

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY :
& MUNICIPAL EMPLOYEES, COUNCIL 13 :
v. : CASE NO. PERA-C-15-98-E
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION & CHANCELLOR FOR THE :
STATE SYSTEM OF HIGHER EDUCATION :

PROPOSED DECISION AND ORDER

On April 17, 2015, the American Federation of State, County and Municipal Employees, Council 13 (Union or AFSCME) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State System of Higher Education (PASSHE or State System) and the Chancellor for PASSHE violated Section 1201(a) (1) and (5) of the Public Employe Relations Act (PERA or Act).

The Union specifically alleged that the Chancellor is the collective bargaining agent for the entire State System, not individual university presidents. As such, the Union alleged that, when the Governor, on December 22, 2014, announced that non-essential employes under the Governor's jurisdiction were authorized for a day off on December 26, 2014, the Chancellor unilaterally determined not to extend that to all fourteen universities and delegated that decision to individual university presidents, which resulted in some university presidents giving a paid day off and some did not. In its charge, the Union specifically claims that, by placing the decision to close universities with the presidents, the Chancellor gave unilateral discretion to third parties with no role in bargaining to determine an additional pay day off from work.

On April 30, 2015, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on Friday, November 20, 2015, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Also during the hearing, the parties supplemented the hearing testimony with the submission of mutually agreed upon factual stipulations.¹ The Union filed its post-hearing brief on March 7, 2016. The State System filed its brief on March 28, 2016.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The State System of Higher Education is a public employer within the meaning of Section 301(1) of PERA. (S.F. ¶ 1)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (S.F. ¶ 2)
3. At the time of the events that gave rise to this dispute, AFSCME and the State System were parties to a collective bargaining agreement (CBA), effective July 1, 2011 through June 30, 2015. (S.F. ¶ 3)
4. The CBA sets forth wages, hours and terms and conditions of employment for AFSCME-represented employes in a number of bargaining units, including those AFSCME-represented employes employed by the State System. Appendix S to the CBA sets forth those terms and conditions of employment which are unique to State System employes represented by AFSCME. (S.F. ¶ 5)

¹ The hearing testimony will be cited herein as "N.T." and references to the Stipulations of Fact will be cited herein as "S.F."

5. The CBA contains provisions pertaining to hours of work, holidays, personal leave days and vacations. The CBA is attached to the Stipulation of Facts submitted by the parties. (S.F. ¶s 4 & 6)

6. The State System is comprised of the Office of the Chancellor and the following 14 universities: Bloomsburg University, California University, Cheyney University, Clarion University, East Stroudsburg University, Edinboro University, Indiana University, Kutztown University, Lock Haven University, Mansfield University, Millersville University, Shippensburg University, Slippery Rock University and West Chester University. (S.F. ¶ 7)

7. The Office of the Chancellor has offices at the following three locations: The Dixon University Center, Vartan Way and PASSHE Center City. (S.F. ¶ 8)

8. The State System is an independent agency and its employes are not under the jurisdiction of the Governor. (S.F. ¶ 9)

9. AFSCME represents employes at all fourteen universities and the Office of the Chancellor. (S.F. ¶ 10)

10. All AFSCME represented employes are non-instructional employes. (S.F. ¶ 13)

11. On December 22, 2014, then-Governor Corbett's Deputy Secretary for Human Resources and Management, James Honchar, announced that non-essential employes under the Governor's jurisdiction were authorized for a full-day closure on December 26, 2014. Mr. Honchar's December 22, 2014 email is attached to the Stipulations of Fact submitted by the parties. Mr. Honchar's email expressly provided that "[t]his early release/closing schedule is in accordance with the provisions of Management Directive 530.17, Partial and Full-Day Closings of State Offices." (Exhibit C; S.F. ¶s 14 & 15)

12. AFSCME employes throughout the State System are both essential and non-essential employes. (S.F. ¶ 16)

13. Based on the December 22, 2014 announcement, the Chancellor independently decided that the Office of the Chancellor would close on December 26, 2014, and the Chancellor's Office did not negotiate with AFSCME about that closure. (N.T. 15-16, 19; S.F. ¶ 17)

14. The State System follows Management Directive 530.17 (Hereinafter, "the Directive"). The parties attached Management Directive 530.17 to the Stipulations of Fact. The non-essential AFSCME represented employes, who are employed through the Office of the Chancellor, received a day off with pay in accordance with the Directive, due to the Chancellor's decision to close the Office of the Chancellor, on December 26, 2014. (S.F. ¶s 18, 19 & 20)

15. The Directive, Section 5, 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.

(Exhibit D) (emphasis original)

16. No university president made any changes to their previously determined schedule for December 26, 2014. (S.F. ¶ 21)²

17. Under Act 188 of 1982, The State System of Higher Education Act, "[t]he Chancellor shall negotiate or cause to be negotiated on behalf of, the Board [of Governors] and subject to its final approval collective bargaining agreements pursuant to [PERA]." (24 P.S. § 20-2005-A)

18. The presidents of the individual universities do not negotiate individually with AFSCME on a statewide basis for the CBA. They do negotiate with AFSCME regarding specific items that are delineated in the CBA. (S.F. ¶ 22-23)

19. University presidents have made decisions regarding closure of their institution for reasons such as extreme weather, utility interruptions, and safety and security issues. The parties attached such notices to the Stipulations of Fact. (S.F. ¶s 24 & 25)

20. AFSCME did not learn of the Chancellor's decision to close the Office of the Chancellor site on December 26, 2014, until January 28, 2015. (S.F. ¶26)

21. On or about January 30, 2015, AFSCME's Director of the Grievance and Arbitration Department, Kristie Wolf-Maloney, emailed Brian Mbuu and William Helzlsouer in the State System's Human Resources and Labor Relations office, and Karen Momberger, Assistant to the Executive Director of AFSCME, with questions about the December 26, 2014 closure, which the parties attached to the Stipulations of Fact. (S.F. ¶s 27 & 28)

22. Ms. Wolf-Maloney's email provided, 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:

² I rejected part of Stipulation of Fact No. 21 because it conflicted with Exhibit F which demonstrates that ten university administrations negotiated a deferred holiday for December 26, 2014; At those universities, presidents did not make unilateral decisions to close.

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

(Exhibit F)

23. On March 11, 2015, Mr. Mbuu responded via email, which is attached to the Stipulations of Fact and which provided, in relevant part, 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.

(Exhibit F; S.F. ¶s 29 & 30)

24. The following universities closed on December 26, 2014 because they had already been scheduled to close and to use December 26, 2014 as a deferred holiday under Appendix S of the CBA: California University, Cheyney University, Clarion University, East Stroudsburg University, Edinboro University, Indiana University, Kutztown University, Mansfield University, Shippensburg University and West Chester University. (S.F. ¶31)

25. Appendix S of the CBA identifies seven major holidays: New Year's Day, Martin Luther King Jr.'s Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. Appendix S identifies four unspecified minor holidays. (S.F. 32)

26. Appendix S of the CBA provides, in relevant part, as follows:

Holidays

At the 14 institutions of the Pennsylvania State System of Higher Education, 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 a 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 the Pennsylvania State System of Higher Education.

(Exhibit A; S.F. ¶ 33)

27. Bloomsburg University and Lock Haven University remained open on December 26, 2014, and non-essential employees were required to work. (S.F. ¶34)

28. At Millersville University and Slippery Rock University, employees were required to use leave time if they wished to have December 26, 2014 off, or were required to talk to their supervisor about getting work for the day if they did not want to use leave time. (S.F. ¶35)

DISCUSSION

The Office of Chancellor closed the Office of the Chancellor on December 26, 2014 and employees within the Office of the Chancellor were allowed a day off with pay. The Union argues that hours of work and days off with pay are mandatory subjects of bargaining. (Union's Post-hearing Brief at 7). The Union further contends that the Office of Chancellor is responsible for bargaining terms and conditions of employment throughout State System. (Union's Post-hearing Brief at 7). The Union posits that, "[i]n making the unilateral decision to close on December 26, 2014, the Employer did not negotiate with AFSCME over the decision to close or the impact of the decision." (Union's Post-hearing Brief at 9). "[T]he Employer allowed each of the fourteen individual University Presidents to decide whether or not to close their individual institutions on December 26, 2014. (Union's Post-hearing Brief at 9). Consequently, argues the Union, AFSCME employees at the Chancellor's Office received an extra day off with pay on December 26, 2014, and the remaining AFSCME employees throughout the institutions at the State System did not receive the additional day off with pay. (Union's Post-hearing Brief at 9).

The Union additionally maintains that "except for scheduling minor holidays, there is no provision in Appendix S which authorizes or grants the fourteen presidents the authority to unilaterally decide days of work or paid days off. (Post-hearing Brief at 11). In this regard, the Union argues that Act 188 does not grant individual university presidents the authority to unilaterally change terms and conditions of employment. Rather such matters must be bargained by the Chancellor's Office on behalf of the Board of Governors. (Union's Post-hearing Brief at 11).

The Union further argues that neither Act 188 nor the CBA constitute a waiver of the Union's right to bargain the issue of paid closings for all AFSCME bargaining unit members. University presidents have powers to run their institutions, but Act 188 limits the powers of the university presidents to comply with collective bargaining agreements negotiated and agreed to by the Board of Governors. (Union's Post-hearing Brief at 11-12). Although Act 188 grants the presidents the power to "perform all of those other things necessary and required for the orderly operation of the institution," such a general grant does not override the statutory obligation to bargain, nor can it be considered a clear and unmistakable waiver of the Union's right to negotiate a mandatory subject of bargaining. (Union's Post-hearing Brief at 12).

Nor can the management rights clause found in Article 2 of the CBA be interpreted as including the power to unilaterally determine when to open or close institutions with or without pay because the Board has held that such broad language does not constitute a clear and unmistakable waiver of bargaining rights regarding the specific subject matter. (Union's Post-hearing Brief at 13). Moreover, the Union maintains that past practice of closing individual institutions for weather, snow, flooding or other emergencies is not controlling because institution presidents must have the right to ensure the safety of

students and employees on the local level where such emergencies are not effecting all fourteen institutions. The Union has never questioned a local president's authority to close an institution for an overriding managerial reason such as ensuring safety or the provision of basic utilities. (Union's Post-hearing Brief at 13-14). The Union claims that, should the State System want its presidents to have the power to make unilateral determinations regarding mandatory subjects of bargaining, such as non-holiday institutional closings, it should negotiate those terms into a successor bargaining agreement. (Union's Post-hearing Brief at 14).

The State System counter-argues that the Chancellor simply closed the Office of the Chancellor and followed the Directive, which the Board of Governors had adopted and followed since 2011, to give a full-day closing to the employees under the Chancellor's immediate direction and control. (PASSHE's Post-hearing Brief at 5). The State System posits that the presidents have the statutory ability to perform any and all things necessary and required for the orderly operation of the institution unless in conflict with the Board of Governors. (PASSHE's Post-hearing brief at 6). The Chancellor does not have authority over general operating parameters of the institutions just like local presidents do not have authority over operations at any of the Offices of the Chancellor. The State System posits that the "net impact to the employees if a facility is closed is that they will still receive compensation. There is no evidence that has been presented in this case that any employee has not received the appropriate compensation to which they are entitled. AFSCME is simply seeking more compensation for its members than they are entitled to receive." (PASSHE's Post-hearing Brief at 7). The fact that the non-essential AFSCME employees at the Office of the Chancellor received an additional day off with pay does not obligate the State System to compensate all AFSCME members with a day off. (PSASSHE's Post-hearing Brief at 8).

The Union has alleged that the State System violated Section 1201(a)(1) and (5) of PERA by unilaterally changing terms and conditions of employment regarding a mandatory subject of bargaining. However, the Board has consistently held that an employer has a managerial prerogative to determine which days it will be open and operational and which days it will be closed. **APSCUF v. State System of Higher Education**, 24 PPER ¶ 24070 (Final Order, 1993); **Lackawanna County Area Vo-Tech School**, 25 PPER ¶ 25140 (Final Order, 1994). Moreover, the State System applies and enforces the Directive and Appendix S of the CBA. The actions of the Chancellor and the individual presidents comply with past practice, the Directive and Appendix S. Consequently, the closing of the Office of the Chancellor, and the manner in which the presidents handled December 26, 2014, did not constitute the requisite **change** in terms and conditions of employment, which is a fundamental element of a bargaining violation under the Act.

The State System's adoption and application of the Directive is not at issue in this case, as it has been in place since 2011. (F.F. 14) Certainly, no one is contesting management's authority to unilaterally close its facilities for safety or emergency concerns. The Directive, however, additionally authorizes the State System to close its facilities for any other reasons. The Directive expressly provides that "[p]artial or full-day closings within the scope of this directive are not holidays," and that essential employees required to work on those days "shall be compensated at their regular straight rate of pay and such hours will not be counted towards overtime." (F.F. 15). On December 22, 2014, Mr. Honchar directed that, on Friday, December 26, 2014, "[n]on-essential employees under the Governor's jurisdiction [were] authorized a full-day closing." He further specified that "[t]his early release/closing schedule is in accordance with the provisions of Management Directive 530.17, Partial and Full-Day Closings of State Offices." (Exhibit C). As it had done since 2011, the Chancellor of the State System also invoked the Directive and authorized those employees at the Office of the Chancellor for a full-day closing with a full day's compensation. The Chancellor did not change any terms or conditions of employment by closing the Office of the Chancellor and giving those employees an additional day off with pay, which was not, under the provisions of the Directive, an unbargained holiday.

Similarly, the Chancellor did not change terms and conditions of employment and indeed followed the CBA by leaving the issue of closing individual universities on

December 26, 2014 to the presidents. Under Act 188, the Chancellor controls and directs the employees under the Office of the Chancellor. The individual university presidents control and direct the daily operations and the employees at their respective, individual universities. Under Act 188, "[t]he [C]hancellor shall be empowered to employ central office professional and staff employees appropriate for the efficient discharge of the [C]hancellor's duties." 20-2005-A(6). "[t]he [C]hancellor shall be responsible for the administration of the central office, System-wide business procedures, and for the overall organization of maintenance of the physical plants and security at all institutions." 20-2005-A(7). Individual institution presidents are appointed by the Board of Governors and "shall be the chief executive officer of that institution." 20-2010-A. The statutory duties of the presidents include a "necessary-and-required" clause providing as follows: "Consistent with the policies of the Board to do and perform all of those other things necessary and required of the orderly operation of the institution." 20-2010-A(16).

The Chancellor may have overriding statutory authority to close any institution under exigent circumstances, but the daily administration of operations, and the decision to close, lies with the university president, under Act 188. The Chancellor does not exercise operational control over the universities. In this regard, the decision to close at the local level of an individual institution lies with the university president under Act 188, as "necessary and required of the orderly operation of the institution." To the extent that the orderly operations of the local universities were not compromised by closing or remaining open on December 26, 2014, closing remains a managerial prerogative unless the closing is provided as a holiday by the local administration. Moreover, Exhibit F, attached to the Stipulations of Fact, expressly provides that the president of each university may apply the Directive. Accordingly, the Chancellor has the authority under the Directive to close the office of the Chancellor, and the individual presidents also have the authority to close their respective universities under the Directive.

The State System negotiated seven major holidays and four unspecified minor holidays. The express provisions of Appendix S authorizes the local individual university administrations to schedule the minor holidays "when an institution is not at full operation." (F.F. 26). The CBA, Appendix S further provides that "[t]he matter of rescheduling minor holidays shall be resolved on a meet and discuss basis at the 14 institutions of the Pennsylvania State System of Higher Education." That is exactly what happened at 10 of the universities. At some time prior, those local administrations met with local AFSCME representatives and agreed to schedule December 26, 2014, as a deferred holiday under Appendix S. Those universities met their contractual obligations under the CBA. Because the Chancellor's Office closing was a Directive closing and not a holiday, there was no obligation to bargain the paid closing System-wide.

Absent an agreement between AFSCME and a local institutional administration for a deferred holiday on December 26, 2014, or the local president's invocation of the Directive, December 26, 2014 remained a work day, unless employees chose to submit and use accrued leave to take the day off. That is also exactly what happened at the remaining institutions that did not negotiate a deferred holiday with AFSCME for December 26, 2014. Bloomsburg and Lock Haven remained open and those employees were required to work because AFSCME did not negotiate a deferred holiday with those administrations and those presidents did not choose to invoke the Directive, as was their prerogative. Millersville and Slippery Rock employees were required to use leave or work, for the same reasons. Again, nothing changed. The Chancellor did not declare or add a holiday, in violation of the CBA or any bargaining obligation. The Chancellor closed the offices under the daily operational control of the Chancellor pursuant to the Directive. This action did not apply to the universities throughout the system, the daily operations of which are controlled by local administrations under Act 188, and the past practice of applying the Directive. There is no evidence on this record, since 2011 when the State System adopted the Directive, that the Chancellor ever applied the Directive system-wide from the Chancellor's Office. The local presidents are not required to invoke the Directive merely because the Chancellor did. Also, on this record, there is no evidence that the Union representatives at the remaining four institutions approached their local presidents' administrations to negotiate for a deferred holiday on December 26, 2014.

Accordingly, the Union did not establish the requisite change in terms and conditions of employment to prevail on their bargaining violation claim. The Chancellor applied the Directive, which has been applied since 2011, to close the offices under the operational control of the Chancellor. The Chancellor, under Act 188, 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. Accordingly, the State System did not engage in unfair practices when the Chancellor closed only the Office of the Chancellor on December 26, 2014, leaving university administrations in control of negotiating a deferred holiday for that day, invoking the Directive for that day or remaining open that day.³

CONCLUSIONS

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

1. The State System is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The State System has not committed unfair practices within the meaning of Section 1201(a) (1) or (5).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 tenth day of May, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

³ Although the Union argues in its Post-hearing Brief that PASSHE did not negotiate the impact of the Chancellor's decision to close the Office of the Chancellor on December 26, 2014, it did not allege an impact bargaining violation in its specification of charges and the record does not establish that the State System refused requested impact bargaining. The issue of impact bargaining, therefore, is not presented for consideration or established by the record.