

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WEST CONSHOHOCKEN BOROUGH :
POLICE OFFICERS :
 :
 v. : CASE NO. PF-C-20-16-E
 :
WEST CONSHOHOCKEN BOROUGH :

PROPOSED DECISION AND ORDER

On March 17, 2020, the West Conshohocken Borough Police Officers (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that West Conshohocken Borough (Borough) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (Act or PLRA), as read with Act 111. The Union specifically alleged that the Borough unilaterally changed terms and conditions of employment when, on February 13, 2020, the Chief of Police (Chief) issued a Memo to his Sergeants requiring that requests for shift exchanges first be submitted to him, whereas prior to that date such requests were submitted only to the Sergeants, which had been the long standing past practice.

On August 12, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of Friday, November 13, 2020, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On May 10, 2021, both the Union and the Borough filed post-hearing briefs.

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

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision within the meaning of Act 111, as read with the PLRA. (N.T. 7)
2. The Union is a labor organization within the meaning of Act 111, as read with the PLRA. (N.T. 6)
3. Michael Sinclair is the Chief of Police of the Borough's Police Department (Department). Chief Sinclair has been the Chief for 11 years. (N.T. 144)
4. Sergeant John Bianchini has been a patrol supervisor at the Borough for 5 years. He has been a police officer at the Borough for 35 years. (N.T. 9-11)
5. Sergeant Brian Raskiewicz has also been a patrol supervisor for the past 5 years, and he has been a police officer with the Borough for 25 years. (N.T. 46-47)
6. The Department has 11 full-time officers. Patrol officers work rotating shifts. One rotation lasts two weeks. Sergeant Bianchini works a steady shift from 11:00 a.m. to 11:00 p.m. (N.T. 9-11)

7. Sergeants develop the shift schedule of officers for at least 6 months in advance in a computer program that generates the schedule by automatically rotating the officers through a shift rotation of two weeks on daylight and two weeks on night shift, with the same personnel rotation from week to week. Officers do not pick their shift schedule. The Chief has not been personally involved in setting up the overall schedule for the past 5 years. In the past, Sergeant Bianchini approved shift exchanges when requested by officers, which occurred "here and there." (N.T. 11-12, 74-75, 77, 147-150)

8. The schedule is printed out and given to the local courts so they have the officers' shift schedules for scheduling court hearing dates for cases involving Borough officers. (N.T. 150)

9. There are 7 shifts in a two-week rotation including six 12-hour shifts and one 8-hour shift. The 8-hour shift is always on Sunday. The first week of the rotation is a longer week than the second week of the rotation. In the first week of their rotation, officers work two 12-hour shifts on, two 12-hour shifts off, two 12-hour shifts on and an 8-hour shift on Sunday. The following week, they work two 12-hour shifts. (N.T. 25, 111, 149-150)

10. The Chief is ultimately in charge of all personnel matters including scheduling, exchanging shifts and days off, and he wants to stay in control of the scheduling and the supervisors. (N.T. 145-146, 181)

11. Shift exchanges among officers have been permitted in the Department for approximately 40 years. Chief Sinclair agrees that officers are permitted to switch shifts. Sometime around 2009-2010, the Department started using a form for officers to use to submit requests for shift exchanges, vacation, sick, holiday, comp. time, and personal time. (N.T. 18, 42, 47, 84-86, 93-95, 151, 171; Union Exhibits 1-5: Borough Exhibit 1)

12. When an officer requests a day off, the officer always gets approved for it, and the Department pays overtime for another officer to fill the shift. Those requests are first submitted to a Patrol Sergeant then placed in the Chief's mailbox. When the Chief receives the request, he automatically approves it because the officer is entitled to take the time in his/her leave bank. For shift exchange requests, the officer submits the exchange request form to a Patrol Sergeant who then places a copy in the Chief's mailbox. Before 2020, the Chief would read the exchange request form and approve it. There is no financial impact to the Borough for shift exchanges. (N.T. 52, 108, 152-153)

13. Chief Sinclair has always reviewed and approved all shift exchange requests that he received, but he acknowledges that he did not receive 100% of all shift exchange requests. The Chief typically received and approved 1 or 2 shift exchange requests per year consistent with Sergeant Bianchini's assessment that they were submitted "here and there." The Chief and the Sergeants never denied a shift exchange request. Before 2020, the Chief's review and approval was always after the Patrol Sergeant's review and approval. There were two levels of approval. Chief Sinclair is the end receiver of all forms and approves all of them. Before early 2020, the Chief never saw shift requests for more than 1 or 2 days at a time. (N.T. 16-17, 31, 53-54, 103, 151-155, 165-166, 168, 170-171, 174)

14. On January 21, 2020, Officers Evangelist and Webster submitted a shift exchange request. Officer Evangelist agreed with Officer Webster that Evangelist would work Webster's night shift and that Webster would work Evangelist's scheduled day shift for 5 consecutive shifts. This was the first request in the Department for that many exchanges. (N.T 31, 157; Borough Exhibit 1)

15. The January 21, 2020 shift exchange request alarmed the Chief because he had never seen a shift exchange request for 5 shifts in his 11 years as Chief. He thought it was an anomaly to exchange that many days. Sergeant Raskiewicz also testified that, prior to early 2020, officers did not seek to exchange large blocks of shifts. (N.T 66-68, 745-75, 156-158, 187-188)

16. In Chief Sinclair's view, the recent Memorandum of Agreement (MOA) negotiated between the Borough and the Union provided that the rotating shift schedule would remain the same and by exchanging as many as 5 consecutive shifts, the officers involved were effectively removing themselves from the rotation and scheduling themselves for steady day or night shifts. The Chief did not take immediate action after he received a copy of the January 21, 2020 Webster-Evangelist shift exchange request form. (N.T. 157-161, 163-164; Joint Exhibit 1(d))

17. Chief Sinclair approved the Webster-Evangelist shift exchange because he knew that Webster had family issues with a new baby. (N.T. 178)

18. The MOA provides, in relevant part, that: "Shift scheduling shall remain as it currently exists." During negotiations, the parties understood that language to mean that the rotating shift schedule was to remain the same. (N.T. 106-107, 135-138; Joint Exhibit 1(d) at 2)

19. On February 5, 2020, Officer Pagliaro submitted a shift exchange request seeking to exchange 7 shifts, a full two-week shift rotation, with Officer Carlin, where Pagliaro would work Carlin's scheduled day shift rotation and Carlin would work Pagliaro's scheduled night shift rotation, giving Pagliaro four weeks on daylight. The Chief did not receive a copy of this shift exchange request. He learned about it when he saw the written, posted schedule with changes on it. Chief Sinclair then asked Sergeant Raskiewicz about the request and Sergeant Raskiewicz then gave the Chief a copy of the request form. (N.T. 50-51, 68, 72-73, 159-160, 178, 184-185; Union Exhibit 3)

20. The Chief never saw a 7-day shift exchange prior to the February 5, 2020 Pagliaro-Carlin shift exchange request. Upon discovering the Pagliaro-Carlin shift exchange, after the Webster-Evangelist shift exchange, the Chief spoke with Sergeant Raskiewicz about his concerns regarding the MOA and officers keeping their shift rotations. Sergeant Raskiewicz told the Chief: "We can do this," to which the Chief responded: "no you can't." Chief Sinclair did not want to set a new precedent for block shift exchanges. (N.T. 160-161, 163-164, 187-188)

21. On or about February 10, 2020, Sergeant Raskiewicz told the Chief that certain officers were going to put in for shift exchanges every other week thereby creating a steady shift for those officers. The Chief believed that this violated the MOA, which preserved the rotating shift schedule from the last collective bargaining agreement (CBA). The Chief does not want

shift swapping to cause a permanent shift for officers. (N.T. 163, 168, 170, 177; Joint Exhibit 1(a) & 1(d))

22. The parties' terms and conditions of employment are governed by a CBA effective January 1, 2013, through December 31, 2015, an interest arbitration award, effective 2016, through 2019, and the MOA effective January 1, 2020, through December 31, 2023. (Joint Exhibit 1(a-d))

23. The 2013-2015 CBA provides, in relevant part, as follows:

. . . . The scheduling of shifts is provided by the Chief of Police and the Mayor.

Effective January 4, 2010, the Department shall commence operating under 12-hour shifts[.]The Chief of Police shall determine the starting and ending time for those shifts, as well as the rotation thereof. Upon the change to 12-hour shifts, all leave time, including personal time, bereavement time, holidays, sick time, vacation time and compensatory time within the contract which is expressed in "days" shall be converted to hours within each "day" under the contract being converted to 8 hours.

(Joint Exhibit 1(a), Article II § III)

24. The CBA further provides that an officer called to County, State or Federal court outside of the officer's regularly scheduled work time shall receive 1.5 times the officer's hourly rate of pay for a minimum of 4 hours and a maximum of 8 hours. An officer attending district court during off-duty hours shall be compensated for a minimum of 2 hours at 1.5 times the officer's hourly rate of pay and shall be paid at that rate for hours over 2 hours. (Joint Exhibit 1(a), Article II, §§ VII-VIII)

25. On February 13, 2020, Chief Sinclair issued a Memo to Sergeants Bianchini and Raskiewicz in response to the January 21, 2020 Webster-Evangelist 5-day shift exchange request and the February 5, 2020 Pagliaro-Carlin 7-day shift exchange. (N.T. 156; Joint Exhibit 2)

26. The first 2 paragraphs of the Chief's Memo outline the Webster-Evangelist shift exchange and the Pagliaro-Carlin shift exchange. The Chief's Memo further provides, in relevant part, as follows:

3. The Collective Bargaining Agreement between the Borough and the Officers provides that the Chief of Police shall determine the starting and ending times of the shifts and the rotation thereof.

4. Although I recognize that, on occasion, members have traded an individual must trade a separate shift in order to accommodate a personal issue, officers have changed shifts [sic]. However, my concern is that, based upon the above changes and the discussions surrounding them, that the intent of this switch is to effectuate a "permanent" shift for certain officers or something very similar to it.

5. As members of the Officers' bargaining team are aware, the Officers had proposed a permanent shift, which was not agreed to by the parties and was not included in the collective bargaining agreement.

6. When I questioned you [the 2 Sergeants] about the whole tour being changed in essence creating a steady shift for two members of the department, you both alluded to the fact that they can change their shifts, as long as they submit the shift request(s). You also contended that they are only changing the shift every two weeks and are not asking for steady shifts. However, the result of what has occurred is that officers are working a steady shift in spite of the fact that the contract does not provide for this.

7. In light of the above, I want to remind you that shift swapping cannot be used to effectuate a permanent shift for any officer. In addition, copies of all requests for shift changes should be provided to me for approval before they are approved by you until further notice.

(Joint Exhibit 2)

27. Chief Sinclair credibly testified that, in the context of officers starting to exchange 7-shift blocks in early 2020, the purpose of the Memo was to ensure that the Sergeants brought the requests for shift exchanges to the Chief to discuss the reasons for the shift exchange before approving or denying the request. The Memo only requires Sergeants to bring a shift exchange request form to the Chief before Sergeant approval when the exchange request is for 5 or 7 shifts, not for a shift exchange request for 1 or 2 shifts. Prior to early 2020, officers seeking to exchange shifts did not have to provide a reason to exchange 1 or 2 shifts. In this regard, the Chief told his Sergeants that the Memo only applied to shift-exchange requests for 5 or 7 shifts, and the Chief credibly testified that the past practice for smaller blocks of shift exchanges had not changed. (N.T. 53-54, 86-87, 164-165, 167, 174, 181-183)

28. Chief Sinclair allowed Pagliaro-Carlin to exchange for the first week of their exchange, because Sergeant Raskiewicz had already approved it, but he directed Sergeant Raskiewicz to put them back on their scheduled shift for the second, short week, i.e., he approved 5 of the 7 requested exchanges. (N.T. 65,168, 188)

29. Chief Sinclair does not have a hard cut-off for the number of shifts allowed to be exchanged at one time. It is only because of the practice among officers beginning in early 2020 to use shift exchanges to avoid rotation that he wants to be notified of the exchange requests in advance of approval. (N.T. 179-181)

30. On February 17, 2020, after Chief Sinclair issued his Memo to the Sergeants, Webster and Evangelist submitted a shift exchange request for 5 consecutive shifts where Webster would work Evangelist's day shifts and Evangelist would be working Webster's night shifts. Sergeant Bianchini denied the request per the Chief's Memo. It was the first time that Sergeant Bianchini denied a shift exchange request. (N.T. 20-21; Union Exhibit 1)

31. On March 9, 2020, Officer Carlin put in a shift-exchange request form for shift exchanges from March 9, 2020, through March 23, 2020. On April 6, 2020, Carlin requested to exchange shifts from April 6, 2020, through April 20, 2020. Chief Sinclair credibly testified that he did not receive a copy of Carlin's shift-exchange request. As such, he did not deny approval for it. Officer Carlin's shift exchange did not occur because

Sergeant Raskiewicz did not hear back from the Chief.¹ (N.T. 55-56, 166, 174, Union Exhibit 4)

32. On July 19, 2020, Officers Webster and Evangelist put in a shift exchange request form requesting that Evangelist work Webster's night shift and Webster work Evangelist's day shift for 5 consecutive shift assignments. Sergeant Bianchini discussed with Chief Sinclair the need for Webster to be home while a contractor was at his home. The Chief approved the 5-shift exchange under the circumstances. (N.T. 22-23, 31, 164-165; Union Exhibit 2)

DISCUSSION

The Borough in this case does not dispute the existence of a long-standing past practice permitting the officers to voluntarily exchange shifts among themselves, as long as there is no overtime or other financial burden to the Borough and the exchanging officers work the exchanged shifts. The dispute in this matter centers on the scope of that practice and on whether Chief Sinclair unlawfully changed the existing past practice when he issued his Memo to the Sergeants on February 13, 2020, changing the approval process for shift exchanges.

The Union argues that the Chief has never had any input into the approval of shift exchanges and that such approval was solely within the authority of the Sergeants. (Union Brief at 17). Prior to February 13, 2020, argues the Union, there was no limitation on the number of shifts that could be exchanged at one time. (Union Brief at 18). Officers were free to exchange shifts at their own discretion without the Chief's involvement, and the Chief's February 13, 2020 directive constitutes a change in past practice. (Union Brief at 18). Also, as far back as 1981, there has never been a denial of a shift exchange request until the Chief's February 13, 2020 Memo which subjected the requests to the Chief's approval and potential denial. (Union Brief at 18). The Union further contends that the Chief's testimony that the officers were attempting to create permanent shifts without rotating is not supported by the evidence; it constitutes speculation and neither the Sergeants nor Union President Walker were aware of an intent by officers to attempt to establish permanent shifts. (Union Brief at 19). The shift-exchange benefit, argues the Union, is a mandatory subject of bargaining because it directly affects the working conditions of officers as it allows officers to attend to personal matters without using leave. (Union Brief at 20).

The Borough's long-standing permission of mutual, voluntary shift exchanges was a benefit to officers affecting their working conditions without any financial or administrative burden to the Borough. Shift exchanges, therefore, constitute a well-established past practice, changes to which are mandatorily bargainable, and the Borough is without managerial authority to change the practice unilaterally. However, the record is clear that the Chief did not change the practice as it existed. Rather the officers

¹ Sergeant Raskiewicz testified that he placed Carlin's March 9, 2020 shift-exchange request in the Chief's mailbox. Although I have credited the Chief's testimony that he did not receive it, I am not discrediting Sergeant Raskiewicz's testimony. It is certainly possible, if not probable, that the form was lost in a bundle of mail in the Chief's mailbox. However, it is perplexing that Sergeant Raskiewicz did not follow up verbally with the Chief after not hearing back from him.

attempted to change the practice by expanding the scope of the shift-exchange requests, and the Chief was within his managerial authority to not allow the existing practice to mutate into a more expanded benefit that would undermine the contractually provided rotating shift system, which contrary to the Union's argument, is supported by the record and is not speculative.

The record shows that Sergeants Bianchini and Raskiewicz develop the shift schedules according to the contract by automatically rotating officers through a shift rotation schedule of two weeks on daylight and two weeks on night shift, with the same personnel rotation from week to week. Chief Sinclair has not been personally involved in developing the overall shift for the officers in the past 5 years. The shift-rotation schedule is printed out and given to the local courts so the courts know to schedule hearings when the officers are available during the day. The parties' terms and conditions of employment are governed by the expired 2013-2015 CBA, an interim arbitration award and the most recent MOA. Taken together, the CBA and the MOA provide that the Chief is ultimately responsible for scheduling and maintaining the rotating shifts. Chief Sinclair credibly testified that he is ultimately in charge of all personnel matters, including shift exchanges, and that he wants to stay in control of the supervisors and scheduling.

Chief Sinclair agrees that officers are permitted to exchange shifts, which has been a practice for 40 years. Before February 2020, officers submitted their shift exchange requests to one of the Sergeants. Those shift-exchange request forms were then placed in the Chief's mailbox. The Sergeants approved all shift-exchange requests, but the Chief credibly testified that he reviewed all the request forms that he received and that he also approved all shift exchange requests. In other words, there were always two levels of approval, and the Chief had always been part of the approval process, albeit after the Sergeants first approved the requests. Chief Sinclair credibly testified that he never denied a shift exchange request. Contrary to the Union's position, the Chief always approved and was involved in the approval of shift exchanges; his involvement prior to February 2020, was after the Sergeants' initial approval. Chief Sinclair, Sergeant Bianchini and Sergeant Raskiewicz all respectively testified that shift exchange requests before early 2020 were submitted one or two times per year, "here and there," and did not involve large blocks of shifts. Those requests were never denied, but always reviewed by the Chief. Also, the Chief credibly testified that he never saw shift exchange requests for more than 1 or 2 shifts at a time.

The officers, however, changed the scope and breadth of the shift-exchange practice on January 21, 2020, when Officer Evangelist and Officer Webster submitted a shift exchange request for 5 consecutive shifts. This was the first such request for that many shift exchanges, and it alarmed Chief Sinclair, although he did not take immediate action. Officers work six, 12-hour shifts and one 8-hour shift in a two-week rotation. Chief Sinclair credibly testified that, in his view, the MOA provides that the scheduling of shifts shall remain the same, meaning that officers would remain on a two-week shift rotation cycle. He also credibly testified that large blocks of shift exchanges would eliminate the shift rotation for the month.

On February 5, 2020, Officer Pagliaro submitted a shift exchange request seeking to exchange 7 shifts, which is a full two-week shift rotation, where Officer Pagliaro would work two weeks of Officer Carlin's day shift and then Officer Pagliaro would be normally scheduled for another two weeks of day shift, giving Officer Pagliaro four weeks on days. Prior to

Officer Pagliaro's February 5, 2020 request, Chief Sinclair had never seen a 7-day shift exchange request, and he did not want to set a new precedent or practice of approving large block shift exchanges, creating permanent shifts contrary to the MOA. On or about February 10, 2020, Sergeant Raskiewicz told Chief Sinclair that certain officers were going to put in for shift exchanges every other week thereby creating steady shifts for those officers, which the Chief believed violated the MOA. The Chief's credible testimony regarding Sergeant Raskiewicz's comments contradicts the Union's argument that there is no evidence that officers are attempting to create permanent shifts and avoid the rotation or that such efforts are speculative on the part of the Chief.

Consequently, Chief Sinclair issued his February 13, 2020 Memo to the Sergeants providing that "shift swapping cannot be used to effectuate a permanent shift for any officer. In addition, copies of all requests for shift changes should be provided to me for approval before they are approved by you until further notice." (F.F. 26). The Chief testified that the Memo only requires Sergeants to bring a shift request form to the Chief before Sergeant approval when the request is for 5 or 7 shifts, which could eliminate a rotation, and not for exchange requests for a few shifts. The Chief credibly testified that he did not change the existing practice of permitting Sergeants to approve smaller exchanges of 1 or 2 shifts. The Chief does not have a hard cut-off number of requested shifts for exchange. He just wants to hear the reasons for large block exchanges. Indeed, Chief Sinclair approved the Webster-Evangelist exchange because he knew that Officer Webster had a new baby.

On February 17, 2020, Webster and Evangelist again submitted a shift exchange request for 5 consecutive shifts, after the Chief's Memo. Sergeant Bianchini denied the request under the Chief's Memo. As further evidence that officers were now seeking large blocks of shift exchanges in 2020, Officer Carlin submitted a shift exchange request on March 9, 2020, to exchange shifts from March 9, 2020, through March 23, 2020. Again on April 6, 2020, Officer Carlin requested to exchange shifts from April 6, 2020, through April 20, 2020. Having not received a copy of this request, Chief Sinclair did not approve or deny it. Again on July 19, 2020, Officers Webster and Evangelist requested to exchange shifts for 5 consecutive shifts. Sergeant Bianchini discussed the request with Chief Sinclair informing the Chief that Officer Webster needed the exchange because a contractor was coming to his home. Chief Sinclair approved this large block exchange to accommodate Webster.

The substantial, competent evidence is clear and uncontradicted that the past practice of permitting officers to exchange shifts was limited in scope and frequency of use. Officers periodically requested to exchange 1 or 2 shifts at a time a few times per year, and the Chief always approved those requests after the Sergeants. Although the Sergeants have historically done all the scheduling and first-level shift-exchange approvals for the past 5 years, the Chief regularly and consistently exercised managerial approval in following up on the Sergeants regarding scheduling and shift exchanges. However, in January 2020, that all changed when bargaining unit officers began requesting large blocks of shift exchanges which the Chief and the Sergeants had never before approved. Approval of these large blocks of shift exchanges was not the past practice, and the Chief was within his managerial rights to require prior approval from him before such large shift-exchange requests were granted. Chief Sinclair credibly testified that he could approve such large blocks of exchanges in the future for good reason and that he would continue to approve and permit Sergeants to approve smaller requests as a matter of course, consistent with the past practice. Indeed, it was

necessary for the Chief to timely limit the expansion of the shift exchange requests in terms of both amount and frequency before the expanded benefit became a term and condition of employment.

Moreover, expanding the existing benefit to include large blocks of shift exchanges would impact the court scheduling of officers, thereby imposing a financial burden on the Borough to pay overtime for an officer who was scheduled to be in court during the day, which was the officer's scheduled shift, but traded his day shift to a night shift, thereby receiving overtime for the daytime court appearance. Consequently, the Borough has managerial prerogative to prevent the expansion of shift swapping to the extent that it creates overtime for officers.

Accordingly, the Chief did not change the past practice of permitting Sergeant approval and Chief review of limited, infrequent shift exchange requests, and the Union officers, not the Chief, changed shift exchange practice by attempting to unilaterally expand a benefit not before recognized as a term and condition of employment by management.

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 of West Conshohocken is a public employer and political subdivision pursuant to Act 111, as read with the PLRA.

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

3. The Board has jurisdiction over the parties hereto.

4. The Borough has not committed unfair labor practices within the meaning of Section 6(1)(a) or (e) of the PLRA, as read 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 charge is dismissed, the complaint is rescinded and 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 order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twentieth day of May, 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

JACK E. MARINO
Hearing Examiner