COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION	:	
v.	:	Case No. PF-C-99-51-E
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE	:	

FINAL ORDER

On October 2, 2001 the Pennsylvania State Troopers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions and a supporting brief to a September 12, 2001 Proposed Decision and Order (PDO). In the PDO, the Hearing Examiner dismissed the Association's Charge of Unfair Labor Practices and concluded that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth) did not violate its collective bargaining duty under Act 111 and the PLRA, because it had a sound arguable basis for its actions and interpretation of physical fitness provisions in the parties' collective bargaining agreement (CBA). In its exceptions, the Association asserts that the Hearing Examiner erred by: (1) concluding that the Commonwealth established a sound arguable basis grounded in contractual privilege to implement a physical fitness program; (2) failing to conclude that the Commonwealth's actions constituted the unlawful repudiation of the parties' CBA; (3) failing to conclude that the creation of a physical fitness program is a procedural assessment and constitutes a mandatory subject of bargaining which may not be unilaterally implemented. On October 12, 2001, the Commonwealth filed a timely brief in response to the Association's exceptions.

The Association did not except to the Hearing Examiner's Findings of Fact, which are summarized as follows. Article 44 of the parties' CBA establishes a physical fitness committee comprised of representatives of both the Association and the Commonwealth to develop a mutually acceptable physical fitness program for state troopers.[1] Section 5 of Article 44 provides that "[i]f after a good faith effort the Committee is unable to reach agreement . . . the Commonwealth shall be permitted to formulate and present the [Association] a complete physical fitness program that it intends to implement. . . ." The physical fitness committee met various times prior to March of 1998, but was unable to reach an agreement. The Commonwealth then decided to formulate and present a complete program to the Association. In furtherance of this decision, it developed a request for proposal (RFP) and selected Fitness Intervention Technologies (FIT) as the vendor to develop validated physical fitness standards for cadets, liquor enforcement officers and incumbent state police members. FIT prepared a survey that was distributed to all state police personnel to ascertain the essential functions of these jobs.[2] Upon receipt of the surveys, FIT began to develop job task simulation exercises and

[1] The full text of Article 44 is set forth in the PDO at F.F. 3.
[2] The Association objected to the survey, but agreed to allow the survey to proceed after meeting with the Commonwealth. (F.F. 6.)

physical exercises. The Commonwealth randomly selected state police members to be tested over a two day period, in order for FIT to determine what level of performance would be necessary to meet the essential functions of these jobs.[3]

In a letter dated March 21, 2000, the Commonwealth informed the Association that it believed it was at the stage in the CBA that allowed it to formulate and present a complete physical fitness program. The Commonwealth explained that FIT's validation study was designed to establish legal, reasonable, objective and job related fitness standards, and that the Commonwealth would be unable to formulate a complete physical fitness program until these minimum fitness standards were established.[4]

The Hearing Examiner did not err in his application of the sound arguable basis test. In Pennsylvania State Troopers Ass'n v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000) the Commonwealth Court affirmed the Board's recognition of "'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a failure to bargain in good faith. Mindful that it is the Board's function to encourage the parties to bargain and reach agreement over wages, hours and terms and conditions of employment, the Board will entertain a defense to a refusal to bargain charge, where the parties' agreement evidences satisfaction of the bargaining duty regarding a matter at issue. 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 . . . for the claim that the employer's action was permissible under the agreement." Id., at 651. The Hearing Examiner reasonably accepted the Commonwealth's assertion that it had a sound arguable basis in Article 44, Section 5 of the CBA for hiring FIT to develop job task simulation exercises and physical exercises for randomly selected state police members, because that section provides that if the "Committee is unable to reach agreement . . . the Commonwealth shall be permitted to formulate and present the [Association] a complete physical fitness program . . . ." (PDO, F.F. 3; Commonwealth Ex. 1.) This section of the parties' CBA permits the Commonwealth to "formulate" a physical fitness program. The Commonwealth has a sound arguable basis for claiming that its actions were part of that formulation.

In support of its first exception, the Association argues that the Hearing Examiner adopted an overly broad application of the sound arguable basis doctrine, when he should have instead reviewed the contract to determine whether the Association had waived its right to bargain the physical fitness program, citing Township of Upper Saucon

[3] The Association included with its Charge a copy of a memorandum from Lt. Colonel Thomas K. Coury to Troop Commanders and the Director of the Bureau of Liquor Control Enforcement instructing the randomly-selected troopers to report for the FIT study. Because the Association has never alleged that the Commonwealth engaged in unlawful direct dealing, neither the Hearing Examiner nor the Board addresses this issue.

[4] The Commonwealth Court granted the Association's petition to enjoin the Commonwealth from subjecting the randomly selected members to the job task simulation exercises and physical exercises, pending the outcome of the proceedings before the Board. (PDO, F.F. 9.)

v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993). In Upper Saucon, the public employer was charged with unilaterally changing a mandatory subject of bargaining in violation of Act 111 and the PLRA. In defense of that charge, the public employer argued that the union waived its right to bargain the change by relying on broad language in the management rights clause of the parties' CBA. The Board and the Commonwealth Court rejected that argument, holding that such broad language does not support a waiver of the right to bargain over a mandatory subject. Unlike the employer in Upper Saucon, the Commonwealth did not assert a waiver defense. Rather, the Commonwealth argued that it had a sound arguable basis grounded in Article 44, Section 5 of the CBA for its actions. Accordingly, the Hearing Examiner was correct in applying the sound arguable basis analysis in lieu of a waiver analysis, which was not raised as a defense to the Association's Charge.

In support of its second exception, the Association argues that the Commonwealth repudiated the parties' CBA when it hired FIT and began formulating a physical fitness program without utilizing the joint physical fitness committee. The Association asserts that the Commonwealth unlawfully abandoned a program that the physical fitness committee had been working on, when that committee failed to reach agreement on a single issue. While the clear repudiation of a collective bargaining agreement constitutes an unfair labor practice, Pennsylvania State Troopers Ass'n v. PLRB, supra, citing Millcreek Educ. Ass'n v. Millcreek Township Sch. Dist., 22 PPER ¶ 22185 (Final Order, 1991), aff'd, 631 A.2d 734 (Pa. Cmwlth. 1993) appeal denied, 537 Pa. 626, 641 A.2d 590 (1994), there is no evidence of an express repudiation of Article 44 here, because as discussed above, the Commonwealth had a sound arguable basis grounded in that article for its action. It is undisputed that the Committee, after meeting for a period of almost three years, failed to reach an agreement. The Association argues that because the Committee failed to reach agreement on only one issue, the parties should have continued to bargain and that the Commonwealth repudiated the agreement and committed an unfair labor practice by thereafter taking action to formulate a program. However, as discussed above, the Commonwealth had a sound arguable basis for taking the actions that it did when the Committee failed to reach agreement after a period of three years. Further, as the Hearing Examiner noted, where the parties' CBA addresses the specific subject upon which the unfair labor practice was based, proper interpretation of what the parties have bargained is a matter for the grievance procedure, not this Board. (PDO, at 4-5, citing, Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 28 PPER ¶ 28048 (Final Order, 1997)).

The Association finally argues that the creation of a physical fitness program is a procedural assessment that constitutes a mandatory subject of bargaining which may not be unilaterally implemented. In briefing its final exception, the Association acknowledges the Commonwealth's ability to assess the physical abilities or capacities of its members. It argues, however, that "the procedure utilized to perform the substantive assessment is clearly a mandatory subject of bargaining and the unilateral amendment of such a procedure constitutes a violation of . . . the PLRA and Act 111." (Ass'n, Br. at 10.) The Hearing Examiner was not required to reach this issue because, as discussed above, a physical fitness program has not yet been developed. There are no findings to support the Association's allegation that a

program has been "implemented." Rather, as discussed above, the Commonwealth's actions in randomly selecting employes for job task simulations and physical exercises in preparation for determining essential job functions, were in furtherance of formulating a complete program with FIT for presentation to the Association, a position which has a sound arguable basis grounded in Article 44 of the parties' CBA. Until a physical fitness program is developed, the "procedure" utilized to perform a "substantive" assessment of the physical fitness of members of the bargaining unit is not at issue.

The record reveals that the parties bargained for the creation of a Committee to seek to develop a mutually acceptable physical fitness program. The relevant language concerning this Committee was added to the parties' contract in 1988 and has remained unchanged since then. The record also reveals that by March of 1998, ten years after this language was added, the Committee had failed to reach an agreement. The CBA further provides that if the Committee fails to reach agreement, the "Commonwealth shall be permitted to formulate and present the [Association] a complete physical fitness program . . . ." (PDO, F.F. 3.) The Commonwealth's actions thus far are in furtherance of this contractually provided formulation. Once a complete program is formulated and presented to the Association, if the Association believes it is unreasonable "it shall so advise the Commonwealth . . . and include . . . the reasons for objection." (PDO, F.F. 3.) Pursuant to the parties' agreement, absent the Association's concurrence with the completed program, the Commonwealth shall have the duty to submit the matter to arbitration. Thus, the Commonwealth lacks the right to unilaterally impose a physical fitness program under the agreement. However, the agreement provides the Commonwealth does have the right to prepare and present a program to the Association and the actions of the Commonwealth to date are in furtherance of this right. Accordingly, the Association's objections are premature at this time and its rights are adequately protected without the ability to frustrate the Commonwealth's ability to at least prepare and propose such a program to the Association.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned case be and the same are hereby dismissed and the Proposed Decision and Order be and the same is made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this eighteenth day of December, 2001. The Board hereby authorizes the Secretary of

the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.