

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

NORTHAMPTON COUNTY DEPUTY :  
SHERIFFS ASSOCIATION :  
 :  
v. : Case No. PERA-C-12-145-E  
 :  
 :  
NORTHAMPTON COUNTY :

**PROPOSED DECISION AND ORDER**

On May 8, 2012, Northampton County Deputy Sheriffs Association (Association or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Northampton County (County or Respondent) alleging that the County violated Sections 1201(a)(1), (2) and (5) of the Public Employe Relations Act (PERA).

On June 11, 2012, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and December 4, 2012 in Harrisburg was assigned as the time and place of hearing if necessary, before Thomas P. Leonard, Esquire, a hearing examiner of the Board. The conciliator did not resolve the dispute, making a hearing necessary.

On June 27, 2012, the examiner continued the case to December 11, 2012. The hearing was held on the rescheduled day, 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. Northampton County is a public employer within the meaning of section 301(1) of PERA.
2. Northampton County Deputy Sheriffs Association is an employe organization within the meaning of section 301(3) of PERA.
3. Randall P. Miller is the Sheriff of Northampton County. He is not an elected official but is appointed by the County Executive. (N.T. 47)
4. The Association is the exclusive representative of a subdivision of the employer unit comprised of all full-time and regular part-time security guards who are directly involved with and necessary to the functioning of the courts and who are not hired, fired and directed by the courts including but not limited to sheriff's security deputies and deputy sheriffs; and excluding sheriff's screening officers, court security officers, security supervisors, administrative supervisors, criminal supervisors and management level employes, supervisors, first level supervisors, confidential employes and prison guards as defined in the Act. (Case No. PERA-R-0-104-E)
5. In 2010, the unit was amended and sergeants were added to the unit when the Board issued a Nisi Order of Unit Clarification in Case No. PERA-U-09-375-E.
6. The Association and County are parties to a collective bargaining agreement (CBA) effective January 2, 2006 through December 31, 2010 for the wages, hours and terms and condition of employment for the members of the unit. (N.T. 10, 47, Union Exhibit 1).

7. Prior to the expiration of said agreement and thereafter, the parties engaged in collective bargaining negotiations. The County and the Association reached a tentative agreement but the membership rejected the tentative agreement. As of the date of this hearing, the parties had presented their dispute to an interest arbitration panel. (N.T. 15, Respondent Exhibit 1)

8. The CBA at Article XXXIII, Section 1, contains the following language:

Section 1 Each employee shall have a Primary Duty Assignment (PDA) and reporting structure. There shall be the following PDA Sections:

- (a) Protective Services;
- (b) Sector Deputy/Civil/Firearms;
- (c) Criminal/DRS/Warrants;
- (d) Prison Transport;
- (e) Support Services.

The County reserves the right to add, subtract, or modify duties with respect to PDA Sections and to create new PDA Sections. The County agrees to meet and discuss with the Association prior to implementing any such changes.

(N.T. 10, 47, Union Exhibit 1, page 49)

9. The Sheriff's Department is comprised of five divisions each providing specialized services. A primary duty assignment (PDA) is a permanent assignment to one of the five divisions of specialized services. Sergeants had been given a PDA to one of those divisions. (N.T. 12, 47, Union Exhibit 2, Case No. PERA-C-10-413-E, Proposed Decision and Order, Finding of Fact 4).

10. In 2010, during contract negotiations, the County proposed the creation of a Sergeants PDA, which would be subsection (f) of Article XXXIII, Section 1. However, the packet was rejected by the bargaining unit members. (N.T. 14-15, County Exhibit 1, page 3).

11. On January 23, 2012, the County implemented a policy creating a new PDA section titled "Sergeant". (N.T. 17, Union Exhibit 3)

12. Sergeant Mike Weston, an Association Executive Board member, testified that the policy creating a Sergeant PDA greatly affected overtime assignments. (N.T. 19-21).

13. Weston testified that the Association never agreed to the creation of a Sergeant PDA. (N.T. 21)

14. On April 16, 2012, the County implemented a policy mandating that the bargaining unit members notify the Sheriff's Department at least fifteen minutes prior to their scheduled reporting time by speaking directly to a supervisor. The new policy also indicated that "a voice message on the Department answer service may be used as a backup or secondary form of notification ONLY." (N.T. 29, Union Exhibit 4)

15. Deputy Darin Stewart testified that the prior policy was that when an employee was took an unexpected sick leave, he or she would call the Sheriff's dispatch center to notify the dispatcher of his absence and leave a message on the answering machine if no one was there. (N.T. 27)

16. He testified that there were no other parameters when calling off sick. (N.T. 28)

17. The Sheriff implemented the new call-off procedure for two reasons. First, the Sheriff had concerns that a law enforcement agency should be relying primarily on an answering machine for call-offs. The safety and whereabouts of a sheriff's deputy is an issue on an unexpected absence. Second, the new call-off procedure brought the Sheriff's Department employees into line with the other County departments' requirements for the timely notification of an unexpected absence. (N.T. 83-87)
18. The County also explained its interests in the Policy Statement on the Attendance handout given to all employees. The statement said that the County "expects employees to be reliable and to be punctual in reporting to scheduled work. Absenteeism and tardiness result in a burden on other employees and on the County's overall efficient operations." (N.T. 88, 91, County Exhibit 12)

#### DISCUSSION

The Association alleges that the County committed unfair practices in violation of sections 1201(a) (1) and (5) of PERA in two matters.

##### I. New Primary Duty Assignment:

The first part of the charge alleges that the County violated its duty to bargain by unilaterally creating a New Sergeant Primary Duty Assignment (PDA). The Association seeks the rescission of the PDA and to make whole bargaining unit members for any monetary losses.

Sergeant Mike Weston, an Association Executive Board Member, testified that on January 23, 2012, the County issued a policy that created a Sergeant PDA to be added to the existing five PDAs. Weston testified that the policy greatly affected overtime assignments for the Sergeants. Weston testified that the Union never agreed to the creation of a Sergeant PDA.

The County admits that it added a Sergeant PDA, but asserts that it was allowed to do so pursuant to the collective bargaining agreement. If an employer was contractually privileged to act as it did, then no such unfair practices may be found. SEPTA, 35 PPER 73 (Final Order 2004), citing Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). As the court explained in Pennsylvania State Troopers Association:

"The [Board] has recognized 'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a refusal to bargain in good faith. 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 [respondent]'s action was permissible under the agreement. See Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 29 PPER ¶ 29213 (Final Order 1998), aff'd, 736 A.2d 707 (Pa. Cmwlth. 1999); Delaware County Lodge #27 of the Fraternal Order of Police on behalf of the Members of the Police Force of the Borough of Prospect Park v. Prospect Park Borough, 27 PPER ¶ 27222 (Final Order 1996); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order 1987) (quoting NCR Corp., 271 N.L.R.B. 1212 (1984) as saying that 'where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the National Labor Relations Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct')."

761 A.2d at 651.

The County's contractual privilege argument has merit. The parties are currently bound by a CBA while a successor agreement is being negotiated. The CBA at Article XXIII, Section 1 allows the County to create a new PDA section. This language in provides the County with a "sound arguable basis" for creating the Sergeant PDA. Accordingly, the charge alleging a violation of section 1201(a)(5) will be dismissed.

## II. New Call-Off Procedure

The second part of the charge alleges that the County violated its duty to bargain when it altered the call-off procedure for employees taking an unscheduled sick leave. On April 16, 2012, the County announced that employees unable to report for duty due to illness shall notify the Sheriff's Department at least 15 minutes prior to their scheduled reporting time by speaking directly to a supervisor. The employee could leave a voice message "on the answering service as a backup or a secondary form of notification ONLY."

The Association argues that this procedure change is a mandatory subject of bargaining for two reasons. First, there had never been a 15 minute time constraint before the policy. Second, the individual calling off must speak directly with a supervisor instead of simply leaving a message on an answering machine.

The Board will find an employer in violation of Section 1201(a)(5) of the Act if the employer unilaterally changes a mandatory subject of bargaining under Section 701 of the Act. **Appeal of Cumberland Valley School District**, 483 Pa. 134, 394 A.2d 946 (1978). If, however, the employer changes a matter of inherent managerial policy under Section 702 of the Act, then no refusal to bargain may be found. **PLRB v. State College Area School District**, 461 Pa 494, 337 A.2d 262 (1975).

Section 702 of PERA provides, in relevant part, as follows:

Public 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 of 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**.

43 P.S. § 1101.702 (emphasis added).

In **State College Area School District**, *supra*, our Supreme Court addressed the relationship between Sections 701 and 702 and therein developed the analysis that the Board must apply in determining whether a matter is bargainable under Section 701 or a non-bargainable managerial prerogative under Section 702. The Court opined that determinations in this area must strike a balance between employees' interests in the terms and conditions of their employment on the one hand and the employer's interests in performing managerial functions on the other. 337 A.2d at 268. "In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." **Id.** The Court, in **State College**, further held as follows:

[W]here an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours or other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

337 A.2d at 268.

The County explained its interests in the Policy Statement on the Attendance handout. The County "expects employees to be reliable and to be punctual in reporting to scheduled work. Absenteeism and tardiness result in a burden on other employee and on the County's overall efficient operations." The County's adoption of a fifteen minute call-off procedure provides the County with the essential information vital to the operation of the department by giving the employer the names of the employees who would be not be available to work that shift. The requirement that the employees notify the supervisor 15 minutes before the shift is a minor intrusion on the employee's personal time and furthers the employer's Section 702 interest in the "direction of personnel." It is plausible to presume that the employee would be spending that time travelling to work to begin his or her shift. The Sheriffs Department is now following the same call-off procedure as the other County departments. As for the requirement of speaking directly to a supervisor, Chief Deputy Zieger testified that merely leaving a message on an answering machine caused a concern as to the employees' whereabouts and his or her safety.

Applying the **State College** balancing test to the call-off procedure in the present case, the County has made a convincing case that that its interests in the "direction of personnel" by having some advanced knowledge of who is going to be out of work on an unscheduled basis outweighs the employees' interests in the terms and condition of their employment and their starting hours.

Accordingly, the County's decision to institute a call-off procedure constituted a matter of inherent managerial policy under Section 702 of PERA.

#### **CONCLUSIONS**

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

1. Northampton County is a public employer under section 301(1) of PERA.
2. The Northampton County Deputy Sheriffs Association is an employe organization under section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The County has not committed unfair practices in violation of Sections 1201(a) (1) and (5) 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 twenty-ninth day of May, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

\_\_\_\_\_  
Thomas P. Leonard, Hearing Examiner