

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MIDDLEBURG BOROUGH POLICE OFFICERS' :
ASSOCIATION :
 :
v. : Case No. PF-C-19-74-E
 :
MIDDLEBURG BOROUGH :

PROPOSED DECISION AND ORDER

On December 19, 2019, the Middleburg Borough Police Officers' Association (Association) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Middleburgh Borough (Borough or Employer) alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111.

On February 19, 2020, the Secretary 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 April 8, 2020, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was continued with the consent of the parties. The hearing was held on August 7, 2020, via SKYPE for Business before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association submitted a post-hearing brief on October 5, 2020. The Borough submitted a post-hearing brief on October 28, 2020.

The Hearing Examiner, based on all matters of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 5-6).
2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 5-6).
3. The parties are subject to a contract settlement agreement dated January 30, 2018, which modified and extended the terms of the collective bargaining agreement (CBA) which had the effective dates of January 1, 2015 through December 31, 2017. The contract settlement agreement extended the agreement between the parties until December 31, 2021. (N.T. 11; Association Exhibit 1).
4. There are two police officers in the bargaining unit. (N.T. 19).
5. Under the current written agreements, police officers may earn overtime. A police officer has been permitted to take overtime as compensatory time instead of payment. There is no language in the parties' written agreements with respect to compensatory time. This practice started

in at least 2005. Prior to 2019, there was no limitation on how much compensatory time a police officer could accrue in any given year. (N.T. 11-12, 21).

6. 2019 was the first year the Borough carried over compensatory time from one year to the next for the police officers. Prior to 2019, compensatory time was reset or "zeroed out" at the end of the year. In other words, during the year, the police officer could accumulate unlimited compensatory hours and at the end of the year the compensatory time would be wiped off the books. (N.T. 24-34, 40-41; Borough Exhibits 1,2).

7. In early 2019, the Borough realized that it could not "zero out" compensatory time and decided to pay its police officers' outstanding 2018 compensatory time and set an initial cap of 480 hours. This change is reflected in the February 2019 Borough Council Meeting where the Borough approved a motion to pay police officer David Schaffer for his 2018 compensatory time hours, which exceeded 480 hours, as overtime hours at his current 2019 payroll wage. (N.T. 13, 45-46; Union Exhibit 2).

8. In the July 2019 Borough Council Meeting, the Borough lowered the compensatory time cap to 200 hours and, due to the reduction, approved a payment to Schaffer for 280 hours of compensatory time. The Borough also agreed to consider reducing the cap to compensatory time during the 2020 budget review. (N.T. 14-15; Union Exhibit 3).

9. In the November 2019 Borough Council Meeting, the Borough passed a motion to pay the current 200-hour maximum of police officer compensatory time down by 50 hours each calendar quarter of year 2020 and to establish a new police officer compensatory time maximum of 40 hours. (N.T. 17-18; Union Exhibit 4).

10. The Borough did not meet, bargain or negotiate with the Association over the reduction of the 200-hour cap to the 40-hour cap on compensatory time. (N.T. 18).

DISCUSSION

In its charge, the Association alleges that the Borough has violated Section 6(1)(a) and (e) of the PLRA when it changed policies and implemented a 40-hour cap on compensatory time without fulfilling its bargaining obligation.

An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining, whether established by a collective bargaining agreement or past practice. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), appeal denied, 569 Pa. 727, 806 A.2d 864 (2002); Utility Workers of America, Local 416, AFL-CIO v. Municipal Authority of the Borough of West View, 32 PPER ¶ 32187 (Final Order, 2001).

The record is clear that the Borough did not meet, bargain or negotiate with the Association over the 40-hour cap on compensatory time. Compensatory time is a mandatory subject of bargaining. City of Wilkes-Barre, 29 PPER 29175 (Proposed Decision and Order, 1998); Spring Garden Township, 49 PPER ¶ 3 (Proposed Decision and Order, 2017).

It is not contested that the written collective bargaining agreements between the parties do not contain language dealing with compensatory time.

Thus, in order to determine if the Employer in this case changed the terms and conditions of employment the analysis must consider whether an established past practice regarding compensatory time existed.¹

Where the charge concerns a mandatory subject allegedly established through past practice, the complainant has the burden of proving by substantial, credible evidence that the employer has unilaterally changed an established practice. Delaware County Lodge No. 27, Fraternal Order of Police v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997); Fraternal Order of Police Fort Pitt Lodge 1 v. City of Pittsburgh, 37 PPER 84 (Proposed Decision and Order, 2006). In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27 (1977), the Pennsylvania Supreme Court defined a past practice 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 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 the underlying circumstances presented.

476 Pa. at 34 n.12 (emphasis in original).

The issue in this matter is whether there was an established past practice with respect to compensatory time. For years, the Borough would "zero out" the police officers' compensatory time at the end of the year. That is, police officers weren't compensated for their remaining compensatory time at the end of the year. The Borough changed this policy in the beginning of 2019 and started paying the police officers for their compensatory time from 2018 and set an initial cap of 480 hours for compensatory time. Then, in the Summer of 2019, the Borough unilaterally established a 200-hour cap on the number of compensatory hours a police officer could accrue. Then, at the end of 2019, the Borough again changed the compensatory time rules and established a 40-hour cap on compensatory time.

Reviewing this record, it is clear that there has not been a consistent or accepted practice with respect to compensatory time and therefore a recognizable past practice with respect to compensatory time does not exist. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 24 PPER ¶

¹ Generally, there are four situations in which evidence of past practice is used:

- (1) to clarify ambiguous language;
 - (2) to implement contract language which sets forth only a general rule;
 - (3) to modify or amend apparently ambiguous language which has arguably been waived by the parties; and
 - (4) to create or prove a separate enforceable condition of employment which cannot be derived from the express language of the agreement.
- County of Allegheny, 476 Pa. 27, 34 (1977).

24171 (Final Order, 1993) (no past practice found where the employer did not consistently follow seniority for the selection of vacation periods); Clarks Summit Borough, 29 PPER ¶ 29216 (Final Order, 1998) (no past practice found where the employer did not consistently increase the pay of employees upon the completion of a probationary period); FOP Lodge 1 v. City of Pittsburgh, 37 PPER ¶ 84 (Proposed Decision and Order, 2006) (Union unable to establish the existence of a past practice of compensating field training officers with two A/P days for each month worked). The record is clear that the employer did in fact unilaterally change the compensatory time cap of 200 hours to 40 hours. However, the issue of compensatory time has been in flux for all of 2019 and the record does not show that, prior to the change from 200-hours cap to a 40-hour cap, a state of affairs existed that was "regarded by the [people] involved as the normal and proper response to the underlying circumstances presented." Therefore, the Association has not met its burden of showing that the employer has unilaterally changed an established practice and the charge will be dismissed.

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 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 Borough has not committed an unfair labor practice in violation of Section 6(1)(a) and (e) of the PLRA and 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 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 November, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
Stephen A. Helmerich, Hearing Examiner