

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA LIQUOR ENFORCEMENT :
ASSOCIATION :
:
v. : Case No. PERA-C-13-1-E
:
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :
BUREAU OF LIQUOR CONTROL ENFORCEMENT:

FINAL ORDER

The Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement (Commonwealth) filed timely exceptions with the Pennsylvania Labor Relations Board [Board] on January 27, 2014, to a Proposed Decision and Order (PDO) issued by the Hearing Examiner on January 6, 2014, finding that the Commonwealth violated Section 1201(a)(1) and {5} of the Public Employe Relations Act (PERA).¹ Following an extension of time granted by the Secretary of the Board, the Commonwealth filed a brief in support of the exceptions on February 24, 2014. The Pennsylvania Liquor Enforcement Association (Association) filed a brief in response to the exceptions on March 14, 2014. After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDING OF FACT

24. The Commonwealth issued a Special Order for Automatic Vehicle Locators (AVLs) directing supervisors to perform random checks. In a memorandum issued on March 20, 2013, Major John P. Lutz, Director of the Bureau of Liquor Control Enforcement directed that "[a]ll supervisors shall also utilize the Sagequest MobileControl website to regularly review the driving habits and behaviors for officers under their command. Should unsafe or erratic driving patterns be revealed, appropriate supervisory action should be taken." (N.T. 132; Association Exhibit 3).

DISCUSSION

In the Charge of Unfair Practices filed by the Association on January 2, 2013, the Association alleged that the Commonwealth violated Section 1201{a)(1) and (5) of PERA by implementing AVLs without bargaining with the Association over the installation of the AVLs or 4 their effects on the wages, hours and working conditions of the Liquor Enforcement Officers (LEOs), Upon hearing the testimony and weighing the evidence presented by the parties, the Hearing Examiner determined that the installation of the AVLs in Commonwealth vehicles was a managerial prerogative not subject to collective bargaining. With regard to the impact of the AVLs on the LEOs' wages, hours and working conditions, the Hearing Examiner determined that the LEOs' concerns over security and wages were not severable from the managerial decision to install the AVLs and therefore those issues were subject only to a meet and discuss requirement under PERA. However, the Hearing Examiner held that implementation of the Commonwealth's policy to utilize information from

¹The twentieth day following issuance of the PDO, January 26, 2014, was a Sunday and therefore is excluded from computation of the period for filing of exceptions. 34 Pa. Code §95.100(b).§95.100(b).

the AVLs to assess "erratic driving" and impose discipline for it imposed a severable change upon the LEOs' working conditions that was subject to collective bargaining. Accordingly, the Hearing Examiner concluded that the Commonwealth violated Section 1201(a)(1) and (5) of PERA by failing to engage in impact bargaining with respect to the discipline relative to "erratic driving".

It is this conclusion, regarding the impact of discipline for "erratic driving", from which the Commonwealth has filed exceptions.² Accordingly, the Hearing Examiner's Findings of Fact (FF), as amended, and relevant to the exceptions, are summarized as follows.

LEOs employed by the Commonwealth conduct both undercover and uniform investigations dealing with alcohol offenses at licensed and unlicensed establishments. (FF 3) LEOs who are members of the bargaining unit are provided with take-home vehicles for commuting to and from work and for use throughout the workday. (FF 4)

In January 2010, the Commonwealth notified the Association of a meet and discuss session regarding AVLs, which would monitor the LEOs' location, speed, and driving habits, such as fast starts, hard turns, and erratic driving.³ However, the AVLs were not installed at that time. (FF 5)

On October 31, 2012, the Commonwealth held another meet and discuss session with the Association, during which the AVLs were discussed once again. The Commonwealth indicated that the AVLs would be used for accountability, and advised the Association that the AVLs could be used for disciplinary actions. (FF 6) As a result of the October 31, 2012 meeting, the Association President had concerns about how the AVLs would be used for discipline and enforcement of the rules. Although LEOs are required by administrative regulation to abide by all traffic laws, the Commonwealth has not provided any specific instruction, rules, policies or guidelines concerning "erratic driving" as monitored by the AVLs. (FF 7, 17 and 19).

On or about December 4, 2012, the Commonwealth began installing the AVLs. The Association demanded impact bargaining on December 5, 2012 relative to their concerns about the disciplinary process. The Association President

²The Association has not filed exceptions from the Hearing Examiner's determination that installation of the AVLs was a managerial prerogative or from the decision that security and wage issues are not severable from the decision to install AVLs in the vehicles.

³The AVL is a device that tracks the GPS location of the vehicle and downloads the information every 30 seconds through a cellular phone system to a server at Sage Quest. The data is then stored on that server for the Commonwealth to view live or retrieve historically. The AVLs were not installed for someone in an office to continually track the LEO vehicles, but rather as a resource for supervisors who have a concern about one of their subordinates. (FF 26)

had concerns regarding alleged inaccuracies of the AVLs which had been reported to him. (FF 16)⁴

The AVLs monitor real time location, speed, hard stops, hard accelerations, and hard cornering. (FF 22)⁵ The AVL system sends out individualized alerts based upon criteria or specifications set by the LEOs' supervisor. (FF 22) Major Butler has advised the Section Supervisors and District Office Commanders that hard starts, hard stops, and hard cornering are not to be taken at face value, meaning that they need to be investigated, but speeding presents a different situation where there is less latitude for that type of conduct. (FF 22) Major Butler suggested setting the AVL system to be notified of speeding in excess of 20 mph over the speed limit or 85 mph. However, supervisors have discretion and there could be supervisors who set their alerts to 20 mph over the limit, while others might have zero tolerance and want alerts for anything at all over the limit. (FF 23)⁶

Prior to the AVLs, the Commonwealth did not monitor the driving habits of LEOs. The only monitoring of driving habits occurred if a LEO was stopped by a local or state police officer. If so, the LEO was provided with an opportunity to be questioned and offer an explanation immediately. (FF 14) After installation of the AVLs, LEOs are not given an opportunity to review the AVL data at or near the time of the occurrence to note any discrepancies or provide an immediate explanation. (FF 17)

By the end of December 2012, all of the vehicles utilized by LEOs had AVLs in them. (FF 8) As of January 2, 2013, the Commonwealth had not responded to the Association's demand for impact bargaining. (FF 9)⁷

To establish an unfair practice for refusing to impact bargain, the employs representative must prove that (1) the employer exercised its managerial prerogative; (2) there was a demonstrable impact on employe wages, hours, or working conditions that is severable from implementation of the managerial prerogative; (3) the employe representative demanded to impact

⁴ Specifically, the Association President, received an email alert through the AVL system for "erratic driving" for driving 83 mph in a 55 mph zone. The Association President could not specifically recall speeding on that day and had to think about where and why it might have occurred. He was told by his supervisor to slow down. The Association Vice President has also received similar notifications. (FF 15)

⁵ There are tolerances built into the system by the vendor Sage Quest, but no evidence was introduced concerning those tolerances. (FF 21 and 22)

⁶ Major Butler further advised that LEOs with three or four accidents should be monitored more closely than those employes who have never had an accident. (FF 23)

⁷ On March 20, 2013, the Commonwealth issued a Special Order for AVLs directing supervisors to perform random checks on LEOs. Major John P. Lutz, Director of the Bureau of Liquor Control Enforcement directed that "[a]ll supervisors shall also utilize the Sagequest MobileControl website to regularly review the driving habits and behaviors for officers under their command. Should unsafe or erratic driving patterns be revealed, appropriate supervisory action should be taken." (FF 24)

bargain following management's implementation of its prerogative; and (4) the employer refused to bargain. Lackawanna County Detectives' Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000). There is no dispute that installation of the AVLs was a managerial prerogative, and that disciplinary matters constitute a working condition for purposes of PERA. PLRB v. City of Erie School District, 9 PPER § 9031 (Final Order 1978), aff'd, 10 PPER § 10112 (Court of Common Pleas of Erie County 1979). The issue presented in the exceptions is whether the Association has established a demonstrable impact on employe discipline that is severable from the managerial decision to install AVLs in Commonwealth vehicles.

Generally, where an employer exercises its managerial prerogative to install new technology to monitor employe behavior for purposes of discipline under existing rules, the disciplinary aspects of employe working conditions remain unchanged, and thus there is no impact on the employee that is severable from introduction of the new technology. FOP, Lodge No. 5 v. City of Philadelphia, 29 PPER ¶29000 (Final Order, I 1997); FOP, Lodge No. 9 v. City of Reading, 27 PPER ¶27259 (Final ' Order, 1996); see Oil City Area Education Association v. Oil City Area School District, 34 PPER 31 (Proposed Decision and Order 2003)(holding that union's claim of a duty to bargain over the impact of installation of cameras on employe discipline must be dismissed because the record indicates that installing cameras did not have the effect of changing guidelines or procedures for disciplining employes). However, where the employer exercises a managerial prerogative to install monitoring devices, but uses the enhanced monitoring of the new technology to create new rules or more stringent guidelines, or to alter the procedures for review of employe conduct, those new rules, guidelines, or procedures constitute a severable impact on working conditions that is mandatorily negotiable under PERA. Amalgamated Transit Union, Division 1279 v. Cambria County Transit System, 21 PPER §21007 (Final Order 1989), aff'd, 22 PPER §22056 (Cambria County Court of Common Pleas, 1999).

The Commonwealth argues on exceptions that the Hearing Examiner erred in failing to make findings regarding the "just cause" requirements for discipline contained in the collective bargaining agreement as allegedly evidencing bargaining over the impact of enforcement of work rules concerning "erratic driving". However, in rejecting this very same argument in AFSCME, Council 13 v. Commonwealth, Department of Transportation, 22 PPER ¶22015 at 32 (Final Order, 1990), the Board stated that "the presence of a just cause provision in the parties' collective bargaining agreement certainly does not show that they bargained over the changes in the work rules..."

In the PDO, the Hearing Examiner expressly held that the rules, guidelines and procedures relative to employe discipline for "erratic driving" were altered by the Commonwealth under the auspices of the enhanced monitoring available through the AVLs. Specifically, the Hearing Examiner stated as follows:

In any event, the AVL system has actually changed the disciplinary procedures, despite the Commonwealth's argument to the contrary. As set forth above, the Commonwealth did not monitor the driving habits of LEOs prior to the installation of the AVLS. The only monitoring of driving habits occurred if an LEO was stopped by a local or state police officer, at which time the LEO was immediately provided with an opportunity to be questioned and explain things. In contrast, under the AVL program, 2 the Commonwealth now has the ability to retrieve historically the AVL information and question individual LEOs about erratic driving behaviors at any time the supervisor pleases, which could be weeks or months following the incident, thereby placing the employe at a significant disadvantage. What is worse, there are no actual rules or policies regarding the tolerances for these erratic driving behaviors, placing bargaining unit members at considerable risk of disparate treatment. In essence, the Commonwealth has created a new ground for discipline to the extent the erratic driving behaviors are not covered by the vehicle code. Although LEOs have always been expected to abide by all traffic laws, a fast start, hard stop, or other erratic driving behaviors do not necessarily violate the motor vehicle code. Nevertheless, bargaining unit members could be subject to discipline for these nebulous infractions.

(PDO at 8-9).

The Commonwealth argues, however, that the LEOs were always required by administrative regulations to abide by all traffic laws. However, as correctly pointed out by the Hearing Examiner, "erratic driving" is undefined in the Vehicle Code and is not a crime or contained in any traffic law. The driving behavior of a LEO was previously assessed by a police officer's first hand witnessing of the circumstances as they occurred, and/or the LEO's explanation at the scene, and viewed under the officer's knowledge of the Vehicle Code and traffic laws.⁸ LEOs now, however, based on a historical

⁸The Commonwealth argues that Finding of Fact 14 is in error because complaints concerning LEOs' driving were allegedly not limited to police officers. Rather according to the Commonwealth, Thomas Butler, the Director of the Bureau of Liquor Control Enforcement, also received anonymous complaints from the public concerning the driving behaviors of the LEOs. It is apparent from review of the PDO and the record, that the Hearing Examiner discredited this testimony. Indeed, the record evidence indicates that LEOs had unmarked cars that were not discernable as police or enforcement vehicles. Further, Mr. Butler equivocated when questioned about the level of investigation from calls that most likely were from "someone who probably knows them and probably doesn't like them." (N.T. 100). On this record, there are no compelling circumstances warranting reversal of the Hearing Examiner's decision not to credit this part of Mr. Butler's testimony, and to make findings of fact consistent with that credibility determination. Pennsylvania State Troopers Association v. Commonwealth, Pennsylvania State Police, 41 PPER 33 (Final Order, 2010), *affirmed sub nom, Commonwealth, Pennsylvania State Police v. PLRB*, No. 626 C.D. 2010 (Pa. Cmwlth. 2011); Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

review of AVL records, may be disciplined for "erratic driving" which is undefined in any law, rule, regulation or guideline, and is determined solely by the parameters and discretionary judgment of each supervisor.⁹

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that following installation of the AVL devices, the Commonwealth's rules, guidelines and procedures with respect to discipline for "erratic driving" effectuated a change in employs working conditions that was severable from the Commonwealth's decision to install the AVL devices. See Cambria County Transit System, *supra*. Accordingly, the Hearing Examiner did not err in holding that the Commonwealth has an impact bargaining obligation with respect to discipline for "erratic driving", and concluding that the Commonwealth violated Section 1201{a}(1) and (5) of PERA by refusing to bargain with the Association. Accordingly, the Commonwealth's exceptions shall be dismissed and the PDO made 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 Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement are hereby dismissed, and the January 6, 2014 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 fifteenth day of April, 2014. 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.

⁹ Findings of Fact 7, 17 and 19 in the PDO, are supported by substantial evidence of record. The record indicates that the Commonwealth did not provide the Association with any definition of "erratic driving" to guide the LEOs' conduct. Indeed, even the Commonwealth's March 20, 2013 memorandum to supervisors and directors does not provide specifics with regard to the type of conduct which would constitute "erratic driving" or warrant discipline. See Abington Transportation Association v. PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990) (holding that work rules that are vague and overbroad are mandatory subjects of bargaining); Pennsylvania State Troopers Association v. Commonwealth, Pennsylvania State Police, 41 PPER 101 (Final Order, 2010) (recognizing that through collective bargaining, broadly-worded work rules may be narrowed down to identify what is expected of employee so that employee are on notice of conduct for which they may be subject to discipline).

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AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement, hereby certifies that it has ceased and desisted from its violations of Sections 1201(a){1} and (5) of the Public Employee Relations Act; that it has bargained over the impact of the decision to implement the AVL devices in LEO vehicles relative to disciplinary procedures with respect to issues of "erratic driving"; that it has posted a copy of the Proposed Decision and Order and Final Order in the manner prescribed therein; and that it has served a copy of this affidavit on the Association 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