COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION	:	
	:	
v.	:	Case No. PF-C-07-156-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
PENNSYLVANIA STATE POLICE	:	

PROPOSED DECISION AND ORDER

On December 4, 2007, the Pennsylvania State Troopers Association (PSTA) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth), violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by unilaterally adopting a scheduling system known as PRO-SAM."[1] On December 27, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 29, 2008. Upon the request of the PSTA and without objection by the Commonwealth, the hearing examiner subsequently rescheduled the hearing to February 20, 2008. The hearing was held as rescheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On March 12, 2008, each party filed a brief.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. The PSTA is the exclusive representative of a bargaining unit that is comprised of approximately 4300 sworn members of the Pennsylvania State Police (PSP), approximately 2700 of whom are patrol corporals, patrol troopers and crime troopers. (N.T. 5, 21)

2. Effective July 1, 2000, the parties entered into a collective bargaining agreement providing at article 6 as follows:

"SCHEDULING

Section 1. The workweek shall consist of any five workdays in the week from Saturday through Friday.

Section 2. The workday for all members shall be any eight consecutive hours, inclusive of the meal period, within the period from midnight to midnight of the calendar day; up to two (2) hours may be in the preceding or subsequent day. Should the time overlap of two (2) hours be exceeded by the Commonwealth, the member so assigned shall be paid time and one-half of his/her rate of pay, for all hours in excess of the two (2) hour overlap period.

Section 3. There shall be a minimum of eight hours off between shifts. When two shifts are worked with fewer than eight hours off, hours worked in the eight hour period beginning with the end of the first shift shall be paid at a rate of two and one-half times the hourly rate. A member shall receive no additional compensation for work performed during this period.

Section 4. A change in shift after the shift is posted may take place where twenty-four (24) hours notice is given prior to the start of the newly-scheduled shift. Any change in schedule without such notice shall be paid at the rate of time and one-half for all hours on that shift. This section shall not be construed as preventing such shift changes.

[1] The PSTA also alleged that the Commonwealth committed unfair labor practices by direct dealing, but the PSTA withdrew that portion of the charge at the hearing after reaching a settlement with the Commonwealth (N.T. 53).

Section 5. A member shall not be required to remain within the jurisdiction of his/her station during non-working hours. This provision shall not apply to a member who is on alert time.

Section 6. A roster of bargaining unit members' shifts for the following week shall be posted at each work location no later than the Tuesday of the week preceding that described in the roster."

(Joint Exhibit 1)

3. Prior to December 1, 2007, scheduling responsibilities for were performed on a station-by-station basis, typically by a corporal, a sergeant or a station commander. (N.T. 5; paragraph 9 of the charge)

4. Prior to December 1, 2007, "steady midnighters" worked a schedule of ten days on and four days off. (N.T. 28)

5. On December 1, 2007, the Commonwealth partially implemented a scheduling system known as professional shift allocation management (PRO-SAM) for patrol supervisors in Troops D and E, with the intent to implement the same scheduling system statewide for all patrol units. (N.T. 7)

6. Under PRO-SAM, supervisors use one of several set scheduling matrixes based on staffing levels and schedule patrol troopers to shifts based on data indicating when crimes and crashes occur. (N.T. 7, 30-31; paragraph 17 of the charge)

7. Under PRO-SAM, patrol troopers work a 21-day schedule with every third weekend off. (N.T. 28)

DISCUSSION

The PSTA has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA as read in pari materia with Act 111 by unilaterally implementing a scheduling system known as PRO-SAM. According to the PSTA, the Commonwealth was under an obligation to bargain before it implemented PRO-SAM because scheduling is a mandatory subject of bargaining.

The Commonwealth contends that the charge should be dismissed because it had the management prerogative to implement PRO-SAM unilaterally. The Commonwealth also contends that the charge should be dismissed because it was contractually privileged to implement PRO-SAM.

An employer commits unfair labor practices under sections 6(1)(a) and 6(1)(e) if it unilaterally changes a mandatory subject of bargaining, Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998), but not if it unilaterally changes a managerial prerogative. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002). If a matter is not among those expressly made mandatory subjects of bargaining under Act 111, it nevertheless is a mandatory subject of bargaining if it is rationally related to employe duties and if the employer's interest in the matter does not substantially outweigh the employes' interest in the matter. Plumstead Township, supra. Otherwise, the matter is a management prerogative. Id. Depending on the circumstances of the case, a scheduling change may be a mandatory subject of bargaining, Indiana Borough v. PLRB, 695 A.2d 470 (Pa. Cmwlth. 1997); Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993), or a management prerogative. City of Reading, 30 PPER ¶ 30121 (Final Order 1999).

An employer does not commit unfair labor practices under sections 6(1)(a) and 6(1)(e) if its conduct was contractually privileged. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). As the court explained in that case:

"The [Board] has recognized 'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a refusal to bargain in good faith. 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 [respondent]'s action was permissible under the agreement. See [Ellwood City Police Wage and Policy Unit v.] Ellwood City Borough[, 29 PPER ¶ 29213 (Final Order 1998), aff'd, 736 A.2d 707 (Pa. Cmwlth. 1999)]; Delaware County Lodge #27 of the Fraternal Order of Police on behalf of the Members of the Police Force of the Borough of Prospect Park v. Prospect Park Borough, 27 PPER [¶] 27222 (Final Order 1996); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER [¶] 18117 (Final Order 1987)(quoting NCR Corp., 271 N.L.R.B. 1212 (1984) as saying that 'where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the [National Labor Relations Board] will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct')."

761 A.2d at 651.

The PSTA's charge

The record shows the following: that the PSTA represents approximately 4300 sworn members of the PSP, approximately 2700 of whom are patrol corporals, patrol troopers and crime troopers (finding of fact 1); that prior to December 1, 2007, scheduling responsibilities were performed on a station-by-station basis, typically by a corporal, a sergeant or a station commander; that prior to December 1, 2007, "steady midnighters" worked a schedule of ten days on and four days off (findings of fact 3-4); that on December 1, 2007, the Commonwealth partially implemented a scheduling system known as PRO-SAM for patrol supervisors in Troops D and E, with the intent to implement the same scheduling system statewide for all patrol units (finding of fact 5); that under PRO-SAM supervisors use one of several set scheduling matrixes based on staffing levels and schedule patrol troopers to shifts based on data indicating when crimes and crashes occur (finding of fact 6); and that under PRO-SAM patrol troopers work a 21-day schedule with every third weekend off (finding of fact 7).

In City of Reading, supra, the Board dismissed a charge alleging that an employer committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA as read in pari materia with Act 111 by unilaterally changing police officers' schedules. In that case, the Board found that the employer assigned police officers holding administrative positions to once-a-month patrol duty at a time other than their normal shifts. The Board reasoned that the change to their schedules was a management prerogative rather than a mandatory subject of bargaining because the employer's interests "to keep the officers in the administrative division in touch with the problems faced by uniformed patrol officers, to monitor patrol operations with an eye toward improvement and to increase visibility on the streets" substantially outweighed the police officers' interests in not having their personal lives and outside employment disrupted. Id. at 262. In rejecting the charging party's contention that the assignment was a mandatory subject of bargaining, the Board explained as follows:

"Under the [charging party's] position here, a public employer cannot direct certain officers to work a different shift even though the employer perceives a need for better visibility on the streets and increased police protection. In other words, an employer cannot direct certain officers to patrol the streets during a time of increased criminal activity or time of crisis if those officers do not normally work those hours unless the employer first bargains with the union. Such a position ignores managerial prerogative and unduly burdens public employers in fulfilling their obligation to provide citizens with adequate police protection. Although an employer certainly has an obligation to bargain with the representative of its employes over the number of hours in a regular shift, the wages paid for those hours, including premium pay for overtime and shift differentials, and its system of scheduling shifts, the employer is not required to bargain over decisions regarding direction of personnel, especially where such decisions have minimal impact on employe interests."

Id. (footnote omitted).

The same result obtains on the facts of record here. As noted above, under PRO-SAM, supervisors schedule patrol troopers to shifts based on data indicating when crimes and crashes occur. As such, the implementation of PRO-SAM implicates the Commonwealth's managerial interest in directing personnel to provide citizens with adequate police protection much like the scheduling change in City of Reading, supra, implicated the same managerial interest there. As also noted above, under PRO-SAM, only the schedules of some patrol troopers have been changed. Notably, the record does not show that there has been any other impact on the interests of members of the bargaining unit. Although the PSTA established that prior to December 1, 2007, its members were permitted to work "double backs," to take a car home in between "double-backs," to trade or switch work days and/or shifts with the approval of their supervisor and to request and take a day off with the approval of their supervisor (N.T. 5-6), the record does not show that they are no longer permitted to do any of that. Thus, under the analysis set forth in City of Reading, which also involved a change to the schedules of some but not all members of the bargaining unit, it is apparent that the Commonwealth's interest in implementing PRO-SAM substantially outweighs the troopers' interest in the matter. See also City of Reading, 38 PPER 71 (Proposed Decision and Order 2007), where another hearing examiner found that a scheduling change for some but not all police officers to improve police response times was a management prerogative. The Commonwealth, therefore, had the management prerogative to implement PRO-SAM. Accordingly, the charge must be dismissed.

In support of its contention that the Commonwealth was under an obligation to bargain before implementing PRO-SAM, the PSTA cites Township of Upper Saucon, supra, for the proposition that a scheduling change is a mandatory subject of bargaining. In that case, the court held that a department-wide scheduling change from rotating shifts to steady shifts was a mandatory subject of bargaining. See also Indiana Borough, supra, where the court held that a department-wide scheduling change from steady shifts to rotating shifts was a mandatory subject of bargaining.

The PSTA's reliance on Township of Upper Saucon, supra, is, however, misplaced. In City of Reading, supra, the Board distinguished Township of Upper Saucon, explaining as follows:

> "Upper Saucon and Indiana Borough do not control this case. Rather, those cases hold that an employer has an obligation to bargain with the representative of its police officers regarding a change in its bargaining unit-wide-system of scheduling, which implicates the shift selection and scheduling of officers within the bargaining unit as a whole. The purpose of collective bargaining between an employer and the representative of a bargaining unit of its employes is to establish and set forth the terms that will govern the wages, hours and working conditions of the employes in that unit. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944). The periodic assignment in this case did not alter the City's system of scheduling work hours for officers within the unit. More specifically, the officers in the administrative division continue to work the same number of hours under the periodic assignments and they still work their daily shift, 8 a.m-4 p.m., Monday through Friday. Thus, this case is not Upper Saucon or Indiana Borough. The once per month evening assignments did not increase these officers' regularly scheduled hours, which the Board has recognized as a mandatory subject of bargaining. Hazleton Area School District, 15 PPER 15170 (Final Order, 1984)(employer's refusal to reduce summer hours of secretarial employes during summer as had been done the previous seven years involved mandatory subject of bargaining)."

Id. at 262. Under the same reasoning, Township of Upper Saucon is distinguishable here as well.

The Commonwealth's contractual defense

In view of the foregoing disposition of the charge, the Commonwealth's defense of contractual privilege need not be addressed. In the interest of completeness, however, it will be addressed nevertheless.

According to the Commonwealth, it was contractually privileged to implement PRO-SAM because the parties' collective bargaining agreement contains a scheduling provision that "does not, in any way, limit the ability of the PSP to change the shift that any PSTA

member works, if the schedule is posted two weeks in advance, in compliance with the agreement" (brief at 8). As set forth in finding of fact 2, the record shows that the parties' collective bargaining agreement provides at article 6, section 4, as follows:

> "A change in shift after the shift is posted may take place where twenty-four (24) hours notice is given prior to the start of the newly-scheduled shift. Any change in schedule without such notice shall be paid at the rate of time and one-half for all hours on that shift. This section shall not be construed as preventing such shift changes."

Inasmuch as article 6, section 4, expressly references the circumstances under which a posted shift may be changed, it is apparent that there is a sound arguable basis for construing the collective bargaining agreement to mean that the Commonwealth may change a shift if it gives the requisite 24-hour notice. See SEPTA, 35 PPER 73 (Final Order 2004)(an authority was contractually privileged to change employe shifts where the parties' collective bargaining agreement provided that "[t]he Authority retains the right to schedule based on the need of the Authority."

In order to prevail on a defense of contractual privilege, however, the employer must show not only that it has a sound arguable basis for ascribing a particular meaning to an applicable collective bargaining agreement but also that it has acted in accordance with its interpretation of the agreement. Pennsylvania State Troopers Association, supra. The record does not show that the Commonwealth ever gave the requisite 24-hours notice set forth in article 6, section 4, of the parties' collective bargaining agreement. There is, therefore, no basis for concluding that the Commonwealth has acted in accordance with its interpretation of the agreement. Thus, the Commonwealth's implementation of PRO-SAM was not contractually privileged. See Commonwealth of Pennsylvania, Department of Corrections, Quehanna-SCI, 35 PPER 28 (Proposed Decision and Order 2004)(employer's scheduling change was not contractually privileged because the employer did not act in accordance with its interpretation of the applicable collective bargaining agreement).

In support of its contention to the contrary, the Commonwealth relies on North Cornwall Township, 33 PPER ¶ 33054 (Final Order 2002). In that case, the Board found that an employer was contractually privileged to change the length of police officers' shifts from eight to ten hours. Unlike here, however, the record there showed that the employer not only had a sound arguable basis for its interpretation of the applicable collective bargaining agreement but also that it acted in accordance with its interpretation of the agreement. North Cornwall Township is, therefore, distinguishable on the facts.

The Commonwealth also relies on City of Loch Haven, 34 PPER 147 (Proposed Decision and Order 2003). In that case, the hearing examiner found that an employer was contractually privileged to change a police officer's schedule from a rotating shift to a fixed shift and to change a police officer's schedule from a fixed shift to a rotating shift. Again, however, the record there showed that the employer not only had a sound arguable basis for its interpretation of the applicable collective bargaining agreement but also that it acted in accordance with its interpretation of the agreement. City of Loch Haven is, therefore, distinguishable on the facts as well.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Commonwealth is an employer under of section 3(c) of the PLRA as read in pari materia with Act 111.

2. The PSTA is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.

3. The Board has jurisdiction over the parties.

4. The Commonwealth has not committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-first day of March 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner