

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
 :
 : CASE NO. PERA-C-20-6-E
v. :
 :
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION, WEST CHESTER UNIVERSITY¹ :

PROPOSED DECISION AND ORDER

On January 10, 2020, the Association of Pennsylvania State College and University Faculties (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State System of Higher Education (PASSHE) by and through its administrative representatives at West Chester University (WCU) violated Section 1201(a)(1), (3), (5) and (8) of the Public Employee Relations Act (Act or PERA). The Union specifically alleged that WCU management unlawfully discriminated against, coerced and engaged in direct dealing with Head Swimming Coach and Summer Swimming Camp Director Stephen Mazurek, when it conditioned his permanent appointment to Head Men's and Women's Swimming and Diving Coach on his waiving the right to continue to be compensated according to current practices contrary to two prior arbitration awards and the collective bargaining agreement (CBA).

On February 27, 2020, the Secretary of the Board issued a complaint and notice of hearing designating a hearing date of Wednesday June 10, 2020, in Harrisburg. The parties agreed to conduct the hearing via the video deposition of Coach Mazurek on that date without the presence of a hearing examiner, during which both parties in interest were represented by legal counsel; they were also afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. Both parties filed their post-hearing briefs on August 24, 2020. The Union filed a reply brief on September 8, 2020. The matter was originally assigned to Hearing Examiner John Pozniak. On September 30, 2020, I informed the parties that the case was reassigned to me.

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

FINDINGS OF FACT

1. PASSHE is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)

¹ The caption appears as amended by the Hearing Examiner.

3. Jamie Rudisill had been the Head Men's and Women's Swimming and Diving Coach at WCU since 1988, and he was a member of the Union's intercollegiate coaches' bargaining unit. (Complainant Exhibit 10, F.F. 3)

4. Coach Mazurek started working at WCU while he was still an undergraduate at WCU in 2000. He graduated WCU in 2002, and he graduated LaSalle University in 2006, with a Master's Degree in Elementary and Special Education. While matriculating at WCU, Coach Mazurek was involved in swimming as a sport. (N.T. 7-8)

5. In 2000, Coach Mazurek started as a swim lessons instructor working under former Head Coach Rudisill. In 2008, WCU hired Coach Mazurek as a full-time Assistant Coach and Pool Manager. (N.T. 7-8)

6. As Assistant Coach, Coach Mazurek helped supervising and instructing at the swim camps under then Swim Camp Director and Head Coach Rudisill. (N.T. 8)

7. Former Head Coach Rudisill's duties included, among others, having operational control over the Swim Camps. As of 2005, the compensation that Former Head Coach Rudisill received from WCU for running the Swim Camps was 20% of the gross income from the camps. (N.T. 9)

8. In 2008, the Summer Swim Lesson Program ran for a total of 12 weeks during May, June and July, for six 2-week sessions. Each day included from 4-8 hours of instruction and swimming. This Program has run every year from May through July.² (N.T. 10)

9. In the Program, coaches would teach beginners through "pre-competitive" level swimmers. Beginners are ages 5 and under, who do not yet know how to swim. Coaches would also prepare older swimmers for swim team and competitive swimming. This type of instruction has continued to the present with the addition of adult lessons, including lessons for people over 70 years of age. (N.T. 10-11)

10. The WCU Athletic Director in 2008, was Ed Matejkovic. The Athletic Director reports to the Vice President of Student Affairs, who at the time was Matt Bricketto. (N.T. 9)

11. Article 7.3(E) of the CBA for non-faculty athletic coaches provides, in relevant part, as follows:

2. Current practices regarding compensation for camps and clinics, including dual compensation, run by Regular full-time COACHES employed as of the effective date of this Agreement shall continue.

3. Current practices regarding participation in and compensation for camps and clinics, including dual compensation, for Regular part-time head and assistant COACHES shall continue.

(Complainant Exhibit 2, Article 7(E) at 12)

² The record does not indicate whether the camps were cancelled due to COVID-19 during the summer of 2020.

12. Multiple collective bargaining agreements over the years have retained the language included in Article 7.3.E. On April 29, 2020, the parties entered into a new agreement which retained the same provisions. (Complainant Exhibits 1, 2, 3, 4, 5 & 9)

13. WCU athletic coaches had been working under a written and agreed-upon summer camp policy from 1992. The goal of the 1992-policy was to bring into WCU additional income for sports scholarships and to provide additional compensation for the camp directors. With respect to scholarships, the policy stated that a minimum of 50% of gross income generated from each weekly camp would go towards scholarships for the sport while permitting a coach to earn 20% of gross revenue up to a certain maximum or cap. In 2004, the coaches requested that the written 1992 policy be revised to eliminate the cap. As the camp director generating the most money, Former Coach Rudisill received much less than 20% of adjusted gross revenues due to the cap. Management agreed to the change but wanted to ensure that 50% of gross revenue first went to scholarships after adjustments for expenses. Ultimately, the parties agreed to a new policy in 2005, which eliminated the caps but provided for 50% of gross income from each weekly camp session to support scholarships for that sport. (Complainant Exhibit 7 at 3-7)

14. Beginning in 2005, and for three years thereafter, Former Coach Rudisill submitted compensation claims equal to 20% of adjusted gross receipts. His request forms, which were approved by three layers of management review, were paid for 2005-2007 inclusively, contrary to the 2005 policy. "His request forms, which required several approvals including the signature of Dr. Bricketto, were always okayed." (Complainant Exhibit 7 at 6-7)

15. In 2008, then Vice President Bricketto suddenly changed the practice regarding head Coach Rudisill's compensation. Coach Rudisill filed a grievance, which was heard by Arbitrator Jay Nadelbach, Esquire. Vice President Bricketto's position at arbitration was that Rudisill's 20% of gross income violated the 2005 written policy requiring 50% of gross income from the camps to go toward scholarships first, that Rudisill was paid more than he was entitled to receive, that Rudisill did not follow the 2005-written policy when he requested 20% of gross income and that he should not be unjustly enriched due to management's lack of oversight. (Complainant Exhibit 7 at 8)

16. Arbitrator Nadelbach, in his grievance arbitration award (Nadelbach Award), dated November 28, 2011, stated the following:

Notably, the Grievant's written compensation requests went through at least three (3) layers of review and approval. Summer camp coordinator Huber did the math and verified the amounts. He then forwarded the requests to Athletic Director Matejkovic. Upon his approval, the requests went to Vice President Bricketto. He then signed the payment request forms and sent them to the payroll office.

This process was followed numerous times over the three (3) year period, 2005-2007. The payment method and approval route used were fair and reasonable, open and notorious and consistently followed by both parties. There was no sleight of hand or tricky maneuvering undertaken by the Grievant to get paid unwarranted monies.

(Complainant Exhibit 7 at 11)

17. Arbitrator Nadelbach concluded that "[t]he sudden and unilateral determination in 2008 to disregard the past practice regarding [Rudisill's] summer camp compensation, therefore, violated [Article 7.3.E of] the collective bargaining agreement[,] and that "[t]he Grievant is entitled to additional pay for 2008 based upon the identical method utilized from 2005 through 2007 to calculate his summer camp compensation." (Complainant Exhibit 7 at 12)

18. Arbitrator Nadelbach further awarded the following: "The Grievant [Rudisill], consistent with the parties' past practice, was entitled to 20% of the summer camps' gross revenue, minus any refunds, for operating summer swim camps in 2008. (Complainant Exhibit 7 at 13)

19. Following the Nadelbach Award, WCU continued to refuse to pay Head Coach Rudisill 20% of camp gross revenue pursuant to the "current practices" provision of Article 7.3.E, as ordered by the Nadelbach Award, for 2009, 2010, 2011, 2012 and 2013 Summer Camps. Head Coach Rudisill filed five grievances, one for each year. Those grievances were heard and decided by Arbitrator Mattye M. Gandel. (Complainant Exhibit 8 at 20)

20. Two days before the scheduled Gandel Arbitration, PASSHE's Assistant Vice Chancellor for labor relations, Michael Mottola, had his assistant email a letter to Head Coach Rudisill informing him of PASSHE's intent to recapture alleged overpayments amounting to \$115,445. By Proposed Decision and Order dated July 16, 2015, a Board hearing examiner concluded that Mr. Mottola's conduct was coercive and violated Section 1201(a)(1) of PERA. (Complainant Exhibit 10, F.F. 20, & pgs. 3-4)

21. In his award dated October 16, 2014, Arbitrator Gandel concluded that WCU again violated Article 7.3.E of the CBA by reducing Head Coach Rudisill's dual compensation for the summer camps. (Complainant Exhibit 8)

22. Arbitrator Gandel issued the following award (Gandel Award), in relevant part:

2. The University violated Article 7.3.E when it did not follow the "practice" of compensating the Grievant at the rate of 20% of gross revenues less refunds for operating the 2009, 2010, 2011, 2012 and 2013 summer camp programs.

3. The University shall make the Grievant whole by compensating him for the difference between the amount he should have received for those five camp seasons and the amount he actually received.

4. The University shall apply the negotiated language of Article 7.3.E going forward as long as that language remains in effect.

(Complainant Exhibit 8 at 20)

23. On July 24, 2015, the Commonwealth Court of Pennsylvania sustained the Gandel Award and denied PASSE's appeal. The Commonwealth Court concluded as follows:

Merely informing the Union that it would refuse to pay dual compensation based on past practice is not sufficient to repudiate the past practice, particularly where the union has consistently disputed WCU's right to do so by filing grievances. Article 7.3.E of the CBA is the only instance in which the parties addressed dual compensation. Article 7.3.E has existed in each applicable CBA. WCU either failed to successfully negotiate the removal of Article 7.3.E from the CBA or did not make an attempt to eliminate the provision. Accordingly, WCU is obligated to continue to pay dual compensation based upon Article 7.3.E and the past practice established by the credited evidence. [School District of Philadelphia v. Phila. Fed'n of Teachers, [Local 3], 651 A.2d [1152] at 1156.

. . . .

Having reviewed the Gandel Award and rejected all of WCU's arguments, we conclude that based upon the language of Article 7.3.E of the CBA, the award of dual compensation in the form of 20% of gross revenues less refunds is rationally derived from the CBA and does not violate public policy.

Accordingly, we affirm.

(Complainant's Exhibit 9 at 13-14, 16)

24. In August 2017, Head Coach Rudisill retired. Upon his retirement, Coach Mazurek was appointed Interim Head Coach of the Men's and Women's Swimming and Diving Programs. Also, in 2017, and prior to Head Coach Rudisill's retirement, both Athletic Director Matejkovic and Vice President of Student Affairs Bricketto retired. (N.T. 11, 25)

25. Subsequently, WCU appointed Terrie Beattie as the new Interim Athletic Director. Also at about the same time, WCU appointed Zeb Davenport as the new Interim Vice President of Student Affairs. Both individuals are now permanently appointed to those respective positions. (N.T. 12)

26. In June 2017, Interim Vice President of Student Affairs Davenport told Coach Mazurek that the compensation would not be the same for the camps as Head Coach Rudisill was receiving. (N.T. 12-13, 25-26)

27. When Summer Swim Camp began in 2018, Coach Mazurek continued to serve as the Interim Head Coach. In that capacity, he requested and received 20% of the gross income from the camps as Head Coach Rudisill had requested and received, even though Vice President Davenport told him that his camp compensation would not be calculated under the same formula as Rudisill's camp compensation. (N.T. 13-14, 25)

28. Andy Huber is the Assistant Athletic Director and Coordinator who reports to Athletic Director Beattie. Coach Mazurek asked Assistant Athletic Director Huber why he was still receiving 20% of the gross income from the camps after Vice President of Student Affairs Davenport told him that he would not receive that amount. Assistant Athletic Director Huber responded that it was his understanding that prior arbitration awards prevented WCU

from changing the compensation calculation for the Summer Swimming Program Director.³ (N.T. 14, 27)

29. During the spring of 2019, WCU began searching for a new permanent Head Coach, while Coach Mazurek was still serving as the Interim Head Coach. Coach Mazurek applied for the permanent position, and he ran the Summer Swim Camps in 2019, for which he again received 20% of the gross income from the camps for the second time. (N.T. 15)

30. Assistant Athletic Director Huber sent the coaches a report based on the number of registered Summer Camp participants with a compensation form to sign if the coaches agreed with the revenue numbers. After Head Coach Mazurek signed the form for his 20% of gross camp income for his compensation, there was a management level review by the Athletic Director and then by the Vice President for Student Affairs. (N.T. 30)

31. In late July 2019, after the Summer Camp Program ended for the season, WCU Athletic Director Terry Beattie informed Coach Mazurek that he was selected as the new permanent Head Coach. (N.T. 15-16)

32. On September 23, 2019, Head Coach Mazurek received a contract, dated September 19, 2019. He was already serving as the new permanent Head Men's and Women's Swimming and Diving Coach for the 2019-2020 academic year. (N.T. 16-18; Complainant Exhibit 6)

33. On the second page of the contract, which includes the job description, position duties and responsibilities, it states that the employee must respond to the Athletic Director no later than October 11, 2019. (N.T. 17; Complainant Exhibit 6)

34. The cover letter to the contract provides, in relevant part, as follows:

Previously, head coaches for swimming at West Chester University were compensated for summer swim camps at 20% of adjusted gross income of the camp. This is far in excess of what other head coaches at West Chester University receive for conducting summer camps. In order to address this inequity, this contract is offered with the understanding that your compensation for the 2020 summer swim camp and all future summer swim camps will be paid in accordance with the attached local 2005 summer camp policy. This policy states that

³ PASSHE contends that Assistant Athletic Director Huber is not an employee who is authorized to bind PASSHE or WCU. Therefore, argues PASSHE, the testimony of Head Coach Mazurek that Assistant Athletic Director Huber stated that WCU was prevented by the Arbitration Awards from changing the camp pay calculation was hearsay, especially since Huber did not testify. However, I am not accepting the Huber statement for the truth of the matter asserted therein or that PASSHE believed at that time that it must apply the two Arbitration Awards to Coach Mazurek. I have only accepted Coach Mazurek's testimony to the extent that Assistant Athletic Director Huber conveyed his own understanding of the Arbitration Awards which does not bind PASSHE to anything. Additionally, whether PASSHE at one time believed that the Awards required it to calculate Coach Mazurek's camp compensation the same way it did Coach Rudisill's is not part of this decision.

a maximum of 50% of gross revenues may be used for salaries, fringe benefits, and operating the camp.

Should you reject this appointment and the attached contract on this basis, you will retain your current permanent regular full-time assistant coach position with West Chester University.

(N.T. 18-19; Complainant Exhibit 6)

35. Coach Mazurek understood this letter to mean that WCU was only offering him the position of permanent Head Coach if he agreed to give up the past compensation of 20% of camp gross income for running the Summer Camp Program that had been the past practice with Coach Mazurek, for two years in a row, and with former Head Coach Rudisill since 2005. (N.T. 19)

36. Head Coach Mazurek shared an office with Former Head Coach Rudisill for 9 years and became familiar with the arbitration litigation between Head Coach Rudisill and WCU regarding his compensation for Summer Camps. He was familiar with the Arbitration Awards in Head Coach Rudisill's favor. (N.T. 19-20)

37. Coach Mazurek signed the contract because he felt that he had no choice given that he wanted to be the permanent Head Coach, and the cover letter to the contract stated that he would go back to the position of Assistant Coach. He believed that his new camp compensation would not be as much as he had been receiving. (N.T. 20-21)

38. Article 10, Section 1 of the CBA provides, in relevant part, as follows:

B. The salary to be paid each COACH, the sport or sports at the UNIVERSITY for which the COACH will be responsible, and his/her duties and responsibilities will be determined by individual negotiations between the UNIVERSITY President, or his/her designee, and the COACH at the time of appointment or as duties and responsibilities change.

(Complainant Exhibits 1 & 2, Article 10.1.B)

DISCUSSION

The Union contends that WCU made Coach Mazurek's contract for the permanent Head Men's and Women's Swimming and Diving Coach conditioned upon his foregoing his contractual right under Article 7.3.E to 20% of adjusted gross revenues of the camps and therein also threatened him with retaliatory demotion from Head Coach to permanent Assistant Coach, if he asserted his Article 7.3.E rights to compensation based on past practice. The Union also argues that this conduct constituted direct dealing, a repudiation of the parties CBA and a refusal to comply with two grievance Arbitration Awards. The Union also emphasizes that one of the Arbitration Awards (the Gandel Award) was affirmed by the Commonwealth Court, which required WCU to pay the Summer Camp Program Director consistent with past practices, i.e., 20% of gross camp revenues in Coach Mazurek's case.

PASSHE argues that prior arbitration decisions involving a specific individual, i.e., Former Swim Camp Director Rudisill, do not bind WCU in paying Swim Camp Director Mazurek, where Article 10.1.B of the CBA authorizes coaches to individually negotiate their compensation, thereby giving PASSHE a sound arguable basis for negotiating individually with Head Coach Mazurek. PASSHE maintains that WCU and Head Coach Mazurek have the freedom to agree, through individual negotiation, his coach's salary, duties and responsibilities. Coach Mazurek was aware of his right to negotiate when he executed his contract, and he did not seek any changes to his compensation or his duties and responsibilities at the time. PASSHE contends that the Nadelbach and Gandel Awards stand only for how Former Coach Rudisill, not Coach Mazurek, was to be compensated according to the past practice regarding his summer camp compensation.

Also, PASSHE argues that neither the Nadelbach Award nor the Gandel Award recognizes a past practice for the position of head swim coach; rather those Awards focus on Coach Rudisill's individual rights and his personal compensation as the permanent head swim coach at the time. Both Awards, argues PASSHE, were grounded in the personal accomplishments of Coach Rudisill and his development of the Summer Swim Camp Program. PASSHE contends that, although Coach Mazurek was paid the compensation formula paid to Former Coach Rudisill for two years in a row, such payment did not establish a past practice for Coach Mazurek because he was the Interim Head Coach at the time. Consequently, WCU could have hired an outside permanent Head Coach in 2019, and Coach Mazurek's compensation for the prior two years would not have established a practice applied to the newly hired individual. In that case, the language of Article 7.3.E would not apply to a person who did not hold the position permanently; it only applies after the person is hired as a full-time permanent coach.

PASSHE also contends that there is no evidence that its alleged bargaining and contract violations as well as its refusal to apply the Nadelbach and Gandel Awards to Mazurek were discriminatorily motivated or that Coach Mazurek was involved in known Union activities when WCU presented Coach Mazurek with a contract and new camp compensation under the 2005 policy, instead of his former compensation as Summer Swim Program Director. Additionally, PASSHE argues that it did not violate Section 1201(a)(8) because the Nadelbach and Gandel Awards did not apply to Coach Mazurek and were limited in application to Former Coach Rudisill.

In its reply brief, the Union emphasizes the different applications of Articles 7 and 10, and that those differences undermine PASSHE's sound arguable basis defense for direct dealing, repudiating the CBA and failing to comply with the two Arbitration Awards. The Union contends that Article 10 is limited to individually bargaining the regular salary of each coach for their regular coaching duties during the academic year, not camp or clinic compensation. In contrast, Article 7 provides for additional compensation for camp and clinic work beyond an individual coach's regular salary, called dual compensation. The Union cites to the Commonwealth Court's decision affirming the Gandel Award, which opined that "Article 7.3.E of the CBA is the only instance in which the parties addressed dual compensation." (Union Reply Brief at 3). The Union contends that "[e]ven today, dual compensation is not addressed in Article 10 or anywhere else in the CBA." (Union Reply Brief at 3) (emphasis original in Brief). In this regard, the Union maintains that there is nothing in the CBA or past practices that authorizes PASSHE to apply Article 10 to additional compensation for camps or clinics, which is governed by Article 7. Therefore, argues the Union, PASSHE is required to

follow current practices in compensating coaches running camps and clinics, and Article 7 does not require a coach, who runs a camp, to be a permanently designated coach or head coach of a sport at WCU.

One issue to be decided in this case is whether the Nadelbach and Gandel Awards' interpretation of Article 7.3.E of the CBA apply to Head Coach Mazurek and require that he receive the 20% of adjusted gross income from the Summer Swimming Camp Program that he received while he was the interim Head Coach and Director of the Summer Swim Camp Program during the summers of 2018 and 2019. Another issue is whether Article 10 of the CBA provided WCU with a sound arguable basis for directly dealing with Head Coach Mazurek regarding his camp compensation in addition to his regular full-time coaching salary. Depending on the answers to those two questions, the issue then becomes, if the two arbitration awards are binding and Article 10 of the CBA is inapplicable under the circumstances, whether the manner in which WCU individually negotiated with Coach Mazurek and refused to apply the awards to his camp compensation constituted unfair practices in violation of Section 1201(a)(1), (3), (5) and/or (8).

PASSHE's argument that neither the Nadelbach Award nor the Gandel Award recognize past practice for the position of Head Men's and Women's Swimming and Diving Coach is correct. The Awards do not address compensation practices for regular coaching duties or positions. The Nadelbach and Gandel Awards both interpret and apply Article 7.3.E and conclude that payment practices for compensating a coach running a camp or clinic in a dual capacity must be continued and cannot be unilaterally reduced simply to comply with the 2005 policy. An arbitrator's interpretation of a contract provision is authoritatively binding on the parties when a contract is renegotiated without the modification of that provision. Philadelphia Federation of Teachers, supra (holding that the parties implicitly incorporate into their new collective bargaining agreement an arbitrator's prior interpretation of a contractual provision that has not been modified or renegotiated in the new agreement, unless the previous decision was clearly erroneous or changed conditions call into question the continued application of the decision). The Commonwealth Court in Pennsylvania State System of Higher Education, West Chester University v. APSCUF, 2057 C.D. 2014 (Pa. Cmwlth. 2015) (Memorandum Opinion), affirmed the Gandel Award and expressly stated therein that the Award was not erroneous or contrary to public policy. Article 7.3.E has remained unchanged in the collective bargaining agreements between these two parties since the Awards were issued. The two Awards' interpretation of Article 7.3.E are incorporated into the new CBA and, therefore, bind WCU to pay Head Coach Mazurek 20% of the adjusted gross income from the Summer Swimming Camps. Under Article 7.3.E, WCU is required to maintain the practice of compensating Coach Mazurek for his Summer Swim Camp duties in the same manner that they compensated him for the two years while he was Interim Head Coach.

As the Commonwealth Court noted in affirming the Gandel Award, Article 7.3.E is the only CBA provision that applies to dual compensation and that provision has been renewed in every collective bargaining agreement since the Rudisill litigation began in 2008. Indeed, the parties entered into a new Agreement on April 20, 2020 and retained the same provision. Contrary to PASSHE's argument, Article 10 has no applicability here. Article 7.3.E provides that "[c]urrent practices regarding compensation for camps and clinics, including dual compensation, run by Regular full-time COACHES employed as of the effective date of this Agreement shall continue," as well

as "compensation for camps and clinics, including dual compensation, for Regular part-time head and assistant COACHES." (F.F. 11).

PASSHE's argument, that Coach Mazurek's compensation while he was Interim Head Coach could not establish a past practice for his compensation because he was not the permanent Head Coach and WCU could have hired another permanent head coach without the history of compensation, ignores the language of Article 7.3.E, and is without merit. Article 7.3.E does not exclude interim coaches and indeed expressly applies current practices for compensation to assistant coaches. Article 7.3.E also does not require a camp director to be a permanent head coach. In this regard, Coach Mazurek's status as a permanent head coach, interim head coach or assistant coach is immaterial under Article 7.3.E, as long as he was a regular full or part-time coach. Also, there is nothing in the record to suggest that Coach Mazurek would not have been retained as the Summer Swim Camp Director had he not been appointed permanent Head Men's and Women's Swimming and Diving Coach for WCU.

As the Director of the Summer Swimming Program in 2018 and 2019, Coach Mazurek received dual compensation in the amount of 20% of adjusted gross revenues from the camps while he was a regular full-time coach. Consequently, WCU established a practice of compensating Head Coach Mazurek at 20% of adjusted gross revenues for his running the summer camps for two years and, under the Nadelbach and Gandel interpretation of that contractual provision, WCU must continue to pay Mazurek by that same formula. Also, PASSHE's hypothetical facts are simply not the facts presented here. The facts here are that Coach Mazurek was retained as the camp director notwithstanding the level of his full-time coaching position.

PASSHE argues that the Nadelbach and Gandel Awards resolved grievances filed on behalf of Former Head Coach Rudisill and, therefore, can only apply to Former Coach Rudisill. PASSHE argues that Arbitrator Nadelbach noted that the 2005 policy was not made an integral part of Former Coach Rudisill's compensation process. Unlike with Coach Rudisill, PASSHE contends that WCU Vice President of Student Affairs Davenport informed Coach Mazurek in 2017 that it was WCU's intention not to follow the Rudisill compensation formula and in September 2019, Coach Mazurek was specifically provided with the 2005 policy.

However, the binding nature and applicability of the two Awards to Head Coach Mazurek, or any other dually compensated coach, derive from the Awards' consistent interpretation of Article 7.3.E. The Awards' conclusions, that Article 7.3.E requires PASSHE to continue compensating a camp or clinic director who is also a coach, as had been done in the past, without reduction, is a conclusion that equally applies to Mazurek and others. It is the interpretation of the CBA that applies to all dually compensated coaches, not the specific remedy awarded to Former Head Coach Rudisill.

Where Mazurek, like Rudisill, was already paid 20% of gross camp revenues for two years in a row, the Arbitration Awards required WCU to continue to honor that practice, and WCU is contractually forbidden from changing that practice until it renegotiates Article 7.3.E. WCU in this case did not follow the mandate of those two Awards and Article 7.3.E. The 2005 policy does not override Article 7.3.E of the CBA because it does not prohibit a camp compensation calculation based on 20% of gross adjusted camp revenue as received by Rudisill and Mazurek. (Complainant Exhibit 9 at 10). As occurred in the two Awards, Mazurek submitted his compensation request for two years based on 20% of camp revenues. That compensation request was

reviewed by management for two years in a row. Based on management's approval, Coach Mazurek received his requested compensation establishing the practice regarding the manner in and formula by which Mazurek would be compensated for the camp.

Moreover, the fact that Vice President Davenport told Coach Mazurek that WCU did not intend to continue with the Rudisill compensation formula and thereafter for two years in a row compensated Mazurek according to that very same formula further raised Mazurek's expectations that WCU indeed intended to continue to approve his requests for and pay him 20% of Summer Camp adjusted gross revenue as was done with Rudisill. In this context, the 2005-policy was not made an integral part of Coach Mazurek's camp compensation process, just as Arbitrator Nadelbach noted with respect to Former Coach Rudisill.

The collectively bargained for Article 7.3.E requires that compensation received by coaches for their camp or clinic work must not be changed. It does not permit WCU to individually bargain with camp and clinic directors to change their camp or clinic compensation or their compensation formulas. WCU changed the compensation that Coach Mazurek had been receiving for his camp duties and individually negotiated the reduction of his camp pay by offering him a contract threatening to demote him back to assistant coach if he did not accept the reduced compensation being offered for his camp duties.

Additionally, WCU does not have a contractual privilege under Article 10 of the CBA. This contractual provision allows for individual negotiations with coaches for their REGULAR salary as compensation for their position as coaches at WCU and not their compensation as camp or clinic operators. The Union does not dispute that individuals seeking coaching positions at WCU may negotiate their individual starting compensation for their regular coaching duties. Article 10, however, does not apply to compensation for coaches who, in a dual capacity, also run clinics or camps. As the Commonwealth Court noted, only Article 7.3.E applies to compensation for camps and clinics and dual compensation. Article 10.1.B provides as follows:

The salary to be paid each COACH, the sport or sports at the UNIVERSITY for which the COACH will be responsible, and his/her duties and responsibilities will be determined by individual negotiations between the UNIVERSITY President, or his/her designee, and the COACH at the time of appointment or as duties and responsibilities change.

(F.F. 37). The plain language of this provision simply does not authorize WCU to negotiate compensation with individuals for their camp or clinic work. Therefore, WCU did not have a sound arguable basis for negotiating directly and individually with Head Coach Mazurek to change the camp compensation that he had been receiving for two years as Summer Swimming Program Director. WCU, therefore, engaged in unlawful direct dealing with Coach Mazurek.

Also, WCU committed an independent violation of Section 1201(a)(1) of the Act. An independent violation of Section 1201(a)(1) occurs, "where in light of the totality of the circumstances, the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER 32165 at 404 (Final Order, 2001); Northwest Area Educ. Ass'n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). Under this

standard, the complainant does not have a burden to show improper motive or that any employees have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employee rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER 26155 (Final Order, 1995).

Under the totality of the circumstances a reasonable person in Coach Mazurek's position would have been intimidated, coerced and restrained regarding the exercise of his rights under the CBA. Coach Mazurek was reasonably and subjectively unable to assert his collectively bargained for entitlement to the same compensation formula under which he had been paid pursuant to Article 7.3.E when WCU made its offer for the permanent Head Coach position contingent upon his accepting a reduction in compensation for his Summer Swimming Program duties. Also, on balance, PASSHE has not offered any legitimate reasons that would outweigh a coach's interest in not having his/her camp or clinic compensation unilaterally reduced in exchange for holding or obtaining a coaching position.

Additionally, PASSHE's argument, that the Nadelbach and Gandel Awards were grounded in Former Coach Rudisill's accomplishments because he developed the Summer Swimming Program into a very lucrative enterprise for WCU, is an erroneous mischaracterization of the two Awards. Accordingly, PASSHE's position, that the Awards should not apply to Coach Mazurek because he merely became the custodian of Rudisill's enterprise after years of Rudisill's entrepreneurial development, is without merit. Although the Awards discuss Former Coach Rudisill's achievements, that was not the factual or legal premise for the Awards. Those decisions were based simply on the application of Article 7.3.E and the fact that Former Coach Rudisill's compensation for his camp work had been formulated by management's approving his requests for multiple years for 20% of adjusted camp gross revenues, establishing a compensation practice that WCU was without authority to unilaterally reduce under Article 7.3.E. Accordingly, both Awards are binding on WCU regarding the manner in which to apply Article 7.3.E and for determining compensation practices of coaches for their camp or clinic work.

However, WCU did not violate Section 1201(a)(3) when it made the offer for the position of permanent Head Coach contingent on Mazurek's acceptance of a reduction in his camp compensation. To establish a claim for discrimination, the Union had the burden of establishing that WCU knew that Coach Mazurek was engaged in protected activity and that it took adverse employment action against Mazurek because of or in retaliation for those activities. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998).

In this case, the record does not establish that Coach Mazurek was engaged in any protected activities before WCU decided to offer him an individual Head Coach contract contingent upon Coach Mazurek accepting a reduction in his camp compensation. As a matter of law, there is no evidence from which to infer that the decision to reduce Mazurek's camp compensation was motivated by any protected activities or that management had any knowledge of such activities. Indeed, an inference can be made from the record that WCU was motivated by a desire to divert more money from the Summer Swim Camp Program towards swimming and diving scholarships for matriculating students at WCU, consistent with the 2005 policy, and by a desire to reduce inequities among camp directors' compensation. Accordingly, the Union did not establish a prima facie case of discrimination or a violation under Section 1201(a)(3).

CONCLUSIONS

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

1. PASSHE is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. PASSHE has committed unfair practices independently and derivatively in violation of Section 1201(a)(1), (5) and (8) of PERA.
5. PASSHE has not committed unfair practices in violation of Section 1201(a)(3) of PERA.

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 PASSHE shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act;
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of

employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative;

3. Cease and desist from refusing to comply with binding grievance arbitration awards;

4. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately reinstate the compensation formula of 20% of adjusted gross revenue from the Summer Swim Camps used to compensate Coach Mazurek while he was interim Head Swimming Coach during 2018 and 2019 and continue to maintain that compensation practice indefinitely while Coach Mazurek continues to run the camps;

(b) Immediately make whole Head Coach Mazurek for any financial losses sustained by reducing his camp compensation, plus 6% per annum interest on his losses, by refusing to comply with the Nadelbach and Gandel Awards and by directly dealing with and coercing Coach Mazurek;

(c) Immediately rescind any provision contained in an individual contract with Head Coach Mazurek requiring the payment of camp compensation different from the 20% of adjusted gross camp revenue;

(d) 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 employees and have the same remain so posted for a period of ten (10) consecutive days; and

(e) 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixteenth day of October 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
 :
 : CASE NO. PERA-C-20-6-E
v. :
 :
 :
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION, WEST CHESTER UNIVERSITY :

AFFIDAVIT OF COMPLIANCE

The Pennsylvania State System of Higher Education, West Chester University hereby certifies that it has ceased and desisted from interfering with and coercing employes in the exercise of their protected contractual rights and activities; that it has ceased and desisted from unilaterally repudiating Article 7.3.E and unilaterally reducing contractually protected and bargained for camp compensation for Head Coach Mazurek; that it has ceased and desisted from direct dealing with Head Coach Mazurek regarding his camp compensation and changing bargainable terms and conditions of employment, in violation of Section 1201(a) (1) and (5) of the Public Employe Relations Act; that it has complied with the Nadelbach and Gandel Arbitration Awards' applications of Article 7.3.E to the practice of compensating Coach Mazurek the 20% of gross adjusted revenue for the camps as established during the years he was interim Head Coach directing the Summer Swimming Program; that it has made whole Head Coach Mazurek plus 6% per annum interest on his losses; that it has rescinded any individual contract provision compensating Coach Mazurek differently than the practice of 20% of adjusted gross camp revenue; that it has posted a copy of the decision and order as directed 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