

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE, :
FOP LODGE 9 :
 :
v. : Case No. PERA-C-17-55-E
 :
SEPTA :

PROPOSED DECISION AND ORDER

On March 6, 2017, the Fraternal Order of Transit Police, FOP Lodge 9 (FOTP or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority), alleging that SEPTA violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally implementing various new policy directives on November 18, 2016 and March 2, 2017 without giving the Union 10 days' notice as required by the collective bargaining agreement. By letter dated March 27, 2017, the Board Secretary directed the Union to amend the charge by providing a copy of the collective bargaining agreement. On April 3, 2017, the Union amended the charge by providing the collective bargaining agreement and further alleging that SEPTA also violated Section 1201(a)(1) and (5) of the Act by unilaterally implementing a cell phone policy on September 1, 2016 without providing 10 days' notice. The Union also alleged that SEPTA refused to bargain over these policies, as well as the effects of the policies. In addition, the Union averred that SEPTA committed unfair practices by refusing to meet with the Union on March 30, 2017 because the Union had its attorney present.

On January 20, 2017, the Secretary issued an Amended Complaint and Notice of Hearing, assigning July 6, 2017, in Harrisburg, as the time and place of hearing, if necessary. On July 5, 2017, I continued the hearing indefinitely at the request of both parties for the purpose of permitting ongoing settlement discussions. By letter dated February 12, 2018, the Union requested that the hearing be rescheduled.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board on April 30, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. SEPTA filed a post-hearing brief on June 26, 2018. The Union filed a post-hearing brief on June 27, 2018.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. SEPTA is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4)

3. The Union is the exclusive bargaining representative for a unit of police officers employed at SEPTA. (Joint Exhibit 1)

4. The Union and SEPTA were parties to a collective bargaining agreement (CBA), which was effective from April 29, 2012 through March 31, 2016. (Joint Exhibit 1)

5. Following the expiration of the CBA, the parties entered into a successor agreement by way of a Memorandum of Agreement (MOA) on March 2, 2017, which was effective through March 31, 2018. (Joint Exhibit 2)

6. Article V, Section 3 of the CBA is entitled "Union Rights" and provides, in pertinent part, as follows:

The Authority shall make a good faith effort to notify the Union of any new Department issued permanent policy or directive, or change in any such policy or directive affecting it or its members at least ten (10) days before the effective date of such policy or directive.

(Joint Exhibit 1)

7. Article V, Section 5 of the CBA, which is also entitled "Union Rights," provides, in pertinent part, as follows:

In all matters pursuant to this Agreement and in any matter involving interaction between the Union and the Authority, the Authority shall recognize duly authorized representatives of the Union and the Union shall recognize the duly authorized representatives of the Authority and each party shall conduct business with such duly authorized representatives.

(Joint Exhibit 1)

8. Article XXXV of the CBA is entitled "Authority Rights" and provides, in pertinent part, as follows:

All management rights and responsibilities which the Authority has not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in the Authority, including, but not limited to, the right to establish and administer policies, procedures and standards of services, education, training, operations, services and maintenance of the Authority to determine Authority financial, budgetary, accounting and organizational policies and procedures; to utilize technology; to direct the workforce; to reprimand, suspend, discharge, or otherwise discipline employees for cause, to hire, promote, demote, transfer, layoff and recall employees to work; to determine the number of employees and the duties to be performed; to contract out; to maintain the efficiency of employees; to establish, expand, reduce, alter, combine, or consolidate, or abolish any operation or service; to determine staffing patterns and areas worked to establish and change work schedules and work standards; to require employees to work overtime; to control and regulate the use of facilities, supplies, equipment and other property of the Authority; to determine the number, location, and operation of the Authority,

the assignment of work, the qualifications required, and the size and composition of the work force; to make or change Authority rules, regulations, policies and practices, and otherwise generally to manage the Authority, so as to attain and maintain the full operating efficiency. The provisions of this Article will not be used to discriminate against the exercise of any rights afforded to an officer by this Agreement.

(Joint Exhibit 1)

9. Article XXXIX of the CBA is entitled "Committees" and provides, in pertinent part, as follows:

The Authority and the Union hereby establish a Safety and Productivity Committee.

The committee shall be comprised of six members, three to be appointed by the Chief of Police and three by the Union. The members appointed by the Chief of Police shall be sufficient rank to represent the Department and authoritatively address the subject matter of the committee. One of the persons appointed by the Chief of Police may be a Labor Relations Department representative...

The objectives of the Joint Safety and Productivity Committee are to cooperate in working toward achieving as promptly as possibly the most efficient and economical utilization of work forces and facilities and to achieve significantly higher productivity in the Authority's operations. It is recognized that such desired productivity depends in great part on the fairness and effectiveness of supervision, equipment for employees, and the good faith cooperation by the officers and their Union Representatives with the representatives of the Authority in the attainment of this essential goal...

Seven (7) days prior to the meetings, the Union and the Authority shall provide a written agenda or list of items to be discussed at the meeting...

The establishment of the Committee shall not affect the existing rights of either party under other provisions of this agreement and shall assist, rather than in any way limit, the Authority's right to direct the work force.

No committee meeting or report under this section shall substitute for, act, replace, or act as collective bargaining under [PERA], or modify or amend any provision of this agreement.

(Joint Exhibit 1)

10. On or about November 18, 2016, SEPTA issued a written direct order pertaining to the operation of police vehicles, which stated that, as long as an officer is inside a police vehicle, the driver's window and front passenger window must be at least halfway down. (Union Exhibit 1, 2)¹

¹ The written direct order contains exceptions for inclement weather and driving on an expressway. (Union Exhibit 1).

11. SEPTA did not provide the Union with notice of the written direct order 10 days before its effective date. (N.T. 28-30)

12. SEPTA Inspector Charles Lawson testified that the order was distributed to the supervisors who were expected to review it with their subordinate personnel during roll call when the supervisors issue various types of patrol orders for their shifts. (N.T. 105)

13. Lawson also confirmed that the order applies to all uniformed officers in a marked vehicle. (N.T. 115)

14. The Union was not aware of the written direct order until December 2016 when a bargaining unit employee was disciplined for allegedly violating the order. (Union Exhibit 3)

15. On January 4, 2017, Lawson emailed FOTP President Omari Bervine attaching a draft copy of a policy governing the use of SEPTA issued mobile cell phones. (N.T. 38-39; SEPTA Exhibit 2, Union Exhibit 5)

16. In early March 2017, SEPTA issued another order stating that "[a]ny officer who is out of the public eye, restroom, district headquarters, locker room, etc...must notify dispatch by radio with their location and reason." (N.T. 33-35, 108; Union Exhibit 3)

17. SEPTA did not provide the Union with notice of the "out of public eye" order 10 days before its effective date. (N.T. 36)

18. SEPTA distributed the "out of public eye" order at a command staff meeting among the supervisory personnel and then passed it along to bargaining unit officers at roll call in March 2017. (N.T. 33-35, 108-109)

19. By email dated March 3, 2017, Bervine indicated the following to SEPTA Chief of Police Thomas Nestel and Chief Labor Relations Officer Chad Cuneo:

On behalf of the [Union], we hereby demand to bargain over the new policy directive concerning the requirement to notify dispatch by radio whenever officers are "out of the public eye" as well as the effects of that new policy. Please contact me at your earliest convenience to schedule such negotiations.

(N.T. 36-37; Union Exhibit 4)

20. SEPTA did not respond to Bervine's March 3, 2017 email. (N.T. 37)

21. By separate email also dated March 3, 2017, Bervine indicated the following to Cuneo:

As your records will reflect, I serve as the President of the Fraternal Order of Transit Police, FOP Lodge 109, the certified and exclusive bargaining representative for Police Officers employed by [SEPTA]. I was recently provided a copy of a new Directive entitled "Authority Issued Mobile Cell Phones," which sets forth the Authority's policy and procedures relating to its

determination to issue Officers cell phones to be used for work purposes only.

In reviewing the new Directive, it was clear to the FOTP that the issuance of work phones and the policies/procedures governing their issuance and use intimately impact mandatorily negotiable terms and conditions of employment, including but not limited to officer discipline. To that end, the FOTP has taken steps to address its concerns with the Authority, most recently in a grievance meeting which took place February 10, 2017. Unfortunately, the FOTP's concerns have not been adequately addressed.

In light of the foregoing, the FOTP hereby formally demands to bargain over the substantive, as well as any impact/implementation, issues associated with the issuance/use of Authority issued cell phones, prior to implementation. Kindly provide your availability in the next several weeks to address this important issue.

Finally, in order to fully understand the nature and extent of the Authority's proposed changes, and to formulate comprehensive proposals relative to these modifications, the FOTP requests the following information:

Type, make, model of the Authority-issued cell phones;

Technology available and/or installed on the phone, including but not limited to, applications, GPS, video/audio recording capabilities, etc.;

Scope of access available to Officers who are issued Authority cell phones, i.e., internet app store, text, long distance calls, music, etc.;

I thank you, in advance, for your response. If you have any questions, please do not hesitate to contact me.

(N.T. 42-43; Union Exhibit 6)

22. SEPTA did not respond to Bervine's March 3, 2017 email. (N.T. 43)

23. At some point in March 2017, Bervine and Cuneo set up a meeting between the Union and SEPTA for March 30, 2017. The Union showed up for the meeting at SEPTA headquarters. Present on behalf of the Union were Bervine, FOTP Vice President Anthony Michetti, Treasurer John Goodman, and FOTP attorney Thomas Kohn. Nestel was present for SEPTA, along with several members of the command staff. (N.T. 43-45)

24. When Cuneo arrived for the meeting, he greeted the Union representatives and asked who Kohn was. Bervine replied that Kohn was the Union's lawyer, after which Cuneo refused to hold the meeting with Kohn present. When pressed for a reason, Cuneo stated that it was an administrative meeting, to which Bervine replied that the Union intended to bargain over the alleged policies for which they had recently demanded bargaining. Cuneo told Bervine that SEPTA had no obligation to bargain, but

that SEPTA would meet to discuss the Union's concerns, as long as Kohn was not present. At that point, the meeting concluded. (N.T. 45-47)

25. SEPTA eventually implemented the cell phone policy in June 2017. (N.T. 47; Union Exhibit 7)

DISCUSSION

The Union has alleged that SEPTA violated Section 1201(a)(1) and (5) of the Act² by repudiating various provisions of the CBA in connection with the unilateral implementation of several policies related to SEPTA issued cell phones, the "windows down" written direct order, and the "out of public eye" order. The Union also alleges that SEPTA violated the Act by refusing to bargain the implementation and impact of these policies. The Union further contends that SEPTA committed unfair practices by refusing to supply information to the exclusive representative necessary to carry out its collective bargaining obligation. SEPTA counters that the charge should be dismissed because it had no obligation to bargain the implementation or impact of any policy or patrol order, and that it had a contractual privilege for its actions here.

It is well settled that the Board exists to remedy violations of statute, i.e., unfair labor practices, and not violations of contract. Pennsylvania State Troopers Ass'n v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). Where a breach of contract is alleged, interpretation of collective bargaining agreements typically is for the arbitrator under the grievance procedure set forth in the parties' collective bargaining agreement. *Id.* at 649. However, the Board will review an agreement to determine whether the employer has clearly repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance. *Id.*

Article V, Section 3 of the CBA is entitled "Union Rights" and provides, in pertinent part, as follows:

The Authority shall make a good faith effort to notify the Union of any new Department issued permanent policy **or directive**, or change in any such policy **or directive** affecting it or its members at least ten (10) days before the effective date of such policy **or directive**. (Emphasis added).

The record shows that SEPTA clearly did not repudiate the CBA with regard to the cell phone policy. Indeed, SEPTA provided the Union with notice of the policy in January 2017, which was several months before the policy became effective in June 2017. As such, SEPTA has not committed unfair practices in violation of the Act in connection with the contractual notice provisions of the CBA related to the cell phone policy.

The same result does not obtain, however, with regard to the contractual notice provisions for the alleged "windows down" and "out of

² Section 1201(a) of the Act provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act... (5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

public eye" policies. SEPTA did not provide notice to the Union of the alleged "windows down" and "out of public eye" policies 10 days prior to their respective effective dates. SEPTA maintains that the alleged "windows down" and "out of public eye" policies are not policies at all, but rather simple patrol orders, which are not subject to the 10-day contractual notice requirements contained in the CBA. SEPTA claims that the orders are informal in nature, not necessarily permanent and were issued in response to current safety concerns. And, even if the alleged policies were permanent policies consistent with Article V, Section 3 of the CBA, SEPTA need only make a good faith effort to provide the Union with notice of the same. SEPTA's contractual privilege argument must be rejected.

Regardless of whether or not the "windows down" and "out of public eye" orders amount to policies, they are both clearly directives within the meaning of Article V, Section 3 of the CBA. Thus, it is of no consequence whether the orders are policies or simply patrol orders, as alleged by SEPTA, because they are still subject to the contractual notice provisions of the CBA. It cannot be seriously contested that a patrol order is the same thing as a directive. In fact, Cuneo himself refers to the "windows down" order as a directive in his March 10, 2017 grievance response to the Union. (Union Exhibit 2). And, even assuming the modifier "permanent" applies to the term "directive" in Article V, Section 3 of the CBA, Lawson readily conceded that the orders apply to the entire bargaining unit and that there has never been a time from the date SEPTA implemented the directives through the date of the hearing when the directives were not in effect or enforced upon bargaining unit employees. (N.T. 115-117). In fact, there is no evidence whatsoever that either directive was temporary or limited in any way. Furthermore, SEPTA cannot hide behind the "good faith effort" language in the first clause of the provision. Although SEPTA put on evidence that at least one of the orders, the "windows down" order, was motivated by safety concerns, there was no safety reason that prevented SEPTA from giving the Union the contractual notice. (N.T. 113-114).³

Likewise, the record shows that SEPTA has repudiated Article V, Section 5 of the CBA by refusing to meet with the Union while its attorney was present. Article V, Section 5 provides that:

In all matters pursuant to this Agreement and in any matter involving interaction between the Union and the Authority, the Authority shall recognize duly authorized representatives of the Union and the Union shall recognize the duly authorized representatives of the Authority and each party shall conduct business with such duly authorized representatives. (Emphasis added).

The record shows that, at some point in March 2017, Bervine and Cuneo set up a meeting between the Union and SEPTA for March 30, 2017. The Union showed up for the meeting at SEPTA headquarters. Present on behalf of the Union were Bervine, Michetti, Goodman, and Kohn, the FOTP counsel. Nestel was present for SEPTA, along with several members of the command staff.

³ Lawson described a 2016 event, in which a Philadelphia police officer survived an attack at least partly because his window was down, and he could hear his surroundings, as being the impetus for the order. (N.T. 104-105, 113-114).

When Cuneo arrived for the meeting, he greeted the Union representatives and asked who Kohn was. Bervine replied that Kohn was the Union's lawyer, after which Cuneo refused to hold the meeting with Kohn present. When pressed for a reason, Cuneo stated that it was an administrative meeting, to which Bervine replied that the Union intended to bargain over the alleged policies for which they had recently demanded bargaining. Cuneo told Bervine that SEPTA had no obligation to bargain, but that SEPTA would meet to discuss the Union's concerns, as long as Kohn was not present. At that point, the meeting concluded.

This was a clear repudiation of the parties' CBA, which requires SEPTA to recognize the duly authorized representatives of the Union and to conduct business with the same "[i]n **all matters** pursuant to [the CBA] and **in any matter involving interaction** between the Union and [SEPTA]." (Emphasis added). It is irrelevant whether SEPTA has a bargaining obligation with regard to the cell phone policy or the "windows down" and "out of public eye" directives for purposes of this provision. SEPTA still agreed to recognize the Union's duly authorized representatives and to conduct business with those representatives in any matter involving interaction between the parties. The March 30, 2017 attempted meeting was certainly an interaction between the parties. As a result, it was a clear unfair practice for Cuneo to refuse to meet with the Union while Kohn was present.

In its brief, SEPTA contends that it did not violate the Act for refusing to meet with the Union while Kohn was present because Kohn had already filed an unfair practice charge against SEPTA and SEPTA did not have its counsel present for the meeting. However, this argument is belied by the fact that Cuneo told the Union representatives that he would not meet with them while Kohn was present. Cuneo did not assert a right to have SEPTA counsel present for the meeting, nor did he propose to reschedule the meeting once SEPTA could secure the presence of its attorney. Instead, he simply refused to meet with the duly authorized Union representatives in direct contravention of Article V, Section 5 of the CBA.

SEPTA also raises the Safety and Productivity Committee provision of the CBA contained in Article XXXIX as a defense. How this provision shields SEPTA from liability, however, is unclear. First of all, the initial clause of Article V, Section 5 states that "[i]n **all matters pursuant to this Agreement and in any matter involving interaction between the Union and the Authority**, the Authority shall recognize duly authorized representatives of the Union." (Emphasis added). The Safety and Productivity Committee is clearly a matter pursuant to the CBA. Therefore, SEPTA is required to recognize the duly authorized representatives of the Union in connection therewith. What is more, the Safety and Productivity Committee provision contains no prohibition whatsoever on attorneys. To the contrary, the provision states that "[t]he committee shall be comprised of six members, three to be appointed by the Chief of Police and three by the Union." Further, the Safety and Productivity Committee provision contemplates the inclusion of various representatives where it states the following:

It is recognized that such desired productivity depends in great part on the fairness and effectiveness of supervision, equipment for employees, and the good faith cooperation by the officers **and their Union Representatives** with the representatives of the Authority in the attainment of this essential goal. (Emphasis added).

In any case, the provision also states that "[t]he establishment of the Committee shall not affect the existing rights of either party under other provisions of this agreement," which certainly includes the Union's right to have the Authority recognize and conduct business with its duly authorized representatives in Article V, Section 5. Similarly, the provision further states that "[n]o committee meeting or report under this section shall...modify or amend any provision of this agreement," which also includes the Union rights provision. Therefore, SEPTA's contractual privilege defense to the repudiation charge is rejected.

Nevertheless, SEPTA is correct in its argument that it has no bargaining obligation with regard to the implementation or impact of the various policies/directives. First of all, the record shows that the charge is premature relative to the cell phone policy. Indeed, the Union filed the initial charge on March 6, 2017, and the amended charge on April 3, 2017, long before SEPTA actually implemented the cell phone policy in June 2017. It is well settled that the Board will dismiss a charge as prematurely filed where the complainant files the charge prior to actual implementation. City of Allentown, 19 PPER § 19120 (Final Order, 1988). Likewise, SEPTA has a managerial prerogative to implement the cell phone policy, as it constitutes utilization of technology pursuant to Section 702 of PERA.⁴ SEPTA also has a managerial prerogative to implement the "windows down" and "out of public eye" directives, as they represent the simple direction of personnel under Section 702 of PERA.

The Commonwealth Court has adopted a four-part test for a prima facie cause of action when a public employee alleges a refusal to bargain over the impact of a matter of managerial prerogative. Lackawanna County Detectives' Ass'n v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000). First, the employer must lawfully exercise its managerial prerogative. Second, there must be a demonstrable impact on wages, hours, or working conditions, matters that are severable from the managerial decision. Third, the union must demand to negotiate these matters following management's implementation of its prerogative. And fourth, the public employer must refuse the union's demand. *Id.* at 794-795.

In this case, the record is devoid of any evidence that the Union demanded to bargain the impact following implementation of the cell phone policy and the "windows down" directive or that SEPTA refused any such demand from the Union. Further, the record contains no evidence whatsoever that the "out of public eye" directive has any severable impact from the managerial decision, as the Union has not demonstrated how a refusal to abide by the directive constitutes new grounds for discipline. As such, the refusal to bargain the implementation and impact of the various policies/directives portion of the charge must be dismissed. Furthermore, having concluded that SEPTA has no obligation to bargain the implementation or impact of the various policies/directives, I must decline the Union's request for a remedy

⁴ Section 702 of PERA provides that "[p]ublic employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives. 43 P.S. § 1101.702.

to rescind any discipline issued to bargaining unit members for violating the directives and limit the remedy to a cease and desist order, along with the Board's usual posting requirements.

Finally, the Union argues that SEPTA violated the Act by refusing to supply information necessary for the exclusive representative to carry out its collective bargaining obligation. However, neither the initial charge nor the amended charge can be fairly read to include such an averment. Therefore, the Union's argument in this regard is also dismissed.

CONCLUSIONS

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

1. SEPTA is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employee organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. SEPTA has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

That SEPTA shall:

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of the Act.
2. Cease and desist from refusing to bargain collectively in good faith with the employee organization which is the exclusive representative of employees in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.
3. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:
 - (a) 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;
 - (b) 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; and

(c) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this 3rd day of October, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE,	:	
FOP LODGE 9	:	
	:	
v.	:	Case No. PERA-C-17-55-E
	:	
SEPTA	:	

AFFIDAVIT OF COMPLIANCE

SEPTA hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employee Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order in the manner prescribed therein; and that it has served a 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