. (N.T. 135, 157)
7. All the applicants were asked the same questions by a panel of interviewers. The panel members completed the interview sheets and submitted their recommendations to Robert Rapak, an employee of the Bureau. They rated the applicants in a range from "strongly not recommended" to "strongly recommended". (N.T. 41, 105, 131, Exhibit 9)
8. After all the interviews were complete, Mr. Rapak filled out a matrix which established the most highly recommended applicant. (N.T. 106, 117)
9. Mr. Rapak then gave the matrix to the superintendent of the Capitol Police, Richard Shaffer. (N.T. 41, 106)

10. On April 8, 2010, Superintendent Shaffer selected Sergeant Brown to fill the vacancy. (N.T. 36, 202-203, Union Exhibit 12)
11. Mr. Shaffer's selection of Sergeant Brown was based on the fact that all three members of the panel had strongly recommended him for the position of administrative lieutenant. (N.T. 42, 131, Commonwealth Exhibit 1).
12. On April 14, 2010, the FOP filed a grievance over Brown's promotion, alleging that DGS violated the parties' collective bargaining agreement when it did not select the applicant with the most seniority. (N.T. 178, 212, Union Exhibit 12).
13. The FOP grievance proceeded to an arbitration hearing on August 5, 2011. (N.T. 336, Commonwealth Exhibit 11)
14. At the arbitration, the FOP's stated position was that the administrative lieutenant was a "shift assignment" as that term is used in Article 28, Section 10 of the parties' agreement, and therefore DGS should have given the position of administrative lieutenant to most senior applicant. (N.T. 336, Commonwealth Exhibit 11, p. 4)
15. The arbitrator issued his award on January 20, 2012, in which he held the position of administrative lieutenant was not a "shift assignment" as described in Article 28, Section 10 and therefore DGS did not violate the collective bargaining agreement when it selected Sergeant Brown for the position. (N.T. 336, Commonwealth Exhibit 11).
16. Sometime in August of 2011, Sergeant DeLellis, Officer Clarence Stokes, and Officer Nicole Herb, made a request to Superintendent Shaffer for approval for paid administrative leave to attend an FOP convention and elections in Salt Lake City, Utah, from August 15 to August 19, 2011. (N.T. 37, 48)
17. Mr. Shaffer approved their request as he had done since he became the superintendent in 2003. (N.T. 49)
18. On August 17, 2011, Bryan Oles, a program manager in the Office of Administration (OA), Bureau of Labor Relations (BLR), received an email from Sergeant Ruby Crawford, notifying him of Officer Herb's request for paid administrative leave. (N.T. 230, Commonwealth Exhibit 7)
19. Mr. Oles' responsibilities include approving administrative leave requests. (N.T. 229)
20. Mr. Oles informed Sergeant Crawford that, pursuant to the parties' collective bargaining agreement, Officer Herb was not entitled to administrative leave with pay. Oles pointed out that the officer was entitled to union business leave. (N.T. 230, 286, Commonwealth Exhibit 7)
21. On August 22, 2011, Sergeant DeLellis contacted Mr. Oles via email requesting the necessary paperwork for administrative leave approval, and informing Mr. Oles that Mr. Shaffer had approved the administrative leave request. Mr. Oles responded on August 26, 2011, reiterating the position of OA BLR that, pursuant to Article 14, Section 3, of the parties' collective bargaining agreement, leave without pay with seniority credit, was to be used to attend FOP conferences and conventions. (N.T. 230, 286, Commonwealth Exhibits 3 and 7)
22. Article 14, Section 3 of the CBA states:

FOP officials or elected delegates shall be granted up to six (6) weeks leave without pay without loss of seniority credit where such time is necessary to enable them to attend official FOP conventions or elections.

(N.T. 17, 72, Commonwealth Exhibit 3)

23. Superintendent Shaffer was not aware of this CBA language on leave for FOP conventions when he approved leave in 2011. (N.T. 49)

DISCUSSION

FOP Lodge 85, in its capacity of the exclusive representative of the Capitol Police, has filed a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania, Department of General Services, has violated the PLRA as read *in pari materia* with Act 111, on two occasions. They will be discussed separately.

Failure to Promote Most Senior Applicants

The FOP alleges that the Commonwealth promoted Sergeant Kevin Brown instead of two more senior applicants into an administrative lieutenant position. The FOP alleges that this promotion violated the PLRA, because it was an act of retaliation, discrimination and a refusal to follow the CBA. As a remedy, the FOP requests that the Board order the Commonwealth to offer the Administrative Lieutenant position to Lt. Richard Shaw, and then Lt. William Turner if Lt. Shaw declines the offer.

The Commonwealth defends the charge on procedural and substantive grounds. However, it is not necessary to reach the substantive defense for the following reason.

The procedural defense is that the FOP's charge was not timely filed. Section 9 (e) of the PLRA establishes a six week statute of limitations for charges to be filed. 43. P.S. 211.9(e). A charge of unfair labor practices must be filed within six weeks of when the complainant knew or should have known that an unfair labor practice was committed. **FOP, Haas Memorial Lodge, #7 v. PLRB**, 696 A.2d 873 (Pa. Cmwlth. 1997)

The FOP filed its charge on September 16, 2011, which is more than six weeks after the April 8, 2010 decision to promote. The FOP argues that the statute of limitations did not begin to run until August 5, 2011, when it claimed that it first learned, during an arbitration hearing on the issue, that the Commonwealth was not promoting on the basis of seniority.

In rebuttal to this argument, the Commonwealth points out that the FOP knew or should have known the Commonwealth's position earlier than August 5, 2011. First, as early as March 25, 2010, when the interviews were conducted, the FOP should have known that the Commonwealth was going to use a basis other than seniority for the promotion. Second, on April 14, 2010, when the FOP filed the grievance based on the claim that seniority should have been the determining factor in making promotions, the FOP knew the basis for the Commonwealth's selection.

In light of these facts, the Commonwealth's statute of limitations defense has merit. This part of the charge will be dismissed.

Rescission of Administrative Leave

The FOP's second allegation is that the Commonwealth's August 22, 2011 rescission of Superintendent Shaffer's approval of administrative leave for capitol police officers to attend the FOP national convention and election was a repudiation of a long-standing past practice in violation of section 6(1)(e) of the PLRA and that it was a "clear and unequivocal retaliation against the FOP's members for their participation in protected union activity" in violation of section 6(1)(a) and (c) of the PLRA.

As for the alleged section 6(1)(e) violation, the Commonwealth defends its action by pointing out that the past practice argument is not applicable where language in a collective bargaining agreement addresses the same subject. **Mahoning Township**, 42 PPER ¶ 7 (Proposed Decision and Order, 2011), citing **County of Allegheny v Allegheny County Prison Employees**, 476 Pa. 27, 34, n. 12, 381 A. 2d 849, 852 n. 12 (1978).

Bryan Oles, an Office of Administration, Bureau of Labor Relations manager who is responsible for approving administrative leave, cited CBA language to justify his decision. He cited Article 14, Leaves of Absence Without Pay, which specifically addresses the leave request at issue in the present dispute. Oles' decision to deny administrative leave was proper and will not be reversed by this Board on a past practice theory. No violation of section 6(1)(e) will be found.

As for the alleged section 6(1)(a) and (c) violation, after reviewing all of the evidence of record, I cannot conclude that the Commonwealth's denial of paid administrative leave to attend the FOP convention violated sections 6(1)(a) and (c) of the PLRA.

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 of Pennsylvania, Department of General Services, is an employer under section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. The Fraternal Order of Police, Lodge 85 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), (c) 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 of unfair labor practices is dismissed and the complaint is 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 (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of October, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner