

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :  
ASSOCIATION :  
 :  
v. : Case No. PF-C-98-149-E  
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COMMONWEALTH OF PENNSYLVANIA :  
PENNSYLVANIA STATE POLICE :

FINAL ORDER

On June 14, 1999, the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the proposed decision and order (PDO) issued May 24, 1999. In the PDO, the hearing examiner concluded that the Commonwealth committed unfair labor practices in violation of the Pennsylvania Labor Relations Act (PLRA) Section 6(1)(a) and (e) when it unilaterally terminated probationary trooper review panel (PTRP) hearings for probationary state troopers facing dismissal by the Commonwealth. Pursuant to an extension of time granted by the Secretary of the Board, the Commonwealth filed a brief in support of its exceptions on July 13, 1999, and the Pennsylvania State Troopers Association (Association) filed a responsive brief on August 3, 1999.

The Commonwealth began providing probationary state troopers facing dismissal for poor performance with PTRP hearings in 1984. The probationary troopers were given advance notice of any witnesses who were to appear against them at the hearing and they were also permitted to be represented by counsel, to present testimony and evidence, and to cross-examine witnesses. (FF 3, PDO at 1). After discussion between the parties, the Commonwealth extended the PTRP hearing process to probationary troopers facing dismissal for disciplinary reasons as well. (FF 4, PDO at 2).

The charge in this case was not the first unfair labor practices charge filed with the Board regarding the PTRP hearing process. The Commonwealth terminated the PTRP hearings in 1995, and the Association filed a charge of unfair labor practices at that time (Case No. PF-C-95-212-E). (FF 5, PDO at 2). The 1995 charge was settled on November 30, 1995, and resulted in what the parties refer to as the Burns and Shade Agreement.<sup>1</sup> Following the settlement, the Commonwealth continued to

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<sup>1</sup> The text of the agreement is as follows:

The format of the review for probationary Troopers Burns and Shade shall consist of:

1. A review conducted by a Probationary Trooper Retention Panel (PTRP). The PTRP shall consist of three commissioned officers designated by the Director, Bureau of Personnel with one appointed as chairperson. If the primary reason for the review is due to performance, a Station Commander and a Troop Patrol Section Commander from outside the probationary Trooper's Troop will serve on the panel.

conduct PTRP hearings for other probationary troopers in accordance with the terms of the Burns and Shade Agreement until January 1998. (FF 7, PDO at 3). Subsequently, the Commonwealth dismissed probationary trooper Mark E. Encin (Encin) without a PTRP hearing by letter dated May 29, 1998, and then dismissed probationary trooper Gerald T. Devlin (Devlin) approximately three months later, also without a PTRP hearing. (FF 8-11, PDO at 3). The Commonwealth did not bargain over the termination of the PTRP hearings, and the Association was not aware that the hearings were terminated until

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2. The PTRP shall review performance reports, general investigations, Troop endorsements and summaries of the Bureau of Professional Responsibility reports, if applicable, prior to the review with the probationary Troopers. Based on this information, the PTRP members shall have the ability to request additional documentation or the presence of individuals at the actual PTRP review. Copies of the information provided to panel members shall be provided to the probationary Trooper and his/her advocate.
  3. The Troopers shall receive written notification of the review. The notification shall include the reason(s) the review has been scheduled and the name(s) of any individual(s) requested to appear at the review (if applicable). The notification shall also inform probationary Troopers they may: have representation, present information (oral statements or written material), request the Department provide additional relevant documents, request an individual with relevant information be allowed to appear at the review and submit questions they or their advocate would like the PTRP to ask an individual who appears at the review.
  4. The PTRP review shall open with a recitation by the PTRP chairperson of the reason(s) the review is being conducted and an explanation of how the review will be conducted. The PTRP shall then question the individual(s) requested to appear (this includes the probationary Trooper being reviewed). After concluding its questioning of individual(s), the PTRP will consider questions submitted by the Troop Commander or designee and the probationary Trooper or his/her advocate. The Panel shall consider a parties' offer of proof which indicates that the information the question is trying to elicit is both relevant and appropriate to the proceedings. The determination on whether a question will be asked rests solely with the PTRP. The review shall conclude with optional closing statements by the probationary Trooper or his/her advocate and the Troop Commander or designee.

The parties agree that the use of the above procedure for the reviews of Troopers David T. Burns and Scott C. Shade is a full and final settlement and resolves all issues raised by the case referenced above. Both parties recognize that this settlement is without precedent and prejudice to the contractual and statutory rights of either party. The Pennsylvania State Police explicitly reserves any right it possesses to modify or discontinue either this process or the formerly used probationary Trooper review process, with the express understanding that the Pennsylvania State Troopers Association does not recognize or acknowledge such a right and may challenge any such unilateral change.

Devlin received his notice of dismissal August 26, 1998. (FF 11-12, PDO at 3). This charge of unfair labor practices was filed two days later.

The Commonwealth asserts in its exceptions that the hearing examiner erred in concluding: that the decision to terminate PTRP hearings was bargainable; that the probationary trooper hearings were more rationally related to the probationary troopers' interest in their terms and conditions of employment than to the Commonwealth's managerial prerogative to establish qualifications for positions; and, that the Commonwealth committed unfair labor practices under the PLRA.

The Board will first address the status of the probationary troopers under Act 111. The Commonwealth Court recently decided that "absent specific language in the collective bargaining agreement itself to that effect, or other specific contractual or legislative requirements, a probationary officer is not subject to the protections of a collective bargaining agreement." Township of Sugarloaf v. Bowling, 722 A.2d 246 (Pa. Cmwlth. 1998), Petition for allowance of appeal granted, 1999 Pa. LEXIS 2206. Consistent with this decision, the parties agree that probationary troopers are members of the bargaining unit, and that the Association has been the exclusive representative of state troopers, including probationary troopers since Act 111 was passed. (N.T. at 18). The collective bargaining agreement provides that the term "member" shall include probationary troopers except where excluded. (Joint Ex. 1, Art. 28, Sec. 16, at 46). It is thus established that the probationary troopers are in the bargaining unit and are covered by the parties' collective bargaining agreement.

The Commonwealth Court in Sugarloaf v. Bowling in denying access to the grievance procedure of a "probationary employe" opined that "the collective bargaining agreement exists to protect the rights and benefits of those who are actually employees of the employer." Id., n.6 at 249 (emphasis added). This decision implies that probationary employes are not actually employes of the employer for purposes of Act 111, a position that is inconsistent with both Board and Supreme Court precedent. In York County, 10 PPER ¶ 10255 (Order and Notice of Election, 1979), the Board held that a professional employe cannot be excluded from a bargaining unit simply because he or she is on a probationary status. Similarly, newly hired employes who are hired and placed on the employer's payroll after the date of submission of eligibility lists until the last day of the payroll period immediately preceding the election order are eligible to vote in representation elections. The Board's objective is to afford as many employes as possible who have an interest in the outcome of an election an opportunity to vote. Catchment Area 094 Corp., 9 PPER ¶ 9143 (Order Directing Canvassing of Challenged Ballots, 1978).

An analogous situation was presented under the Public Employee Relations Act (PERA) shortly after its passage in 1970. Much like the probationary status of police officers before they acquire tenure or civil service protection, public school teachers are initially hired as "temporary professional employes" and must serve a form of probation before they acquire tenure under the Public School Code. See 24 P.S. § 11-1108. During an initial period of employment, temporary professional employes can be evaluated and discharged by a school district for lesser reasons than statutorily allowed once acquiring tenure. See 24 P.S. § 11-1122. It was argued that a collective bargaining agreement which purportedly provided for arbitration of grievances by temporary professional employes under a

contractual just cause standard was unlawful as beyond the authority of the school district to negotiate.

The Supreme Court opined in Board of Education v. Philadelphia Federation of Teachers Local No. 3, 464 Pa. 92, 346 A.2d 35 (1975) that a school district may agree in a collective bargaining agreement to submit to arbitration the propriety of discharging a non-tenured teacher. In that case, the parties' collective bargaining agreement provided that teachers without tenure could not be subjected to discipline or discharge without just cause. The Court found no restriction upon the substantive grounds for dismissal of a non-tenured teacher in this provision of the collective bargaining agreement.<sup>2</sup> Id., n. 17 at 42. Similarly, the Board finds no restriction upon the Commonwealth's ability to determine the substantive criteria by which it decides to retain or dismiss probationary troopers. See below. Further, the Supreme Court found that "[t]he mere fact that a particular subject matter may be covered by legislation does not remove it from collective bargaining . . . if it bears on the question of wages, hours and conditions of employment . . . . [The Act] only prevents the agreement to and implementation of any term which would be in violation of or inconsistent with any statutory directive." Id., at 38 (citing PLRB v. State College Area School District, 337 A.2d 262, 269 (1975)(decided under PERA). The Board finds nothing in the record that would remove the PTRP hearing process from collective bargaining, nor does it find the PTRP hearings to be in violation of or inconsistent with any statutory directive. The Board recognizes that these cases were decided under PERA, however, it finds nothing in either Supreme Court decision or Act 111 that suggests or compels a different result.

The Board will next address the bargainability of the Commonwealth's decision to terminate PTRP hearings for probationary troopers facing dismissal. An issue is deemed to be a mandatory subject of bargaining under Act 111 if the issue bears a rational relationship to the employees' duties. City of Clairton v. PLRB, 528 A.2d 1048 (Pa. Cmwlth. 1987). The Board will find an employer in violation of its bargaining obligation enforceable under PLRA Section 6(1)(a) and (e) if the employer unilaterally changes a term and condition of employment. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). The Commonwealth in effect urges the Board to disregard this longstanding rational relationship analysis because the Supreme Court in Pipkin v. Pennsylvania State Police, 548 Pa. 1 693 A.2d 190 (1997) found that under the Section 205(f) of the Administrative Code of 1929, as amended,<sup>3</sup> probationary troopers do not possess a property right in continued employment, and are thus not entitled to due process protections. The Board does not dispute the Supreme Court's constitutional determination, however, it is nondeterminative of the issues presented by this unfair labor practices case.

As the hearing examiner explained, the Pipkin decision dealt with constitutional law, not labor law. (PDO at 5). The absence of constitutional due process protections for probationary troopers does not

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<sup>2</sup> The Court cited Article XI of the Public School Code, Act of March 10, 1949, P.L. 30, art. I, § 101 et seq., 24 P.S. § 1-101 et. Seq. (1962) in defining a non-tenured teacher, or "temporary professional employe" as "any individual who has been employed to perform for a limited time, the duties of a newly created position or of a regular professional employe whose service has been terminated by death, resignation, suspension or removal."

<sup>3</sup> 71 P.S. § 65(f).

preclude the possibility that PTRP hearings may be a mandatory subject of bargaining under Act 111 and the PLRA. The Pennsylvania Constitution Article III, Section 31 authorizes the legislature to grant police the right to collective bargaining. The scope of substantive issues which can be the subject of mandatory bargaining is not set forth in the Constitution. Rather, it was left to the Legislature and the passage of Act 111. Pennsylvania State Troopers Assoc. v. Commonwealth of Pennsylvania, 603 A.2d 253 (Pa. Cmwlth. 1992)(citing State Conference of State Police Lodges of FOP v. Commonwealth, 522 A.2d 144-145 (Pa. Cmwlth. 1987)(Doyle, J. concurring). See also FOP v. Commonwealth of Pennsylvania, 571 A.2d 531 (Pa. Cmwlth. 1990) wherein the Commonwealth Court opined that the Constitution authorizes collective bargaining between municipalities and police officers, and Act 111 gives police officers the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits. Because the Constitution permits collective bargaining between the Commonwealth and the Association through Act 111, the issue of whether the termination of PTRP hearings is mandatorily bargainable is decided under that statute.

Under the City of Clairton analysis, supra, the Board finds that the issue of pretermination hearings bears a rational relationship to the probationary troopers' duties. The parties were unable to cite a case dealing with the bargainability of PTRP hearings or termination, and the Board is not aware of any such case. However, the hearing examiner analogized two cases dealing with the bargainability of promotional qualifications and hiring procedures. City of Sharon, 29 PPER ¶ 29147 (Final Order, 1998), aff'd sub nom.; F.O.P. Rose of Sharon Lodge No. 3 v. PLRB, 729 A.2d 1278 (Pa. Cmwlth. 1999)(establishing the criteria for promotions is more rationally related to the employer's managerial prerogative to establish the qualifications for positions than to employe terms and conditions of employment, and therefore not a mandatory subject of bargaining); East Allegheny School District, 13 PPER ¶ 13060 (Proposed Decision and Order, 1982)(employer must bargain over the procedures to be followed in filling a position). From these two cases, the hearing examiner reasoned that an employer is under no obligation to bargain over the criteria it uses in making a promotional decision, yet the employer must bargain over the procedures to be followed in filling a position. Similarly, the Commonwealth is under no duty to bargain over the criteria for retaining or dismissing probationary troopers, yet it must bargain over the procedures to be followed in doing so. See also Harrison Township Water Authority, 29 PPER ¶ 29086 (Final Order, 1998)(water authority acted within its managerial prerogative in establishing qualifications for newly created position; parties bargained over procedure for filling position, as evidenced by the collective bargaining agreement).

The PTRP hearings constituted a term and condition of employment for every probationary trooper hired by the Commonwealth since 1984. Probationary troopers facing dismissals have consistently been afforded the opportunity to defend themselves in dismissal proceedings. The Commonwealth argues that the Commissioner has the sole discretion to terminate probationary troopers as provided in the Administrative Code, Section 205(f). The Board does not dispute this assertion. Making the PTRP hearings a subject of mandatory bargaining does not disrupt the Commissioner's discretion or authority, it merely affords the probationary troopers the opportunity to defend themselves prior to termination - an

opportunity that is rationally related to their terms and conditions of employment.

The hearing examiner's determination that the PTRP hearings are a mandatory subject of bargaining is consistent with the Board's longstanding policy of considering the public employer's management objectives. City of Philadelphia, 727 A.2d 1187 (Pa. Cmwlth. 1999)(citing Indiana Borough, 695 A.2d 470)(Pa. Cmwlth. 1997)). For an issue to be deemed a managerial prerogative and thus not a mandatory subject of bargaining, the managerial policy must substantially outweigh any impact an issue will have on the performance of the duties of the police. City of Philadelphia (citing Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1991)). As discussed above, the Commonwealth's managerial prerogative to establish the qualifications for positions is unaffected by collective bargaining over the procedures for dismissal of probationary troopers. The Commonwealth maintains complete control over the qualifications and criteria to be used in the decision to retain or dismiss probationary troopers. The Commonwealth's interest in establishing qualifications for positions and the probationary troopers' interest in defending themselves in dismissal proceedings are compatible. The Board finds no reason to weigh these two interests against one another because they are not in conflict or competition with one another.

In its brief, the Commonwealth urges a different result by relying on Temple University, 23 PPER ¶ 23034 (Final Order, 1992). In that case, the Board found that the University did not violate its bargaining obligation by unilaterally discontinuing the noncontractual practice of conducting desk audits as part of its investigation for job reclassifications. The case is factually and statutorily dissimilar. That case was decided under PERA, and followed a line of Board decisions holding that an employer's reclassification of an employee is a managerial prerogative, provided that the reclassification does not result in removal of an employee from a collective bargaining unit and that the wage, hour and working condition consequences of reclassification decisions are fully negotiable and arbitrable. Id. (citing PLRB v. Commonwealth, 9 PPER ¶ 9061 (Nisi Decision and Order, 1978); Public Utility Commission, 19 PPER ¶ 19072 (Final Order, 1988); PLRB v. Commonwealth, 16 PPER ¶ 16086 (Final Order, 1985); PLRB v. Commonwealth, 14 PPER ¶ 14136 (Final Order, 1983)). It is settled that job reclassifications are not mandatory subjects of bargaining when they do not remove employees from collective bargaining units. Therefore, the investigatory procedures used in processing employees' requests for job reclassifications are also managerial prerogative. However, the dismissals in this case are fundamentally dissimilar. First, the probationary troopers are not making a request of the Commonwealth, as did the employees in Temple University, supra. The PTRP hearings are conducted in response to poor performance evaluations by the Commonwealth or for disciplinary reasons, not because the probationary troopers request to be evaluated through a grievance. Second, unlike the employees in Temple University, the probationary troopers are removed from the collective bargaining unit when they are dismissed by the Commonwealth. Third, the desk audits that were the subject of the Temple University case were investigatory procedures conducted by the employer in order to upgrade an employee's job and compensation or to defend itself in a grievance procedure. In this case, the hearings provided the probationary employees with the only opportunity to defend themselves prior to being terminated. The Board does not find support for the Commonwealth's position under this PERA case.

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 matter be and the same are hereby dismissed, and the Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of December, 1999. 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.

CONCURRENCE BY CHAIRMAN JOHN MARKLE JR.

I concur in the result of this Final Order, considering the history of the two parties practice of bargaining over probationary employes. However, I would find that in general, the procedures for retaining or dismissing probationary employes is a permissive subject of bargaining.