COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LOWER MORELAND TOWNSHIP POLICE BENEVOLENT ASSOCIATION	:	
v.	:	Case No. PF-C-16-85-E
LOWER MORELAND TOWNSHIP	:	

PROPOSED DECISION AND ORDER

On September 9, 2016, the Lower Moreland Township Police Benevolent Association (Association or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Lower Moreland Township (Township or Employer), alleging that the Township violated Section 6(1)(a), (c), and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, by unilaterally changing a longstanding past practice regarding the application of reckoning periods in the imposition of discipline for bargaining unit members.[1]

On September 27, 2016, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating December 19, 2016, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary and was held on December 19, 2016, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief on March 20, 2016. The Township filed a post-hearing brief on March 22, 2016.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Township is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 3)

2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 3-4)

3. The Association and Township were parties to a collective bargaining agreement (CBA), which was effective from January 1, 2014 through December 31, 2015. (PBA Exhibit 9)

4. Shawn McCoy has been employed as a police officer with the Township since April 2010. (N.T. 10)

5. Peter Hasson has been employed as the Township's Chief of Police since 2000. (N.T. 39, 53-54)

6. In August 2016, McCoy was disciplined for missing a preliminary hearing scheduled for June 29, 2016. In connection therewith, McCoy had a meeting with Hasson on August 5, 2016, during which Hasson advised that he was recommending a 10-day suspension to the Board of Commissioners for neglect of duty. McCoy requested that the Chief consider a reckoning period or a period of time in which no disciplinary action has occurred, so as to render the most recent discipline a first offense. (N.T. 10-11, 15, 57, 61; PBA Exhibit 2)

[1] The Association withdrew its allegation that the Township violated Section 6(1)(c) of the PLRA in its post-hearing brief. (Association post-hearing brief at 2).

7. McCoy inquired about the reckoning period because he had gone for more than a year without discipline. Hasson declined to apply any reckoning period. (N.T. 11-12; PBA Exhibit 1)

8. On July 31, 2012, McCoy received a Letter of Reprimand from Hasson for an incident involving a failure to acknowledge radio transmissions and an untimely response to a call. The Chief's Memorandum indicates that "[t]his document shall serve as a Letter of Reprimand for Officer McCoy's actions on July 3, 2012. It will remain in Officer McCoy's file for a period of one year from the date of the incident, provided there is no repeat of a similar type incident." (N.T. 14; PBA Exhibit 3)

9. On September 25, 2012, McCoy received a Letter of Reprimand from Hasson for responding to a call in another township without permission or that township's request for assistance. The Chief indicated that "[t]his document shall serve as a Letter of Reprimand and shall be placed in Officer McCoy's personnel file for a period of one year from the date of the incident. It may be removed at that time provided that there are no further disciplinary issues during that time." (N.T. 14-15; PBA Exhibit 4)

10. In recommending the 10-day suspension for McCoy in August 2016, Hasson considered prior instances of discipline over the past several years, including prior suspensions. (N.T. 58-59, 63; Employer Exhibit 2)

11. Hasson has applied a one-year reckoning period for several officers who received various Letters of Reprimand between 2008 and 2012. (N.T. 42-44; PBA Exhibit 8)

12. By letter dated August 11, 2016, Hasson notified McCoy that the Board of Commissioners voted on August 9, 2016 to approve the recommendation that McCoy be suspended for 10 days. (PBA Exhibit 2)

DISCUSSION

The Association has charged the Township with violating Section 6(1)(a) and (e) of the PLRA[2] and Act 111 by unilaterally changing a longstanding past practice regarding the application of reckoning periods in the imposition of discipline for bargaining unit members. Specifically, the Association argues that the parties have a past practice of applying one-year reckoning periods for the offense of neglect of duty, which the Township changed without bargaining with the Association when the Chief declined to apply a reckoning period and suspended McCoy for 10 days in August 2016. The Township contends that the charge should be dismissed because the parties have no past practice regarding reckoning periods.

In determining whether an employer has committed a bargaining violation by contravening an established past practice, the Board must initially decide whether the change involves a mandatory subject of bargaining. **South Park Township Police Ass'n v. PLRB**, 789 A.2d 874 (Pa. Cmwlth. 2002); **City of Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre**, 33 PPER ¶ 33087 (Final Order, 2002). An employer may not act unilaterally regarding a mandatory subject of bargaining without satisfying its statutory bargaining obligations with its employes' union representative. **Teamsters Local Union 764 v. Lycoming County**, 41 PPER 8 (Proposed Decision and Order, 2010). In **Fairview Township**, 30 PPER ¶ 30209 (Proposed Decision and Order, 1998), 31 PPER ¶ 31019 (Final Order, 1999), the Board found the application of reckoning periods in disciplinary matters to be a mandatory subject of bargaining.[3]

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[2] Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act...(e) To refuse to bargain collectively with the representatives of his employes, subject to the provisions of section seven (a) of this act. 43 P.S. § 211.6.

[3] It is well settled that the Board properly relies on precedent to determine whether a matter constitutes a mandatory subject of bargaining rather than reinventing the wheel by applying the Act 111 balancing test to arrive at the same result as the established precedent. **Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Dept. of Corrections, Fayette SCI**, 35 PPER 58 (Proposed Decision and Order, 2004) citing **Teamsters Local 77 & 250 v. PLRB**, 786 A.2d 299 (Pa. Cmwlth. 2001). Although the decision regarding the negotiability of a particular subject is in part fact driven (i.e. balancing the relationship of the issue to Section 1 matters on one hand and core managerial interests on the other), once the Board has conducted this analysis the result is precedential for future cases on the same or similar facts. **Fayette SCI**, **supra**. Of

In **City of Wilkes-Barre**, **supra**, the Board noted that it has consistently applied the definition of past practice adopted by the Pennsylvania Supreme Court in **County of Allegheny v. Allegheny County Prison Employees Independent Union**, 381 A.2d 849 (Pa. 1978) and stated as follows:

> [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. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to underlying circumstances presented. *Id.* quoting **County of Allegheny**, at 852, n. 12. In **Ellwood City Police Wage and Policy Unit v. Ellwood City**, 29 PPER ¶ 29214 (Final Order, 1998), **aff'd**, 731 A.2d 670 (Pa. Cmwlth. 1999), the Board stated that '[t]he definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances.' *Id.* at 507. In **Pennsylvania Liquor Control Board Officers III v. Pennsylvania State Police, Bureau of Liquor Control Enforcement**, 24 PPER ¶ 24171 (Final Order, 1993), the Board held that, where evidence of past practice revealed a divergent application of a seniority system in selecting vacation periods, there was no past practice.

In the instant matter, the Association has not sustained its burden of proving that the Township unilaterally changed a past practice regarding the application of reckoning periods in the imposition of discipline for bargaining unit members. In the specification of charges, the Association specifically alleged that the parties had a past practice of applying a one-year reckoning period for offenses classified as neglect of duty. According to the Association's theory, the past practice developed as a result of a policy adopted by the previous Chief in the 1990's. However, the record is devoid of any evidence whatsoever that either Hasson or the previous Chief ever applied a reckoning period for a neglect of duty offense. Instead, the only record evidence shows that Hasson applied a reckoning period for minor offenses, which he addressed through Letters of Reprimand. Without more, I am unable to conclude that the parties had a past practice of applying a one-year reckoning period for more serious offenses, such as neglect of duty, as alleged by the Association. Indeed, Hasson specifically testified that he does not apply reckoning periods to more serious offenses, such as neglect of duty. (N.T. 44-45, 71-73). At best then, the record shows a divergent application for reckoning periods here. Although the Association introduced as PBA Exhibit 7 a procedural directive issued by the prior Chief in the 1990's, which provides for a one-year reckoning period for the neglect of duty offense with which McCoy was charged, the Board has held that an existing policy, which has never been acted upon, is insufficient to establish a past practice. **AFSCME Council 13 v. Pennsylvania State System of Higher Education**, PERA-C-15-98-E (Final Order, 2017). As previously set forth above, there is no evidence that the Township has ever applied a reckoning period for a neglect of duty offense. Accordingly, the charge must be dismissed.[4]

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course, where a party introduces new or different facts that may alter the weight the matter at issue bears on the interests of the parties, additional analysis may be warranted. The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such a departure. *Id.* (citing **Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre**, 33 PPER ¶ 33087 (Final Order, 2002). In this case, the Township has not introduced any new or different facts to justify a departure from the Board's established precedent, nor has the Township even argued that reckoning periods are not a mandatory subject of bargaining. Thus, it must be concluded that the reckoning periods here are a mandatory subject of bargaining.

[4] The Association has not submitted any evidence to support its allegation of an independent violation of Section 6(1)(a) of the PLRA. Therefore, the charge of an independent violation of Section 6(1)(a) will also be dismissed.

CONCLUSIONS

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

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

2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA.

3. The Board has jurisdiction over the parties hereto.

4. The Township has not committed unfair labor practices in violation of Section 6(1)(a) or (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 25th day of May, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner