

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
v. :
 : Case No. PERA-C-12-154-E
 :
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF CORRECTIONS :
RETREAT SCI :

PROPOSED DECISION AND ORDER

On May 22, 2012, the Pennsylvania State Corrections Officers Association (Association or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania, Department of Corrections, Retreat SCI, (Commonwealth or Respondent) alleging that the Commonwealth violated Sections 1201(a)(1), (5) and (8) of the Public Employee Relations Act (PERA).

On June 20, 2012, the Secretary of the Board issued a Complaint and Notice of Hearing in which December 10, 2012 in Harrisburg was assigned as the time and place of hearing before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

The hearing was held as scheduled, at which time all parties in interest were afforded a full opportunity to present testimony, cross examine witnesses and introduce documentary evidence. 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. The Commonwealth of Pennsylvania, Department of Corrections, is a public employer within the meaning of section 301(1) of PERA. (N.T. 9-10)

2. The Department of Corrections operates the State Correctional Institution at Retreat (SCI Retreat), located in Hunlock Creek, Pennsylvania.

3. The Pennsylvania State Corrections Officers Association is an employe organization within the meaning of section 301(3) of PERA. (N.T. 9-10)

4. The Association is the exclusive collective bargaining representative of the corrections officers and other employes employed by the Department of Correction who are members of the the H-1 collective bargaining unit. (N.T. 9)

5. The Commonwealth and the Association are parties to a collective bargaining agreement for the H-1 Unit that includes a provision at Article 6 titled "Hours of Work." (N.T. 25, 46, Union Exhibit 1, p. 2)

6. The Commonwealth and the Association are also parties to a Statewide Training Agreement that was arrived at in 1988 in settlement of "100 pending grievances over training assignments and avoidance of shift differentials" at SCI Mercer. The Training Agreement states, in relevant part:

4. Assignments to training may be mandated in the following situations:

- a. The training is part of a mandatory training curriculum, employees have not previously attended such training within specified time frames, and have not volunteered for the training;
- b. The number of employees volunteering for the training does not fill the class.

7. Whenever possible, training shall be scheduled in conjunction with the employee's normal work shifts. Interruptions between their normal work shifts and the training session will not be scheduled just to avoid the payment of shift differential. Additionally, unless necessary, employees will not be scheduled for mandatory training during their regular days off or during the 24 hour work day as defined in Article 6, Section 2, during which they were on approved, paid leave for their 8 hour shift.

9. The provisions of this settlement will be applicable to all training conducted by the Department of Corrections.

(N.T. 25, 46, Union Exhibit 1, pp. 3 and 5)

7. On July 1, 2003, Arbitrator Edward O'Connell issued a grievance arbitration award addressing an issue involving the scheduling of mandatory training for H-1 employees at SCI Retreat. (N.T. 25, 46, Union Exhibit 1)

8. Arbitrator O'Connell noted that the grievance "protests the assignment of mandatory training *on days off* at the straight time rate, rather than immediately before or after regular shifts at the overtime rate." (Union Exhibit 1, cover page). Specifically, Arbitrator O'Connell identified the issue to be resolved as "whether the

Commonwealth violated the collective bargaining agreement when it *changed employee work schedules* to conduct mandatory training without payment of overtime." (N.T. 25, 46, Union Exhibit 1 at p. 1, Emphasis added by Examiner).

9. Arbitrator O'Connell sustained the grievance based on his determination that the Department and the Association's predecessor, AFSCME, had agreed, by way of a 1988 training agreement, to conduct training, including all mandatory training, "in conjunction with" normal work shifts, and that SCI Retreat, having for 13 years consistently conducted mandatory training before or after normal shifts on an overtime basis, was not free to change employees' shifts and have them train on their regular days off to avoid overtime. (N.T. 25, 46, Union Exhibit 1 at pp. 10-11).

10. In his decision, Arbitrator O'Connell noted that the Department's amount of "mandatory training," that is, training "required of [b]argaining [u]nit employees, as a condition of their employment," had increased from 4.5 hours per year in 1988 to 48 hours in 1998. (N.T. 25, 46, Union Exhibit 1 at pp. 5, 7).

11. This type of "mandatory training" is commonly referred to by the parties as "block training" because under Department policy 5.1.1 the mandatory training is given to employees in blocks of time, currently five 8-hour blocks, or 40 hours per year. (N.T. 51-55; Commonwealth Exhibit 1).

12. In 2001, in scheduling block training, mandated for all employees, SCI Retreat changed schedules in order to avoid the payment of overtime. Arbitrator O'Connell, in his 2003 Award, determined that such a change of schedules violated the Training Agreement and that training must be conducted before or after employees' normal shifts as per the practice at SCI Retreat and the 1988 training agreement. (N.T. 25, 46, Union Exhibit 1).

13. Since the O'Connell Award was issued in 2003, SCI Retreat has conducted all mandatory block training in conjunction with employees' normal shifts and paid the employees overtime for their attendance. (N.T. 57-60, 62-63, 68, 80; Commonwealth Exhibit 2).

14. The Department's training academy, as per policy 5.1.1, determines what training will be included in block training from year to year. The Department issues a block training schedule in April before the beginning of the July 1 fiscal year. The academy sometimes allows a few hours of block training slots to be filled in by an institution to meet the particular training needs of the institution. (N.T. 51-55, 76-77; Commonwealth Exhibit 1).

15. Not all training is required by the academy as block training and certain training is only provided to "designated employees" selected by the institution. (N.T. 54-57; 76-77; Commonwealth Exhibit 1, Attachment 2-A).

16. In 2012, these latter types of training given to only "designated employees" and they include training on cell extraction procedures, video camera operations, emergency restraining chair, emergency vehicles, PepperBall systems, remotely activated custody

control (RACC) belt, and sally port sergeant duties. (N.T. 54-57, Commonwealth Exhibit 1)

17. SCI Retreat conducts these types of trainings for designated employees on shift unless it is determined that such trainings will be given as part of block training mandated of all employees, in which case such training is done after employees' normal shifts on an overtime basis. (N.T. 55-59, 80-81).

18. Over the years, certain subjects, such as cell extraction procedures, have been placed both in and out of the block training schedule. (N.T. 76-78, Commonwealth Exhibit 2)

19. In the fall of 2008, when cell extraction training was included in mandatory block training, the training was given after normal shifts on an overtime basis. (N.T. 57-58, 79-80; Commonwealth Exhibit 2).

20. However, in January 2010, cell extraction training was not part of mandatory block training for all employees but was given only to designated employees on shift at straight pay. (N.T. 62-63, 80-83; Commonwealth Exhibit 3).

21. On January 26, 2010, the SCI Retreat ordered Correctional Officer Craig Bienkowski and other COs to receive training in cell extraction procedures as well as video camera operations and sally port sergeant duties during their shift. No overtime was paid. (N.T. 80-83, Commonwealth Exhibit 3, p. 17)

22. In 2012, neither the academy nor SCI Retreat included training on cell extraction procedures, video camera operations, RACC belt or emergency restraint chair as mandatory block training on its training plan. (N.T. 54, 62; Commonwealth Exhibit 1, Attachment 2-C).

23. In January 2012, SCI Retreat designated certain employees to take training on cell extraction, video camera operations, RACC belt or emergency restraint chair because no one at the institution had received the training in 2011. (N.T. 59-60).

24. This training, even though it was not part of block training, was conducted before or after the designated employees' normal shifts on an overtime basis because SCI Retreat's overtime budget at that point allowed for the training to be conducted on overtime. (N.T. 62, 74-75; Union Exhibit 2).

25. Employees who attended this training in January 2012 were paid either overtime or were given commensurate compensatory time for attending the training. (N.T. 25-29, 62, 74-75, Union Exhibit 2).

26. On April 27, 2012, SCI Retreat designated CO Bienkowski and other employees to attend training on cell extraction, video camera operations, RACC belt or emergency restraining chair. On this occasion, as had been done in January 2010, SCI Retreat gave the training to the designated employees during their normal work shifts; no one had their schedule changed to attend the training. No overtime was paid. (N.T. 26, 37, 41-43; Union Exhibit 4)

DISCUSSION

The Association alleges that on April 27, 2012, the Commonwealth's Department of Corrections, SCI Retreat, committed unfair practices in violation of Sections 1201(a)(1), (5) and (8) of PERA when it unilaterally changed the way in which training is scheduled, causing the loss of overtime to employees.

The Commonwealth operates 26 State Correctional Institutions where thousands of inmates are incarcerated and guarded by thousands of corrections officers who are members of the Association. In order that the corrections officers guard the inmates within the American Corrections Association's guidelines as well as federal and state law, the Commonwealth regularly trains corrections officers. The training is scheduled in advance of each fiscal year, in coordination with the Department's Elizabethtown training academy and the management at each SCI. The training covers a myriad of subjects. Some subjects must be taught every year; others every two or three years. The Department mandates that COs receive 40 hours of training a year. Each SCI sees to it that the 40 hours of training are scheduled either as part of "block training" before or after a shift or as directed training during a shift.

On April 27, 2012, the management of SCI Retreat ordered CO Craig Bienkowski and 11 other COs to attend training during their shift. In the seven and a half (7.5) hours of training, the trainers addressed the following subjects: RACC Belt (2 hours), Video Camera Operations (1 hour), Emergency Restraint Chair (1.5 Hours) and Cell Extraction Procedures (3 hours).

The Association's charge alleges that the Commonwealth should have scheduled the training before or after the shift, at an overtime pay rate, and that the failure to do so violates PERA. The Association advances two legal theories in support of the charge.

The first theory is that the Commonwealth has failed to comply with the terms of a February 11, 2003 Arbitration Award resolving two grievances filed by the Association alleging that the Commonwealth violated a 1988 Training Agreement. The Association argues that the Commonwealth violated section 1201(a)(8) of PERA, which prohibits employers from "[r]efusing to comply with the provisions of an arbitration award deemed binding under Section 903 of Article IX." 43 P.S. §1101.1201(a)(8).

An employer commits unfair practices within the meaning of Section 1201(a)(8) of PERA if a grievance arbitration award exists, the employer's right to appeal the award has been exhausted and the employer has refused to comply with the provisions of the award. Commonwealth v. PLRB, 478 Pa. 582, 387 A.2d 435 (1978). Once the employer's appellate rights have been exhausted, the merits of the award are no longer at issue. Id. Thus, in deciding whether or not the employer has complied with the provisions of the award, the Board looks at the four corners of the award to determine the intent of the arbitrator as expressed in the award. City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶ 24052 (Final Order, 1993).

The O'Connell Award involved two grievances alleging that SCI Retreat had changed COs' schedules for training to avoid paying overtime. The training at issue in 2003 was block training, in which the Department scheduled employees to receive training over an entire shift on what would have been their days off, rather than immediately before or after regular shifts at the overtime rate. The Arbitrator found that SCI Retreat had changed schedules to avoid the payment of overtime. The arbitrator determined that the schedule change violated the 1988 training agreement.

In the present case, however, the Department did not change the COs' work schedules. When CO Bienkowski arrived at his shift on April 27, 2012, he learned that he would be trained that day. This is different from the facts in the grievances in the O'Connell Award, where the employees' schedules were changed so that they received training on what normally would have been their days off. The assignment of individual training topics during a shift was not at issue in the O'Connell Award and was not ordered to be stopped. As stated above, the O'Connell Award ordered the end of the schedule changes to do training, which did not occur here. Also, it must be noted that the Department is continuing to schedule 40 hours a year in block training for COs to be taken after their shifts at an overtime rate of pay. Accordingly, there will be no finding of a refusal to comply with the O'Connell Award and no finding of a Section 1201(a)(8) violation.

The Association's second theory is that the Commonwealth's April 27, 2012 assignment of training to CO Bienkowski and the other COs violates the duty to bargain in violation of Section 1201(a)(5) in that it contravened a legally established past practice of assigning all training to be before or after a shift.

A past practice is defined as "the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances." County of Allegheny v. Allegheny County Prison Employees Indep. Union, 476 Pa. 27, 34, n. 12, 381 A. 2d 849, 852, n. 12. (1977). A past practice is "a usage that has evolved between the parties as a normal reaction to a recurring type of situation." *Id.* To the extent that the parties' reaction to a recurring situation varies or is not consistent, there can be no finding of a binding past practice. Commonwealth of Pennsylvania v. Pennsylvania State Police, Bur. of Liquor Control Enforcement, 24 PPER ¶ 24171 (Final Order, 1993)

The evidence in this case does not prove a consistent past practice of conducting all training of the COs at SCI Retreat before or after their shift at an overtime rate of pay since the 2003 O'Connell Award. For example, the testimony of CO Craig Bienkowski that he had never been assigned training on shift prior to April, 2012, was contradicted by Commonwealth records showing that he had received training during a shift on January 26, 2010. Also, the Commonwealth witnesses, Deputy Superintendent Michael Hoover and Training Coordinator Jason Jordan credibly testified that the Department required that COs attend mandatory training both during regular shifts at regular pay as well as before and after shifts at overtime pay. As an example of this, Deputy Superintendent Hoover testified that in the 2008-09 fiscal year, SCI Retreat mandated that cell extraction training

be given after shift at overtime, due to the fact that it was part of block training. However, in 2010, SCI Retreat gave that same training on shift at straight pay.

Accordingly, the past practices theory for alleging a Section 1201(a)(5) violation is not supported by the evidence.

CONCLUSIONS

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

1. The Commonwealth of Pennsylvania, Department of Corrections, is a public employer within the meaning of section 301(1) of PERA.
2. The Pennsylvania State Corrections Officers Association is an employe organization within the meaning of section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth has not committed unfair practices in violation of Sections 1201(a)(1), (5) and (8) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA the 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 final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this tenth day of March, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD


Thomas P. Leonard, Hearing Examiner