

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CHESTER UPLAND EDUCATION
ASSOCIATION, PSEA/NEA :
 :
 : CASE NO. PERA-C-13-327-E
 v. :
 :
 CHESTER UPLAND SCHOOL DISTRICT :
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 CHESTER UPLAND EDUCATIONAL SUPPORT :
 PERSONNEL ASSOCIATION, PSEA/NEA :
 : CASE NO. PERA-C-13-328-E
 v. :
 :
 CHESTER UPLAND SCHOOL DISTRICT :

FINAL ORDER

The Chester Upland Education Association, PSEA/NEA (EA) and the Chester Upland Educational Support Personnel Association, PSEA/NEA (ESPA) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on August 4, 2015, to a Proposed Decision and Order (PDO) issued on July 15, 2015, dismissing their consolidated Charges of Unfair Practices alleging violations of Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by the Chester Upland School District (District). Following an extension of time granted by the Secretary of the Board, the EA and ESPA filed a brief in support of the exceptions on August 24, 2015. The District was granted an extension of time to respond, and filed a brief in opposition to the exceptions on September 30, 2015. The case was submitted by the parties to the Hearing Examiner on stipulations. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

28. The CBA between the EA and the District addresses Sick Leave in Article XXIII. Article XXIII(A) provides as follows:

All bargaining unit members employed shall be entitled to eleven (11) sick leave days each school year as of the first official day of said school year whether or not they report for duty on that day. Unused sick leave days shall be accumulated from year to year with no maximum limit.^[1]

(Exhibit 1, p. 36).

29. The CBA between ESPA and the District addresses sick leave in Article XIX. Article XIX provides as follows:

Each full-time non-probationary employee shall be entitled to eleven (11) sick days per year which shall accrue as of July 1 of each year. New full-time non-probationary employees shall accrue sick leave on the basis of one (1) sick day for each month worked which shall be retroactive to the date of employment upon completion of probation. Employees shall be required to submit a doctor's note after three consecutive days of absence for illness.

(Exhibit 2, p. 7).

29. The District's new Attendance and Punctuality Policy was put into effect at some point in the 2013-2014 school year. The Policy sets forth direction to employees regarding tardiness or lateness:

¹ Article XXIII(E) provides for "Payment for Unused Sick and Personal Leave".

An employee must call the school office/direct supervisor's office if he/she is going to be late. The employee must provide an estimated arrival time.

A school based employee who has failed to notify the school within one-half hour after the required time of arrival shall be considered absent.

Lateness extending beyond two hours of the required time of arrival shall be considered an absence.

Second, the Policy describes a monitoring system or procedure:

Prompt arrival at work will be strictly enforced via the following procedures:

- Lateness will be circled on the time and attendance sheet
 - Warning letters will be distributed
- Staff Member/Administration conferences will be held with union representation
- Anecdotal records will be filed
 - An unsatisfactory rating ascribable to excessive lateness will be recommended when appropriate.

Third, the Policy describes an "Attendance Protocol" with the following features:

After the third day of absence for personal illness:

- An informal conversation with your rating officer
- Note on the Attendance Ledger that the conversation took place
- A memo documenting the conversation

After the fifth day of absence for personal illness:

- A warning memo and copy of current Attendance Ledger
- Memo and copy of the ledger placed in the school or appropriate office file

After the seventh day of absence for personal illness:

- Unsatisfactory Incident memo
- Conference with the rating officer and union representation
- Documents forwarded for review to the Deputy Superintendent
- The Deputy Superintendent will forward the documents to the official personnel file

After the ninth day of absence for personal illness:

- Unsatisfactory Incident Memo
- A conference with the rating officer and union representation
- Documents forwarded to the Deputy Superintendent (instructional) or the Director of Human Resources (non-instructional) for a second level hearing.

(Joint Exhibit 3).

DISCUSSION

The EA and ESPA are parties to collective bargaining agreements (CBAs) with the District which expired on June 30, 2013. The CBAs address the accumulation and use of sick leave. In or about late August, 2013, the District issued notification to employees of a new Attendance & Punctuality Policy (Policy). By letter dated August 29, 2013, Tricia Audrain, on behalf of the EA and ESPA, notified the District that the "protocols outlined in this document are changes to the terms and conditions of employment. As such any change to these mandatory subjects of bargaining must be agreed upon by both parties prior to implementation." The District did not believe that the Policy was a mandatory subject of bargaining, and there was no collective bargaining over the Policy. On November 7, 2013, the

District issued revisions to the Policy. In discussions with the EA and ESPA representative, the District asserted that the Policy was meant to explain how absences would be tracked, and that the District did not alter the way employees could use sick leave or change any of the disciplinary consequences associated with absences. In accordance with the Policy, the District has maintained records of attendance during the 2013-2014 school year and provided notices of attendance to employees represented by the EA and ESPA. The District claims that the discipline imposed after the adoption of the Policy is not any different than the discipline which could have been applied prior to the adoption of the Policy.

The EA and ESPA argue that the stipulations and exhibits of record evidence that the unilaterally implemented Policy differs from the negotiated sick leave provisions of the CBAs, and therefore the EA and ESPA satisfied their burden of proving a violation of Section 1201(a)(1) and (5) of PERA. Generally, the complainant bears the burden of proof on a charge of unfair practices under PERA alleging a unilateral change in wages, hours or working conditions. In this regard, the Commonwealth Court and the Board have recognized that where the employer issues a unit-wide policy unilaterally altering or defining the negotiated terms in a collective bargaining agreement, the complainant has established a *prima facie* case of a failure to bargain in good faith. **Wilkes-Barre Township v. PLRB**, 878 A.2d 977 (Pa. Cmwlth. 2005). Where an employer's unilaterally imposed policy differs from the express words of a collective bargaining agreement, the burden of proving that there is in fact no change with respect to the application of negotiated terms and conditions of employment lies with the respondent as a defense to the charge. *E.g.* **Springfield Education Association v. Springfield School District**, PERA-C-04-83-E (Proposed Decision and Order, 2005); **Sto-Rox Education Association v. Sto-Rox School District**, 34 PPER 67 (Proposed Decision and Order, 2003).²

Because the stipulated evidence established that the District's Policy differs from the express terms of the CBAs with respect to employees' sick leave entitlement and usage, the EA and ESPA satisfied their burden of proving an unlawful unilateral change to negotiated working conditions under Section 1201(a)(5) of PERA. As such, the burden of proof shifted to the District to defend against the charge by establishing, through evidence, testimony or stipulations, that its unilaterally implemented Policy effected no actual change to the contract terms because application of the Policy was consistent with a binding past practice regarding sick leave usage and discipline.

Here, the District stipulated that "[i]t is the position of the District that the District has not imposed any discipline on any employee represented by the Associations different than the discipline that there **could** have been implemented prior to the adoption of the policy." (Stipulation 24, emphasis added). That stipulation, as stated, is not an admission by the EA or ESPA that discipline for sick leave usage was imposed prior to implementation of the Policy; nor is it substantial evidence that the District had in fact imposed discipline for sick leave use prior to the implementation of the Policy. In the absence of substantial evidence introduced by the District to show a past practice of issuing prior similar discipline under the CBAs for employees' sick leave use, the District has failed to establish a defense to its violation of Section 1201(a)(1) and (5) of PERA. See **Springfield School District**, *supra.*; **Sto-Rox School District**, *supra.*

After a thorough review of the exceptions and all matters of record, the EA and ESPA have sustained their burden of establishing that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing a Policy that differed from the employees' negotiated sick leave benefits in the CBAs. **Wilkes-Barre Township**, *supra.* The

² Indeed, treating the employer's use of past practices as a defense to a charge involving a unilateral change to negotiated terms in a collective bargaining agreement is consistent with treatment of "contractual privilege" as an employer defense in cases where the complainant has alleged a binding past practice regarding the employees' working conditions. See, **FOP, Pennsylvania Conservation Police Officers Lodge 114 V. Commonwealth, Fish And Boat Commission**, 42 PPER 48 (Proposed Decision and Order, 2011). Furthermore, shifting the burden to the respondent to establish that there is no change to the parties' application of the negotiated language is consistent with the labor concept of a past practice, which may be invoked by either party to 1) clarify ambiguous contract language; 2) implement contract language that establishes a general rule; 3) modify or amend apparently unambiguous contract language which has been arguably waived by the parties; or 4) create or establish a separate enforceable condition of employment which cannot be derived from the express language of the collective bargaining agreement. **County of Allegheny v. Allegheny County Prison Employees Independent Union**, 476 Pa. 27, 34 n.12, 381 A.2d 849, 852 n.12 (1978).

exceptions filed by the EA and ESPA shall therefore be sustained, and the July 15, 2015 PDO shall be modified accordingly.

CONCLUSIONS

CONCLUSIONS 1 through 4 of the July 15, 2015 Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 5 is vacated and set aside and the following additional conclusion is made:

6. The District has committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Chester Upland Education Association, PSEA/NEA and the Chester Upland Educational Support Personnel Association, PSEA/NEA are hereby sustained, and the Order on pages 8-9 of the July 15, 2015 Proposed Decision and Order is hereby vacated.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the District shall:

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

2. 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.

3. Take the following affirmative action:

(a) Rescind the Attendance and Punctuality Policy and restore the *status quo ante*;

(b) Rescind any and all discipline imposed on employes under the Attendance and Punctuality Policy, and make the affected employes whole for any lost wages and/or benefits as a result of said discipline;

(c) Post a copy of the Proposed Decision and Order and Final 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;

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

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member this seventeenth day of November, 2015. 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.

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AFFIDAVIT OF COMPLIANCE

The Chester Upland School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a) (1) and (5) of the Public Employe Relations Act; that it has rescinded the Attendance and Punctuality Policy and has rescinded any and all discipline imposed on employes under the Policy; that it has made the affected employes whole for any lost wages and/or benefits as a result of said discipline; that it has complied with the Final Order as directed therein; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served an executed copy of this affidavit on the Chester Upland Education Association and the Chester Upland Educational Support Personnel Association at their principal places of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public