COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STROUDSBURG AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	CASE NO. PERA-C-16-164-E
STROUDSBURG AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On June 6, 2016, the Stroudsburg Area Educational Support Personnel Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Stroudsburg Area School District (District) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the District unilaterally eliminated a policy that permitted furloughed employes to challenge their layoffs at a local agency hearing before the school board.

By letter dated June 21, 2016, the Secretary of the Board informed the Association that no complaint would be issued on its charge stating that the charge was premature since the policy had not yet been implemented. On July 13, 2016, the Association filed exceptions and a supporting brief. On August 16, 2016, the Board directed that the matter be remanded to the Secretary to issue a complaint. On September 14, 2016, the Secretary issued a complaint and notice of hearing, designating a hearing date of December 21, 2016, in Harrisburg. On September 30, 2016, I continued the hearing at the request of the District and without objection from the Association, and rescheduled the hearing for January 20, 2017, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses, although no testimony was actually presented by either party. During the hearing, the parties entered into a joint stipulation of facts and presented a series of joint exhibits. On May 1, 2017, the Union filed its post-hearing brief. The District filed its post-hearing brief on July 10, 2017.

The examiner, based upon the joint stipulation of facts, joint exhibits and all matters of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6-8)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6-8)

3. On September 1, 1999, the District's school board adopted Policy No. 511, entitled "SUSPENSIONS OR LAYOFFS." The purpose of the policy was "to establish the manner in which the necessary reductions of [certain] staff will be accomplished" through suspensions or layoffs of nonprofessional employes in the bargaining unit. (N.T. 8-9; Joint Exhibit 1)

4. The policy provided that "[c]lassified employees may be entitled to a hearing under the Local Agency Law, Act 353 of 1968, at the employee's request, prior to suspension or layoff." (N.T. 9; Joint Exhibit 1)

5. Policy No. 511 was in effect, in that form, at all times between September 1, 1999 and March 16, 2016. (N.T. 10)

6. On March 16, 2016, the District's school board changed the policy on suspensions or layoffs by eliminating employes' entitlement to a hearing under the Local Agency Law. (N.T. 10-11; Joint Exhibit 2)

7. The District did not bargain the modified Suspension or Layoff Policy No. 511 with the Association and adopted the modified policy at a public school board meeting. (N.T. 12)

8. In June 2016, the District furloughed nine bargaining unit members due to inadequate funding and budgeting, as reflected in a school board resolution dated June 15, 2016. (N.T. 12-13; Joint Exhibit 3)

9. None of the laid off employes requested a local agency hearing and no such hearings were held. (N.T. 13)

10. At all relevant times the District and the Association have been parties to a collective bargaining agreement (CBA) governing terms and conditions of employment. (N.T. 13-14; Joint Exhibit 4)

11. The CBA contains provisions addressing the job security of bargaining unit members. Page 6 of the CBA requires just cause for discipline, reduction in rank or compensation. The same page of the CBA also contains a layoff and recall procedure. (N.T. 14; Joint Exhibit 4)

12. The Association did not file any grievances over the 2016 layoffs because the affected employes were either recalled with no loss of pay or they resigned or retired. (N.T. 15)

13. The Superintendent recommended modifying the original Policy No. 511 because he believed it contained a misstatement of the law. (N.T. 16)

DISCUSSION

The District argues that the Board Secretary correctly refused to issue a complaint on the charge because it was premature. The Union counters that the statute of limitations begins on the date that the public employer implements the new policy. The Union maintains that the policy was implemented on March 16, 2016, when the school board formally and publicly adopted it and the policy went into effect, which gave rise to a cause of action and a statutory filing deadline of July 16, 2016. (Union's Post-hearing Brief at 16). The Union filed the charge on June 6, 2016, which is within the filing period. (Union's Post-hearing Brief at 16). The Union further argues that the new policy went into effect before the layoffs and employes' requesting of a school board hearing would have been futile. Therefore, argues the Union, the new policy has in fact been applied to employes and governed their behavior. (Union's Post-hearing Brief at 16-17). Additionally, the Union cites the Board's decision in Officer of Upper Gwynedd Township v. Upper Gwynedd Township Police Department, 32 PPER ¶ 32101 (Final Order, 2001), for the proposition that, even where a new policy has not been applied to any employe or adversely affected anyone, the statute of limitations begins to run when the new policy begins guiding the behavior of employes. (Union's Post-hearing Brief at 17-18).

The District parries that the Secretary of the Board was correct in declining to issue a complaint because, contrary to the Union's argument, the fact that no District employe was affected by the new policy is determinative and makes the charge premature. (District's Post-Hearing Brief at 7). According to the District: "Bottom line—nothing has happened and nothing was taken away from the Association members." (District Post-hearing Brief at 8).

With respect to the merits of the charge, the Union argues that the District engaged in unfair practices when it unilaterally changed the procedures for layoffs and that such procedures constitute a mandatory subject of bargaining. (Union's Post-hearing Brief at 4-5). The Union recognizes that the decision to layoff employes for financial reasons is a managerial prerogative. The Union, however, emphasizes that the layoff procedures in place protect employes. Those procedures, argues the Union, permit employes to challenge layoffs for various statutory and contractual reasons and constitute terms and conditions of employment as well as mandatory subjects of bargaining. (Union's Post-hearing Brief at t 5-6). The Union also maintains that, regardless of the minimum rights and provisions of the School Code or the CBA, the prior policy had given the right of a local agency hearing to bargaining unit members when they were laid off. The local agency hearing procedures, therefore, became a term and condition of employment. Contrary to the District's position, that the bargaining unit employes are not legally entitled to a local agency hearing to challenge economic layoffs, nothing prohibits an employer from granting employes more rights than those provided by law. (Union's Post-hearing Brief at 7-15).

The District does not dispute that it unilaterally changed the furlough policy and eliminated the nonprofessional employes' right to a school Board hearing for an economic layoff. The District rather argues that there is no statutory right to a school board hearing for nonprofessional employes furloughed for economic reasons because Section 5-514 of the School Code does not apply and the action is not an adjudication under the Local Agency Law, citing Sergi v. School District of Pittsburgh, 368 A.2d 1359 (Pa. Cmwlth. 1977). (District's Post-hearing Brief at 9-10). Nonprofessional employes have the limited hearing rights listed in Section 5-514 of the School Code, which include terminations only for incompetency, neglect of duty, violation of any of the school laws of the Commonwealth or improper conduct. (District's Post-hearing Brief at 10). Absent statutory protection from dismissal, public employes do not have a property interest in continued employment or the procedural due process protections to safeguard those interests. (District's Post-hearing Brief at 10-11).

The resolution of the District's claim that the charge is premature must be addressed first because it could affect subject matter jurisdiction over the merits of the charge. In Bensalem Township Police Benevolent Association v. Bensalem Township, 48 PPER 40 (Final Order, 2016), Bensalem Township notified its police union that it was implementing a Heart and Lung Act procedure requiring officers to file a local agency appeal to the mayor for a denial of benefits and requiring that all procedures would be in accordance with the Local Agency Law. The parties' collective bargaining agreement contained provisions relating to Heart and Lung Act benefits for officers temporarily injured on the job. Over two-and-one-half years after Bensalem Township notified the union of the changes to Heart and Lung Act procedures when benefits are denied, the union filed a grievance on behalf of an officer who was initially denied benefits. The grievance was resolved and the officer received benefits, but Bensalem Township maintained that the

grievance was not arbitrable because the procedure to appeal a denial of benefits was, not through the grievance procedure, but through the Local Agency Law.

The Union filed a charge with the Board one month after the grievance filing and two-and-one-half years after Bensalem Township informed the union that it was implementing the Local Agency Law procedures for the denial of Heart and Lung benefits. In the charge, the union alleged that the township's refusal to arbitrate the grievance by implementing the new policy gave rise to a cause of action for unilaterally changing a mandatory subject of bargaining. The Board held that the charge was untimely because the cause of action arose, and the statute of limitations began to run, "when the township implemented its policy requiring officers to proceed under the Local Agency Law," over two years earlier. Id. at 162.

In Upper Gwynedd Township, supra, the Board stated the following:

> [T]he nature of the unfair practice claim alleged frames the limitations period for that cause of action. . . .
>
> Accordingly, the Board normally looks toward the date of implementation of a unilateral change in evaluating timeliness of a claim that a policy was unlawfully, unilaterally implemented. . . . **Implementation accordingly is the date when the directive becomes operational and serves to guide the conduct of employes, even though no employes may have been disciplined or corrected for failure to abide by the directive**.

Upper Gwynedd Township, 32 PPER at 264 (emphasis added).

Recently, in AFSCME District Council 13 v. Pennsylvania State System of Higher Education, PERA-C-15-98-E (Final Order, January 17, 2017), the Board held that a charge was timely and the union established a change in terms and conditions of employment where the State System relied on a management directive that had been adopted four years earlier to close the offices under the Chancellor's direct supervision and control the day after Christmas 2014. Although the union in that case was well aware that the State System had long ago adopted the management directive, the System relied on a catch-all provision in the directive to authorize the paid closing, among other statutory and contractual reasons not at issue here. In this regard, the Board concluded that, where the policy or directive does not explicitly apply to the specific activity, the employer must establish that the policy had been previously invoked in the specific manner complained of in the charge for there to be no change in terms and conditions of employment.

In the State System case, the management directive provided that the State System could close offices in case of "hazardous road conditions, emergency circumstances, and other conditions as prescribed [by personnel rules]." However, the closing on the day after Christmas was not specifically authorized by the directive (it was not a hazardous road condition or emergency) and the State System had never previously closed offices on the day after Christmas under the catch-all "other conditions."

In this case, there is no dispute that the District's board of directors at a public meeting adopted a very specific change to Policy No. 511 by eliminating non-professional employes' entitlement to a hearing under the Local Agency Law to contest an economic layoff. The policy was publicly adopted and immediately effective. The policy change was clear and specific; it was immediately operational and guided the conduct of the District and employes within the meaning of Upper Gwynedd, supra. Moreover, the District

is incorrect in asserting that the new policy had not been applied to laid off employes. It is precisely because the new policy applied to and was governing behavior of employes that none of the nine employes laid off in June 2016 attempted to pursue a school board hearing under the Local Agency Law, within the meaning of Upper Gwynedd Township, supra. Also, this case is distinguishable from the State System case because the policy change was clear and specific regarding entitlement to a Local Agency hearing, and not pursuant to a broad catch-all provision. Therefore, an inquiry into whether specific employes were denied a hearing or were otherwise directly affected by the policy change is unnecessary. Accordingly, the change to Policy No. 511 was implemented and governed employes' conduct as of March 16, 2016, and the charge is not premature, as argued by the District.

If a matter constitutes a mandatory subject of bargaining, a public employer in the Commonwealth may not act unilaterally regarding that subject. New Britain Township Police Benevolent Association v. New Britain Township, 33 PPER ¶ 33069 (Final Order, 2002). There is no dispute that the District unilaterally changed Policy No. 511 and eliminated the right of nonprofessional employes to request a local agency hearing when they have been laid off for economic reasons. The issue therefore becomes whether the procedure of permitting an individual nonprofessional employe, who was economically laid-off, to request a local agency hearing to challenge his/her economic layoff, constitutes a mandatory subject of bargaining and a term and condition of employment, which may not be eliminated without bargaining.

There is no dispute that the original Policy No. 511 had been in effect from September 1999 until March 16, 2016, and the original policy permitted economically laid-off nonprofessional employes to request a local agency hearing to challenge the layoff. In New Britain Township, the Board held that the procedure for determining eligibility for Heart and Lung Act benefits was a mandatory subject of bargaining and unilaterally appointing a hearing examiner to adjudicate Heart and Lung Act claims constituted an unlawful change in terms and conditions of employment. New Britain Township, supra. The New Britain Township Board stated: "the choice of forum for deciding eligibility has equal impact on employes' as the substantive benefits, where the forum is the vehicle for conveying those benefits to the employes." Id. at 144. Relying on Commonwealth Court precedent, the Board further stated that, "where the employer is involved in a collective bargaining relationship, it must bargain the selection of the procedure, individual or entity empowered to determine employes' entitlement to important medical benefits that significantly impact the employes' terms and conditions of employment." Id. at 145.

Regardless of whether nonprofessional employes laid-off for economic reasons have any property interest with concomitant due process protections created by statutorily provided expectation of continued employment, maintaining employment itself is, at a minimum, a benefit equally as important as medical and other important benefits associated with employment. Although the decision to economically lay off nonprofessional employes is a managerial prerogative, Commonwealth of Pennsylvania, Department of Labor and Industry, 14 PPER ¶ 14264 (Final Order, 1983), the procedures for challenging that decision (to attempt to maintain the benefit and eligibility of continued employment), constitute mandatory subjects of bargaining. In this case, the procedural protections that have been in place since 1999 granting nonprofessional employes the right to a local agency hearing to challenge their economic layoff cannot be unilaterally eliminated thereby depriving employes of an important procedural protection and an opportunity to enlighten management about contractual rights, such as seniority, bumping and

other factors, that may convince management to reverse itself and retain the employe.

Furthermore, in New Britain Township, the Board rejected the District's argument here that the School Code does not provide for a local agency hearing for the economic layoffs of nonprofessional employes. In this context the Board concluded that whether the law permits an action to be taken by an employer, or otherwise grants the employer discretion on the matter, is "mutually exclusive" of whether the matter constitutes a mandatory subject of bargaining under PERA or Act 111 and the PLRA. Id. at 145. Accordingly, the District engaged in unfair practices on March 16, 2016, when it unilaterally eliminated the right of economically laid off nonprofessional employes to seek a local agency hearing before the school board in an effort to challenge the layoff decision in each case and provide the employe with an opportunity to convince the school board that he or she should keep their job and the benefits of continued employment at the District.

CONCLUSIONS

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

1. The District is a public employer.

2. The Union is an employe organization.

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 the Public Employe Relations Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the District shall

1. Cease and desist from interfering, 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 which is the exclusive 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, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately restore the pre-March 16, 2016 Policy No. 511 to its original form and immediately restore to the bargaining unit the right to a local agency hearing for economically laid off employes;

(b) 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

(c) 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 ninth day of August, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STROUDSBURG AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	CASE NO. PERA-C-16-164-E
STROUDSBURG AREA SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLAINCE

The Stroudsburg Area School District 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 restored the right of employes in the bargaining unit to seek a local agency hearing when economically laid-off; that it has posted a copy of the proposed decision and 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