

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE :
TROOPERS ASSOCIATION :
 :
v. : Case No. PF-C-09-103-E
 :
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

PROPOSED DECISION AND ORDER

On August 19, 2009, the Pennsylvania State Troopers Association (Union or PSTA) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that the Commonwealth of Pennsylvania, Pennsylvania State Police (Department or Commonwealth), violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111. The Union specifically alleged that the Commonwealth engaged in unfair labor practices by violating Field Regulation 3-2 when it gave a preference transfer to Corporal Rebecca Warner¹ to Troop P before she completed one full year in her position at the Bureau of Integrity and Professional Standards (BIPS).²

On August 31, 2009, the Secretary of the Board issued a letter to the Union's attorney advising that no complaint would be issued on the charge opining that the "allegation of a violation of the transfer procedure is more appropriately raised as a grievance pursuant to the collective bargaining agreement." On September 18, 2009, the Union filed timely exceptions to the Secretary's letter declining to issue a complaint. On December 15, 2009, the Board directed that the matter be remanded to the Secretary. On December 24, 2009, the Secretary issued an order and notice of hearing scheduling a hearing on April 16, 2010. On April 9, 2010, I continued the hearing at the request of the Commonwealth over the objection of the complainant and rescheduled it for May 3, 2010, in Harrisburg. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Commonwealth is a public employer under Act 111 as read in pari materia with the PLRA.
2. The Union is a labor organization under Act 111 as read in pari materia with the PLRA.
3. As of June 26, 2009, the Commonwealth listed seven corporals ranked in order of eligibility for a preference transfer to Troop P in northeastern Pennsylvania. Corporal David Pope was fourth on the list for a preference transfer to Troop P. (N.T. 10-13; PSTA Exhibit 1).
4. Effective July 25, 2009, the Commonwealth transferred Corporal Roger Stipcak and Corporal Warner to Troop P. Both Corporals were listed above Corporal Pope on the June 26, 2009 preference transfer standing list. (N.T. 13-14, 22, 39, 46-48; PSTA Exhibit 3).

¹ The court reporter transcribed Corporal Warner's name as "Werner." However, the Commonwealth generated documents spell her name as "Warner." I will, therefore, spell the Corporal's name as Warner.

² The Bureau of Integrity and Professional Standards was formerly designated the Bureau of Professional Responsibility. (N.T. 52). The Collective Bargaining Agreement, submitted as Joint Exhibit 1 refers to the Bureau of Professional Responsibility. (Joint Exhibit 1, Article 37). The Bureaus are one in the same and throughout this order I will refer only to the new name for the Bureau abbreviated as BIPS.

5. Corporal Warner transferred into BIPS less than one full calendar year prior to her receiving a preference transfer from BIPS to Troop P. Corporal Pope was in his position for over one year on July 25, 2009. (N.T. 14-15, 22, 46).

6. Field Regulation 3-2 governs transfers. Disciplinary transfers, preference transfers, general transfers, emergency/hardship transfers and temporary intratropo transfers are the types of transfers available to the Commonwealth and the members. (N.T. 19-20; PSTA Exhibit 2).

7. Section 2.03 of Field Regulation 3-2 prescribes the eligibility requirements for a preference transfer and provides, in relevant part, as follows:

B. Eligibility: Any member below the rank of Captain is eligible to submit a Preference Transfer Request for another Troop provided they have:

1. Completed three years of service.

2. Served a minimum of one year in the Troop to which assigned, unless the assignment resulted from a promotion. When a promotion is concurrent with a new assignment, the one-year minimum does not apply.

3. Served a specified time frame, if required, upon the acceptance of a specialized position.

C. Procedures: The following procedures shall be followed when submitting and processing Preference Transfer Requests:

1. Member Submitting Preference Transfer Request:

a. Any eligible member desiring a preference transfer shall submit a Preference Transfer Request to their Troop Commander or Bureau/Office Director and the Troop Administrative Manager (TAM) or Bureau/Office administrative representative. No other correspondence is necessary when submitting the request unless unusual circumstances exist.

. . . .

2. Troop Commanders, Bureau Director/Office Directors, and/or Section Commanders or Commissioned Officer Support Staff:

a. Commanders/Directors, or designees, shall review the Preference Transfer Request to ensure the criteria within this regulation is met before entering their name on this form where indicated.

. . . .

(PSTA Exhibit 2; § 2.03).

8. Due to the difficulty of working against brother and sister members of the Department while holding a position at BIPS, the selection of qualified members for those positions is exempt from the contractually provided process. Members could also be transferred out of BIPS without any formal process if they demonstrated an inability to perform the difficult work in BIPS. (N.T. 53-54; PSTA Exhibit 2, § 2.05).

9. In the past three years, BIPS released four members of the State Police from their BIPS commitment prior to one year of service in BIPS due to inadequate performance or personal issues conflicting with their duties. All four members were transferred out of BIPS through the preference transfer system. (N.T. 54, 62).

10. Section 2.05 of Field Regulation 3-2 provides for General Transfers as follows:

A. Applicability: Any member may be transferred anywhere within the Department whenever it is determined that such transfer(s) is necessary to:

1. Fulfill the requirement(s) for additional services.
2. Fulfill the need(s) for specific or specialized skills.
3. Accomplish any other need(s) of the Department.
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(PSTA Exhibit 2).

11. The one-year minimum in-assignment requirement for preference transfers was put in place because previously members would request a transfer and within three months request another transfer. Because of seniority, these members were bumping other members. (N.T. 34).

DISCUSSION

The Union argues in its post-hearing brief that the Commonwealth failed to comply with Field Regulation 3-2 and unilaterally changed terms of employment when it gave a preference transfer to Corporal Warner from BIPS to Troop P on July 25, 2009, when she lacked a full year of service in BIPS prior to the transfer. (Union's Post-hearing Brief at 5). The Union further contends that, although the eligibility provision of Field Regulation 3-2 specifically requires one year of service "in the Troop to which assigned," the reference to "Troop" was a drafting oversight that was not meant to exclude bureaus because the remainder of the Field Regulation "contemplates that preference transfers apply to members transferring from a Bureau to a Troop." (Union's Post-hearing Brief at 5). The Commonwealth defends by arguing that pursuant to past practice and the language of Field Regulation 3-2, it has a sound arguable basis for not applying the one-year in assignment minimum to preference transfers of members from BIPS. (Commonwealth's Post-hearing Brief at 4-5).

1. No Past Practice

A union's acquiescence to an employer's violations of contract or terms and conditions of employment do not operate as a waiver to contest future, similar unfair practices. AFSCME, Council 85 v. Erie County, 36 PPER 5 (Final Order, 2005). In the past three years, BIPS released four members of the State Police from their BIPS commitment prior to one year of service in BIPS due to inadequate performance or personal issues conflicting with their duties. All four members were transferred out of BIPS through the preference transfer system. However, these discrete occurrences do not constitute a waiver by the Union to enforce bargaining over or compliance with the one-year requirement and does not establish a past practice in contravention to the Field Regulation. The question remains, however, whether the Field Regulation is reasonably subject to the Commonwealth's interpretation, which permits preference transfers from BIPS without complying with the one-year minimum assignment requirement.

2. No Sound Arguable Basis

In Fraternal Order of Transit Police v. Southeastern Pennsylvania Transportation Authority (SEPTA), 35 PPER 73 (Final Order, 2004), the Board stated the following:

The Commonwealth Court has sanctioned the Board's adoption and application of the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB (PSTA I), 804 A.2d 1291 (Pa. Cmwlth. 2002); Pennsylvania State Troopers Ass'n v. PLRB (PSTA II), 761 A.2d 645 (Pa. Cmwlth. 2000). "The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the

language of the parties' collective bargaining agreement, or other bargained for agreement, for the claim that the employer's action was permissible under the agreement." PSTA II, 761 A.2d at 651. "An employer's interpretation need not necessarily be the correct interpretation in order to provide a valid defense, so long as there is a 'sound arguable basis' for its interpretation and a 'substantial claim of contractual privilege.'" Jersey Shore, 28 PPER at 340. In this regard, the Board "will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct." Id. at 341 (quoting NCR Corp., 117 L.R.R.M. at 1063).

SEPTA, 35 PPER at 229.

The Commonwealth does not have a sound arguable basis for its interpretation of the Field Regulation. As emphasized by the Union, Section 2.03(C) clearly contemplates that the preference transfer provisions, including the eligibility requirements, apply to members who occupy positions within bureaus of the Department. Section 2.03 (C) (1) (a) provides that eligible members seeking a preference transfer shall submit their request to either their troop commander or their bureau director. To be eligible, a member must complete one full year in assignment under the terms of the Field Regulation. The regulation permits members working for bureaus to participate in the preference transfer system and no where excludes BIPS from any of its provisions. Subsection 2(a) further provides that bureau directors shall review the preference transfer request to ensure the criteria within the Field Regulation are met. This section further references bureaus and bureau directors in a manner that makes clear that members occupying positions in bureaus including BIPS are covered by Field Regulation 3-2 and its one-year eligibility requirement. Accordingly, the Commonwealth did not have a sound arguable basis for interpreting Field Regulation 3-2 in a manner that eliminated the one-year in-assignment requirement for members occupying positions in BIPS.

3. No Managerial Prerogative

In its post-hearing brief, the Union compared the minimum one-year assignment requirement for a preference transfer to an employer's managerial prerogative to establish substantive eligibility criteria for promotion or staffing, citing FOP Rose of Sharon Lodge No. 3 v. PLRB, 729 A.2d 1278 (Pa. Cmwlth 1999). From this premise, the Union argues as follows:

the PSP has already unilaterally established the substantive criteria for a preference transfer. Pursuant to Field Regulation 3-2, a trooper, corporal, sergeant or lieutenant must serve at least one year in their existing position/assignment. That substantive criteria is not disputed by the PSTA in the instant charge. It is the PSP's failure to abide by that substantive criteria which is challenged.

(Union's Post-hearing Brief at 4-5). The Board, in Rose of Sharon, held that the employer need not bargain over changes in minimal promotional qualifications "because such action relates more directly to the public employer's managerial interest in selection and direction of personnel than to an employee's terms and conditions of employment and accordingly is not a mandatory subject of bargaining." Rose of Sharon, 729 A.2d at 1281-1282. Writing for the Court, in Rose of Sharon, Judge Juliante stated: "[w]e agree with the Board that a change in the minimum requirements for promotion relates directly to the [employer's] managerial prerogative in selection and direction of personnel and is not subject to mandatory bargaining under Act 111." Rose of Sharon, 729 A.2d at 1282. The Union's comparison between substantive promotional criteria and substantive transfer criteria is proper because the transfer criteria, like promotional criteria, are at the heart of the Commonwealth's managerial expertise and the Department's ability to direct, assign and reassign members to meet the operational demands of the Department at any given time under the rational relationship test as applied by the Court in Rose of Sharon, supra.

However, the holding of Rose of Sharon does not apply to this case. The preferential transfer under Field Regulation 3-2 is for the benefit of members, not the Commonwealth. If the Commonwealth had an operational need to transfer Corporal Warner before her one-year anniversary in BIPS, then they could have given her a general transfer, rather than giving her priority on a preferential transfer. Section 2.05 of Field Regulation 3-2 expressly provides that the Department may transfer any member anywhere in the Department to fulfill or accomplish any of the needs of the Department. (F.F. 10). Also, if Corporal Warner demonstrated a verified hardship necessitating her transfer to Troop P, the Commonwealth could have given her an emergency/ hardship transfer and would have thereby complied with Field Regulation 3-2. Both the general and the hardship transfer were adequate to satisfy the operational needs of BIPs and the Department. The Commonwealth, therefore, does not have a managerial prerogative to unilaterally change or ignore the one-year minimum in-assignment requirement for preferential transfers because preferential transfers do not serve the core managerial interests or operational needs of the Department.

Preference transfers satisfy (as the name suggests) the members' preferences, not the Commonwealth's. The substantive criteria at issue here were arbitrarily discarded by the Commonwealth, especially since there are at least two other transfer mechanisms for transferring members like Corporal Warner. Accordingly, under the rational relationship test, the fair and uniform application of eligibility criteria for preference transfers is rationally related to members' duties because it directly affects the desired location of the performance of their daily duties. However, I also conclude that, unlike the substantive promotional criteria in Rose of Sharon, the Commonwealth does not have any interest in reducing the eligibility requirements for preference transfers because by their very nature, the benefit of these transfers attach to the members not the Commonwealth. Indeed, the one-year minimum in-assignment eligibility requirement was established by the Commonwealth to stop a disruptive environment of members constantly seeking transfers as soon as they received an assignment.

The Commonwealth had the burden of establishing that its legitimate managerial interests substantially outweighed those rationally related to members' duties. Rose of Sharon, *supra*. On this record, however, the Commonwealth failed to show a legitimate managerial benefit obtained or interest satisfied by changing the one-year rule for preference transfers from BIPS, when general or hardship transfers would suffice to meet operational needs. The Commonwealth, as a matter of law, therefore, is unable to sustain its burden of proving that it has a managerial prerogative to selectively change or eliminate the one-year rule. On July 25, 2009, Corporal Pope was eligible for a preference transfer to Troop P and Corporal Warner was not. Corporal Pope should have received the preference transfer over Corporal Warner.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The Commonwealth is a public employer and a political subdivision within the meaning of Act 111 as read in pari materia with the PLRA.
2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth has committed unfair labor practices within the meaning of Section 6(1) (a) and (e) of the PLRA as read in pari materia 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 Commonwealth shall

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

2. Cease and desist from refusing to bargain collectively in good faith with the exclusive employe representative in the appropriate police bargaining unit.

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:

(a) Immediately transfer Corporal David Pope to Troop P;

(b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes 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 this decision and order by completion and filing of the attached affidavit of compliance.

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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this ninth day of November, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE :
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AFFIDAVIT OF COMPLAINT

The Commonwealth hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act as read in pari materia with Act 111; that it has immediately transferred Corporal David Pope to Troop P; that it has posted a copy of the decision and order in the manner prescribed in the order; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public