

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :
:
v. : Case No. PF-C-04-147-E
:
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

FINAL ORDER

On August 9, 2005, the Commonwealth of Pennsylvania, Pennsylvania State Police (PSP or Commonwealth) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated July 21, 2005. In the PDO, the Hearing Examiner concluded that the Commonwealth engaged in unfair labor practices in violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), by unilaterally transferring the work of municipal police officer trainer from the police unit to a non-bargaining unit retiree. On September 9, 2005, the Commonwealth timely filed its brief in support of exceptions in compliance with the extension granted by the Board Secretary. On September 28, 2005, the Pennsylvania State Troopers Association (Union) filed a brief in opposition to the Commonwealth's exceptions.

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

AMENDED AND ADDITIONAL FINDINGS OF FACT

6. Pursuant to the established selection procedure, Trooper Shawn Cossin was selected to replace Corporal Boss. The selection of Trooper Cossin was then subject to the approval of the Deputy of Administration. Following such approval the Captain of the PSP Bureau of Training and Education negotiated with Cossin's troop commander for a mutually agreeable start date for Cossin as training instructor. (N.T. 17-18)

9. Training instructors must be certified by the Municipal Police Officers' Education and Training Commission (Commission) to provide training to municipal police officers under Municipal Police Officers' Education and Training Program, commonly known as "Act 120".¹ (N.T. 16)

10. Pursuant to the Commission's regulations, Act 120 instructors are prohibited from teaching more than 180 hours of instruction per training session.² The basic police training course provided by the PSP at the NTC is 750 hours. The PSP employed a sergeant and three corporals, including Corporal Boss, at the NTC. The PSP needs all four of the certified instructors at the NTC to provide a basic training course so those instructors do not exceed the Commission's 180-hour limitation.³ (15-16)

11. Corporal Boss retired, with limited notice, effective June 18, 2004. By June 17, 2004, the PSP timely initiated the process for selecting his replacement, which required a fifteen-day posting, written exam, an interview process and subsequent approval review by the Deputy of Administration. (N.T. 16-18)

¹ The Municipal Police Officers' Education and Training Act, December 19, 1996, P.L. 1158, No. 177, 53 Pa.C.S.A §§ 2161-2171, repealed the Act of June 18, 1974, P.L. 359, No. 120, 53 P.S. 740, commonly known as "Act 120". However, the state mandated police training program is still referred to as "Act 120", even though the training is presently governed by a different statute.

² 37 Pa Code § 203.33(b)11.

³ Although a complement of four training for 750 hours would place each trainer beyond the 180-hour limitation, the record establishes that parts of the basic training course are taught by specialists to provide training in areas requiring professional expertise beyond the general understanding of the PSP, e.g., attorneys, computer professionals and lab experts. (N.T. 18-19, 22-23)

DISCUSSION

In addition to the Hershey Academy, the PSP operates four remote training facilities where it provides various training programs, including Act 120 training to various police officers who are not members of the PSP.⁴ These training centers are at each corner of the Commonwealth. The NTC is located in Meadville, Pennsylvania. Training instructors must be certified by the Commission to provide Act 120 training and are prohibited from providing more than 180 hours of instruction per session. The PSP uses sworn members of the PSP who are included in the bargaining unit as instructors. Retirees are not members of the bargaining unit.

The basic municipal police training course provided by the PSP is 750 hours. The PSP employed a sergeant and three corporals, including Corporal Boss, at the NTC. The PSP needs all four PSP employes to provide a basic training course and remain in compliance with the Commission's regulations. Corporal Boss retired, effective June 18, 2004, without much notice. By June 17, 2004, the PSP timely initiated the established procedure for selecting his replacement, which requires a fifteen-day posting, written examinations, an interview process and subsequent review and approval by the Deputy of Administration. Boss and the other NTC instructors were scheduled to provide an Act 120 class at the end of July, 2004. Without Boss, three officers would be in jeopardy of exceeding the 180-hour limitation. No member of the bargaining unit was available to provide that training on short notice at the time.

Pursuant to the established selection procedure, Trooper Shawn Cossin was selected to replace Boss. The selection of Cossin was then subject to the review and approval of the Deputy of Administration. Following such approval the Captain of the PSP Bureau of Training and Education negotiated with Cossin's troop commander for a mutually agreeable start date for Cossin at the NTC, which was September 11, 2004. On October 1, 2004, the Commonwealth ceased employing Corporal Boss.

In its exceptions, the Commonwealth contends that the Examiner erred in concluding that the PSP violated Section 6(1)(a) and (e). The Commonwealth specifically argues that the Examiner failed to make certain findings of fact that are necessary to support his conclusion that the Commonwealth unlawfully removed bargaining unit work by continuing to employ Boss after the arrival of Cossin at the NTC. The Commonwealth further maintains that the Examiner's conclusion requires support in the form of substantial evidence that Cossin was certified to provide Act 120 training as of September 11, 2004, when he started at the NTC, and/or that Boss was still instructing after that date.

Our review of this matter leads to the conclusion that the unusual chain of events deprives the Board of subject matter jurisdiction. The Board lacks subject matter jurisdiction to consider post-charge events as the sole basis for sustaining the charge. Moreover, it is a violation of due process of law for the Board to find an unfair labor practice for conduct that has not yet occurred at the time the charge is filed and no amendment is thereafter filed to incorporate the additional action constituting the unfair practice. PLRB v. Millcreek Township Sch. Dist., 7 PPER 215 (Final Order, 1976). Although neither of the parties raised this issue, the Board is obligated to raise the issue of subject matter jurisdiction sua sponte. Reserve Township v. Teamsters, Local 249, 32 PPER 32079 (Final Order, 2001).⁵ In Millcreek, supra, a charge was filed against the school district for proposing to unilaterally terminate its busing services. Subsequent to the charge, the district for the first time notified its employes that it was unilaterally subcontracting the bus services. The Millcreek Board noted that the complete cessation of services, as charged, is not an unfair practice, whereas unilateral subcontracting, which was not charged, does constitute an unfair practice. This distinction caused the Board, in PLRB v. City of Philadelphia, 14 PPER 14017 (Final Order, 1982), to explain as follows: "The issues and analysis of questions of complete cessation [of] an enterprise and subcontracting of bargaining unit work are different and distinct and are, accordingly, quite separate causes of action." 14 PPER at 30. In

⁴ E.g., municipal, borough, township police, deputy sheriffs, college and housing authority police.

⁵ The Examiner placed jurisdiction at issue in the PDO.

evaluating the distinction between pre-charge and post-charge events, the Board in City of Philadelphia stated the following:

Where, as in Millcreek, activities subsequent to the filing of a charge of unfair practices would itself constitute an independent violation of PERA, the initial filing must be amended or a subsequent unfair practice must be filed. It would be insufficient for the complaining party merely to rely on an initial filing where the subsequent occurrences demonstrate new and independent unfair practices which are separately actionable and remediable before the Board. Such reliance would not place a responding party on notice of the unfair practice which may be attempted to be proven at the time of hearing on the original charge.

City of Philadelphia, 14 PPER at 30. In distinguishing Millcreek, the City of Philadelphia Board placed great significance on the fact that the Board's investigatory powers permit it to rely on post-charge conduct to support the allegations in the charge and provide a better understanding of the facts and circumstances originally complained of that occurred pre-charge. However, the Board cautioned that post-charge conduct may not be considered to support a separate unfair practice. "The Board [does] not consider the post-Charge conduct of either of the parties in its determination. It could not. If there was a violation of the Act by post-Charge conduct of Respondent, a Charge based on the post-Charge conduct should have been filed." Millcreek, 7 PPER at 216. The Board in City of Philadelphia opined that one important consideration in determining whether post-charge conduct supports the original charge or a separate charge is the remedy to be awarded for the pre-charge and post-charge events. In this case, where the pre-charge conduct is not an unfair practice because the Commonwealth demonstrated a bona fide defense (exigent circumstances), the post-charge events would support a separate unfair practice and the Union should have either amended their charge or filed a new charge alleging a separate cause of action regarding the post-charge events (i.e. that Cossin was available to perform the duties).

We note that the Examiner erroneously reached the opposite result relying on AFSCME, Council 13 v. Commonwealth of Pennsylvania, Department of Transportation(PennDOT), 19 PPER 19137 (Final Order, 1988). However, contrary to the Examiner's conclusion, this case is not analogous to PennDOT. In PennDOT, the employer unlawfully refused to bargain by repeatedly rebuffing union attempts to bargain subcontracting bargaining unit work while it negotiated for a tentative contract with a vendor. The union in PennDOT filed a charge predicated upon the employer's refusal to bargain. After the charge was filed, the employer executed and implemented the contract with the vendor. The Board in PennDOT concluded that it may rely on events occurring subsequent to the charge (i.e., execution and implementation of the contract removing bargaining unit work) where those subsequent events concluded an unlawful course of conduct that began with the unlawful pre-charge events (rebuffing union requests to bargain while preparing a tentative contract) and the post charge events did not represent a separate unfair practice.

In this case, however, the charge was predicated upon conduct that was not unlawful by operation of the Commonwealth's exigent circumstances defense espoused by the Board in FOP, Lodge 24 v. City of Jeanette, 36 PPER 68 (Final Order, 2005). The pre-charge events did not constitute an unfair labor practice and, therefore, the post-charge events could not, as a matter of law, constitute the continuation of an unfair practice that began before the charge was filed and continued to conclusion after the filing of the charge.

Accordingly, the Union's charge is dismissed and the Board lacks jurisdiction to sustain the charge based on the post-charge events of maintaining Corporal Boss after Trooper Cossin arrived at the NTC on September 11, 2004.

After a thorough review of the exceptions, the PDO and all matters of record, the Board shall sustain the exceptions, in part, and reverse the PDO consistent with this Order.⁶

⁶ The Board need not address the Commonwealth's remaining exceptions given the present disposition.

CONCLUSIONS

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

CONCLUSION 4 is vacated and set aside.

5. The Commonwealth of Pennsylvania, Pennsylvania State Police has not committed unfair practices in violation of Section 6(1)(a) and (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order be and the same are hereby sustained, in part; 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, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this seventeenth day of January, 2006. 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.