COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CONRAD WEISER EDUCATION ASSOCIATION, PSEA/NEA	:	
v.	:	Case No. PERA-C-14-114-E
CONRAD WEISER AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On April 18, 2014, the Conrad Weiser Education Association, PSEA/NEA (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Conrad Weiser Area School District (District), alleging that the District violated sections 1201(a)(1), (2), (3), (5) and (9) of the Public Employe Relations Act (PERA).

On May 5, 2014, 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 dispute through the mutual agreement of the parties and July 10, 2014, in Harrisburg was assigned as the time and place of hearing if necessary.

A hearing was necessary, and was held as scheduled, at which time all parties in interest were afforded a full opportunity to present testimony, cross examine witnesses and introduce documentary evidence. Post hearing briefs were submitted on August 28 and September 29, 2014.

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. Conrad Weiser Area School District is a public employer within the meaning of section 301(1) of PERA. (N.T. 11)

2. Conrad Weiser Education Association, PSEA/NEA is an employe organization within the meaning of section 301(3) of PERA. (N.T. 11)

3. The Association is the exclusive representative for the purposes of collective bargaining of the District's professional employees. (N.T. 11)

4. The District and the Association are parties to a collective bargaining agreement (CBA) that expired on June 30, 2012. They are currently conducting negotiations for a successor agreement. (N.T. 8-9. Association Exhibit 1)

5. The parties' CBA, at Appendix C, provides for a school term of 189 work days, with no more than 184 instructional days. The CBA also provides for "four (4) work days may be scheduled as in-service days or other activities that may be part of or in toto of a work day." (N.T. 67, Joint Exhibit 1)

6. In 2012, the Pennsylvania General Assembly enacted the Child Abuse Recognition and Reporting Training Act, 24 P.S. § 1205.6 (Act 126 of 2012), amending the Pennsylvania School Code of 1949, by requiring that "school entities and independent contractors of school entities shall provide their employees who have direct contact with children with mandatory training on child abuse recognition and reporting." Act 126 required the District provide mandatory training of three hours within five years of the law being passed. Act 126 became effective on January 1, 2013. (N.T. 43)

7. In May, 2013, the District Superintendent Randall Grove approached Association President Wendy Lynn Kushner about the possibility of making a memorandum of understanding (MOU) for flex time that would start in June, July or August. (N.T. 13-14, 51-52)

8. With flex time, or "flexing out," the teachers would work hours outside of the contracted day, and rather than being paid for that time, they could apply that time as leave time during the period when the District has provided for either in-service or Act 80 instruction. The concept of flex time was not a past practice for the District's professional employees nor was it an item in the CBA. (N.T. 14-17)

9. Ms. Kushner believed that since the parties were still bargaining a successor CBA at that time, the idea of flex time should belong in the CBA itself and not be simply a separate MOU. (N.T. 14-15)

10. The parties did not reach an agreement on putting the idea of flex time in either a MOU or the CBA. There were no further discussions between Superintendent Grove and Association President Kushner on this subject. (N.T. 17-20)

11. On November 15, 2013, Superintendent Grove sent an email to all of the District's employes informing them of a mandatory training in the Child Abuse Recognition and Reporting Training Act to be produced by a company called Safe Schools. Grove's email stated the employees could complete the mandatory training by participating in online training courses at the employee's convenience and/or in a group setting. The email memo went on to state:

> Act 80 in-service time has been scheduled for December 20, 2013, for completion of this online training. If you complete the training independently outside the normal work day, prior to December 20, you can substitute the time spent in completing the training for the scheduled December 20 in-service time and leave after the students' early dismissal. If you have not completed the training, you will be required to complete it during the scheduled in-service time on December 20.

(N.T. 28, 47, Association Exhibit 2) (Underlining in original).

DISCUSSION

The Association alleges that the District committed unfair practices under Section 1201(a)(1),(2),(3) and (5) and (9) of PERA by unilaterally including the optional benefit of flex time for employees when it scheduled a mandatory in-service day for December 20, 2013. The concept of a flex time benefit had not been bargained with the Association, it did not appear in the CBA and it was not an established past practice in the District. With flex time, or "flexing out," the teachers would work hours outside of the contracted day, and rather than being paid for that time, they could apply that time as leave time during the period when the District has provided for either in-service or Act 80 instruction.

In this case, the District offered flex time in conjunction with a mandatory in-service training on recognizing and reporting child abuse.

On its face, flex time falls within the description of "hours" as defined in section 701 of PERA and is therefore a mandatory subject of bargaining. **Hazleton Area School District**, 15 PPER ¶ 15051 (Proposed Decision and Order, 1984), 15 PPER ¶ 15170 (Final Order, 1984).

The District defends its action by arguing that it wanted to comply with the Pennsylvania Department of Education (PDE) mandate to train employees in recognizing and

reporting child abuse as soon as possible after PDE issued its regulations, even though the regulations allowed five years for the districts to do the training. The Association contends that this five year compliance period allowed the District to easily include the flex time concept in the CBA then being bargained in the summer and fall of 2013, rather than rush into the scheduling the mandated training on an in-service day with the benefit of flex time.

