

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

BERKS COUNTY FRATERNAL ORDER OF POLICE, :  
LODGE NO. 71 :  
 :  
v. : Case No. PF-C-19-35-E  
 :  
BOROUGH OF LEESPORT, TOWNSHIP OF :  
MAIDENCREEK, TOWNSHIP OF ONTELAUNEE :  
BY AND THROUGH THE NORTHERN BERKS :  
REGIONAL POLICE COMMISSION :

**PROPOSED DECISION AND ORDER**

On July 1, 2019, the Berks County Fraternal Order of Police, Lodge No. 71 (FOP), in cooperation with the Northern Berks Regional Police Association (Association or Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA or Act), as read with Act 111, alleging that the Borough of Leesport, the Township of Maiden Creek and the Township of Ontelaunee, by and through the Northern Berks Regional Police Commission (Commission) violated Section 6(1)(a), (b), (c) and (e) of the PLRA. The FOP alleged that the Commission's Chief of Police, engaged in intimidation and coercion while violating the parties' collective bargaining agreement (CBA) and past practice by requiring the Chief's approval before engaging in Union business while on duty and, in one instance, threatened to discipline a Sergeant if he went to a grievance meeting with the Commissioners while on duty.

On August 1, 2019, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on September 27, 2019, in Harrisburg, Pennsylvania. The parties requested a 90-day continuance to pursue settlement negotiations, and the hearing was rescheduled for January 15, 2020. Negotiations did not resolve the dispute, and the January 15, 2020 hearing was necessary. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On March 12, 2020, the Commission filed its post-hearing brief. On March 13, 2020, the FOP filed its post-hearing brief.

The examiner, based upon witness testimony, admitted documents and all matters of record, makes the following:

**FINDINGS OF FACT**

1. The Borough of Leesport, the Township of Maiden Creek and the Township of Ontelaunee are public employers and political subdivisions in Berks County, pursuant to Act 111 and the PLRA, jointly cooperating in providing police services by and through the Commission. (N.T. 10)
2. The Commission is the governing body of the Northern Berks Regional Police Department (Department). The Department is physically located at the site of the Ontelaunee Township Building. The Commission members are appointed by the contributing, cooperating municipalities. Each municipality appoints one commissioner, and there are three commissioners on the

Commission (i.e., an elected supervisor from each of the two townships and the elected Mayor from the Borough). (N.T. 22-23, 75)

3. The Association or Union is the local certified exclusive bargaining representative of the police officers employed by the Commission. The Association has its own elected officers (e.g. President, Vice President and Treasurer). The Association is affiliated with the FOP, Lodge No. 71, but it is separate and distinct from the FOP. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 46-47; Respondent Exhibit 1)

4. A former collective bargaining agreement, that was effective from January 1, 2008 through December 31, 2011, provides that the agreement was between the Commission and the Association. The current CBA, which expired on December 31, 2019, provides that the CBA is between the Commission and the FOP, Lodge No. 71. (Respondent Exhibit 10: Union Exhibit 1)

5. Article 29 of the 2008-2011 agreement provided, in relevant part, as follows:

The aggrieved officer and/or the President of the Association shall be granted reasonable time, if required, during working hours to process grievances in accordance with Step 1,2 and 3, and to attend arbitration under Step 4 without loss of pay or other benefits.

(Respondent Exhibit 10, Article 29, p.31)

6. Brian Horner has been the Department's Chief of Police since May 8, 2017. Prior to becoming Chief of Police, he was a Detective Sergeant in the Department. He has been with the Department for approximately 29 years. The Chief is not involved in collective bargaining negotiations. (N.T. 10, 66, 77, 102-103)

7. Sean Showalter is a Patrol Sergeant in the Department, and he has been the President of the Association since the beginning of 2019. Sgt. Showalter is an FOP representative for the Association. Robert Wood is a Detective Sergeant in the Department, and he is the Vice President of the Association. William Dillman is a patrol officer in the Department, and he is the Association Treasurer. (N.T. 9-12, 46-47, 56, 110-111, 174)

8. Angel Toro is a bargaining unit patrol officer employed at the Department. Officer Toro is a former President and Treasurer of the Association. While he was Association President, Officer Toro worked on grievances. While he was Treasurer, Officer Toro and Sgt. Ronald Mohl prepared for interest arbitration during work hours at the Department. There is no evidence that Chief Horner or the prior chief knew that Officer Toro conducted Union business during work hours. While Officer Toro was President, he was on extended leave for over a year due to an injury, during which time he filed approximately 12 grievances which were all processed while he was off-duty on leave. (N.T. 86-89 96-97)

9. On February 27, 2019, Sgt. Mohl sent an email to bargaining unit members stating, in relevant part, as follows:

Looking at Thursday, March 14, 2019 at 1800 hrs to have an NBRPD Association meeting at the NBRPD Office for election of executive officers. Please make every effort to be in attendance. Let me know if there is any conflict with this date and time. I will reach

out to Chief Horner, giving him the respect & courtesy of his position of making him aware of the intended NBRP Association meeting, for his approval of On Duty Officers being allowed to attend the meeting.

(N.T. 41-42; Respondent Exhibit 1)

10. The officers at the Department work 12-hour shifts. Sgt. Showalter works the 6:00 p.m. to 6:00 a.m. shift and was working that shift on June 10, 2019. (N.T. 11, 30, Respondent Exhibit 4)

11. At all times relevant hereto, the parties were operating under the CBA effective from January 1, 2016, through December 31, 2019. (N.T. 14-15; Union Exhibit 1)

12. Article 29 of the 2016-2019 CBA currently in effect contains the grievance procedure and provides, in relevant part, as follows:

The aggrieved officer and/or the President of the FOP, Lodge #71 shall be granted reasonable time, if required, during working hours to process grievances in accordance with Step 1, 2 and 3 and to attend arbitration under Step 4 without loss of pay or other benefits.

(N.T. 15-16; Union Exhibit 1, Article 29 p. 39)

13. Chief Horner credibly testified that the difference between the 2008-2011 contract and the current CBA regarding on-duty grievance processing is that the former contract permitted the President of the Association to work on grievances on duty, if required, whereas the current CBA permits the President of the FOP, Lodge No. 71, not the Association, to spend reasonable time to process grievances on duty, if required. The FOP Lodge No. 71 President is not an employe of the Department, and he is not a commissioner. (N.T. 108-110, 122; Union Exhibit 1; Respondent Exhibit 10)

14. The Chief also credibly testified that the contractual language: "reasonable time, if required, during working hours," means that the Chief has the authority to determine what is a reasonable time to spend on Union business during work hours and whether it is required and, therefore, that he needs notice of the activity and has the right to approve or disapprove of Union work on duty, depending on street coverage. (N.T. 137-141)

15. The Chief's understanding of the CBA is that, if an aggrieved officer is working on his own grievance during work hours, he needs to inform the Chief so that the Chief can address the coverage and man-hours issues within the municipalities. (N.T. 144-146)

16. Prior to May 2019, the Chief had expressed concerns in the Department about Union officers working on Association business while on duty. Under the Association's by-laws, the Association Treasurer should not be involved in processing grievances. One of the first times that the Chief raised the issue of doing Union business while on duty was after a 4-hour morning training session about CPR, first aid and bleeding. The Chief learned of an Association meeting following the 4-hour training. He did not interfere with the Association meeting, but he ordered the on-duty officers not to attend and immediately begin patrolling the streets. From time to time, the Chief holds Department meetings. After a Department meeting on February 6,

2019, the Association wanted to hold a Union meeting, but the Chief prohibited on-duty officers to attend due to coverage obligations. (N.T. 50-51, 107, 186)

17. On May 13, 2019, Detective Sgt. Wood emailed Sgt. Showalter and Officer Dillman as follows:

A few weeks back I along with Steve Hoptley were told not to discuss association business on duty by the Chief. Angel [Toro] needs me to sign a grievance and I told him I can not do this on duty. He told me you (Sean) were out of the country. What's your status and if that's the case can I sign on duty?

(Respondent Exhibit 2)

18. On May 13, 2019, Sgt. Showalter responded: "Since I am unavailable you have the right to sign that grievance. If there are any ramifications we will deal with them as well." (Respondent Exhibit 3)

19. Also on May 13, 2019, Detective Sgt. Wood responded with his understanding of what the CBA grievance procedure allows regarding officers working on grievances while on duty. (Respondent Exhibit 4)

20. Detective Sgt. Wood stated, in relevant part, the following:

Also the CBA says the grievant and the President of the FOP, Lodge #71 shall be granted reasonable time during work hours... This CBA needs to be changed to cover the bargaining committee or at least the association President, VP, and/or Treasurer. If it isn't addressed we can not work on these matters while on duty.

(Respondent Exhibit 4)

21. On May 16, 2019, the Association Vice President filed three Step-2 grievances on behalf of Officer Angel Toro. Step 2 of the contractual grievance procedure is a meeting with the appointed Commissioners. (N.T. 20-24, 159; Union Exhibit 3)

22. All three Step-2 grievances state the following, in relevant part:

On Friday May 10, 2019 Chief Brian Horner responded to a grievance filed on Thursday, May 9, 2019 by the FOP Berks Lodge #71. Chief Brian Horner denied the grievance at step #1 of the grievance process.

The FOP Berks Lodge #71 is requesting a meeting with the Northern Berks Regional Police Commission to discuss the grievance at step #2 of the grievance process, as stipulated in the Collective Bargaining Agreement, Article 29.

(Union Exhibit 3)

23. On May 27, 2019, Sgt. Showalter emailed Whitney Rahman, the Commission's Solicitor, asking whether the Association could meet with her and the Commissioners on June 11, 2019, close to 6:00 p.m., for collective

bargaining negotiations because the CBA was due to expire December 31, 2019. (N.T. 25-26; Respondent Exhibit 12)

24. On June 3, 2019, Chief Horner sent an email to the three Association officers, i.e., President Showalter, Vice President Wood and Treasurer Dillman. The subject line in the email identifies "FOP/NBRP Assoc. Union Business during working hours." (N.T. 17-19; Union Exhibit 2)

25. The body of the email provides, in relevant part, as follows:

Please be advised that any Officer/Sgt. That works on or attends FOP/NBRP Assoc. union business **during working hours needs to be approved by the Chief of Police.** Please don't assume that you or they can just work on union business during shifts without approval.

Like I said.....FOP/NBRP Assoc. union business during working hours needs to be approved by the Chief Of Police. Union business during working hours is not part of [ ] Officer/Sgt. Duties.

I am willing to work with the FOP/NBRP Assoc. but I have obligations in running the police department. There is a municipality that has recently commented about hours of service/coverage so I need to be aware of when Union Business is taking place that involves an on-duty Officer/Sgt.

(Union Exhibit 2; Respondent Exhibit 7) (emphasis original as highlighted in yellow)

26. The Chief credibly testified that the impetus for his June 4, 2019 email was the complaints that he was receiving from Heidi Fiedler, the Commissioner from Maidencreek Township, who wanted more police coverage in her Township. To satisfy Ms. Fiedler, Chief Horner wanted all the officers who were on duty to be actively patrolling on the streets. In addition to her complaints, Commissioner Fiedler did not want to extend or renew the Chief's contract. (N.T. 105-106, 127-128)

27. The Chief needs to know if street coverage is compromised due to an on-duty officer engaging in Union work so he could adjust the coverage. The Chief had recently learned of Union business interfering with coverage, and he was not told about it. The Chief believed that the matter needed to be addressed because he is accountable to the commissioners for the street coverage. (N.T. 105-106)

28. The Chief wants to approve or disapprove the performance of on-duty Union business to prevent inadequate street coverage. The Chief's understanding of the CBA is that the FOP Lodge No. 71 President, Joe Brown, is the person who can represent grievants at grievance meetings. (N.T. 106-108)

29. Also on June 3, 2019, Sgt. Showalter emailed Chief Horner, Detective Sgt. Wood and Officer Dillman in response to the Chief's June 3, 2019 email. The email provided as follows:

Chief,

I am not aware of any FOP/Association/Union business being conducted recently during working hours other than Vice President Wood signing a form.

If there is something specific you are referring to I would appreciate knowing about it.

(Respondent Exhibit 8)

30. On June 4, 2019, Chief Horner responded to Sgt Showalter's June 3, 2019 email and addressed it to Sgt. Showalter, Detective Sgt. Wood and Officer Dillman. The email provided as follows:

Sean,

I didn't say there was anything taking place recently or I would've addressed it. I just wanted all of you to be aware that this is a Directive from here on that FOP/NBRP Assoc. union business during working hours needs to be approved by the Chief of Police. This is ONLY for officers that are working and not off duty officers.

(Respondent Exhibit 9) (emphasis original)

31. On June 6, 2019, Attorney Rahman emailed Sgt. Showalter scheduling a meeting with the Commission members for Step 2 of the Toro grievances. (N.T. 24-25; Union Exhibit 4)

32. Attorney Rahman's email stated the following:

Sgt. Showalter: Pursuant to Article [29] of the collective bargaining agreement, the Commission will meet with the FOP to discuss the grievance referenced in the attached request to meet at an executive session at its regular meeting on June 10, 2019. We anticipate this will occur at approximately 8:00 p.m. We look forward to seeing you then. Please let me know if you have any questions. -Whitney

(Union Exhibit 4)

33. Sgt. Showalter was scheduled to work on June 10, 2019, when Solicitor Rahman scheduled the Step-2 grievance meeting with the Commissioners. (N.T. 26-28)

34. There is no evidence of record establishing that Sgt. Showalter was unable to request to meet with the commissioners at a date or time when he was off duty or that he sought the Chief's permission to meet with the Commissioners while on duty.

35. On June 10, 2019, Sgt. Showalter arrived at the Department at approximately 5:45 p.m. for his 6:00 p.m. shift. Upon his arrival, Chief Horner asked Sgt. Showalter to come into his office, along with Association Vice President, Detective Sgt. Wood and Association Treasurer, Officer Dillman, to let them know that he wanted them to inform him about performing Union work on duty. (N.T. 27-28, 111-112)

36. Chief Horner initiated the conversation by saying that Sgt. Showalter was not permitted to attend the Step-2 grievance meeting with the

commissioners that evening. Chief Horner was holding the CBA and Sgt. Showalter noticed yellow highlighting on the CBA. Chief Horner primarily addressed Sgt. Showalter during this meeting. (N.T. 28)

37. During the meeting, Chief Horner told Sgt. Showalter that he would write-up Sgt. Showalter if he went to the Step-2 grievance meeting that evening. Chief Horner also stated that Sgt. Showalter is not allowed to make up the schedule and asserted that Sgt. Showalter scheduled himself to attend a meeting while on duty. (N.T. 29-30, 90-94)

38. Chief Horner further asserted that Sgt. Showalter sent an email to Detective Sgt. Wood and Officer Dillman telling them to disobey the Chief's directive not to do Association work on duty. Sgt. Showalter at this time denied that he told anyone to disobey the Chief's directive. (N.T. 32-33)

39. Chief Horner told Sgt. Showalter that he was not allowed to do Association business on duty because Sgt. Showalter was not the President of the FOP as provided for in the CBA. The Chief asserted that FOP President Joe Brown should be going with Officer Toro to the Step-2 grievance meeting. He was angry about Sgt. Showalter attending the Toro grievance meeting that night with the commissioners. (N.T. 32-33, 77-80, 111-112, 115)

40. The Chief asked Sgt. Showalter to recite the grievance procedure provision in the CBA, but Sgt. Showalter did not have a copy of the CBA with him. The Chief several times hit the CBA against his hand and held it up to Sgt. Showalter. (N.T. 32-35, 80-81)

41. Also during the June 10, 2019 meeting, the Chief several times asked Sgt. Showalter if Showalter knew that he was the "fucking Chief." The Chief several times stated: "I'm the fucking Chief," and "do you know that I'm the fucking Chief." The Chief was angry and loud. (N.T. 33-35, 80-81, 90-92, 113-114)

42. Sgt. Showalter told the Chief that what he was doing relating to restricting Association business on duty could be an unfair labor practice, to which the Chief responded that he did not care. (N.T. 34-35)

43. The Chief told Sgt. Showalter that, if he went to the grievance meeting that night or the scheduled June 11, 2019 contract negotiation session with the commissioners, he would write-up Showalter. Chief Horner also stated that, if Sgt. Showalter wanted to go to any meetings to conduct Union business while on duty, he had to use comp time. (N.T. 35-36, 80)

44. Inside the Chief's office, the Chief said to Sgt. Showalter: "You better not be fucking lying to me Sgt." The discussion then moved to the hallway outside the Chief's office. Chief Horner several times yelled to Sgt. Showalter: "If I find out you fucking lied to me..." Sgt. Showalter denied that he was lying to the Chief, then he and Officer Toro went to the grievance meeting with the commissioners at approximately 6:00 or 6:15 p.m. Chief Horner did not attend the executive session meeting with the commissioners, during which the Toro grievances were discussed. (N.T. 35-38, 74, 81, 94, 113-114)

45. Chief Horner uses profanity in general. He uses profanity during discussions involving non-Union related matters. He has engaged in loud or angry behavior with individual Commission members, specifically Maiden creek

Township Commissioner Fiedler. Sgt. Showalter and other officers also use profanity in the Department. (N.T 51-56, 104-106)

46. The Chief's behavior during the June 10, 2019 meeting in his office, when he was using profanity, was different than when he usually uses profanity. He usually is joking or calm when he uses profanity on general matters. During the June 10, 2019 meeting, the Chief was very angry and agitated; he was red in the face. The Chief's anger during this meeting was because Sgt. Showalter was attempting to conduct Union business while on duty, without prior approval. (N.T. 62-63, 94-95)

47. Sgt. Showalter was never disciplined as a result of the June 10, 2019 meeting with the Chief, for going to the June 10, 2019 grievance meeting with the commissioners or for any emails that he sent to Association members. He was not required to use his comp time for attending the June 10, 2019 grievance meeting with the commissioners. (N.T. 56-57, 70-71)

48. Sgt. Showalter, Officer Dillman and probationary Officer Gregory Falk were on duty the night of June 10, 2019. The Chief was concerned that, if Sgt. Showalter and Officer Dillman went to the grievance meeting, an unsupervised probationary officer in training would be alone covering the streets of three municipalities. (N.T. 125-126)

#### DISCUSSION

The Union filed the instant unfair labor practice charge under Section 6(1)(a), (b), (c) and (e) of the PLRA as read with Act 111. In its post-hearing brief, the FOP does not address or develop its claim under Section 6(1)(b). The law under Section 6(1)(b) is as follows:

Section 6(1)(b) of the PLRA, like Section 1201(a) (2) of PERA, prohibits an employer from dominating or interfering with a union to the point where the union can be deemed a "company union." PLRB v. Commonwealth (Department of Educ.), 14 PPER ¶ 14069 (Proposed Decision and Order, 1983), 14 PPER ¶ 14135 (Final Order, 1983). The PLRB will find an employer in violation of Section 6(1)(b) of the PLRA if the employer compromises the integrity of a labor organization to the point it is no longer independent of the employer. Port Vue Borough, 30 PPER ¶ 30189 (Proposed Decision and Order, 1999). To prove such a violation, the union must show that the employer is interfering or dominating the union by placing managerial employees in the hierarchy of the union or by providing financial or other aid to the union to the point that it is employer controlled and no longer represents the wishes of the bargaining unit. Pennsylvania Department of Labor and Industry, 15 PPER ¶ 15025 (Final Order, 1984).

Commonwealth of Pennsylvania, Pennsylvania State Police, 40 PPER 119 at 406 (PDO, 2009). The record in this case does not establish that the Commission placed managerial employees in the hierarchy of the Association, that it has given financial support to the Association or that it, in any way, influenced Association decisions or operations. The specification of charges does not contain any allegations related to financial support or influence or management's alleged interference with Union operations and decision. Also, the record contains no evidence that the Chief or the Commission controls the



Association such that the Union no longer represents the wishes of the bargaining unit. Accordingly, the charge under Section 6(1)(b) is dismissed as unfounded.

The Association alleges that the Commission contravened the parties' CBA and past practice, in violation of Section 6(1)(a) and (e), when the Chief of Police issued a directive to Association officers requiring his approval before conducting Association business while on duty and when the Chief, during a June 10, 2019 meeting, told Sgt. Showalter that he could not attend a Step-2 grievance meeting with the commissioners on behalf of Officer Toro. The Commission raises several defenses and asserts that a reasonable reading of the grievance procedure provided in the CBA gives the Chief of Police the authority to approve or disapprove of processing grievances while on duty, due to operational demands and street coverage requirements, that on-duty grievance processing is not a mandatory subject of bargaining, and therefore cannot be a past practice, and that unapproved, on-duty grievance processing is not protected activity.

Regardless of whether the Chief's directive, not to conduct Union business on duty without approval, constitutes a change in a past practice or a violation of the CBA, the record shows that the Chief initially gave that directive before May 13, 2019, as evidenced by Sgt. Wood's May 13, 2019 email. Detective Sgt. Wood is the Union Vice President and, on May 13, 2019, he informed Sgt. Showalter, the Union President, and Officer Dillman, Union Treasurer, of the Chief's verbal directive. The record also shows that, prior to May 13, 2019, the Chief prohibited on-duty officers from attending an Association meeting after a 4-hour training and, as early as February 6, 2019, he prohibited on-duty officers from attending a Union meeting after one of the Chief's Department meetings. The PLRA provides that: "No petition or charge shall be entertained which relates to acts which occurred or statements which were made more than six weeks prior to the filing of the petition or charge." 43 P.S. § 211.9(e). The record shows that the Union leadership had actual knowledge of the Chief's directive, that he must approve on-duty Association business, as early as February 6, 2019, and, in any event, before May 13, 2019, which is more than six weeks prior to the July 1, 2019 filing date of the charge. Any alleged statutory violations related to the Chief's requirement that on-duty officers obtain his prior approval before conducting on-duty Union business, therefore, are untimely and barred by the statute of limitations contained in the PLRA.

Notwithstanding untimeliness, the record does not support a finding of a past practice that the Chief permitted officers to perform Association business while on duty without Chief approval. Officer Toro did testify that he and Sgt. Mohl prepared for interest arbitration and processed grievances while on duty. However, there is no evidence that Chief Horner or the prior Chief knew that he and Mohl were engaged in Association business while on duty or while they were supposed to be patrolling the streets. Also, the record does not establish whether or not Sgt. Mohl sought and obtained either Chief Horner's or the former chief's approval before engaging in on-duty Association business.

When Chief Horner learned that Union business was being conducted on duty without his approval, he enforced his interpretation of the CBA and directed the Union officers to stop the activity. In order for a practice to become a binding term and condition of employment, both parties must be aware of the practice and the behavior of both parties must demonstrate they mutually accept that behavior in response to the recurring set of

circumstances at issue. Moreover, with activities as frequent as the filing of grievances and other Association business, an isolated occurrence or two of working on Association business over the years, unknown by management, cannot rise to the level of a past practice. Accordingly, on-duty Association business was not a binding past practice.

The Commission emphasizes that Ellwood City Wage and Policy Unit v. PLRB, 736 A.2d 707 (Pa. Cmwlth. 1999), is controlling here. In Ellwood City, the Commonwealth Court held that processing grievances and conducting other union related business on company time is not protected activity. The Court further held that a similar contractual provision, which stated that union representatives and aggrieved employees shall be granted reasonable time to process grievances on duty, gave the employer the right to be notified subject to approval for on-duty grievance processing. The Court concluded that on-duty grievance processing without management's approval is outweighed by management's interest in maintaining the availability of adequate police personnel to ensure public safety. Therefore, requiring notice to and limitation by management regarding on-duty grievance processing and other Union work is a managerial prerogative and not a mandatory subject of bargaining. Ellwood City, 736 A.2d at 711.

The FOP attempts to distinguish Ellwood City by arguing that the chief in that case only required notification of on-duty union work and not approval. (FOP Post-hearing Brief at 7). However, the Ellwood City chief in his directive made clear that only "[a]fter notification **and approval** of the 'begin' time for processing a grievance, the date, beginning time and the ending time shall be recorded and submitted to the office of the Chief of Police." Ellwood City, 736 A.2d at 708 (emphasis added).

Furthermore, a binding past practice must involve a mandatory subject of bargaining. South Park Township Police Ass'n v. South Park Township, 32 PPER 32078 (Final Order, 2001), and on-duty union work is not a mandatory subject. Ellwood City, supra. Without additional contractual protection, where the contract evidences that the employer expressly waived its managerial prerogative to approve Union business on duty, Coatesville Area School District v. Coatesville Area Teachers Association, 978 A.2d 413 (Pa. Cmwlth. 2009), the alleged practice of performing Union business on duty unknown to management did not become binding where it is not a mandatory subject of bargaining. Accordingly, I agree with the Commission that, under Ellwood City, the Chief's directive does not violate any past practice, because it is not a mandatory subject of bargaining, and the alleged practice was not known to management. The directive, therefore, is not coercive under Section 6(1)(a) or a bargaining violation under 6(1)(e).

Moreover, the CBA did not provide additional protection or evidence that the Commission bargained away its managerial prerogative to require approval before officers can perform on-duty Union business. Both the Commonwealth Court and the Board have recognized the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB, 804 A.2d 1291 (Pa. Cmwlth. 2002); Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER ¶ 18117 (Final Order, 1987). The doctrine requires the dismissal of a charge where the employer establishes a sound arguable basis for ascribing a certain meaning to the language of the collective bargaining agreement or other bargained for agreement and that the employer's conduct was in conformity with that interpretation. Fraternal Order of Transit Police v. SEPTA, 35 PPER 73 (2004). An employer's interpretation need not be the correct interpretation as long as a sound arguable basis exists for its

interpretation, thus establishing a substantial claim of contractual privilege. Id. Moreover, it is not the function of the Board to interpret collective bargaining agreements through unfair practice charges. Hatfield Township Police Dept. v. Hatfield Township, 18 PPER ¶ 18226 (Final Order, 1987).

Article 29 of the 2016-2019 CBA contains the grievance procedure and provides, in relevant part, that "[t]he aggrieved officer and/or the President of the FOP, Lodge No. 71 shall be granted reasonable time, if required, during working hours to process grievances in accordance with Step 1, 2 and 3 and to attend arbitration under Step 4 without loss of pay or other benefits." (F.F. 12) (emphasis added). As the Commission emphasized during the hearing, this language is a departure from the language contained in a prior collective bargaining agreement which provided that the "President of the Association shall be granted reasonable time, if required, during working hours to process grievances in accordance with Step 1,2 and 3, and to attend arbitration under Step 4 without loss of pay or other benefits." (F.F. 5) (emphasis added).

As evident from comparing the 2008-2011 collective bargaining agreement to the current CBA, the parties deliberately agreed to change the identity of the person who could be granted reasonable time, if required, to process grievances during work hours from the President of the Association to the President of the FOP Lodge No. 71. Sgt Showalter is the President of the Association, not the FOP Lodge No. 71. The record shows that Joe Brown is the President of the FOP Lodge No. 71. Accordingly, Sgt. Showalter is not automatically authorized to perform Association business on duty. Also, Article 29 clearly provides that an aggrieved officer shall be granted reasonable time, if required to process grievances on duty. A reasonable understanding of this provision is that only grievances could be processed on duty and not any and all Association business.

Furthermore, the determination of what constitutes a reasonable time and whether or not it is required to be done on duty cannot reasonably be interpreted as being in the sole discretion of the aggrieved officer who may subjectively believe that he needs his entire shift to process his grievances. In this vein, a reasonable interpretation of Article 29, which aligns with the Chief's, Detective Sgt. Woods's, Sgt. Mohl's and the Commonwealth Court's interpretation in Ellwood City, is that, if an on-duty, aggrieved officer is going to be able to be paid for processing grievances instead of police work, management has the right to know and to determine how much time is reasonable or required based on operational concerns. Therefore, the Chief has a sound arguable basis in the CBA for concluding that, based on operational needs, he must be notified of planned grievance processing to be conducted by an on-duty, aggrieved officer subject to the Chief's approval based on operational needs and street coverage.

Detective Sgt. Wood, Vice President of the Association, expressed the same understanding as the Chief of Police regarding Article 29 in his May 13, 2019 email stating that, if the CBA is not changed, none of the Association officers can work on Union matters while on duty. Additionally, Sgt. Mohl stated in his February 27, 2019 email that he believed that Chief Horner, at a minimum, deserved to be notified of Union business so he could make appropriate adjustments. In this regard, Sgt. Mohl stated: "I will reach out to Chief Horner, giving him the respect & courtesy of his position of making him aware of the intended NBRP Association meeting, for his approval of On Duty Officers being allowed to attend the meeting." Accordingly, the Chief

did not violate the CBA or a past practice, especially since there is no evidence that Sgt. Showalter could not have requested to meet during an off-duty time or simply request on-duty time from the Chief.

The Union also alleges that the Commission violated Section 6(1)(c) of the PLRA. In a discrimination claim under Section 6(1)(c) of the PLRA, the claimant has the burden of proving that the employe(s) engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse employment action against the employe(s) that was motivated by the employes' engaging in that known protected activity. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004); FOP, Lodge 5 v. City of Philadelphia, 38 PPER 184 (Final Order, 2007). A necessary element of a discrimination claim under Section 6(1)(c) is that the Union must establish that employes suffered an adverse action that affected their employment. Faculty Federation of Community College of Philadelphia Local 2026 AFT, AFL-CIO v. Philadelphia Community College, 51 PPER 23 (PDO, 2019)

The record in this case does not establish that any of the officers suffered any adverse employment action. The Chief did not discipline any officers or make any changes to any officer's terms or conditions of employment as a result of anyone processing grievances on duty or violating the Chief's directive. Also, as previously concluded herein, the officers attempting to perform Association business on duty without prior approval is not protected activity and, therefore, the Chief's directive and behavior were not unlawfully motivated. Accordingly, the claims under Section 6(1)(c) are dismissed as unfounded.

The Union also alleges that the Township committed an independent violation of Section 6(1)(a) of the PLRA when the Chief issued his directive, verbally threatening Sgt. Showalter with discipline and yelled at him while banging the CBA in his hand on June 10, 2019. The Board will find an independent violation of Section 6(1)(a) of the PLRA if the actions of the employer, in light of the totality of the circumstances in which the act occurred, tend to be coercive, regardless of whether employes have been shown in fact to have been coerced. Bellefonte Police Officers Ass ' n v. Bellefonte Borough, 27 PPER ¶ 27183 (Proposed Decision and Order, 1996) (*citing* Northwestern Education Ass ' n v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 6(1)(a). Northwestern School District, *supra*. However, an employer does not violate the PLRA or PERA where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Ringgold Sch. Dist., 26 PPER ¶ 26155 (Final Order, 1995).

The record establishes that the Chief issued several directives before May 13, 2019, which he reiterated and explained on June 3, 2019. These directives require his prior approval before any officer conducts Union business while on duty. The record also establishes that the Chief, during the meeting in his office on June 10, 2019, became escalated, red-faced, banged the CBA in his hand and used profanity. Had the June 3, 2019 directive or the Chief's behavior during the June 10, 2019 meeting addressed protected activity, he certainly would have violated Section 6(1)(a). However, the Chief, relying on the CBA, required that officers obtain the Chief's prior approval before engaging in grievance matters while on duty. Under the totality of the circumstances, any officer conducting Association business while on duty after June 3, 2019, is also engaged in insubordination in violation of a clear and unequivocal managerial directive. Consequently, the

Chief's ire on June 10, 2019 was a result of his perception that Sgt. Showalter was being insubordinate by attempting to engage in unapproved Union business on duty and his perception that Sgt. Showalter lied about telling other officers not to follow the Chief's directive. The Chief's behavior that evening was not a response to any protected activity.

Also, on balance, the Chief's legitimate managerial concerns outweigh any coercive effect on a reasonable officer for engaging in Union business while on duty without prior approval, especially the night of June 10, 2019, given the staffing levels that evening. Chief Horner credibly testified that he issued the directive of June 3, 2019, to control street coverage and manpower, which falls within the purview of the Chief of Police, who also does the scheduling. Chief Horner was receiving complaints from Heidi Fiedler, the Commissioner from Maiden Creek Township. Ms. Fiedler wanted more police coverage in her Township. The Chief was under pressure from Ms. Fiedler, who did not want to renew Chief Horner's contract as Chief of Police. To satisfy Ms. Fiedler, Chief Horner wanted all the officers who were on duty to be actively patrolling on the streets.

Consequently, Chief Horner needs to know if street coverage is compromised due to an on-duty officer engaging in Union work instead of patrolling the streets and making them better able to respond to emergency calls. In this regard, Chief Horner wanted to be in a position to approve or disapprove of the performance of on-duty Union business to prevent inadequate street coverage and emergency responses. Chief Horner also credibly testified that, if he is aware of an officer's desire to perform Association business while on duty and the time the officer will want to do so, he could adjust the coverage on the streets within the three municipalities.

Furthermore, there is no evidence of record establishing that any Association Officer is unable to coordinate the performance of Union business with or without the involvement of the Commission while they are not on duty. Chief Horner became escalated on June 10, 2019 because he had recently learned of Union business interfering with street coverage, about which he was not told, after his June 3, 2019 directive. The Chief believed that the matter needed to be addressed in a meeting because he is accountable for the street coverage and Sgt. Showalter did not heed his June 3, 2019 email directive. Moreover, Sgt. Showalter, Officer Dillman and probationary Officer Falk were on duty the night of June 10, 2019. The Chief was concerned that, if Sgt. Showalter and Officer Dillman went to the grievance meeting, an unsupervised probationary officer in training would be alone covering the streets of three municipalities.

Chief Horner is not attempting to restrict, interfere with or otherwise prevent officers from conducting Union business on or off duty. In this regard, he told the Association leadership: "I am willing to work with the FOP/NBRP Assoc. but I have obligations in running the police department. There is a municipality that has recently commented about hours of service/coverage so I need to be aware of when Union Business is taking place that involves an on-duty Officer/Sgt." (F.F. 25). The Chief simply needs to balance the demands imposed on him by the commissioners, the Department's operations and the street coverage, on the one hand, against the interest of on-duty officers wishing to engage in Union business, on the other. On-duty Union business interferes with legitimate managerial concerns. The Chief's need to know about on-duty Association activities does not interfere with Union business or protected activity. Although the Chief became escalated and used profanity during the June 10, 2019 meeting, his behavior did not violate

the law because his anger was related to employe performance issues and business reasons (such as perceived insubordination and lying); it was not related to employes' protected activities. Accordingly, neither the Chief's directives prior to May 13, 2019, which were reiterated and explained on June 3, 2019, or his behavior on June 10, 2019, were coercive or otherwise interfered with protected activities under Section 6(1)(a) of the PLRA. Ellwood City, supra.

#### 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 Leesport, the Township of Maiden Creek and the Township of Ontelaunee are public employers and political subdivisions in Berks County pursuant to Act 111, as read with the PLRA, jointly cooperating in providing police services by and through the Commission.
2. The Complainants are public employes and police officers employed by the Commission and covered by Act 111 and the PLRA. The FOP and the Union are labor organizations within the meaning of Act 111, as read with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The Commission has not committed unfair labor practices within the meaning of Section 6(1)(a), (b), (c), 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 fifteenth day of May, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

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JACK E. MARINO  
Hearing Examiner