

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA LIQUOR :
ENFORCEMENT ASSOCIATION :
 :
v. : Case No. PERA-C-09-2-E
 :
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :
BUREAU OF LIQUOR CONTROL ENFORCEMENT :

PROPOSED DECISION AND ORDER

On January 5, 2009, the Pennsylvania Liquor Enforcement Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that the Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement (Commonwealth), violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA). The Union specifically alleged that the Commonwealth engaged in unfair practices by requiring all employes at the Pittsburgh District Office to work the day after Thanksgiving 2008, and by prohibiting those employes from using other forms of paid leave for that day. The Union also alleged that the Commonwealth unilaterally repudiated a bargained for agreement whereby no bargaining unit members would be required to work the day after Thanksgiving. During the hearing, the Union withdrew the repudiation claim. (N.T. 4-5).

On January 13, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing take place on Thursday, March 19, 2009, in Harrisburg, Pennsylvania. There were several continuances, and I held two days of hearing on April 16, 2009 and September 18, 2009. During both hearings, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. This case was consolidated for hearing purposes only with Case Number PERA-C-09-1-E. Both parties timely filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).
3. The parties' collective bargaining agreement (CBA) contains a list of holidays; the day after Thanksgiving is included in the list. (N.T. 8; Respondent Exhibit 1, Art. 7, § 1).
4. Article 7, Section 3, of the CBA provides as follows:

If an employe is required to work on any of the holidays set forth in Section 1 of this Article, except for the day after Thanksgiving,...the employe will be compensated at one and one-half times their regular hourly rate of pay for all hours worked on the holiday shift and any overtime extension thereof....

If an employee works on the day after Thanksgiving, the employee shall be compensated at the employee's regular hourly rate of pay for all hours worked on said holiday. The employee shall receive paid time off for all

hours worked on the day after Thanksgiving up to a full shift. The paid time off shall be in lieu of holiday pay for that time under Section 2 Above.

(Respondent Exhibit 1, Article 7, § 3).

5. The day after Thanksgiving is the only non-premium holiday. A premium holiday is a holiday for which the Commonwealth pays one and one-half times an employe's hourly rate of pay plus an additional day off as a compensation day. A bargaining unit employe who works a non-premium holiday receives straight pay plus and additional day off as a compensation day.¹ (N.T. 8-9, 11; Respondent Exhibit 1, Art. 7 § 3).

6. Article 20, Section 1 of the CBA provides as follows:

It is understood and agreed that the Commonwealth, at its sound discretion, possesses the right, in accordance with the applicable laws, to manage all operations including the direction of the working force and the right to plan, direct, and control the operation of all equipment and other property of the Commonwealth, except as modified by this Agreement.

(Respondent Exhibit 1, Article 20, §1).

7. On September 12, 2008, the Commonwealth posted an assigned detail directing all but three officers stationed at the Pittsburgh District Office to perform an underage drinking patrol at Heinz Field parking lots on November 28, 2008 (i.e., the day after Thanksgiving) during the football game between the University of Pittsburgh (Pitt) and the University of West Virginia. (N.T. 12, 14; Respondent Exhibit 2).

8. The directive covering the Pitt-West Virginia game was an "all-office" detail. An all office detail is a work assignment directed by the Bureau of Liquor Control Enforcement Command requiring all officers at a district office to work the assignment. The CBA requires the Commonwealth to post notice of such a detail at least two weeks prior to the performance of the assignment. The Pitt-West Virginia detail was posted over two months prior to the event. (N.T. 35-36; Respondent Exhibits 1 & 2).

9. Based on prior knowledge and past experience with the Pitt-West Virginia football game and the reputation of the two universities themselves, the Bureau of Liquor Control Enforcement Command anticipated a large amount of underage alcohol consumption prior to and during the football game. (N.T. 34).

10. After receiving notification of the detail, employes requested leave. The Commonwealth refused to permit other forms of leave on November 28, 2008. The computer program through which leave is requested, approved and recorded does not permit other forms of leave to be entered on a holiday. The Commonwealth informed employes that no one may use compensation time, annual, personal or even sick time on the day after Thanksgiving holiday. The only form of leave that may be used by a bargaining unit member is holiday leave. If an employe is sick on a holiday, the employe must use holiday time not sick time because the computer will not accept any other type of time. (N.T. 13-14, 48-51).

11. The Commonwealth permitted three bargaining unit employes at the Pittsburgh District Office to take off on the day after Thanksgiving 2008 because they reserved the whole week off before the September 12, 2008 posting of the detail assignment. When an employe reserves a Monday-to-Friday vacation, the CBA requires the Commonwealth to give an employe off on the weekend before and the weekend after the Monday-to-Friday vacation. (N.T. 14-15; Respondent Exhibit 1, Art. 11, §3(a)).

¹ During the first day of hearing, the Commonwealth objected to the Union's presenting of any evidence concerning the day after Thanksgiving, 2008 because, argued the Commonwealth, the charge only mentions Thanksgiving day. The Commonwealth's attorney argued that testimony regarding the day after Thanksgiving was irrelevant and that an attempt to present a claim regarding the day after Thanksgiving would constitute an untimely amendment to the charge. (N.T. 9). I deferred my ruling on the Commonwealth's objection and permitted the Union to present the objected to evidence. During the second day of hearing, however, I overruled the Commonwealth's objection for the following reason: The charge expressly refers to a non-premium holiday; the record demonstrates that the day after Thanksgiving is the only non-premium holiday; and the record shows that the Commonwealth is well aware that fact. (N.T. 31). Accordingly, the charge adequately placed the Commonwealth on notice that the matters complained of occurred on and pertained to the day after Thanksgiving.

12. Officers stationed at other district offices throughout the Commonwealth worked on the day after Thanksgiving, 2008. Also, officers worked on the day after Thanksgiving, 2007. In 2006, officers from the Altoona and Williamsport District Offices worked the day after Thanksgiving. (N.T. 38-42; Respondent Exhibit 3 at 5-9; Respondent Exhibit 4 at 5-8; Respondent Exhibit 5 at 8).

13. The Commonwealth assigns enforcement duties on holidays to provide some coverage throughout the Commonwealth, independent of events like the Pitt-West Virginia football game. Not all holidays require all-office details. For holidays without an all-office detail, the Commonwealth permits officers to volunteer to work holidays. (N.T. 22-24, 39).

14. In the past, the Commonwealth has not required all employees from the Pittsburgh District Office to work the day after Thanksgiving holiday. The Pitt-West Virginia football game had not been held on the day after Thanksgiving until 2008. Traditionally, the game is held on a Saturday, and it alternates year to year between Pittsburgh and West Virginia. The Commonwealth did not bargain with the Union over the directive to involuntarily work the day after Thanksgiving holiday. (N.T. 14, 34-35).

DISCUSSION

The issue is whether, on this record, the Commonwealth may lawfully require that all employees from a given district office work the day after Thanksgiving, without the option of taking other paid leave, where the CBA expressly designates that day as a holiday with non-premium pay and where the Commonwealth has historically provided holiday enforcement with staff who volunteered to work the holiday.

The Union argues that the day after Thanksgiving is a negotiated, paid holiday provided by the parties' CBA. Accordingly, the Union contends that the Commonwealth was obligated to bargain since the Commonwealth did not present evidence demonstrating the operational necessity of contradicting the CBA and requiring all of the Pittsburgh District Office employees to work the day after Thanksgiving 2008. (Union Post-hearing Brief at 5).

The Union further maintains that, for the past fourteen years, no officer from the Pittsburgh District Office had ever been required to work the day after Thanksgiving. The Commonwealth, therefore, violated an established past practice when it required all but three employees to work that day without the option of taking leave. (Union's Post-hearing Brief at 4). The Union recognized that the Commonwealth presented evidence that enforcement officers had worked the day after Thanksgiving in recent years (2005, 2006 and 2007), but emphasizes that the Commonwealth's witness "could not state how many of the Enforcement Officers who worked the day after Thanksgiving volunteered to work that day versus being directed to work. (Union's Post-hearing Brief at 4).

The Commonwealth offers several defenses. The Commonwealth asserts the defense of contractual privilege and maintains that it acted in accordance with the CBA. A sound arguable interpretation of the CBA, contends the Commonwealth, supports its position that it was contractually privileged to require employees to work the day after Thanksgiving holiday. (Commonwealth's Post-hearing Brief at 13-14). The Commonwealth also contends that there had never been a specific reason for an all-office detail on the day after Thanksgiving and therefore no reason to use other leave for that day. (Commonwealth Post-hearing Brief at 15). Consequently, the Commonwealth argues that no past practice exists because unit members were not at any time prior to 2008 required to work the Friday after Thanksgiving and therefore not previously precluded from using leave on the that holiday. (Commonwealth Post-hearing Brief at 15). Accordingly, the Commonwealth claims that "the alleged 'recurring situation' put forth by the [Union] here to support its past practice argument never occurred prior to 2008," and that "a non-event can hardly be considered a past practice." (Commonwealth Post-hearing Brief at 15-16). Moreover, the Commonwealth maintains that its computer software program (Employee Self-Service or ESS) for requesting and recording employee leave, which has been in place for several years, will not permit an employee (or management) to utilize any form of paid leave other than holiday leave on any designated holiday. (Commonwealth's Post-hearing Brief at 13). Accordingly, there can be no past practice of utilizing other forms of paid leave on any holiday.

1. Contractual Privilege

Both the Commonwealth Court and the Board have recognized the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB, 804 A.2d 1291 (Pa. Cmwlth. 2002); Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER ¶ 18117 (Final Order, 1987). The doctrine requires the dismissal of a charge where the employer establishes a sound arguable basis for ascribing a certain meaning to the language of the collective bargaining agreement or other bargained for agreement and that the employers conduct was in conformity with that interpretation. Fraternal Order of Transit Police v. SEPTA, 35 PPER 73 (2004). An employer's interpretation need not be the correct interpretation as long as a sound arguable basis exists for its interpretation thus establishing a substantial claim of contractual privilege. Id. Moreover, it is not the function of the Board to interpret collective bargaining agreements through unfair practice charges. Hatfield Township Police Dept. v. Hatfield Township, 18 PPER ¶ 18226 (Final Order, 1987).

The Commonwealth posits that a sound arguable interpretation of Article 7 of the CBA, and other sections, supports its position that the Commonwealth can require employes to work the day after Thanksgiving to meet operational needs. Article 7 of the CBA establishes the pay structure for employes who work on premium holidays and the non-premium holiday. Employes who work on the non-premium holiday (i.e., the day after Thanksgiving) receive straight time plus an additional day off with straight pay. Article 7 also provides that "[i]f an employe is required to work on any of the holidays set forth in Section 1 of this Article, except for the day after Thanksgiving, ... the employe will be compensated at one and one-half times their regular hourly rate of pay for all hours worked on the holiday shift." (F.F. 4)(emphasis added). "If an employee works on the day after Thanksgiving, the employee shall be compensated at the employee's regular hourly rate of pay for all hours worked on said holiday." (F.F. 4). This language arguably contemplates instances where employes will be "required" to work holidays listed in Section 1, which includes the day after Thanksgiving, based on operational needs, even when they have not volunteered to work the holiday.

Additionally, Article 20 of the CBA gives the Commonwealth discretion and authority to manage any and all operations and to direct personnel accordingly. Taken together, Articles 7 and 20 arguably permit the Commonwealth to require that employes work holidays where, in management's reasonable discretion, properly managing and executing enforcement operations so requires. Contract interpretation, reconciling the contractual ambiguity created by granting the holiday but describing in detail the payment structure for employes that work the non-premium holiday along with the language that employes could be "required" to work holidays, is within the expertise of an arbitrator and not the Board or its hearing examiners. Accordingly, I conclude that the Commonwealth acted in accordance with a sound arguable interpretation of the CBA when it required employes to work the day after Thanksgiving. I emphasize that I have not determined that the Commonwealth's position or its interpretation of the CBA is correct; rather I have merely concluded that the meaning ascribed by the Commonwealth to the CBA is arguably sound and that this contract interpretation matter is properly within the jurisdiction of an arbitrator.

The Union's claim that the Commonwealth unlawfully denied other forms of paid leave to employes on the day after Thanksgiving 2008 must also be dismissed for two reasons. First, since the Commonwealth was contractually privileged to retain and exercise its managerial prerogative to require all but three employes at the Pittsburgh District Office to work the day after Thanksgiving to meet operational needs, it necessarily follows that it could deny the use of other types of paid leave to those employes because it would undermine the mandate to draft a full complement of officers to work the Pitt-West Virginia game. Second, the record shows that, since converting to the ESS system several years ago, Commonwealth management does not have any control over permitting employes to utilize other forms of paid leave on a holiday. The ESS system through which leave is requested, approved and recorded does not permit other forms of leave to be entered on a holiday. The Commonwealth informed employes that no one may use compensatory time, annual, personal or even sick time on the day after Thanksgiving holiday. The only form of leave that can be used by a bargaining unit member is the holiday.² Even if an employe is sick on a holiday, the employe must use holiday leave not sick time because the computer will not accept any other type of leave.

² The day after Thanksgiving is not a paid holiday for managing members of the Pennsylvania State Police, so they may use other paid leave that day.

2. Past Practice

The Commonwealth parries the Union's past practice claim by arguing that a past practice cannot exist as a matter of law where, as here, the Commonwealth had never had an opportunity or need to respond to the set of circumstances presented by the Pitt-West Virginia football game on the day after Thanksgiving 2008.

As noted by the Commonwealth in its post-hearing brief, our Supreme Court adopted the following definition of past practice:

A Custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or practice...must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances.... [I]t must be accepted in the sense of being regarded by the men involved as the normal and proper response to the underlying circumstances presented.

County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 n. 12 (1977)(emphasis original). Although the Union established a practice whereby the Commonwealth sought volunteers to work holidays in general, the record does not demonstrate any practice or accepted course of conduct when the Commonwealth's operational needs require an all-office detail on a holiday within the geographic coverage of a given district office. Although the record shows that the Altoona District Office has required an all-office detail to conduct enforcement at Penn State games and the Pittsburgh District Office has required an all-office detail for the Saint Patrick's Day Parade in Pittsburgh, none of these all-office details have occurred on a paid holiday.

For the first time in any witness's memory, the Pitt-West Virginia football game was scheduled in Pittsburgh within the jurisdiction of the Pittsburgh District Office on the day after Thanksgiving. Based on knowledge and experience with the Pitt-West Virginia football game in past years and the knowledge of the two universities themselves, the Bureau of Liquor Control Enforcement command anticipated significant underage alcohol consumption prior to and during the football game. Command's managerial discretion, expertise and experience with this particular football game led it to the conclusion that they needed the fullest complement of officers they could obtain to conduct liquor control enforcement operations before and during the football game at Heinz Field, which constitutes a legitimate operational need to draft all available officers for enforcement duties on the day after Thanksgiving. Therefore, the necessary factual predicate for finding a past practice in this case (i.e., that the Commonwealth seeks volunteers only to work on holidays that require an all-office detail to adequately provide liquor enforcement at large events) does not exist. Concluding otherwise, in the absence of such a custom or practice, would usurp management's authority to establish and provide, in its discretion, an appropriate level of public service and would handcuff management's ability to protect the health safety and welfare on holidays. The Union is not management's partner in determining the manner in the scope of the Commonwealth's enforcement enterprise or the level of liquor enforcement services that are appropriately provided to the public. Commonwealth of Pennsylvania, Venango County Bd., of Assistance v. PLRB, 459 A.2d 452, 454-55 (Pa. Cmwlth. 1983)(citing First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)).

Accordingly, the Commonwealth has not engaged in unfair practices under Section 1201(a)(1) or (5) of PERA by requiring all but three bargaining unit employees stationed at the Pittsburgh District Office to work on the day after Thanksgiving 2008 to conduct an all-office detail of investigating the expected underage consumption of alcohol at the Pitt-West Virginia game without permitting employees to take other forms of paid leave and without seeking a diminished complement of volunteers.

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 of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement is a public employer under PERA.

2. The Pennsylvania Liquor Enforcement Association is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Commonwealth has not committed unfair practices within the meaning of Section 1201(a) (1) or (5).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 ninth day of March, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner