

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA, :
LOCAL 509 :
 :
v. : Case No. PERA-C-11-385-E
 :
 :
SPRINGDALE BOROUGH :

PROPOSED DECISION AND ORDER

On October 31, 2011, the Utility Workers Union of America, Local 509 (Union or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Springdale Borough (Borough or Respondent) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) in three separate actions. On November 8, 2011, the Union filed an amended charge of unfair practices.

On July 6, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on March 30, 2012 in Pittsburgh before Thomas P. Leonard, Esquire, a hearing examiner of the Board. The hearing was continued to May 17, 2012 and again to August 24, 2012.

The hearing was held on the rescheduled date at which time the parties were afforded a full opportunity to present testimony, cross examine witnesses and introduce documentary evidence. On October 9, 2012 the Union filed a brief and on November 29, 2012, the Borough filed a brief.

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. Springdale Borough is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8-9)
2. The Utility Workers Union of America, Local 509 is an employee organization within the meaning of Section 301(3) of PERA. (N.T. 8-9)
3. The Union is the exclusive representative of all of the Borough's full-time and regular part-time "street, water and other public workers" excluding supervisors. (N.T. 24, Union Exhibit 6)
4. The Borough and the Union have been parties to a series of collective bargaining agreements, the most recent having the term of September 1, 2008 through June 30, 2012. (N.T. 24, Union Exhibit 6)
5. The Borough's public works department is made up of four employes and a working operations foreman. All the employees are in the bargaining unit represented by the Union. (N.T. 109, 145)
6. William Cadamore is the working operations foreman. He has worked for the Borough for 22 years and has been the Union vice president and steward for the past 14 years. (N.T. 95-96)
7. At the September 20, 2011 meeting of Borough Council, Councilman James Zurisko made a motion to remove Cadamore from the position of working operations foreman. Zurisko made the motion because of what he saw as Cadamore's lack of leadership. (N.T. 128-130, 135)

8. Zurisko's motion to remove Cadamore received a second from Councilman John Molnar. However, the Council never voted on the motion. Instead, the motion was tabled. Cadamore remained in the position of working operations foreman. (N.T. 114)
9. Cadamore has never been disciplined by the Borough. (N.T. 114)
10. The collective bargaining agreement has a Grievance Procedures and Mediation Clause, at Article 16, that states:

Article 16, Grievance Procedures and Mediation Clause

1. No Employee shall be discharged, disciplined, or otherwise discriminated against without just cause.
2. A grievance shall be any dispute over the interpretation or application of this agreement or any difference which may arise between the parties hereto.
3. A grievance shall be filed no more than 15 days from when the Employee becomes aware of the circumstance that created the grievance.
4. Any grievance which arises shall be processed through the following procedure:
 - A. The dispute will be brought to the attention of the Personnel Chairman or if the Personnel Chairman is unavailable, the Vice Chairman of Personnel by the aggrieved Employee(s) and/or his (their) steward or committeeman. The Employer must give his/her answer in writing within seven (7) working days.
 - B. If the Problem is not satisfactorily resolved or settled in the first step, the Union Bargaining committee will, with the assistance of the Union Staff Representative, present the grievance in writing within fifteen (15) working days to the entire Springdale Borough Council (or a majority thereof depending upon circumstances). The Borough Council must give their decision in writing with 24 hours of the next meeting of Council or the grievance moves to the next step C below.
 - C. If the grievance remains unresolved, it shall be referred to binding mediation by the PA Department of Mediation - Pittsburgh Office upon the demand of either the Union or the Employer within ten (10) days after the conclusion of step B above.

Under this paragraph, grievances should be reduced to writing no later than the second step of the procedure. The steward, and not the grievant, should write grievances.
5. Decisions of the Mediator will be final and binding on both parties. The expense of the Mediator, if any, will be born equally by both parties.
6. The powers of the Mediator shall include the authority to render a final and binding decision with respect to any dispute brought before him including the right to modify or reduce or rescind any disciplinary action taken by the employer, but excluding the right to amend, modify or alter the terms of this agreement.
7. The Mediator shall have the authority to decide the question or the ability to mediate.
8. More than one grievance may be submitted to the same mediator.

9. If either party fails to appear before the mediator, that party shall forfeit its rights in connection with the dispute or disputes.

(N.T. 24, Union Exhibit 6)

11. Ronald Borczyk is the Borough Manager. He began as manager in April, 2011. He is the first manager employed by the Borough. Former Borough Secretary-Treasurer April Winklmann performed many of the duties the manager now performs. (N.T. 154)
12. From April 28, 2011 to June 7, 2011, Cardamone filed five grievances on behalf of employees. (N.T. 13, Union Exhibits 1 to 5)
13. On June 21, 2011, the Borough Council denied the five grievances at Step B of the grievance procedure, notifying the Union of its decision on June 24. (N.T. 13, Union Exhibits 1 to 5).
14. On August 2, 2011, Borough Manager Borczyk wrote to Cadamore:

In response to your memo of July 12, 2011, Springdale Borough Council, via motion at its meeting of July 19, 2011, agrees that all denied grievances be moved to binding arbitration¹; as per request of Local 509 of the Utility Workers of America.

(N.T. 161, 166, Union Exhibit 16)

15. Borczyk testified that his August 2, 2011 letter's use of "arbitration" was a typographical error and that it meant to read "mediation." (N.T. 166)
16. On August 25, 2011 the Union moved to take all the denied grievances to binding mediation. (N.T. 167, Union Exhibits 1-5)
17. The Union sought binding mediation under Article 16 of the parties collective bargaining agreement. The Borough then refused to proceed to binding mediation for any of the five grievances, pointing to the Pennsylvania Bureau of Mediation form, which states: "The parties must agree that Grievance Mediation has been accepted in the above matter by further affixing **both parties signature below**. A Mediator will be assigned within 72 hours from receipt of your request." (Underlining in original) (N.T. 13, 31, 33, Union Exhibits 1-5)
18. On or about September 22, 2011, Borough Manager Borczyk responded to the Union, "I have been advised by the Springdale Borough Legal Counsel to refrain from signing the recent documents in request of grievance mediation."

(Union Exhibit 15)

19. On October 20, 2011, Borough Manager Borczyk issued Cadamore a memorandum which set forth in relevant part:

Effective October 24, 2011, the following working terms are required of the Springdale Borough Working Operations Foreman as per Article 6 of the current Collective Bargaining Agreement;

The regular Work Day will be Monday through Friday 7:30 A.M. until 4:00 P.M.- A 30 minute lunch break will be taken between 11:30 A.M. and 1:30 P.M. - the 15 minute am break must be taken between 8:30 and 10:30 A.M.- the 15 minute pm break must be taken between 1:30 and 2:30 p.m.

¹ The Borough states on page 5 of its brief, "While the letter said arbitration, the testimony of record established that this was a typographical error and Springdale was in agreement to send the grievances to binding mediation." This is consistent with Manager Borczyk's testimony. (N.T. 166).

This will permit appropriate service to the residents of the Borough of Springdale and will reduce the number of calls necessary to coordinate work effort with the office and the other Springdale DPW employees. Emergency requests for changing of these requirements must be made in writing and approved and approved by the Head of the Streets Department.

...

(N.T. 98, 100, Union Exhibit 13)

20. The October 24, 2011 memorandum was the first time in Cadamore's history of employment that the Borough unilaterally directed him to work a set of hours. (N.T. 117)
21. Cadamore testified that it had been the longstanding practice for the Borough to schedule the hours of the working operations foreman based on an agreement with the working operations foreman. (N.T. 99)
22. Former Councilman David Watts served from 1987 to 2007. In his twenty years as a council member, the practice of the Borough was to obtain the agreement with the working operations foreman on his scheduled hours. (N.T. 84-85, 88)
23. Watts testified that the 2003-2008 collective bargaining agreement was the first one that provided for a choice of two different sets of hours for the working operations foreman. (N.T. 84, Union Exhibits 11 and 12)
24. April Winklmann was the Borough Secretary-Treasurer for 14 years until 2011. When she held the position, there was no borough manager. She did many of the tasks the current Borough Manager does. (N.T. 65-67)
25. Winklmann testified that in her time with the Borough, the hours of the working operations foreman were set by agreement with the working operations foreman, even after the collective bargaining agreement added the alternative schedule for the position. (N.T. 71-72, 75-76, 78)
26. Article 6, Working Hours, of the Collective Bargaining Agreement, states that the hours for working operations foreman are

POSITION	SCHEDULED HOURS	BREAKS
...
WORKING OPERATIONS FOREMAN	Monday-Friday 7:30 am - 4:00 pm or 6:30 am - 3:00 pm	1-15 minute am 1-30 minute lunch 1-15 minute pm
	Other as special projects warrant.	
...

(N.T. 24, Union Exhibit 6)

27. Before 2003, the parties' collective bargaining agreement stated that the hours of the working operations foreman were Monday-Friday, 6:30 am to 3:00 pm. (N.T. 91, Union Exhibit 12)
28. Article 6 in the current collective bargaining agreement also provides under the Working Hours,

"However, the Employer reserves the right, to modify temporarily the work schedule in both day and hours if mutually agreed by the employee and notification provided to the union."

(N.T. 24, Union Exhibit 6)

29. Article 6 of the collective bargaining agreement also provides,

"However, the Employer reserves the right to modify temporarily the work schedule in both days and hours if mutually agreed by the employee and notification provided to the union."

(N.T. 24, Union Exhibit 6)

30. Article 18 of the current collective bargaining agreement provides

Article 18. Labor Relations

A. Management's Right Clause

It is agreed between the parties that the Employer shall have the supervision, direction and control of its property and the operation of the Borough to the extent that control does not conflict with any of the provisions or any past practices.

(N.T. 24, Union Exhibit 6)

31. Manager Boczyk's October 24, 2011 change in hours made for a one hour later end time and affected Cadamore's ability to begin work at a second job. (N.T. 101-102)

DISCUSSION

I. September 20, 2011 Borough Council Retaliation

The first allegation is that "On or about September 20, 2011, the Borough of Springdale at their regular monthly Council meeting made a motion to remove Union Steward William Cadamore from the position of Working Operations Foreman because he files too many grievances"

The Union contends that the motion was made to intimidate Cadamore to deter him from engaging in protected activity. The Union contends that the motion violated Section 1201(a)(1) of PERA, which prohibits public employers from "[i]nterfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." An independent violation of Section 1201(a)(1) will be found if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive regardless of whether employes have been shown to, in fact, have been coerced. **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985).

The burden of proof is on the charging party, the Union, to show by substantial and legally credible evidence that the Borough has violated PERA. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 322 A.2d 106 (1977). For the reasons stated below, the Union has not sustained its burden of proof.

The Union asserts that at the September 20, 2011 Borough Council Councilman James Zurisko made a motion to remove William Cadamore from the position working foreman as an act of retaliation for his protected activity of filing grievances. Council Daniel Copeland was at the meeting. The day after the meeting, Copeland sent an email to Cadamore informing him of Zurisko's motion. His e-mail also contended that Zurisko said he made the motion because "there is a lack of leadership" and "all he is doing is filing

grievance after grievance against the borough." Zurisko's motion never received a second and it was never tabled or rescinded.

The Borough does not contest that Zurisko made a motion to remove Cadamore. However, the Borough denies that the motion included the statement that Cadamore "files grievance after grievance."

In support of its case the Union called former councilman Copeland to support the allegation that Zurisko made the motion because of Cadamore's filing of grievances. In rebuttal, the Borough called the following witnesses to testify that Zurisko made no such statement: Zurisko himself; Borough Council President David Finley and Borough Council Personnel Committee Chairman Jason Fry. Zurisko, the maker of the alleged statement, testified that he did not refer to grievances as the reason for making the motion. His testimony was credible. Councilmen Finley and Councilmen Fry testified that nothing was said about Cadamore's grievance filing as the reason for the motion. Their testimony was also credible.

Having observed the witnesses on this point, I am not convinced that Zurisko referred to Cadamore's filing of grievances as a reason for making the motion to remove him from the position of working operations foreman. Absent proof of this element, it is difficult to conclude that the Borough or any individual Borough council member engaged in conduct that could "tend to be coercive" so as to violate Section 1201(a)(1) of PERA.

II. September 22, 2011 Refusal to Proceed to "Binding Mediation"

The second allegation is that the Borough is refusing to move grievances to the final step of "binding mediation" in the parties' grievance procedure, in violation of Section 1201(a)(5) of PERA. On or about August 24, 2011, the Union sent five requests for Grievance Mediation to the Springdale Borough Manager Ronald L. Borczyk. On or about September 22, 2011, Springdale Borough Manager Ronald Borczyk responded to the Union that the Borough refused to sign the Grievance Mediation forms that require signatures from both the Borough and the Union. The Union contends that this violated Article 16, Section 4-C of the Collective Bargaining Agreement that calls for the grievance to go to the Bureau of Mediation and was therefore a violation of the Borough's duty to bargain.

The Borough's defense to the charge is stated in its brief. "Springdale accommodated the Union's lack of timeliness up through the time Springdale consented to move the matters to mediation as outlined in its August 2, 2011 correspondence. When no action was taken for almost three months, at this point, Springdale took the position that such delay tainted the grievances and they were untimely. Springdale refused to sign the request for mediation."

The Union cites no cases involving the concept of "binding mediation" or cases addressing the specific issue of whether an employer's refusal to proceed to "binding mediation" is a refusal to bargain in violation of section 1201(a)(5) of PERA. The notion of "binding mediation" does not appear in PERA. When mediation is mentioned in PERA, at Section 801, the language is in relation to a collective bargaining impasse. The relevant part of the section states, "the parties may voluntarily submit to mediation." 43 P.S. 1101.801. The word "binding" appears in later in the article on collective bargaining impasses, but appears as a modifier for "arbitration." Section 804 states, "Nothing in this article shall prevent the parties from submitting impasses to voluntary binding arbitration,..." 43 P.S. 1101.804.

The parties have negotiated a grievance procedure that is different from the traditional grievance procedure called for in Section 903 of PERA, one that concludes with binding arbitration. Article 16(4)(C) of the collective bargaining agreement provides that unresolved grievances "shall be referred to binding mediation by the PA Department (sic) of Mediation-Pittsburgh Office upon the demand of either the Union or the Employer within ten(10) days after the conclusion of step B above."

In the present case, the official form used by the Bureau of Mediation is the "Request for Grievance Mediation and requires both parties' consent to participate in the

process. The form states, "The parties must agree that Grievance Mediation has been accepted in the above matter by further affixing **both parties signature below**. A Mediator will be assigned within 72 hours from receipt of your request." (Underlining in original). The Borough did not sign the forms, the grievances remain unresolved and the present charge resulted.

It is unclear from this record how the parties agreed to binding mediation rather than binding arbitration. This approach to grievance resolution contains contradictory ideas. It binds the parties to participate in a process that is usually entered into by a voluntary act.

There is a longstanding policy favoring the arbitration of grievances. With the enactment of PERA in 1970, the General Assembly mandated that Pennsylvania public sector employers with collective bargaining agreements with their employees provide for binding arbitration of grievances. Section 903 of PERA states,

"Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso the final step shall provide for a binding decision by an arbitrator or a tri-partite board of arbitrators as the parties may agree.

43 P.S. 1101.903

In **Bald Eagle Area School District v. PLRB**, 499 Pa. 62, 451 A. 2d. 671 (1982), the Supreme Court held that arbitration of grievances is mandatory and that questions of arbitrability are for arbitrator. The Supreme Court noted the legislative policy favoring arbitration and of avoiding extensive pre-arbitral litigation matches. However, **Bald Eagle Area School District** deals with the issue of an employer refusing to proceed to binding arbitration. The present case involves a grievance procedure with a different final resolution step, binding mediation. There are no Board decisions discussing such a procedure.

The Union questions the fairness of giving the Borough the power to determine the timeliness of grievances. The Union argues that the Borough, by deciding on September 22 not to proceed to binding mediation because too much time had elapsed, has become "judge, jury and executioner" of the grievances. It points out that two months earlier, the Borough Council voted to proceed to the last step of the grievance procedure for these five grievances, even though that was past the ten days required to move from Step B to Step C of the grievance procedure.

Despite the Union's arguments, I am constrained to find that the Borough has not committed an unfair practice when it refused to sign the forms for grievance mediation for the five grievances. This conclusion is based on the lack of legal precedent for the Union's position, the lack of statutory authority in PERA for binding mediation and the language in the Bureau of Mediation forms requiring both parties' signatures to proceed to binding mediation, which essentially allows the process to remain voluntary.

III. October 20, 2011 Change of Cadamore's Work Hours

The third allegation is that on or about October 20, 2011, Springdale Borough Manager Ronald L. Borczyk sent a memo to William Cadamore changing his work hours, in violation of the Collective Bargaining Agreement, Article 6, Working Hours, and Sections 1201(a) (1) and (5) of PERA.

On October 20, 2011, the Borough Manager changed Cadamore's schedule, from 6:30 a.m. to 3:00 p.m. to 7:30 a.m. to 4:00 p.m. This change impacted Cadamore's ability to work a second job, at his own business.

The Borough defends its action by pointing to language in the collective bargaining agreement at Article 6, which provides alternative work schedules. The Borough argues

that the Borough Manager simply chose an alternative schedule allowed by the collective bargaining agreement. An employer may rely on a contractual privilege defense if it has a sound arguable basis for the decision. **Jersey Shore Area Education Ass'n v. Jersey Shore Area School District**, 18 PPER ¶ 18117 (Final Order, 1987).

However, the Union replies that when it came to the issue of fixing the hours of the working operations foreman, it was the past practice for the Borough to mutually come to an agreement on hours with the working operations foremen. The new Borough Manager has ignored this past practice by unilaterally setting the hours. In **County of Allegheny v. Allegheny County Prison Employees Independent Union**, 381 A. 2d 849 (Pa. 1977), the Pennsylvania Supreme Court defined past practice, stating:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. ... It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances.

381 A. 2d 849, 852 n. 12. Thus, to find a past practice, it must be shown that the conduct occurred before, in response to the same or a similar set of circumstances, with at least the knowledge and acquiescence of both parties.

To prove the existence of a past practice of scheduling the working operations foreman with his agreement, the Union offered the testimony of Cadamore, former council member David Watts and former Borough Secretary-Treasurer April Winklmann. These witnesses testified credibly that it has been the past practice for the Borough to schedule the working operations foreman's hours of work by mutual agreement with him. Their testimony was un rebutted by any credible evidence from the Borough. Additionally, language in the collective bargaining agreement's management rights clause provides that the parties would be bound by past practice. The Union has sustained its burden of proving that a past practice existed for the scheduling of the working operations foreman. In light of this, the Borough's reliance of a contractual privilege defense will be denied. The Borough's change of Cadamore's work hours without his agreement is a violation of the Borough'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. Springdale Borough is a public employer under section 301(1) of the PERA.
2. Utility Workers Union of America, Local 509 is an employee organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The Borough has committed unfair practices under sections 1201(a)(1) and (5) 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 Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA;

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action:
 - (a) Restore the past practice of scheduling the working operations foreman's hours with his agreement;
 - (b) 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
 - (c) 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fourth day of June, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner