COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE	:	
v.	:	Case No. PERA-C-04-194-E
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	

FINAL ORDER

On December 23, 2004, the Fraternal Order of Transit Police (Union) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board), to a Proposed Decision and Order (PDO) issued December 6, 2004. In the PDO, the Hearing Examiner concluded that the Union's charge was not timely filed and dismissed the charges. On January 18, 2005, the Southeastern Pennsylvania Transportation Authority (SEPTA) filed a response to the exceptions and a supporting brief. After review of the exceptions and all matters of record the Board makes the following:

ADDITIONAL FINDING OF FACT

6. Procedure Directive 30 (PD 30), dated May 19, 2002, contains two separate provisions requiring that an officer who fails to report for his examination claiming illness or injury shall not report for duty without a doctor's note verifying that the employe can work at full capacity. The second provision separated the policy into an independent paragraph for emphasis. The Union received actual notice of PD 30 ten days in advance of the issuance date. SEPTA's per capita distribution system notified each employe in the bargaining unit of PD 30. SEPTA maintains a current reference book of policy directives in each of the SEPTA zones for convenient employe and Union access. PD 30 was maintained in the book. SEPTA's witness was unequivocal that the employes and the Union received actual notice of PD 30 in May 2002. (N.T. 36-40; Joint Exhibit 4).

DISCUSSION

Effective May 19, 2002, SEPTA issued PD 30. Article VII of PD 30 provided that an officer may be excused from his scheduled physical fitness examination for illness or injury. However, it twice provides that an officer who fails to report for his examination claiming illness or injury "shall not report for duty without a doctor's note which indicates they can work at full capacity." (F.F. 5). Effective March 21, 2004, SEPTA issued Procedure Directive 64 (PD 64). Article VII of PD 64 reiterates that an officer may be excused from his scheduled physical fitness examination for illness or injury and again twice provides that an officer shall not return to duty without a doctor's note which indicates that they can work at full capacity." (F.F. 6).

On April 21, 2004, the Union filed a charge of unfair practices alleging that SEPTA, through PD 64, unilaterally instituted a policy

requiring a doctor's note stating that an officer, who did not report to their physical fitness exam due to illness or injury, was fit for duty before the officer could return or report to work. The Examiner concluded that the charge was filed beyond the limitations period because the policy was actually implemented at least as far back as PD 30, in May of 2002.

In its exceptions, the Union contends that the Examiner erred in concluding that the charge was untimely filed. The Union specifically argues that the Examiner erred in finding that SEPTA implemented the policy prior to March 21, 2004 and erred in concluding that SEPTA enforced the policy prior to that date. The Union maintains that the limitations period did not begin until March 21, 2004, when the Union claims the policy was first implemented or enforced.

Section 1505 of the Public Employe Relations Act (PERA) provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge." 43 P.S. § 1101.1505. The Board has consistently held that, to comply with the statute of limitations of Section 1505, a timely unfair practice charge under PERA, alleging a unilateral policy change, must be filed within four months from the date that the complainant knew or should have known of the implementation of the policy. Pennsylvania Nurses Ass'n v. Commonwealth of Pennsylvania, Dep't of Pub. Welfare, 24 PPER ¶ 24083 (Final Order, 1993); Officer of the Upper Gwynedd Township Police Dep't v. Upper Gwynedd Township, 32 PPER ¶ 32101 (Final Order, 2001). Indeed, the law is well established that the statute of limitations begins to run from the date of implementation. Athens Area Sch. Dist. v. PLRB, 23 PPER ¶ 23183 (Court of Common Pleas of Bradford County, 1992); Allegheny County Sheriff's Ass'n v. Allegheny County, 35 PPER 75 (Final Order, 2004); Upper Gwynedd, supra. The Union's exceptions require the Board to address the following two questions: (1) Whether SEPTA implemented the policy prior to December 21, 2003, which is four months prior to the date that the Union filed the unfair practice charge in this case; and, if so, (2) whether the Union knew or should have known that the policy was implemented.[1]

The Union argues that the policy was not implemented until it was applied to one of the bargaining unit members. In Upper Gwynedd, supra, the Board dismissed this argument and held that "[i]mplementation accordingly is the date when the directive becomes operational and serves to guide the conduct of employes, even though no employes may have been disciplined or corrected for failure to abide by the directive." Upper Gwynedd, 32 PPER at 264.

The record in this case reveals that the policy was formally created and issued on May 19, 2002 in PD 30 as reflected in Finding of Fact No. 4. This finding was not challenged on exceptions and will not be disturbed. 34 Pa. Code § 95.98(a)(3); Fraternal Order of Police, Lodge No. 5 v. PLRB, 727 A.2d 1187 (Pa. Cmwlth. 1999). Article VII of PD 30 articulates the policy twice and specifically provided a separate paragraph to emphasize the change. Also, the record establishes that

[1] For purposes of the timeliness analysis only, the Board will assume without concluding that the policy effectuates a change in a mandatory subject of bargaining.

around the time of implementation the Union received actual notice of the policy change, and that PD 30 was issued to each of the employes in the bargaining unit. In addition to the Union's receipt of actual notice, SEPTA maintains a book of policy directives in each of the SEPTA zones for the employes and the Union to conveniently reference. The Union, as the exclusive bargaining representative policing the CBA and the terms and conditions of employment on behalf of the employes, has a duty to periodically inspect this reference book of policies at reasonable intervals, i.e., at least within every four months.[2] The record contains uncontradicted, substantial evidence that SEPTA provided actual notice of the policy change on or before May 19, 2002. Indeed, when questioned about receiving notice of the policy in May of 2002, the Union's sole witness testified that he did not "recall" whether he received a copy of the policy either in the capacity of a Union official or an employe. May 19, 2002 is significantly prior to the December 21, 2003 cut-off date for being within the four-month statute of limitations under PERA.

The Union contends that the Examiner erred in concluding that SEPTA enforced the policy prior to March 21, 2004. The Union argues that Fraternal Order of Police, Lodge No. 9 v. City of Reading, 18 PPER ¶ 18239 (Proposed Decision and Order, 1987) governs this case and SEPTA's failure to apply or enforce the policy prevented its implementation until March 21, 2004 when applied to Officer Kiser. The Union argues that the April 21, 2004 charge is therefore timely.

The Examiner properly distinguished City of Reading from this case and the Board adopts his analysis herein. The Examiner stated the following:

> In City of Reading, the employer adopted a policy in 1981 that employes would pay five dollars for lost fuel cards after one free replacement. When employes lost cards, however, they were not required to pay the five dollars. In 1987, because of epidemic fuel card losses, the employer reissued the 1981 policy and told employes they would now have to pay the five dollar replacement fee for lost cards. The Union filed a charge alleging a unilateral change by the employer in 1987. The employer argued the charge was filed more than four months after the change. The hearing examiner found that the lengthy hiatus, when the employer had the opportunity but chose not to enforce the five dollar replacement fee, established a new status quo. The hearing examiner concluded that the 1987 policy changed the intervening status quo of no replacement fee and consequently found a timely unfair practice.
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> Those facts are materially different from the facts in this case. In City of Reading, despite the employer's written policy, when employes lost fuel cards they were not charged the five dollar replacement fee. When circumstances arose under which the five dollar fee could have been charged pursuant to the employer's 1981 policy, the employer chose not to do so until it issued the 1987 policy.

[2] The Board does not address whether the existence of the May 19, 2002 policy in the zone reference books alone constitutes constructive notice to the Union of the policy.

> In the instant case there is no evidence that any situation arose under which SEPTA's 2002 Procedure Directive 30 would have required a bargaining unit member to tender a doctor's note before returning to work, and where SEPTA chose not to apply that directive.

(PDO at 2-3). Additionally, in Fraternal Order of Police, Washington Lodge No. 17 v. City of Easton, 20 PPER ¶ 20048 (Order Directing Remand to the Hearing Examiner, 1989), the union filed a charge two years after the employer adopted a physical fitness testing policy with disciplinary provisions for failing the test. The union lodged objections to the fitness policy approximately one-and one-half years after the implementation of the policy. In response to the union's objections, the employer formally notified the union that it was officially suspending the policy requiring the physical testing of police officers. Four months after the formal suspension of the policy, the employer issued a memorandum stating that it was reinstating the policy requiring minimum standards for physical fitness. The Board held that the employer's official suspension of the policy "effectively reestablished the prior policy of not requiring police officers to meet minimum standards of physical fitness." Easton, 20 PPER at 133. Accordingly, the Easton Board concluded that the limitations period began upon reinstatement of the policy and the charge was timely filed from the employer's reinstatement date.

Accordingly, the Board has recognized that certain limited intervening events can act to toll the statute of limitations after the proper notice of the official implementation of a policy. In Reading, the employer sent a clear signal to the bargaining unit that it was not abiding by the policy provisions and thereby established a past practice regarding conditions of employment that officers did not have to pay for replacement fuel cards. In Easton, the employer clearly suspended the policy. In both cases, the employer manifested its clear intent, through gross inaction or written notification, that it was refusing to apply the policy at issue and, therefore, the statute began to run anew from the reinstatement of the original policy. Here, the record is devoid of evidence establishing that SEPTA did not apply the policy or that SEPTA had repeated opportunities to require doctor's notes from officers who called out sick on their scheduled fitness testing day to verify their fitness for duty before returning to work. Indeed, the Board emphasizes that the record establishes that SEPTA applied the policy the first and only time that it had an opportunity to do so since May 2002 against Officer Kiser in March 2004. Accordingly, the Union failed to establish a past practice that SEPTA neglected or chose not to enforce the policy within the meaning of Reading. Also, the record lacks evidence demonstrating that SEPTA notified the Union that it was suspending the policy at any time. Therefore, Easton and Reading are inapposite, the limitations period began to run on or about May 19, 2002 and the charge is untimely.

In Nemec v. Commonwealth of Pennsylvania, Office of Administration, 17 PPER ¶ 17073 (Final Order, 1986), the Board relied on the Commonwealth Court's holding in Thomas v. PLRB, 483 A.2d 1016, 1017-1018 (1984), and concluded that "the PLRB lacks subject matter jurisdiction to act on any unfair practices alleged to have occurred outside the four-month limitations period." Office of Administration,

17 PPER at 195. Accordingly, the Board is without jurisdiction to entertain the charge in this case, which the Examiner properly dismissed.

After a thorough review of the exceptions, responses thereto and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner, as amended, consistent with this Order.

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 in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman and Anne E. Covey, Member, this fifteenth day of February, 2005. 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.