The District cannot be faulted for scheduling the training when it did because of the seriousness of the subject matter of the training. Furthermore, the CBA did allow it to use up to four (4) in-service days for training. The District acted within its managerial prerogative in selecting this particular training subject for an in-service day.

The better part of the Association's argument is that the District added a flex time benefit to the mandated training without bargaining. By allowing employees to substitute the time spent in completing the training in an online mode for the scheduled December 20 in-service time, the District gave those employes the chance to leave school after the students' early dismissal. For those employees who could take advantage of the offer of flex time, this also gave them an early start to their winter vacation. The District should have first bargained this benefit with the Association and not unilaterally offered it. As the Association points out, when the District first brought up the concept of flex time earlier in the year, the Association responded that flex time should be made part of the CBA. While the District's action in promptly scheduling a mandatory training on an in-service day with the benefit of flex time was well intentioned, the District still had a duty to first bargain this adjustment of hours. The District will be found to have violated section 1201(a)(5) of PERA. This finding will also lead to finding that the District committed a derivative violation of Section 1201(a)(1) of PERA.

The Association also alleges that the District's decision violated Section 1201(a)(2) of PERA, which prohibits which prohibits an employer from "[d]ominating or interfering with the formation, existence or administration of any employee organization." 43 P.S. § 1101.1201(a)(2). This section is intended to prohibit an employer from establishing a "company union." **PLRB v Commonwealth (Department of Education)**, 14 PPER ¶ 14069 (Proposed Decision and Order, 1983), 14 PPER ¶ 14135 (Final Order, 1983). To prove such a violation, the Association must show that the employer is interfering or dominating the union by placing managerial employes in the hierarchy of the union or by providing financial or other aid to the union to the point that the union is controlled by the employer and not longer represents the wishes of the employees. **Pennsylvania Department of Labor and Industry**, 15 PPER ¶ 15025 (Proposed Decision and Order, 1984).

In the present case, the facts do not support a finding that the District violated Section 1201(a)(2). When the Superintendent unilaterally offered the ability to use flex time to the employees as part of the mandatory training for child abuse recognition and reporting, his action, as discussed above, violated the District's duty to bargain. However, the action fell short of providing the kind of financial or other aid to the Association that would result in the formation of a company union. His action did not rise to the level of "dominating or interfering with the formation, existence or administration" of the Association. Accordingly, based on this record, no violation of Section 1201(a)(2) will be found.

The Association also alleges that the District's decision violated Section 1201(a)(3) of PERA, which prohibits an employer 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." 43 P.S. § 1101.1201(a)(3). The facts do not support a finding that the District violated this section of PERA.

The Association also alleges that the District's decision violated Section 1201(a)(9) of PERA, which prohibits an employer "from [r]efusing to comply with the requirements of 'meet and discuss.' " 43 P.S. 1101.1201(a)(9). Section 301(17) of PERA states that

> '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: Provided that any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised."

43 P.S. 1101.301(17)

In this case, the gravamen of the Association's case was that the District violated its duty to bargain a mandatory subject of bargaining, not that it violated its duty to meet and discuss. The testimony did not support a finding that the District violated the requirements of meet and discuss. Accordingly, there will be no finding that the employer violated Section 1201(a)(9) of PERA.

As for the remedy for the violation of Section 1201(a)(1) and (5), the facts of the present case are somewhat difficult to reconcile with traditional Board practice. To remedy an unfair practice, the Board customarily orders a return to the status quo ante. Such a remedy in the present case would force the employes who chose the flex time to leave early on December 20, 2013 to somehow account for that election of an early leave. However, such a remedy would unfairly penalize employe and the Board has recognized the unfairness of such a remedy in previous cases. "[T]he Board has consistently held that when an employer commits unfair practices by directly dealing and unilaterally extending wage increases to individual, complicit employes, the Board will not order the return of those wage increases because the employer, not the employee, is deemed to have committed the unfair practice and to have engaged in the unlawful conduct." **Warminster Township**, 31 PPER ¶ 31156 (Final Order, 2000). In the present case, the employes did not receive a wage increase but rather received a benefit of leave usage. They were allowed to use time they had worked outside the normal hours to leave early on the day before the winter vacation. Nevertheless, the rationale in **Warminster Township** should apply here and the employes should not be penalized for their employer's unfair practice. Accordingly, the appropriate remedy in this case is for the District to cease and desist from such unilateral decisions in the future.

CONCLUSIONS

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

1. The Conrad Weiser School District is a public employer under section 301(1) of PERA.

2. The Conrad Weiser Education Association, PSEA/NEA is an employe organization under section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has committed unfair practices in violation of Section 1201(a)(1)and (5) of PERA.

5. The District has not committed unfair practices in violation of Section 1201(a)(2),(3) and (9) 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 District shall

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

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

3. Take the following affirmative action:

   (a) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

   (b) 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.

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 thirtieth day of December, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner