

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE :  
v. :  
SOUTHEASTERN PENNSYLVANIA :  
TRANSPORTATION AUTHORITY :  
CASE NO. PERA-C-17-151-E

**PROPOSED DECISION AND ORDER**

On June 9, 2017, the Fraternal Order of Transit Police (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that SEPTA discriminated against Union Vice-President Officer Anthony Michetti and deviated from long-standing past practices by denying him Union leave on May 7, 2017, a date designated as an "All-Hands-On-Deck" (AHOD) day by SEPTA.

On July 3, 2017, the Acting Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on Friday, October 27, 2017, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On January 22, 2018, the Union filed its post-hearing brief. The Authority filed its post-hearing brief on February 16, 2018.

The examiner, based upon all matters of record, makes the following:

**FINDINGS OF FACT**

1. The Authority 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. Officer Anthony Michetti has been the Union Vice President since July 2016. As Union Vice President, Officer Michetti, among other things, advocates for members, files grievances and attends grievance meetings. (N.T. 15-16)

4. Officer Omari Bervine is the President of the Union. Officer Bervine frequently requests, and has never been denied, time off for Union business. He has received approximately fourteen days off for Union business during calendar 2017, as of the October 27, 2017 hearing date. Officer Bervine has received Union leave, even though he requested it with less than three business days' notice. On May 7, 2017, Officer Bervine was off sick. SEPTA does not exercise discretionary approval authority over sick or FMLA leave. (N.T. 51-52, 67-68, 76)

5. The Authority designates several days every calendar year as AHOD days. AHOD days have existed for many years at SEPTA. SEPTA designates AHOD days on days when certain scheduled events are expected to draw, and historically have drawn, large crowds of people using SEPTA transportation. (N.T. 61-62; Employer Exhibit 4)

6. SEPTA develops an operational plan many weeks in advance of an AHOD day for covering the event on the day in question. (N.T. 63)

7. On January 12, 2016, Officer Salvatore Perpetua filed a grievance because the Authority allegedly denied him a regularly scheduled day off on St. Patrick's Day, a designated AHOD day. In the grievance, Officer Perpetua cited Article 8 of the CBA, which allegedly afforded him one set of two consecutive days off per week in a one or two-week cycle, regardless of any AHOD designation for the scheduled day off. (Employer Exhibit 1)

8. Vice President Michetti and the Union had discussed changing SEPTA's AHOD policy with management prior to May 7, 2017. It is SEPTA's policy to identify in advance all AHOD days for the entire forthcoming calendar year. The officers know in advance not to schedule vacation days, and other non-medical, non-sick leave, that would include any of the AHOD days. (N.T. 17, 35, 60, 75-76)

9. On December 8, 2016, Captain James Reynolds issued a memorandum to all supervisory police personnel, in which SEPTA designated five AHOD days during calendar year 2017. Sunday, May 7, 2017, the day of the Broad Street Run, was explicitly designated as an AHOD day. SEPTA police supervisors distributed the information to all the officers. (N.T. 43-44, 60-63; Employer Exhibit 4)

The SEPTA memo further provides as follows:

When Planning future work schedules involving the below dates, supervisors will restrict, as in deny, personnel requested time off. Time off is defined as overtime compensation hours, holiday compensation day, vacation and personal days off.

It is important to have all personnel working during these public events that public transportation has a high volume of passengers and/or has an elevated potential for acts of terrorism. Only a primary vacation week is to be considered for granting time off on these dates. Restrictions include having only one officer off from the same shift during these dates. It is the officer's responsibility to manage their time off around the Transit Police department's public safety obligations. Commanders will deny supervisors and officers requests for a one, two, three, four and even five individual days off that overlap any of the major events that are scheduled.

(Employer Exhibit 4)

10. Officer Michetti is assigned to the overnight or "last-out" shift, also referred to as the "A Tour," which covers 11:00 p.m. to 7:00 a.m. He is assigned to Pattison Station, which is the last stop along the Broad Street Run. Officer Michetti is responsible for locking down and opening the system at Pattison during the week. On weekends, trains operate all through the night and Officer Michetti is responsible for patrolling. During the early morning hours of Sunday,

May 7, 2017, Officer Michetti was responsible for sweeping the trains and checking for bombs and other items left behind. (N.T. 20-22, 58, 66)

11. The Broad Street Run is an annual ten-mile race on the first Sunday in May, along Broad Street in Philadelphia. Racers and attendees use SEPTA transportation. There are 40,000 to 43,000 participants who run in the race. The City provides stadium seating for spectators. The Broad Street subway line is used to capacity on that day. (N.T. 59-61; Employer Exhibit 4)

12. On April 13, 2017, Officer Carl Anderson, Jr. submitted a "Request for Day Off." Officer Anderson is assigned to the Last-Out shift like officer Michetti. In his Aril 13<sup>th</sup> request, Officer Anderson requested May 6, 2017 and May 7, 2017 off for vacation. Officer Anderson's request for May 6<sup>th</sup> was denied for manpower reasons. His May 7<sup>th</sup> request was denied because the day was designated as an AHOD day. Officer Anderson is not a Union officer, and his request was denied even though it was made several weeks in advance of the AHOD. (N.T. 37-38, 41, 74; Employer Exhibit 2)

13. On April 30, 2017, Officer Alex Svay submitted a "Request for Day Off." Officer Svay is also assigned to the same "last-out" shift as Officer Michetti. In his request, Officer Svay requested leave for Sunday, May 7, 2017. Officer Svay's request was denied because of the Broad Street Run, which was an AHOD day. (N.T. 39, 41, 74; Employer Exhibit 3)

14. On Wednesday, May 3, 2017, at 4:49 p.m., Officer Michetti emailed Labor Relations Manager, Chad Cuneo, as follows: "Chad please hold me off Union time from April 5, 2017 to April 14, 2017." The next morning, Thursday, May 4, 2017, Mr. Cuneo responded: "Do you mean May?" (N.T. 71-72, 83; Employer Exhibit 5)

15. Officer Michetti wanted to attend Police Week in Washington D.C., which is a two-week event to meet with other FOP organizations. Police Week offers training regarding grievances, arbitrations and other Union related business. Officer Michetti planned to be "on [SEPTA] property," and available on May 7, 2017, but wanted to be off duty unless called upon. (N.T. 18-19, 23, 27-28, 46)

16. Officer Michetti responded Friday, May 5, 2017 as follows: "Yes I apologies [sic] for the confusion that would be May." The same day, Mr. Cuneo consulted with commanding officers to see if they could accommodate Officer Michetti's request for May 7, 2017. Command staff could not accommodate the request because all officers in the operational plan for the Broad Street Run were needed. On May 5, 2017, Mr. Cuneo responded as follows: "Anthony—your Union leave is approved for the dates you listed May 5 to May 15, 2017—except Sunday May 7, 2017—you cannot be released on that date due to manpower requirements." Mr. Cuneo also discussed this with Officer Michetti, who was granted the days off before and after the Broad Street Run. (N.T. 28, 44-45, 71-72, 77, 82-84; Employer Exhibit 5)

17. Every officer is plugged into an operational plan for AHOD days months in advance of the day. Every Officer in the plan is a vital component to maintaining safety and authority during large scale events. By the time Officer Michetti requested leave for May 7, 2017, operational plans had been prepared and developed for some time. SEPTA

needed all the officers included in the operational plan for the Broad Street Run on May 7, 2017.

18. Before SEPTA received and denied Officer Michetti's request for leave on the AHOD day of May 7, 2017, it had already denied other officers' leave requests for the same day and the same shift as Officer Michetti's. Union leave has never been denied until Officer Michetti's request for Union leave for May 7, 2017. There has never been a request for Union leave on an AHOD day. Officer Michetti was in fact aware, as of December 2016, that May 7, 2017, was an AHOD day. He gave less than three days' notice for his leave request. (N.T. 18, 20-24, 72, 75-76, 80)

19. The SEPTA command staff, including the Chief, all worked during the Broad Street Run on May 7, 2017. (N.T. 67)

20. The Authority excuses officers from AHOD days when they are taking sick or FMLA leave. Some officers were excused from working on the day of the Broad Street Run, on May 7, 2017, because they were sick. Eight-to-ten officers took sick or FMLA leave. (N.T. 67-68)

21. Officer Matthew Ryan was approved for a vacation in Ireland that included May 7, 2017. Officer Ryan requested his vacation in Ireland one full year in advance. Officer Ryan's wife had a business trip scheduled for Ireland, which the couple sought to extend into a vacation. Officer Ryan's request for vacation on May 7, 2017, significantly predicated the Authority's preparation and development of its operational plan for the day of the Broad Street Run. (N.T. 67-68)

22. Other than Officer Ryan, no other officer was approved for vacation or compensation time on May 7, 2017. (N.T. 67-68)

23. Article 5, Section 2 of the parties' collective bargaining agreement (CBA) provides as follows:

The Union will notify, preferably in writing or by fax, the Labor Relations Department at least three (3) working days (Monday to Friday) in advance of any requested calls off for Union business except in the case of an emergency. The request will include the names and locations of the officers to be called off and will be granted subject to the operational needs of the Department as determined by the Department. Normally a request from the President or Vice-President of the Union will not be denied. Upon receipt of a request, the Labor Relations Department will notify Police Administration which will prepare the call off form which will be given to the Captain of Patrol to sign and when signed will be faxed to the direct supervisor of the officers to be called off.

(Joint Exhibit 1, Article 5, Section 2)

#### **DISCUSSION**

As an initial matter, the Union, for the first time in its post-hearing brief, raises a claim for an independent violation of Section 1201(a)(1) for the Authority's denial of Officer Michetti's Union leave request for May 7, 2017. (Union's Post-hearing Brief at 8 & 20). However, the Union did not allege an independent cause of action under Section 1201(a)(1) in its specification of charges. Accordingly, the

Union did not preserve the cause of action within the four-month limitations period and the Authority was not afforded adequate notice or opportunity to defend such a claim at the hearing. Therefore, I am without authority or jurisdiction to consider whether SEPTA's actions constituted an independent violation of Section 1201(a)(1).

The Union argues that the Authority discriminated against Officer Michetti in retaliation for his protected Union activity when it denied him Union Leave on May 7, 2017. In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employee engaged in activity protected by PERA; (2) that the employer knew that the employee engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employee's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employee's prima facie case. Stairways, supra. Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). A pre-eminent factor in sustaining a charge of discrimination is a determination that the employee in question was the victim of disparate treatment by the employer. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989).

In this case, there is no question that SEPTA management was well aware of Union Vice-President Michetti's protected Union activities. However, the Union failed to establish a prima facie case of discrimination. The record lacks substantial, competent evidence from which to infer that the Authority was unlawfully or discriminatorily motivated when it denied Officer Michetti Union leave on May 7, 2017.

The Union contends that SEPTA retaliated against Officer Michetti by denying Union leave during the Broad Street Run because he and the Union regularly raised the membership's objections to the Authority's ongoing practice of designating AHOD days, at labor-management meetings and through the filing of a grievance, and because of his other protected activities as Union Vice-President. The Union also argues that because Union leave was never before denied a Union officer and because other officers were on leave the day of the Broad Street Run, Officer Michetti was treated disparately. I find no evidence supporting the Union's position.

The Authority did not treat Officer Michetti any differently than any other officer. The Authority presented credible evidence that it denied leave to two other officers on Officer Michetti's shift on the same day. The record shows that Union leave has never been approved during an AHOD designated day and that Officer Michetti and Officer Bervine have never been denied Union leave at any other time. Contrary to the Union's argument, the fact that Officer Perpetua filed a grievance for being required to work on a regularly scheduled day off coinciding with an AHOD day (St. Patrick's Day), indeed, supports the Authority's position that, under the CBA and pursuant to past practice, leave will not be approved for any officer or commanding officer, including the Chief, for an AHOD day, especially when scheduled or

requested after the deployment plan preparation. There simply is no nexus between the Perpetua grievance and the Authority's denial of Officer Michetti's Union leave request for May 7, 2017. There is no evidence that the Perpetua grievance was in any way related to the reasons for the leave denial.

Also, Officer Michetti was not treated differently than the officers who called off sick or used FMLA leave on May 7, 2017 or other AHOD days. The Authority consistently accepts those types of leave, which is unlike SEPTA's exercise of authority to approve compensation, vacation or Union leave. The Authority does not restrict approval for sick or FMLA leave on any given day including AHOD days. Officers who take sick or FMLA leave are not in a similar situation as officers who seek vacation, compensation, holiday compensation or Union leave. Fundamentally, officers who are sick or taking FMLA leave for their own personal medical condition cannot fully perform police duties, which often include confronting hostile individuals or groups.

There simply is no precedent for granting Union leave on an AHOD day, and the Authority established that AHOD days have been in place for years. Whether SEPTA properly exercised its authority to deny leave in this case under the CBA and past practice is irrelevant to whether it exercised its authority in a non-discriminatory manner. It matters only that I have credited SEPTA's business reasons as the motive for their decision to deny leave to Officer Michetti on May 7, 2017.

The Union also points to Officer Ryan's approved vacation to Ireland as disparate treatment of Officer Michetti. However, the record clearly establishes that the circumstances surrounding Officer Ryan's request were not at all similar to those surrounding Officer Michetti's request. Officer Ryan obtained approval for his vacation, which included the day of the Broad Street Run, a full year in advance and well before the Authority developed and prepared its deployment plan for that day, which allowed the Authority to make the appropriate adjustments to its deployment complement. Officer Michetti, however, requested Union leave for that day just days before the Broad Street Run and after the deployment plan had been developed. Officer Michetti's late request to be excused from working an AHOD day was unreasonable since he was aware of the AHOD designation for May 7, 2017 and was aware of Police Week for a long time. Although Officer Michetti testified that he was a late replacement for Officer Bervine, who was supposed to go to Police Week instead, Officer Bervine never requested the day for Union leave with enough advance notice for the Authority to adjust its complement.

Rather than establishing disparate treatment, the record shows that SEPTA has a non-discriminatory, evenly-applied, no-exceptions policy. The policy requires that officers are not to be released on an AHOD day, unless there is adequate notice at or before the beginning of the calendar year so that SEPTA's commanding officers can make the appropriate adjustments and preparations for deployment on days involving security threats resulting from the large number of people in the transit system. Officer Ryan's vacation request a year in advance of the Broad Street Run conformed to the established policy. Therefore, Officer Ryan and the Officers on sick or FMLA leave are not similarly situated to officer Michetti, and the Union did not establish any disparate treatment of Officer Michetti.

The best evidence of SEPTA's non-discriminatory and non-discretionary AHOD policy is its December 8, 2016 memo. The memo from Captain Reynolds explicitly provides that supervisors are required to deny any requested time off without discretion whether it is compensation time, holiday compensation time, vacation or personal time off. Significantly, sick and FMLA leave are not restricted for AHOD days, which is consistent with the record as a whole and past practice. Moreover, Captain Reynold's memo is consistent with permitting Officer Ryan's vacation to Ireland, which overlapped May 7, 2017. The memo expressly provides that "[o]nly a primary vacation week is to be considered for granting time off on these dates. . . . Commanders will deny supervisors and officers requests for a one, two, three, four and even five individual days off that overlap any of the major events that are scheduled." (F.F. 9).

Moreover, Officer Michetti was approved for all the leave he requested before and after the Broad Street Run and was never denied Union leave even after his protected activity. There simply is no evidence that the Authority retaliated against Officer Michetti. Also, I credit the Authority's reasons for denying Officer Michetti's Union leave on May 7, 2017, and I find that the Union's argument, that the Authority's reasons are pretextual, to be unfounded. The CBA requires that Union officers request Union leave at least three weekdays in advance of Union leave and that NORMALLY a request from the Union President or Vice President will not be denied subject to operational needs. The CBA clearly contemplates denying Union leave to the Union President or Vice-President on an AHOD day where operational needs require the commitment, service and protection of every officer for adequate security during large scale events, such as the Broad Street Run, which pose significant security risks. Indeed, I credit the Authority's assertion that it was relying on and applying the CBA's allowance for denying leave based on operation needs in requiring Officer Michetti to be on duty during the Broad Street Run. The non-discretionary application of an unambiguous contractual provision cannot be discriminatory. Accordingly, the record supports the Authority's denial of Officer Michetti's request for Union leave on May 7, 2017, and there is no evidence of discriminatory retaliation or unlawful motive.

Although the three-day contractual notice requirement has been waived in the past, there is no evidence that, Union officers have ever been granted Union leave on an AHOD day. Indeed, the record shows that the Authority goes out of its way to accommodate the Union leave requests of the Union officers.

The Union also argues that SEPTA violated its bargaining obligation under Section 1201(a)(5) of PERA when it denied Officer Michetti Union leave on a designated AHOD day. The Union relies on Article 5, Section 2 of the CBA and emphasizes that "normally" such leave shall be granted, but here it was denied which is inconsistent with the CBA and inexcusable considering Officer Ryan was permitted to go to Ireland on the same day. (Union's Post-hearing Brief at 19).

The Union's interpretation of the CBA may be reasonable, but so is that of the Authority. Also, there is no precedent, let alone past practice, for approving Union leave on an AHOD day. In Fraternal Order of Transit Police v. Southeastern Pennsylvania Transportation Authority (SEPTA), 35 PPER 73 (Final Order, 2004), the Board aptly opined as follows:

In Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212, 117 L.R.R.M. 1062 (1984) and Vickers, Inc., 153 N.L.R.B. 561, 59 L.R.R.M./ 1516 (1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 28 PPER 28200, at 433 (Final Order, 1997). The Commonwealth Court has sanctioned the Board's adoption and application of the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB (PSTA I), 804 A.2d 1291 (Pa. Cmwlth. 2002); Pennsylvania State Troopers Ass'n v. PLRB (PSTA II), 761 A.2d 645 (Pa. Cmwlth. 2000). "The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained for agreement, for the claim that the employer's action was permissible under the agreement." PSTA II, 761 A.2d at 651. "An employer's interpretation need not necessarily be the correct interpretation in order to provide a valid defense, so long as there is a 'sound arguable basis' for its interpretation and a 'substantial claim of contractual privilege.'" Jersey Shore, 28 PPER at 340. In this regard, **the Board "will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct."** Id. at 341 (quoting NCR Corp., 117 L.R.R.M. at 1063).

SEPTA, 35 PPER at 229 (emphasis added). Accordingly, an employer does not engage in unfair practices in violation of Section 1201(a)(1) and (5) of PERA if it has a sound arguable basis for ascribing a particular meaning to the applicable contractual language and if its actions are in accordance with that construction of the agreement. Pennsylvania State Troopers Ass'n, 761 A.2d at 651.

I conclude that the Authority in this case had a sound arguable basis for relying on Article 5, Section 2 of the CBA for the authority to deny any and every officer, including Union officers, leave for any reason on AHOD days, in the interest of operational needs and security concerns, in a neutral, non-discriminatory manner, as occurred in this case. The record shows that the Authority neutrally applied this contractual provision and long-standing AHOD policy to both non-Union and Union officers alike, and that it properly relied on this provision to deny the late Union leave request of Officer Michetti for May 7, 2017. Consequently, there has been no change in terms and conditions of employment.

Accordingly, the Union did not meet its burden of proving the necessary elements of its causes of action under Section 1201(a) (1), (3) and (5), and the charge of unfair practices is dismissed in its entirety.

## **CONCLUSIONS**

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

1. The Authority is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Authority has not committed unfair practices within the meaning of Section 1201(a)(1), (3) or (5) of PERA.

## **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 and become final and binding.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of February, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner