

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :  
:  
v. : Case No. PF-C-08-100-E  
:  
COMMONWEALTH OF PENNSYLVANIA :  
PENNSYLVANIA STATE POLICE :

**PROPOSED DECISION AND ORDER**

On August 12, 2008, 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 (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by unilaterally modifying an agreement of the parties involving the assignment of discretionary overtime.<sup>1</sup> On September 3, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October 30, 2008. The hearing examiner, upon requests of the PSTA and without objections by the Commonwealth, subsequently continued the hearing three times.

On March 27, 2009, a first day of hearing was held.<sup>2</sup> The hearing examiner afforded the parties a full opportunity to present evidence and to cross-examine witnesses.<sup>3</sup> The hearing examiner, upon the agreement of the parties, left the record open for a second day of hearing if requested by the PSTA (N.T. 141-143, 179).

On April 20, 2009, the PSTA requested a second day of hearing. On April 29, 2009, the hearing examiner scheduled a second day of hearing for July 13, 2009. The second day of hearing was held as scheduled. The hearing examiner again afforded the parties a full opportunity to present evidence and to cross-examine witnesses. On September 25, 2009, the PSTA filed proposed findings of fact and a memorandum of law by deposit in the U.S. Mail. On November 6, 2009, the Commonwealth filed a brief by hand-delivery.

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 includes troopers, corporals and sergeants employed by the Commonwealth as members of various Troops within the Pennsylvania State Police (PSP). (N.T. 56)

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<sup>1</sup> The PSTA also alleged that the Commonwealth committed unfair labor practices under sections 6(1)(c) and (d) of the PLRA as read in pari materia with Act 111 because the Commonwealth modified the agreement in retaliation for the PSTA having filed grievances and other charges. In its brief, however, the PSTA has not addressed the charge as filed under sections 6(1)(c) and (d). An argument not presented to a hearing examiner is waived. SSHE, 32 PPER ¶ 32118 (Order Denying Application for Supersedeas 2001). Accordingly, the charge as filed under sections 6(1)(c) and (d) will not be addressed.

<sup>2</sup> All NT cites are to the notes of testimony from the first day of hearing.

<sup>3</sup> At the conclusion of the PSTA's case-in-chief, the hearing examiner took under advisement pending the receipt of briefs a motion by the Commonwealth to dismiss the charge as untimely filed to the extent that it may be construed as alleging that the Commonwealth committed unfair labor practices by including premium time within a 400-hour per calendar year limit for the assignment of discretionary overtime as set forth in the agreement of the parties (N.T. 143-147). A close review of the charge does not show that the PSTA alleged that the Commonwealth committed any such unfair labor practices. Thus, whether or not the Commonwealth committed any such unfair labor practices is not before the Board and will not be addressed. See Iroquois School District, 37 PPER 167 (Final Order 2006) (the Board only has jurisdiction to find violations alleged in a charge); Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974) (same). The Commonwealth's motion is, therefore, moot and will not be addressed.

2. On June 7, 2007, the PSP issued a field regulation (FR 5-1) setting forth a negotiated agreement of the parties as follows:

"ASSIGNMENT OF DISCRETIONARY OVERTIME

1.01 PURPOSE

This regulation is intended to ensure effective oversight and consistent distribution of discretionary overtime within all affected segments of the Department. This regulation does not prohibit the distribution of discretionary overtime based upon performance-related factors, when warranted.

1.02 DEFINITIONS

- A. Discretionary Overtime: Overtime that is allocated to members to fulfill the mandates of a specific project or program. The term does not include incidental overtime incurred by members in the performance of their normal duties.
- B. Patrol-related Overtime: Discretionary overtime that is customarily assigned to Patrol Unit members for highway safety purposes. Patrol-related overtime includes, but is not limited to, construction, zone assignments, super load escorts, speed enforcement, and DUI enforcement programs.

1.03 PROCEDURES

- A. Monitoring of Overtime: Troop Commanders shall:
  - 1. Monitor the usage and assignment of all overtime hours worked by members under their command.
  - 2. Consider hours worked as the primary focus when evaluating discretionary overtime among members.
  - 3. Determine when the amount of discretionary overtime hours to be distributed among members under their command reaches a level where participation by members from other work locations should be considered. In cases of patrol-related overtime, selection of members from other locations shall follow the sequence listed in Section 1.03 B.
  - 4. Take action on the assignment of discretionary overtime when a member's total amount of overtime hours begins to exceed norms.
  - 5. Be the approving authority for the assignment of discretionary overtime to:
    - a. Sergeants and Lieutenants, unless such assignment is prohibited by another department regulation or directive.
    - b. Any member whose total number of overtime hours worked during any calendar year exceeds 400 hours.
- B. Selection of Members For Patrol-Related Overtime Assignments: Members from the Station within whose primary jurisdiction the project/program is located shall be given first consideration to staff patrol-related overtime programs. The following order shall be utilized when selecting from those members:
  - 1. Patrol Unit Troopers First Class and Troopers.
  - 2. Patrol Unit Corporals and other Station members commonly used for patrol zone coverage.

3. All other members holding the rank of Trooper or Corporal.
4. Any member whose number of overtime hours worked during the calendar year is, at any time, temporarily deemed by the Troop commander to have exceeded norms.
5. With the approval of the Troop Commander, those members listed in 1.03 A. 5.

#### 1.04 REASSIGNMENT OF DISCRETIONARY OVERTIME HOURS

Once discretionary overtime is assigned to any member, the project supervisor or other supervisory designee must approve any changes such as: reassignment of shift to another member, rescheduling of shift hours. Participation in 'selling' of overtime hours (the relinquishing of assigned overtime to another member for any compensation) is strictly prohibited."

(N.T. 58-66; Association Exhibit 5)

3. On July 31, 2008, the commanding officer for Troop T (Captain William A. Horgas) issued Troop Special Order 08-13 providing at paragraph 9 as follows:

"9. Reference (a) describes discretionary overtime as overtime that is allocated to members to fulfill the mandates of a specific project or program; however, there is no guarantee or entitlement of overtime. Troopers may be assigned up to a maximum 44 hours per month of discretionary overtime; Corporals, a maximum 32 hours per month; and Sergeants (only after Troopers and Corporals are no longer available), a maximum 24 hours per month (not more than 12 hours per pay period). Sergeants new to the Troop will **NOT** be permitted to work discretionary overtime for 90 days and then only with the approval of the Troop Commander. At any time, the Troop commander may temporarily suspend a member from participating in discretionary overtime when it is deemed that they have exceeded norms for overtime hours. Assignment of Sergeants may be suspended at anytime by the Troop Commander. All premium time is included in the 400-hour limit, as mandated by Reference (a) and; if a member reaches 400 hours, the assignment of discretionary overtime must be approved by the Troop Commander. Supervisors may schedule a member to work no more than an eight-hour, discretionary overtime shift immediately before or after the member's regularly scheduled eight hour shift on straight time (**THIS SHALL BE THE EXCEPTION RATHER THAN THE NORM**).

#### **MEMBERS SHALL HAVE 8 HOURS OFF PRIOR TO THEIR NEXT SCHEDULED SHIFT**

Nothing precludes a supervisor from splitting a 12 hour overtime shift into 4 or 6 hour increments depending on staffing requirements and the nature of the project. Under no circumstances, however, shall members work more than 16 contiguous hours. Discretionary overtime shifts not attached to another shift shall not exceed 12 hours per member. It is imperative upon supervisors to monitor members for signs of fatigue etc. and take this into consideration prior to the assignment of discretionary overtime."

(Association Exhibit 6)

4. Upon issuing the order, Captain Horgas emailed a copy of it to the PSTA. (N.T. 33-34)

#### DISCUSSION

The PSTA has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111 by unilaterally modifying an agreement of the parties involving the assignment of discretionary overtime. The agreement of the parties is as set forth in a field regulation (FR-1) (finding of fact 2). According to the PSTA, under FR-1, the parties agreed that the only limit on the assignment of discretionary overtime to members of the bargaining unit would be 400 hours

per calendar year. In the PSTA's view, when the commanding officer for Troop T (Captain Horgas) issued Troop Special Order 08-13 on July 31, 2008, the Commonwealth violated the agreement of the parties as set forth in FR-1 by limiting the assignment of discretionary overtime to troopers, corporals and sergeants to a maximum of 44, 32 and 24 hours respectively per month.<sup>4</sup>

The Commonwealth contends that the charge should be dismissed because the assignment of discretionary overtime is a managerial prerogative. Noting that the agreement of the parties as set forth in FR-1 provides that troop commanders shall "[m]onitor the usage and assignment of all overtime hours worked by members under their command" and are to "[t]ake action on the assignment of discretionary overtime when a member's total amount of overtime hours begins to exceed norms" (finding of fact 2), the Commonwealth also contends that the charge should be dismissed because Captain Horgas issued Troop Special Order 08-13 pursuant to and consistent with the agreement of the parties. The Commonwealth further contends that any relief for any unfair labor practice it may have committed should not include a make whole order because the record does not show that any trooper, corporal or sergeant actually lost overtime as the result of Troop Special Order 08-13.

Recently, in Commonwealth of Pennsylvania, Case No. PF-C-08-169-E (Final Order, September 15, 2009), the Board restated the analysis to be applied in a case "concern[ing] the Board's role when an employer is charged with violating its statutory duty to bargain, and the employer contends that it in fact satisfied its bargaining obligation by agreeing to contract language that authorizes the action alleged to be the unfair practice." Slip opinion at 3. As the Board explained:

"In Port Authority Transit Police Association v. Port Authority of Allegheny County, 39 PPER 147 (Final Order, 2008), the Board addressed this issue as follows:

It is well established that a public employer may not unilaterally alter terms agreed to in a collective bargaining agreement. Thus, a clear repudiation of the terms of the collective bargaining agreement is an unfair practice ... Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005). However, a public employer may defend against an alleged bargaining violation arising from changes to a mandatory subject of bargaining by relying on agreed-upon contract language that arguably supports its actions. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER P. 18117 (Final Order, 1987). In assessing whether there is a 'sound arguable basis' in the contract, the Board will not endorse one interpretation over another and the employer's interpretation of the contract need not even be the correct or most accurate interpretation for the contractual privilege defense to apply. ... North Cornwall Township Police Association v. North Cornwall Township, 33 PPER P. 33054 (Final Order, 2002). Where there is language in the contract that supports the employer's claimed right to act unilaterally regarding a specific subject matter, the employer has sustained its burden of proving a 'contractual privilege,' and the Board will dismiss a charge alleging that the employer violated its bargaining obligation ... Pennsylvania State Troopers Association, supra.

Id. at 513. The Board further stated in Port Authority of Allegheny County, that '[i]nterpretation of the collective bargaining agreement is within the province of the grievance arbitrator, not the Board.' Id. at 514 n.2 (citing Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978))."

Id.

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<sup>4</sup> The PSTA alleged in the charge that the Commonwealth also violated the agreement of the parties as set forth in FR-1 when the western patrol section commander for Troop T (Lieutenant James E. McFadden) on July 1, 2008, and the station commander for Troop T at New Stanton (Sergeant Anthony DeLuca) on July 9, 2008, issued directives involving the assignment of discretionary overtime. In its brief, however, the PSTA does not address the charge to the extent that it references those directives. Accordingly, the charge as to those directives will not be addressed either. See SSHE, supra.

A close review of the agreement of the parties as set forth in FR-1 reveals that the parties agreed that the only limit on the assignment of discretionary overtime to members of the bargaining unit would be 400 hours per calendar year (finding of fact 2). A close review of Troop Special Order 08-13 reveals that it imposes additional discrete monthly limits on the number of discretionary overtime hours that troopers, corporals and sergeants may be assigned (finding of fact 3). By imposing the additional discrete monthly limits, the Commonwealth clearly repudiated the agreement of the parties as set forth in FR-1 insofar as it only limits the assignment of discretionary overtime to members of the bargaining unit on a calendar year basis. Accordingly, the Commonwealth must be found to have committed the unfair labor practices charged.

The Commonwealth's contention that the charge should be dismissed because the assignment of overtime is a managerial prerogative is without merit. Under the analysis set forth in Commonwealth of Pennsylvania, supra, the Board's focus in a case of this nature is on whether or not the employer has clearly repudiated a term in a negotiated agreement, not on whether the term is a managerial prerogative. Thus, whether or not the assignment of overtime is a managerial prerogative is irrelevant.

The Commonwealth's contention that the charge should be dismissed because Captain Horgas issued Troop Special Order 08-13 pursuant to and consistent with the agreement of the parties as set forth in FR-1 also is without merit. Although the agreement of the parties as set forth in FR-1 provides that a commanding officer shall "[m]onitor the usage and assignment of all overtime hours worked by members under their command," a close review of Troop Special Order 08-13 hardly shows that Captain Horgas was monitoring the usage and assignment of overtime; to the contrary, it shows that he was preemptively limiting the usage and assignment of overtime. Moreover, although the agreement of the parties as set forth in FR-1 provides that a commanding officer is to "[t]ake action on the assignment of discretionary overtime when a member's total amount of overtime hours begins to exceed norms," a close review of Troop Special Order 08-13 hardly shows that Captain Horgas was taking action when a member's total amount of overtime hours began to exceed norms; to the contrary, it shows that he was preemptively taking action without even knowing if a member's total amount of overtime hours had begun to exceed norms. Thus, the record does not show that the Commonwealth has a sound basis for arguing that it was contractually privileged to issue Troop Special Order 08-13.

The Commonwealth's contention that any remedy for its unfair labor practices should not include make whole relief because the record does not show that any member of the bargaining unit actually lost overtime as the result of Troop Special Order 08-13 is without merit as well. Any question as to an employe's eligibility for make whole relief is to be litigated in a compliance hearing. See Munhall Borough, Case No. PERA-C-09-76-W (Final Order, October 20, 2009).

#### CONCLUSIONS

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

1. The Commonwealth is an employer under 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 committed unfair labor practices under sections 6(1)(a) and (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 Commonwealth shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights guaranteed in the PLRA as read in pari materia with Act 111.
2. Cease and desist from refusing to bargain collectively with the representative of its employes.
3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PLRA as read in pari materia with Act 111:
  - (a) Rescind Troop Special Order 08-13 to the extent that it limits the assignment of discretionary overtime to troopers, corporals and sergeants on a monthly basis;
  - (b) Make whole any trooper, corporal and sergeant who lost overtime as the result of the limits placed on the assignment of discretionary overtime to them under Troop Special Order 08-13;
  - (c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
  - (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

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 nineteenth day of November 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner