

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE PA :
CONSERVATION POLICE OFFICERS LODGE 114 :
 :
v. : Case No. PERA-C-10-124-E
 :
COMMONWEALTH OF PENNSYLVANIA :
FISH AND BOAT COMMISSION :

PROPOSED DECISION AND ORDER

On April 9, 2010, the Fraternal Order of Police, Pennsylvania Conservation Police Officers Lodge 114 (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania (Commonwealth) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by designating new common areas of law enforcement by waterways conservation officers without bargaining "as to the application of these new terms and conditions of employment for bargaining unit members, or their impact upon members of the bargaining unit."¹ On April 26, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on September 21, 2010. On July 15, 2010, the hearing examiner continued the hearing upon the request of the Commonwealth and without objection by the FOP. On October 15, 2010, the hearing examiner held the hearing and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On December 10, 2010, each party filed a brief.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. Since at least 1982, the Commonwealth has employed waterways conservation officers to work in law enforcement for the Fish and Boat Commission. (N.T. 8-9, 119-120)
2. In 1991, the Commonwealth decided to enhance law enforcement in areas with increased boating and fishing activity by designating them as common areas where two or more waterways conservation officers who otherwise worked in separate geographic districts would be jointly responsible for law enforcement. (N.T. 13, 120-126, 138-139)
3. In 1993, the Commonwealth designated Lake Wallenpaupack as a common area. (N.T. 36-37, 64-66, 72-73, 139)
4. In 1999, the Commonwealth designated Blue Marsh Lake and Three Rivers as common areas. (N.T. 53-55, 59, 100; Commonwealth Exhibit 6)
5. In 2000, the Commonwealth designated Struble Lake and Delaware River as common areas. (N.T. 86-88, 94-96, 140)
6. In 2001, the Commonwealth designated Conneaut Lake and Youghiogheny Reservoir as common areas. (N.T. 40-42, 55-56, 59, 62-63, 139)
7. In 2003, the Commonwealth designated Harveys Lake, Lake Harmony and Susquehanna River as common areas. (N.T. 66-68, 70-75, 77; Commonwealth Exhibit 4)
8. Effective July 1, 2003, the Commonwealth and Council 13, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), which was the then exclusive

¹ The FOP also alleged that the Commonwealth committed unfair practices under sections 1201(a)(2), (3) and (4) of the PERA by designating the common areas in retaliation for the waterways conservation officers having organized. The FOP withdrew those portions of the charge at the hearing (N.T. 6-7), however, so they are no longer before the Board.

representative of the waterways conservation officers, entered into a four-year collective bargaining agreement providing at article 2 (Management Rights), section 1, as follows:

"It is understood and agreed that the Employer, at its sound discretion, possesses the right, in with accordance applicable laws, to manage all operations, including the direction of the work force and the right to plan, direct, and control the operation of all equipment and other property of the Employer, except as modified by this or unit agreements.

Matters of inherent managerial policy are reserved exclusively to the Employer. These include but shall not be limited to such areas of discretion or policy as the functions and programs of the Employer, standards of service, its overall budget, utilization of technology, the organizational structure, and selection and direction of personnel,"

and at appendix N (Law Enforcement Fish and Boat Unit) as follows:

"Overtime

* * *

Article 20, Overtime, Section 5, and the June 14, 1989 side letter establishing overtime equalization units will continue to apply to this unit.

* * *

Redistricting

When redistricting plans are being considered by the Fish and Boat Commission, management will notify the Union of the changes that are being considered. At the request of the Union, management will Meet and Discuss on the proposed redistricting. Officers from the involved district and their Union representatives will be given the opportunity to attend any such Meet and Discuss session."

(N.T. 10-11; FOP Exhibit 1, Commonwealth Exhibit 1)

9. The June 14, 1989, side letter referenced in appendix N of the collective bargaining agreement was superseded by an October 5, 1994, letter confirming AFSCME and the Commonwealth's understanding regarding "overtime equalization units and overtime assignment procedures," including that "[e]ach officer's district shall constitute an overtime equalization unit. Some districts may include an area in common with one or more additional districts." (N.T. 12-13; FOP Exhibit 2)

10. By 2007, the Commonwealth designated Octotaro Reservoir as a common area. (N.T. 90-92)

11. On July 5, 2007, the Board certified the FOP as the exclusive representative of the waterways conservation officers. (Case No. PERA-R-07-181-E)

12. On August 10, 2007, the parties agreed to designate Cowanesque-Hammond-Tioga Lakes Management Area as a common area. (N.T. 69-70, 76; Commonwealth Exhibit 5)

13. By letter dated March 10, 2008, the FOP submitted to the Commonwealth proposals for a new collective bargaining agreement. Two of the proposals were as follows:

"ARTICLE 44 - REDISTRICTING

Section 1. When redistricting plans are being considered by the Fish and Boat Commission, management will notify the union of the changes that are being considered. At the request of the Union, management will meet and discuss on the proposed redistricting. Officers from the involved district and their union representatives will be given the opportunity to attend any such meet and discuss session. Any revisions will be after mutual agreement between the union and management.

ARTICLE 48 - COMMON AREAS

Section 1. The employer and the Union agree that certain high volume patrol areas need additional manpower and the Union recognize[s] the establishment of Common Areas.

Section 2. Common areas shall be designated as follows:

- a. Lake Erie and Presque Isle Bay and their shoreline.
- b. Lake Arthur and its shoreline from the time period of Memorial Day until Labor Day.
- c. Raystown Lake and its shoreline from the time period of Memorial Day until Labor Day.

Section 3. Any additions or deletions to this list from Section 2, shall be agreed upon a mutual agreement between the Employer and the Union."

(N.T. 16; FOP Exhibit 4)

14. On September 4, 2009, the FOP asked the Commonwealth for a list of the common areas the Commonwealth felt were in existence. (N.T. 21, 126, 142)

15. On September 11, 2009, the Commonwealth provided the FOP with a list that included Three Rivers, Youghiogheny Reservoir, Lake Wallenpaupack, Susquehanna River, Blue Marsh Reservoir, Conneaut Lake, Cowanesque-Hammond-Tioga Lakes, Harveys Lake, Lake Harmony, Delaware River and Octoraro Reservoir as common areas and Kinzua Reservoir² as a proposed common area. (N.T. 21, 25, 126; FOP Exhibit 8)

16. On November 18, 2009, the Commonwealth met with the FOP to discuss designating Lake Clarke as a common area. (N.T. 79-82; FOP Exhibit 6)

17. On November 20, 2009, the Commonwealth met with the FOP to discuss designating Allegheny Reservoir³ as a common area. (N.T. 45-46, 51; FOP Exhibit 6)

18. On November 23, 2009, the Commonwealth met with the FOP to discuss designating Struble Lake and Lake Nockamixon as common areas. (N.T. 88-94; FOP Exhibit 6)

19. By memoranda dated January 8, 2010, the Commonwealth designated Struble Lake and Lake Nockamixon as common areas. (N.T. 109-113; FOP Exhibit 6)

20. By memorandum dated January 11, 2010, the Commonwealth designated Lake Clarke as a common area. (N.T. 24, 81, 83; FOP Exhibit 7)

21. On March 19, 2010, the Commonwealth provided the FOP with documentation designating Struble Lake and Lake Nockamixon as common areas. (N.T. 22-23; FOP Exhibit 6)

22. On August 10, 2010, the parties entered into a five-year collective bargaining agreement effective July 1, 2007, without incorporating the bargaining proposal by the FOP that common areas be designated by mutual agreement. (N.T. 28, 34-35; FOP Exhibit 9, Commonwealth Exhibit 2)

² The record shows that Allegheny Reservoir and Kinzua Reservoir are one and the same (N.T. 28). Thus, any reference to one will include the other. For ease of reference, each also will be referred to as Allegheny/Kinzua Reservoir.

³ See footnote 2.

DISCUSSION

The FOP has charged that the Commonwealth committed unfair practices under sections 1201(a) (1) and (5) of the PERA by designating new common areas of law enforcement for waterways conservation officers without bargaining "as to the application of these new terms and conditions of employment for bargaining unit members, or their impact upon members of the bargaining unit." As set forth in the specification of charges, the FOP alleges that effective January 11, 2010, the Commonwealth designated Delaware River, Octoraro Reservoir, Struble Lake, Lake Nockamixon, Lake Clarke, Blue Marsh Reservoir/Lake as common areas. As also set forth in the specification of charges, the FOP further alleges that on March 19, 2010, the Commonwealth informed it that Conneaut Lake, Allegheny/Kinzua Reservoir,⁴ Three Rivers Area, Youghioghney Reservoir, Lake Wallenpaupack, Susquehanna River, Cowanesque-Hammond-Tioga Lakes, Harveys Lake and Lake Harmony were common areas. According to the FOP, overtime opportunities for the waterways conservation officers were adversely affected when the Commonwealth designated those common areas because more than one waterways conservation office would be available to work in those areas, thereby reducing the overtime each might work.

The Commonwealth contends that the charge should be dismissed (1) because its designation of common areas implicates the level of law enforcement services it provides and thus is a management prerogative that it has no obligation to bargain, (2) because a collective bargaining agreement covering the waterways conservation officers included a management rights clause and incorporated a side letter giving it the right to designate common areas, (3) because under the same collective bargaining agreement it was contractually privileged to designate common areas so long as it met and discussed, which it did (4) because any loss of overtime opportunities for waterways conservation officers resulting from its designation of common areas is speculative and non-severable from its designation of the common areas in the first place, (5) because the FOP never requested impact bargaining, (6) because with one exception (Lake Clarke) the charge is untimely filed and (7) because the charge is moot.

As a jurisdictional matter, the Commonwealth's timeliness contention must be addressed first.

The Commonwealth contends that the charge is untimely filed because except for Lake Clarke it designated all the other common areas at issue more than four months before the FOP filed the charge. In support of its contention, the Commonwealth cites Thomas v. Commonwealth of Pennsylvania, PLRB, 483 A.2d 1016 (Pa. Cmwlth. 1984). In that case, our Commonwealth Court held that the Board only has jurisdiction to remedy an unfair practice if a charge is filed within four months of when the charging party knew or should have known of the unfair practice charged. Thus, in and of itself, the fact that the Commonwealth designated a common area more than four months before the FOP filed the charge is irrelevant as the focus of the dispositive inquiry is on when the FOP knew or should have known as much.

The record shows that on September 11, 2009, the Commonwealth provided the FOP with a list that included Three Rivers, Youghioghney Reservoir, Lake Wallenpaupack, Susquehanna River, Blue Marsh Reservoir, Conneaut Lake, Cowanesque-Hammond-Tioga Lakes, Harveys Lake, Lake Harmony, Delaware River and Octoraro Reservoir as common areas and Allegheny/Kinzua Reservoir as a proposed common area. See finding of fact 15. The record also shows that in 2000 the Commonwealth designated Struble Lake as a common area, see finding of fact 5, that on January 8, 2010, the Commonwealth designated Lake Nockamixon as a common area, see finding of fact 19, that on January 11, 2010, the Commonwealth designated Lake Clarke as a common area, see finding of fact 20, and that on March 19, 2010, the Commonwealth provided the FOP with documentation designating Struble Lake and Lake Nockamixon as common areas. See finding of fact 21.

On that record, it is apparent that the FOP knew or should have known no later than September 11, 2009, that the Commonwealth had designated Three Rivers, Youghioghney

⁴ The FOP referenced Allegheny Reservoir and Kinzua Reservoir as separate common areas, but as noted above they are one and the same. See footnote 2.

Reservoir, Lake Wallenpaupack, Susquehanna River, Blue Marsh Reservoir, Conneaut Lake, Cowanesque-Hammond-Tioga Lakes, Harveys Lake, Lake Harmony, Delaware River and Octoraro Reservoir as common areas. September 11, 2009, of course, is more than four months before the FOP filed the charge on April 9, 2010. Thus, to the extent that the FOP has charged that the Commonwealth committed unfair practices by designating Three Rivers, Youghiogheny Reservoir, Lake Wallenpaupack, Susquehanna River, Blue Marsh Reservoir, Conneaut Lake, Cowanesque-Hammond-Tioga Lakes, Harveys Lake, Lake Harmony, Delaware River and Octoraro Reservoir as common areas, the charge is untimely filed and must be dismissed accordingly.

Given, however, that the record shows that the Commonwealth only designated Allegheny/Kinzua Reservoir as a proposed common area on September 11, 2009, did not designate Lake Clarke as a common area until January 11, 2010, and did not provide the FOP with documentation designating Struble Lake and Lake Nockamixon as common areas until March 19, 2010, there is no basis for finding that the FOP knew or should have known of the Commonwealth's designations of Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake as common areas more than four months before the FOP filed the charge on April 9, 2010. Thus, as to Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake, the charge is timely filed.

The Commonwealth presented a document indicating that it was considering designating Allegheny/Kinzua Reservoir as a common area in 1997 (Commonwealth Exhibit 3). In addition, one of the Commonwealth's witnesses testified that he "understood" that Allegheny/Kinzua Reservoir was a common area as early as 2005 (N.T. 44). The Commonwealth also established that it designated Struble Lake as a common area in 2000. See finding of fact 5. As set forth above, however, the record shows that the list of common areas the Commonwealth provided to the FOP on September 11, 2009, only refers to Allegheny/Kinzua Reservoir as a proposed common area. Moreover, the record may be searched in vain for any evidence that the Commonwealth ever designated Allegheny/Kinzua Reservoir as a common area at any time thereafter, that the Commonwealth designated Lake Nockamixon as a common area prior to January 8, 2010, or that the FOP knew or should have known of the Commonwealth's designation of Struble Lake as a common area in 2000. Thus, the Commonwealth's timeliness contention as to Allegheny/Kinzua Reservoir, Lake Nockamixon and Struble Lake finds no support in the record.

As a procedural matter, the Commonwealth's mootness contention will be addressed next.

The Commonwealth contends that the charge should be dismissed as moot because after the FOP filed the charge the parties entered into a collective bargaining agreement without incorporating a bargaining proposal by the FOP that common areas be designated by mutual agreement. See findings of fact 13 and 22. The Commonwealth cites APSCUF v. PLRB, No. 70 MAP 2009 (November 17, 2010), 2010 Pa. LEXIS 2583, and City of Philadelphia, 36 PPER 95 (Proposed Decision and Order 2005), in support of its contention. In APSCUF, our Supreme Court held that the Board may dismiss as moot a charge relating to bargaining if bargaining has resulted in a collective bargaining agreement by the time the charge is heard. In City of Philadelphia, Hearing Examiner Timothy Tietze dismissed as moot a charge alleging that an employer refused to engage in interest arbitration for a new collective bargaining agreement where the parties had entered into a new collective bargaining agreement by the time of the hearing.⁵ Notably, however, the FOP has not charged that the Commonwealth committed unfair practices related to bargaining for their collective bargaining agreement. Thus, APSCUF and City of Philadelphia are inapposite, and there is no basis for dismissing the charge as moot. See City of Allentown, 27 PPER ¶ 27250 (Final Order 1996) (the Board has jurisdiction to process charges even though they may be moot).⁶

⁵ The Board issued a final order dismissing exceptions to Hearing Examiner Tietze's proposed decision and order. See 36 PPER 158.

⁶ The fact that the parties entered into their collective bargaining agreement without incorporating the FOP's bargaining proposal that common areas be designated by mutual agreement is immaterial to a mootness analysis but may be relevant to a waiver analysis. See Middletown Township, 24 PPER ¶ 24167 (Final Order 1993) (a waiver based on bargaining history obtains where a party has "consciously yielded" its position after a matter was "fully discussed" during bargaining). To the extent that the Commonwealth's contention is that the charge should be dismissed under a waiver analysis, however, it must be rejected for lack of proof that the FOP "consciously yielded" its position relative to its bargaining proposal after having "fully discussed" the matter during bargaining.

As to the merits of the charge, application of the law to the facts of record leads to the conclusion that it must be dismissed for a variety of reasons even though it is not moot and even though it is timely filed as to Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake.

First, under section 702 of the PERA, an employer has the management prerogative to determine the level of services it provides. SEPTA, 35 PPER 73 (Final Order 2004). Moreover, an employer is under no obligation to bargain over a change to a management prerogative. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002). The record shows that the Commonwealth designates common areas to enhance the level of law enforcement it provides, see finding of fact 2, so it is apparent that the Commonwealth's designation of common areas is a management prerogative.⁷ Thus, to the extent that the FOP has charged that the Commonwealth committed unfair practices by designating common areas without bargaining, the charge must be dismissed because the Commonwealth was under no obligation to bargain.⁸

In support of the charge, the FOP presented testimony that the Commonwealth never conducted formal studies before designating some common areas (N.T. 60-61, 75, 83, 109, 111-112), but the FOP cites no authority for the proposition that an employer's exercise of a management prerogative without conducting a formal study is violative of the PERA, and none has been found.

The FOP also cites Munhall Borough, 40 PPER 102 (Final Order 2009), for the proposition that overtime is a mandatory subject of bargaining. In that case, the Board found that an employer was under an obligation to bargain over pay for being on-call for overtime. The FOP has not charged, however, that the Commonwealth refused to bargain over pay for being on-call for overtime; rather, the FOP has charged that the Commonwealth has refused to bargain over designating common areas. Munhall Borough is, therefore, inapposite.

Second, a refusal to bargain charge is to be dismissed "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 v. PLRB, 761 A.2d 645, 651 (Pa. Cmwlth. 2000). The record shows that the collective bargaining agreement in effect when the Commonwealth designated Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake as common areas included a provision that the Commonwealth was to meet and discuss over redistricting. See finding of fact 8. The record also shows that the Commonwealth met with the FOP and discussed designating Allegheny/ Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake as common areas. See findings of fact 16-18. On that record, it is apparent that the Commonwealth was contractually privileged to act as it did, so the charge must be dismissed for that reason as well even if the Commonwealth was under an obligation to bargain over the designation of common areas.

The FOP presented testimony that redistricting is "very different" from designating common areas (N.T. 15), but whether or not that is the case calls for an interpretation of the collective bargaining agreement, which is within the province of an arbitrator, not the Board. See PSTA, supra, where the court observed that

⁷ Although not dispositive, no merit is found in the Commonwealth's contention that a management rights clause in a collective bargaining agreement covering the waterways conservation officers gave it the right to designate common areas unilaterally. The management rights clause is boilerplate, see finding of fact 8, and as such provides no support for the Commonwealth's contention. See Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993) (a boilerplate management rights clause will not insulate an employer from any bargaining obligation it may have). Nor is any merit found in the Commonwealth's contention that a side letter incorporated into the collective bargaining agreement gave it the right to designate common areas unilaterally. The side letter only speaks to overtime equalization procedures when common areas are created. See finding of fact 9.

⁸ Given that the Commonwealth was under no obligation to bargain over its designation of common areas, the same result would obtain even if the common areas other than Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake were at issue.

"where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the [National Labor Relations Board] will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct."

Id. at 651.

Third, an employer is only required to impact bargain upon request. Lackawanna County Detectives' Association, supra. The record does not show that the FOP ever requested impact bargaining. Thus, to the extent that the FOP's charge is that the Commonwealth committed unfair practices by not engaging in impact bargaining, the charge must be dismissed for lack of proof.⁹

Fourth, the record shows that the collective bargaining agreement in effect when the Commonwealth designated Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake as common areas included a provision relating to the equalization of overtime in common areas. See findings of fact 8-9. In negotiating that provision, the Commonwealth satisfied whatever impact bargaining obligation it may have had relative to overtime opportunities for the waterways conservation officers. See Commonwealth of Pennsylvania, 19 PPER ¶ 19138 (Final Order 1988) (employer was under no further obligation to bargain over its managerial decision to cut back on services and to furlough employees where the parties' collective bargaining agreement contained a furlough provision). Accordingly, even if the FOP had requested impact bargaining, the charge nevertheless would have to be dismissed.

Fifth, an employer is under no obligation to bargain over a change to a mandatory subject of bargaining where the change inevitably results from and therefore is non-severable from its exercise of a managerial prerogative. Lackawanna County Detectives' Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000). Any adverse impact the Commonwealth's decision to designate common areas had on available overtime opportunities for the waterways conservation officers was non-severable from the decision itself and thus not subject to bargaining. See City of Philadelphia, 28 PPER ¶ 28048 (Final Order 1997) (an employer was under no obligation to bargain over a loss of overtime inevitably resulting from its exercise of its management prerogative to determine the level of services it provides).¹⁰

CONCLUSIONS

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

1. The Commonwealth is a public employer under 301(1) of the PERA.
2. The FOP is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has not committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

⁹ Given that the FOP never requested impact bargaining, the same result would obtain even if the common areas other than Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake were at issue.

¹⁰ Given that any adverse impact the Commonwealth's decision to designate common areas had on available overtime opportunities for the waterways conservation officers is non-severable from the decision itself, the same result would obtain even if the common areas other than Allegheny/Kinzua Reservoir, Lake Clarke, Lake Nockamixon and Struble Lake were at issue.

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of December 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner