

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY :
AND MUNICIPAL EMPLOYEES, COUNCIL 13 :
: :
v. : Case No. PERA-C-15-98-E
: :
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION :

FINAL ORDER

The American Federation of State, County and Municipal Employees, Council 13 (AFSCME) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on May 26, 2016, challenging a Proposed Decision and Order (PDO) issued on May 10, 2016. In the PDO, the Board's Hearing Examiner concluded that the Pennsylvania State System of Higher Education (PASSHE or State System) did not violate Section 1201(a)(1) or (5) of the Public Employee Relations Act (PERA) when it closed the Office of the Chancellor on December 26, 2014, but did not extend that closure to the State System's fourteen universities. Pursuant to extensions of time granted by the Secretary of the Board, AFSCME filed a brief in support of the exceptions on July 20, 2016, and PASSHE filed a brief in response to the exceptions on September 12, 2016.

The facts of this case, as stipulated to by the parties, are summarized as follows. PASSHE is comprised of the Office of the Chancellor and fourteen universities: Bloomsburg, California, Cheyney, Clarion, East Stroudsburg, Edinboro, Indiana, Kutztown, Lock Haven, Mansfield, Millersville, Shippensburg, Slippery Rock and West Chester. The Office of the Chancellor has offices located at the Dixon University Center (Harrisburg), Vartan Way (Harrisburg) and PASSHE Center City (Philadelphia). PASSHE is an independent agency and its employees are not under the jurisdiction of the Governor.

AFSCME represents non-instructional employees at the fourteen universities and the Office of the Chancellor. AFSCME and PASSHE were parties to a collective bargaining agreement (CBA) effective from July 1, 2011 to June 30, 2015. The CBA contains provisions pertaining to wages, hours, holidays, vacations and personal leave for the PASSHE employees, as well as employees in other bargaining units represented by AFSCME. Appendix S to the CBA sets forth terms and conditions of employment that are unique to PASSHE employees. Appendix S, among other things, identifies seven major holidays and four unspecified minor holidays, stating as follows:

Holidays

At the 14 institutions of [PASSHE], the following days shall be recognized as holidays:

1. New Year's Day
2. Martin Luther King Jr.'s Birthday
3. Memorial Day
4. Independence Day
5. Labor Day
6. Thanksgiving Day
7. Christmas Day

In recognition of the change of Martin Luther King Jr.'s Birthday from a minor to a major holiday, managers will be as flexible as possible in allowing employees appropriate use of accrued paid leave during periods when the University is not at full operation, including but not limited to the December holiday season.

The remaining four holidays shall be scheduled by the administration of these institutions during the time on the academic schedule when an institution is not at full operation.

The matter of rescheduling minor holidays shall be resolved on a meet and discuss basis at the 14 institutions of [PASSHE].

On December 22, 2014, the Deputy Secretary for Human Resources and Management announced that non-essential employees under the Governor's jurisdiction were authorized a full-day closure on December 26, 2014 in accordance with the provisions of Management Directive 530.17 (Partial and Full-Day Closings of State Offices). Based on the December 22, 2014 announcement, the Chancellor determined that the Office of the Chancellor would close on December 26, 2014. The Chancellor did not negotiate with AFSCME about the closure.

Due to the Chancellor's decision to close the Office of the Chancellor, the non-essential employees¹ represented by AFSCME who are employed by that Office received a day off with pay on December 26, 2014 pursuant to Management Directive 530.17. Section 5 of Management Directive 530.17 provides, in relevant part, as follows:

a. General.

(1) The Secretary of Administration is responsible for authorizing office closings of any duration for the Harrisburg area, Philadelphia and Pittsburgh office buildings, and the Scranton and Reading State Office Buildings because of hazardous road conditions, emergency circumstances, or other conditions.

(2) Heads of field offices outside of the Harrisburg area, Philadelphia and Pittsburgh office buildings, and the Scranton and Reading State Office Buildings may be authorized by their agencies to close such offices in case of hazardous road conditions, emergency circumstances, and other conditions as prescribed in **Management Directive 505.7, Personnel Rules**.

(3) Partial and full-day closings within the scope of this directive are not holidays.

(4) Consistent with operational requirements, agencies should be as flexible as possible in allowing employees to use annual, personal, or unpaid absence when hazardous road conditions, emergency circumstances, or other conditions exist.

...

c. Full-Day Closings.

(1) When a full-day closing is authorized, employees who are in non-essential operations will be authorized to be absent from work. Such employees will be compensated at their regular rate of pay. The hours for which such employees are paid but do not work because of an authorized full-day closing will not be counted as hours worked for overtime purposes.

PASSHE has followed Management Directive 530.17 since 2011. The Chancellor and the university presidents have closed their institutions pursuant to Management Directive

¹ PASSHE employees represented by AFSCME are classified as both essential and non-essential employees.

530.17 for reasons such as extreme weather, utility interruptions, and safety/security issues, but not for days off after holidays.

Ten of the fourteen universities had been scheduled to close and use December 26, 2014 as a deferred minor holiday pursuant to Appendix S of the CBA. Bloomsburg and Lock Haven remained open on December 26, 2014, and non-essential employees were required to work. Millersville and Slippery Rock required employees to either use leave time or contact their supervisors about being assigned work. No university president made any changes to their previously determined schedule for December 26, 2014.

On or about January 30, 2015, Kristie Wolf-Maloney, AFSCME's Grievance and Arbitration Department Director, e-mailed Brian Mbuu and William Helzlsouer in PASSHE's Human Resources and Labor Relations office with questions concerning the December 26, 2014 closure. Ms. Wolf-Maloney's e-mail stated, in relevant part, as follows:

We have recently become aware that while the Chancellor closed the Dixon University center on December 26th, at least one university did not close.

We are investigating whether or not to file a statewide or a local grievance but want to investigate further. I am requesting that our time frames to file the grievance be extended 15 days after we receive the following information from you:

1. Any policy, procedure or management directive dealing with closings for special holidays and/or inclement weather
2. Were there any other universities that did not close and if so, which ones
3. Will the employees who did not receive the special holiday/day off be granted another day off

On March 11, 2015, Mr. Mbuu responded as follows:

1. Special Holidays and Closings are the purview of the Presidents of each institution. The Presidents' authority and duties are outlined in Act 188. ... We do follow Management Directive 530.17 when an office closing is determined by the President of each University or the Chancellor for the Office of the Chancellor staff.
2. The following Universities used the 26th as a deferred Holiday in accordance with our Appendix in the Master Agreement and Master Memorandum...
3. There was no special holiday granted. Only the Office of the Chancellor was closed.

AFSCME filed its Charge of Unfair Practices on April 17, 2015, alleging that PASSHE violated Section 1201(a)(1) and (5) of PERA by unilaterally closing the Dixon University Center on December 26, 2014, and "placing the decision regarding closure [of the universities on December 26, 2014] in the hands of the universities' individual presidents..." A hearing was held before the Board's Hearing Examiner on November 20, 2015, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that PASSHE did not violate Section 1201(a)(1) or (5) of PERA, stating, in relevant part, as follows:

[AFSCME] did not establish the requisite change in terms and conditions of employment to prevail on their bargaining violation claim. The Chancellor applied [Management Directive 530.17], which has been applied since 2011, to close the offices under the operational control of the Chancellor. The Chancellor, under Act 188,^[2] does not control the daily operations of the 14 universities within the State System. The universities are under the operational control of their respective presidents, who possess the managerial prerogative to close for any reason, under Act 188 or the Directive. The presidents must close for a designated major holiday or may negotiate a deferred minor holiday, under the express terms of the CBA. The Chancellor and the individual university presidents followed the law under Act 188, the CBA, Appendix S and past practice by leaving university closures to the local administration at the university level, and not the Office of the Chancellor.

(PDO at 10). Accordingly, the Hearing Examiner rescinded the complaint and dismissed the Charge.³

The issues presented by AFSCME in its exceptions are whether PASSHE violated its duty to bargain under Section 1201(a)(1) and (5) of PERA by (1) unilaterally closing the Office of the Chancellor on December 26, 2014, thereby providing a paid day off to those employees; and (2) delegating the authority to close the fourteen universities on that date to the individual presidents of each institution. An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining. **Appeal of Cumberland Valley School District**, 483 Pa. 134, 394 A.2d 946 (1978); **Commonwealth of Pennsylvania v. PLRB**, 459 A.2d 452 (Pa. Cmwlth. 1983). The Board has consistently held that paid days off are mandatory subjects of bargaining. See **PLRB v. Forest Hills School District**, 6 PPER 250 (Nisi Decision and Order, 1975) (paid in-service days are a condition of employment); **PLRB v. Clarion County Commissioners**, 8 PPER 106 (Nisi Decision and Order, 1977) (holiday schedule is a mandatory subject of bargaining); **Middletown Township Police Benevolent Association v. Middletown Township**, 27 PPER ¶ 27203 (Final Order, 1996) (vacation leave is a mandatory subject of bargaining); **Chester Upland Education Association, PSEA/NEA v. Chester Upland School District**, 47 PPER 50 (Final Order, 2015), **aff'd sub nom., Chester Upland School District v. PLRB**, __ A.3d __, 2016 WL 6778048 (Pa. Cmwlth. 2016) (sick leave is a mandatory subject of bargaining). The complainant alleging a unilateral change bears the burden of proving by substantial, credible evidence that such a change has occurred. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977); **Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police**, 36 PPER 101 (Final Order, 2005), **aff'd**, 1661 CD 2005 (Pa. Cmwlth. 2005) (opinion not reported).

AFSCME alleges in its exceptions that the Hearing Examiner erred in relying on **APSCUF v. State System of Higher Education**, 24 PPER ¶ 24070 (Final Order, 1993) and **Lackawanna County Area Vo-Tech Federation of Teachers, Local #3876 v. Lackawanna County Area Vo-Tech School**, 25 PPER ¶ 25140 (Final Order, 1994), to conclude that PASSHE's actions on December 26, 2014 are within its managerial prerogative because those cases concern an employer's managerial discretion to implement a school calendar. The Board agrees that this case does not concern PASSHE's implementation of a school calendar for student and teacher instruction days. Indeed, no change was made to the existing school calendar at the universities. Rather, the issue here is PASSHE's provision of a paid day off on December 26, 2014 to the non-instructional bargaining unit employees of the Office of the Chancellor, but not to the employees at the fourteen universities. Therefore, AFSCME's exception on this issue is sustained.

² The State System of Higher Education Act (Act 188), Act 188 of 1982, 24 P.S. §§ 20-2001-A - 20-2019-A.

³ The Hearing Examiner further concluded that AFSCME did not allege an impact bargaining violation in its Charge, and that the record did not establish such a violation. No exceptions were filed by AFSCME to the Hearing Examiner's decision regarding this issue. 34 Pa. Code § 95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

AFSCME additionally asserts that the Hearing Examiner erred in concluding that Management Directive 530.17 authorized the Chancellor and university presidents to unilaterally decide whether to provide AFSCME represented employees with an additional day off on December 26, 2014 without bargaining with AFSCME. PASSHE, on the other hand, contends that the Hearing Examiner properly concluded that Management Directive 530.17 provides PASSHE with a sound arguable basis for closing for "any other reasons." However, Management Directive 530.17 is not a bargained for agreement between PASSHE and AFSCME. Nor is it incorporated into the CBA. Therefore, a contractual privilege defense does not apply. The question remains however, whether PASSHE acted consistent with the past practices of the parties in using Management Directive 530.17. **County of Allegheny v. Allegheny County Prison Employees Independent Union**, 476 Pa. 27, 381 A.2d 849 (1977).

AFSCME does not contest the Hearing Examiner's finding that the university presidents have relied on Management Directive 530.17 in closing their institutions for reasons such as extreme weather, utility interruptions and safety/security issues. AFSCME contends, however, that the practice of the Chancellor and university presidents in this regard does not extend to closure of their facilities in order to provide the employees with a paid day off following a holiday. The record supports a finding that the Chancellor and the university presidents have a practice of reliance on Management Directive 530.17 to close their facilities for weather-related or emergency circumstances. However, there is no evidence that the Chancellor or university presidents have closed facilities for any reason other than weather or emergencies. Accordingly, the record does not support a practice of closing for a paid day off after a holiday.

AFSCME further alleges that the Hearing Examiner erred in determining that the university presidents possess the authority under Section 20-2010-A(16) of Act 188 to unilaterally decide to close their institutions and give their employees a day off for any reason because the general grant of powers to the presidents under that statute does not supersede PASSHE's obligation to bargain with AFSCME concerning paid days off. Section 20-2010-A(16) of Act 188 provides that the university presidents have the power to "perform all of those other things necessary and required for the orderly operation of the institution." 24 P.S. § 20-2010-A(16). The Board and the Courts have held that broad management rights language, such as the language found in Section 20-2010-A(16), does not permit an employer to unilaterally change a mandatory subject of bargaining or preclude an employee organization's right to bargain over such a mandatory subject. **See Township of Upper Saucon v. PLRB**, 620 A.2d 71 (Pa. Cmwlth. 1993).

Our Supreme Court has held that mandatory subjects of bargaining under Section 701 of PERA are only excluded from bargaining "where other applicable statutory provisions explicitly and definitively prohibit the public employer from making an agreement as to that specific term or condition of employment." **PLRB v. State College Area School District**, 461 Pa. 494, 510, 337 A.2d 262, 270 (1975). Section 20-2010-A(1) of Act 188 does not preclude bargaining, but specifically provides that the university presidents' powers are limited to only those matters that do not conflict with the parties' CBA. 24 P.S. § 20-2010-A(1).

Indeed, the statutory bargaining obligation regarding matters of non-instructional employees' wages, hours and working conditions, including leaves of absences, lies with the Chancellor and the Commonwealth. 24 P.S. § 20-2003-A(c). Employee pay, hours of work and leave are addressed in the CBA negotiated between the Chancellor, the Commonwealth and AFSCME. (FF 4, 5, 25, 26). Thus, the individual university presidents' authority does not extend to those matters addressed through collective bargaining. 24 P.S. § 20-2010-A(1). A day off with pay is clearly a matter of employee wages, hours and working conditions within the bargaining obligation of the Chancellor, and therefore is beyond the authority of the individual university presidents to unilaterally change. Accordingly, AFSCME's exception on this issue is sustained.

Notwithstanding the lack of authority to unilaterally grant a paid day off, the stipulated facts establish that the university presidents did not make any changes to their previously determined schedules on December 26, 2014, and therefore no changes occurred at the universities. (FF 16). However, irrespective of what occurred at the

universities, the Chancellor closed the Dixon Center, Vartan Way and Center City Offices of the Chancellor on December 26, 2014, and gave those non-instructional bargaining unit employees a paid day off without bargaining with AFSCME. As noted above, the record does not demonstrate that the Chancellor has ever utilized Management Directive 530.17 to close the Office of the Chancellor and provide a paid day off to its employees absent a specific weather-related or emergency situation. Therefore, in the absence of substantial evidence of a past practice, PASSHE violated its duty to bargain under Section 1201(a)(1) and (5) of PERA by unilaterally providing a paid day off on December 26, 2014 to the Office of the Chancellor employees. **Appeal of Cumberland Valley School District, supra; Commonwealth of Pennsylvania, supra.** Accordingly, the Board shall vacate the Hearing Examiner's determination that PASSHE did not violate Section 1201(a)(1) and (5) of PERA.

Concerning the appropriate remedy, Section 1303 of PERA authorizes the Board to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action ... as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, and not punitive. **Uniontown Area School District v. PLRB**, 747 A.2d 1271 (Pa. Cmwlth. 2000). Further, it is within the Board's discretion to determine the appropriate relief for an employer's unfair practices. **PLRB v. Martha Company**, 359 Pa. 347, 59 A.2d 166 (1948). As for the employees at the fourteen universities, no unfair practice was committed because there was no change to their wages, hours or working conditions. Therefore, the Board cannot afford them remedial relief. Concerning the employees of the Office of the Chancellor, those employees received an extra day off with pay. Where as here, employees receive wage and benefit increases pursuant to unlawful unilateral action by an employer, the Board will not direct that the increases be rescinded because to do so would penalize the employees for the employer's unfair practice. **PLRB v. Lower Paxton Township**, 9 PPER ¶ 9260 (Nisi Decision and Order, 1978); **Mifflin County School District**, 22 PPER ¶ 22065 (Final Order, 1991); **AFSCME District Council 88 v. Warminster Township**, 31 PPER ¶ 31156 (Final Order, 2000). Accordingly, upon consideration of the record and the purposes and policies of PERA, the Board will limit the remedy to direct PASSHE to cease and desist from its violation of Section 1201(a)(1) and (5) of PERA.

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, AFSCME has sustained its burden of establishing that PASSHE violated Section 1201(a)(1) and (5) of PERA by closing the Office of the Chancellor for non-emergency reasons and unilaterally providing an additional paid day off to some of the bargaining unit members represented by AFSCME on December 26, 2014. Therefore, AFSCME's exceptions shall be sustained and the May 10, 2016 PDO shall be set aside consistent with the above discussion.

CONCLUSIONS

CONCLUSIONS numbers 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION number 4 is vacated and set aside and the following additional conclusion is made:

5. The State System 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 American Federation of State, County and Municipal Employees, Council 13 are hereby sustained and the Order on page 11 of the May 10, 2016 Proposed Decision and Order is hereby vacated and set aside, and

IT IS HEREBY FUTHER ORDERED AND DIRECTED

that the State System 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) 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; and
 - (b) 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 January, 2017. 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

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 13

v.

PENNSYLVANIA STATE SYSTEM OF HIGHER
EDUCATION

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Case No. PERA-C-15-98-E

AFFIDAVIT OF COMPLIANCE

The State System hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (5) of the Public Employe Relations Act; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on AFSCME 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