COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION	:	
	:	
v.	:	Case No. PF-C-09-54-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
PENNSYLVANIA STATE POLICE	:	

PROPOSED DECISION AND ORDER

On April 23, 2009, 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.[1] On May 4, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on July 23, 2009. The hearing examiner, upon the request of the PSTA and without objection by the Commonwealth, subsequently continued the hearing. On October 15, 2009, the hearing was held. The hearing examiner afforded the parties a full opportunity to present evidence and to cross-examine witnesses. The parties agreed to incorporate by reference testimony by the PSTA's president (Sergeant Bruce Edwards) in Case No. PF-C-08-100-E (N.T. 10).[2] On November 6, 2009, the PSTA filed proposed findings of fact, proposed conclusions of law and a memorandum of law by deposit in the U.S. Mail. On November 20, 2009, the Commonwealth filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The PSTA is the exclusive representative of a bargaining unit that includes troopers and corporals employed by the Commonwealth in various Troops within the Pennsylvania State Police (PSP). (N.T. 56, Case No. PF-C-08-100-E)

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

[1] 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. At the hearing, however, the PSTA withdrew the charge under section 6(1)(c) (N.T. 5-6), so that portion of the charge is no longer before the Board. Moreover, in its brief, the PSTA has not addressed the charge under section 6(1)(d), so that portion of the charge is waived. See SSHE, 32 PPER ¶ 32118 (Order Denying Application for Supersedeas 2001)(an argument not presented to a hearing examiner is waived). Accordingly, the charge under sections 6(1)(c) and (d) will not be addressed.

[2] Any references to the notes of testimony (NT) from the hearing in Case No. PF-C-08-100-E will reference that case number. Any other NT cites are to the notes of testimony from the hearing in the instant case.

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, Case No. PF-C-08-100-E; Joint Exhibit 1)

3. On March 16, 2009, the commanding officer for Troop A (Captain George A. Kuzilla, Jr.) issued Troop Special Order A 2009-09 referencing "(a) FR 6-17, Work Zone Management, dated January 22, 2009" and "(b) FR 5-1, Assignment of Discretionary Overtime, dated June 7, 2007." (Joint Exhibit 2)

4. Paragraph 2 of Troop Special Order A 2009-19 provides in pertinent part as follows:

> "Work zones shall be staffed by Patrol Troopers whenever possible. Corporals should be used <u>only</u> when there are no qualified Troopers available. Justification for the use of Corporals will be required."

(Joint Exhibit 2)

5. Paragraph 6 of Troop Special Order A 2009-19 provides in pertinent part as follows:

> "Reference (b) sets the yearly amount of discretionary overtime at 400 hours per member. Any amount over 400 must be approved by the Troop Commander. Station Commanders and the Patrol Unit Supervisor at Greensburg Headquarters shall ensure that members do no[t] exceed this number without prior approval. To attempt to ensure an[] equitable assignment of hours throughout the year, members are restricted to 100 hours of overtime per calendar quarter. Unless operationally necessary members shall not be assigned overtime exceeding 100 hours.
> In the event that member(s) at a location do not reach the 100 hour level in any quarter they may be permitted to be assigned over the 100 hours per quarter 'catch –up'. This should only occur after the other members at the location are given the opportunity to attain the 100 hour level. Supervisors must be cognizant of the safety aspect of assigning members discretionary overtime hours."

(Joint Exhibit 2)

6. The Commonwealth did not bargain with the PSTA before Captain Kuzilla issued Troop Special Order A 2009-19. (N.T. 21)

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 did not agree to exclude corporals from the assignment of discretionary overtime any time a trooper is available and agreed that the only limit on the assignment of discretionary overtime would be 400 hours per calendar year. In the PSTA's view, when the commanding officer for Troop A (Captain Kuzilla) issued Troop Special Order A 2009-19 on March 16, 2009, the Commonwealth violated the agreement of the parties by excluding corporals from the assignment of discretionary overtime any time a trooper is available and by limiting the assignment of discretionary overtime to 100 hours per calendar quarter.

The Commonwealth contends that the charge should be dismissed because the assignment of discretionary overtime is a managerial prerogative. The Commonwealth also contends that the charge should be dismissed because Captain Kuzilla was contractually privileged to issue Troop Special Order A 2009-19. 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 or corporal lost overtime as the result of Troop Special Order A 2009-19.

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:
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> > 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.
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> 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.

A close review of the record reveals that the Commonwealth clearly repudiated the agreement of the parties as set forth in FR-1 when Captain Kuzilla issued Troop Special Order A 2009-19. The agreement of the parties does not exclude corporals from the assignment of overtime any time a trooper is available (finding of fact 2), yet Troop Special Order A 2009-19 does (finding of fact 4). Moreover, the agreement of the parties only limits the assignment of discretionary overtime to 400 hours per calendar year (finding of fact 2), yet Troop Special Order A 2009-19 imposes an additional limit of 100 hours per calendar quarter (finding of fact 5). 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 involves a managerial prerogative. Thus, whether or not the assignment of discretionary overtime is a managerial prerogative is irrelevant.

The Commonwealth's contention that the charge should be dismissed because Captain Kuzilla was contractually privileged to issue Troop A Special Order 2009-19 also is without merit. As noted above, under the analysis set forth in Commonwealth of Pennsylvania, supra, the defense of contractual privilege obtains "[w]here there is language in the contract that supports the employer's claimed right to act unilaterally." Although, as the Commonwealth points out, the agreement of the parties provides that a

commanding officer shall "[m]onitor the usage and assignment of all overtime hours worked by members under their command" (finding of fact 2), a close review of Troop Special Order A 2009-19 hardly shows that Captain Kuzilla 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 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," id., a close review of Troop Special Order A 2009-19 hardly shows that Captain Kuzilla 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 Captain Kuzilla was contractually privileged to issue Troop Special Order A 2009-19.

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 A 2009-19 is without merit as well. Make whole relief is a customary remedy, however, with any question as to a particular employe's eligibility for make whole relief 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 A 2009-19 to the extent that it excludes corporals from the assignment of overtime any time a trooper is available and limits the assignment of discretionary overtime to 100 hours per calendar quarter;

(b) Make whole any trooper or corporal who lost overtime as the result of Troop Special Order A 2009-19;

(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 seventh day of December 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner