

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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

**FINAL ORDER**

The Middleburg Borough Police Officers Association (Association) filed timely exceptions with the Pennsylvania Labor Relations Board on December 14, 2020, challenging a Proposed Decision and Order (PDO) issued on November 25, 2020. In the PDO, the Board's Hearing Examiner concluded that Middleburg Borough (Borough) did not violate Section 6(1)(a) or (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111 of 1968, when it implemented a 40 hour cap on the amount of compensatory time the Borough police officers could earn in a calendar year. The Borough filed a brief in opposition to the exceptions on December 31, 2020.

The facts of this case are summarized as follows. The parties are subject to a January 30, 2018 contract settlement agreement, which modified and extended the terms of the collective bargaining agreement (effective January 1, 2015 through December 31, 2017) to December 31, 2021. (FF 3). Under the current written agreements, police officers may earn overtime; however, there is no language in the parties' written agreements concerning compensatory time. Since 2005, the police officers were permitted to accrue compensatory time in lieu of overtime. (FF 5).

Prior to 2019, there was no limitation on the amount of compensatory time a police officer could accrue in any given year and compensatory time was reset or "zeroed out" at the end of each year. (FF 5, FF 6). Beginning in 2019, the Borough carried over the compensatory time earned by the police officers in 2018 and set an initial cap of 480 hours of compensatory time that could be earned each year consistent with the Fair Labor Standards Act. The Borough made this change during its February 2019 Borough Council meeting and approved a motion to pay the police officers for any compensatory time earned in 2018 that was above the 480 hour cap. (FF 7). At its July 2019 Borough Council meeting, the Borough unilaterally reduced the cap on compensatory time to 200 hours and approved a payment to Officer David Schaffer for 280 hours of compensatory time. (FF 8).

During the November 2019 Borough Council meeting, the Borough passed a motion to establish a new 40 hour cap on compensatory time and pay the current 200 hour cap on compensatory time down by 50 hours each calendar quarter of 2020. (FF 9). The Borough did not bargain with the Association over the reduction of compensatory time from the 200 hour cap to the 40 hour cap. (FF 10).

The Association filed its Charge of Unfair Labor Practices on December 19, 2019, alleging that the Borough violated Section 6(1)(a) and (e) of the PLRA by unilaterally reducing the amount of compensatory time a police officer can earn during the year from 200 hours to 40 hours. On February 19,

2020, the Secretary of the Board issued a Complaint and Notice of Hearing. After two continuances, a hearing was held before the Board's Hearing Examiner on August 7, 2020, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the Association failed to establish that the parties had a consistent practice concerning compensatory time and, therefore, it did not meet its burden of showing that the Borough unilaterally changed such a practice. Accordingly, the Hearing Examiner held that the Borough did not violate Section 6(1)(a) or (e) of the PLRA, dismissed the Charge and rescinded the complaint.

In its exceptions, the Association argues that the Hearing Examiner erred in concluding that the Borough did not violate its duty to bargain under Section 6(1)(a) and (e) of the PLRA when it unilaterally implemented a 40 hour cap on compensatory time.<sup>1</sup> The Board has held that both the allowance of payment for compensatory time and the reduction of the amount of compensatory time earned are matters of wages subject to mandatory bargaining. Montgomery County, 14 PPER ¶ 14170 (Final Order, 1983); 43 P.S. § 217.1. An employer possesses a statutory duty to seek out the exclusive representative of its employees and bargain prior to implementing changes in the *status quo* that affect mandatory subjects of bargaining. Salisbury Township v. PLRB, 672 A.2d 385 (Pa. Cmwlth. 1996). This fundamental mandate of labor law is applicable regardless of whether the collective bargaining agreement expressly mentions such benefits; whether they have been incorporated into the agreement by reference; or whether the agreement is silent on that mandatory subject of bargaining. City of Erie v. PLRB, 32 A.3d 192 (Pa. 2011).

Here, the record shows that prior to 2019 the Borough's police officers were permitted to accrue unlimited compensatory time throughout the year, which was "zeroed out" at the end of each year. The Borough's first change to that practice occurred in February of 2019 when it carried over the accrued hours of compensatory time for its officers, placed a cap on such time to 480 hours per year and paid the officers for any compensatory time above the 480 hour cap. The Borough thereafter lowered the cap on compensatory time to 200 hours in July 2019. Although the Association could have requested bargaining over either change, it did not do so. However, it is well settled that a union does not forever waive its right to bargain future changes to a mandatory subject by its acquiescence (either express or implied) to the employer's previous unilateral changes in the subject matter. Crawford County v. PLRB, 659 A.2d 1078 (Pa. Cmwlth. 1995), *appeal dismissed as improvidently granted*, 672 A.2d 1318 (Pa. 1996); Temple University Hospital Nurses Association v. Temple University Health System, 41 PPER 3 (Final Order, 2010).

To establish a unilateral change to a mandatory subject of bargaining under Act 111 and Section 6(1)(e) of the PLRA, the Association need not prove a past practice, but need only satisfy its burden that there was a change in the then existing *status quo* regarding a mandatory subject of bargaining.

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<sup>1</sup> The Association does not challenge any of the Hearing Examiner's Findings of Fact in its exceptions. Therefore, the Hearing Examiner's findings are conclusive. FOP Lodge #5 v. City of Philadelphia, 34 PPER 22 n.3 (Final Order, 2003).

The *status quo* has been defined as the "last actual peaceable and lawful noncontested status which preceded the controversy." Fairview School District v. Commonwealth of Pennsylvania, Unemployment Compensation Board of Review, 454 A.2d 517, 520 (Pa. 1982).<sup>2</sup> Here, the uncontested findings show that, in November 2019, the Borough reduced the cap on compensatory time from the *status quo* of 200 hours to 40 hours and did not bargain with the Association over the change to the cap on compensatory time. Because compensatory time is a mandatory subject of bargaining and there is no past practice with regard thereto, the Borough was statutorily required to bargain with the Association prior to reducing the cap on compensatory time in November 2019 from 200 to 40 hours. See City of Erie, supra. Therefore, the Borough violated its duty to bargain under Section 6(1)(a) and (e) of the PLRA when it unilaterally changed the *status quo* concerning compensatory time from a 200 hour cap to a 40 hour cap.

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Association has sustained its burden of establishing that the Borough violated Section 6(1)(a) and (e) of the PLRA by unilaterally changing the *status quo* concerning the cap on compensatory time. Therefore, the Association's exceptions shall be sustained and the November 25, 2020 PDO shall be set aside consistent with the above discussion.

#### CONCLUSIONS

CONCLUSIONS numbers 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION number 4 is vacated and set aside and the following additional conclusion is made:

5. Middleburg Borough has committed unfair labor practices within the meaning of Section 6(1)(a) and (e) of the PLRA.

#### 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 by the Middleburg Borough Police Officers Association are hereby sustained, and the November 25, 2020 Proposed Decision and Order be and the same is hereby vacated and set aside, and

#### IT IS HEREBY FUTHER ORDERED AND DIRECTED

that Middleburg Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.

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<sup>2</sup> The burden to establish a past practice as evidence that there was no change in the *status quo* rests with the employer as a defense to the charge of a failure to bargain in good faith. See Chester Upland School District v. PLRB, 150 A.3d 143 (Pa. Cmwlt. 2016).

2. Cease and desist from refusing to bargain collectively with the representative of its employees.

3. Take the following affirmative action:

(a) Rescind the 40 hour cap on compensatory time and return to the *status quo ante*; and

(b) Post a copy of the Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employees and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with the Final Order by completion and filing of the attached Affidavit of Compliance.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this fifteenth day of June, 2021. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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**AFFIDAVIT OF COMPLIANCE**

Middleburg Borough hereby certifies that it has ceased and desisted from its violation of Sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111 of 1968; that it has rescinded the 40 hour cap on compensatory time and returned to the *status quo ante*; that it has posted a copy of the Final Order as directed; and that it has served a copy of this affidavit on the Middleburg Borough Police Officers Association at its principal place of business.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

SWORN AND SUBSCRIBED TO before me  
the day and year first aforesaid.

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Signature of Notary Public