

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :
ASSOCIATION :
v. : Case No. PF-C-09-54-E
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

PROPOSED DECISION AND ORDER

On February 28, 2011, the Pennsylvania State Troopers Association (PSTA or Association), by and through its attorney, requested that the Pennsylvania Labor Relations Board (Board) hold a hearing on the issue of whether employes were made whole by the Commonwealth of Pennsylvania, Pennsylvania State Police (PSP) for discretionary overtime lost due to the imposition of unlawful special orders as had been ordered in a Proposed Decision and Order issued on November 19, 2009 that was sustained in a Final Order by the Board on March 16, 2010.

On March 2, 2011, Hearing Examiner Donald Wallace notified the parties that he would hold a hearing on August 4, 2011 on the issue raised by the Association. On August 11, 2011, the Examiner continued the hearing to October 14, 2011. On October 4, 2011, the Examiner again continued the hearing upon the joint request of the parties for time to pursue a settlement.

On June 13, 2013, the Association again requested a hearing on whether the Commonwealth complied with the Final Order in this case and in Case No. PF-C-08-100-E. The Board assigned Hearing Examiner Thomas P. Leonard to hear the case because Hearing Examiner Wallace retired from the Board. The Examiner scheduled the hearings for January 30 and 31, 2014.

On January 24, 2014, the Association forwarded to the Hearing Examiner an arbitration award (Award) involving the same issues raised in the unfair labor practice charge.

On April 3, 2014, the Examiner notified the parties that a hearing would be held on July 29, 2014, in Harrisburg to determine whether the PSP complied with the Board order.

The hearing was held as scheduled, at which time the parties submitted stipulated facts and the Mountz Award.

The examiner, on the basis of the stipulations presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. There is no language in the parties' collective bargaining agreement (CBA) which controls the assignment of discretionary overtime. (N.T. 5, Stipulation of Parties)
2. There is no language in the parties' CBA which provided for the equalization of discretionary overtime. (N.T. 5, Stipulation of Parties)
3. There is no requirement in the CBA or elsewhere that discretionary overtime was assigned by seniority. (N.T. 5, Stipulation of Parties)
4. Field Regulation 5-1 (FR 5-1) controls the distribution of discretionary overtime. The special orders at issue in Case Nos. PF-C-08-100-E and PF-C-09-54-E, which purported to implement FR 51 have been rescinded. (N.T. 5, Stipulation of Parties)

5. The PSP does not receive official records regarding which members may have signed up for any particular discretionary overtime shift or the reasons for their selection or non-selection. (N.T. 5, Stipulation of Parties)

6. Many members would have signed up for discretionary overtime shifts. However, it was not possible to determine from PSP records which members should have been selected for any particular discretionary overtime shift, absent the special orders. (N.T. 6, Stipulation of Parties)

7. All discretionary overtime assignments during the relevant peak time periods went to members of PSTA's bargaining unit. (N.T. 6, Stipulation of Parties)

8. On April 22, 2010, Affidavits of Compliance were filed with the Pennsylvania Labor Relations Board in Case Nos. PF-C-08-100-E and PF-C-09-54-E.

9. The parties, in an attempt to find a remedy to the situation at hand, voluntarily proceeded to binding arbitration in front of Arbitrator Lynne Mountz. (N.T. 6, Joint Exhibit 1)

10. On April 29, 2011 and December 12, 2013, Arbitrator Mountz heard testimony in support of grievances filed by the PSTA seeking payment of discretionary overtime that they lost as a result of the inappropriate transfer of overtime to other stations during construction projects. (Joint Exhibit 1)

11. On January 21, 2014, Arbitrator Mountz issued an Opinion and Award that stated, in relevant part:

Remedy

The PSTA seeks to have the members at the three stations made whole for the amount of overtime that they lost as a result of the inappropriate transfer of overtime to other stations. While a "make whole" remedy is an appropriate award for an established loss of income resulting from a contractual breach, there is no basis upon which such an award can be issued in this matter.

At the outset it bears repeating that there is no contractual language which controls the assignment of overtime. There is no equalization clause. There is no requirement that overtime be assigned on the basis of seniority. While Section 1.03 B. of FR 5-1 provides the general order of categories in which patrol-related discretionary overtime is to be assigned, it does not specify how individual members within any category are to be selected for an overtime assignment. Simply stated, none of the Grievants have established that they had a contractual right to work any specific overtime shift.

On the facts presented, it is virtually impossible to determine how much overtime, if any, each of the grievants would have received if the Troop Commanders had not assigned the overtime to other stations. Only three of the Grievants testified with respect to the shifts that they were available to work. There were twenty five (25) Grievants from the King of Prussia Station, nineteen (19) Grievants from Pocono and four (4) Grievants from Mercer.

Ben LeClair, a Labor Relations Specialist in the Office of Administration, went through each grievance with the attached documentation and work schedules and prepared a document which includes each Grievant by name and lists the shifts which have been assigned out of their respective stations. (N.T. 178-179; Exhibit C-3). Based upon this evidence, it is clear that numerous Grievants were in fact claiming that they should have been assigned to work the same shift.

(N.T. 182-185; Exhibit C-3). Some of the Grievants were claiming that they should have been assigned to work overtime shifts which were occurring at the same time and/overlapping. (*Id.*) Obviously, multiple members were not going to be assigned to the same overtime shift and no member was going to be assigned to an overlapping shift or two shifts occurring at the same time.

Nor is there any basis on the record produced to simply divide the overtime hours among the members of each station as the PSTA has argued. Such an award presupposes that all members were available to work all overtime shifts, a fact that is not only unsupported but is contradicted by the evidence. (Exhibit C-3).

Finally, in fashioning a remedy in this matter, it is significant to note that none of the overtime shifts at issue were assigned to individuals outside of the bargaining unit. *For this, and all of the reasons set forth above, I concur with the PSP that the only remedy available is a cease and desist directive.*

AWARD

The Grievances are Sustained. The Commonwealth, Pennsylvania State Police, is directed to cease assigning construction zone overtime to members in locations other than the station with primary jurisdiction of a project without first considering and adhering to the selection order for assigning overtime to available members in the station with primary jurisdiction in accordance with the requirements of FR 5-1.

(N.T. 6, Joint Exhibit 1, pages 15-16, Italics added by Hearing Examiner, emphasis in original)

DISCUSSION

The Association has requested that the Board hold a hearing on its claim that the Commonwealth is not complying with the Proposed Decision and Order and the Final Order in this case and Case No. PF-C-08-100-E to make its members whole for lost overtime

The Proposed Decision and Order, affirmed by the Board, stated that the PSP was to (a) Rescind Troop Special Order 08-13 to the extent that it limits the assignment of discretionary overtime to troopers, corporals and sergeants on a monthly basis; (b) Make whole any trooper, corporal and sergeant who lost overtime as the result of the limits placed on the assignment of discretionary overtime to them under Troop Special Order 08-13.

On April 22, 2010, the PSP filed Affidavits of Compliance in this case and Case No. PF-C-08-100-E.

However, the Association contends that the PSP has not made whole the troopers, corporals and sergeants who lost overtime as the result of the limits placed on the assignment of discretionary overtime to them under Troop Special Order 08-13. Therefore, the Association filed this request for a compliance hearing.

After the Association made this request to the Board, the Association and the Commonwealth attempted to resolve this matter through grievance arbitration. The issue before the arbitrator was whether the PSP had improperly assigned discretionary overtime to the members of the PSTA and, if so, what should the remedy be. The arbitrator found that the PSP had improperly assigned overtime in violation of Field Regulation 5-1 (FR 5-1) at three PSP stations. However, in fashioning a remedy for the violation, the arbitrator found that it was "virtually impossible to determine how much overtime, if any, each of the grievants would have received if the Troop Commanders had not assigned the overtime to other stations." For that reason, the arbitrator limited her award to a cease and desist order.

The arbitrator's reasoning and conclusion are relevant to the present dispute.

In addition, the parties appeared before me on July 29, 2014 and stipulated to facts that are relevant to the dispute. The facts show that the PSP does not receive official records regarding which members may have signed up for any particular discretionary overtime shift or the reasons for their selection or non-selection. Also, the facts show that despite many members who would have signed up for discretionary overtime shifts, it was not possible to determine from PSP records which members should have been selected for any particular discretionary overtime shift, absent the special orders.

In light of the arbitration award and the parties' stipulations at this compliance hearing, it is impossible to determine how much overtime, if any, the Association members would have received if the Troop Commanders had assigned the overtime properly. Therefore, it is impossible to say what lost overtime should be awarded to the members. Accordingly, it is appropriate to find that the Commonwealth's failure to make troopers whole for lost overtime does not constitute a refusal to comply with the proposed decision and order and final order.

CONCLUSIONS

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

1. The Commonwealth is an employer under section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. The PSTA is a labor organization under section 3(f) of the PLRA as read *in pari materia* with Act 111.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has not failed to comply with the proposed decision and order and final order issued in this case.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read *in pari materia* with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the request for a compliance order is dismissed.

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 fifth day of August, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner