

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE	:	
CONFERENCE OF PENNSYLVANIA LIQUOR	:	
CONTROL BOARD LODGES	:	
	:	
v.	:	Case No. PERA-C-99-295-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
PENNSYLVANIA STATE POLICE	:	
BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	
	:	

FINAL ORDER

On July 15, 1999, a charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) by the Fraternal Order of Police, Conference of Pennsylvania Liquor Control Board Lodges (FOP) in which it alleged that the Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement (Commonwealth) violated Section 1201(a)(1) of the Public Employee Relations Act (Act). In support of the charge of unfair practices, the FOP alleged that the Commonwealth instituted a Physical Fitness Validation Study requiring the participation of a "random sample" of members of the bargaining unit to participate in a study which included physical exercises. They alleged that the random sample constituted more than two-thirds of the bargaining unit and that the Commonwealth observed and evaluated the activity and prepared a written record of observations and evaluations. Despite allegations of refusal to bargain, refusal to meet and discuss and discrimination set forth in the specification, the FOP alleged violation of only Section 1201(a)(1) of the Act. After review of the charge of unfair practices, the Secretary by letter dated August 6, 1999, dismissed the charge. The Secretary determined that the Board has held that fitness testing is a matter of managerial prerogative and not a mandatory subject of collective bargaining and that no cause of action under Section 1201(a)(1) of the Act was stated in the charge.

Thereafter, on August 26, 1999, timely exceptions were filed to the Secretary's decision declining to issue a complaint. In the exceptions the FOP alleges that the Commonwealth had a duty to bargain impact of any decision regarding fitness testing for the bargaining unit and therefore it was error for the Secretary to dismiss the charge entirely for the reason that fitness testing is a matter of managerial prerogative.

After review of the charge of unfair practices as amended in the exceptions, the Board shall sustain the dismissal of the charge. The FOP, in the exceptions, seeks to avoid the managerial nature of fitness for duty testing for physically demanding jobs by alleging a refusal to bargain over the impact of that decision, conceding that fitness for duty testing is itself a matter of managerial prerogative. The Board has stated in International Association of Fire Fighters Local 22, AFL-CIO v. City of Philadelphia, 28 PPER ¶ 28100 (Final Order, 1997), affd, Pa. Cmwlth Court, No. 1000 C.D. 1997 (unreported, 1998), as follows regarding the distinction between negotiation over a mandatory subject of bargaining and negotiation over the impact of the imposition to the matter of managerial prerogative:

"An impact situation differs in that the Employer has by statutory right altered the relationship between the parties unilaterally by changing a matter of managerial prerogative which has impact over wages, hours and/or working conditions. Oftentimes, that impact is not known or discernable until the managerial policy is implemented and the impact of that decision filters down to employee working conditions. Accordingly, the employer's obligation to bargain impact arises "on demand" from the employee representative once the wage, hour or working condition impact is known."

28 PPER p. 206. Accordingly negotiations over the impact of a management decision differ dramatically from an employer's obligation regarding changing a mandatory subject. In the latter circumstance, it is the employer's obligation to seek out the collective bargaining representative and present a bargaining opportunity for its employees prior to any change. FOP Lodge 5 v. City of Philadelphia, 21 PPER ¶ 21042 (Final Order, 1990). On the other hand when an employer lawfully implements a matter of managerial prerogative, the impact on employee wages, hours and working conditions by virtue of the lawful implementation of managerial prerogative may or may not occur and may or may not present matters for negotiation. Accordingly, it is only after the matter of management prerogative is implemented, its wage, hour and working condition consequence is known and the union makes a demand to bargain which is refused by the employer does a cause of action for refusal to impact bargain arise.

Review of the specifications of charges in this case discloses that the FOP contended an obligation to impact bargain arose simultaneously with the Commonwealth's implementation of the Physical Fitness Validation Study on June 23, 1999. The Secretary properly noted, relying on City of Easton, 20 PPER ¶ 20095 (Proposed Decision and Order, 1989), that fitness for duty testing is a matter of managerial prerogative and not mandatorily negotiable. Consistent with Easton and other similar cases, the Commonwealth's unilateral implementation of the fitness for duty testing was a matter of managerial prerogative and not negotiable. Accordingly, it was only after this policy was implemented, employee wage, hour and working condition impact demonstrated, a bargaining demand was made and refused, that a cause of action would have arisen. However a review of the specification of charges discloses that the FOP did not make a bargaining demand which was refused by the Commonwealth. Rather, the FOP argues that the cause of action for a refusal to bargain over impact arose simultaneously with implementation on June 23, 1999.

The Board agrees with the FOP that Easton states that the public employer must satisfy its obligation to impact bargain over a matter of managerial prerogative. However, consistent with IAFF v. Philadelphia, supra, the facts of Easton demonstrate that once the employer announced its fitness for duty testing, the union sought to negotiate over impact issues (e.g. whether existing officers should be grandfathered, payment for remedial training time to meet fitness standards, and testing reliability issues) and demanded bargaining with the employer. However, the employer responded that no changes would be made to the existing policy and the employer then reinstated the suspended fitness testing program without modification. The Board found the violation in Easton because once the fitness for duty standards were announced, the union identified impact regarding mandatory bargaining subjects, and made its bargaining demand which was refused by the employer. Like IAFF v. Philadelphia, the union in

Easton demonstrated a demand to negotiate perceptible wage, hour and working condition impact and a refusal by the employer to negotiate. The allegations set forth in the charge of unfair practices as amended in the exceptions in this matter do not demonstrate a demand to bargain over these perceived issues of impact and a refusal by the Commonwealth. Accordingly, for this reason alone the charge of unfair practices as amended in the exceptions must be dismissed.

We further note that in the charge of unfair practices as originally filed the union alleged only violation of Section 1201(a)(1) despite separate factual allegation of a refusal to meet and discuss. Much like the obligation to impact bargaining following imposition of a matter of managerial prerogative, the obligation to meet and discuss arises on demand by a public employee representative over the managerial prerogative decision itself. APSCUF v. SSHE, 24 PPER ¶ 24070 (Final Order, 1993).

In its exceptions, FOP has not excepted to the Secretary's dismissal of its claims of discrimination and refusal to bargain over the Commonwealth's underlying decision to initiate fitness for duty testing. Further the FOP has not amended the charge of unfair practices as originally filed to incorporate allegations of violation of Section 1201(a)(3) (discrimination), 1201(a)(5)(refusal to bargain) and 1201(a)(9)(refusal to meet and discuss).

After a thorough review of the charge of unfair practices as amended in the exceptions, the Board shall dismiss the exceptions and affirm the decision of the Secretary.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions be and the same are dismissed and the Secretary's decision not to issue a complaint be and the same is 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 nineteenth day of October, 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.