

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :
ASSOCIATION :
v. : Case No. PF-C-09-103-E
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

FINAL ORDER

On November 29, 2010, the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth or PSP) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Decision and Order (PDO) issued on November 9, 2010. In the PDO, the Board's Hearing Examiner concluded that the Commonwealth 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 transferring Corporal Rebecca Warner to Troop P through a preference transfer before she completed one full year in her position at the Bureau of Integrity and Professional Standards (BIPS). Pursuant to an extension of time granted by the Secretary of the Board, the Commonwealth timely filed a brief in support of its exceptions on December 29, 2010. The Pennsylvania State Troopers Association (Association) filed a timely response to the Commonwealth's exceptions on January 19, 2011. After a thorough review of the record, the Board makes the following:

ADDITIONAL FINDING OF FACT

12. Corporal Joseph Sarkis, Vice President of the Association, could not state whether the Commonwealth has applied the one-year minimum in-assignment requirement in the past to members transferring from BIPS to a troop through a preference transfer. (N.T. 70).

DISCUSSION

The facts of this case are summarized as follows. On June 26, 2009, the Commonwealth listed seven corporals ranked in order of eligibility for a preference transfer to Troop P in northeastern Pennsylvania. Corporal David Pope was fourth on the list for a preference transfer to Troop P. Effective July 25, 2009, the Commonwealth transferred Corporal Roger Stipcak and Corporal Warner to Troop P. Both Corporals were listed above Corporal Pope on the June 26, 2009 preference transfer standing list. Corporal Warner transferred into BIPS less than one full calendar year prior to her receiving a preference transfer from BIPS to Troop P. Corporal Pope was in his position for over one year on July 25, 2009.

PSP Field Regulation 3-2 (FR 3-2) governs transfers, such as disciplinary transfers, preference transfers, general transfers, emergency/hardship transfers and temporary intratroop transfers. Section 2.03 of FR 3-2 prescribes the eligibility requirements for a preference transfer and provides, in relevant part, as follows:

- B. Eligibility: Any member below the rank of Captain is eligible to submit a Preference Transfer Request for another Troop provided they have:
1. Completed three years of service.
 2. Served a minimum of one year in the Troop to which assigned, unless the assignment resulted from a promotion. When a promotion is concurrent with a new assignment, the one-year minimum does not apply.
 3. Served a specified time frame, if required, upon the acceptance of a specialized position.

Due to the difficulty of working against fellow members of the Department while holding a position at BIPS, the selection of qualified members for those positions is exempt from the contractually provided process. Members could also be transferred out of BIPS without any formal process if they demonstrated an inability to perform the difficult work in BIPS. In the past three years, BIPS released four members from their Bureau commitment prior to one year of service in BIPS due to inadequate performance or personal issues conflicting with their duties. All four members were transferred out of BIPS through the preference transfer system. Corporal Joseph Sarkis, Vice President of the Association, could not state whether the Commonwealth has ever applied the one-year in-assignment requirement in the past to members transferring from BIPS to a troop through a preference transfer. The one-year in-assignment requirement for preference transfers was put in place because previously members would request a transfer and within three months request another transfer. Because of seniority, these members were bumping other members.

In the PDO, the Hearing Examiner concluded that the Commonwealth's release of four members from BIPS in the past three years without the required one-year of service did not constitute a waiver of the Association's right to bargain over compliance with the one-year in-assignment requirement under FR 3-2, nor did it establish a past practice in contravention to that requirement. The Hearing Examiner further concluded that the Commonwealth did not have a sound arguable basis for interpreting FR 3-2 in a manner that eliminated the one-year in-assignment requirement for members occupying positions in BIPS. The Hearing Examiner additionally determined that the Commonwealth failed to demonstrate that it had a managerial prerogative to change or eliminate the one-year in-assignment requirement because preference transfers benefit the members, not the Commonwealth. Therefore, the Hearing Examiner held that the Commonwealth violated Section 6(1)(a) and (e) of the PLRA.

The Commonwealth alleges in its exceptions that the Hearing Examiner erred in finding that the Association met its burden of proving that the Commonwealth unilaterally changed the requirement for a preference transfer from BIPS to a troop. The Commonwealth further alleges that the record demonstrates that its practice has been to allow members to transfer from BIPS to a troop through a preference transfer without having one-year of service at BIPS.

An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining, whether established by a collective bargaining agreement or past practice. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), appeal denied, 569 Pa. 727, 806 A.2d 864 (2002); Utility Workers of America, Local 416, AFL-CIO v. Municipal Authority of the Borough of West View, 32 PPER ¶ 32187 (Final Order, 2001). Where the charge concerns a mandatory subject allegedly established through past practice, the complainant has the burden of proving by substantial, credible evidence that the employer has unilaterally changed an established practice. Delaware County Lodge No. 27, Fraternal Order of Police v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997); Fraternal Order of Police Fort Pitt Lodge 1 v. City of Pittsburgh, 37 PPER 84 (Proposed Decision and Order, 2006). In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the Pennsylvania Supreme Court defined a past practice as follows:

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 a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.

476 Pa. at 34 n.12, 381 A.2d at 852 n.12 (emphasis in original).

The Field Regulation is not a collective bargaining agreement. An alleged violation of the Field Regulation is not a unilateral change violating Section 6(1)(a) and (e)

unless it can be shown that by consistently applying the Field Regulation in a certain manner, the employer has established a binding past practice. The record shows that in the past three years, the Commonwealth has permitted four members with less than one year of service with BIPS to transfer from BIPS to a troop through preference transfers. Further, the Commonwealth presented evidence demonstrating that it has never applied the one-year in-assignment requirement under FR 3-2 to members transferring from BIPS through a preference transfer. The Association failed to rebut this evidence. Indeed, Association Vice President Sarkis could not state whether the Commonwealth has ever applied the one-year in-assignment requirement to members of BIPS utilizing the preference transfer system. Therefore, the Association has failed to present evidence to support the finding of an established past practice. See City of Pittsburgh, supra (no past practice found where employer did not consistently award two paid days off to officers working as field training officers); McCandless Police Officers Association v. Town of McCandless, 21 PPER ¶ 21071 (Proposed Decision and Order, 1990) (no past practice found where employer did not consistently apply same method in computing vacation days for officers with twenty years of service). Because the record does not support the finding of an established past practice, the Association has failed to meet its burden of proving by substantial, credible evidence that the Commonwealth unilaterally changed the one-year in-assignment requirement under FR 3-2. Accordingly, we must vacate the conclusion in the PDO that the Commonwealth violated Section 6(1)(a) and (e) of the PLRA.¹

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Board shall sustain the Commonwealth's exceptions and set aside the Proposed Decision and Order consistent with the above discussion.

CONCLUSIONS

CONCLUSIONS 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside and the following additional conclusion is made:

5. The Commonwealth has not committed unfair labor practices within the meaning of Section 6(1)(a) and (e) of the PLRA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Commonwealth of Pennsylvania, Pennsylvania State Police are hereby sustained, and the Order on pages 7-8 of the PDO is vacated. It is further Ordered that the Charge of Unfair Labor Practices be and hereby is dismissed, and the Complaint issued thereon is rescinded.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman and James M. Darby, Member, this twentieth day of September, 2011. 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.

¹ Based upon the disposition of this issue, the Board need not address the Commonwealth's remaining exceptions.