

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LABORERS INTERNATIONAL UNION OF NORTH:
AMERCIA, LOCAL 1310 :
 :
 v. : CASE NO. PERA-C-16-45-E
 :
 CITY OF WILKES-BARRE :

PROPOSED DECISION AND ORDER

On February 10, 2016, as amended on April 1, 2016, the Laborers International Union of North America, Local 1310 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Wilkes-Barre violated Section 1201(a) (1) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the City unilaterally eliminated bargaining unit positions, diverted bargaining unit work and failed to abide by the contractual bumping provisions.

By letter dated March 15, 2016, the Secretary of the Board informed the Union that it was unable to process the charge until the Union provided a copy of the collective bargaining agreement and alleged which work had been specifically reassigned. On April 13, 2016, the Secretary issued an amended complaint and notice of hearing, after receiving the amended charge with requested attachments, and therein designated a hearing date of June 3, 2016, in Harrisburg. After several granted continuances at the request of both parties, the hearing was held on April 12, 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. On July 14, 2017, the Union filed its post-hearing brief. The City filed its post-hearing brief on August 4, 2017.

The examiner, based upon the testimony, exhibits and all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7-8)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7-8)
3. Ken Pahler was the Deputy Director of the Department of Public Works (DPW) for over 12 years. In that position, he handled sanitation, recycling, parks, golf course, roads, bridges and snow and tree removal; he maintained DPW vehicles; he supervised mechanics; and he purchased DPW equipment for the City. (N.T. 20; Joint Exhibit 4)
4. On July 21, 2006, the City agreed to include the position of Deputy DPW Director in the bargaining unit under certain conditions. (N.T. 43-44, 47; Union Exhibit 2)

5. On January 3, 2012, the City and the Union signed a Memorandum of Agreement (MOA), agreeing that "language will be added [to the CBA] to allow management to assign related duties to any job without triggering the bumping clause." ¹ (Joint Exhibit 2, ¶ 6)

6. The MOA further provides that "[o]nly two things will trigger bumping:" (1) The complete elimination of a job; and (2) changes in a job which are so significant, it renders the original job unrecognizable. (Joint Exhibit 2, ¶ 6)

7. In November 2015, the Mayor-elect was Tony George. At this time, the Mayor-elect's transition team met with Union representatives at the Union Hall on North Washington Street in the City. There were two meetings, one in November and one in December 2015. Present at these meetings for the City were the City Solicitor, Tim Henry, Mayor-elect George, Greg Barrouk, the City Administrator, and Human Resources Director Ellen Meehan. Present at the meeting for the Union were Tom Borum, Tony Seiwel and Paul Grace, although there may have been slight differences in attendance between the two meetings. Mayor-elect George was sworn in as the City's Mayor on January 4, 2016. (N.T. 62, 76-78, 104-108)

8. At both meetings, the City's administration discussed with the Union that the City wanted to eliminate Mr. Pahler's position. The Union did not agree. The Mayor-elect was "fairly clear that he was eliminating [Mr. Pahler's] position." (N.T. 77-80, 104-105, 108-110, 111-112)²

9. Ellen Meehan was the Human Resources Director in January 2016. She called Mr. Pahler into her office on Wednesday, January 6, 2016. Also at the meeting on that date was Solicitor Henry, and they informed Mr. Pahler that the City was eliminating his position. (N.T. 22-23, 26, 47; Joint Exhibit 4)

10. On January 7, 2016, Ms. Meehan issued a memorandum to Mr. Pahler memorializing the January 6, 2016 meeting and informing Mr. Pahler of his bumping rights. (Joint Exhibit 4)

11. The January 7, 2016 letter provides, in relevant part, as follows:

On Wednesday, January 6, 2016, you were informed by myself and City Attorney Tim Henry that the City of Wilkes-Barre has made the determination to eliminate your position.

Therefore, and in accordance with Article VII, Section 3, Subsection (b), you have the right to "bump" an employee with

¹ The January 3, 2012 MOA contains a date of December 29, 2011 in the heading of the document, but it was not signed until January 3, 2012.

² There is a conflict in testimony between the Union's witness, Mr. Borum and the City's witness, Mr. Henry. Mr. Borum testified that, at the December 2015 post-election meeting between the new administration and the Union, the Mayor-elect merely presented the desire to eliminate Mr. Pahler's position and sought to negotiate it. Mr. Henry testified that the Mayor-elect made it "fairly clear that he was eliminating [Mr. Pahler's] position," at both post-election meetings in late 2015. (N.T. 108-109). I resolve this conflict in favor of the City and Solicitor Henry.

less overall seniority in a job which you can perform within thirty (30) working days. You must be able to perform the job duties of the position into which you bump in a manner which is satisfactory to the City within thirty (30) working days of assignment. The City, in its sole discretion, shall determine if you are performing in a satisfactory manner.

You have five (5) work days in which to exercise your "bumping" rights. The five (5) work days shall commence on Thursday, January 7, 2016 and terminate on Wednesday, January 13, 2016. Please provide me, in writing, the job position in which you intend to "bump" no later than Wednesday, January 13, 2016.

I have provided your Union Representative with information you may want to consult relative to the job duties and qualifications of the positions into which you may bump within the PSE Local #1310 bargaining unit. Please consult with your Union Representative to review this information if you so desire.

(Joint Exhibit 4).

12. The parties' CBA, Article XXII, provides, in relevant part, as follows:

Section 1. If the City is considering contracting out a service, they will first inform the Union of the same and meet with them to discuss the issue and receive input from the Union. The Union will have the opportunity to present written evidence to the City supporting their claim that they are capable of performing the service as efficiently and cost effectively as the contractor or assignee. However, the City will still retain the right to contract out or assign the work, regardless of the outcome of these discussions.

(Joint Exhibit 1, Article XXII, § 1)

13. The position of Program Manager requires a Bachelor's Degree or comparable experience. The City will accept only a candidate with a Bachelor's Degree for the position of Purchasing Agent. (N.T. 128-132)

14. Mr. Pahler does not possess a Bachelor's Degree. Mr. Pahler had been off work for a worker's compensation injury since at least January 12, 2016. Mr. Pahler could not bump into another position while on worker's compensation leave. He has also been approved for Social Security Disability benefits. He was denied two positions into which he sought to bump. The City denied him those positions because he was unqualified, in the City's view. He was not interviewed for those positions. Those two positions were the Program Manager and Purchasing Agent positions. Mr. Pahler was awarded the third position

into which he sought to bump, and he currently holds that position with the City.³ (N.T. 47, 49-53, 120, 123, 127, 133)

15. The only similarity between the positions of Purchasing Agent, Program Manager and Deputy DPW Director, Mr. Pahler's former position, is purchasing. Mr. Pahler's purchasing was limited to purchases for DPW equipment. All purchases for police, fire and DPW vehicles go through the Purchasing Agent. (N.T. 123-124)

16. The Program Manager Position is part of the Community Development Office, which is collateral to DPW, and Mr. Pahler was not involved in that Office. The Purchasing Agent Position reports directly to the Finance Director for the City. Mr. Pahler reported directly to the Director of DPW, when he was Deputy DPW Director. (N.T. 125)

17. Since the elimination of the Deputy DPW Director position, Mr. Pahler has observed other bargaining unit employees performing his old job duties. The City has assigned most of Mr. Pahler's former duties, as Deputy DPW Director, to Ron Romanelli. Mr. Romanelli is in the bargaining unit. (N.T. 42, 66-67, 72)

DISCUSSION

During the hearing, the Union withdrew the charge with respect to the alleged elimination of two of the positions included in the charge. With respect to eliminating positions, the Union is now only disputing the elimination of one position. (N.T. 8). In sum, the Union alleges that the City removed bargaining unit work and assigned the work to non-unit employees, that the City unlawfully eliminated the position of Deputy DPW Director without bargaining in violation of the Act and that the City violated the bumping provisions of the CBA. The record does not contain substantial, competent evidence that the City removed bargaining unit work or in some manner reassigned bargaining unit work to non-unit employees. Accordingly, that part of the charge is dismissed.

The Union argues that, according to the MOA signed on January 3, 2012, the position of Deputy DPW Director was a bargained-for position and, therefore, could not be unilaterally eliminated without bargaining to agreement with the Union. The City parries with a contractual privilege defense.

In Fraternal Order of Transit Police v. Southeastern Pennsylvania Transportation Authority (SEPTA), 35 PPER 73 (Final Order, 2004), the Board aptly opined as follows:

In Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212, 117 L.R.R.M. 1062 (1984) and Vickers, Inc., 153 N.L.R.B. 561, 59 L.R.R.M./ 1516 (1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Ellwood City Police Wage and Policy Unit v.

³ The record does not specifically identify the position that Mrs. Pahler currently holds. The City identifies the position as the Recreation Manager in its brief.

Ellwood City Borough, 28 PPER 28200, at 433 (Final Order, 1997). The Commonwealth Court has sanctioned the Board's adoption and application of the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB (PSTA I), 804 A.2d 1291 (Pa. Cmwlt. 2002); Pennsylvania State Troopers Ass'n v. PLRB (PSTA II), 761 A.2d 645 (Pa. Cmwlt. 2000). "The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained for agreement, for the claim that the employer's action was permissible under the agreement." PSTA II, 761 A.2d at 651. "An employer's interpretation need not necessarily be the correct interpretation in order to provide a valid defense, so long as there is a 'sound arguable basis' for its interpretation and a 'substantial claim of contractual privilege.'" Jersey Shore, 28 PPER at 340. In this regard, ***the Board "will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct."*** Id. at 341 (quoting NCR Corp., 117 L.R.R.M. at 1063).

SEPTA, 35 PPER at 229 (emphasis added).

A reasonable interpretation of Article XXII of the parties' CBA, the January 3, 2012 MOA, as well as the bumping and seniority provisions of the CBA is that the City already bargained for the right to eliminate positions, with the concomitant right of more senior employees to bump into other positions held by less senior employees, as long as the administration meets and discusses the matter with the Union. Article XXII also reasonably permits the City to reassign the duties of the eliminated position to other employees within the bargaining unit.

The record shows that the administration officials and the Mayor-elect met with the Union twice in late 2015 to inform them that the City was definitely eliminating Mr. Pahler's position. The parties further discussed the matter during those two meetings.⁴ The CBA does not impose a bargaining obligation on the City for purposes of position elimination. The City satisfied its meet-and-discuss obligations and eliminated Mr. Pahler's position relying on a reasonable interpretation of Article XXII. The City's interpretation does not have to be correct, and the Board need not act as an arbitrator to determine which party's interpretation is correct. The City only has to demonstrate a sound arguable basis for its interpretation, which burden it has satisfied here. Moreover, absent a contractual prohibition to the contrary, the City is not any more restricted in eliminating a position, which it agreed with the Union to include in the bargaining

⁴ The Union argues that Article XXII of the CBA requires "discussions," which means that more than one meeting must occur. The Union also contests that there were two meetings. However, I have credited the Solicitor's testimony that two meetings occurred. (N.T. 104-108). Also, a reasonable interpretation of the CBA is that "discussions" do indeed occur when parties revisit a topic during the same meeting or address a topic involving different people at different times during the same meeting or on the same date.

unit, than it is restricted in eliminating a position that this Board may have placed in the bargaining unit.

The Union further claims that the City failed to honor the bumping provisions of the CBA by not permitting Mr. Pahler to bump into either the Purchasing Agent position or the Program Manager position. The Union argues, as did Mr. Pahler at the hearing, that Mr. Pahler was qualified for those two positions and that the City failed to follow the contract by not permitting him to bump into either of those two positions. The record shows that Mr. Pahler is currently holding a City position into which he was permitted to bump after determining that he was qualified for the position he currently holds and not qualified for the first two positions. Under Article VII, Section 3 of the CBA, the City retains the right to determine qualifications for any candidate for a position when bumping is involved, based on, but not limited to, education, physical ability and experience. Also, under Board law, absent a contractual provision to the contrary, a public employer has an absolute managerial prerogative to establish and determine qualifications for positions. Service Employees International Union, Local 668 v. Commonwealth of Pennsylvania, Department of Military and Veterans Affairs, 40 PPER 88 (Final Order, 2009); FOP Rose of Sharon Lodge No. 3 v. City of Sharon, 29 PPER ¶ 29147 (Final Order, 1998) In its January 7, 2016 letter to Mr. Pahler, the City specifically cited Article VII, Section 3 and stated: **"You must be able to perform the job duties of the position into which you bump in a manner which is satisfactory to the City within thirty (30) working days of assignment. The City, in its sole discretion, shall determine if you are performing in a satisfactory manner."** (F.F. 11; Joint Exhibit 4) (emphasis added).

Mr. Pahler testified that the Purchasing Agent position and the Program Manager position were below his Deputy DPW Director position, that he supervised those allegedly subordinate positions and that he had done all the job duties of those positions. However, the City's witness credibly contradicted his testimony and established that Mr. Pahler was not, in its view, qualified for those positions. This determination was well within the City's managerial prerogative. Commonwealth, Department of Military and Veterans Affairs, supra. The Purchasing Agent position requires a Bachelor's Degree, which Mr. Pahler does not possess. The Program Manager position requires either a Bachelor's Degree or comparable experience and the City determined (and credibly established) that Mr. Pahler's experience was not comparable.

Moreover, at the time Mr. Pahler sought to bump into those positions, he was on leave for a worker's compensation injury and had been approved for Social Security Disability benefits, rendering him unqualified, due to his unavailability and physical condition, to bump into either of those two positions. Also, contrary to Mr. Pahler's testimony, the duties of the Purchasing Agent position and the duties of the Program Manager position were not similar to his duties as Deputy DPW Director. The only similarity between the positions of Deputy DPW Director, Mr. Pahler's former position, on the one hand and the Purchasing Agent and Program Manager, on the other hand, is purchasing. Mr. Pahler's purchasing was limited to purchases for DPW equipment. All purchases for police, fire and DPW vehicles go through the Purchasing Agent.

Furthermore, the Program Manager Position is part of the Community Development Office, which is collateral, and not subordinate to, the chain of command in DPW. Mr. Pahler was not involved with the Community Development Office. The Purchasing Agent Position reports directly to the Finance Director for the City. This position too is not in the DPW chain of command. Mr. Pahler, however, reported directly to the Director of DPW when he was Deputy DPW Director. Accordingly, Mr. Pahler did not have the experience with the general job duties of the Purchasing Agent or the Program Manager, which were in other departments or offices, except to the extent that portions of those other two positions involved purchasing.

It is not within the province of this Board to review and evaluate the City's expertise in determining the qualifications that a candidate may or may not have for filling a certain position. City of Sharon, supra; Department of Military and Veterans Affairs, supra. The City's determinations about Mr. Pahler's qualifications were indeed reasonable and, therefore, the CBA was properly applied. He did, after all, receive a position with the City for which the City deemed him qualified. Therefore, the City did not engage in unfair practices and reasonably applied the CBA bumping provisions with respect to Mr. Pahler.

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 is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The City has not committed unfair practices within the meaning of Section 1201(a)(1) or (5).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of September, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner