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	:	

PROPOSED DECISION AND ORDER

On May 22, 2020, the American Federation of State, County, and Municipal Employees, District Council 89 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Lebanon County (County or Employer), alleging that the County violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally declaring bargaining unit employes exempt from the Families First Coronavirus Relief Act (FFCRA). By letter dated June 26, 2020, the Secretary of the Board declined to issue a complaint and dismissed the charge, noting the County's decision to exempt certain employes from the emergency paid sick leave and expanded family and medical leave under the FFCRA did not affect existing contractual leave and involved the provision of the level of services within management's prerogative. AFSCME filed timely exceptions to the Secretary's decision not to issue a complaint on July 16, 2020.

On September 15, 2020, the Board issued an Order Directing Remand to Secretary for Further Proceedings, concluding that resolution of this matter will be best served by a through examination of the factual and legal issues raised. On October 23, 2020, the Secretary issued a Complaint and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on April 2, 2021, if necessary.

The parties agreed to proceed by way of joint stipulations of fact in lieu of appearing before the Board for an evidentiary hearing. The Board received the duly executed joint stipulations of fact, as well as a number of exhibits, on August 13, 2021, after which a briefing schedule was issued. The parties each filed post-hearing briefs in support of their respective positions on September 27, 2021.

The Examiner, on the basis of all of the matters and documents of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (Joint Exhibit 12)[1]

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (Joint Exhibit 12)

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[1] The joint stipulations of fact have been marked as Joint Exhibit 12, as the parties have also submitted 11 other joint exhibits.

3. AFSCME is the exclusive bargaining agent for a unit of Corrections Officers at the County Prison. (Joint Exhibit 12)

4. On or about March 18, 2020, the Families First Coronavirus Relief Act (FFCRA) was signed into law. (Joint Exhibit 12)

5. The FFCRA provided two kinds of paid leave benefits for eligible employes of certain "employers" as the term is defined within each Act, known as the Emergency Paid Sick Leave Act (EPSLA) and the Expanded Family Medical Leave Act (EFMLA). (Joint Exhibit 12)

6. The County is an "employer" under both the EPSLA and the EFMLA. (Joint Exhibit 12)

7. 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. (Joint Exhibit 12)

8. A "qualifying reason" for paid leave under the EPSLA exists in the following circumstances: (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. (Joint Exhibit 12)

9. EFMLA provisions amended the Federal Family and Medical Leave Act (FMLA) to require employers to provide certain additional amounts of paid time off to employes who were unable to work due to a bona fide need for leave to care for a child whose school or child care provider was closed or unavailable for reasons related to COVID-19. (Joint Exhibit 12)

10. Under the EPSLA and EFMLA, a covered employer may exclude "health care providers" or "emergency responders" from the paid leave benefit. (Joint Exhibit 12)

11. An "emergency responder" under the regulations is defined as anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or otherwise needed for the response to COVID-19. This includes, but is 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. (Joint Exhibit 12)

12. The benefits under the EPSLA and EFMLA were effective from April 1 through December 31, 2020. (Joint Exhibit 12)

13. The County excluded all employes who fell under the definition of "emergency responders." This included all employes of the Lebanon County Correctional Facility, all employes of the Department of Emergency Services, all employes of Renova Center, all employes of the Sheriff's Department, all employes of the Probation Department, all employes of the Children and Youth Services Department, and all County Detectives. (Joint Exhibit 12)

14. When AFSCME sought to bargain over the exclusion of Corrections Officers from the paid leave benefits under the EPSLA and the EFMLA, the County engaged in two telephone conference negotiation sessions on April 14 and April 22, 2020 with AFSCME. Present on behalf of AFSCME were District Council 89 Staff Representative Andrew Kozlosky and District Council 89 Director Steve Mullen. Present on behalf of the County were Michelle Edris, Director of Human Resources, and Warden Robert Karnes, along with the County's Labor and Employment Solicitor, Peggy Morcom. (Joint Exhibit 12)

15. Following each meeting, the Director of Human Resources discussed AFSCME's concerns and demand for benefits with the County Commissioners. The County Commissioners chose to maintain their original position that "emergency responders," which included Correctional Officers, would remain ineligible for EPSLA and EFMLA benefits. The County forwarded emails to Kozlosky indicating the same. (Joint Exhibit 8, 10, 12)

16. On March 19, 2020, the County issued a memo to all employes regarding the FFCRA. (Joint Exhibit 1, 12)

17. On April 16, 2020, the County issued a notice to all County employes concerning the EPSLA, with an effective date of April 1, 2020. (Joint Exhibit 2, 12)

18. On July 20, 2020, the County issued COVID-19 Pandemic Travel Restrictions Guidelines/Procedure. (Joint Exhibit 3, 12)

19. On October 5, 2020, the County issued Modified COVID-19 Pandemic Travel Restrictions Guidelines/Procedures to all employes. (Joint Exhibit 4, 12)

20. On December 7, 2020, the County issued COVID-19 Pandemic Updated Quarantine/Isolation/Exposure Guidelines. (Joint Exhibit 5, 12)

21. On January 1, 2021, the County issued a memorandum to all employes concerning the expiration of FFCRA paid leave. (Joint Exhibit 6, 12)

22. On March 8, 2021, the County issued Modified COVID-19 Pandemic Travel Restrictions Guidelines/Procedures. (Joint Exhibit 7, 12)

23. From April 1 through December 31, 2020, AFSCME bargaining unit employes maintained their benefits and rights as set forth under the Family Medical Leave Act, the Americans with Disabilities Act, and the collective bargaining agreement (CBA) between AFSCME and the County. (Joint Exhibit 12)

24. From April 1 through December 31, 2020, 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, i.e. vacation, sick leave, family sick leave, family medical leave, leave of absence, or they could choose to take unpaid leave, and file for unemployment compensation benefits under the Pennsylvania Unemployment Compensation Law. (Joint Exhibit 12)

25. During the April 14, 2020 telephone conference between AFSCME and the County, AFSCME demanded hazard pay of an additional $6.00 per hour across the board for working Corrections Officers and an additional $40.00 bonus for every eight hours of overtime worked, in addition to the demand for benefits under the FFCRA. (Joint Exhibit 12)

26. On April 16, 2020, AFSCME was informed via email that the Union's demands were relayed to the County Commissioners and that the Commissioners had rejected the same. (Joint Exhibit 8, 12)

27. AFSCME requested a second bargaining session, which ensued on April 22, 2020. During that session, the County provided specifics for its rejection of the Union's demands. AFSCME reiterated its demands. (Joint Exhibit 12)

28. During the April 22, 2020 session, the County provided AFSCME with the following specific reasons for denying the request for hazard pay: (a) all Correctional Officers are advised at the time of interview and again at the time of hire that they are considered essential employes of the County, and have the potential of being involved in or exposed to physical violence and communicable diseases, including but not limited to HIV, MERSA, Tuberculosis, Hepatitis, and other blood borne pathogens, etc.; (b) past practice – Correctional Officers worked during the H1N1 outbreak, Hurricane Agnes flooding of 1972, flooding of 2011, as well as other riots and emergency situations, without hazard pay; and (c) in 2018, the County unilaterally revamped the salary chart in an effort to retain Correctional Officers which resulted in substantial pay increases for all Correctional Officers. (Joint Exhibit 12)

29. By email dated April 22, 2020, AFSCME representative Andrew Kozlosky indicated, in relevant part, the following to the County's Director of Human Resources, Michelle Edris:

> As a follow up to our conference call.
>
> The County is choosing to exempt the Prison Guards from the FFCRA, which would allow employees to financial compensation through this Federal Law
>
> The County is refusing to discuss any hazard pay due to the increase in wages put into effect in 2019 due to recruitment and retention issues
>
> The County is making an employee use their [sic] own leave if infected with COVID-19 or being made to quarantine...

(Joint Exhibit 9, 12)

30. By email dated April 29, 2020, the County provided the following response, which addresses the corresponding three paragraphs of AFSCME's April 22, 2020 email, in relevant part, to Kozlosky:

Section 826.30(c) healthcare providers and emergency responders may be excluded by the [FFCRA]. 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 facility." Accordingly, the County is excluding all employees who work at LCCF, not just union members. \

This statement is wholly inaccurate and a blatant disregard of the meetings that we conducted at this juncture. More specifically, bargaining meetings were held via telephone conference on 4/14 and 4/22/20. On 4/14/20, Management learned of the union's demands, where we indicated that it would be discussed with the County Commissioners. During the 4/22/20 meeting, the union was provided a detailed response as to the County's position.

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 employee may use sick, vacation, and personal days in lieu of unpaid time.

(Joint Exhibit 10, 12)

31. Some Correctional Officers missed time from work as a result of the following: child positive COVID-19; tested for COVID-19; sent home from work exhibiting COVID-19 symptoms; father tested for COVID-19; girlfriend tested for COVID-19; and husband and son tested for COVID-19. (Joint Exhibit 11, 12)

32. Some employes were out of work on multiple separate occasions, which were reported by the employes as COVID-19 related. (Joint Exhibit 11, 12)

DISCUSSION

AFSCME's charge alleges that the County violated Section 1201(a)(1) and (5) of PERA[2] by unilaterally declaring bargaining unit employes exempt from the FFCRA. Specifically, AFSCME contends that, while the FFCRA was new in 2020, the Board has long held that a public employer is required to bargain over its exercise of discretion related to a statutory leave benefit. The County, on the other hand, maintains that the charge should be dismissed because the County simply exercised its managerial rights related to providing services to the public during a global pandemic in alignment with

[2] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

the discretionary authority evident in the statute and corresponding regulations. The County also argues that the charge should be dismissed because there has been no unilateral change to employe terms and conditions of employment.

In PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975), the Pennsylvania Supreme Court opined as follows:

> [W]hen 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. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours, and terms and conditions of employment, the public employer shall be required to meet and discuss such subject upon request by the public employes' representative pursuant to Section 702.

Id. at 268. The complainant in an unfair practices proceeding has the burden of proving the charges alleged. St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977). The Board will find an employer in violation of its bargaining obligation enforceable under Section 1201(a)(1) and (5) of the Act if the employer unilaterally changes a mandatory subject of bargaining. PLRB v. Mars Area School District, 389 A.2d 1073 (Pa. 1978). If, however, the employer changes a matter of inherent managerial policy under Section 702 of the Act, then no refusal to bargain may be found. State College, supra.[3]

It is well settled that the Board properly relies on precedent to determine whether a matter constitutes a mandatory subject of bargaining rather than reinventing the wheel by applying the State College balancing test to arrive at the same result as the established precedent. PSCOA v. Commonwealth of Pennsylvania Dept. of Corrections, Waynesburg SCI, 33 PPER ¶ 33178 (Final Order, 2002); Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Dept. of Corrections, Fayette SCI, 35 PPER 58 (Proposed Decision and Order, 2004) citing Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001). Although the decision regarding the negotiability of a particular subject is in part fact driven, once the Board has conducted this analysis the result is precedential for future cases on the same or similar facts. Fayette SCI, *supra.* Of course, where a party introduces new or different facts that may alter the weight the matter at issue bears on the interests of the parties, additional analysis may be warranted. The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such a departure. *Id.* (citing Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002). Although Wilkes Barre is a case arising

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[3] Section 702 of the Act provides that "[p]ublic employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel...43 P.S. § 1101.702.

under Act 111, the same principle applies under PERA where a similar balancing or weighing of interest occurs under the State College test for determining whether a bargaining duty applies. PSCOA v. Commonwealth of Pennsylvania Dept. of Corrections, Waynesburg SCI, 33 PPER ¶ 33178 (Final Order, 2002); Fayette, SCI.

In this case, AFSCME cites scores of Board cases for the proposition that paid leave benefits are a mandatory subject of bargaining. Likewise, AFSCME points to the discretionary provision in the FFCRA permitting, but not requiring, an employer of an emergency responder to elect to exclude such employe from the paid leave provisions of the FFCRA. In this regard, AFSCME relies on the Board's decision in Officers of Towamencin Township Police Dept. v. Towamencin Township, 52 PPER 75 (Final Order, 2020) for the rule that discretionary provisions of the FMLA must be bargained. However, AFSCME's reliance on this line of Board cases is misplaced here.

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 FFCRA 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 FFCRA 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.

In any event, the charge must also fail because the record shows that there has not been any change to employe terms and conditions of employment. To that end, the parties stipulated that from April 1 through December 31, 2020, AFSCME bargaining unit employes maintained their benefits and rights as set forth under the CBA between AFSCME and the County, as well as the Family Medical Leave Act and the Americans with Disabilities Act. Similarly, the parties also stipulated that from April 1 to December 31, 2020, corrections officers who were out of work for reasons related to COVID-19 were permitted to use their contractual leave. As such, AFSCME has not sustained its burden of establishing any change to the status quo. For this reason, the charge must also be dismissed.

Despite this record evidence, AFSCME nevertheless contends that the County still failed to satisfy its bargaining obligation by pointing to the two negotiation sessions between the parties on April 14 and April 22, 2020. However, the National Labor Relations Board General Counsel issued an Advice Memo regarding the COVID-19 pandemic in Memphis Ready Mix (Case 15-CA-259794) on July 31, 2020, indicating that a party to a collective bargaining

agreement is under no obligation to bargain over issues covered by the contract for the life of the agreement, citing to Connecticut Power Co., 271 NLRB 766 (1984). Indeed, this Board has relied on similar reasoning in adopting the contractual privilege defense to a charge of unfair practices. When the parties' contract contains provisions concerning the subjects in dispute, the employer may establish that it discharged its bargaining obligations by showing that it had a sound arguable basis for its interpretation of those provisions. Hatfield Township, 18 PPER 18226 (Final Order 1987). As set forth above, the record shows that AFSCME bargaining unit employes maintained their benefits and rights as set forth under the CBA and that corrections officers who were out of work for reasons related to COVID-19 were permitted to use their contractual leave. The only logical inference that may be drawn from the factual stipulations is that the CBA between AFSCME and the County does, in fact, cover employe leave. Therefore, the County did not have any duty to bargain with AFSCME regarding leave entitlement for the life of the contract, and the charge must be dismissed.

Finally, AFSCME alleged in its charge that the County also violated the Act by refusing to bargain the impact of its decision to exempt the corrections officers from the FFCRA. However, AFSCME did not raise this issue in its post-hearing brief, and as a result, this issue is waived. Accordingly, the charge will be dismissed in its entirety.

CONCLUSIONS

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has not committed unfair practices in violation of Section 1201(a)(1) or (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded, and the charge is dismissed.

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 23rd day of November, 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner