

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
CONFERENCE OF PA LIQUOR :
CONTROL BOARD LODGES :
 :
v. : Case No. PERA-C-01-393-E
 :
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

FINAL ORDER

Fraternal Order of Police, Conference of Pennsylvania Liquor Control Board Lodges (Union) filed timely exceptions on November 5, 2004, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued October 18, 2004. After the grant of an extension by the Board Secretary, the Union filed a brief in support of its exceptions on November 22, 2004. In the PDO, the Hearing Examiner concluded that the Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement (Commonwealth) had not committed unfair labor practices within the meaning of Section 1201(a)(5) of the Public Employee Relations Act (PERA) by not providing Liquor Enforcement Officers (LEOs) private hotel rooms while on work assignment. The Commonwealth filed a brief in response on December 10, 2004.

The Union filed three exceptions, asserting that the Hearing Examiner 1) failed to find as fact that after December 9, 1997, LEOs were provided with private accommodations and that the Union demonstrated a minimum of 254 instances of LEOs being afforded such accommodations, 2) failed in concluding that the Commonwealth has not committed unfair practices in violation of Section 1201(a)(5) of PERA, and 3) failed to conclude that the Commonwealth's previous practice of providing private accommodations rose to the level of a past practice, which the Commonwealth unilaterally changed in violation of PERA.

The Hearing Examiner's salient findings of fact are as follows. LEOs are civilian employees within the Bureau of Liquor Control Enforcement of the Pennsylvania State Police who investigate alleged violations of the liquor laws. On occasion, LEOs are required to travel outside their primary work district and need overnight accommodations. LEOs generally obtain their own accommodations unless the Bureau is conducting a large-scale investigation, in which case the Bureau may dictate where the LEOs stay. From approximately January 1998, to July 2001, the Bureau's policy was to provide traveling LEOs with private accommodations whenever possible, with the exception of LEOs who traveled to the Harrisburg area, where they were required to stay at the State Police academy without private accommodations when rooms were available.

From July 13 to 15, 2001, the State Police assisted the State College Borough police and the Pennsylvania State University during an arts festival held in State College. The State Police assigned 241 employees to the 2001 State College arts festival in response to riots that occurred in previous years; 170 of the assigned employees required

overnight accommodations. The majority of the assigned employees provided overnight accommodations, including the LEOs, were required to share a hotel room with another employee. There were no other hotels or motels in the State College area that could provide the State Police with the number of rooms they secured at the Super 8 Motel; all other hotels and motels contacted by the State Police could provide at most a dozen rooms.

After a thorough review of the Union's exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

18. The Bureau had several reasons for lodging all of the LEOs assigned to the arts festival at State College in a single location, including the motel's proximity to the arts festival and its efficiency if it became necessary to convene the employees in the case of an emergency. (5/28/04 N.T. 31, 39-40)

DISCUSSION

In its first exception, the Union asserts that the Hearing Examiner failed to make findings of fact indicating, *inter alia*, that the Bureau provided LEOs with private accommodations since December 9, 1997. The Hearing Examiner is obligated only to set forth those findings necessary to support his conclusion and is not required to summarize the evidence, make unnecessary findings of fact or make findings that would support another conclusion, regardless of the existence of substantial evidence to support such findings. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975); Ford City Borough, 19 PPER ¶ 19117 (Final Order, 1988); AFSCME v. Dep't Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). Since the Union's proposed findings of fact are not necessary to support the Hearing Examiner's conclusions, and since the conclusions contained in the PDO are well supported by substantial record evidence, this exception is dismissed.

The Union next asserts that the Hearing Examiner erred in finding that the Commonwealth has not committed unfair practices within the meaning of Section 1201(a)(5) of PERA. A past practice may create or establish a separate enforceable condition of employment that cannot be derived from the express language of the collective bargaining agreement. County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977). Furthermore, an employer commits an unfair practice within the meaning of PERA when the employer unilaterally changes a mandatory subject of bargaining, including one established by past practice. In re Appeal of Cumberland Valley School District, 483 Pa. 143, 394 A.2d 946 (1978). However, prior to reaching an analysis of whether or not the Commonwealth unilaterally changed a past practice, it is necessary to determine whether the relevant matter is a mandatory subject of bargaining that rises to the level of a past practice.

The Board and the courts have not previously addressed the issue of whether or not an employer must bargain over providing private accommodations for employees for business travel. In determining whether or not a novel issue is a mandatory subject of bargaining, the Board

applies the following balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975)(State College):

[W]here an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

PLRB v. State College Area School District, 461 Pa. at 506, 337 A.2d at 268.

The Board has previously held that under the State College balancing test, the charging party is required to demonstrate by substantial and legally credible record evidence that the matter in dispute impacts upon the employees' interest in wages, hours or other terms and conditions of employment, and that the impact on employee interests outweighs the effect on the employer's system as a whole. See PSSU Local 668, AFL-CIO, CLC v. Commonwealth, Department of Public Welfare, 31 PPER ¶ 31020 (Final Order, 1999), *aff'd sub nom. PSSU v. PLRB*, 763 A.2d 560 (Pa. Cmwlth. 2000). In this case, the Commonwealth proved that it had several non-economic reasons for housing the LEOs and its other officers at a single location, including the motel's proximity to the arts festival and its efficiency if it became necessary to convene the employees in the case of an emergency. The Union's argument that the Commonwealth had other accommodation alternatives, specifically that other hotels or motels in the region could separately provide up to a dozen single occupancy rooms, is unavailing. The fact that other alternatives existed to using a single location does not diminish the weight of the Commonwealth's decision, since the option it chose was considered the best available option for the purpose of achieving its objective. See Mount Lebanon Association, PSEA/NEA v. Mount Lebanon School District, 30 PPER ¶ 30043 (Proposed Decision and Order, 1999).

In contrast, the Hearing Examiner found that the Union presented no testimonial or documentary evidence to demonstrate that the requirement that the LEOs share accommodations with other employees affected their wages, hours or terms and conditions of employment. As the Hearing Examiner noted, "the only evidence offered by the FOP on this issue was speculative testimony by an LEO who was not present during the assignment regarding the potential impact on the LEOs." (PDO, p.4). The Union counters this discussion, stating that this testimony from the Union president was based on actual experience regarding the impact of being required to share a hotel room in the course of employment. However, as the Hearing Examiner correctly noted, the witness was not present during the relevant assignment. Additionally, the witness's testimony that sharing a room, "is a morale issue. You stay with somebody you don't know lots of times. You get somebody that snores, you don't get any sleep" (N.T. 28) is vague and insubstantial compared to the Commonwealth's reasons for housing the LEOs in a single facility for the arts festival. While the Board

declines to find that requiring employees to share accommodations in all cases is a managerial prerogative, here, the Union failed to present sufficient evidence to satisfy the State College balancing test. Therefore, the Commonwealth's requirement that LEOs share motel rooms in this circumstance did not rise to the level of an unfair practice under Section 1201(a)(5).

Assuming, *arguendo*, that the Union established that whether or not employees share hotel accommodations is a mandatory subject of bargaining, the Union failed to prove that the Commonwealth altered its past practice. In County of Allegheny v. Allegheny County Prison Employees Independent Union, *supra*, our Supreme Court defined a past practice as follows:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the [parties] involved as the normal and proper response to the underlying circumstances presented.

476 Pa. at 34 n.12, 381 A.2d 852 n.12 (emphasis in original). Critical to a finding that there has been a past practice, then, is a showing that the same set of circumstances occurred before. The Union contends that the Commonwealth established a past practice of providing traveling LEOs with private accommodations whenever possible, with the exception of LEOs who traveled to the Harrisburg area. The Union failed to establish that the LEOs were consistently provided with single accommodations at events similar to the arts festival. See County of Allegheny v. Allegheny County Prison Employees Independent Union, *supra* (holding that a past practice that rises to the level of a term or condition of employment is one that consistently occurs in response to the same set of circumstances). Additionally, the Union failed to establish that it was possible for the Commonwealth to accommodate the LEOs in private rooms in a single facility consistent with its objectives. Therefore, even if the Union established a Commonwealth past practice of providing single rooms to the LEOs at similar events whenever it deemed possible (PDO, Finding of Fact 10), the Union failed to prove that such an outcome was possible during the event at issue. Consequently, the Union's final two exceptions are dismissed.

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 as amended final.

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 above case number be and the same, are hereby dismissed consistent with this order, and the Proposed Decision and Order as amended herein is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this eighteenth day of January, 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.