

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :
 :
 v. : Case Nos. PF-C-08-27-E
 : PF-C-08-106-E
 COMMONWEALTH OF PENNSYLVANIA :
 PENNSYLVANIA STATE POLICE :

AMENDED PROPOSED DECISION AND ORDER

On February 27, 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 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally transferring to non-members of the bargaining unit work that previously had been performed by members of the bargaining unit. The Board docketed the charge to Case No. PF-C-08-27-E.

On March 12, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 6, 2008. After of a series of granted continuance requests, the hearing was scheduled for January 8, 2009, in Harrisburg, Pennsylvania.

On August 22, 2008, the PSTA filed a charge of unfair labor practices alleging that the Commonwealth violated sections 6(1)(a) and 6(1)(e) by unilaterally transferring to non-members work that had been performed by members of the bargaining unit, and that the Commonwealth unilaterally implemented Special Order 2008-51, paragraph 11 of which was overly vague. The Board docketed the charge to Case No. PF-C-08-106-E. On October 1, 2008, the Secretary issued a complaint and notice of hearing directing that a hearing be held on November 19, 2008.

By letter docketed October 30, 2008, the parties mutually requested that these cases be consolidated for hearing, and that both be heard on January 8, 2009. I granted that request.

On January 8, 2009, a consolidated hearing was held.¹ The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. Each party filed a post-hearing brief.

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 Commonwealth has recognized the PSTA as the exclusive representative of a bargaining unit that includes troopers, corporals, sergeants, lieutenants, captains and majors in the Pennsylvania State Police. Civilians are not included in the bargaining unit. (Joint Exhibit 1).
2. Motor carrier enforcement officers (MCEO) and motor carrier enforcement supervisors (MCES) are civilian employees of the State Police. They have limited authority under the vehicle code to inspect commercial vehicles. (N.T. 91-93, 100, 106-107).
3. The Automated Incident Memo System is a method of preliminary information collection used by the State Police. When an individual reports a problem or makes a complaint to the State Police, an operator takes down the information and dispatches an officer to the scene. These preliminary reports have areas for the operator to indicate an incident number, a topical code, the name of the Complainant, who initiated the

¹By agreement of the parties the issues raised in both charges were incorporated into PF-C-08-106-E, leaving the other charge dismissed. (N.T. 6, 148).

complaint, who it was assigned to, and the time it was initiated, assigned and completed. These preliminary reports have a remarks section that is supposed to be completed. These preliminary reports are reviewed for accuracy, corrected, and the corrected information is then transferred to a final report. (N.T. 15, 16, 56-57, 64, 97-98).

4. On July 11, 2008, the Commonwealth issued State Police Department Directive Special Order 2008-51. The second sentence of paragraph 11 states, "Because MCEOs and MCEs are visible representatives of the Department, they shall stop to assist disabled motorists, remove immediate hazards from the roadway, and assist at the scene of crashes where there is an absence of police officers or other qualified first responders." (PSTA Exhibit 2).

DISCUSSION

The PSTA charges the Commonwealth with violating Section 6(1)(a) and (e) of the PLRA because it supposedly transferred bargaining unit work without bargaining, and because paragraph 11 of Special Order 2008-51 issued by the Commonwealth is "overly vague."

The Commonwealth denies that it has unilaterally transferred bargaining unit work, and asserts that paragraph 11 of the Special Order is not overly vague.

Because the PSTA has not proved that the Commonwealth unilaterally transferred bargaining unit work, that portion of the charge is dismissed. However, because the PSTA has proved that **a portion of** paragraph 11 is overly vague, that portion of the charge is sustained, and the Commonwealth is ordered to rescind **a sentence in** that paragraph, as written.

We will first examine the PSTA's proofs insofar as they relate to the unilateral transfer of bargaining unit work.

An employer commits a violation of the PLRA when it unilaterally transfers work performed exclusively by the bargaining unit to non-unit members; or where it materially alters the mix of work done by bargaining unit members and non-unit members. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992).

Nevertheless, it must be shown that the Commonwealth directed non-bargaining unit employees to perform the bargaining unit work in question, as opposed to errant, non-unit employees who, on their own, independently decide to perform that work. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 38 PPER 96 (Proposed Decision and Order, 2007).

The *point d'appui* of the PSTA's unilateral transfer allegation is a series of Automatic Incident Memos (memos). They're computer generated preliminary reports, filled out by either a trooper or a civilian operator at a remote location from the incident, based upon information received. The PSTA argues that these memos show that the Commonwealth has unilaterally transferred unit work outside the unit. There are, however, two fatal shortcomings in using these memos as the evidentiary foundation of the PSTA's case.

The first shortcoming is that the memos contain errors.² Not only are there specific errors in those memos introduced, but as a group they are all reviewed, and corrections made, before the information is transferred to the permanent police record.

The second shortcoming is that these memos simply don't record a complete and specific rendition of what really occurred.³ (N.T. 57-58, 98-99, 102, 103, 115, 128-129, 130, 135, 136-137, 139-140). And, that lack of specificity caused witnesses on both sides to answer questions with conjecture as opposed to factual certainty. The simple fact that no witnesses had any personal knowledge of the incidents in question only served to

² Some of the memos incorrectly title the person reporting the incident as a trooper. (PSTA Exhibit 1, p.1, 4, 6, 80). Few of the memos have anything written in the remarks section, even though virtually all memos should have notations there. (N.T. 57-58, 128). One memo indicates that the incident was initiated, assigned and completed in less than sixty seconds. (PSTA Exhibit 1, p.8).

³ One memo indicates that the event was "escort-superload," but the remarks section indicates simply, "weigh." (PSTA Exhibit 1, p. 20). Most of the memos have nothing written in the remarks section. (See footnote 2).

increase the uncertainty and conjecture in their testimony. These short excerpts from answers to questions about the memos illustrate the point:

"The way this looks is that Trooper Johnson was probably out on patrol." (N.T. 15).

"Brandon Schneider, more than likely, is a police operator." (N.T. 15).

"I don't know. I don't know if that was error on the, probably dispatcher that initiated it, Brandon Schneider." (N.T. 21).

"So you would conclude that William Johnson would be a trooper, which the records don't indicate." (N.T. 22).

"It would lead you to believe that he escorted the superload on January 9th of 2008." (N.T. 28).

"It appears that Santiago came upon a disabled vehicle...." (N.T. 29).

"That's what I would assume, yes." (N.T. 33).

"This incident was assigned as a state department investigation, which would be, in this case, I'm assuming, something permit related." (N.T. 35).

"That's a good question. I would have to assume that it was an error on the part of the person entering the information...." (N.T. 37).

"And he probably called it in after the fact and called in the fact that he did a school vehicle check...." (N.T. 37-38).

"Probably[,] that the trailer of the oversized load didn't display registration." (N.T. 43).

"I don't know. It could possibly be a trooper." (N.T. 45).

"Probably[,] a towing company." (N.T. 47).

"I guess. I'm not positive." (N.T. 47).

"I would assume that, yes, sir." (N.T. 63).

"That's what I would interpret it as." (N.T. 65).

"I would assume, looking at this, that Trooper Kolodzi, more likely than not, was present there at the scene." (N.T. 137).

Even counsel's questions occasionally reflected the speculative nature of the testimony:

"Is it safe to assume that he was directing traffic around this crash?" (N.T. 33).

"So[,] Trooper Kline may have been on the roadway and saw --- and again, we're trying --- we're getting into hypotheticals, admittedly, but[,] just trying to understand what's occurring in these incidents. We're speculating a little bit." (N.T. 46).

The pragmatic problem is that none of the witnesses was present at any of the events that the memos purport to describe. Each witness merely testified about what they thought the memos meant, and consequently what they thought happened. Moreover, the memos themselves were often incomplete and error ridden. (N.T. 115, 116, 117). Therefore, the record testimony from witnesses who attempted to describe events solely from those memos has little evidentiary weight.

Moreover, to the extent the PSTA presented competent evidence of non-unit employees performing unit work, it merely showed isolated, non-unit employees taking it upon

themselves to perform bargaining unit work. There was no showing that the Commonwealth instructed them to do so. Quite the opposite; when the Commonwealth discovered that an MCEO had performed unit work, he was given a counseling memorandum the same day and admonished not to do so in the future. (N.T. 111, 144; Commonwealth Exhibit 1; PSTA Exhibit 1, p. 19).

The PSTA's charge, insofar as it alleges the Commonwealth unilaterally transferred unit work, is dismissed. However, the Commonwealth does not fare so well in the analysis of Special Order 2008-51. It is vague, and does not give employees adequate notice of what is expected of them.

The Board has long adopted the position that "rules which are, on their face, vague or overbroad will be presumed to have a greater impact on the employees than might otherwise be the case." Fairview Scholl District, 21 PPER ¶ 21079 at 203 (Proposed decision and Order, 1990)(citations omitted), 22 PPER ¶ 22135 (Final Order, 1990).

In Fairview, the Hearing Examiner found a rule that required employees to "participate in staff development activities," to be so vague as to violate PERA.⁴ The portion of Special Order 2008-51, in paragraph 11, which states that MCEO's "shall stop to assist disabled motorists," and "assist at the scene of crashes..." is no less vague. Therefore, it must be rescinded, and it is so ordered.

CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Commonwealth is the Commonwealth under Act 111, and consequently an employer under Section 3(c) of the PLRA.
2. The PSTA is a labor organization under Section 3(f) of the PLRA, as read with Act 111.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has committed unfair labor practices under Section 6(1)(a) and 6(1)(e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the Commonwealth shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA.
2. Cease and desist from refusing to bargain collectively with the representative of its employees.
3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of the PLRA:

(a) Rescind the second sentence of paragraph 11 in Special Order 2008-51;

⁴ PERA is the Public Employee Relations Act, 43 P.S. §1101.101 to 2101. As the PLRA applies to uniformed employees, PERA applies to non-uniformed employees.

(b) 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 employees and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and 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 May, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Timothy Tietze, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE POLICE ASSOCIATION :
 :
 v. : Case No. PF-C-08-106-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 PENNSYLVANIA STATE POLICE :

AFFIDAVIT OF COMPLIANCE

The Commonwealth hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111; that it has rescinded the second sentence in paragraph 11 of Special Order 2008-51; that it has posted a copy of the proposed decision and order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public