

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
 v. : Case No. PERA-C-07-123-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF CORRECTIONS :
 GRATERFORD SCI :

FINAL ORDER

The Pennsylvania State Corrections Officers Association (Association) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on July 19, 2011 to a Proposed Decision and Order (PDO) issued on June 30, 2011. In the PDO, the Hearing Examiner concluded that the Commonwealth of Pennsylvania (Commonwealth) did not violate Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by continuing to require employes to treat with a panel physician for ninety days for injuries under the Heart and Lung Act. The Commonwealth filed a timely brief in response to the exceptions on August 2, 2011. The facts found by the Hearing Examiner are not in dispute and, for purposes of the exceptions, are summarized as follows.

Since 1995, the Commonwealth has required bargaining unit employes, who have suffered work-related injuries and sought benefits under the Heart and Lung Act, to obtain treatment for that injury from a list of medical providers designated by the Commonwealth for the first ninety days after the injury. In a letter dated February 8, 2002, the Association raised the issue of eliminating the requirement of treating with panel physicians for Heart and Lung benefits. Sometime after that letter, the Association and the Commonwealth held a meeting during which the subject of panel physicians was raised. At the meeting, Commonwealth representatives stated that the Commonwealth did not distinguish between treatment under the Heart and Lung Act and the Workers Compensation Act and that there was no reason to change the procedure of treating with panel physicians for the first ninety days.

In 2006, the Association and the Commonwealth entered into an agreement titled "MEMORANDUM OF UNDERSTANDING PROVIDING FOR PROCEEDINGS BEFORE THE COMMONWEALTH OF PENNSYLVANIA HEART AND LUNG ACT/ACT 534/ACT 632 GRIEVANCE ARBITRATION PANEL" (Agreement). Section 1 of the Agreement defines its scope as follows:

This Agreement applies to all proceedings before Arbitrators Ralph Colflesh and Thomas McConnell and any future arbitrators selected by the parties pursuant to Paragraph 10 of the January 31, 2006 Interest Arbitration Award to hear appeals of claims filed pursuant to the "Heart and Lung Act."

Section 3 of the Agreement provides, in relevant part, as follows:

(b) The Claimant shall provide the [Commonwealth] with a list of all medical providers who have provided treatment for the claimed injury and shall execute a medical release authorizing the release of the medical providers' records to the Commonwealth.

(c) The Commonwealth shall have the right to have all claimants examined by a physician of the Commonwealth's choosing.

The Commonwealth has not at any time since 1995 changed the practice of requiring injured employes to treat with a panel physician for the first ninety days. Indeed, following the 2006 Agreement, the Commonwealth continued to require corrections officers at all of its correctional institutions to treat with designated panel physicians for ninety days after an injury.

The Hearing Examiner determined that the Association's allegations in the charge failed to place the Commonwealth on notice of the specific acts the Association was asserting to be the unfair practice, and therefore, dismissed the Association's charge. In the alternative, the Hearing Examiner concluded that even if the charge had been sufficiently pled, the Association failed to establish that the Commonwealth violated Section 1201(a)(1) and (5) of PERA by continuing the practice of requiring employes to treat with a panel physician for the first ninety days following a work injury.

The Association filed timely exceptions arguing that the Hearing Examiner erred in dismissing its charge of unfair practice. The Association asserts, *inter alia*, that the Hearing Examiner erred in failing to find that the Commonwealth committed an unfair practice on November 16, 2007, by continuing to require employes to treat with panel physicians contrary to the Association's understanding of the parties' 2006 Agreement concerning the procedures for Heart and Lung Act claims.

Treatment with panel physicians and the procedures for resolving claims under the Heart and Lung Act are mandatory subjects of bargaining. New Britain Township Police Benevolent Association v. New Britain Township, 33 PPER ¶33069 (Final Order, 2002; County of Delaware v. PLRB, 735 A.2d 131 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 561 Pa. 679, 749 A.2d 473 (2000). Therefore, lawful practices governing treatment and processing of employe claims under the Heart and Lung Act may rise to a binding past practice that establishes employe wages, hours and working conditions. New Britain Township, *supra*. To establish an unfair practice for a unilateral change in wages, hours and working conditions, the complainant must prove that the employer has, in fact, changed a mandatory subject of bargaining contrary to an express agreement or binding past practice. Minersville Area Educational Support Personnel Association v. Minersville Area School District, 41 PPER 31 (Final Order, 2010); Montgomery Township Police Officers v. Montgomery Township, 37 PPER 140 (Final Order, 2006). Thus, for purposes of the case here, in the absence of an agreement of the parties to change or eliminate a lawful practice regarding treatment with panel physicians under the Heart and Lung Act, the employer would not violate PERA by maintaining the *status quo* with respect to that practice. See Montgomery Township, *supra*.

The record is clear that since 1995, the Commonwealth has required employes to treat with a panel physician for ninety days for injuries falling under the Heart and Lung Act. The 2006 Agreement makes no mention of the practice, nor does it contain language expressly eliminating this requirement. Indeed, the Association, in its brief on exceptions, acknowledges that "[t]here is no language in that agreement that requires claimants to treat with any particular physician. Language continuing the ... panel-doctor requirement is conspicuously absent from this 13-page document. Nowhere is a panel of Department-selected physicians even mentioned." (Association's Brief in Support of the Exceptions at 4). Moreover, the Hearing Examiner succinctly found as follows:

The substantial evidence of record clearly establishes that the Commonwealth has consistently and uninterruptedly required bargaining unit employes to treat with designated panel physicians for ninety days after a work related injury to receive Heart and Lung benefits since 1995. The record is clear that there has been no change in that practice or policy since 1995 and that there is no evidence that the parties reached an agreement to change or eliminate the practice. Because nothing has changed, the Union's allegation that it was "advised by management for the first time" of this "new term and condition of employment" is contrary to the record.

(PDO 4-5). Because no agreement has changed or eliminated the practice of requiring employes to treat with panel physicians for the first ninety days for injuries under the Heart and Lung Act, the Commonwealth has not altered the *status quo* in contravention of its statutory bargaining obligation under Section 1201(a)(5) of PERA by continuing the practice on and after November 16, 2007.¹

¹ Because we have affirmed the Hearing Examiner's conclusion that the Commonwealth has not violated Section 1201(a)(1) and (5) of PERA on the merits, we need not address the Hearing Examiner's procedural dismissal of the Charge for lack of specificity in the pleadings.

After a thorough review of the exceptions and all matters of record, we find that the Hearing Examiner did not err in concluding that the Commonwealth did not violate Section 1201(a)(1) and (5) of PERA by continuing the practice of requiring correctional officers to treat with a panel physician for the first ninety days following injuries under the Heart and Lung Act. Accordingly, we shall dismiss the Association's exceptions and make the PDO final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Pennsylvania State Corrections Officers Association are hereby dismissed, and the June 30, 2011 Proposed Decision and Order, be and hereby is made absolute and final.

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.