

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

INDIANA COUNTY DEPUTY SHERIFF'S :  
ASSOCIATION :  
 : Case No. PERA-C-18-153-W  
v. :  
 :  
INDIANA COUNTY SHERIFF AND INDIANA :  
COUNTY :

**PROPOSED DECISION AND ORDER**

On June 29, 2018, the Indiana County Deputy Sheriff's Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Indiana County Sheriff (Sheriff) and Indiana County (County), alleging that the Respondents violated Section 1201(a)(1), (3), and (5) of the Public Employee Relations Act (PERA or Act) by unilaterally changing a longstanding past practice and prohibiting deputy sheriffs from working secondary law enforcement jobs.

On July 20, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on November 28, 2018, in Pittsburgh, if necessary.

The hearing ensued as scheduled on November 28, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Respondents filed a post-hearing brief on March 15, 2019. The Association filed a post-hearing brief on March 18, 2019.

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 Respondents are both public employers within the meaning of Section 301(1) of PERA. (N.T. 7)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7)
3. The Association is the certified bargaining agent for a unit of deputy sheriffs employed with the County Sheriff's office. (Association Exhibit 3)
4. The Association and the County are parties to a collective bargaining agreement (CBA) effective January 1, 2017 to December 31, 2019. (Association Exhibit 3)
5. For at least 19 years, the Sheriff has allowed the deputy sheriffs in his office to work secondary employment in a law enforcement capacity. (N.T. 11-14)
6. By memo dated May 3, 2018, Sheriff Robert Fyock circulated a notice of "Procedures and Policy Changes," which provided in relevant part as follows:

SECONDARY LAW ENFORCEMENT EMPLOYEE POSITIONS;

PRIMARY DUTY TO SHERIFF'S OFFICE - All members engaging in secondary employment must recognize that their primary duty, obligation and responsibility is to the Indiana County Sheriff's Office. Members are subject to call at all times, for emergencies, special assignments or extra duty and no secondary employment may infringe on these obligations.

The Indiana County Sheriff's Office has taken on more responsibilities and we must meet our obligation as to what we are required to do. Additional duties may still be added in the future and we are getting contacted to assist with more emergency situations. Effective the above date [May 3, 2018], Deputy Sheriffs will no longer be authorized to have or work in secondary law enforcement duties or positions.

All Deputies, will perform all duties: Security, Domestic Relations, Children & Youth Services, Civil, Transports, Office, Court, or Afternoon/Night Shift(s) or Special Detail(s) if needed or assigned.

Other Policy and Procedures in Addition to Standard Operating Procedures (SOP) may be changed or updated if necessary.

(N.T. 12-14; Association Exhibit 2)

7. By memo dated May 4, 2018, Fyock circulated an "inter-office memo," which provided in relevant part as follows:

Due to the lack of compliance with the current secondary employment policy and the current needs of this agency, the following will be effective "30" days from the date of this memo.

I will not authorize secondary employment as a Part Time Police Officer by Full Time employees of this agency. If you are currently employed as a Part Time Police Officer in any capacity you will terminate that employment within "30" days of the date of this memo. (See Section C Subsection 12 of the [Indiana County Sheriff's Office] SOP).

If you are currently working secondary employment (non law enforcement) in which you have not submitted a written request to the Sheriff, you have "30" days from the date of this memo to do so.

Any full time member or employee who desires to gain part time employment in a non law enforcement profession shall submit a request in writing to the Sheriff for approval using a "Secondary Employment Application Form." A form must be submitted for **each position** you are requesting approval for.

Any part time deputy that gets promoted to a full time Deputy position shall terminate any part time law enforcement position within "30" days of the promotion.

Any member or employee who has been approved for secondary employment must under Section C Subsection 13 recognize that you are subject to call at all times for emergencies, special assignments, or extra duties.

This Policy will be strictly adhered to, with **NO EXCEPTIONS!!!**

(Association Exhibit 2) (Emphasis in original)

8. The Sheriff implemented the policy without bargaining with the Association. (N.T. 21, 146)

9. Fyock testified that he has several reasons for the policy, including an increase in the number of man hours for his deputy sheriffs, never knowing what might come up, the potential for an even greater increase of duties, a greater risk of injury in law enforcement positions, the potential for fatigue and conflicts of interest, and availability during emergencies in the secondary position. (N.T. 148-152)

10. As a result of the policy, five deputy sheriffs had to terminate their secondary law enforcement jobs within 30 days of the memo or face discipline at that point. Deputy sheriffs working secondary jobs in non-law enforcement positions did not have to terminate their positions. (N.T. 15-16)

11. By order dated September 19, 2018, the Court of Common Pleas of Indiana County enjoined the Sheriff from enforcing the secondary law enforcement policy as it applied to the five deputy sheriffs having secondary law enforcement jobs as of May 3, 2018. (N.T. 45-46; Association Exhibit 5)

#### DISCUSSION

The Association's charge alleges that the Respondents violated Section 1201(a)(1) and (5) of PERA<sup>1</sup> by unilaterally changing a longstanding past practice and prohibiting deputy sheriffs from working secondary law enforcement jobs.<sup>2</sup> The Sheriff, on the other hand, maintains that the charge should be dismissed because the secondary employment policy is a matter of inherent managerial prerogative, which outweighs the interests of the employees. The Sheriff also contends that he had the managerial right to adopt the policy under Section 1620 of the County Code. The Sheriff further posits that there has been no unilateral change in terms and conditions of employment because the Sheriff has always had a policy providing for his authority to regulate and approve or disapprove types of secondary employment, along with the number of hours worked.

Preliminarily, both parties agree that this matter is controlled by the balancing test set forth by the Pennsylvania Supreme Court in PLRB v. State

<sup>1</sup> Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(5) 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. 43 P.S. § 1101.1201.

<sup>2</sup> The Association withdrew the charge under Section 1201(a)(3) of the Act during the November 28, 2018 hearing. (N.T. 172).

College Area School District, 337 A.2d 262 (Pa. 1975), wherein the Court opined:

[W]hen an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours, and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the Courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours, and terms and conditions of employment, the public employer shall be required to meet and discuss such subject upon request by the public employes' representative pursuant to Section 702.

*Id.* at 268. The complainant in an unfair practices proceeding has the burden of proving the charges alleged. St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977). The Board will find an employer in violation of its bargaining obligation enforceable under Section 1201(a)(1) and (5) of the Act if the employer unilaterally changes a mandatory subject of bargaining. PLRB v. Mars Area School District, 389 A.2d 1073 (Pa. 1978). If, however, the employer changes a matter of inherent managerial policy under Section 702 of the Act, then no refusal to bargain may be found. State College, *supra*.

The Board has found secondary employment policies to be a mandatory subject of bargaining in some cases, and an inherent managerial prerogative in others. In Abington School District, 18 PPER ¶ 18188 (Proposed Decision and Order, 1987), the Hearing Examiner found that a rule, which prohibited "engaging in any outside employment which interferes with availability for work or ability to perform work," was a mandatory subject of bargaining. The Hearing Examiner's decision was affirmed by the Board, 19 PPER ¶ 19067 (Final Order, 1988), the Montgomery County Court of Common Pleas, 20 PPER ¶ 20064 (1989), and the Commonwealth Court. Abington Transportation Ass'n v. PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990). By contrast, the Board has found that a public employer is free to unilaterally implement a ban on outside employment when the purpose of that ban is to preserve the integrity of government and prevent conflicts of interest between its employes' public employment and private employment. Lincoln University Chapter American Ass'n of University Professors v. Lincoln University, 37 PPER 147 (Proposed Decision and Order, 2006) *citing* AFSCME Council 13 v. Commonwealth of Pennsylvania, 479 A.2d 683 (Pa. Cmwlth. 1984); PSSU Local 668, SEIU, AFL-CIO v. Bucks County, 25 PPER ¶ 25036 (Proposed Decision and Order, 1994). Thus, the determination is a fact specific inquiry.

The Respondents contend that this matter is controlled by Northampton County Deputy Sheriff's Ass'n v. Northampton County, 38 PPER 90 (Proposed Decision and Order, 2007), in which the Hearing Examiner found that the County's managerial concerns outweighed the interest of the employes in wages, hours, and terms and conditions of employment. In Northampton County, the sheriff had a longstanding policy prohibiting an employe with a full-time position with another employer from taking a full-time position with the sheriff's office, unless the employe retired or assumed a part-time position with the other employer. The sheriff in that case offered two reasons for the policy; to guarantee the appearance of a deputy in the case of an emergency at the county sheriff's office where his or her first allegiance

was, and to guarantee the safety of employees who use firearms. To that end, the sheriff testified that it was unsafe to have an employee work eight hours, then drive to work, and then work another eight to ten hours providing courtroom security and carry a firearm. 38 PPER at 247.

In this case, however, the Sheriff implemented a policy which prohibited the deputy sheriffs from engaging in secondary employment in law enforcement positions on even a part-time basis. In doing so, Fyock testified that one of his reasons for implementing the policy was to prevent fatigue among his employees, especially since they carry firearms and have to make split-second decisions about the use of deadly force. (N.T. 149-150). However, as the Association points out, Fyock conceded that he did not even keep track of secondary work hours or shifts performed by his deputy sheriffs. (N.T. 160). Instead, the Association introduced testimony from the deputy sheriffs that most of them averaged only about seven hours per week or less, and that at most, one deputy worked approximately 16 hours per week. (N.T. 86, 95, 104; Association Exhibits 6-9). As such, there is a stark contrast between the record here and Northampton County where the two deputy sheriffs at issue would have been working two full-time jobs consisting of at least eight-hour shifts. Indeed, the Sheriff here did not present any evidence whatsoever that the deputy sheriffs working secondary law enforcement jobs on a part-time basis do so at any time other than weekends when they are not working their regular shifts at the Sheriff's office. It is hard to imagine fatigue becoming such a critical factor where the employees are working one or two shifts per week on a part-time basis, especially if they are doing so primarily on the weekends. As a result, the Hearing Examiner's decision in Northampton County is inapposite, and while the Sheriff has legitimate concerns regarding fatigue among his employees, those concerns do not outweigh the substantial interest of the employees in earning significantly more wages in secondary law enforcement positions.

The Sheriff also testified that he was concerned about an increasing workload and lack of manpower as another "critical basis for the adoption of the Policy." See Respondent's Brief at 8. To that end, the Respondents contend that outside law enforcement employment is more likely to make a deputy sheriff unavailable during the work day due to the need to attend court hearings relating to the outside employment. Indeed, the Respondents introduced statistical evidence that the responsibilities and workload of the deputy sheriffs has significantly increased. (Employer Exhibit 2). Specifically, the deputy sheriffs have to provide security at three separate buildings, (N.T. 56, 108, 113-114), provide greater courtroom security, (N.T. 108, 114-115), spend more time transporting prisoners, (N.T. 62, 109-110, 118-119, 122-123, 136), serve more bench warrants, (N.T. 124), assist with bonds and children and youth services (CYS) in obtaining placement, (N.T. 119), and greater responsibilities with Protection From Abuse (PFA) orders and related hearings, (N.T. 64, 117, 121-123, 127-128), all of which represents an increase in the workload.

However, as the Association persuasively argues, the Respondent's exhibit fails to provide a calculation of the average man-hours per deputy, which is important because the Sheriff's office has hired more deputies to cover the increased workload. Indeed, the Sheriff's office hired two full-time deputy sheriffs to assist with the increased security at additional buildings, including the CYS facility. (N.T. 129). Likewise, the Respondents' own witness, Sergeant Ryan Hill, admitted that the Sheriff's office recently hired three additional part-time deputy sheriffs. (N.T. 129). Even more persuasively, the Association introduced testimony that all

five deputy sheriffs who worked secondary law enforcement jobs during 2018 had a total of six or seven hearings put together. (N.T. 77, 92, 98-99, 101-102, 104). Further, the deputy sheriffs used their own personal leave time, which they earned pursuant to the CBA, to attend these hearings. (N.T. 26). What is more, Fyock and Hill both conceded that if the workload for any given day did not allow for time off, the request for leave could simply be denied. (N.T. 141, 154). It is unclear exactly how this scheduling issue interferes with the essential functions of the Sheriff's office any more than sick leave callouts would, especially since hearing dates are generally set with plenty of advance notice. Fyock and Hill both testified that they did not care why the leave was taken if it was approved. (N.T. 141, 154). Hill also acknowledged that he has never had to deny the use of earned vacation time because of scheduling problems. (N.T. 132). As a result, while the Sheriff certainly has a legitimate concern regarding the increasing workload and scheduling of his deputy sheriffs, this does not outweigh the employees' interest in earning greater wages in secondary law enforcement positions on this record where the facts do not support any such interference.

The Sheriff further testified that he implemented the Policy because of potential conflicts of interest. Specifically, the Sheriff had reservations about his deputy sheriffs being called upon to transport a prisoner who they may have arrested in their secondary law enforcement position. The Sheriff indicated that the prisoner could bear a grudge against that deputy sheriff and make allegations of harassment against him or her, which then need to be investigated. (N.T. 150-151, 164-165, 169-170). Although this is another valid concern for the Sheriff, he did not explain how exactly this situation rises to the level of a conflict of interest sufficient to satisfy the integrity of government interests which were so critical in Commonwealth of Pennsylvania and Bucks County, *supra*.

The County's Employee Manual states that "[a] potential or actual conflict of interest occurs whenever an employee is in position to influence a decision that may result in a personal gain for the employee or an immediate family member as a result of the County's business dealings." (Association Exhibit 4). The record is devoid of any evidence whatsoever that the deputy sheriffs would be in such a position when they have to transport prisoners they might have arrested in their secondary law enforcement positions. In fact, the deputy sheriffs already have to transport prisoners they may have arrested in performing their deputy sheriff duties for the County. The Respondents have not identified any discernible conflict between the deputy sheriffs' private interests and/or secondary employment, and their official responsibilities. Instead, the Respondents seem to have abandoned the potential conflict of interest argument and adopted one based on an alleged "conflict of roles." See Respondent's Brief at 8. Once again, however, the interests of the employees in earning greater wages outweighs the probable effects related to such potential harassment claims, despite the Sheriff's valid concerns.

The Sheriff also contends that there is a greater risk of injury in law enforcement positions. However, the Sheriff did not testify that he has had deputy sheriffs who were injured and missed work because of their secondary law enforcement jobs. Instead, the Sheriff admitted that there are many non-law enforcement activities that could result in injury to his employees. (N.T. 159-160). Yet, the Sheriff does not restrict these activities. In fact, the Sheriff allows his deputy sheriffs to assist law enforcement with mobile awareness and DUI checkpoints, despite the inherent dangers. (N.T. 153).

In addition, the Sheriff testified that he implemented the policy because he needed to ensure the availability of his deputy sheriffs during emergencies. Once again, however, the record shows that this has never been a problem for deputy sheriffs working secondary law enforcement positions. (N.T. 32-33, 135). Even Hill conceded as much. (N.T. 135). Indeed, Deputy Sheriff John Blake who also works part-time for the Cherry Tree Police Department described how he turns down work for Cherry Tree during circumstances when he is called in or on stand-by time for his primary duties with the Sheriff's office. (N.T. 81-82). Blake explained how this is not problematic because it is a small department that does not have 24-hour coverage, and that even if nobody else can cover his shift with Cherry Tree, the Pennsylvania State Police handles the primary jurisdiction there. (N.T. 81-82).

Similarly, the Sheriff asserted at the hearing that the policy is necessary because he never knows what might come up and the potential for an even greater increase of job duties for his deputy sheriffs. These assertions are speculative in nature, however, and while they may prove to be true in the future, they are not sufficient to outweigh the substantial interests of the employees in earning greater wages in secondary law enforcement positions. The Respondents submit in their post-hearing brief that the Policy imposes only a light burden on the employees since they are still able to work secondary employment in non-law enforcement positions. See Respondents' Brief at 11. This argument is not persuasive. As the Hearing Examiner warned in Elizabethtown Non-Supervisory Police Negotiating Committee v. Elizabethtown Borough, 29 PPER ¶ 29099 (Proposed Decision and Order, 1998) the prohibition against secondary law enforcement positions would be devastating to the interests the deputy sheriffs have in this case in earning a living by working in the very field (law enforcement) for which they have been trained and which offers them the best money. 29 PPER at 242.<sup>3</sup> Therefore, it must be concluded on this record that the Sheriff's interests, while important and legitimate, do not outweigh the substantial interests of the employees and are not borne out by the record.

Next, the Sheriff argues that he possesses the managerial right to adopt the Policy pursuant to Section 1620 of the County Code.<sup>4</sup> The record shows that the Sheriff attempted to preserve his Section 1620 rights by notifying the County Commissioners on March 14, 2016. (N.T. 144-145; Employer Exhibit 3). Likewise, the CBA acknowledges the Section 1620 rights of the various County row officers. (Association Exhibit 3). Nevertheless, this argument must be rejected. It cannot be seriously disputed that this case does not implicate the Sheriff's hiring or discharging rights under

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<sup>3</sup> Although Elizabethtown Borough was decided under Act 111, the deputy sheriffs in the instant matter have the same critical interest in earning greater wages within their field of expertise as the police officers in that case.

<sup>4</sup> Section 1620 provides, in relevant part, as follows: "[W]ith respect to representation proceedings before the Pennsylvania Labor Relations Board or collective bargaining negotiations involving any or all employees paid from the county treasury, the board of county commissioners shall have the sole power and responsibility to represent judges of the court of common pleas, the county and all elected or appointed county officers having any employment powers over the affected employees. The exercise of such responsibilities by the county commissioners shall in no way affect the hiring, discharging and supervising rights and obligations with respect to such employees as may be vested in the judges or other county officers." 16 P.S. § 1620.

Section 1620. Nor can it be said that this matter touches upon the Sheriff's supervising rights either. The Policy prohibits full-time deputy sheriffs from working secondary law enforcement jobs on a part-time basis while they are off duty. I am unable to conclude that the Sheriff's supervising rights under Section 1620 extend to what employes choose to do on their own time where there is no quantifiable interference with their primary job duties or the employer's enterprise. The Respondents have cited absolutely no authority to support such a proposition either.

Finally, the Sheriff maintains that the charge should be dismissed because there has been no unilateral change in terms and conditions of employment, as the Sheriff has always had a policy providing for his authority to regulate and approve or disapprove types of secondary employment, along with the number of hours worked. (See Employer Exhibit 1). However, this argument is also unavailing. The record shows that the alleged policy has never been enforced. (N.T. 54). It is well settled now 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, 48 PPER 58 (Final Order, 2017). As such, the Association has sustained its burden of proving that Respondents violated Section 1201(a)(1) and (5) of the Act.

#### **CONCLUSIONS**

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

1. The Respondents are both public employers within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Respondents have committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

#### **ORDER**

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

#### **HEREBY ORDERS AND DIRECTS**

that Indiana County and the Indiana County Sheriff, shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA;
2. 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;

3. Take the following affirmative action, which the examiner finds necessary to effectuate the policies of PERA:

(a) Immediately rescind the Policy prohibiting deputy sheriffs from working secondary law enforcement jobs, restore the status quo ante as it existed prior to the implementation of the Policy, and make whole any and all affected employes for any losses sustained a result thereof, including six (6%) percent per annum interest;

(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 the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(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; and

(d) Serve a copy of the attached Affidavit of Compliance upon the Union.

**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 19<sup>th</sup> day of June, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

INDIANA COUNTY DEPUTY SHERIFF'S :  
ASSOCIATION :  
v. : Case No. PERA-C-18-153-W  
INDIANA COUNTY SHERIFF AND INDIANA :  
COUNTY :

AFFIDAVIT OF COMPLIANCE

Indiana County and the Indiana County Sheriff, hereby certify that they have ceased and desisted from the violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that they have complied with the Proposed Decision and Order as directed therein by immediately rescinding the Policy prohibiting deputy sheriffs from working secondary law enforcement jobs, restoring the status quo ante as it existed prior to the implementation of the Policy, and making whole any and all affected employes for any losses sustained a result thereof, including six (6%) percent per annum interest; that they have posted a copy of the Proposed Decision and Order as directed therein; and that they have served an executed 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

