COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE, FOP LODGE 109	:	
v.	:	Case No. PERA-C-17-55-E
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

FINAL ORDER

The Southeastern Pennsylvania Transportation Authority (SEPTA or Authority) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on October 23, 2018, from a Proposed Decision and Order (PDO) issued on October 3, 2018, in which the Hearing Examiner found that SEPTA violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by repudiating provisions of a collective bargaining agreement, and refusing to meet with the representative of the Fraternal Order of Transit Police, FOP Lodge 109 (FOTP or Union). Following an extension of time granted by the Secretary of the Board, SEPTA filed a brief in support of the exceptions on November 26, 2018. The FOTP was also granted extensions of time by the Secretary, and filed a brief in response to the exceptions on February 1, 2019.

On March 6, 2017, the FOTP filed a Charge of Unfair Practices with the Board alleging that SEPTA violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing two policies on November 18, 2016 and March 2, 2017, without giving the FOTP ten days prior notice as required by the collective bargaining agreement. On April 3, 2017, the FOTP amended the charge by providing the collective bargaining agreement and further alleging that SEPTA also violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing a cell phone policy on September 1, 2016 without providing the ten days notice. The FOTP also alleged that SEPTA refused to bargain over these policies, as well as the effects of the policies. In addition, the FOTP averred that SEPTA committed an unfair practice by refusing to meet with the FOTP on March 30, 2017, because the FOTP had its attorney present.

On April 27, 2017, the Secretary issued an Amended Complaint and Notice of Hearing. Following continuances of the hearing date, a hearing was held on April 30, 2018, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and summarized for purposes of the exceptions, as follows.

The FOTP and SEPTA were parties to a collective bargaining agreement (CBA), which was effective from April 29, 2012 through March 31, 2016. (FF 4). On March 2, 2017, the parties entered into a Memorandum of Agreement (MOA), extending the terms of the CBA through March 31, 2018. (FF 5).

Article V of the CBA is entitled "Union Rights". Section 3 of Article V provides, in pertinent part, as follows:

> The Authority shall make a good faith effort to notify the Union of any new Department issued permanent policy or directive, or change in any such policy or directive affecting it or its members at least ten (10) days before the effective date of such policy or directive.

(FF 6). Section 5 of Article V of the CBA provides, in pertinent part, as follows:

> In all matters pursuant to this Agreement and in any matter involving interaction between the Union and the Authority, the Authority shall recognize duly authorized representatives of the Union and the Union shall recognize the duly authorized representatives of the Authority and each party shall conduct business with such duly authorized representatives.

(FF 7).

Article XXXV of the CBA is entitled "Authority Rights" and provides, in pertinent part, as follows:

> All management rights and responsibilities which the Authority has not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in the Authority, including, but not limited to, the right to establish and administer policies, procedures and standards of services[;] … to direct the workforce; … to make or change Authority rules, regulations, policies and practices, and otherwise generally to manage the Authority, so as to attain and maintain the full operating efficiency. The provisions of this Article will not be used to discriminate against the exercise of any rights afforded to an officer by this Agreement.

(FF 8).

Article XXXIX of the CBA is entitled "Committees" and provides, in pertinent part, as follows:

> The Authority and the Union hereby establish a Safety and Productivity Committee.
>
> The committee shall be comprised of six members, three to be appointed by the Chief of Police and three by the Union.
> ...
>
> The objectives of the Joint Safety and Productivity Committee are to cooperate in working toward achieving as promptly as possible the most efficient and economical utilization of work forces and facilities and to achieve significantly higher productivity in the Authority's operations. It is recognized that such desired

> productivity depends in great part on the fairness and effectiveness of supervision, equipment for employees, and the good faith cooperation by the officers and their Union Representatives with the representatives of the Authority in the attainment of this essential goal...
>
> Seven (7) days prior to the meetings, the Union and the Authority shall provide a written agenda or list of items to be discussed at the meeting...
>
> The establishment of the Committee shall not affect the existing rights of either party under other provisions of this agreement and shall assist, rather than in any way limit, the Authority's right to direct the work force.
>
> No committee meeting or report under this section shall substitute for, act, replace, or act as collective bargaining under [PERA], or modify or amend any provision of this agreement.

(FF 9).

On or about November 18, 2016, SEPTA issued a written order pertaining to the operation of police vehicles which stated that as long as an officer is inside a police vehicle the driver's window and front passenger window must be at least halfway down, with exceptions for inclement weather or driving on an expressway. (FF 10). SEPTA Inspector Charles Lawson testified that the order was distributed to the supervisors who were expected to review it with their subordinate personnel during roll call when the supervisors issue various types of patrol orders for their shifts. (FF 12). Inspector Lawson also confirmed that the order applies to all uniformed officers in a marked vehicle. (FF 13). SEPTA did not provide the FOTP with notice of the "windows down" order ten days before its effective date. (FF 11). The FOTP was not aware of the order until December 2016 when a bargaining unit employe was disciplined for allegedly violating the order. (FF 14).

On January 4, 2017, Inspector Lawson emailed FOTP President Omari Bervine attaching a draft copy of a policy governing the use of SEPTA issued mobile cell phones. (FF 15). By email dated March 3, 2017, Bervine wrote the following to SEPTA Chief Labor Relations Officer Chad Cuneo:

> As your records will reflect, I serve as the President of the Fraternal Order of Transit Police, FOP Lodge 109, the certified and exclusive bargaining representative for Police Officers employed by [SEPTA]. I was recently provided a copy of a new Directive entitled "Authority Issued Mobile Cell Phones," which sets forth the Authority's policy and procedures relating to its determination to issue Officers cell phones to be used for work purposes only.
>
> In reviewing the new Directive, it was clear to the FOTP that the issuance of work phones and the policies/procedures governing their issuance and use

> intimately impact mandatorily negotiable terms and conditions of employment, including but not limited to officer discipline. To that end, the FOTP has taken steps to address its concerns with the Authority, most recently in a grievance meeting which took place February 10, 2017. Unfortunately, the FOTP's concerns have not been adequately addressed.
>
> In light of the foregoing, the FOTP hereby formally demands to bargain over the substantive, as well as any impact/implementation, issues associated with the issuance/use of Authority issued cell phones, prior to implementation. Kindly provide your availability in the next several weeks to address this important issue.
>
> Finally, in order to fully understand the nature and extent of the Authority's proposed changes, and to formulate comprehensive proposals relative to these modifications, the FOTP requests the following information:
>
> Type, make, model of the Authority-issued cell phones;
>
> Technology available and/or installed on the phone, including but not limited to, applications, GPS, video/audio recording capabilities, etc.;
>
> Scope of access available to Officers who are issued Authority cell phones, i.e., internet app store, text, long distance calls, music, etc.;
>
> I thank you, in advance, for your response. If you have any questions, please do not hesitate to contact me.

(FF 21).[1]

In early March 2017, SEPTA issued another order stating that "[a]ny officer who is out of the public eye, restroom, district headquarters, locker room, etc… must notify dispatch by radio with their location and reason." (FF 16). SEPTA distributed the "out of the public eye" order at a command staff meeting among the supervisory personnel, who then passed it along to bargaining unit officers at roll call. (FF 18). SEPTA did not provide the Union with notice of the "out of the public eye" order ten days before its effective date. (FF 17).

By email dated March 3, 2017, Bervine emailed the following to SEPTA Chief of Police Thomas Nestel and Chief Labor Relations Officer Cuneo:

> On behalf of the [Union], we hereby demand to bargain over the new policy directive concerning the requirement to notify dispatch by radio whenever officers are "out of the public eye" as well as the effects of that new policy. Please contact me at your earliest convenience to schedule such negotiations.

[1] SEPTA eventually implemented the cell phone policy in June 2017. (FF 25).

(FF 19).

SEPTA did not respond to either of Bervine's March 3, 2017 emails. (FF 20 and 22). However, Bervine and Cuneo set up a meeting between the FOTP and SEPTA for March 30, 2017. Present at the meeting on behalf of the FOTP were Bervine, FOTP Vice President Anthony Michetti, Treasurer John Goodman, and FOTP attorney Thomas Kohn. Nestel was present for SEPTA, along with several members of the command staff. (FF 23). When Cuneo arrived for the meeting, he greeted the Union representatives and asked who Kohn was. Bervine replied that Kohn was the FOTP's lawyer, after which Cuneo refused to hold the meeting with Kohn present. When pressed for a reason, Cuneo stated that it was an administrative meeting, to which Bervine replied that the FOTP intended to bargain over the alleged policies for which they had recently demanded bargaining. Cuneo told Bervine that SEPTA had no obligation to bargain, but that SEPTA would meet to discuss the FOTP's concerns as long as Kohn was not present. At that point, the meeting concluded. (FF 24).

Based on the evidence presented, the Hearing Examiner rejected SEPTA's argument that the alleged "windows down" and "out of the public eye" orders are not policies falling within Article V, Section 3 of the CBA, but rather are patrol orders which, according to SEPTA, are not subject to the ten days contractual notice requirement. The Hearing Examiner in that regard held, as follows:

> Regardless of whether or not the "windows down" and "out of public eye" orders amount to policies, they are both clearly directives within the meaning of Article V, Section 3 of the CBA. Thus, it is of no consequence whether the orders are policies or simply patrol orders, as alleged by SEPTA, because they are still subject to the contractual notice provisions of the CBA. It cannot be seriously contested that a patrol order is the same thing as a directive. In fact, Cuneo himself refers to the "windows down" order as a directive in his March 10, 2017 grievance response to the Union. (Union Exhibit 2). And, even assuming the modifier "permanent" applies to the term "directive" in Article V, Section 3 of the CBA, Lawson readily conceded that the orders apply to the entire bargaining unit and that there has never been a time from the date SEPTA implemented the directives through the date of the hearing when the directives were not in effect or enforced upon bargaining unit employes. (N.T. 115-117). In fact, there is no evidence whatsoever that either directive was temporary or limited in any way. Furthermore, SEPTA cannot hide behind the "good faith effort" language in the first clause of the provision. Although SEPTA put on evidence that at least one of the orders, the "windows down" order, was motivated by safety concerns, there was no safety reason that prevented SEPTA from giving the Union the contractual notice. (N.T. 113-114).

(PDO at 7). Accordingly, the Hearing Examiner concluded that SEPTA repudiated the provisions of Article V Section 3 of the CBA when it

failed to provide the FOTP with ten days notice of the "windows down" and "out of the public eye" policies.

The Hearing Examiner also found that Article V, Section 5 of the parties' CBA requires SEPTA to recognize the duly authorized representative of the FOTP and to conduct business with the same "[i]n all matters pursuant to [the CBA] and in any matter involving interaction between the Union and [SEPTA]." The Hearing Examiner rejected SEPTA's reliance on the Safety and Productivity Committee provision contained in Article XXXIX of the CBA as a basis to preclude FOTP Attorney Kohn because that provision contains no prohibition on attorneys being the union representative. Thus, the Hearing Examiner concluded that because the March 30, 2017 meeting was an interaction between the parties under Article V, Section 5 of the CBA, it was a repudiation of the contract and an unfair practice for Cuneo to refuse to meet with the FOTP while Attorney Kohn was present.

With respect to the FOTP's charge alleging SEPTA's obligation to bargain the "windows down" and "out of the public eye" directives, the Hearing Examiner held that SEPTA has no bargaining obligation with regard to the implementation or impact of these policies, as they amounted to the direction of personnel under Section 702 of PERA, with no negotiable severable impact on employe wages, hours or working conditions. Accordingly, the Hearing Examiner ordered as follows:

> As such, the refusal to bargain the implementation and impact of the various policies/directives portion of the charge must be dismissed. Furthermore, having concluded that SEPTA has no obligation to bargain the implementation or impact of the various policies/directives, I must decline the Union's request for a remedy to rescind any discipline issued to bargaining unit members for violating the directives and limit the remedy to a cease and desist order, along with the Board's usual posting requirements.

(PDO at 9-10).

On exceptions, SEPTA argues that the Hearing Examiner erred in finding that the "windows down" and "out of the public eye" orders were directives subject to the ten day notice requirement of Article V, Section 3 of the CBA.[2] In this regard, SEPTA argues that the Board's

[2] In its statement of exceptions, but not its brief, SEPTA argues that the Hearing Examiner erred in finding that the FOTP's allegations regarding the "windows down" policy was timely filed under Section 1505 of PERA. Section 1505 of PERA provides that "[n]o … charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the … charge." 43 P.S. §1101.1505. The four months statute of limitations under Section 1505 of PERA commences to run when the complainant knows, or should know, of the implementation of a policy that it contends was unlawfully imposed without bargaining. The employe representative is on notice of implementation when its agents, officers or representatives know of the policy. PSSU, Local 668 v. Lancaster County, 24 PPER ¶24027 (Final Order, 1993); Officers of the Upper Gwynedd Township Police Department v. Upper Gwynedd Township, 32 PPER ¶32040 (PDO, 2001), *aff'd,* 32 PPER ¶32101 (Final Order, 2001). The Hearing

jurisdiction does not extend to alleged violations of the CBA. *See* Jersey Shore School District, 18 PPER ¶18117 (Final Order, 1987).

The Board is statutorily charged with remedying unfair practices under Article XII of PERA. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). The fact that an alleged unfair practice may also involve an interpretation of the contract, does not divest the Board of its statutory jurisdiction over unfair practices. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993). In performing its statutory duty to determine whether there has been a failure to bargain in good faith, the Board may review the language of a collective bargaining agreement. Id. In reviewing the contract in the context of an unfair practice, an employer's actions that amount to a repudiation of contract language, or a unilateral amendment of the contract, constitutes a failure to bargain in good faith under Section 1201(a)(5) of PERA. Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005); Chester Upland School District v. PLRB, 150 A.3d 143 (Pa. Cmwlth. 2016); Pennsylvania State Troopers Association, *supra.* Generally, an employer's failure to abide by a strict time-limit or notice requirement to which it agreed in the collective bargaining agreement amounts to a repudiation of that contract provision for purposes of Section 1201(a)(1) and (5) of PERA. Palmerton Area School District v. PLRB, 34 PPER 92 (Pennsylvania Court of Common Pleas, 2003); FOP, Lodge No. 5 v. City of Philadelphia, 28 PPER ¶28109 (Proposed Decision and Order, 1997), *affirmed*, 29 PPER ¶29000 (Final Order, 1997), *affirmed sub nom*, FOP, Lodge No. 5 v. PLRB, 727 A.2d 1187 (Pa. Cmwlth. 1999); Utility Workers Union of America v. Hempfield Township Municipal Authority, 41 PPER 11 (Proposed Decision and Order, 2010).

Article V, Section 3 of the CBA provides for an agreed upon time period in which SEPTA is to provide notice to the FOTP of a new policy or directive. Article V, Section 3 provides as follows:

> The Authority shall make a good faith effort to notify the Union of any new Department issued permanent policy or directive, or change in any such policy or directive affecting it or its members at least ten (10) days before the effective date of such policy or directive.

The Hearing Examiner did not err in finding that the "windows down" and "out of the public eye" orders are directives to employes, and subject to the contractual notice provisions of Article V, Section 3 of the CBA. Indeed, the Hearing Examiner's findings are supported by substantial evidence of record. As noted by the Hearing Examiner, Cuneo himself referred to the "windows down" order as a directive in his March 10, 2017 response to the FOTP's grievance concerning an employe being disciplined for failing to abide by the "windows down" directive. Furthermore, as noted by the Hearing Examiner, the "windows down" and

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Examiner's Finding of Fact that "[t]he Union was not aware of the written direct order until December 2016 when a bargaining unit employe was disciplined for allegedly violating the order" (FF 14) is supported by substantial evidence of record, including Union Exhibit 2, and the testimony of Mr. Bervine (N.T. 32). Therefore, SEPTA's exception to the timeliness of the FOTP's allegations regarding the "windows down" policy, is dismissed.

"out of the public eye" orders were applicable to the entire bargaining unit, permanent in nature, and not issued in immediate response to any contemporaneous safety issue, thus drawing the reasonable inference that the "windows down" and "out of the public eye" orders were in fact, permanent policies or directives, within Article V, Section 3 of the CBA. Accordingly, the Hearing Examiner did not err in finding that the "windows down" and "out of the public eye" orders were policies or directives subject to the ten days contractual notice requirements contained in Article V, Section 3 of the CBA.

In at least two previous Board orders, hearing examiners have consistently held that an employer's failure to abide by similar contractual notice provisions for rule changes amounts to a repudiation of the collective bargaining agreement. In City of Philadelphia, the hearing examiner found as follows:

> [T]he City's failure to provide such notice violated a provision of the collective bargaining agreement which requires the City to notify the FOP of "all substantive changes or new rules and regulations" at least ten days prior to the change. Since there is no "sound arguable basis" in the collective bargaining agreement for the failure to provide such notice, … the failure to provide such notice constitutes an unlawful unilateral change.

Id., 28 PPER at 239. Similarly, in Hempfield Township Municipal Authority, the hearing examiner held as follows:

> An employer violates sections 1201(a)(1) and (5) if it repudiates a provision in a collective bargaining agreement….
>
> The record shows that article V, section 1, of the parties' collective bargaining agreement provides that "[t]he Authority shall give employees reasonable advance notice of the applicability of any and all rules by posting said rules for a period of no less than seven (7) days prior to the effective date of said rules" ….
>
> [I]t is apparent that the Authority repudiated article V, section 1, of the collective bargaining agreement by not posting its no-smoking policy for no less than seven days prior to its effective date. Thus, to that extent, the Authority committed unfair practices under sections 1201(a)(1) and (5).

Id., 41 PPER at 36-37.

On this record, it is undisputed that SEPTA failed to provide notice to the FOTP of the "windows down" and "out of the public eye" policies ten days prior to their respective effective dates, as required by Article V, Section 3 of the CBA. Consistent with Board caselaw, SEPTA's failure to provide the FOTP with ten days notice of the "windows down" and "out of the public eye" policies was a repudiation of Article V, Section 3 of the CBA. *See* City of Philadelphia, *supra.*; Hempfield Township Municipal Authority, *supra.* The Hearing Examiner, therefore did not err in concluding that SEPTA

violated Section 1201(a)(1) and (5) of PERA by implementing the "windows down" and "out of the public eye" policies without the contractually required ten days notice to the FOTP.[3]

SEPTA next argues on exceptions that the Hearing Examiner erred in finding that it violated Section 1201(a)(1) and (5) of PERA by refusing to meet with the FOTP if FOTP Attorney Thomas Kohn was present. As the Board held in Greater Nanticoke Area School District, 3 PPER 157 at 158 (Nisi Decision and Order, 1973), "[b]argaining units are free to choose their own bargaining agent, and to use a negotiator of their own choosing on their behalf in bargaining sessions. Such a negotiator is, in effect, the agent of that bargaining unit in such a role." The Board also noted in North Cambria School District, 3 PPER 318 at 320 (Nisi Decision and Order, 1973), that "[a]n employer must accept and bargain with the representatives selected by the union to represent it in collective bargaining negotiations. The fact that the representative may be personally objectionable to the employer, or that he is not an employe does not relieve the employer from [its] duty to bargain." Further, in Port Authority Transit Police Association v. Port Authority of Allegheny County, 21 PPER ¶21023 (Final Order, 1989), the Board stated that "[t]he public employer simply does not have the right to … designate for the Union which individual shall negotiate or meet and discuss on the Union's behalf. It is the duty of both parties in the collective bargaining process to negotiate with the designated representative of its counterpart. Neither party can condition its continued participation in the collective-bargaining process on the removal of individuals designated by its bargaining counterpart not to its liking." *See also* City of Pittston, 26 PPER ¶26016 (Final Order, 1994). Indeed, Section 101 of PERA provides that the express purpose of the act is fulfilled by "granting to public employes the right to organize and choose freely their representatives…." 43 P.S. §1101.101. A "representative" is expressly defined by PERA to mean "any individuals acting for … employes…" 34 P.S. §1101.301(4).

SEPTA's reliance on Cheltenham Township v. PLRB, 846 A.2d 173 (Pa. Cmwlth. 2004), to argue that it may restrict the employes' choice of representative, is entirely misplaced. The sum and substance of the Cheltenham Township case is that during an investigatory interview where the employe fears discipline may be imposed, the employe has the statutory right to choose a union representative.[4] An attorney retained by the union is a union representative. Cheltenham Township Police Association v. Cheltenham Township, 36 PPER 4 (Final Order, 2005); Town of Hudson v. Labor Relations Commission, 870 N.E. 2d 618, 69 Mass. App. Ct. 549 (2007). Contrary to SEPTA's argument, Cheltenham Township actually holds that an attorney retained by the union may be a chosen representative of employes for any and all purposes of PERA, including *Weingarten*. As the Board held in Norristown Borough, "[t]here is no

[3] Furthermore, SEPTA's argument that "patrol orders" are not "directives" under Article V, Section 3, is an attempt to unilaterally alter the negotiated contractual provisions in violation of Section 1201(a)(1) and (5) of PERA. *See* Wilkes-Barre Township, *supra*; Chester Upland School District, *supra*.

[4] National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975).

doubt that either party to the negotiation process must bargain in good faith with the representatives sent to the bargaining table by the other side. The parties are free to bargain through employes, **attorneys**, hired negotiators, etc. It is an unfair practice for a party to the bargaining process to refuse to bargain with the designated representative at the bargaining table." Norristown Borough, 8 PPER 70 at page 71 (emphasis added); Caln Township, 11 PPER 11252 (Proposed Decision and Order, 1980).

Here, the FOTP identified Attorney Kohn as its designated representative. Once Cuneo told Bervine that SEPTA would meet to discuss[5] the FOTP's concerns regarding the "windows down" and "out of the public eye" policies, SEPTA had no statutory right to refuse to engage in its meet and discuss obligation on the basis that FOTP Attorney Kohn was present as the representative for the FOTP.

Moreover, SEPTA's argument that it had a contractual right to restrict the participation of FOTP representatives in a Safety and Productivity meeting under Article XXXIX of the CBA is unavailing. Article XXXIX is not an express waiver of the FOTP's statutory right to designate a representative or agent for the bargaining unit employes. As noted by the Hearing Examiner, the plain language of the CBA provides for the FOTP to designate its representative in committee meetings with SEPTA. As discussed above, the Hearing Examiner does not err in reviewing a CBA to find a repudiation of the agreed upon contract terms. Millcreek Township School District; Pennsylvania State Troopers Association. In this regard, the Hearing Examiner correctly found as follows:

> First of all, the initial clause of Article V, Section 5 states that "[i]n all matters pursuant to this Agreement and in any matter involving interaction between the Union and the Authority, the Authority shall recognize duly authorized representatives of the Union." (Emphasis added). The Safety and Productivity Committee is clearly a matter pursuant to the CBA. Therefore, SEPTA is required to recognize the duly authorized representatives of the Union in connection therewith. What is more, the Safety and Productivity Committee provision contains no prohibition whatsoever on attorneys. To the contrary, the provision states that "[t]he committee shall be comprised of six members, three to be appointed by the Chief of Police and three by the Union." Further, the Safety and Productivity Committee provision contemplates the inclusion of various representatives where it states the following:
>
> It is recognized that such desired productivity depends in great part on the fairness and effectiveness of supervision, equipment for employees, and the good faith cooperation by the officers and their Union Representatives

[5] "'Meet and discuss' means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employes…." 43 P.S. §1101.301(17).

> with the representatives of the Authority in the attainment of this essential goal. (Emphasis added).
>
> In any case, the provision also states that "[t]he establishment of the Committee shall not affect the existing rights of either party under other provisions of this agreement," which certainly includes the Union's right to have the Authority recognize and conduct business with its duly authorized representatives in Article V, Section 5. Similarly, the provision further states that "[n]o committee meeting or report under this section shall... modify or amend any provision of this agreement," which also includes the Union rights provision. Therefore, SEPTA's contractual privilege defense to the repudiation charge is rejected.

(PDO at 8-9).[6]

On this record, SEPTA's refusal to meet with the FOTP to discuss the FOTP's concerns with the "windows down" and "out of the public eye" policies while FOTP Attorney Kohn was present, constituted an interference with the FOTP's statutory right to designate a representative, and thus, was a violation of Section 1201(a)(1) of PERA. Further, as found by the Hearing Examiner, SEPTA's refusal to meet with the FOTP, while FOTP Attorney Kohn was present, was in contradiction to the express provisions of the parties CBA, and therefore a repudiation of agreed upon contract language in violation of Section 1201(a)(5) of PERA. Accordingly, the Hearing Examiner did not err in concluding that SEPTA violated Section 1201(a)(1) and (5) of PERA by refusing to meet with the FOTP on March 30, 2017.

SEPTA also argues that the Hearing Examiner's remedy for the unfair practice is improper. However, the Hearing Examiner did not direct remedial relief. Instead, the Hearing Examiner limited the remedy to a cease and desist order, declined to direct rescission of the "windows down" or "out of the public eye" policies, and did not order the revocation of any discipline issued to bargaining unit members for violating the directives. The only affirmative relief directed by the Hearing Examiner was limited to directing SEPTA to post the PDO for a period of ten days, and attest to the posting by filing an affidavit of compliance. Limiting the relief for an unfair practice

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[6] SEPTA, for the first time on exceptions, argues that it was excused from meeting with the FOTP while FOTP Attorney Kohn was present because Attorney Kohn was representing the FOTP in a Charge of Unfair Practices he had filed with the Board as the counsel of record for the FOTP. First, this issue is waived because SEPTA failed to preserve the argument before the Hearing Examiner, 34 Pa. Code §95.98 (a)(2) ("[n]o reference may be made in the statement of exceptions to any matter not contained in the record of the case). Secondly, the Board does not enforce or police the conduct of attorneys with respect to their professional obligations as licensed attorneys. Chester Township, 21 PPER ¶21005 (Final Order 1989); Utility Workers Union of America Local 433 v. White Oak Borough, 40 PPER 41 (Proposed Decision and Order, 2009). Finally, contrary to the mandates of PERA, SEPTA did not even attempt any good faith effort to meet with the FOTP while FOTP Attorney Kohn was present as a FOTP representative.

to a cease and desist order is within the discretionary authority of the Hearing Examiner. Pennsylvania Labor Relations Board v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948). The Hearing Examiner did not abuse his discretion in issuing a limited remedy, which is consistent with the Board's typical cease and desist order.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that SEPTA violated Section 1201(a)(1) and (5) of PERA by repudiating provisions of the collective bargaining agreement and refusing to meet with the representative of the FOTP. Accordingly, the exceptions filed by SEPTA shall be dismissed, and the PDO made absolute and 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 Southeastern Pennsylvania Transportation Authority are hereby dismissed, and the October 3, 2018 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, James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this sixteenth day of April, 2019. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

AFFIDAVIT OF COMPLIANCE

SEPTA hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order and Final Order as directed therein; 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 Union 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