

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 764 :
 :
 :
 v. : Case No. PF-C-16-94-E
 :
 :
 BERWICK BOROUGH :

PROPOSED DECISION AND ORDER

On October 3, 2016, Teamsters, Local Union No. 764 (Teamsters or Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111, and therein alleged that Berwick Borough (Borough) violated Section 6(1)(e) of the PLRA by hiring police officers from a civil service list ruled invalid through a grievance settlement. On October 18, 2016, the Secretary of the Board issued a letter refusing to process the charge unless the Union amended its charge to include a copy of the parties' collective bargaining agreement (CBA). On October 25, 2016, the Union amended its charge by including the relevant portions of the parties' CBA and by further alleging that Mayor Tim Burke sustained a grievance challenging the Civil Service Commission's list of police officer candidates and that the Borough continues to fail to abide by that grievance settlement.

On November 10, 2016, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 17, 2017, in Harrisburg, Pennsylvania. On February 17, 2017, I granted the parties' request for a continuance based upon the representation that they planned on submitting a stipulation of facts, and I rescheduled the hearing for March 6, 2017. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. A stipulation of facts was not submitted. The Teamsters filed a post-hearing brief on March 30, 2017. The Borough filed a post-hearing brief on May 22, 2017.

The examiner, based upon witness testimony, admitted documents and all matters of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision pursuant to Act 111 and the PLRA. (N.T. 3)
2. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 3)
3. The parties' CBA was approved and executed by both the Union and Borough Council. (N.T. 7-8)
4. The CBA contains a grievance and arbitration procedure. Article 8, Section 2 of the "GREIVANCE AND ARBITRATION" procedure provides as follows:

Section 2. All grievances shall first be submitted to the Chief of Police so that he may have an opportunity to settle them. A grievance must be filed in writing within fifteen (15) days of the occurrence giving rise to the grievance or when the Employee/Union knew or by reasonable diligence, should have known of its occurrence. In the event the Chief of Police is unable to resolve a matter within five (5) days after it has been presented to him, it shall be appealed to the Mayor. The Mayor shall render a decision in writing within five (5) days after the matter has been presented to him. If the decision of the Mayor is unsatisfactory, within five (5) days after his decision, it shall be appealed to the full Borough Council. They shall render a decision in writing within fifteen (15) days after the matter has been presented to them. If the decision of the Council is unsatisfactory, the Union shall notify the Borough of their intent to move the matter to arbitration; such notification shall be made within one (1) week following receipt of the Council's decision. The parties agree to submit all matters at impasse to binding arbitration. If the parties are unable to agree on an impartial arbitrator, they shall select said arbitrator in accordance with the rules and regulations of the American Arbitration Association. All decisions of the arbitrator shall be final and binding. The parties shall be responsible for the costs of their respective presentation to the arbitrator; the costs of the arbitrator and the hearing shall be shared equally.

(Joint Exhibit 1, Art. 8, § 2)

5. Article 10, Section 6 of the parties' CBA provides the following:

Upon the retirement, voluntary termination or death of a member, or for any other reason a vacancy occurs, the Borough shall, within ninety (90) days, fill such vacancy with a qualified person from the eligibility list as established within the guidelines of the Civil Service Commission. If no list is current at the time of the vacancy, the Borough shall, within one hundred fifty (150) days, fill the vacancy with a qualified person as per the guidelines established by the Civil Service Commission.

(Joint Exhibit 1, Art. 10, § 6)

6. In 2016, the Borough had a vacancy in the Police Department. Pursuant to a memorandum of understanding, the parties agreed to extend the contractual time period to fill the vacant position until the end of the 2016 calendar year. (N.T. 9)

7. The parties' CBA incorporates the Borough's Civil Service Commission guidelines on hiring police officers. On September 8, 2016, the Union filed a grievance with the Chief of Police complaining that the Borough violated the CBA and the Civil Service Commission guidelines in the manner by which the Civil Service Commission developed the police officer candidate list. (N.T. 9-10; Joint Exhibit 2)

8. The Chief of Police received the grievance, and he forwarded the grievance unresolved to the Mayor at the second step of the grievance procedure. (N.T. 9-10)

9. Mayor Burke discussed the grievance with Union President Jimmy Little, after which the Mayor wrote a letter, dated September 16, 2016, resolving the grievance at step 2 in favor of the Union. (N.T. 9-11; Joint Exhibit 4)

10. The Mayor's September 16, 2016 letter provides, in relevant part, as follows:

On Tuesday Sept. 13, 2016, I received [sic] from Police Chief Ken Strish. I carefully reviewed each of the 10 grieved items and have found certain civil service rules were NOT followed in the current hiring process. This is in my opinion a violation of the Berwick Police Dept. contract article 10 section 6.

My opinion is the following;

- Section 2.2 It appears Mr. Coolbaugh indeed would fall in the category of incompatible commissioner, due to his paid position as Fire chief.
- Section 2.3 From Commission minutes dated July 12, 2016 Nancy Sborz is listed as secretary and the rules clearly state the secretary must be an appointed commission member.
- Section 2.9 The commission did not appoint the written, oral, physical examiners and background investigators as required, however after the background investigations were completed Chief Strish reviewed the paperwork and further investigated. He gave a written recommendation to the commission but to my knowledge Chief Strish never selected a designee.
- Section 2.11 According to paperwork supplied by the borough only minutes from November 2015 and August 2015 were provided. The commission rules state all minutes and records must be kept and preserved for 5 years.
- Section 2.14 Commission rules state that the commission shall make an annual report. There are no annual reports on file.
- Section 4.6 All notices are required to be mailed/delivered at least 7 days prior to the date fixed for examination. Some of The [sic] said to Shultz they were only given 48 hours verbal notice.
- Section 4.10 Current rules state "those candidates passing the physical agility test as outlined in section 4.11 will qualify to take the written test.["] The WRITTEN test was given before the physical agility clearly in violation.
- Section 4.11 Physical Agility Testing. Candidates did not receive physical Requirements in advance, as stated in the rules.
- Section 4.17 Background Investigations. See my response to Section 2.9.
- Section 4.18 Polygraph Examinations. The rules state "notice of

opportunity to retest shall be given in writing to an applicant who failed initial polygraph test.["]

Since all of the above sections appear to have been violated and the police dept. contract "Article#10, Section #6" states that if no list is current at the time of the vacancy, the Borough shall, within one hundred fifty (150) days, fill the vacancy with a qualified person as per the guidelines established by the Civil Service Commission, it appears to me that this is a valid grievance as filed. While considering the merit of this grievance the Borough Solicitor and Jimmie Little from the Union were contacted and their opinions were different. The goal of any hiring process should be to address not only a current manpower shortage but also the future needs of the dept. I would like to offer the following solution: Civil service needs to meet to review their rules and start the hiring process again.

(Joint Exhibit 4)

11. The parties stipulated and agreed that the Civil Service Commission has not reconvened to restart the officer candidate selection process as per the Mayor's grievance settlement letter. (N.T. 12)

12. Borough Council appoints the members of the Civil Service Commission. The Civil Service Commission recommends police officer candidates to Borough Council. Borough Council is ultimately the statutorily authorized entity that hires police officers. The Borough Mayor has no hiring authority. (N.T. 18-20)

13. If there is no hiring in a given calendar year, Borough Council must renew a civil service list of officer candidates by January, otherwise the list expires and a new list must be generated. (N.T. 28-29)

14. When the list expires, the Civil Service Commission starts the officer candidate selection process again which the Commission did three times over 2015 and 2016. (N.T. 29)

DISCUSSION

The essential facts in this case are not in dispute, and the parties are in disagreement over a legal question. The Borough recognizes that, "[a]s a general rule, an employer commits an unfair labor practice under Section 6(1)(a) and (e) if it refuses to comply with a grievance as resolved by one of its representatives under a grievance procedure set forth in a collective bargaining agreement." (Borough's Post-hearing Brief at 2). However, the Borough maintains that "when the representative lacks the statutory authority to resolve the grievance, the employer is not bound by [the] representative's resolution of the grievance," citing Somerset Police Bargaining Unit v. Somerset Borough, 18 PPER ¶ 18085 (Final Order, 1987).

The Borough further contends that, pursuant to Somerset Borough and Section 1121 of the Borough Code, the sole authority to appoint and remove police officers resides with the Borough Council and not the Mayor. "Therefore, the [M]ayor had no statutory authority to direct the civil service commission to review its rules and begin the hiring process again." (Borough's Post-hearing Brief at 2). The Borough further cites Duncannon Police Officers Association v. Duncannon Borough, 40 PPER 7

(Proposed Order of Dismissal, 2009) wherein the Union claimed that Duncannon Borough was bound by its mayor's resolution of a grievance at step 2 of the grievance procedure challenging the discharge of a police officer. The Hearing Examiner concluded that Duncannon Borough did not engage in unfair practices by refusing to abide by the mayor's grievance settlement to reinstate the officer because, under Section 1121 of the Borough Code, only borough council is authorized to appoint or remove police officers. (Borough's Post-hearing Brief at 3). Thus, argues Berwick Borough here: "[S]ince the resolution of this grievance falls within the statutory purview of Berwick Borough Council, Mayor Burke's resolution of the grievance is not binding unless there was a complete, clear, and unequivocal delegation of Council's authority to him," which there has not been. (Borough's Post-hearing Brief at 4). "Here, the mere inclusion of the Mayor in the grievance procedure is not sufficient to constitute such a delegation." (Borough's Post-hearing Brief at 4).¹

The Union also recognizes the exception to the general rule under Somerset Borough and admits that, where a mayor lacks statutory authority to resolve a grievance, he may not do so merely by being included in the contractual grievance procedure absent a clear and unequivocal delegation of council's statutory authority. (Union's Post-hearing Brief at 3). However, the Union argues that Somerset Borough is distinguishable and therefore not controlling here.

The Union contends that, contrary to Somerset Borough, (wherein Council had not ceded to the mayor its statutory authority to fix and determine police hours and that mayor's grievance resolution contravened those statutory powers), the legislative and other exclusive statutory powers of Borough Council are not being encroached upon here. (Union's Post-hearing Brief at 5). The Union maintains that the Council agreed in the CBA with the Union that "vacancies in the police department shall be filled within specified periods of time and in accordance with the guidelines of its Civil Service Commission. To the extent that the Borough fails to abide by those contractual limitations, it violates the contract, which gives rise to a grievance that the mayor, at the second step in the grievance procedure, may resolve." (Union's Post-hearing Brief at 5).

The Union further argues that Duncannon Borough is also distinguishable. (Union's Post-hearing Brief at 7). In Duncannon Borough, the mayor sustained a grievance challenging the dismissal of a police officer. Relying on Somerset Borough and the Board's decision in Jefferson County Court Appointed Employees Ass'n v. Jefferson County, 36 PPER 140 (Final Order, 2005), the Hearing Examiner dismissed the unfair labor practice charge and concluded that the mayor had improperly encroached on council's statutory authority to hire and, therefore, Duncannon Borough was not bound by the mayor's decision to rehire the officer after discharge. (Union's Post-hearing Brief at 7). The Union maintains that the Hearing Examiner's Duncannon Borough decision was in error because the Supreme Court subsequently reversed Jefferson County, which undermines any reliance on [Somerset Borough]." (Union's Post-hearing Brief at 7-8). The Union maintains that, in this case, the CBA "provides a mechanism for the resolution of grievances by a party other than the municipality's governing body by virtue of its delegation

¹ The Board, by operation of law, has nullified lower steps of the grievance procedure in police agreements involving boroughs for certain types of grievances that would require the legislative, hour-setting or hiring authority of a borough council. These types of grievances are more properly initiated at the borough council level, and borough police contracts should so provide.

of such authority to a designated representative, the mayor." (Union's Post-hearing Brief at 9).

In Jefferson County Court Appointed Employees Ass'n v. PLRB, 985 A.2d 697 (Pa. 2009), the County Commissioners applied to the court of common pleas for permission to raise taxes to cover a budget shortfall because taxes had already been levied to the limit permitted by law. The court denied the County's request. Forced to cut expenditures to balance the County's budget, the County Commissioners reduced budget appropriations to various County departments including the Judiciary. The Commissioners charged the County Salary Board with implementing the budget reductions by eliminating positions. The Jefferson County Salary Board consists of the Commissioners, the President Judge and the Treasurer. The Salary Board voted to eliminate 11 County positions including five trial court employee positions that were defined in the collective bargaining agreement and determined by the Board to be necessary to the functioning of the court. The President Judge voted against eliminating the five trial court positions and the Salary Board allowed the President Judge to determine which five positions would be eliminated.

On the same day that the President Judge informed the five employees of the elimination of their positions, those employees filed grievances with their immediate supervisors, which was the first step in the grievance procedure. The supervisors sustained the grievances as did the President Judge, who determined that the grievants should be reinstated. The President Judge forwarded his determination to the Commissioners. The Commissioners refused to reinstate the grievants concluding that the President Judge lacked the authority to resolve the grievances because the grievance settlements contravened the County's exclusive right to set the County budget for all County departments including the Judiciary.

Hearing Examiner Lassi concluded in Jefferson County that, "[h]aving negotiated a CBA where the employees' immediate supervisors and department head are delegated the authority to resolve grievances at steps one and two of the grievance procedure, the County is bound by its designated representatives' resolution of the grievances in favor of the employees." Jefferson County Court Appointed Employees Ass'n v. Jefferson County, 36 PPER 78 at 213 (Proposed Decision and Order, 2005). Examiner Lassi further held that "the County has not demonstrated that compliance with the grievance settlements requires raising of additional taxes." Id.

The Board concluded that the President Judge's grievance settlements were not valid because they encroached on the exclusive legislative power of the Commissioners in setting the budget. The Supreme Court, however, reversed both the Commonwealth Court and the Board. In reversing the Board, the Supreme Court specifically noted that the Salary Board acts in an administrative capacity rather than a legislative one in setting salaries and compensation for County employees within the budget and that the authority to appropriate funds and levy taxes is vested in the Commissioners. Id. at 701, n.4. Consequently, our Supreme Court reinstated the Hearing Examiner's determination that the record failed to support the conclusion that the grievance settlements encroached upon the County's authority to establish a budget. In this context, our Supreme Court opined as follows:

It is noteworthy that the Judiciary did not request more funding than the County had already allocated to it and, regardless of the outcome of the grievances, . . . the Judiciary remained obligated to determine how to operate within its budget. . . . The Judiciary, therefore, possessed the collectively bargained for authority to settle the grievance, which did

not equate to a demand for additional funds from the County, and did not contravene the County's legislative budget-making function by doing so.

Id. at 709 (emphasis added).²

Somerset Borough and Duncannon Borough are distinguishable and the Supreme Court's holding in Jefferson County controls the disposition of the instant case. In Somerset Borough and Duncannon Borough, the records established that the grievance settlements by the mayors in those two cases indeed interfered with the exclusive statutory authority of borough council to set hours for and hire police officers. This case is more like Jefferson County, however, because Mayor Burke's grievance settlement did not encroach on the legislative functions or exclusive statutory authority of the Borough Council. The Civil Service Commission here, like the Salary Board in Jefferson County, performs administrative rather than legislative functions and is subordinate to Borough Council. Because the Civil Service Commission is a subordinate administrative body to Council, the Mayor is not encroaching on the separate, co-equal legislative or statutory functions of Council. In settling the grievance, Mayor Burke directed that the Civil Service Commission develop a new list of officer candidates by following its own procedures and rules. The grievance settlement does not require Borough Council to hire any particular officers at this point, which would be an encroachment on the exclusive authority of Council.

The grievance merely requires the subordinate administrative Civil Service Commission to implement Mayor Burke's grievance settlement, like the President Judge's grievance settlement in Jefferson County required the administrative Salary Board to act. The Borough Council's authority to hire police officers is not impacted or triggered until the Civil Service Commission complies with the grievance settlement and develops a new list. In this case, Borough Council expressly, clearly and unequivocally agreed to incorporate the non-legislative, administrative Civil Service process into the CBA and designated the mayor as the Borough representative to address and potentially resolve grievances arising from those contractual provisions. Accordingly, the Borough is engaging in unfair labor practices by refusing to implement the Mayor's grievance settlement.

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 is a public employer and a political subdivision within the meaning of the PLRA as read in pari materia with Act 111.

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

² I disagree with the Union's position that the Supreme Court's holding in Jefferson County "undermines any reliance" on Somerset Borough or in any way sub silentio overruled Somerset Borough. The Supreme Court's Jefferson County decision, relevant to this case, hinged on the fact that the record did not establish that the President Judge's grievance settlement encroached on the County Commissioners' constitutionally protected legislative authority to establish the budget. The Court did not hold that such a grievance settlement would have been enforceable if the record had established such an encroachment, which would have been the required holding to overrule this Board's decision in Somerset Borough.

3. The Board has jurisdiction over the parties hereto.

4. The Borough has committed unfair labor practices within the meaning of Section 6(1)(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 Borough shall

1. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

2. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in in pari materia with the PLRA:

(a) Immediately implement the Mayor's second step grievance settlement by holding a Civil Service Commission meeting and by applying established Civil Service rules, regulations and procedures to the officer candidate selection process;

(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 tenth day of July, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violations of Section 6(1)(e) of the Pennsylvania Labor Relations Act as read in pari materia with Act 111; that it has immediately implemented all terms and conditions of the Mayor's second step grievance settlement; that it has posted a copy of the proposed decision and order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public