COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 89	:	
v.	:	Case No. PERA-C-20-104-E
LEBANON COUNTY	:	

FINAL ORDER

The American Federation of State, County and Municipal Employees, District Council 89 (AFSCME) filed timely exceptions and supporting brief with the Pennsylvania Labor Relations Board (Board) on December 13, 2021, challenging a Proposed Decision and Order (PDO) issued on November 23, 2021. In the PDO, the Board's Hearing Examiner concluded that Lebanon County (County) did not violate Section 1201(a)(1) or (5) of the Public Employe Relations Act (PERA) when it unilaterally exempted corrections officers from the paid leave benefits provided under the Families First Coronavirus Response Act. On January 3, 2022, the County filed a response and brief in opposition to the exceptions.

The facts of this case, as stipulated to by the parties, are summarized as follows. AFSCME is the exclusive bargaining representative of the corrections officers employed at the County Correctional Facility. (FF 3). On or about March 18, 2020, the Families First Coronavirus Response Act (Coronavirus Response Act) was signed into law, which provided two kinds of paid leave benefits for eligible employes of certain employers[1] known as the Emergency Paid Sick Leave Act (EPSLA) and the Expanded Family Medical Leave Act (EFMLA). (FF 4, 5). The benefits under the EPSLA and EFMLA were effective from April 1 through December 31, 2020. (FF 12).

The EPSLA provisions required employers to provide eligible employes with up to 80 hours or 10 days of paid time off to use for a qualifying reason prior to using their own available paid leave benefits. A qualifying reason for paid leave under the EPSLA exists where (a) the employe was quarantined pursuant to Federal, State, or local government order or advice of a health care provider; (b) the employe was experiencing COVID-19 symptoms and seeking a medical diagnosis; (c) the employe had a bona fide need to care for an individual subject to quarantine pursuant to Federal, State, or local government order or advice of a health care provider; (d) the employe had a bona fide need to care for a child under 18 years of age whose school or child care provider is closed or unavailable for reasons related to COVID-19; and/or (e) the employe was experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor. (FF 8). The EFMLA provisions amended the federal Family and Medical Leave Act (FMLA) to require employers to provide paid time off to employes who were unable to work due to a bona

[1] The County falls within the definition of employer under both the EPSLA and EFMLA. (FF 6).

fide need for leave to care for a child whose school or childcare provider was closed or unavailable for reasons related to COVID-19. (FF 9).

However, the Coronavirus Response Act also provided that employers could exclude health care providers and emergency responders from those paid leave benefits. 29 CFR 826.30(c). Thus, under the EPSLA and EFMLA, a covered employer may exclude health care providers or emergency responders from the EPSLA and EFMLA paid leave benefits.[2] The parties stipulated that emergency responders under the federal regulations include, but are not limited to, military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. (FF 11).

On April 16, 2020, the County issued a policy to all employes concerning the Coronavirus Response Act benefits, with an effective date of April 1, 2020. (FF 17). The County excluded all employes who fell under the definition of emergency responders, which included all employes of the County Correctional Facility, Department of Emergency Services, Renova Center, Sheriff's Department, Probation Department, Children and Youth Services Department, and County Detectives. (FF 13).

On April 22, 2020, AFSCME representative Andrew Kozlosky sent an email to Michelle Edris, the County's Director of Human Resources, stating, in relevant part, as follows:

> The County is choosing to exempt the Prison Guards from the [Coronavirus Response Act], which would allow employees to financial compensation through this Federal law.
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> . . .
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> The County is making an employee use their own leave if infected with COVID-19 or being made to quarantine….

(FF 29).

By email dated April 29, 2020, the County responded to Mr. Kozlosky's April 22, 2020 email, stating, in relevant part, as follows:

> Section 826.30(c) healthcare providers and emergency responders may be excluded by the [Coronavirus Response Act]. Section 826.30(c)(2) defines "emergency responders" as "correctional institutional personnel" and "individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the

[2] 85 FR 19326-01, 2020 WL 1663275 (April 6, 2020).

> facility." Accordingly, the County is excluding all employees who work at [the Lebanon County Correctional Facility], not just the union members.
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> . . .
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> Employees who are considered healthcare workers, emergency first responders, or those who work for a County facility employing these individuals and whose work is necessary to maintain the operation of the facility may use their own paid sick leave or the employee may take unpaid leave. Additionally, employees who are diagnosed with COVID-19 may apply for Family Medical Leave under the Family Medical Leave Act. Generally, such leave is unpaid. However, our policy provides that the employees may use sick, vacation, and personal days in lieu of unpaid time.

(FF 30).

From April 1 through December 31, 2020, AFSCME bargaining unit employes maintained their benefits and rights as set forth under the FMLA, the Americans with Disabilities Act (ADA), and the collective bargaining agreement (CBA) between the parties. (FF 23). In that same period, corrections officers who were out of work as a result of reasons related to COVID-19 were permitted to use their accrued paid time off (vacation, sick leave, family sick leave, family medical leave, leave of absence) or they could choose to take unpaid leave.[3] (FF 24). Some corrections officers missed time from work as a result of testing positive for COVID-19, being sent home from work for exhibiting COVID-19 symptoms, or having a child or family member testing positive for COVID-19. (FF 31). Some employes were out of work on multiple, separate occasions related to COVID-19. (FF 32).

AFSCME filed its Charge of Unfair Practices on May 22, 2020, alleging that the County violated Section 1201(a)(1) and (5) of PERA by refusing to bargain over its decision to exclude the corrections officers from the benefits provided under the Coronavirus Response Act and its impact therein. On June 26, 2020, the Secretary of the Board issued a letter dismissing the Charge, stating that the County's decision to exclude the corrections officers from the Coronavirus Response Act benefits fell within its managerial prerogative to determine the level of services needed to provide adequate coverage in its correctional facility during the pandemic. The Secretary further stated that the Charge failed to allege sufficient facts to demonstrate how the County's decision to exclude the corrections officers from these benefits had a severable impact on their wages, hours and working conditions. After the filing of exceptions, the Board issued an Order Directing Remand to the Secretary for Further Proceedings on September 18, 2020.

On October 23, 2020, the Secretary issued a Complaint and Notice of Hearing, directing that a hearing be held before the Hearing Examiner on April 2, 2021. In lieu of a hearing, the parties submitted joint

[3] An employe taking unpaid leave may be entitled to file for unemployment compensation benefits under the Pennsylvania Unemployment Compensation Law.

stipulations of fact and exhibits to the Board's Hearing Examiner on August 13, 2021. Both parties filed post-hearing briefs on September 27, 2021.

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

> While AFSCME is correct that paid leave benefits and the discretionary provisions of a statute are ordinarily regarded as mandatory subjects of bargaining, the record here shows that there are new or different facts which alter the weight the matter at issue bears on the interests of the parties, warranting additional analysis and departure from established precedent. Indeed, the record here demonstrates that the Federal government enacted the [Coronavirus Response Act] in response to the deadly global pandemic in March 2020 to allow for additional leave benefits for reasons related to COVID-19 and permitted covered employers to exempt certain emergency responders from those requirements. The County, in this case, elected to exclude the corrections officers, as emergency responders, because those employes were on the frontlines of public safety and were responsible for the care, custody, and control of incarcerated individuals. As the County points out in its post-hearing brief, the County did so to maintain essential public services and ensure safety during the pandemic since the Lebanon County Correctional Facility is a 24/7 operation. As previously set forth above, the County is not required to bargain over matters of inherent managerial policy, such as its standards of services, pursuant to Section 702 of PERA. Thus, while the potential paid leave benefits of the [Coronavirus Response Act] would certainly impact employe terms and conditions of employment, the employe interests are significantly outweighed by the County's interests in continuing to provide critical and essential public services during a sweeping worldwide emergency.

(PDO at 7). The Hearing Examiner further found that the stipulated facts demonstrated that the County did not change any terms and conditions of employment of the corrections officers because they maintained their benefits and rights set forth in the parties' CBA, the FMLA and the ADA and were permitted to use their contractual leave when they were out of work due to COVID-19 related reasons. Because it could be inferred from the stipulated facts that the parties' CBA covered employe leave, the Hearing Examiner concluded that the County did not have a duty to bargain over leave entitlement for the term of the CBA, citing to Memphis Ready Mix, 2020 WL 6336670 (NLRB Advice Memorandum, July 31, 2020)(party not obligated to

bargain over issues in contract for life of agreement). Accordingly, the Hearing Examiner rescinded the complaint and dismissed the Charge.[4]

In its exceptions, AFSCME argues that the Hearing Examiner erred in concluding that the County did not violate Section 1201(a)(1) and (5) of PERA when it unilaterally excluded the corrections officers from the Coronavirus Response Act benefits because paid leave benefits and discretionary aspects of a statute are mandatorily negotiable. The County counters that new and different facts, i.e. the global COVID-19 pandemic, were present to support the Hearing Examiner's decision that the County's exclusion of the corrections officers from the Coronavirus Response Act paid leave benefits was a managerial prerogative.

An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining. Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978); Commonwealth of Pennsylvania v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983). In PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975), the Supreme Court articulated the standard to be applied in determining whether a matter is a mandatory subject of bargaining under Section 701 or a managerial prerogative under Section 702 as follows:

> [W]here an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

337 A.2d at 268. In determining whether a disputed item is a mandatory subject of bargaining or a matter of inherent managerial policy, the Board properly relies on its prior application of the State College balancing test to the disputed item, unless a party presents new or different facts that may alter the weight the matter at issue bears on the interests of the parties. Pennsylvania State Corrections Officers Association v. Department of Corrections, Fayette SCI, 35 PPER 84 (Final Order, 2004); Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002). The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such departure. *Id.*

Applying the State College balancing test, the Board has held that paid days off, AFSCME, Council 13 v. PASSHE, 48 PPER 58 (Final Order, 2017), and discretionary aspects of a statute that have a severable impact on employes'

[4] The Hearing Examiner also concluded that AFSCME waived its allegations that the County violated its duty to bargain over the impact of its decision to exempt the corrections officers from the Coronavirus Response Act leave benefits because it failed to address that issue in its post-hearing brief. 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").

wages, hours and working conditions are mandatory subjects of bargaining. *See* APSCUF v. PASSHE, 40 PPER 43 (Final Order, 2009). However, the Board has also determined that a public employer's decision that strikes at the core of its public purpose to provide necessary standards of services and effectiveness of its operation, is within management prerogative under Section 702 of PERA. Fraternal Order of Transit Police v. SEPTA, 36 PPER 115 (Final Order, 2005); Easton Area Education Association v. Easton Area School District, 32 PPER ¶ 32163 (Final Order, 2001).

The County contends that its decision to exempt the corrections officers from the Coronavirus Response Act paid leave benefits falls within its managerial prerogative to determine standards of services under Section 702 of PERA. Specifically, the County alleges that corrections officers are "on the frontlines of public safety and are responsible for the care, custody, and control of incarcerated individuals" and that exclusion from the paid leave benefits was necessary to provide appropriate staffing and services on a 24/7 basis at its correctional facility. (County Brief at 6). The County further asserts that it is imperative to maintain effective and efficient 24/7 operations to provide this essential public service and ensure the safety of the public and incarcerated individuals.

In formulating the balancing test in State College, the Pennsylvania Supreme Court recognized that "[i]n striking this balance [between mandatory and managerial subjects] the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." State College, 337 A.2d at 268. The appellate courts have repeatedly stressed the public employer's managerial rights under Section 702 of PERA to ensure the provision of public services. AFSCME, Council 13 v. PLRB, 479 A.2d 683 (Pa. Cmwlth. 1984); APSCUF v. PLRB, 226 A.3d 1229 (Pa. 2020). In this regard notably the United States Department of Labor Regulations explain the reasoning for the exclusion of emergency personnel as follows:

> The authority for employers to exempt emergency responders is reflective of a balance struck by the [Coronavirus Response Act]. On the one hand, the [Coronavirus Response Act] provides for paid sick leave and expanded family and medical leave so employees will not be forced to choose between their paychecks and the individual and public health measures necessary to combat COVID-19. On the other hand, providing paid sick leave or expanded family and medical leave does not come at the expense of fully staffing the necessary functions of society, including the functions of emergency responders. The [Coronavirus Response Act] should be read to complement—and not detract from—the work being done on the front lines to treat COVID-19 patients, prevent the spread of COVID-19, and simultaneously keep Americans safe and with access to essential services.

85 FR 19326-01, 19335, 2020 WL 1663275.

Here, the County is responsible for the care, custody and control of incarcerated individuals in its correctional facility on a 24/7 basis. In order to provide this essential public service and to ensure the safety of

the public and those incarcerated individuals, the County must maintain adequate staffing of its correctional facility. Adequate staffing was even more important during the enactment of the Coronavirus Response Act, where the world was affected by the COVID-19 pandemic. The Board also acknowledges that emergency responders such as the corrections officers here had an interest in receiving these additional paid leave benefits during the pandemic. However, on these facts, the County's interests in maintaining the efficient and effective operation of its correctional facility outweighs the interests of the corrections officers in receiving additional paid leave under the Coronavirus Response Act. Therefore, the Hearing Examiner properly concluded that the County did not violate Section 1201(a)(1) or (5) of PERA.[5]

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the County did not violate Section 1201(a)(1) or (5) of PERA by unilaterally excluding the corrections officers from the paid leave benefits of the Coronavirus Response Act. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the American Federation of State, County and Municipal Employees, District Council 89 are hereby dismissed, and the November 23, 2021 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this sixteenth day of August, 2022. 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.

[5] Based upon the disposition of this issue, the Board need not address AFSCME's remaining exceptions.