

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA LIQUOR :  
ENFORCEMENT ASSOCIATION :  
 :  
v. : Case No. PERA-C-09-1-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 or Bureau), violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA). The Union specifically alleged that the Commonwealth engaged in unfair practices by unilaterally adopting new work rules prohibiting bargaining unit members from the following: (1) publicly criticizing the State Police without notifying the employer; (2) fraternizing with personal associates or off-duty personnel while on duty; and (3) obtaining a tattoo without prior approval from the Bureau Director. During the hearing, the Union withdrew the public criticism claim. (N.T. 68).

On January 13, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing take place on Wednesday, March 18, 2009, in Harrisburg, Pennsylvania. After several continuances, 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 evidence and cross-examine witnesses. This case was consolidated for hearing purposes only with Case Number PERA-C-09-2-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. Liquor Enforcement Officers (officers) spend the majority of their work time undercover. (N.T. 56).
4. Undercover work consists of entering bars, night clubs and stadia for football games and concerts to perform liquor enforcement duties. Officers are permitted to consume alcohol while performing undercover duties. (N.T. 56, 72).
5. Undercover attire requires any type of dress to blend in with the patrons or meet the requirements of the establishment. Undercover attire may include anything from a suit and tie to a tank top and shorts. (N.T. 56).
6. Major John Lutz is a member of the Pennsylvania State Police. Major Lutz is the Executive Director of the Bureau of Liquor Control Enforcement for the Commonwealth. On or about November 10, 2008, Major Lutz issued changes to the Bureau Procedure Manual (Manual). Section 2.29 provides as follows:

On-Duty Time Restricted to Enforcement Work: An Enforcement Officer shall restrict their duties during working hours to their assigned duty area, unless otherwise detailed. An Enforcement Officer shall not perform any enforcement duty for the purpose of private gain, make any purchases, conduct personal business, fraternize with personal associates or other officers who are off-duty, or devote any of their time to any activity other than that which relates to enforcement work, while on duty.

The fraternization clause was added as part of the November, 2008 changes. Prior to the addition of this clause, officers were required to limit their on-duty time to state work. (N.T. 58-61, 69-71, 78; Union Exhibit 1, § 2.29).

7. Section 2.38 also contains a change to the Manual and provides as follows:

Tat[t]oos: Enforcement Officers shall not obtain any tattoos in any areas which might be visible while performing any of the tasks associated with being a Liquor Enforcement Officer, whether in uniform or in an undercover capacity, including but not limited to the head, neck, arms and legs, without the prior approval of the Bureau Director. Prior to obtain[ing] a tattoo or replica which would be visible to the public, the Enforcement Officer shall submit correspondence, along with photograph, sketch, or drawing of the desired image, through channels, to the Bureau Director.

(N.T. 61-62; Union Exhibit 1, § 2.38).

8. The Commonwealth did not bargain with the Union over the November, 2008 Manual changes. (N.T. 61, 63).

9. Major Lutz issued the new rule regarding fraternization as a result of learning of two separate incidents. The first incident occurred in July, 2006 and involved an on-duty officer stationed at the Williamsport District Office who met a friend, who was not an officer, at a bar. Both consumed alcoholic beverages throughout the night. The officer was hospitalized from intoxication. (N.T. 71).

10. The second incident occurred later in 2006 where two on-duty officers met with an off-duty officer. All three officers attended a bar event advertised as a Mardi Gras Party. An investigation revealed that the three officers were partying and socializing with customers. All three officers were evicted because one of the officers was groping a woman. During the eviction, one of the officers displayed his badge and claimed that he was an officer and that he could not be evicted. The Wilkes-Barre police were called to the scene. (N.T. 72-73).

11. The fraternization rule is not meant to preclude officers from greeting one another or talking to one another in passing. (N.T. 73).

12. The Manual does not expressly define fraternize. There are many other terms used in the Manual that are not specifically defined. Violators of the fraternization rule are subject to discipline. (N.T. 74, 78-79).

13. Bargaining unit members have tattoos that are visible while performing undercover duties. Tattoos are common among people who frequent certain establishments where officers are undercover. Tattoos can help an officer blend in while performing undercover duties. Tattoos that identify an individual can hinder undercover work. (N.T. 62-64).

14. After a recent applicant examination for officers, Major Lutz reviewed a CD-ROM prepared by human resources of applicant tattoos. The tattoos revealed that some applicants could not work undercover due to tattoos that would eventually expose them. (N.T. 74-75).

15. The tattoo provision was added to protect Commonwealth undercover operations by determining whether officers were contemplating a tattoo that would expose their cover and thereby limit the usefulness of the officer by not being able to work undercover. It

does not apply to any existing tattoos on bargaining unit members, and it does not prevent a bargaining unit member from obtaining a tattoo. (N.T. 75, 81).

16. Under the new tattoo policy, Major Lutz and human resources personnel pass judgment on whether a proposed tattoo submitted to Major Lutz by way of sketch or photo is acceptable. Tattoos on exposed areas during undercover operations of a name, or an obscene or racist tattoo would be unprofessional and unacceptable to Major Lutz. (N.T. 76, 79-80).

17. Major Lutz will not accept a tattoo that is an image of KKK. The Commonwealth must appear as if it is performing fair, equitable, balanced and non-prejudicial law enforcement. (N.T. 77).

18. The tattoo provision does not preclude an officer from obtaining an obscene tattoo on a non-visible part of his or her body. A bargaining unit member who obtains a tattoo in violation of the new tattoo policy could be disciplined. (N.T. 78).

19. Section 6.02 of the Rules of Conduct for Employees provides, in part, as follows:

[E]ach employee, as a representative of the Department and State government, has an obligation to adhere to high standards of honesty, integrity, and impartiality in their personal conduct.

(Respondent Exhibit 1 at 1, § 6.02).

20. Section 6.02(A)(4) of the Rules of Conduct for Employees provides in part as follows:

Employees shall avoid associations or dealings with racketeers, illegal gamblers, criminals, or other persons with criminal reputations, except in the performance of duty, and while acting under proper and specific orders from a supervisor.

(Respondent Exhibit 1 at 1, § 6.02(A)(4)).

## DISCUSSION

### 1. Fraternalization

The Union argues that the portion of the November 10, 2008 Special Order that prohibits officers from fraternizing with personal associates or off-duty officers while on duty is vague and overbroad. (Union's Brief at 6).<sup>1</sup> The Commonwealth defends with two arguments: (1) that Section 2.29 had already expressly prohibited officers from engaging in any activity that was not related to enforcement duties and therefore, the Commonwealth's restriction against fraternizing included in the November 10, 2008 Manual changes did not constitute the requisite change in terms and conditions of employment, (Commonwealth's Brief at 7); and (2) that, even if the revision to Section 2.29 of the Manual constitutes a change, it is not vague and overbroad. (Commonwealth Brief at 8). The Commonwealth argues that Section 2.29 is a rule mandating that work time is for work only and not for socializing, partying or drinking with friends or coworkers. As such, an employer is free to direct its employees to conduct only the work for which they are being paid during work hours, especially where, as here, the record demonstrates that partying and socializing has interfered with the mission of the employer and the performance of officers' enforcement duties. (Commonwealth Brief at 8). The Commonwealth emphasizes that Section 2.29 is reasonable and targets work conduct only and does not impact non-work pursuits. (Commonwealth Brief at 9).

The provision prohibiting officers from "fraternize[ing] with personal associates or other officers who are off-duty," was added to a section in the Manual that already prohibited non-work conduct during work time. Accordingly the added prohibition is a

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<sup>1</sup> The Union does not assert that this alleged work rule change is a mandatory subject of bargaining.

descriptive subset of that which was already prohibited. If Major Lutz had added language to Section 2.29 prohibiting officers from obtaining oil changes on their personal vehicles while on duty, that conduct also would have already been precluded by the general rule that already existed. Therefore, the Bureau did not change or add prohibited behavior. Rather, it clarified the fact that fraternizing with personal associates and off-duty officers was prohibited because of recent incidents where officers were partying and becoming intoxicated with friends and off-duty officers during their work time. Contrary to the Union's assertion, therefore, the fraternization clause makes Section 2.29 more clear and understandable rather than vague and ambiguous.

Also, the term "fraternize" itself is not vague and ambiguous in terms of prohibiting the conduct to which it refers. Although the term is not specifically defined in the Manual, the common dictionary meaning is to associate cordially or intimately. Webster's Encyclopedic Dictionary of the English Language, Random House, 762 (2d. ed. 1996). Synonyms for fraternize are words like socialize, mingle, mix and consort. Id. I find no vagueness or ambiguity with the prohibition against fraternizing with off-duty officers or personal associates. The term clearly does not refer to the courteous acknowledgments or greetings of co-workers in passing, as suggested by the Union.

Moreover, Section 6.03(A)(4) of the Rules of Conduct already prohibits associations or dealings with criminals or persons with criminal reputations, unless specifically authorized. Although the Union argues that the term fraternize is undefined and vague, it is clear from the Rules of Conduct that the amended Section 2.29 prohibits associations and dealings with personal friends or off-duty officers while an officer is on duty much in the same way that Section 6.03 of the Rules of Conduct prohibits associations with criminals at any time. Fraternizing involves personal interactions that exceed greetings or acknowledgments. Unlike personal greetings, fraternizing, at a minimum, diminishes an officer's concentration and compromises the work or mission.

The compromising effect of fraternizing on Commonwealth missions in liquor enforcement is evidenced by the two events which caused Major Lutz to clarify the rule requiring that work time is for work only. The first incident occurred in July, 2006 and involved an on-duty officer who met a friend at a bar. Both consumed alcoholic beverages throughout the night, and the officer was hospitalized from intoxication. The second incident occurred later in 2006 where two on-duty officers met with an off-duty officer. All three officers attended a bar event advertised as a Mardi Gras party. An investigation revealed that the three officers were partying and socializing with customers. All three officers were evicted because one of the officers was groping a woman. During the eviction, one of the officers displayed his badge and claimed that he was an officer and that he could not be evicted. The Wilkes-Barre police were called to the scene. These two events clearly demonstrate how fraternizing on duty, especially since alcohol is involved with undercover liquor enforcement duties, can compromise Commonwealth missions and professionalism. These incidents necessitated the clarification to the rule which restricted work time to work. Therefore, the addition of the fraternization clause to Section 2.29 clarified already prohibited behavior and the term is not vague or overbroad, especially since all non-work conduct was already prohibited.

## **2. Tattoos**

The Union similarly argues that the part of the Commonwealth's November 10, 2008 Special Order, which requires approval before an officer may obtain a new tattoo, constitutes a mandatory subject of bargaining and a vague, overbroad provision. (Union Brief at 8).

The Commonwealth's regulation of tattoos that are exposed on an employee's body while performing their Commonwealth duties and serving the public is analogous to an employer's imposition of a dress code or the Commonwealth's requirement for officers to wear uniforms. Both involve the Commonwealth's managerial determination of acceptable public appearance while representing the Commonwealth in a certain capacity. In PSSU Local 668, SEIU v. Commonwealth of Pennsylvania, Department of Public Welfare, 31 PPER 31020 (Final Order, 1999), the Board concluded that a dress code policy (requiring employees to dress in appropriate attire because of their public interactions with clients, lawyers and

community service agencies where employees did not have to spend extra money on suits, ties, shoes and dry cleaning) was a managerial prerogative and not a mandatory subject of bargaining. In Department of Public Welfare, *supra*, the Board expressly noted that the record supported the Commonwealth's argument that the County Assistance Office had a "substantial interest in the professional delivery of services, and that appropriate office attire by employees who deal with the public furthers that interest." *Id.* at 50.

Also, independently applying the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), the Commonwealth has a legitimate managerial interest in maintaining successful undercover operations without exposing the identity of individual officers as well as maintaining the public's perception in the integrity, fairness and professionalism of Commonwealth law enforcement operations. The record in this case establishes that the Commonwealth has a legitimate interest in the professional and proper appearance of officers who represent the Commonwealth as well as ensuring that the public perceives the effectuation of law enforcement as fair, equitable, balanced and non-prejudicial. Indeed, the Rules of Conduct specifically provides that each employee is a representative of the Commonwealth. As such the Rules expressly require each employee to maintain and "adhere to high standards of honesty, integrity, and impartiality in their personal conduct." (F.F. 19).

The tattoo provision does not prohibit tattoos; it merely requires approval for tattoos that will be visible during undercover work. It does not apply to any existing tattoos on bargaining unit members, nor does it prevent a bargaining unit member from obtaining a tattoo. Bargaining unit members already have tattoos that are visible while performing undercover duties. Because tattoos are common among people who frequent certain bars and clubs where officers work undercover, they can help an officer blend into the environment while performing undercover duties. However, the record is clear from testimony from both Commonwealth and Union witnesses that tattoos that identify an individual can hinder undercover work. Exposed tattoos during undercover operations of a name or an obscene or racist theme would be unprofessional and unacceptable to the Major. Major Lutz understandably will not accept a tattoo that is, for example, an image of "KKK." There are no additional costs associated with the tattoo review policy, and the Union did not offer any evidence of countervailing privacy concerns regarding tattoos that would be exposed and visible to the public at large. Like the dress code in Department of Public Welfare, the tattoo policy here is not a mandatory subject of bargaining under State College because the Commonwealth's managerial interests in maintaining successful undercover operations by protecting the identity of its officers, as well as its interest in preserving the public's perception of fair and balanced enforcement, outweighs any interest the employees have in obtaining inappropriate tattoos.

The rule requiring officers to obtain prior approval before obtaining a tattoo on exposed areas of the body is not vague or overbroad. The rule does not specifically define or otherwise list specific tattoos or types of tattoos that would be unacceptable because any amount of specificity would nullify the rule. To delineate specific types of tattoos that would be unacceptable would be to permit anything not mentioned in the rule. The dress code in Department of Public Welfare, like the tattoo rule here, required appropriate attire only. It did not attempt to describe the types of shirts, pants or shoes that would be acceptable. The Commonwealth could not reasonably predetermine and include all manner of unacceptable tattoos in a comprehensive rule. The type of conduct sought to be regulated by the tattoo rule simply does not lend itself to more specific definition or detail. To attempt to be more specific would undermine the effectiveness of the rule and the ability of the Commonwealth to ensure that inappropriate tattoos are not visible.

Moreover, the rule is not vague or overbroad regarding discipline. The conduct that will result in discipline is very clear. Employees must seek approval for any tattoo on the neck, arms or legs. If an employee obtains a tattoo in those areas without approval, regardless of the type of tattoo, he or she has violated the rule. There is nothing vague or overbroad about the required conduct. Employees must submit a sketch of the proposed tattoo and obtain permission.

**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 sixth day of April, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner