COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED STEEL PAPER FORESTRY RUBBER MANUFACTURING ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL	:	
v.	:	Case No. PF-C-12-90-E
MCDONALD BOROUGH	:	

PROPOSED DECISION AND ORDER

On July 23, 2012, the United Steel Paper Forestry Rubber Manufacturing Energy Allied Industrial and Service Workers International (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that the Borough of McDonald (Borough) violated Section 6(1) (a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111. The Union specifically alleged that the Borough refused to bargain in good faith for an initial collective bargaining agreement and unilaterally changed terms and conditions of employment when the Police Chief issued a memo requiring part-time officers to provide a minimum of three days per week availability or lose scheduled days.

On August 8, 2012, the Secretary of the Board (Secretary) issued a letter informing the Union that, "[i]n order for the Board to determine whether the charge was timely filed, it will be necessary for you to amend the charge to specify the exact date(s) that you believe an unfair labor practice occurred." On August 17, 2012, the Union filed an amended charge including the alleged dates.

On August 31, 2012, the Secretary of the Board issued a complaint and notice of hearing scheduling a hearing for Wednesday, April 3, 2013, in Pittsburgh. On October 9, 2012, Sergeant Dennis L. Ahlborn filed with the Board a petition to decertify the Union. This unfair labor practice charge proceeding blocked all proceedings on the decertification petition. Due to the blocking nature of the charge, I rescheduled the hearing for November 8, 2012, in Pittsburgh. A second day of hearing was necessary, and it was held on November 28, 2012. During the two hearings, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Borough of McDonald is a public employer and political subdivision under Act 111, as read in **pari materia** with the PLRA. (N.T. 5).

2. The Union is a labor organization under Act 111, as read in **pari materia** with the PLRA. (N.T. 5).

3. Mark Cummings is the President of Local 14693 in Canonsburg, Pennsylvania. Mr. Cummings participated in the organizing of the police officers of the Borough. Phil Ornot was main organizer of the Borough's officers. (N.T. 11-12, 31).

4. Ross McClellan is a staff representative for the Union. He was assigned to the Borough in October, 2011. He prepared an initial set of proposals along with the officers. (N.T. 36, 137).

5. Marilou Ritchie is the Borough Council President. (N.T. 26-27; 329).

6. Michael Lauderbaugh was a member of Borough Council until late May or early June, 2012. He resigned before the June Borough Council meeting. In January, 2012, Council appointed him to be one of two Council members to negotiate the police contract with the Union. (N.T. 38, 45, 114, 207, 240).

7. Mark E. Dorsey has been the Chief of Police for the Borough for twenty-six years and he has been a police officer for thirty-five years in total. (N.T. 278; Borough Exhibit 1).

8. Michael Schaal has been a Borough Council member for two years. In January, 2012, Council appointed Mr. Schaal to be one of two Council members (along with Mr. Lauderbaugh) to negotiate the police contract with the Union. (N.T. 207-208, 240).

9. Christopher Gabriel is the attorney who was appointed by Borough Council in the first week of June, 2012, to represent the Borough in collective bargaining with the Union for the police officers. (N.T. 119, 305-306, 327-328).

10. There are seven Borough Council members. A majority is four. Council did not authorize Mr. Schaal or Mr. Lauderbaugh to enter any binding agreements. (N.T. 208, 210).

11. Prior to September 16, 2011, only the two full-time police officers of the Borough were in a bargaining unit of police officers. The parties stipulated and agreed that the bargaining unit of full-time officers was represented by an independent wage and policy committee. On September 16, 2011, the Board certified the broader unit of full-time and part-time police officers after the Union won an election. (N.T. 13-18, 23; Union Exhibits 1 & 2).

12. On December 9, 2011, Mr. Cummings e-mailed Borough Council President Marilou Ritchie on behalf of Ross McClellan requesting several dates in January to begin negotiations. The same e-mail identified the Unit Chair as John Tegley, and Unit Griever and Unit Secretary as Bradley Resnik. (N.T. 26-27; Union Exhibit 4).

13. The collective bargaining agreement for the two full-time officers expires December 31, 2013. The Union took the position with its members that they would not negotiate on behalf of the full-time officers until their contract expired. No Borough representatives were present to hear the Union's position regarding the full-timers' contract during the internal Union meetings. There is no evidence that the Borough agreed to honor the full-timers' contract, and the Borough contests the existence of such an agreement. (N.T. 31-32).[1]

14. All face-to-face bargaining meetings were held at the Borough Municipal Building. There were three face-to-face bargaining meetings held before Mr. Gabriel became the Borough's lead negotiator. The first bargaining session between the Union and the Borough was on January 23, 2012; the second was held in March, 2012, and the third was on May 24, 2012. Between February and May, 2012, the Union and Borough representatives also engaged in negotiations via e-mail correspondence and e-mail attachments containing proposals and counterproposals. (N.T. 32, 37, 56-82, 90, 137-138, 140-141, 144, 173, 208-211; Union Exhibit 6).

15. On May 29, 2012, Officer Tegley notified Mr. McClellan that the Chief posted a notice requiring part-timers to provide a minimum availability of three days per week. This directive had not been discussed with the Union prior to the posting. (N.T. 111-112, 281-282; Union Exhibit 15).

16. The Chief's posted memo is dated May 29, 2012, and provides, in relevant part, as follows:

> For quite some time now, we have experienced issues with availability of part-time officers filling shifts when needed, and quite frankly, it has gotten out of hand in a very bad way. It is imperative we have the availability of part-time officers on the McDonald Police Department Roster. The flexibility and availability of the part-time officers, offers the necessary ingredient required for the successful operation of this department. Combined with the regular hours of the full-time officers, this adds a tremendous opportunity for the department to achieve goals necessary to provide the best quality of law enforcement services to all of our communities we now serve.
>
> To that end, effective immediately, all pert-time offices are to be available no less than three (3) days per week for employment with the McDonald Police Department. Sgt. Ahlborn shall be, as before, in charge of the scheduling. Any scheduling requests must go through Sgt. Ahlborn. **Those officers unable to fulfill this obligation will either be terminated, or if you so wish, permitted to resign in good standing with this department.**

(Borough Exhibit 1) (emphasis original).

17. The purpose of the memo was to motivate part-timers to take more shifts because the summer was approaching and the police department was experiencing a lot of call-offs. More than fifty percent of the shifts are covered with part-time officers and the call-offs were negatively affecting scheduling and operations. (N.T. 281-283, 289-290).

18. When Chief Dorsey hires part-time police officers, he spends a full day reviewing his expectations of them and gives them the operations manual for review. For the past twenty years, the Chief has informed newly hired part-time officers that they must be available for at least three days per week or they would not be scheduled and may have to resign. This three-shift minimum availability policy was not in writing. (N.T. 278-281, 291-294).

[1] I sustained the Borough's objection to the admission of Union Exhibit 3. Accordingly, I have not admitted Union Exhibit 3, and I have not relied on anything contained therein. The third page of Union Exhibit 7 is the same as the first page of Union Exhibit 3. The third page of Union Exhibit 7 was admitted for the limited purpose of showing that the page was sent to Mr. Lauderbaugh.

19. In early June 2012, before that month's Council meeting, Mr. Lauderbaugh resigned from Council. On June 5, 2012, Mr. McClellan receive an e-mail from Council President Ritchie attaching a June 4, 2012, memo from Chief Dorsey amending certain language from his May 29, 2012, posted memo. (N.T. 114-115, 283-285; Union Exhibit 15).

20. The June 4, 2012 memo from Chief Dorsey provides, in relevant part, as follows:

> The current directive stipulates: **Those officers unable to fulfill this obligation will either be terminated, or if you so wish, permitted to resign in good standing with this department.**
>
> The underlined section above will now read as follows"
>
> **Those officers unable to fulfill this obligation will not receive scheduling preferences; therefore same officers may not receive scheduled days.**

(Union Exhibit 15).

21. On Tuesday, June 5, 2012, Mr. McClellan held a telephone conversation with Council President Ritchie who confirmed that Mr. Lauderbaugh was no longer a member of Borough Council and that all future contacts for collective bargaining will be made through the Borough's labor attorney, Christopher Gabriel. (N.T. 117-119).

22. Mr. McClellan and Mr. Gabriel met at the Borough Municipal Building on June 20, 2012, and they were the only ones in attendance at this meeting. (N.T. 120, 122-123, 152, 160, 306-307).

23. Mr. McClellan handed Mr. Gabriel two documents: the Borough's proposal for the whole unit, based on the full-timers' contract (Union Exhibit 11) and a document that listed three issues deemed by the Union to remain outstanding after the May 24, 2012, meeting with Mr. Lauderbaugh (Union Exhibit 16). No proposals were exchanged at the June 20, 2012, meeting. (N.T. 122-123, 308; Union Exhibits 11 & 16).

24. At the June 20, 2012, meeting, Mr. Gabriel relayed to Mr. McClellan that the Borough Council indicated nothing had been agreed to and he requested an update on bargaining from Mr. McClellan. During this meeting, Mr. McClellan indicated that significant progress in bargaining had indeed been made. Mr. McClellan told Mr. Gabriel three times that there was no package to take back to Borough Council members or Union members. Mr. McClellan referred Mr. Gabriel to the Borough's proposal and claimed that the parties tentatively agreed to the Borough's proposal on all but the three issues. (N.T. 121, 152, 309-313, 333; Borough Exhibit 3).

25. Also during the June 20, 2012 meeting, Mr. Gabriel asked Mr. McClellan if there were any documents, other than the Borough's proposal, to indicate that there were any tentative agreements made because nothing on the Borough's proposal indicated the existence of any tentative agreements. Mr. McClellan also told Mr. Gabriel that the parties agreed to honor the full-timers' contract through its expiration on December 31, 2013. (N.T. 315-317).

26. On July 19, 2012, Mr. McClellan sent a letter to Borough Council President Marilou Ritchie requesting the appointment of a Board of arbitrators and listed three issues for arbitration matching those listed in Union Exhibit 16. (N.T. 125, 319-320; Union Exhibits 17-20).

27. On July 23, 2012, Ms. Ritchie sent a letter to Mr. McClellan informing him that the Borough appointed Mr. Gabriel as their partial arbitrator and that the Borough considered all issues to be in dispute. Ms. Ritchie stated that "[d]espite this notice, which is required by Act 111, the Borough nevertheless looks forward to meeting with the Union in the near future in the hopes of resolving all issues and reaching an agreement." (N.T. 127, 162; Union Exhibit 19).

28. Ms. Ritchie's July 23, 2012, letter further provides as follows:

> Please note that the Borough does not agree that any matters have been resolved and, as you yourself explained to Mr. Gabriel, no tentative agreement was ever presented to or voted on by the (sic) either the Union membership or Borough Council. McDonald Borough therefore considers all issues to be in dispute at this time.

(Union Exhibit 19).

29. On July 23, 2012, Mr. McClellan filed a charge of unfair labor practices with the Board. (N.T. 123, 320; Charge of Unfair Labor Practices at Case No. PF-C-12-90-W).

30. On July 25, 2012, Mr. Gabriel sent, via e-mail attachment, two documents to Mr. McClellan. The first was the July 23, 2012, letter from Marilou Ritchie and the second was a list of issues in dispute according to the Borough. The Borough's "non-exhaustive list of subjects" contains 21 items. (N.T. 127-128; Union Exhibits 19 & 20).

31. On July 31, 2012, the parties' representatives met at the Borough Municipal Building. Mr. McClellan and Mr. Kuzio attended on behalf of the Union; Mr. Gabriel, Mr. Schaal and Chief Dorsey attended on behalf of the Borough. The two full-time officers were also present. (N.T. 129-131).

32. Mr. Gabriel told Mr. McClellan that Council told him that there were no agreements. He and Mr. Schaal denied that there was a tentative agreement on all but three issues and specifically denied that there was agreement to apply the existing contract to the full-timers. He indicated that Mr. Lauderbaugh did not obtain approval from Council to agree to anything. Mr. McClellan responded that it was his understanding that Council decided to leave the full-timers' contract in place. Mr. McClellan did not at any time present his modifications to the Borough's proposal (i.e., Union Exhibit 14) to Mr. Gabriel. Mr. Gabriel did not refuse to negotiate unless the Union withdrew the charge. (N.T. 131-135, 167-170, 184, 259-263, 317, 321-322).

DISCUSSION

The Union claims that the Borough bargained in bad faith by attempting to revisit issues to which the parties' authorized negotiators previously agreed. The Union further contends that the Borough unilaterally changed terms and conditions of employment when Chief Dorsey posted a memo requiring part-time officers to make themselves available for a minimum of three shifts per week or not receive scheduled days.[2]

1. No Bad Faith Bargaining

The parties in this case have both focused their attention on the bargaining details in an effort to establish whether or not there were tentative agreements made by the Borough in bargaining and whether the Borough negotiators had the authority to enter such agreements. However, those are not relevant inquiries in this case. The analysis for determining whether an employer refused to bargain a collective bargaining agreement for its police officers in good faith under Act 111 is different than it is for employes who are not entitled to interest arbitration under the Public Employe Relations Act. The analysis begins with Section 2 of Act 111, which provides as follows:

> It shall be the duty of public employers and their policemen and firemen employes to exert every reasonable effort to settle all disputes by engaging in collective bargaining in good faith and by entering into settlements by way of written agreements and maintaining the same.

43 P.S. § 217.2. Section 3 requires that bargaining begin at least six months before the start of the fiscal year of the political subdivision and that requests for arbitration be made at least one hundred ten days before the start of the fiscal year. 43 P.S. § 217.3.

Section 4 provides, in relevant part, as follows:

> (a) If in any case of a dispute between a public employer and its policemen or firemen employes the collective bargaining process reaches an impasse and stalemate, or if the appropriate **lawmaking body does not approve the agreement reached by collective bargaining**, with the result that said employers and employes are unable to effect a settlement, then **either party to the dispute, after written notice to the other party containing specifications of the issue or issues in dispute, may request the appointment of a board of arbitration**.
>
> For purposes of this section, an **impasse or stalemate shall be deemed to occur in the collective bargaining process if the parties do not reach a settlement of the issue or issues in dispute by way of a written agreement within thirty days after collective bargaining proceedings have been initiated.**
>
> In the case of disputes involving **political subdivisions of the Commonwealth, the agreement shall be deemed not approved within the meaning of this section if it is not approved by the appropriate lawmaking body within one month after the agreement is reached by way of collective bargaining.**

43 P.S. 217.4(a)(emphasis added).

[2] The charge was filed after the Chief posted the amended memo. Accordingly, only the amended memo is at issue for determining whether a bargaining violation occurred.

In **Borough of Nazareth v. PLRB**, 534 Pa. 11, 17, 626 A.2d 493, 496 (1993), the Supreme Court of Pennsylvania expressly held that "under the language of Section 4 of Act 111, both the employee and the employer have the right to file an unfair labor practice petition with the PLRB to compel the other party to proceed to interest arbitration." **Id.** In **Capital City Lodge No. 12, Fraternal Order of Police v. PLRB**, 30 A.3d 1241 (Pa. Cmwlth 2011), the Commonwealth Court of Pennsylvania held, **inter alia**, that the lawmaking body of a political subdivision in the Commonwealth can refuse to approve even a tentative agreement without committing an unfair labor practice under Act 111. Id. at 1245.

In **Bivighouse v. Borough of Telford**, 445 A.2d 561 (Pa. Cmwlth 1982) and **Salisbury Township v. PLRB**, 672 A.2d 385 (Pa. Cmwlth 1996), the Commonwealth Court held that collective bargaining has begun under Act 111 once either party requests bargaining "irrespective of whether the parties actually meet to discuss the terms and conditions of employment." **Salisbury**, 672 A.2d at 388 (citing **Bivighouse, supra**). Consequently, "[i]f the parties have not reached a written agreement indicating the settlement of the issue in dispute within thirty days after the date that collective bargaining was requested, and one of the parties demands that the matter be submitted to interest arbitration, the other party must comply with that demand. A refusal to proceed to interest arbitration constitutes an unfair labor practice." **Salisbury Township**, 672 A.2d at 388 (citing **Nazareth, supra**).

The facts in this case establish that the Board certified the Union on September 16, 2011, which was too late for Act 111 interest arbitration to occur in time for 2012. **Roof Garden Lodge No. 98, Fraternal Order of Police v. PLRB**, A.2d (Pa. Cmwlth. 1996); **Rye Township Police Ass'n v. Rye Township**, 37 PPER 141 (Final Order, 2006). On December 9, 2011, Mr. Cummings contacted Borough Council President Ritchie requesting several dates to begin collective bargaining negotiations. At this point, however, it is significant to note that under the Board's case law, the Borough did not yet have a bargaining obligation for 2013. **Fraternal Order of Police Lodge 5 v. City of Philadelphia**, 29 PPER ¶ 29149 (Final Order, 1998) and **Fraternal Order of Police Lodge 5 v. City of Philadelphia**, 27 PPER ¶ 27131 (Final Order, 1996). In both **City of Philadelphia** cases, the Board held that "although the parties may in their discretion initiate bargaining more than six months prior to the beginning of the public employer's fiscal year, Act 111 does not create a duty to bargain prior to the six-month deadline set forth in Act 111." **City of Philadelphia**, 29 PPER at 347. Accordingly, in December, 2011 and January, 2012, the Borough did not have a bargaining obligation for either 2012 or 2013. The Borough's bargaining obligation for 2013 would not arise until early July, 2012.

In **Rye Township, supra**, two members of the three-member board of supervisors negotiated a tentative agreement with the police union when they had no bargaining obligation because the union was certified too late for the statutory time tables to apply. At the next public meeting of supervisors, one of the supervisors who agreed to the negotiated contract moved for its ratification and adoption. However, neither of the other two supervisors supported the motion, even though one of them already agreed to the contract. The union filed a charge of unfair labor practices alleging that the board of supervisors had a duty to ratify the contract, to which a majority of the supervisors already agreed.

In concluding that no unfair labor practice occurred, the **Rye Township** Board relied on the Commonwealth Court's decision in **Delaware City Lodge #27 FOP v. PLRB**, 461 A.2d 1337 (Pa. Cmwlth. 1983)(holding that the time provisions for bargaining under Sections 3 and 4 of Act 111 are mandatory both for collective bargaining and for requesting arbitration), and held that "agreements between public employers and the representatives of their employes, where no bargaining obligation is owed, are not enforceable by the Board." **Rye Township**, 37 PPER at 439.

This case is analogous to **Rye Township**. The Borough did not have any duty to bargain with the Union between December 2011, when Mr. Cummings made his initial request to bargain, and May, 2012. Yet the Borough did voluntarily engage in non-mandatory bargaining. In this regard, the Borough cannot be deemed to have engaged in bad faith bargaining for two reasons: (1) Even if Mr. Lauderbaugh and Mr. Schaal tentatively agreed to all the contractual provisions that the Union claims they agreed to between January, 2012 and May, 2012, **Rye Township, supra,** permitted the Borough to renege on those tentative agreements because there was no duty to bargain during that time period; and (2) assuming that bargaining was timely, thereby imposing a bargaining obligation on the Borough, Act 111 and the case law cited above provide that any tentative agreement can be rejected by the lawmaking body of a political subdivision.

There are no tentative agreements binding on a political subdivision, under Act 111. Act 111 is an interest arbitration statute. It is designed to get bargaining disputes before an arbitrator if the parties have not agreed within one month of timely bargaining. It simply does not matter if Mr. Lauderbaugh and Mr. Schaal agreed to anything because Council was lawfully permitted to reject anything its bargaining committee agreed to in favor of placing all issues before an arbitrator. Under Act 111, it is an unfair labor practice to refuse to proceed to arbitration. **Nazareth, supra**. It is not an unfair labor practice for a lawmaking body of a political subdivision to refuse to approve tentative agreements. **Capital City Lodge, supra**.

2. No Unilateral Change

On June 4, 2012, Chief Dorsey posted an amended memo requiring part-time officers to provide Sergeant Ahlborn with a minimum availability of three days per week and providing that a failure to do so would result in not being scheduled. The Chief credibly testified that, for the past twenty years, he verbally instructed newly hired part-time officers that they must be available for at least three days per week or they would not be scheduled and may have to resign. In **Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia**, 31 PPER ¶ 31023 (Final Order, 1999), the Board held that the codification of an unwritten policy, which does not change the terms of the unwritten policy, does not constitute the requisite change in terms and conditions of employment to sustain a charge of unfair labor practices. In the **City of Philadelphia** case, the Board expressly rejected the notion that codification itself establishes a change. **Id.** In this regard, the **Philadelphia** Board opined as follows:

> The record does not reflect that the written policy changed any of the officers' terms or conditions of employment. The written policy does not establish any new bases for discipline, nor does it change the procedure by which discipline is imposed. In each of the codification cases that the hearing examiner cited, the new written policy was different than the unwritten policy. The hearing examiner misapprehended the holdings of these two cases by determining that codification alone constitutes a change in working conditions. A close review of these codification cases reveals that codification may create a bargaining obligation, but only if it results in a real change to a mandatory subject of bargaining. The FOP did not demonstrate any such change in this case, nor did it establish that there were any new sources of discipline under the written policy, and thus, the new policy was not mandatorily bargainable.

City of Philadelphia, 31 PPER at 58.

Similarly here, the record does not establish that the Chief's June 4, 2012, posting changed the **status quo** regarding the requirement of part-time officers to provide a minimum availability of three shifts per week to the scheduling Sergeant or lose scheduled shifts.

CONCLUSIONS

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

1. The Borough of McDonald is a public employer and political subdivision under Act 111, as read in **pari materia** with the PLRA.

2. The Union is a labor organization within the meaning of the PLRA, as read in **pari materia** with Act 111.

3. The Board has jurisdiction over the parties hereto.

4. The Borough has **not** committed unfair labor practices within the meaning of Section 6(1) (a) or (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 and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded and 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-second day of April, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO
Hearing Examiner