

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LANSDALE POLICE BENEVOLENT ASSOCIATION :
 :
 v. : Case No. PF-C-21-38-E
 :
 LANSDALE BOROUGH :

PROPOSED DECISION AND ORDER

On May 12, 2021, the Lansdale Police Benevolent Association (Association or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Lansdale Borough (Borough or Employer), alleging that the Borough violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, by denying a police officer's request for outside employment.

By letter dated July 20, 2021, the Secretary of the Board declined to issue a complaint and dismissed the charge, noting that the Borough's policy provides that approval of outside employment shall be at the discretion of the Chief of Police. On August 6, 2021, the Association filed timely exceptions to the Secretary's decision not to issue a complaint, further alleging that the Borough's policy limited the discretion of the Chief of Police and that the denial of outside employment was inconsistent with past practice. On September 21, 2021, the Board remanded the matter to the Secretary with direction to issue a complaint.

On October 29, 2021, the Secretary issued a Complaint and Notice of Hearing, assigning the charge to conciliation. On November 2, 2021, the charge was initially deferred to the grievance arbitration process due to a pending grievance. By letter dated December 6, 2021, the Association filed a request to schedule a hearing and averred that the grievance had been withdrawn. On December 15, 2021, the deferral was rescinded, and the matter was scheduled for hearing on February 17, 2022.

The hearing ensued, as scheduled on February 17, 2022, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.¹ The parties thereafter each filed separate post-hearing briefs in support of their respective positions on May 13, 2022.

The Hearing 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 Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 6)

2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 6)

¹ The hearing was held virtually in light of the ongoing Covid-19 pandemic.

3. The Association is the exclusive bargaining representative for a unit of police employes working at the Borough. (Union Exhibit 8, 9)

4. Nicholas Oropeza has been a police officer for the Borough for approximately 25 years. He currently works as a patrol officer, but also previously served as a detective. (N.T. 12-13)

5. Michael Trail has been a police officer for the Borough for approximately 20 years. On March 1, 2017, Trail became the acting Chief of Police for the Borough. He received the permanent appointment as Chief in March 2018. (N.T. 55-57)

6. After Trail became the Borough's Chief of Police, he implemented a series of policy changes or updates at the Borough, in an effort to get the department accredited, including a specific policy entitled "Outside Employment and Outside Overtime," which was issued in April 2019. (N.T. 15-16, 57-58, 70)

7. Section 1021.2 of the Policy provides in relevant part, as follows:

Members of the Lansdale Police Department shall obtain written approval from the Chief of Police or the authorized designee prior to engaging in any outside employment or outside overtime. Approval of outside employment or outside overtime shall be at the discretion of the Chief of Police in accordance with the provisions of this policy. Failure to obtain prior written approval for outside employment or overtime, or engaging in outside employment or overtime that is prohibited by this policy, may lead to disciplinary action.

(Union Exhibit 2)

8. Section 1021.3 of the Policy, which is entitled "Request and Approval," provides in relevant part, as follows:

Members must submit a memorandum requesting outside employment to the Chief of Police for consideration. The memo shall include: the name of the proposed company, address and phone number of the company, anticipated work to be performed, the location, and the anticipated hours per day and total hours per week employed.

If approved, the member will be provided with a copy of the approved request form. Unless otherwise indicated in writing on the request form, approval for outside employment will be valid through the end of the calendar year in which the request is approved. Members seeking to continue outside employment must submit a new request form at the start of each calendar year.

(Union Exhibit 2)

9. Section 1021.3.2 of the Policy, which is entitled "Denial," provides in relevant part, as follows:

Any member whose request for outside employment has been denied should be provided with a written notification of the reason at the time of the denial.

(Union Exhibit 2)

10. Section 1021.3.4 of the Policy, which is entitled "Appeal," provides in relevant part, as follows:

If a member's request for outside employment is denied or if previous approval is revoked or suspended, the member may file a written notice of appeal with the Chief of Police within 10 days of receiving notice of the denial, revocation or suspension.

A revocation or suspension will only be implemented after the member has completed the appeal process.

If the member's appeal is denied, he/she may file a grievance as provided in the Grievances Policy.

(Union Exhibit 2)

11. Section 1021.4.1 of the Policy, which is entitled "Prohibited Outside Employment," provides in relevant part, as follows:

The Department reserves the right to deny any request for outside employment that involves:

- (a) The use of department time, facilities, equipment or supplies.
- (b) The use of the Lansdale Police Department badge, uniform or influence for private gain or advantage.
- (c) The member's receipt or acceptance of any money or other consideration for the performance of duties or services that he/she would be required or expected to render in the course or hours of his/her employment, appointment or as part of his/her regular duties.
- (d) The performance of duties or services that may later be subject directly or indirectly to the control, inspection, review, audit or enforcement of any other member of this department.
- (e) Demands upon the member's time that would render the performance of his/her duties for this department deficient or substandard.
- (f) Activities that may conflict with any other policy or rule of the Department.
- (g) A pari-mutuel horseracing facility (58 Pa. Code § 165.33)
- (h) Employment in any capacity in or for any establishment that serves or permits alcohol.

No full-time sworn officer shall work outside employment during the four hours prior to reporting for their scheduled duty shift.

(Union Exhibit 2)

12. Section 1021.4.2 of the Policy, which is entitled "Security and Law Enforcement Officer Outside Employment," provides in relevant part, as follows:

No member of this department may engage in any outside employment as a law enforcement officer, private security guard, private investigator, or other similar private security position.

(Union Exhibit 2)

13. On March 18, 2021, Officer Oropeza submitted a memorandum to Chief Trail, which provided in relevant part, as follows:

I am requesting outside employment with Intercounty Investigations and Solutions, Inc., company address, 51 West End Trail #189, Macungie, PA 18062, phone, 267-246-5835. My duties would include administrative and marketing. Most of the work would be completed from my home, around 10-20 hours a week.

(N.T. 17-18; Union Exhibit 3)

14. Oropeza testified that he never intended to serve as a private security guard, private investigator, or in any other private security position with regard to his outside employment request. (N.T. 18)

15. Oropeza testified that, on or about March 24, 2021, he went to the police department and asked to speak with the Chief because he had not heard anything regarding his outside employment request. Oropeza further testified that he met with Trail that day, at which point Trail advised Oropeza that Trail could not approve his request. Oropeza indicated that Trail would not approve the request because it was for a private security company, which Oropeza disputed. (N.T. 18-19)

16. By email dated March 24, 2021, Trail confirmed his conversation with Oropeza and indicated the following, in relevant part:

Nick, first I apologize for getting back to you this late but with respect to your March 18, 2021, request for outside employment, I must deny the request in accordance with section 1021.4.2 of the [Lansdale Police Department] Policy Manual...

(N.T. 19; Union Exhibit 4)

17. On March 26, 2021, Oropeza submitted a memorandum to Trail, which provided in relevant part, as follows:

In regard to your denial of my outside employment request on March 24, 2021[,], I am appealing your decision, under section 1021.3.4 APPEAL which states:

If a member's request for outside employment is denied or if previous approval is revoked or suspended, the member may file a written notice of appeal with the Chief of Police within 10 days of receiving notice of the denial, revocation or suspension.

On [sic] your March 24, 2021 email to me you state, you must deny the request in accordance with section 1021.4.2 of the [Lansdale Police Department] Policy Manual.

This section states:

1021.4.2 SECURITY AND LAW ENFORCEMENT OFFICER OUTSIDE EMPLOYMENT
No member of this department may engage in any outside employment
as a law enforcement officer, private security guard, private
investigator, or other similar private security position.

On [sic] my March 18, 2021 memorandum requesting outside employment, I never requested outside employment as law enforcement officer, private security guard, private investigator, or other similar private security position. I therefore respectfully appeal your decision to deny me outside employment. The section you cited does not match my request. I have attached my memorandum and your denial to this memorandum of appeal...

(N.T. 20-21; Union Exhibit 5) (Emphasis in original)

18. Oropeza testified that he never had any meeting or discussion with Trail regarding his appeal. (N.T. 21)

19. On April 2, 2021, Trail issued a memorandum to Oropeza, which provided in relevant part, as follows:

Nick, I have reviewed your appeal for the denial of outside employment with Intercounty Investigations and Solutions, Inc., and again I must deny your request.

Intercounty Investigations and Solutions is a licensed private investigation firm headquartered in Lehigh County PA. State law does not allow active-duty police officers to be licensed private investigators. While you have not requested to become a licensed private investigator, you have requested to be employed by one to perform, among other things, "Administrative Duties."

Administrative duties are those tasks necessary for the operations of this private investigation firm and in my opinion are too closely aligned with your duties as a Lansdale Borough Police Officer and for that reason your request must be denied.

(N.T. 21-22; Union Exhibit 6)

20. Oropeza testified that the grievance procedure at the Borough requires that grievances be submitted through the Association, so he filed a grievance with the Association president on April 4, 2021, which provided in relevant part, as follows:

...As a result of my denial of appeal and utilizing my due process as provided in the policy, I am filing a grievance. The policy states an officer cannot work as a private investigator, I never requested to be a private investigator. It is my contention the Chief's interpretation of Policy 1021.4.2 is wrong. Furthermore, the Chief states my administrative duties would be too closely aligned with my duties as [sic] Lansdale Borough Police Officer. The Chief never once asked me what administrative duties I would be performing, yet he gave an opinion on them. The Chief never spoke with me about this outside employment with exception to March 24, 2021, even after I filed an appeal. My request included the duty of marketing which was not addressed. Lastly Officer [George] Johnson had been

approved to be an investigator with AmeriHealth within their Special Investigation Unit, by the Chief on January 16, 2018. I have attached all documentation to this grievance...

(N.T. 23-25; Union Exhibit 7)

21. On April 8, 2021, the Association's Grievance Committee issued a recommendation to the Association to not process the grievance. The recommendation specifically indicated the following, in relevant part:

The [Association's] Grievance Committee has received a grievance, which was filed on April 6th, 2021, by Nicholas Oropeza. The committee has reviewed the grievance and after careful consideration to the issues raised, the committee does not recommend the grievance to be upheld.

The committee reviewed the entire grievance and the past practice of other officers. We have taken into account Oropeza's request to work outside the Police Department for another company as an Administrator only. We believe this does not violate the Police Departments [sic] Policy as he is not taking an active role in investigations or using his police qualifications. However, after review of the [Association] bylaws it states in Section 7 (Legal Aid - Grievance Committee) "in regards to contractual grievances." Based on the language in the bylaws and function of the [Association], a grievance must be a contractual issue for the [Association] to consider the grievance.

The Committee does not believe the grievance is a contractual issue but is a policy issue with the Policy Department. The Committee recommends the grievance filed by Oropeza to be denied. We also recommend Oropeza to file a complaint with the Montgomery County Fraternal Order of Police (FOP)...

(N.T. 25-26; Union Exhibit 8)

22. The Association introduced evidence that Officer George Johnson submitted a request to Chief Trail for off duty employment on January 13, 2019. The request was for two positions, the first of which involved AmeriHealth Caritas Family of Company, as an investigator in the Company's Special Investigations Unit. Johnson testified that the position involved working as a desktop investigator conducting inquiries of assigned cases of alleged fraud against Pennsylvania Medicaid insurance. The second position was for a position working as a Driving Coach for Streetsafe Driving Academy. Trail approved both requests on January 16, 2019. (N.T. 42-46; Union Exhibit 10, 11)

23. Officer Johnson testified that he left his position at AmeriHealth Caritas Family of Company in November 2020 because the demands began to exceed his ability to continue working only part-time. (N.T. 45-46, 51)

24. The Association also introduced evidence that Johnson submitted a request to Trail for off duty employment on December 18, 2020. This request was for a position as a Security Official at North Penn School District. Trail denied the request on December 22, 2020. (N.T. 49-50, 70-71; Borough Exhibit 2)

25. The Borough introduced the testimony of Chief Trail in support of its position. Trail testified that the purpose of the Outside Employment Policy was twofold, to allow officers to seek outside employment under certain conditions in a safe manner and to protect the reputation of the Borough's police department from potential conflicts of interest. (N.T. 58-59)

26. Trail described his role in the process as receiving the request from the officers and reviewing it preliminarily. He then applies the policy to the request. He testified that if the request does not violate the spirit and intent of the policy, he will approve it. (N.T. 59-60)

27. The Borough introduced Policy 1003, which is entitled "Grievances," and which provides in Section 1003.1 entitled "Purpose and Scope," in relevant part, as follows:

The purpose of this order is to establish and incorporate the contractually agreed upon grievance procedure between the [Association] and the Borough...as it relates only to sworn full-time officers. All other personnel will follow their current collective bargaining agreements...

Grievances - A grievance is a dispute raised by an officer, several officers, or the [Association], involving the interpretation or application of the express non-disciplinary terms of the collective bargaining agreement between the Borough of Lansdale and the [Association]...

(N.T. 62; Borough Exhibit 7)

28. Trail testified that he denied Oropeza's request for outside employment for several reasons. First of all, Trail noted that Intercounty Investigations and Solutions is run by Chad Bruckner, who was a former detective for the Borough. Trail explained that Oropeza and Bruckner both had outstanding reputations in the community for their work as detectives for the Borough. Trail consulted the Private Detective Act of 1953 because Intercounty Investigations and Solutions is a private investigation firm licensed in Lehigh County. Trail testified that there was a lot of ambiguity in the definition section of the Private Detective Act about what it means to be engaged in the business of a private investigation firm. He stated that there is language in that statute indicating that persons who are engaged in the business of private investigations cannot also be police officers. He believed that, because Oropeza did not have any significant marketing experience, even if Oropeza did not plan on engaging in investigative activities, his name and reputation as a Borough police detective would carry significant weight and become strongly associated with Intercounty Investigations and Solutions. He concluded that approving the outside employment request would not have been in the best interests of the Borough's police department then. (N.T. 64-69)

29. Trail testified that he approved Officer Johnson's request for outside employment with AmeriHealth Caritas Family of Company in January 2019, which was before the current policy was implemented in April 2019. He also explained that, under his reading of the Private Detective Act of 1953, there is a specific exemption under the statute for people who are engaged in insurance investigations, which covered Johnson's request. He further

described how Johnson had recently returned to the Borough at the time of his request after a period of about eight years since he was previously employed as a law enforcement officer for the Borough. Based on that, Trail concluded that Johnson did not have an outstanding reputation as a detective, which was also why Trail approved the request. (N.T. 69-70)

DISCUSSION

The Association has charged the Borough with violating Section 6(1)(a) and (e) of the PLRA² and Act 111 by denying a police officer's request for outside employment where the Borough's Policy allegedly limited the discretion of the Chief and the denial of outside employment was inconsistent with past practice. The Borough, on the other hand, contends that the charge should be dismissed because there has been no unilateral change of employe terms and conditions of employment. The Borough also maintains that the charge should be dismissed because outside employment is a managerial prerogative, and the Borough had a sound arguable basis or contractual privilege to deny the outside employment request.

In Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011), the Board specifically outlined the relevant law as follows:

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). 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, 381 A.2d 849 (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 [m]anagement or the employees on one or more occasions. A custom or 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

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.

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, 381 A.2d at 852 n. 12

43 PPER at 179 (emphasis in original).

In this case, the Association has not sustained its burden of proving that the Borough violated the PLRA or Act 111. The record shows that the Outside Employment Policy was not a bargained-for agreement between the parties, but rather that it was unilaterally issued by the Chief in April 2019.³ As a result, an alleged violation of the Policy is not a unilateral change violating Section 6(1)(a) and (e) unless it can be shown that by consistently applying the Policy in a certain manner, the Borough has established a binding past practice.⁴ Commonwealth of Pennsylvania, Pennsylvania State Police, supra. The record is devoid of any evidence whatsoever that the Borough has ever permitted an officer to work for a private investigation firm in any capacity. At most, the Association introduced evidence that the Borough had, on one occasion, permitted an officer to work for AmeriHealth Caritas Family of Company to conduct desktop insurance investigations. But even this predated the current Policy. In any event, the record shows that, since the current Policy was issued in April 2019, the Chief has used it to deny that same officer's request for outside employment to work as a Security Official at North Penn School District. Therefore, the Association has failed to present evidence to support the finding of an established past practice of permitting officers to work for a private investigation firm. *Id.* Because the record does not support the finding of an established past practice, the Association has failed to meet its burden of proving by substantial credible evidence that the Borough unilaterally changed the terms of the Outside Employment Policy. *Id.*

To the contrary, the record shows that the Borough actually followed the existing Policy by processing Oropeza's request in accordance with the steps expressly set forth therein. In that regard, the Chief received the request, issued his denial and reasons therefor in writing, received the appeal, and issued his denial of the appeal in writing, as well. As the Borough notes, the crux of the Association's charge is in essence not a change in terms and conditions of employment. Instead, the Association simply disagrees with the way in which the Chief utilized his discretion under the Policy in reaching his decision. However, the Policy provides that approval of outside employment shall be at the discretion of the Chief. The Chief did not alter the Policy in reaching his determination on Oropeza's request. Rather, the Chief essentially concluded simply that the request to work for a private investigation firm, even as an administrator or in marketing, ran afoul of the Policy's prohibition against outside employment under Section 1021.4.2 in "other similar private security position[s]." This determination at least arguably complies with the alleged limitations in the

³ Likewise, there is no evidence that the parties subsequently incorporated the Outside Employment Policy into the collective bargaining agreement.

⁴ This, of course, is assuming the question of secondary employment is a mandatory subject of bargaining in this instance. However, it is not necessary to reach this issue given the ultimate disposition of the charge here.

Policy of the Chief's discretion and shows that the Chief applied the Policy to Oropeza's request.⁵

Furthermore, it is well settled that the Board will dismiss a charge of unfair labor practices where the only question presented is one of application of an existing policy under the particular facts to an individual member of the bargaining unit. Fraternal Order of Police Lodge 9 v. City of Reading, 29 PPER ¶ 29064 (Proposed Decision and Order, 2018), 29 PPER ¶ 29177 (Final Order, 1998). Because no unilateral change in policy occurred, the issue of whether Oropeza was properly denied approval for secondary or outside employment was appropriately reserved to the parties' grievance procedure and not the filing of a charge of unfair labor practices.⁶ City of Reading, 29 PPER at 413 (*Compare* FOP White Rose Lodge 15 v. City of York, 50 PPER 17 (Proposed Decision and Order, 2018), 50 PPER 18 (Final Order, 2018) (city unilaterally implemented a bargaining unit wide policy that precluded the chief's exercise of discretion to grant the use of sick leave for FMLA purposes)). Accordingly, the charge must be dismissed, as the Association has not proven that the Borough violated the PLRA.⁷

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 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

⁵ If the Association objected to the actual content and provisions of the Policy, the time to challenge the same would have been within six weeks of the issuance of the Policy, consistent with the limitations period set forth in the PLRA.

⁶ Why the Association decided not to process Oropeza's grievance is unclear, especially given that the Policy expressly states that a denial is subject to the grievance procedure.

⁷ The Association argues in its post-hearing brief that the Borough also refused to bargain the impact of the Chief's actions; however, the Association did not allege an impact bargaining claim in the specification of charges or in its exceptions to the Secretary's dismissal of the charge. Nevertheless, such a claim must also fail given that there has been no unilateral change to employe terms and conditions of employment.

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 first day of August, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner