COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UPPER MOUNT BETHEL POLICE ASSOCIATION	:	
v.	:	Case No. PF-C-96-196-E
UPPER MOUNT BETHEL TOWNSHIP	:	

FINAL ORDER

On October 7, 1999, Upper Mount Bethel Township (Township) filed timely exceptions along with a brief in support of exceptions to a proposed decision and order (PDO) entered on September 17, 1999. In the PDO, the hearing examiner concluded that the Township violated Section 6(1)(a), (c) and (d) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by temporarily disbanding its police department and furloughing its police officers in retaliation for their protected activity. Based on this conclusion, the examiner directed the Township to, inter alia, immediately reinstate the police department and make all bargaining unit members whole for lost wages and benefits from the date of disbandment until the officers' reinstatement. On October 27, 1999, the Upper Mount Bethel Police Association (Association) filed its response to the Township's exceptions and a supporting brief.

The essential facts of this case are as follows. The Township and the Association were parties to a collective bargaining agreement, which was in effect for the period of January 1, 1994, to December 31, 1995. The parties commenced negotiations for a successor agreement to the 1994-1995 contract but after a period of negotiations reached impasse. On December 4, 1995, a hearing before a binding interest arbitration panel was scheduled for March 18, 1996, but did not take place as scheduled because one of the panel members became ill. During 1994 and 1995, numerous incidents of misconduct were committed by various township police officers, some of which the Township investigated and resulted in discipline. On January 23, 1996, Township supervisor and police liaison Lou Donatelli told the Township's police officers that any grievances or lawsuits filed by the officers against the Township would be met with strict retaliation.

Based on Mr. Donatelli's statement, the Association filed an unfair labor practice charge (PF-C-96-41-E), which a hearing examiner sustained in a November 1996 PDO concluding that the Township violated Section 6(1)(a) and (c) of the PLRA and Act 111. Upper Mount Bethel Township, 28 PPER ¶ 28017 (Proposed Decision and Order, 1996). The hearing for that charge was held on June 12, 1996, wherein two bargaining unit members, Officers Nasatka and Smith, testified regarding Mr. Donatelli's January 23 statement. On the day after the hearing, June 13, 1996, the Township informed the Association president in writing that the Township was considering plans to disband the police department and to completely cease providing police services. On August 12, 1996, the Township's board of supervisors introduced a resolution to disband its police department effective August 31, 1996. As of August 31, 1996, the Township ceased all operations of police services. As a result, in September 1996 the Association filed this unfair labor practice charge (PF-C-96-196-E) alleging that the Township's disbandment of the police force violated Section 6(1)(a), (b), (c), (d) and (e) of the PLRA and Act 111.

At a township supervisors meeting on September 9, 1996, a number of individuals, including Donatelli, Mr. Nelson, who is also a township supervisor, Solicitor Backenstoe and a resident of the township discussed whether the Township could create a new police department and, if so, when that could occur. Solicitor Backenstoe and Supervisor Nelson stated that there was no time limit as to when the Township could create a new department. Supervisor Donatelli stated that after two years the Township had no obligation to call back the officers. Donatelli further stated that "there will be another police department but when they don't know. There will be another police department . . . he did not disband the police department to permanently do away with the police." (FF 12). Finally, Supervisor Donatelli made comments regarding the number of grievances filed by different bargaining unit members. On or about October 31, 1996, John Hunt, a township resident, asked Supervisor Donatelli if the Township police department would ever come back. Donatelli replied, "yes, after two years. I want them to come back." (FF 13).

The hearing on the September 1996 charge was held on February 20, 1997, before a hearing examiner who issued a PDO dated July 28, 1997, in which he concluded that the Township's cessation of police services was not complete and permanent and therefore violated Section 6(1)(a), (c) and (d) of the PLRA and Act 111. On August 18, 1997, the Township filed timely exceptions to the PDO along with a motion to reopen the record. In its motion, the Township requested remand for the purpose of introducing evidence that the Township had not in fact resumed nor did it intend to resume the provision of police services. The Township alleged that it had evidence not previously available at the time of hearing regarding the steps taken to dispose of its police equipment and vehicles. By order dated May 14, 1998, the Board remanded the matter to the hearing examiner for further proceedings in which the Township would be permitted to offer the evidence cited in its motion. Thus, an additional hearing was held before the hearing examiner, who subsequently issued a second PDO on September 17, 1999. In the PDO, the examiner concluded that despite evidence that the Township had in fact auctioned off all of its police equipment and vehicles as of February 18, 1998, the record still supported a violation of Section 6(1)(a), (c) and (d) of the PLRA and Act 111. The Township has again filed timely exceptions. These exceptions are now before the Board for disposition.

The Township has filed seven separately enumerated exceptions to the September 17, 1999, PDO. Because the first four exceptions are interrelated, the Township has grouped those exceptions into one argument: whether the hearing examiner erroneously concluded that the Township has not completely and permanently ceased to provide police services for township residents. Although the Township introduced evidence on remand showing that it had auctioned off all of its police equipment and vehicles as of February 18, 1998, and despite an additional finding by the hearing examiner in his September 17, 1999, PDO to the same effect, the examiner concluded that the record still supported a violation of Section 6(1)(a), (c) and (d) of the PLRA and Act 111. In reaching this conclusion, the examiner determined that although the Township had *completely* eliminated police services, it had not done so *permanently* based on Supervisor Donatelli's stated intentions, which the examiner attributed to the Township's board of supervisors as a whole, only to temporarily cease provision of police services. In support, the examiner likened this situation to Youngwood Borough Police Dep't v. PLRB, 539 A.2d 26, 28 (Pa. Cmwlth. 1988), appeal denied, 522 Pa. 599, 562 A.2d 323

(1989), where "police operations were never intended to be completely and permanently ended...."

An employer may go out of the business of providing a discretionary public service for any reason, including anti-union animus, so long as the service is completely and permanently discontinued. Youngwood Borough, supra; County of Bucks v. PLRB, 465 A.2d 731 (Pa. Cmwlth. 1983); Jefferson-Penn Police Commission, 21 PPER ¶ 21025 (Final Order, 1989); Millcreek Township School Dist., 7 PPER 91 (Nisi Decision and Order, 1976). In Millcreek, the Board adopted the rationale of the United States Supreme Court in Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 85 S.Ct. 994 (1965), stating as follows:

> In [Darlington], the Supreme Court of the United States held that an employer even if it were motivated by anti-union animus could completely cease its operation:
>
> > "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Act." 380 U.S. 270
>
> A complete cessation of business while it may be discriminatory yields no future benefit to an employer in terms of impeding union activity:
>
> > ". . . a complete liquidation of a business yields no such future benefit for the employer if the termination is bona fide. It may be motivated more by animosity toward the union than by business reasons, but it is not the type of discrimination that is prohibited by the Act." 380 U.S. 271, 272
>
> It is clear that Respondent has the discretion to provide or not . . . provide bus transportation for its students. The Board does not make any judgments with respect to the propriety of the actions of the parties during negotiations in terms of good faith nor can it evaluate the motivation behind Respondent's decision to cease its bus service be it for economic reasons or anti-union purposes. The School Code grants a Board of School Directors the right to stop its bus services and since there is neither any express language in the Act indicating legislative intent nor any judicial precedent which might arguably prohibit liquidation, the Board cannot even entertain an argument that the complete cessation of operations is prohibited.

7 PPER at 93. The Board further explained in Millcreek that if a cessation of services proves to be only temporary, the employer is not shielded from an unfair practice charge alleging that the temporary shutdown was motivated by anti-union animus:

> The Board emphasizes that the instant decision involves a complete and permanent termination of an operation that the public employer may perform at its discretion . . . . The instant determination is clearly one of limited application.

> This Board will not permit an employer to use a cessation of operation as both a shield and a sword. An employer even if motivated by anti-union animus can, if it is statutorily permissible, cease one of its operations; however, a complete and permanent cessation of operations is only a shield against violations of Article XII [of PERA]. If a cessation is merely for a period of time and the employer thereafter proceeds to either subcontract out or start up its operations by itself, the Board will pierce through such practices and find a violation of the Act. An employer may not use a less than complete and permanent cessation of operations as a sword to sever itself from the bargaining obligations imposed by the Act.

7 PPER at 93 (emphasis in original).

Just as a school district has the discretion to provide or not provide transportation services for students within its borders, Millcreek, a second class township such as Upper Mt. Bethel has the discretionary authority under Section 1901 of The Second Class Township Code, Act of May 1, 1933, P.L. 103, as amended, 53 P.S. §66901, to create or disband a police force. In this case, the Township's board of supervisors passed a resolution by a 3-2 vote disbanding the police department and discharging its police officers effective August 31, 1996. The parties stipulated that the Township completely ceased provision of police services on that date and there is no evidence of record that the Township has resumed police services. Indeed, upon the Board's remand order the Township introduced evidence that all of its equipment and vehicles were sold at auction on February 18, 1998. The Association has made no allegations or offered any evidence indicating that the Township has in any way resumed police operations. Thus, well over a year later the Township had not resumed police services, nor had the services resumed as of the hearing on remand or by the time of the issuance of the second PDO in September 1999.

Although the Township presented evidence on remand that it sold all of its police equipment and vehicles, the hearing examiner nevertheless concluded based solely on Donatelli's statements made after the decision to disband the police department that the cessation of police services is only temporary. Based on this conclusion, the examiner directed the Township to reinstate its police department and to offer the affected officers reinstatement with back pay. The Township contends that the examiner's conclusion was in error and his reliance on Youngwood Borough is misplaced. The Township asserts that the proper inquiry under the case law is whether the employer actually ceased providing the service at issue and whether the employer has since resumed providing the service. The Township's position is that the Board must look to the actual action taken by the public employer rather than some stated future intent, especially when the future intent is that of one member of the board of supervisors. Because a single member of the board of supervisors cannot bind the entire board, which may of course change members in the future based on the will of the electorate, the Township argues that the Board would be speculating about the possibility of some future event that may never take place. The Township further asserts that even if it decides to create a police force at some future date, such a decision is a matter within its discretion under the Second Class Township Code.

The Board has reviewed the pertinent case law and concludes that the examiner's decision was in error. The controlling case precedent, including

Millcreek, County of Bucks and Jefferson-Penn Police Commission, reveal that in prior cessation of services cases the Board has declined to speculate regarding the public employer's future intent, and has instead confined its review to whether the record before it evidences actual performance of the work at issue by the employer or an alternate provider (e.g., employes of a subcontractor) after the alleged date of permanent discontinuance of the service. In Millcreek, for instance, the Board concluded that the employer had completely and permanently ceased providing bus services even though the employer had authorized an inquiry into possible subcontracting before the record closed. Such an inquiry by the employer in Millcreek could easily have been considered evidence of the employer's future intent. However, the Board in Millcreek did not view the "completeness and permanency" analysis the way the examiner did in this case. Indeed, in Millcreek the Board viewed *permanency* in terms of whether the employer restarted its operations on its own or by way of a subcontractor after the cessation. 7 PPER at 93.

Also, in County of Bucks, supra, *remanded sub nom*. Bucks County (Park Rangers), 18 PPER ¶ 18121 (Final Order, 1987), where the county terminated its park ranger program after its rangers gained certified representation under Act 111, the Board determined on remand from Commonwealth Court that cessation was not permanent because the duties principally performed by the rangers had been resumed by other county employes not represented under Act 111 after the rangers were terminated. Significantly, Commonwealth Court recognized:

> The County may not *under any guise* avoid its Act 111 duty to bargain by subsequently directing its employees or others to resume *any* of the duties principally performed by the rangers prior to their termination; if it wishes to resume these duties, the County must reinstate the rangers and bargain with their Association.

465 A.2d at 734 (emphasis in original). Finally, in Jefferson-Penn Police Commission a police union charged the Commission, Jefferson Township and Penn Township with engaging in a conspiracy to discharge the Commission's police officers and to continue police services under a different guise. The Board affirmed the hearing examiner's decision, which found that the Commission had completely and permanently ceased police services because the Commission had discharged all of its officers and none of the respondents had hired any of the officers or continued police services under a different guise. The Board did not look for some evidence of future intent on the part of the Commission in order to determine whether the cessation of police services had been complete and permanent. Based on the above cases, it is clear that the Board has never taken the approach that the examiner took here in a cessation of service case.

Furthermore, in Youngwood Borough, supra, the employer furloughed its police officers based on budgetary constraints and then offered to meet with the union regarding alternatives to possible disbanding of the police department, thus indicating that no decision to permanently disband had yet been made. Although the State Police took over police services, Commonwealth Court concluded that County of Bucks did not apply because the employer never contended that it completely and permanently ceased police services. However, the Court recognized that the holding in County of Bucks did apply to the employer's use of a constable to do work formerly done by the officers. The Court stated in pertinent part:

> [W]e readily agree with Police that this is a situation where our holding in County of Bucks does apply. Here we have the circumstances foreseen by President Judge Crumlish [in County of Bucks] where a borough directs others to perform services previously rendered by its police force. The examiner found from record evidence that this was a service formerly performed by Police. . . . we conclude that there is substantial evidence to support the examiner's critical findings [and] will affirm the Board's order that the Borough committed an unfair practice in this regard.

539 A.2d at 29-30. Based on Youngwood Borough then, it seems clear that we must look to the employer's actions rather than some speculative or vague future intent to determine whether the cessation of services is only temporary.

This is not a situation where the employer has employed some other means of continuing the service at issue; for instance, by way of subcontracting or the use of non-bargaining unit employes, a practice clearly prohibited by law. City of Reading, 30 PPER ¶ 30139 (Final Order, 1999). Nor is this a situation involving a "runaway shop" or a "partial closing" of the service, both of which if motivated by anti-union animus may be considered unlawful under the National Labor Relations Act. Local 57, Garment Workers (Garwin Corp.) v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942, 87 S.Ct. 2074 (1967); Darlington, supra.

In this case, the Board remanded in order to determine whether the Township had in fact sold its equipment and vehicles. Although not dispositive, the sale of equipment used in the provision of police services tends to support a complete and permanent cessation of services. In September 1996, Donatelli said the Township would bring the police department back in two years; as of the remand, however, police services had not resumed. It is beyond the Board's statutory authority to monitor a public employer's actions ad infinitum. Even if the Board suspects that an employer has some intention of reinstating the service at issue at some future point in time, the Board should not usurp an employer's right to completely and permanently cease operations based only on that suspicion. Bruce Duncan Co. v. NLRB, 590 F.2d 1304 (4th Cir. 1979). We are persuaded on this record that the Association has not demonstrated that the Township's action is not a complete and permanent cessation of police services. If, however, as the Township concedes, the Township decides to reinstate the police department, it will be required to recall the officers and bargain with the Association. County of Bucks. Anything less would allow an employer under the guise of a complete and permanent cessation, to terminate officers for discriminatory reasons, shed the union and subsequently resume services without the union and union-adherent employes.

Finally, the Board's decision here is consistent with those cases where the Board has dismissed unfair practice charges as prematurely filed where the employer has merely announced an intention in the future to take action that would constitute an unfair practice. APSCUF v. PLRB, 661 A.2d 898 (Pa. Cmwlth. 1995). The charge in APSCUF was dismissed for the very reason that the employer might never act in accordance with its stated intent and thus commit an unfair practice. The record in this case is even weaker than in APSCUF where the employer's governing body as a whole passed a resolution that essentially authorized the assignment of bargaining unit

work to non-bargaining unit employes. Accordingly, the Board will sustain the Township's first four exceptions and set aside the PDO. [1]

After a thorough review of the exceptions, the brief in support, the response to exceptions, the brief in opposition to exceptions and all matters of record, the Board shall sustain the exceptions in part and set aside the Proposed Decision and Order consistent with the above discussion.

CONCLUSIONS

That CONCLUSIONS numbers 1 through 3 inclusive and CONCLUSION number 5, as set forth in the Proposed Decision and Order, are hereby affirmed and incorporated herein by reference and made a part hereof.

That CONCLUSION number 4 of the Proposed Decision and Order is hereby vacated and set aside and the following additional conclusion is made:

6. That the Township has not committed unfair labor practices in violation of Section 6(1)(a), (c) and (d) of the PLRA and Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby sustained in part, that the Order on pages 2 and 3 of the Proposed Decision and Order be and the same is hereby vacated and set aside, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the charge is dismissed and the complaint issued thereon is rescinded.

SIGNED, SEALED, DATED AND MAILED this sixteenth day of November, 1999.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

JOHN MARKLE, JR., CHAIRMAN

_____

EDWARD G. FEEHAN, MEMBER

[1] Based on the Board's disposition of the Township's first four exceptions, it need not address the Township's remaining exceptions.