

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOTP LODGE 109¹

V.

Case No. PERA-C-18-132-E

SEPTA

PROPOSED DECISION AND ORDER

On June 11, 2018, the Fraternal Order of Transit Police Lodge 109 (FOTP or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority), alleging that SEPTA violated Section 1201(a)(1), (3), and (5) of the Public Employee Relations Act (PERA or Act) by transferring Officer Richard Galanti out of the canine unit to patrol in retaliation for his protected activity, and then subsequently refusing to provide relevant information regarding the transfer and refusing to process a grievance in connection therewith.

On June 26, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on September 24, 2018, if necessary. After several continuances at the request of both parties, the hearing ensued on January 8, 2020, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The FOTP filed a post-hearing brief on March 3, 2020. SEPTA filed a post-hearing brief on March 4, 2020.

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. SEPTA is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)

2. The FOTP is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)

3. The FOTP is the exclusive bargaining representative for a unit of police employes working at SEPTA. (SEPTA Exhibit 4)

4. The FOTP and SEPTA are parties to a Collective Bargaining Agreement (CBA) effective April 29, 2012 to March 31, 2016, which was extended by a Memorandum of Agreement (MOA) through March 31, 2018. (SEPTA Exhibit 4, 5)

5. Richard Galanti has been a police officer at SEPTA since 2003. He initially served as a patrolman and began working in the canine unit in 2005, which he described as a specialized unit where officers are partnered with a dog for explosives detection or patrol duties. His first dog was

¹ The caption appears as amended by the hearing examiner.

retired after approximately nine or ten years, after which he was assigned a second dog named Abal in 2014. (N.T. 18-20)

6. In November 2015, Lieutenant John Arnold, who was a supervisor in the canine unit, sent an email essentially instructing officers to wear uniforms which req.d "Transit Police" on the outermost garment. (N.T. 23-24)

7. In response, Galanti sent an email on November 17, 2015 stating "[s]ir with all due respect is SEPTA going to pay for the cost of the alterations of my unit issued jacket to meet your requirements," to which Arnold replied "[n]o" on the same date. (N.T. 24-25; Union Exhibit 2)

8. Galanti then contacted the Union, specifically then-President Richard Neal, Ted Grisom and Eddie Kaiser, who advised him they would review the matter with the Chief and not to do anything about the issue until they got back to him, which never happened. (N.T. 26, 65)²

9. On June 15, 2016, Galanti received a three-day disciplinary suspension for allegedly not complying with Arnolq's order, which alanti challenged through the grievance procedure set forth in the CBA. (SEPTA Exhibit 3)

10. On July 12, 2016, the parties held a first level grievance meeting, after which Captain Chuck Lawson sustained the grievance and rescinded the disciplinary suspension. Lawson specifically concluded that Arnold's actual order was "somewhat confusing." (SEPTA Exhibit 3)³

11. On December 6, 2017, Sergeant Michael Wright, who was Galanti's supervisor at the time, sent Galanti an email, which provided in relevant part, as follows:

In reference to the order given by myself and [Lieutenant] Catto for you to purchase a patrol jacket/winter jacket, you are being given a reasonable period of a week to order it. That week will end 12/13/17. It is understood that it will take some time to actually come in from the ffianufacturer but I at least want you to have it order [sic] before the tempe.ratures become dangerously frigid. Thank you sir.

(N.T. 26-28; Union Exhibit 3)

12. Around that same time, Catto gave Galanti a yellow sticky note providing him with the model number and other specifications for the jacket. (N.T. 28-29; Union Exhibit 4)

13. Galanti went to his FOTP representative, Pete Sieron, who immediately filed a grievance on December 7, .2017, protesting the order that Galanti was responsible for buying the jacket. (N.T. 29-30; Union Exhibit 5)

14. On December 8, 2017, Catto sent an email to Galanti, which provided in relevant part as follows:

I wanted to clarify the [December 6, 2017] order. You are required to obtain a K9 winter patrol jacket or show proof that

² It is unclear from the record what positions or titles within the FOTP Grisom and Kaiser held at the time.

³ Lawson has since been promoted to the rank of Inspector, (N.T. 106-107).

you purchased a K9 winter patrol jacket that is compliant with **the K9 winter uniform as prescribed in Directive 601 by the end** of the week of 12/13/17. If you have any questions as to if a **jacket is compliant with this directive, please s e [Lieutenant] Arnold. Thank you.**

(N.T. 30-31; Union Exhibit 6)

15. Galanti testified that he complied with the directive by changing the patches on his current jacket, .tearing the lettering off the back, and securing a Velcro patch to the back of the jacket. He testified that he **notified Omari Bervine, the current FOTP President, by email during the** period allotted by Catto. He did not know if Catto would have accepted this and never actually wore the jacket during the period in question. (N.T. 55, 66)

16. The parties held a first level grievance meeting on December 8, 2017, during which the FOTP and SEPTA each presented their arguments. (Union Exhibit 7)

17. On January 1, 2018, Lawson issued his response, denying the grievance, Lawson concluded that the grievance was untimely because Galanti should have known that SEPTA would not accept responsibility for the cost to replace his patrol jacket in 2015. (N.T. 32-33; Union Exhibit 7)

18. The FOTP appealed Lawson's determination and processed the grievance to the next step, after which a second level grievance meeting ensued on March 2, 2018 before SEPTA's Chief Labor Relations Officer Chad Cuneo. (N.T. 33-34, 72-73; Union Exhibit 8, 10)

19. On March 23, 2018, Catto issued a Memorandum to Galanti, which provided in relevant part as follows:

Effective Sunday, April 1, 2018, you are transferred from the K9 **Unit to the Patrol Division. You will remain assigned to** District 4 with Sunday/Monday regular days off. You will be **notified o f a decision regarding Canine Abal's future no later** than Tuesday, March 27, 2018.

(N.T. 35; Union Exhibit 9)

20. On March 23, 2018, Galanti asked Catto why he was being removed from the canine unit, to which Catto replied "performance." When Galanti questioned him regarding what specific performance, Catto stated that he did not know. (N.T. 35-36; Union Exhibit 9)

21. Also on March 23, 2018, Cuneo issued his response to the second level grievance, which provided in relevant part as follows:

A second level hearing was conducted on Thursday, March 2, 2018, regarding the above referenced grievance. Office [sic] 0.

⁴ Directive 601, which relates to Roll Call and Inspection and is dated April 18, 2014, lists the canine winter uniform requirements simply as "[w]inter patrol jacket."¹¹ On the next line, the Directive states "[l]ong sleeve black BOU shirt with 'Transit Police K-9' on the back, _embroidered badge and name tag," while the remaining lines address trousers, boots, hats, and apparently optional mock turtlenecks for wear under the BOU shirt. (SEPTA Exhibit 1).

Bervine and the grievant, Officer Richard Galanti, were in attendance for the Union. In attendance for the Authority was the undersigned, Labor Relations Manager, C. Cuneo.

The grievance protests the Transit Police Department's refusal to provide a new K-9 Patrol Jacket to Officer Galanti.

Officer Galanti has an older style K-9 Patrol Jacket that was issued to him previously which reads "POLICE K-9" on the back. In November, 2015, Officer Galanti, and all members of Special Operations, were ordered by [Lieutenant] Arnold to insure their uniforms, including their Patrol Jackets, had the words "TRANSIT POLICE,, on the back and were ordered not to wear any garments that were not in compliance.

On November 17, 2015, Officer Galanti sent an email to his supervisors, including [Lieutenant] Arnold, which read "Sir with all due respect is SEPTA going to pay for the cost of the alterations of my unit issued jacket to meet your requirements?"

[Lieutenant] Arnold immediately responded, "No."

Officer Galanti did not obtain a patrol jacket in compliance with the Department's requirements. In [sic] November 15, 2017, Officer Galanti's current supervisor Sgt. [sic] Catto ordered him to purchase a patrol jacket that is in compliance with the Department's uniform requirements. On December 8, 2017, the Union requested a grievance hearing on the issue.

The Union presented some persuasive arguments in support of the grievance, including their reference to Article XLII "Clothing and Equipment" which requires that any change in uniform clothing, which affects the entire department, shall be at the expense of the Department.

However, given the above listed dates (the grievance was not filed until over two years after Officer Galanti's request for payment for the jacket was denied by the Department) and the Labor Agreement's requirement that a grievance must be filed within 14 days of the event on which the grievance is based, the undersigned must concur with Inspector Lawson's 1st Step hearing answer finding that the grievance was not filed in a timely manner and cannot be considered.

The grievance is denied.

(N.T. 73; Union Exhibit 10) (Emphasis in original)

22. On March 27, 2018, Catto issued a Memorandum to Galanti, which provided in relevant part as follows:

Because of your transfer to patrol on April 1, 2018, K9 Abal is expected to remain in continued service with the Police Department. Abal will be assigned another handler and the logistics of the temporary housing arrangements will be forthcoming,

(N.T. 38; Union Exhibit 11)

23. On March 30, 2018, Catto sent an email to Galanti, which provided **in relevant part as follows:**

On Tuesday, April 3, 2018, you will take K9 Abal to the Pet Hotel out by the airport. Please report on duty to District 4 Headquarters at the beginning of your shift and take a marked K9 **vehicle to the housing location...**

(N.T. 40-41; Union Exhibit 14)

24. Also on March 30, 2018, Galanti filed a grievance on his own **behalf, protesting the transfer and removal of his canine partner as being without just cause and in retaliation for his prior grievance regarding the winter patrol jacket.** (N.T. 38-39; Union Exhibit 12)

25. **Galanti then assumed a position in patrol, as directed by Catto.** (N.T. 41)

26; On April 4, 2018, Bervine tried to process the transfer grievance by sending an email to Cuneo, which provided in relevant part as follows:

The [FOTPJ is formally requesting any and all relevant documents relating to the removal of PO Richard Galanti from the K9 Unit and his subsequent, unwanted transfer to District 4, (3pm-11pm) **shift. Specifically, we are requesting any and all performance statistics and metrics utilized to determine that PO Galanti's performance was substandard, to a degree that warranted his removal from the K9 Unit. We are also requesting the performance statistics of all other members of the K9 Unit for the same time period that was considered in determining that PO Galanti's performance with the same unit was unsatisfactory...**

(N.T. 75-76; Union Exhibit 17)

27. On April 16, 2018, Bervine spoke to Cuneo by telephone to **verify that SEPTA had received the information request, as the Union needed the information to process the grievance. Cuneo told him the Union would not be receiving any of the information and that the grievance would not be processed or considered at the first or second level.** (N.T. 78, 97, 101)

28, On September 19, 2018, the FOTP served SEPTA with a Board-issued subpoena for the documents the FOTP requested on April 16, 2018. The FOTP received the documents from SEPTA on October 22, 2018. (N.T. 79-82; Union Exhibit 18, 19)

29, Lawson testified that he decided to transfer Galanti for three **reasons: Galanti's** alleged failure to comply with the 2015 and 2017 orders, his alleged denial to Catto that he did not know the results of the earlier **investigation from** 2015, and his poor performance measures. (N.T. 125)

DISCUSSION

The FOTP has alleged that SEPTA violated Section 1201(a)(1), (3), and (5) of the Act⁵ by transferring Officer Richard Galanti out of the canine unit

⁵ Section 1201(a) of PERA provides that "[p]ublic employers, their agents or **representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of**

to patrol in retaliation for his protected activity, and then subsequently refusing to provide relevant information regarding the transfer and refusing to process a grievance in connection therewith. SEPTA, on the other hand, contends that the charge should be dismissed because there were legitimate nondiscriminatory reasons for the transfer. SEPTA also maintains that the charge should be dismissed because Galanti suffered no adverse employment action. SEPTA further maintains that the transfer would have occurred anyway in light of Abal's eventual medical retirement because SEPTA as a policy, requiring officers to return to patrol when the service life of the dog ends to free up opportunities for other officers to enter the specialized unit, Finally, SEPTA claims that the refusal to bargain portion of the charge is moot, as the FOTP eventually received the information they were seeking, and SEPTA eventually offered to arbitrate the transfer grievance at some later time.

In a Section 1201(a) (3) discrimination claim, the Complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. Audie Davis v. Mercer County Regional Council of Government, 45 PPER 108 (Proposed Decision and Order, 2014) citing St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa, 1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity. Teamsters Local 776 v. Perry county, 23 PPER i 23201 (Final Order, 1992). If the employer offers such evidence, the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual. Teamsters Local 429 v. Lebanon County, 32 PPER i 32006 (Final Order, 2000). The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct. Mercer County Regional COG, supra, citing Pennsylvania Federation of Teachers v. Temple University, 23 PPER i 23033 (Final Order, 1992).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. City of Philadelphia, 26 PPER i 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities-for example, whether leading organizers have been eliminated; the extent to which the adversely affected employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe rights. City of Philadelphia, supra, citing PLRB v. Child Development Council of Centre County, 9 PPER i 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for

this act., (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization... (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

discrimination, Teamsters Local 764 v, Montour County, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employe engaged in protected activity *is* a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER 1 13277 (Final Order, 1982).

The FOTP has sustained its burden of proving the first two elements of a Section 1201(a) (3) discrimination claim. Indeed, the record shows that Galanti had the FOTP file a grievance on his behalf on December 7, 2017, protesting the order that Galanti was responsible for buying the jacket, which *is* clearly protected activity under the Act. Likewise, the record shows that SEPTA was aware of this protected activity, as Lawson received the initial grievance and rendered a step one response in connection therewith. In fact, these two elements of the test are undisputed by the parties. The only remaining issue then is whether SEPTA was motivated by Galanti's protected activity when it notified him of his removal from the canine unit on March 23, 2018.

The FOTP has also sustained its burden of proving the third element of the Section 1201(a) (3) . discrimination test that SEPTA was unlawfully motivated when it transferred Galanti out of the canine unit. Lawson testified at the hearing that he decided to transfer Galanti for three reasons: Galanti's alleged failure to comply with the 2015 and 2017 orders, his alleged denial to Catto that he did not know the results of the earlier investigation from 2015, and his poor performance measures. However, as the Union persuasively notes in its post-hearing brief, none of these reasons withstand scrutiny after careful review.

First of all, the record shows that Lawson himself rescinded the three-day disciplinary suspension Galanti received in 2016 for allegedly not complying with the 2015 order, after Galanti challenged the suspension through the grievance process. In doing so, Lawson concluded that the actual 2015 order was "somewhat confusing," As such, the parties actually settled the grievance over the 2016 disciplinary suspension. However, by transferring Galanti approximately three years later, in part, for allegedly not complying with the 2015 order, which he himself deemed confusing, Lawson has essentially violated the 2016 grievance settlement between the parties, and reinstated discipline for the same event. This is plain evidence of Lawson's unlawful motivation.⁶ Furthermore, as the Union points out, SEPTA failed to present any credible evidence that Galanti actually failed to comply with the 2017 order. Instead, the only evidence of record shows that Galanti tried to comply with the 2017 order by altering his current jacket. Although Galanti was unaware of whether SEPTA would have accepted this as sufficient compliance, the record shows that he was transferred without Lawson or Catto even attempting to verify the status of his uniform. (N.T.

⁶ To the extent SEPTA argues that Galanti has suffered no adverse employment action, Black's Law Dictionary, 6th Edition, defines discipline as "[i]nstruction, comprehending the communication of knowledge and training to observe and act in accordance with rules and orders. Correction, chastisement, punishment, penalty. To bring order upon or bring under control." Under this definition, the transfer clearly constitutes discipline, as Lawson testified that it was done, in part, because Galanti failed to comply with the 2015 and 2017 orders. In any event, the record also shows that Galailti suffered a loss of earnings as a result of his transfer, as he no longer receives pay for a half hour of grooming time for the dog on his regular days off. (N.T. 44-45).

55-56). As the FOTP convincingly notes in its post-hearing brief, if Lawson truly believed that Galanti had disobeyed an order, it would have been far more reasonable for him to simply issue discipline for that incident alone, and not to manufacture additional reasons to support his decision by conducting an exhaustive analysis of Galanti's performance statistics, which he had never done before for anyone else who was already in the canine unit. (N.T. 150).

What is more, the FOTP has demonstrated that Lawson's second reason for the transfer was also pretextual. Lawson claimed that his second reason for removing Galanti from the canine unit was that Galanti allegedly denied to Catto that he had any knowledge of the results of an earlier investigation regarding the 2015 order. Specifically, Lawson claimed that in response to an inquiry from District 4 personnel where Galanti served about whether the members had the appropriate winter uniform, Galanti indicated to his immediate supervisor that he did not have a uniform jacket. (N.T. 134). Lawson further testified that Lieutenant Catto, who was Galanti's commanding officer and supervisor, then asked Galanti what the results were of that prior investigation into the 2015 order and whether Galanti needed to obtain a jacket. (N.T. 125, 134, 148). And, Lawson testified that Galanti lied to Catto by stating that he had no knowledge of the results. (N.T. 125, 134, 148).

However, as the FOTP notes, this was an accurate response. Indeed, Galanti credibly testified that he had discussed the situation with his Union representatives and was advised they were reviewing the matter with the Chief, after which they would get back to him. This testimony was not refuted or contradicted in any way.⁷ At the hearing, Lawson took issue with such a notion, claiming that Galanti was still subject to the 2015 order. (N.T. 134-135). Inexplicably though, as stated above, Lawson himself deemed that order to be confusing and rescinded the discipline Galanti received for allegedly not complying with it. Once again, therefore, Lawson revealed the true reason for Galanti's removal from the canine unit, his audacity to challenge the December 2017 order through the grievance process.

Finally, the record also shows that Lawson's alleged third reason for removing Galanti from the canine unit was similarly pretextual in nature. Lawson testified that he conducted an exhaustive analysis of Galanti's statistics, including his number of arrests, citations, and overall calls for service, during a 16-month period between January 2017 and April 2018. (N.T. 124-126, 148; SEPTA Exhibit 7). Lawson testified that he undertook this analysis to determine Galanti's activity level, "given the fact that he had failed to obey an order twice and lied to his immediate supervisor." (N.T. 148). Lawson stated that he wanted that information to weigh in his ultimate decision. (N.T. 148). Lawson concluded that Galanti's production was significantly below expectations for that period of time, as compared to several other officers, who were included in the study. (N.T. 129). However, Lawson conceded on cross-examination that officers are reactive rather than proactive, and therefore, they cannot significantly control their number of arrests. (N.T. 143).. What is most troubling though is that Lawson

⁷ In fact, SEPTA did not present the testimony of Catto during the hearing, meaning Lawson's testimony in this regard was uncorroborated hearsay evidence. To the extent SEPTA may claim that the testimony was offered not for the truth of the matter asserted, but rather for Lawson's belief that Galanti had lied, such a position is unpersuasive, as Lawson's testimony has not been accepted as credible.

has never performed such an analysis of an officer's performance before once that individual was already assigned to the canine unit. (N.T. 150). Although Lawson claimed that SEPTA has transferred officers in the past who worked in other specialized units for performance reasons, it strains credulity to think Lawson needed further justification to discipline or remove Galanti if he truly believed Galanti had been insubordinate to his commanding officer, especially given the nature of paramilitary organizations like the SEPTA police force. The mere fact then that Lawson even undertook this analysis at all is compelling evidence of unlawful motive, especially when combined with its close timing to the December 2017 grievance, his violation of the 2016 grievance settlement and his subsequent attempt to reinstate discipline for the same alleged incident from 2015.

SEPTA also maintains that the charge should be dismissed because the transfer would have occurred anyway in light of Abal's eventual medical retirement. SEPTA contends that it has a policy requiring officers to return to patrol when the service life of the dog ends in order to allow opportunities for other officers to enter the specialized unit. Lawson testified that SEPTA issued the policy "roughly within 2014, 2016." (N.T. 129-130). Lawson claimed that the policy was enacted after Galanti was assigned his second canine in 2014. (N.T. 130). He also claimed that it was communicated to all members of the department, but he did not have a copy at the hearing, (N.T. 133). In contrast, Galanti testified credibly and without contradiction, that after the alleged policy became effective, at least one other officer had his dog retired, was permitted to remain in the canine unit, and was assigned another dog. (N.T. 170-171). As a result, SEPTA's argument in this regard is also lacking in merit. Accordingly, it must be concluded that SEPTA has violated Section 1201(a)(3) of the Act.⁸

⁸ SEPTA has also raised Article XXXV of the CBA as a defense, which is entitled "Authority Rights," and which provides that "[a]ll 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...hire, promote, demote, transfer, layoff and recall employees to work..." (SEPTA Exhibit 4). However, while the CBA gives SEPTA broad managerial discretion to transfer employees, this Board has long held that a public employer's managerial prerogative does not insulate it from the statutory obligation to exercise that authority without anti-union discrimination. Twin Valley Educational Support Professionals Ass'n, PSEA/NEA v. Twin Valley School District, 49 PPER 72 (Proposed Decision and Order, 2018) (citing Teamsters Local No. 205 v. Brentwood Borough, 35 PPER 112 (Final Order, 2004); United Steel Workers of America, Local 8125 v. East Taylor Township, 24 PPER 24166 (Final Order, 1993); Mid Valley Education Ass'n v. Mid Valley School District, 25 PPER 1 25138 (Final Order, 1994)). Consequently, while Lawson's actions may have constituted an allowable exercise of managerial prerogative absent an improper purpose, his discriminatory motive behind his removal of Galanti from the canine unit, transforms the permissible action into an unfair practice. Twin Valley School District, 49 PPER at 299-300. Under the color of his managerial right, Lawson does not have the authority to retaliate against employees who engage in protected activity. *Id.* at 300 (citations omitted). And, in any case, the CBA also specifically and expressly precludes discrimination under Article IV for "the exercise of any rights afforded by this Agreement," which of course includes a grievance provision. (SEPTA Exhibit 4).

Turning to the refusal to bargain portions of the charge, the FOTP has alleged that SEPTA violated the Act by refusing to process the grievance protesting Galanti's transfer and refusing to provide relevant information in connection therewith. SEPTA argues that these portions of the charge should be dismissed as moot because SEPTA eventually provided the requested information and offered to arbitrate the grievance at some later time.

It is well settled that an employer has a duty to provide requested information to the union, which is relevant to the union's policing of the collective bargaining agreement, even where no grievance is pending. Bristol Township, 27 PPER i 27046 (Proposed Decision and Order, 1996). The standard for relevance is a liberal discovery type standard that allows the union to obtain a broad range of potentially useful information. Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987),

As a general proposition, where an employer refuses to process a grievance to arbitration, it commits an unfair practice, and neither the Board nor the courts on appeal of a Board order finding a refusal to arbitrate may decide the merits of the parties' dispute over arbitrability. Teamsters Local 776 v. Susquehanna Twp. School District, 45 PPER 95 (Final Order, 2014), In fact, it has been repeatedly held for decades that the question of the scope of the grievance arbitration procedure is for the arbitrator, at least in the first instance; meaning that an arbitrator has sole and exclusive jurisdiction to hear disputes related to collective bargaining agreements, including disputes of whether a matter is arbitrable. PLRB v. Bald Eagle Area School District, 451 A.2d 671 (Pa. 1982); Abington Heights School District v. PLRB, 709 A.2d 990 (Pa. Cmwlth. 1998); Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), Even frivolous grievances must be submitted to the arbitrator. Palmerton Area Education Ass'n, PSEA/NEA v. Palmerton Area School District, 41 PPER i 153 (Proposed Decision and Order, 2010) citing Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 391 A.2d 1318 (Pa, Cmwlth. 1978). Refusal to submit a grievance to arbitration constitutes a per se bargaining violation. Indiana Area Education Ass'n, PSEA/NEA v. Indiana Area School District, 35 PPER i 56 (Final Order, 2004), To permit the employer to unilaterally refuse to submit a dispute to arbitration would in effect allow the employer's interpretation to control. East Pennsboro Area School District v. PLRB, 467 A.2d 1356 (Pa. Cmwlth. 1983),

The FOTP has sustained its burden of proving that SEPTA violated Section 1201(a) (5) of the Act by refusing to process the transfer grievance and refusing to provide relevant information in connection therewith. The record shows that the FOTP tried to process Galanti's March 30, 2018 grievance, protesting the transfer, on April 4, 2018 when Bervine made an information request to Cuneo. The FOTP was clearly seeking relevant information that would have aided in the determination of whether to process the grievance to arbitration. Indeed, SEPTA does not argue that the information was irrelevant in any way. Despite this, Cuneo refused to provide any of the requested information during a phone call with Bervine on April 16, 2018. Likewise, Cuneo refused to hear the grievance under the first and second steps of the grievance procedure set forth in the CBA.⁹ The FOTP did not obtain any of the relevant information it was seeking until well after it served SEPTA with a Board-issued subpoena in October 2018, This was clearly an unreasonable delay.

⁹ The third step in the procedure is arbitration. (SEPTA Exhibit 4).

SEPTA argues that this portion of the charge should be dismissed as moot because the FOTP eventually received the information it was seeking, and SEPTA eventually offered to arbitrate the transfer grievance at some later time. Although courts generally will not decide a moot case because the law requires the existence of an actual controversy, the Pennsylvania Supreme Court has recognized two "well-organized exceptions to the mootness doctrine." APSCUF v. PLRB, 8 A.3d 300, 305 (Pa. 2010). The Pennsylvania Supreme Court has reviewed moot matters, in its discretion, when the issue is one of great public importance or is one that is capable of repetition yet evading review. *Id.* at 305.

On these facts, I am unable to conclude that the refusal to bargain portion of the charge has been rendered moot, as alleged by SEPTA. As the FOTP correctly notes in its brief, the crux of the charge was that the information was not provided in a timely manner, not that it was never provided at all. As a result, the FOTP was placed at a serious disadvantage in trying to evaluate the merits of the grievance. Moreover, had the FOTP been provided the relevant information and able to process the grievance, the parties could have potentially reached an amicable resolution beneficial to both sides, which ultimately would have saved the expenses involved in litigating this matter to conclusion or in the arbitration forum. To hold that a public employer is entitled to withhold relevant information from a union and refuse to process a grievance, only to turn it over after an unreasonable delay of approximately six months and eventually offer to arbitrate at some later time, and have the corresponding unfair practice charge dismissed as moot, would frustrate the entire grievance arbitration process, for which the parties bargained and which is expressly approved by the Act.

In any event, even if the case could be construed as moot, the FOTP has presented a classic exception to the mootness doctrine for a situation that is capable of repetition yet evading review. In Temple University Hospital Nurses Ass'n v. Temple University Health System & Temple University Hospital, 42 PPER 55 (Proposed Decision and Order, 2011), the hearing examiner, facing a mootness claim by the employer after it allegedly amended a policy in dispute, found that the moot parts of the charge would not be subject to dismissal because, by the simple expedient of amending the policy as soon as a charge is filed, the employer would be able to evade review of conduct that is capable of repetition.

In the same vein, SEPTA, by the simple expedient of turning over the relevant information and eventually offering to arbitrate only after a period of unreasonable delay and refusing to process the grievance, could effectively evade review of conduct that is very clearly capable of repetition. As such, the charge cannot be dismissed on mootness grounds, and SEPTA must be found in violation of Section 1201(a) (5) of the Act.

CONCLUSIONS

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

1. SEPTA is a public employer within the meaning of Section 301(1) of PERA.
2. The FOTP is an employee organization within the meaning of Section 301(3) of PERA.

3. **The Board has jurisdiction over the parties hereto,**

4. SEPTA has committed unfair practices in violation of Section 1201(a) (1), (3), and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that SEPTA shall:

1. **Cease and desist from interfering with, restraining or coercing** employes in the exercise of the rights guaranteed in Article IV of PERA;

2. **Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization;**

3. **Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the .exclusive representative of employes in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.**

4. **Take the following affirmative action, which the examiner finds necessary to effectuate the policies of PERA:**

(a) **Immediately rescind the transfer of Richard Galanti to the patrol unit and reinstate him to his prior position in the canine unit, and make him whole for any and all lost wages and benefits that he would have earned but for SEPTA's unfair practices, together with six (6%) percent per annum interest.**

(b) **Immediately process the March 30, 2018 grievance, protesting the transfer, to arbitration.**

(c) **Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;**

(d) **Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and**

(e) **Serve a copy of the attached Affidavit of Compliance upon the Union.**

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 5th day of
June, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOTP LODGE 109

v.

Case No. PERA-C-18-132-E

SEPTA

AFFIDAVIT OF COMPLIANCE

SEPTA hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1), (3), and (5) of the Public Employee **Relations Act; that it has complied with the Proposed Decision and Order as** directed therein by immediately rescinding the transfer of Richard Galanti to **the patrol unit and reinstating him to his prior position in the canine unit,** and by making him whole for any and all lost wages and benefits that he would have earned but for SEPTA's unfair practices, together with six (6%) percent **per annum interest; and by immediately processing the March 30, 2018 grievance, protesting the transfer, to arbitration; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has** served an executed 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