COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE	:	
	:	
v.	:	Case No. PERA-C-03-34-E
	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

FINAL ORDER

On April 7, 2004, the Southeastern Pennsylvania Transportation Authority (SEPTA) timely filed with the Pennsylvania Labor Relations Board (Board) exceptions to a Proposed Decision and Order (PDO) issued March 19, 2004. In the PDO, the Hearing Examiner concluded that SEPTA engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally permitting officers on the newly created Special Operations Response Team (SORT) to pick their shift and days off prior to uniformed patrol officers with greater seniority in the bargaining unit. On April 16, 2004, the Fraternal Order of Transit Police (Union) timely filed a brief in opposition to SEPTA's exceptions.

After a thorough review of the exceptions and the record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

8. SEPTA officers are separated into different divisions based on their different job duties. There is a uniformed patrol division, a support services division and an investigation division. SORT officers receive special training to respond to chemical, biological and radiological threats, detect explosives, work with riots and tear gas and extract individuals from crowds. (N.T. 8, 37, 48-50).

9. Patrol officers provide general public safety in the SEPTA zones. SEPTA commanders develop a deployment plan for patrol based on demographics of prior criminal activity, passenger volume and facility usage. The deployment plan determines the number of patrol officers assigned to a particular zone to adequately provide public safety. (N.T. 37-38).

10. SORT officers are not restricted to a single SEPTA zone because their duties, as emergency response personnel, span all the zones. The emergency response duties of the SORT officers are separate from the general security duties of the patrol officers. As a response measure, SORT officers on occasion are deployed to supplement patrol during times of inadequate patrol deployment resulting from increased activity in a zone. SEPTA determines the deployment of the specialty and patrol forces based on SEPTA's assessment of the independent operational needs for those services. Before and after the creation of the SORT division, the non-patrol officers whose duties are not restricted to a particular zone do not pick shifts or days off with the patrol officers based on overall seniority. SORT officers report to a single location from which they are dispatched to respond to specific emergencies unlike the patrol officers who report to their assigned zone. (N.T. 18-20, 24, 31, 41-42, 50-52, 55, 63).

11. Before the full-time SORT unit was separately created, the part-time SORT officers, who at the time also performed patrol duties, picked with the patrol officers and most officers picked zones seven and four. Those zones were insufficiently staffed and protected when SORT officers participated in training exercises or responded to emergencies. Non-patrol officers fulfill a different mission than patrol resulting in SEPTA's need for non-patrol officers to maintain a separate deployment plan and schedule. (N.T. 42, 48, 52-53).

12. SORT officers pick their shifts and days off based on seniority within the team of SORT officers and without regard to non-SORT officers, which is the same procedure that SEPTA and the Union use for other non-patrol, specialty groups of SEPTA officers. Due to the unique and focused duties of the specialty teams there has not been a bargaining unit wide picking of days off and shift. (N.T. 43, 52-53, 55)

DISCUSSION

Article VIII of the parties' collective bargaining agreement (CBA) permits SEPTA patrol officers to pick their shift and days off subject to SEPTA's need to adequately provide public safety by deploying a sufficient number of qualified officers in a given area on each shift. SEPTA has a K-9 unit, a special investigations unit and a bicycle unit, and historically none of these participate in the Article VIII picking process. This charge arose when the more recently established SORT unit did not engage in the Article VIII picking process.

Patrol officers provide general public safety in the SEPTA zones. SORT officers, however, receive special training in chemical, biological and radiological threats, explosive detection, riots, tear gas, and extracting individuals from crowds. SEPTA commanders develop a deployment plan for patrol based on demographics of criminal activity and passenger volume within the individual zones. The deployment plan determines the number of officers and experience level assigned to a particular zone to adequately provide public safety. SORT officers, however, are not restricted to a single SEPTA zone because their duties, as emergency response personnel, span all the zones like those of the special investigations team and the K-9 team. All officers whose duties cannot be restricted to a particular zone do not pick shifts or days off with the patrol officers. SORT officers report to a single location from which they are dispatched to respond to specific emergencies. Before the full-time SORT unit was separately created, the part-time SORT officers, who at the time also performed patrol duties, picked with the patrol officers and most officers picked zones seven and four. Those zones were insufficiently staffed and protected when SORT officers participated in training exercises or responded to emergencies. Non-patrol officers fulfill a different mission than patrol resulting in SEPTA's operational need for non-patrol officers to maintain a separate deployment plan and schedule.

In its exceptions, SEPTA claims that the Examiner erred in concluding that it engaged in unfair practices. SEPTA argues that the Examiner failed to address the issues raised by the evidence and failed to conclude that SEPTA possessed a sound arguable basis under the CBA to require the SORT officers to separately choose their days off independent of patrol officers.

Section 702 of PERA expressly provides that "[p]ublic employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer [and] standards of services." 43 P.S. § 1101.702. In City of Philadelphia (First Responder) v. PLRB, 588 A.2d 67 (Pa. Cmwlth. 1991), Petition for allowance of appeal denied, 528 Pa. 632, 598 A.2d 285 (1991), the Commonwealth Court stated that the "level of fire and medical emergency protection the city wishes to provide to its citizens, its total staffing levels, its budget, and selection and direction of personnel" constitute managerial prerogatives about which a public employer does not possess a duty to bargain. Id. at 72. In Reading Fraternal Order of Police, Lodge No. 9 v. City of Reading, 30 PPER ¶ 30121 (Final Order, 1999), the Board concluded that it is a public employer's managerial prerogative to direct its personnel in a manner that achieves a level and quality of police services that it deems appropriate. The Reading Board cited Queen City Lodge No. 10, Fraternal Order of Police v. City of Allentown, 27 PPER ¶ 27212 (Proposed Decision and Order, 1996) with approval stating that a public employer of police services possesses a managerial prerogative to determine the manner in which to allocate police services.

In this case, the SEPTA commanders determine the number of patrol officers and experience level necessary in the individual zones based on the volume of SEPTA passengers and the amount of criminal activity in each zone. Once the requisite deployment of SEPTA patrol officers is determined for each zone, the patrol officers have an opportunity to pick their zone, shift and days off during the week based on seniority. In this regard, each zone and each shift for a zone has its own staffing requirements for purposes of protection and patrol. The number of patrol officers entitled to a weekend depends on SEPTA's determination of the staffing levels required to properly protect a given zone during a given shift. Therefore, if weekends off are a premium to an individual officer and the number of available weekends in a desirable zone have been taken by more senior officers, an officer would have to choose to work in a different zone or shift or both to obtain the desired days off.

The SORT officers, however, are an independent special operations unit deployed when emergencies and crises arise. SORT officers are not assigned to any particular zone and, therefore, they are not part of SEPTA's patrol deployment, which generally protects the safety of its passengers in the zones. SORT officers report for duty to a central location from which they are dispatched to respond to various situations as they arise. SORT operations are independent of patrol, like the K-9 unit and the special investigations unit, which also do not affect staffing levels in the patrol unit. Regardless of the number and location of emergencies that occur, SORT activities do not impact the daily protection services of the patrol unit unless supplementing inadequate patrol deployment in which case the SORT officers are providing crisis management protection.

We believe that SEPTA possesses a managerial prerogative under Section 702 of PERA to establish, in its discretion, the appropriate staffing levels and combinations of officer units variously trained to adequately provide a quality level of the protective services that it has a duty to provide. 43 P.S. § 1101.702. See also, First Responder, supra; City of Reading, supra. Accordingly, SEPTA may decide the number of SORT officers on duty at any given time based on past and projected emergency activity. Because emergency response duties are independent and different from patrol duties, SEPTA has different daily and weekend staffing requirements to meet its emergency response needs. It was a legitimate exercise of SEPTA's managerial prerogative for the SORT officers to pick shifts and days off separate from the patrol officers because the SORT officers are not restricted to a particular zone, which determines the weekends available to patrol officers. SORT officers work independently of patrol and, therefore, SEPTA's weekend staffing levels for SORT officers are not the same as that for patrol. If less senior SORT officers were unavailable on particular shifts, weekends, etc. due to patrol officers' picking process, it would undermine SEPTA's ability to control the independent staffing level for emergency response services. Also, the record shows that, when SORT officers picked with patrol and were assigned zones, certain zones were left inadequately patrolled when the SORT officers were dispatched to an emergency operation. Accordingly, SEPTA maintains a managerial prerogative to determine independent staffing levels for its emergency response services, which would be undermined if SORT officers' schedules were determined by the patrol officers, based on their seniority picks, instead of by SEPTA.

However, this conclusion is limited. Although the Board finds that including the SORT officers in the general patrol picking process would impair SEPTA's right to ensure adequate staffing levels for emergency response services, SEPTA remains obligated to bargain wages, hours and other terms and conditions of employment under Section 701 of PERA. Consequently, SEPTA may not act unilaterally regarding other scheduling matters in general. Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993). Also, it is significant that SEPTA's creation of the SORT unit and the manner in which it selected officers for that unit are not at issue in this case. The Board, therefore, cautions that an employer may not, under the pretext of creating a new program or function, unilaterally change matters of wages, hours or terms and conditions of employment otherwise negotiable under Section 701.

Also, the Board's review of the exceptions and the record as a whole leads to the conclusion that the Examiner did not sufficiently assess SEPTA's sound arguable basis claim under Article VIII of the CBA. Due to the need for SEPTA to determine the appropriate staffing levels to adequately provide emergency response and counter terrorism services, we believe that SEPTA possessed a sound arguable basis under Article VIII of the CBA to require the SORT officers to pick their weekends separate from the patrol officers. 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).

Article VIII of the parties' CBA provides that "[t]he Authority retains the right to schedule based on the need of the Authority." (F.F. 3; Joint Exhibit 1, Article VIII, ¶ 1). Although officers with at least four years of seniority may pick their days off and shift and, in the case of patrol officers, their zone assignments, "[s]uch choice shall be granted subject to the right of the Department to balance the experience, ability and diversity needs of the work of the Department." (F.F. 3; Joint Exhibit 1, Article VIII, ¶ 2). The SORT officers receive special training in dealing with certain emergencies and terrorism threats. SEPTA has determined that it must maintain certain staffing levels for the SORT team to protect against certain threats. SEPTA has determined that this level of service, which is independent of general patrol and security, must not be governed or influenced by the scheduling picks of the patrol officers. Accordingly, by requiring SORT officers to separately choose their schedules among themselves, SEPTA has satisfied its managerial need to provide quality protective service by ensuring the requisite skill and diversity of experience, as provided for in Article VIII, and by maintaining the proper combination of patrol, SORT and K-9 officers on duty at any given time. Therefore, regardless of whether SEPTA's interpretation of Article VIII of the CBA is correct,[1] we believe that SEPTA has presented a sound arguable basis that the parties bargained the issue of whether SEPTA retained the right to require SORT officers to pick their shifts separate from the patrol division.

After a thorough review of the exceptions, the PDO and all matters of record, the Board shall sustain the exceptions and reverse the PDO consistent with this Order.

CONCLUSIONS

CONCLUSIONS 1 through 3 and 5 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside.

6. That the District has not committed unfair practices in violation of Section 1201(a)(1) and (5).

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order be and the same are hereby sustained; and that the Order on page 5 of the Proposed Decision and Order be, and the same hereby is, vacated and set aside. The Board further orders and directs that the charge of unfair practices is dismissed and the complaint issued thereon is rescinded.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member, and Anne E. Covey, Member, this twenty-second day of June, 2004. 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.

[1] The question of whether SEPTA's assignment of personnel is consistent with the parties' collective bargaining agreement is a matter reserved to the grievance procedure.