

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 :

FINAL ORDER

The Commonwealth of Pennsylvania, Pennsylvania State Police (PSP) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on December 28, 2009, to a Proposed Decision and Order (PDO) issued on December 7, 2009.¹ In the PDO, the Board Hearing Examiner found that the PSP violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968, by imposing quarterly limits on the assignment of discretionary overtime for troopers and corporals, and excluding corporals from overtime whenever a trooper was available. The Secretary of the Board granted an extension of time to file a brief in support of the exceptions, and the PSP timely filed its brief on January 27, 2010. The Pennsylvania State Troopers Association (PSTA) filed a brief in response to the exceptions on February 16, 2010.

Following a hearing on October 15, 2009, the Hearing Examiner issued Findings of Fact, which are uncontested and are summarized as follows. On June 7, 2007, after negotiating an agreement on overtime with the PSTA, the PSP issued a field regulation (FR 5-1) setting forth the 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.

¹ The PSP's exceptions are timely because December 27, 2009, the twentieth day following issuance of the PDO, was a Sunday and is therefore excluded from computation of the twenty-day period for filing exceptions. 34 Pa. Code § 95.100(b).

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.

On March 16, 2009, Captain George A Kuzilla, Jr., the commanding officer for Troop A, Greensburg, issued Troop Special Order A 2009-19 providing at paragraph 2 that "[w]ork zones shall be staffed by Patrol Troopers whenever possible. Corporals should be used only when there are no qualified Troopers available. Justification for the use of Corporals will be required." Paragraph 6 of Troop Special Order A 2009-19 further provided 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.

Based on the above, the Hearing Examiner found that the parties had agreed in FR 5-1 that the only limit on the assignment of discretionary overtime would be a limit of 400 hours per calendar year, and that there is no exclusion of corporals from discretionary overtime. The Hearing Examiner found that contrary to FR 5-1, Troop Special Order A 2009-19 altered the agreed upon terms by limiting the assignment of discretionary overtime to 100 hours per calendar quarter, and excluded corporals from the assignment of overtime whenever a trooper was available to perform the overtime. The Hearing Examiner rejected the PSP's arguments that it had a managerial right, or a "sound arguable basis" under FR 5-1, to impose limits on the assignment of discretionary overtime that were contrary to those agreed upon in FR 5-1. The Hearing Examiner thus concluded that the PSP violated its good faith bargaining obligation under Section 6(1)(a) and (e) of the PLRA. To remedy the unfair labor practice, the Hearing Examiner directed rescission of 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. To further remedy the unfair labor practice, the Hearing Examiner directed make-whole relief for the affected bargaining unit members.

On exceptions, the PSP argues that the Hearing Examiner erred in failing to address and find that the assignment of discretionary overtime is a matter of inherent managerial prerogative that is not a mandatory subject of bargaining. However, with respect to this argument the Board has stated as follows:

[W]here a public employer chooses to negotiate [inherent managerial prerogatives] the appellate courts of the Commonwealth have found that those matters negotiated and included in collective bargaining agreements are binding on the public employer for the life of the agreement. Scranton School Board v. Scranton Federation of Teachers, 27 Pa. Commonwealth Ct. 152, 365 A.2d 1339 (1976). Thus, the mere identification of a matter as one of management prerogative ... does not prohibit a public employer from negotiating over such matters or including agreements in a collective bargaining contract concerning such matters. Indeed, as the Scranton decision indicates, once an employer has negotiated over such matters and reached agreements with a union and incorporated those agreements in a contract, it is an unfair practice for the public employer to refuse to honor those agreements during the life of that contract.

Matous v. Association of Pennsylvania State College and University Faculties, 19 PPER ¶19074 at 198-199 (Final Order, 1988). Further, as aptly stated in Association of Pennsylvania State College and University Faculties v. State System of Higher Education (Clarion University), 20 PPER ¶20111 (Proposed Decision and Order, 1989):

[A collective bargaining agreement] may well include compromises which span the boundaries of mandatory and permissive subjects of bargaining. A unilateral midterm modification of any aspect of that [agreement] therefore serves to undermine the integrity of the entire [agreement]... [T]he prohibition against unilateral mid-term modifications of contractual provisions is not swayed because the provision at issue constitutes a permissive subject of bargaining. Just as the duty to execute an agreement should not turn upon the mandatory or nonmandatory nature of the subject matter, so too the obvious modification or repudiation of such an agreement during the contractual term should not be excepted from a good faith violation simply because there was no duty to bargain over that issue in the first instance.

Id. at 302. Accordingly, we agree with the Hearing Examiner's determination that the focus of this case is not on whether the assignment of discretionary overtime is a

managerial prerogative, but on whether or not the PSP modified, or repudiated, a term of the negotiated agreement in FR 5-1.

In this respect, the PSP argues on exceptions that the Hearing Examiner erred in rejecting its claim of a contractual privilege and in finding that it repudiated the terms of FR 5-1 by imposing limits on the assignment of discretionary overtime. In determining whether the employer has a sound arguable basis for its actions arising from the terms of the agreement, or if the employer unlawfully modified or repudiated an agreement, the Commonwealth Court stated that:

The Board astutely observed a distinction between an employer's application of terms in a collective bargaining agreement, which must have a sound arguable basis in the contract, and an action that attempts to expand contractual terms through unilateral adoption of managerial policies that are not in response to a specific contractual claim and have unit-wide application.

Wilkes-Barre Township v. PLRB, 878 A.2d 977, 983 (Pa. Cmwlth. 2005). In agreeing with the Board in Wilkes-Barre Township that the employer repudiated its agreement with the union by modifying the agreed upon terms, the Commonwealth Court noted that "the Township was not merely applying existing contract language to establish the calculation of pension benefits in its Ordinance. Rather, the Township unilaterally prescribed a certain meaning to the contractual language that is applicable to all bargaining unit members, in violation of its bargaining obligations." Id.

The same distinction applies here, and results in the finding that the PSP unlawfully modified the terms of the agreement reached in FR 5-1 with respect to the assignment of discretionary overtime. Indeed, consistent with the analysis of the Board and the Commonwealth Court in Wilkes-Barre Township, the Hearing Examiner found here that the PSP was not merely applying FR 5-1 to a particular employe, but was in fact modifying the agreement it had reached with the PSTA. The Hearing Examiner expressly found as follows:

The [PSP]'s contention that the charge should be dismissed because Captain Kuzilla was contractually privileged to issue Troop A Special Order 2009-19 ... is without merit. ... Although, as the [PSP] 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.

(PDO at 6). Where, as here, the employer is not merely responding to a particular case of an employe, but is prospectively modifying or limiting the application of agreed-upon language for future cases, the employer is effectively repudiating the agreed-upon terms and imposing its own new terms, altering the parties' agreement in violation of Section 6(1)(e) of the PLRA. Accordingly, the Hearing Examiner correctly concluded as follows:

A close review of the record reveals that the [PSP] clearly repudiated the agreement of the parties as set forth in FR [5]-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 [PSP] must be found to have committed the unfair labor practices charged.

(PDO at 5).

The PSP also excepts to the remedy directed by the Hearing Examiner. The PSP argues that make-whole relief is inappropriate because there is no proof that any bargaining unit member was affected by the limitations on discretionary overtime imposed by Troop Special Order A 2009-19. However, what the Commonwealth Court stated in response to a similar argument in Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998), is equally applicable here:

[T]he [employer] contends that the PLRB's order to make all bargaining unit members whole for any monetary losses suffered is improper and has no sound remedial purpose because the PLRB did not find that the police officers suffered any pecuniary losses that are rationally related to their police duties. However, the fact that the Union has not proved economic loss due to unfair labor practices is of no consequence; the PLRB concedes that if, in fact, the police officers suffered no monetary losses, then the [employer's] liability will be limited to reinstatement of the ... policy and collective bargaining over the matter.

In sum, the [employer's] challenge to the PLRB's "make whole" directive is unwarranted. The PLRB's order that the [employer] "make all bargaining unit members whole for any monetary losses suffered" is in the purest sense remedial and not punitive. See [Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978)]. In fact, the PLRB's final order directs no more than the usual and customary remedy imposed by the PLRB as a consequence of an employer taking unilateral action in violation of its collective bargaining obligation. Accordingly, ... the PLRB's order is proper in that it is reasonable, remedial in nature and furthers the PLRA's policy of promoting mutual resolution of labor disputes.

Id. at 736-737.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the PSP violated Section 6(1)(a) and (e) of the PLRA by imposing quarterly limits on the assignment of discretionary overtime for troopers and corporals, and excluding corporals from overtime whenever a trooper was available contrary to the parties' agreement in FR 5-1 to a 400-hour annual limit. Further, the Hearing Examiner did not err in directing the usual and customary remedy of rescission of the offending parts of Troop Special Order A 2009-19 and make-whole relief for affected employees.² Accordingly, we shall dismiss the PSP's exceptions and make the PDO final.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Commonwealth of Pennsylvania, Pennsylvania State Police are hereby dismissed, and the December 7, 2009 Proposed Decision and Order, be and hereby is 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, Anne E. Covey, Member, and James M. Darby, Member, this sixteenth day of March, 2010. 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.

² We will however amend the Affidavit of Compliance to limit relief to troopers and corporals as directed in the PDO.

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 :

AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania, Pennsylvania State Police hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act, as read in *pari materia* with Act 111, that it has rescinded Troop Special Order A 2009-19 to the extent that it excludes corporals from the assignment of discretionary overtime any time a trooper is available and limits the assignment of discretionary overtime to 100 hours per calendar quarter, that it has made whole any trooper or corporal who lost overtime as the result of Troop Special Order A 2009-19, that it has posted the Final Order and Proposed Decision and Order as directed, and that it has served an executed copy of this affidavit on the Pennsylvania State Troopers Association.

Signature / Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year aforesaid.

Signature of Notary Public