

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF FIRE :
FIGHTERS, LOCAL 22 :
 :
v. : Case No. PF-C-13-111-E
 :
CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

On November 25, 2013, the International Association of Fire Fighters, Local 22 (Union or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia (City or Respondent) violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with the Policemen and Firemen Collective Bargaining Act (Act 111) by engaging in six separate adverse actions against the members of the Union.

On January 9, 2014, the Secretary of the Board issued a Complaint and Notice of Hearing, in which the Board assigned the case to a conciliator for resolution of the matters in dispute through mutual agreement of the parties, and designated April 23, 2014 in Harrisburg as the time and place of hearing, if necessary before Thomas P. Leonard, Esquire, a hearing examiner of the Board. The conciliator did not resolve the matters in dispute. Therefore, a hearing was necessary.

On April 21, 2014, the examiner continued the hearing to May 19, 2014.

The hearing was held on the rescheduled date, at which time the parties were given an opportunity to present testimony, cross examine witnesses and introduce documentary evidence.

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 International Association of Fire Fighters, Local 22, is the exclusive representative for approximately 6,500 employees employed by the City of Philadelphia's police department, with the exception of the Commissioner and Deputy Commissioners. (N.T. 14, 44)
2. Over the years, the Union and the City have been parties to several collective bargaining agreements and Act 111 interest arbitration awards for this bargaining unit. (N.T. 12, 32, Union Exhibits 5(a) and (b), City Exhibits 3 and 4)
3. Article VI of the CBA provides for several procedural rules, such as the right to counsel, when a Fire Board of Investigation, also called a Trial Board, is convened in instances of alleged employee misconduct and potential discipline. (N.T. 32, 94, City Exhibit 3)
4. Article VI does not mandate a Trial Board in any instance, even when an employee is facing dismissal. (N.T. 32, 94, City Exhibit 3)
5. In the 2005 and 2008 Act 111 interest arbitration proceedings the Union has attempted, without success, to amend Article VI so as to mandate that a trial board be convened when an employee is facing dismissal. (N.T. 97, 98, City Exhibits 4 and 5)

6. In 2013, in the current Act 111 interest arbitration proceedings, the Union again sought to amend the CBA to mandate a trial board when the Department is seeking an employee's dismissal. (N.T. 100, City Exhibit 6)

7. In late September and early October, 2013, the Department's Special Investigations Officer, Chief Jeremiah Laster, sent individual notices to three fired department employees and copied the Union that they were to appear before him for "Violation of Directive #25." The employees were Fire Fighter Michael Bernstein, Fire Lt. Edward Collins and Service Paramedic (FSP) Christopher Smith. (N.T. 15, Union Exhibits 1,2 and 3)

8. Directive #25 is a 20-page set of disciplinary rules issued by the Commissioner of the Fire Department. (N.T. 29, 105, Union Exhibit 4)

9. Prior to the SIO's interview of FSP Smith, Joseph Schulle, the President of Local 22, spoke with SIO Laster. (N.T. 25).

10. Schulle was interested in ascertaining whether the City intended to issue a Notice of Intent to Dismiss to FSP Smith. (N.T. 27)

11. Laster assured Schulle that the City was not looking to terminate Smith. (N.T. 27)

12. The interviews took place in early October, 2013. At the conclusion of each of the interviews, the individuals were given three (3) options by the SIO:

1. Accept the discipline that may be imposed, waive the right to a Trial Board and waive the right to grieve:
2. Proceed with a Trial Board;
3. Accept the discipline, waive the right to a Trial Board, but retain the right to grieve the discipline.

(N.T. 15-17)

13. Each of the individuals selected Option 3. (N.T. 17)

14. The "Waiver of Trial Board" that each executed, specifically referenced "Directive 25, Page 4, paragraph 4.2.8" (N.T. 78, 82, City Exhibits 1 and 2)

15. FSP Smith chose Option 3 only after Local 22 President Schulle had conveyed to Smith his prior conversation with SIO Laster and after Schulle recommended to Smith that he select Option #3 as a result of that conversation. (N.T. 30-31)

16. Despite selecting Option 3, FSP Smith, Lt. Collins and FF Bernstein were each subsequently issued a Notice of Intent to Dismiss and a Notice of Suspension. (N.T. 19-21, Union Exhibits 7, 8 and 9)

17. On or about November 5, 2013, the Fire Department convened a Fire Board of Investigation related to allegations against Wayne Morrison. (N.T. 44, Union Exhibit 12)

18. Section 4.2.2 of Directive #25 provides that a member who has had formal charges placed against him or her must be notified in writing, five (5) business days prior to the date of the hearing. (N.T. 12, Union Exhibit 5)

19. Local #22 representative Timothy McShea attended the November 5 hearing and asserted that Morrison had not received written notice of the hearing as required under Section 4.2.2 of Directive #25. (N.T. 37)

20. On October 31, 2013, the City notified FSP Michelle Roche, FSP Sadie Smith and FSP Jeanine Clarency that they were scheduled for individual appointments with SIO Chief

Laster on November 12, 2013, at 9:30, 10:00 and 10:30 a.m., respectively. (N.T. 45-46, Union Exhibits 13(a), 13(b) and 13(c))

21. The notice to all three members simply stated "Violation of Directive #25." (N.T. 45-46, Union Exhibits 13(a), 13(b) and 13(c)).

22. Directive #25 is the disciplinary code of the Fire Department. It is a 20 page document that includes 144 rules. It also includes Sections on Investigative Interviews (Section 4.9 et seq) and Disciplinary Waiver (Section 5.1). (N.T. 12, Union Exhibit 4)

23. In the 2010 Act 111 interest arbitration proceedings, the Union has complained that a notice of investigatory interviews that only states that "Directive #25" has been violated is not sufficient. The Union requested that the Act 111 arbitrators award a notice of interview for discipline "that will include with such notice detailed information regarding the specific allegation(s) against the member and any and all supporting documentation." (N.T. 98, City Exhibit 5, page 3 paragraph 59)

24. The interest arbitration panel did not award a change in the notice of investigation provision. (N.T. 121)

25. In the present Act 111 interest arbitration proceedings begun in 2013, the Union has requested similar changes to the notice procedures. (N.T. 100, City Exhibit 6)

26. Michael Kane is a retired firefighter, having served 33 years and reaching the rank of battalion chief when he retired in 2011. He is currently the Chairman of the Trustees for IAFF, Local 22. (N.T. 49)

27. Kane has been an officer of the Union for some 9 years. In that capacity, he has attended upwards of 20 to 30 investigatory interviews per year at the Fire Department Administration (Headquarters) Building. (N.T. 49)

28. In 2013, Kane attended an investigatory interview at headquarters, which was also attended by a member of the union facing investigation; Chief Jeremiah Laster, a Special Investigations Officer; Karen Hyers, the PFD Human Resources Manager; and Ken Fowler, a member of the Employee Assistance Program. At the end of a SIO interview Kane "lost his temper." (N.T. 50, 51, 124)

29. According to him, Kane described the department's decision to reject a member on probation as "'F-n' bull----" and then went on to imply that Commissioner Ayers engaged in misconduct, saying "Why don't you go ask [Commissioner] Lloyd Ayers what he used to do when he was a young Fire Fighter?" (N.T. at 51, 52)

30. Kane then stood up and began using profanities, saying "f--- this building", "f--- the administration and f--- the commissioner." (N.T. 123)

31. Chief Laster then stood up and told Kane he could not use that language in the office and that he had to leave. Kane left the room but continued to shout loudly all the way down the hallway of open cubicles until he exited the building. (N.T. 123-124 and 128).

32. On December 11, 2013, during his testimony before the 2013 Act 111 Interest Arbitration panel, in which Kane complained about the perceived injustice of departmental discipline, Kane testified, "I went nuts. I started - after the interview was over, I went crazy. I started cursing and yelling." (N.T. 100, City Exhibit 6 at 3279:21-23).

33. On or about November 20, 2013, the Department informed Kane that he was not allowed to enter the Fire Administration Building, and he continues to be banned. (N.T. 54-55 and 127)

34. On November 5, 2013, the Fire Department SIO Chief Laster scheduled a Trial Board hearing for Wayne Morrison. (N.T. 38, 110-111)

35. Union official Timothy Shea attended the hearing with Morrison. When Shea began tape recording the meeting, Chief Laster stopped him from continuing to do so. (N.T. 38, 110)

36. Section V (D) of the CBA, which has been in the CBA since at least 1984, states, "A union representative shall be permitted to bring a tape recorder to meetings where a discussion with an employee is being taped by Officials of the Fire Department." (N.T. 12, 32, Union Exhibit 5(a))

37. After that hearing, Chief Laster reviewed the CBA language and saw that the union had a right to tape the hearings if they are recorded by the City. After the November 5 hearing, the City has allowed the Union to tape all trial boards. (N.T. 42, 110)

DISCUSSION

At the hearing, the Union presented evidence on five of the six allegations in the charge, designated by the parties as paragraphs 3(a), (b), (c), (d) and (f) of the specification of charges. The Union presented no evidence to support paragraph 3(e). The five allegations will be discussed separately.

Paragraph 3(a), Smith, Collins and Bernstein Discipline

The Union alleges that the City violated Section 6(1)(e) of the PLRA when it failed to convene a Trial Board (either an Accident Review Board or a Fire Board of Investigation) before imposing discipline on Fire Service Paramedic (FSP) Christopher Smith, Lt. Edward Collins and Fire Fighter Michael Bernstein. The Association alleges that the manner in which the City disciplined these employees constituted a unilateral repudiation of a provision of the CBA requiring advance notice of changes in work rules.

The Union contends that the case law requires that an employer first bargain with the union before it makes changes to a CBA, citing **Millcreek Township School District v. PLRB**, 631 A.2d 734 (Pa. Cmwlth. 1993), appeal denied 641 A.2d 590 (1994). **Millcreek** has been extended to unfair labor practice charges under the PLRA and Act 111. See, e.g. **Pennsylvania State Troopers Association v. Pennsylvania Labor Relations Board**, 30 PPER 30223 (Final Order, 1999), aff'd 32 PPER ¶ 32002 (Pa. Cmwlth. 2000)

This matter has a long history. For years, the CBA at Article VI has had a provision for a Trial Board. However, the CBA does not include language mandating when a Trial Board is to be convened or that a Trial Board be convened at all. For years, the Union has sought to change the CBA to mandate a Trial Board. However, the Act 111 arbitration panels have not included such mandatory language. The Union again raised the issue in the 2013 Act 111 interest arbitration proceedings that were underway when this unfair labor practice hearing was conducted.

In the present case, the Union argues that the employer has unilaterally repudiated the CBA provision requiring advance notice of a change in work rules when it changed the procedures under which the employer disciplined employees. The parties have adhered to the procedures set in Directive #25 when it comes to discipline leading to dismissal. Section 4.2.8 of Directive #25 explicitly states that "no waiver [of a Trial Board] will be considered for disciplinary actions involving dismissal proceedings." Yet, here, the City specifically offered the members the option to waive a trial board even though Section 4.2.8 provides that no waiver will be considered where a dismissal is involved.

The Union further argues that the City never made any attempt to revise Section 4.2.8 of Directive #25 by, for example, giving five days notice of such a modification pursuant to Section V(a) of the collective bargaining agreement. Rather, the City simply ignored that provision of its own rules, thereby repudiating that portion of Section 4.2.8. The union argues that this repudiation of the work rule constitutes an unfair labor practice.

In response, the City argues that no unfair labor practice should be found because the subject matter of the dispute is well outside the six (6) week statute of limitations set forth in the PLRA and Act 111. "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).

Here, the subject of the Union's charge has been the City's practice for some time; the Union has been complaining about waivers of the Trial Board since 2005. The Union has sought to change this practice in the Act 111 interest arbitrations, so as to mandate a Trial Board when the City was seeking to dismiss. "Once the statute of limitations elapses from the time the complained of policy is effectuated, the cause of action based upon the continued existence of that policy expires." **Philadelphia Fraternal Order of Correctional Officers v. City of Philadelphia**, 30 PPER ¶ 30178 (Final Order, 1999). The City's defense of timeliness is well taken.

The Union has presented an argument that captured this examiner's sympathy. However, in judging whether the complaint violates the PLRA and Act 111, I am constrained by the Board's limited jurisdiction to decide violations of those statutes. I also must respect the jurisdiction of the Act 111 interest arbitration panel, which has been convened as a bargaining impasse tribunal. The issue the Union complains of here has been part of the mix of the parties' competing bargaining demands. In the past, the Act 111 interest arbitration panel has considered and decided not to make this part of its overall award regarding the wages, hours and terms and conditions of employment.

Second, there is a separate reason why this part of the charge is untimely. In this case, the three waivers that form the basis of charge 3(a) all occurred more than 42 days before the charge was filed on November 25, 2013. FSP Smith waived the hearing on October 1, 2013, FF Bernstein waived it on October 2, 2013 and FF Collins waived it on October 3, 2013. To be timely, any charge related to these individuals would have to be filed by November 12, November 13 and November 14, respectively.

Paragraph 3(b), Failure to provide written notice of interviews

The Union next alleges that the City violated Section 6(1)(e) of the PLRA when it failed to provide bargaining unit member Wayne Morrison written notice of the subject of the interviews or the rules and regulations at issue in advance of the interview of leading up to a Fire Board of Investigation. The Union alleges that this is a repudiation of the CBA.

Morrison did not attend this unfair labor practice hearing and thus, did not testify that he did not receive notice of hearing. The union's only evidence on this point is from Union representative Timothy McShea, who offered hearsay testimony that Morrison did not receive written notice. However, the Board cannot find an unfair labor practice without corroborating, admissible evidence. "Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand." **Walker v. Unemployment Compensation Bd. of Review**, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). The City's failure to produce a record that the notice was sent by certified mail is not corroborating evidence because neither the CBA nor Directive #25 requires notice be sent by certified mail.

Accordingly, this part of the charge will be dismissed.

Paragraph 3(c), Failure to provide notice of interviews

The Union complains that the Department failed to provide notice of the subject of the interviews to FSP Michelle Roche, FSP Sadie Smith and FSP Jeanine Clarency in advance of their November 12, 2013 appointment with SIO Laster.

The City raises the same defense to this part of the charge that it raised in paragraph 3(a), that this charge is untimely. The City points out that the Union has been

complaining about this issue since 2010, well outside the six week statute of limitations set forth in the PLRA and Act 111, 43 P.S. 211.9(e).

Under the same rationale for deciding the charge brought in paragraph 3(a), *supra*, this part of the charge will be dismissed.

Paragraph 3(d), Excluding Union Official from Fire Administration Building to Conduct Union Business

The Union next alleges that on or about November 20, 2013, the Fire Department unilaterally excluded IAFF Local 22 Executive Board Member Michael Kane from entering Fire Administration building to conduct union business in connection with representation of a bargaining unit member during a Fire Board of Investigation. The Union alleges that the Department took such action in retaliation for Kane's protected conduct during an August, 2013 investigatory interview.

At the end of an SIO interview, Kane apparently lost his temper. Kane started shouting "F... this building; F... the Administration; F... the Commissioner." Kane admitted in later interest arbitration proceeding that he "went nuts" that day. In this unfair labor practice hearing, Kane testified that he could not remember saying those exact words, although he acknowledged that he might have said "f--- the Commissioner." On this point, Chief Laster testified, without hesitation that Kane said those things. On this disputed point, Chief Laster's credible testimony will be accepted as the accurate and truthful version of what happened on that day.

In **Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania**, 41 PPER 33 (Final Order, 2010), the Board reaffirmed its standard of judging whether employee speech made in the heat of bargaining or a grievance procedure to maintains its protected speech character. The Board stated that an employe's criticism of the employer will lose the protection of the Act only if it is "offensive, defamatory, or opprobrious," and not if it is merely "intemperate, inflammatory or insulting," citing **Washington County**, 23 PPER ¶ 23040 (Proposed Decision and Order, 1992), 23 PPER ¶ 23073 (Final Order, 1992); *see also*, **AFSCME, District Council 85, Local 3530 v. Millcreek Township**, 31 PPER ¶31056 (Final Order, 2000) (employe's conduct will lose protection of the act where is it so obnoxious or violent as to render the employe unfit for service).

The Union argues that Kane did not act in a violent manner and that the City has not accused him of acting violently. It is only Kane's speech that is at issue and most of his speech was behind closed doors until Laster opened the door and asked Kane to leave. The Union argues that this speech did not cross the line set forth in **Pennsylvania State Troopers Association**, *supra*.

However, the evidence is convincing that Kane's tirade fell outside the kind of protected speech defined in **Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania**, *supra*. It was offensive speech in that it was infused with profanity. It was not directed at any particular person in the meeting to develop an argument on behalf of a grievant, but was made at the end of a meeting in which the Union had failed to convince the City of the merits of its position. It was also a tirade that continued as Kane left the room and walked down the hall.

The action the City then took against Kane was because of this offensive speech, not because of protected activity. Kane's union position was not a shield against the city taking the steps it believed was necessary to maintain a civil workplace.

However, the City's 2013 ban on Kane entering the administration building was permanent. It was still in place on the day of the unfair labor practice hearing. The permanent ban seems excessive. In its defense, the City argues that Kane, to this day, has never apologized to the persons in the room with him that day and never "took any responsibility." While there is no evidence that Kane ever apologized, he did take responsibility. Kane admitted he made the statements when he explained to the Act 111 Interest Arbitration Panel that he "went nuts" on that day. It was the first time the City ever charged Kane with such misconduct.

Given all of the facts of this part of the charge, the permanent ban of Kane from the administration building goes beyond the City's interest in maintaining a civilized workplace environment. By making the ban permanent, the City has barred a veteran union official from forever entering a workplace where he has represented numerous members in the past. The permanent ban constitutes an unlawful interference with the right to represent employees and a violation of Section 6(1)(a) of the PLRA. Now that over a year has elapsed since the incident, the City should permit Kane to once again represent employees in the administration building.

Paragraph 3(f), Taping of Trial Board Proceedings

The Union complains that on November 5, 2013, the Fire Department officials in the SIO Chief Laster prevented Union official Timothy Shea from audio taping the Trial Board hearing of FSP Morrison.

The Union has long had the right to audiotape the Trial Board hearings. Under section V (D) of the CBA, the union "shall be permitted to bring a tape recorder to meetings where a discussion with an employee is being taped by Officials of the Fire Department."

The record shows that the Department prevented the Union from taping the November 5, 2013 meeting. After that meeting, Chief Laster reviewed the CBA language on Trial Boards and saw that the union had a right to tape the hearings if they are recorded by the City. The City has now allowed the Union to tape all Trial Boards.

The evidence of record in this case leads to the conclusion that the City's actions on November 5, 2013, constitute a repudiation of the contractual right to record Trial Boards and therefore is a violation of Section 6(1)(a) and (e) 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 City of Philadelphia is an employer under Section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. The International Association of Fire Fighters, Local 22, 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 City has committed unfair labor practices under Section 6(1)(a) and (e) of the PLRA as read *in pari materia* with Act 111.
5. The City has not committed unfair labor practices under Section 6(1)(c) 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 City shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA as read *in pari materia* with Act 111.

2. Cease and desist from refusing to bargain with the exclusive representative of the police employees of the City of Philadelphia.

3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:

(a) Notify Michael Kane that he is allowed in the Fire Administration Building to represent Union members;

(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 employees 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 (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 March, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner