

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :  
PENNSYLVANIA CONSERVATION POLICE :  
OFFICERS LODGE 114 :  
 :  
v. : Case No. PERA-C-10-137-E  
 :  
COMMONWEALTH OF PENNSYLVANIA :  
FISH AND BOAT COMMISSION :

**PROPOSED DECISION AND ORDER**

On April 22, 2010, the Fraternal Order of Police, Pennsylvania Conservation Police Officers Lodge 114 (Complainant or FOP) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania, Fish and Boat Commission (Respondent or Commonwealth) alleging that the Commonwealth violated Sections 1201(a) (1), (2), (3), (4) and (5) of the Public Employee Relations Act (PERA).

On April 28, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the case was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and September 13, 2010, in Harrisburg was scheduled as the time and place of hearing if necessary.

A hearing was necessary but was continued to September 27, 2010 on the motion of the Complainant without objection from the Respondent and again to October 1, 2010 on the motion of the Respondent, without objection from the Complainant.

The hearing was held on the rescheduled date. At the hearing, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Complainant submitted a post-hearing brief on December 2, 2010. The Respondent submitted a post-hearing brief on December 21, 2010.

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

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Fish and Boat Commission, is a public employer within the meaning of Section 301(1) of PERA.
2. The Fraternal Order of Police, Pennsylvania Conservation Police Officers Lodge 114 is an employe organization within the meaning of Section 301(3) of PERA.
3. On July 12 2007, the Board certified the FOP as the exclusive representative for the unit consisting of all full-time and regular part-time Waterways Conservation Officers and Waterways Conservation Officer Trainees employed by the Commonwealth of Pennsylvania, Fish and Boat Commission. (N.T. 6)
4. Prior to July 12, 2007, these employes were represented by Council 13, American Federation of State County and Municipal Employees, AFL-CIO (AFSCME) for purposes of collective bargaining with the Commonwealth. (N.T. 6)
5. AFSCME and the Commonwealth were parties to a collective bargaining agreement for this unit for the period of July 1, 2003 to June 30, 2007. (N.T. 7, Exhibit 1)
6. This CBA included Article 20, "Overtime," which covers the rate of pay for overtime, compensatory time for certain hours of work and the equalization of overtime among employes. (N.T. 8, Complainant Exhibit 1, pp 53-59)

7. Article 20, Section 5, also covers the mandatory assignment of overtime. It states, in relevant part:

In the event that there are an insufficient number of volunteers [for an overtime assignment], the Employer shall have the right to assign such work on a non-volunteer basis beginning with the least senior of those employees who has the least assigned overtime on a non-volunteer basis during the period.

(N.T. 7, 69, Complainant's Exhibit 1, p. 56)

8. Also, Appendix N of the CBA (Law Enforcement Fish and Boat Unit) also addressed overtime specific to Waterways Conservation Officers and states:

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

(N.T. 9; Complainant's Exhibit 1, p. 354)

9. The June 14, 1989 side letter to the CBA established overtime equalization units and set forth the procedure for the assignment of overtime and authorized the Commonwealth to mandate overtime. The 1989 Side Letter stated in part:

"It is understood this agreement does not alter or change the following:  
(1) The Commission's ability to assign mandatory overtime to the WCO or GCO in whose district overtime work is required or, in case of that officer's availability, to any other employe."

(N.T. 96-97; Respondent's Exhibit 1, p. 4)

10. On August 28, 2007, the FOP, as the newly certified bargaining representative of the WCOs and WCO Trainees, made a request to the Commonwealth to bargain with it and submitted a CBA proposal. It took the FOP and the Commonwealth three years to arrive at a new agreement. In August, 2010, the parties reached agreement on the terms of the new collective bargaining agreement. The language providing for the assignment of overtime to officers that was in the AFSCME agreement was retained in the FOP agreement. (N.T. 40, 69, Complainant's Exhibit 7, pp. 5, 42)

11. The waterways conservation officers (WCOs or officers) are the field force for the Bureau of Law Enforcement of the Fish and Boat Commission. (N.T. 72)

12. These officers detect, apprehend and prosecute violators of the Fish and Boat Code. They attend public meetings and present instructional or educational information to the public, they enforce environmental laws and they stock fish. (N.T. 72-74)

13. Officers are assigned to particular geographic areas called districts. There are 77 districts that vary in size and workload. (N.T. 74-75)

14. The FOP and the Commonwealth negotiated a collective bargaining agreement for the period July 1, 2007 to June 30, 2012, which has a similar provision for assigning overtime as existed in the AFSCME agreement. (N.T. 76-77, Complainant's Exhibit 7, p. 42)

15. On March 5, 2010, in preparation for the April 16 opening day of trout season, the Commission assigned overtime to officers. (N.T. 15, 79, Complainant's Exhibit 6)

16. As an example of the overtime assignment, Larry L. Bundy, Jr., ARS in the Northeast Regional Office, assigned David Kanaski, a Waterways Conservation Officer, to work 2 hours of overtime for April 16, 7:00 p.m to 9:00 p.m. and 2 hours of overtime for April 17, 2:00 pm to 4:00 p.m. (N.T. 15, 79, Complainant's Exhibit 6)

#### DISCUSSION

The FOP alleges that the Commonwealth of Pennsylvania, Fish and Boat Commission committed unfair practices in violation of five sections of the Public Employee Relations

Act when it ordered Waterways Conservation Officers to work mandatory overtime on the opening days of trout season in 2010.

The main focus of the allegations is that the Commission violated Section 1201(a)(5) of PERA by issuing an order which it contends was a unilateral change of the practice of assigning overtime. The burden of proof is on the complainant to support its charge that an employer violated its duty to bargain contrary to Section 1201(a)(5) of PERA. Chambersburg Area Education Association v. Chambersburg Area School District, 42 PPER 6 (Final Order, 2011)

Pennsylvania waterways see a huge turnout of licensed fishermen on the opening days of trout season. To meet this phenomenon in 2010, the Fish and Boat Commission's regional offices ordered that the water conservation officers were to work two hours of overtime on April 16, and two hours of overtime on April 17. Two WCOs testified that they had never been ordered to work overtime for the opening day of trout season in the past but were given the opportunity to accept or decline offers of overtime.

The FOP argues that this history constitutes a past practice that bars the Commonwealth from unilaterally ordering mandatory overtime without first bargaining with the FOP. The FOP objected to the order and filed the present charge.

The assignment of overtime implicates hours and wages, both specifically listed in Section 701 of PERA. 43 P.S. § 1101.701 as mandatory subjects of bargaining. The Commonwealth acknowledges this legal duty and contends that it has discharged its duty to bargain, as evidenced by several provisions in the collective bargaining agreement. This includes the rate of pay for overtime, the distribution of overtime hours among the bargaining unit and, relevant to this proceeding, the assignment of overtime. The Commonwealth contends that it was contractually privileged to assign overtime on the opening days of trout season and that this privilege acts as a defense to the refusal to bargain charge.

In Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER ¶ 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212, 117 L.R.R.M. 1062 (1984) and Vickers, Inc., 153 N.L.R.B. 561, 59 L.R.R.M. 1516 (1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 28 PPER ¶ 28200, at 433 (Final Order, 1997). 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).

The Commonwealth has proven that it possessed a sound arguable basis to claim contractual privilege. Under the agreement that was in place at the time of the 2010 assignment of overtime, Article 20, Section 5 gives the Commonwealth the right to make mandatory assignments of overtime. The agreement that was in effect at the time provides that "[I]n the event that there are an insufficient number of volunteers [for an overtime assignment], the Employer shall have the right to assign such work on a non-volunteer basis beginning with the least senior of those employees who has the least assigned overtime on a non-volunteer basis during the period." (Commonwealth Exhibit 1, page 42).

The FOP argues that the Board should instead rely on another document and find that the matter has not been bargained. The FOP contends that language in a 1994 side letter eliminated the right of the Commonwealth to assign mandatory overtime. However, this document has never been executed, so its reliability is not assured. However, even if it

had been executed and found to be reliable, the language in the document does not say that mandatory overtime has been eliminated.

Given the competent evidence of record, the Commonwealth has presented a sound arguable basis that the parties bargained the issue of whether the Fish and Boat Commission had the right to assign mandatory overtime to the WCOs on the opening days of trout season. This provides a contractual privilege defense to the allegation that the Commonwealth has violated its duty to bargain. The charge alleging a violation of Section 1201(a)(5) will be dismissed.

The Complainant has also alleged that the Commonwealth violated Sections 1201(a)(1), (2), (3) and (4) of PERA. The allegations regarding these provisions were not supported by substantial and legally credible evidence. The complainant has not met its burden of proof regarding these sections of PERA. Accordingly, these charges will be dismissed.

#### CONCLUSIONS

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

1. That the Commonwealth of Pennsylvania, Fish and Boat Commission, is a public employer within the meaning of Section 301(1) of PERA.
2. That the Fraternal Order of Police, Pennsylvania Conservation Police Officers Lodge 114 is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the Commonwealth of Pennsylvania, Fish and Boat Commission, has not committed unfair practices in violation of Sections 1201(a)(1), (2), (3), (4) and (5) of PERA.

#### ORDER

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

#### HEREBY ORDERS AND DIRECTS

that the charge of unfair practices is dismissed and the complaint rescinded.

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this fifteenth day of April, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner