COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TRANSPORT WORKERS UNION OF AMERICA LOCAL 234, AFL-CIO	: :	
v.	:	CASE NO. PERA-C-20-188-E
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	: :	

PROPOSED DECISION AND ORDER

On August 5, 2020, the Transport Workers Union of America, Local 234, AFL-CIO (Union, Local 234 or TWU) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Southeastern Pennsylvania Transportation Authority (Authority or SEPTA) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that the Authority unilaterally implemented an intermittent childcare leave process containing an unreasonable procedure and notice requirement for employes having to take unforeseeable intermittent leave for childcare.

On October 27, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of April 21, 2021, in Harrisburg. On March 17, 2021, the Union filed an amended charge with the Board, at the same case number, further alleging that the Authority, on December 31, 2020, unilaterally made changes to the policy including rescinding the intermittent childcare leave, after it became an established term and condition of employment. On March 23, 2021, the Secretary of the Board issued an amended Complaint and Notice of Hearing consolidating the amended charge with the original charge for hearing purposes and designating a hearing date of April 21, 2021. On Monday, April 19, 2021, I cancelled the hearing due to an unforeseen family matter involving SEPTA's Counsel and based on the mutual representation of the parties that they would submit factual stipulations in lieu of a hearing.

On June 14, 2021, the parties filed a Joint Stipulation of Facts and Joint Exhibits. On July 8, 2021, the Union filed a brief in support of its charge, as amended. On August 24, 2021, the Authority filed a brief in opposition to the charge, as amended. On September 27, 2021, the Union filed a reply to SEPTA's brief.

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

FINDINGS OF FACT

1. The Authority is a public employer within the meaning of Section 301(1) of PERA. (Joint Stipulation of Facts ¶ 1)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA, and it is the exclusive bargaining representative for four units of transportation employes working for SEPTA. (Joint Stipulation of Facts, ¶s 2 & 3)

3. The Union and the Authority are parties to four collective bargaining agreements (CBAs), effective from November 7, 2016, through October 31, 2021. (Stipulation of Facts, ¶ 4; Joint Exhibit 1)

4. The CBAs establish an attendance point system (Point System), pursuant to which employes are assessed attendance points for various attendance related infractions. (Joint Stipulation of Facts, ¶ 5; Joint Exhibit 1, Appendix I, pg. 168)

5. The CBAs also establish a process by which employes can apply for leaves of absences. (Joint Stipulation of Facts, ¶ 6, Joint Exhibit 1, § 901 at pg. 138)

6. At the start of the COVID pandemic, SEPTA and the Union began meeting regularly by phone to discuss issues pertaining to the COVID pandemic, including the use of personal protective equipment, cleaning and sanitation practices, and attendance and leave issues, including the Families First Coronavirus Response Act (FFCRA). (Joint Stipulation of Facts, ¶ 7)

7. On March 13, 2020, the Union published its "On The Move" newsletter to its members. (Joint Stipulation of Facts, ¶ 8; Joint Exhibit 2)

8. In the newsletter, the Union reported to its members that, on March 5, 2020, the Authority agreed to provide cleaning materials, institute a sanitizing program of vehicles and facilities and order a large amount of protective equipment. (Joint Exhibit 2)

9. The letter also provided as follows:

> If you can't report to work due to the closure of schools, or the effect of a county-wide or state-wide quarantine, you can use paid or unpaid leave, including vacations, paid personals and earned days off, etc. Of course, if you can't work because you are sick you are entitled to paid sick leave under the contract. And don't forget the no-layoff clause.
>
> The actions taken by SEPTA are a start, but they are not enough. SEPTA must also protect the income of our members *who are not sick, but can't report* to work as a result of the coronavirus.
>
> As far as the Union is concerned, TWU members who have used their paid and unpaid leave, but are unable to work as a result of a quarantine, including one that is the result of exposure to a co-worker with the virus, should receive "paid coronavirus leave," based on the contractual "40 hour guarantee." As we write, the U.S. House of Representatives is voting to provide "income protections" to those forced out of work as a result of the coronavirus. We will challenge SEPTA to do the same.

(Joint Exhibit 2)(emphasis original)

10. On or about March 13, 2020, the Philadelphia Public Schools closed due to the COVID pandemic. (Joint Stipulation of Facts ¶ 9)

11. At about the same time, many other schools and childcare facilities servicing the children of bargaining unit members also closed. (Joint Stipulation of Facts, ¶ 10)

12. In response to the COVID crises, on or about March 16, 2020, SEPTA began holding the Point System in abeyance and notified the bargaining unit employes of this change at about the same time. When SEPTA made this notification, it did not identify a date on which it would resume the Point System. (Joint Stipulation Facts, ¶ 11)

13. On or about March 18, 2020, the President [of the United States] signed into law the FFCRA passed by Congress. The law went into effect on April 1, 2020. (Joint Stipulation of Facts, ¶ 12)

14. As a covered employer, SEPTA was required to provide employes with the FFCRA mandated Emergency Paid Sick Leave (EPSL) and Emergency Family Medical Leave (EFML) for certain COVID-related qualifying reasons. (Joint Stipulation of Facts, ¶ 13)

15. One of the qualifying reasons for FFCRA leave was if the employe was caring for their child whose school or place of care was closed or unavailable due to COVID precautions. (Joint Stipulation of Facts, ¶ 14)

16. SEPTA notified employees that, effective March 29, 2020, it would resume the Point System for certain attendance deviations. Specifically, SEPTA continued to excuse "sick call offs" and "call offs by an employe to care for their child that resulted from a COVID related school closing" from the Point System. However, all other attendance deviations were subject to points under the Point System established in the CBAs, as was applicable pre-pandemic. (Joint Stipulation of Facts, ¶ 15; Joint Exhibit 3)

17. SEPTA's notification provided as follows:

NOTICE

EFFECTIVE MARCH 29, 2020 AT 12:00 A.M. ALL SICK CALL OFFS WILL BE EXCUSED FROM THE ASSESSMENT OF POINTS UNDER THE ATTENDANCE POINT SYSTEM (APS). ADDITIONALLY, CALL OFFS BY AN EMPLOYEE TO CARE FOR THEIR CHILD THAT RESULTED FROM A COVID-19 RELATED SCHOOL CLOSING WILL ALSO BE EXCUSED. ALL OTHER DEVIATIONS (i.e. Late, Miss, AWOL) WILL NOW BE SUBJECT TO POINTS UNDER THE APS.

(Joint Exhibit 3)(emphasis original)

18. On April 1, 2020, the United States Department of Labor (DOL) issued regulations providing further guidance on the implementation of the FFCRA. Under those regulations, employers were not required to provide intermittent leave under the FFCRA. (Joint Stipulation of Facts, ¶ 16; Joint Exhibit 4)

19. The FFCRA provides for both the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. SEPTA is a public employer covered by the mandates of the FFCRA. By its own terms, the rights, benefits and mandates under the FFRCA are only available between April 1, 2020, and December 31, 2020. (Joint Exhibit 4)

20. The EPSLA requires covered employers, among other things, to provide eligible employes up to two weeks or 80 hours of paid sick leave at full pay when the employe is subject to quarantine or isolation related to COVID, has been advised by a health care provider to quarantine or has COVID

symptoms or to care for a child whose school or childcare facility has closed or the childcare provider is unavailable due to COVID. (Joint Exhibit 4)

21. Employers cannot require employes to use other employer provided leave before using sick leave under the EPSLA. Nothing in the EPSLA reduces the rights or benefits of employes provided under existing employer policies or collective bargaining agreements. Employers failing to comply with the sick leave mandates of the EPSLA are subject to enforcement proceedings under the FLSA. (Joint Exhibit 4)

22. The EFMLEA requires employers to provide expanded paid family and medical leave to employes unable to work to care for their child where the child's school or childcare facility is closed due to COVID or other childcare provider is unavailable due to COVID related reasons. (Joint Exhibit 4)

23. The EFMLEA requires that employers provide 12 weeks of leave for COVID related childcare. Although the first 2 weeks under the EMFLEA are unpaid, an employe may substitute EPSLA paid leave for that period of time. The following 10 weeks must be paid under the EFMLEA. If medical and family leave are foreseeable, an employe must provide notice to the employer as soon as practicable. (Joint Exhibit 4)

24. Intermittent leave may be taken under the FFRCA, but the statute does not require employers to make intermittent leave available and provides that intermittent leave can only be taken by way of agreement between the employe and the employer. (Joint Exhibit 4)

25. On April 28, 2020, the Union published another "On the Move" newsletter for its members. (Joint Stipulation of Facts, ¶ 17; Joint Exhibit 5)

26. The Union's April 28, 2020 newsletter provides, in relevant part, as follows:

> SEPTA has suspended the attendance point system to make it easier for sick employees to stay home without incurring disciplinary action. . . . .
>
> The usual documentation and waiting time to receive sick benefits has been waived.
>
> SEPTA is providing full pay to employees who have tested positive for COVID-19 and to those sent home as a result of having contact with a co-worker who tested positive, over and above the requirements of the recently enacted COVID-19 legislation.
>
> SEPTA is quarantining employees beyond the guidance issued by the CDC.
>
> Employees at greater risk to the virus are allowed to take sick leave, even though they are not actually sick.
>
> . . . .

> Due to the reduction in ridership, weekday schedules have been dramatically reduced, allowing operators to work four days on and three days off, at the 40 hour guarantee.
>
> . . . .

(Joint Exhibit 5)

27. At a meeting held on or about April 28, 2020, SEPTA and the Union discussed resuming the entire Point System. There was no agreement as to when the Point System would be resumed in its entirety. (Joint Stipulation of Facts, ¶ 18)

28. On May 15, 2020, SEPTA informed the Union and the bargaining unit members that, effective May 18, 2020, SEPTA would resume issuing attendance points for certain attendance deviations as outlined in the CBAs. Specifically, SEPTA would resume issuing attendance points for certain "Emergency At Home" and "Sick At Home" call offs. (Joint Stipulations of Fact, ¶ 19; Joint Exhibit 6)

29. On or about June 4, 2020, SEPTA and the Union discussed the implementation of several COVID related safety protocols. Specifically, SEPTA notified the Union that, effective June 8, 2020, it would begin conducting employe temperature screenings and waive the three-day waiting period for receiving sick benefits. SEPTA also notified the Union that it would resume assessing attendance points for all remaining attendance related circumstances outlined in the CBAs, except that SEPTA would not assess attendance points to any employe who was: (1) sent home pursuant to a temperature screening; (2) using FFCRA leave; or (3) using the "SEPTA 80." The "SEPTA 80" referred to an additional 80 hours of paid leave that SEPTA voluntarily provided to all employes who had exhausted their EPSL under the FFCRA. (Joint Stipulation of Facts, ¶ 20)

30. On or about June 8, 2020, SEPTA resumed the Point System outlined in the CBAs in its entirety, except that SEPTA did not assess attendance points to any employe who was: (1) sent home pursuant to a temperature screening; (2) using FFCRA leave; or (3) using the "SEPTA 80." SEPTA resumed the Point System without the agreement of the Union. (Joint Stipulation of Facts, ¶ 21)

31. At some point after the FFCRA became effective, SEPTA developed a process by which employes could request intermittent EFML for childcare related issues. This process was developed and implemented without the agreement of the Union. (Joint Stipulation of Facts, ¶ 22; Joint Exhibit 7)

32. SEPTA's intermittent childcare leave process provides, in relevant part, as follows:

> Intermittent Child Care Leave under the FFRCA is not mandatory. However, SEPTA has decided to allow this leave with certain restrictions. This leave MUST be approved by a manager at least 2 weeks prior to the request. The request must be specific as to the days of the week requested; for example-every Tuesday and Thursday, etc. No leave will be processed until this form [included] is signed by both employee and manager. This is done so that the manager can control workforce management. If, for any reason, the leave request is not conducive to business needs, it can be denied.

> Step 1. Employee requests leave from Manager. Discussions regarding day/s of the week requested.
>
> Step 2. Manager has form and has employee complete the form. Both employee and manager sign the form.
>
> Step 3. Manager emails form to [email address]. The form will be reviewed and forwarded to WorkPartners for approval.
>
> Step 4. Manager will get confirmation email from WorkPartners regarding the approval or denial. The denial will only be if the employee does not have available FMLA time to use.
>
> Step 5. Employee is paid for the approved days in accordance with the payroll process for Child Care Leave (2/3 pay).
>
> **ALL CHILD CARE LEAVE REQUESTS MUST BE IN FULL DAY INCREMENTS. NORMAL CALL OUT PROCEDURES APPLY.**
>
> All Child Care Leave approvals will be for 30 days. After that time, the employee will need to reapply and be prepared to submit new documentation to support the leave.
>
> **PLEASE UNDERSTAND THAT MANAGERS ARE RESPONSIBLE FOR ALL SUBMISSIONS OF INTERMITTENT CHILDCARE LEAVE FORMS. NO LEAVES WILL BE PROCESSED WITHOUT THE SIGNED FORM SENT BY A MANAGER.**

(Joint Exhibit 7)(emphasis original)

33. At no point during the COVID pandemic did the Union go on strike. (Joint Stipulation of Facts, ¶ 23)

34. On or about August [5], 2020, the Union filed the first unfair practice charge. (Joint Stipulation of Facts, ¶ 24)

35. On November 13, 2020, SEPTA sent a letter to the Union regarding the availability of leaves of absences under the CBA. (Joint Stipulation of Facts, ¶ 25; Joint Exhibit 8)

36. The November 13, 2020 letter from Chad Cuneo, Chief Labor Relations Officer for SEPTA, provides, in relevant part, as follows:

> This letter is pursuant to our recent discussion concerning employees who have depleted the 12 weeks of expanded family and medical leave under the FFCRA but still have childcare issues due to their child's school only offering at-home remote learning.
>
> . . . .
>
> We discussed [an employe], who was afforded a 30 day unpaid leave of absence after depleting the 12 weeks-of expanded family medical leave under the FFCRA due to childcare issues, and has requested an additional leave of absence.
>
> Due to the unique circumstances involved in the COVID 19 Pandemic, she will be granted an additional 30 day unpaid leave of absence by

> Chief Officer Mike Liberi. . . . We agree that she will not be considered for any additional leaves of absence for a 12 month period beginning December 15, 2020.

(Joint Exhibit 8)

37. On November 30, 2020, SEPTA sent a letter to the Union responding to the Union's November 12, 2020 letter. (Joint Stipulation of Facts, ¶ 26; Joint Exhibit 9)

38. Mr. Cuneo's November 30, 2020 letter provides, in relevant part, as follows:

> You wrote in objection to the Authority's requirement for two weeks' notice for the use of intermittent childcare leave under the Families First Coronavirus Response Act (FFCRA) and the Authority's "…position that bargaining unit members can get paid time off to quarantine only on one occasion."
>
> First, as of August 28, 2020 the requirement for advanced notice for the use of intermittent childcare leave under the FFCRA was discontinued.
>
> Your second contention, that the Authority has taken the position that employees are granted paid time off to quarantine on only one occasion, is inaccurate.
>
> Employes who must quarantine due to a COVID-19 issue are initially afforded 80 hours of emergency paid sick leave under the FFCRA. In the event an employee has exhausted the 80 hours of FFCRA paid leave and subsequently must quarantine due to a positive for COVID-19 test or close contact with a COVID-19 infected coworker in the workplace, SEPTA affords the employee an additional 80 hours of paid leave. If an employee has any subsequent or other COVID-19 related absence or quarantine, employees may use sick leave and may apply for and receive their contractual paid sick benefits.

(Joint Exhibit 9)

39. Consistent with the FFCRA, SEPTA provided EPSL and EFML until December 31, 2020. SEPTA did not solicit, or receive, the agreement of the Union with respect to the statutory end of the FFCRA. (Joint Stipulation of Facts, ¶ 27)

40. On or about December 17, 2020, the Union sent a letter to SEPTA. SEPTA responded by letter, dated January 19, 2021. (Joint Stipulation of Facts, ¶ 28; Joint Exhibit 10)

41. In the Union's December 17, 2020 letter to SEPTA, Brian Pollitt, the Union's Executive Vice President stated, in relevant part, as follows:

> **COVID Related Child Care Leave.** While SEPTA has modified its draconian policy on child care leave, which previously required two weeks' notice, parents with child care needs are still not being accommodated under SEPTA's policy. SEPTA's rigid child care leave policy negative affects all of our members, but has had a

> disproportionately negative impact on women, who unfortunately still bear the lion's share of childcare responsibilities in our society. In addition to being deprived of financial support, parents forced to take child care leave are subject to SETPA's attendance point system leading to discipline, discharge, and/or resignation.

(Joint Exhibit 10)

42. Mr. Cuneo's January 19, 2021 response to the Union's December 17, 2020 letter, which addressed multiple points raised by the Union, provides, in relevant part, as follows:

> **COVID Related Childcare Leave**
>
> Under the [FFCRA], SEPTA employees could utilize up to 12 weeks of paid leave to care for their child in the event of the Child's school or place of care was closed, or the school was offering remote learning only. It should also be noted that SEPTA allowed this leave to be used intermittently for the benefit [of] our employees, which was not required by the FFCRA, but was a discretionary decision for employers.
>
> Additionally, in the event an employee had depleted the 12 weeks of paid childcare leave, SEPTA has allowed employees to utilize the contractual leave of absence to attend to childcare needs. With the expiration of the FFCRA on December 31, 2020, SEPTA continues to allow employees to utilize leaves of absences to attend to childcare needs subject to approval by their manager.

(Joint Exhibit 10)

43. On or about March [17], 2021, the Union filed an amendment to the original unfair practice charge alleging that this second change also violated PERA. (Joint Stipulation of Facts, § 29)

44. Neither SEPTA nor the Union is aware of any employe who was denied intermittent EFML childcare leave because the employe failed to provide enough notice of the requested leave. (Joint Stipulation of Facts, § 30)

DISCUSSION

The Union argues in its brief that, on or about March 16, 2020, schools and childcare facilities in the Philadelphia region closed, requiring parents to stay home with their children. In response, the Authority suspended its Point System, which is outlined in the CBAs, to prevent the discipline and discharge of many employes, while maintaining public transportation operations. The Union further maintains that the favorable suspension of the entire Point System at that time is not the subject of the unfair practice charge, although it constituted an unlawful unilateral change in employment conditions and a repudiation of the CBAs. (Union Brief at 1). However, argues the Union, employes came to reasonably rely on having the Points System held in abeyance. (Union Brief at 1). The Union contends that, on June 8, 2020, after almost 3 months of not assessing attendance points for call offs by employes for childcare reasons, SEPTA "abruptly" began assessing attendance points for those absences. (Union Brief at 1). And then around June 16, 2020,

to provide some relief for those parents who had been able to call off for childcare, the Authority announced that it was voluntarily adopting a policy that would allow employes to take intermittent childcare leave using both the FFCRA and additional leave provided by the Authority. (Union Brief at 1-2).

SEPTA's intermittent childcare leave policy in conjunction with the reinstated Point System, argues the Union, placed employes at risk of discipline to a greater degree than existed under the childcare leave system in place between March 16, 2020, and June 8, 2020, i.e., the point system in partial abeyance. (Union Brief at 2). The pandemic attendance policy included individuals who had already used their allotted leave and who could thereunder take unlimited unpaid leave for childcare, while the new childcare policy did not include those individuals. (Union Brief at 2). The childcare policy also instituted a more onerous application process by requiring two weeks' notice such that employes experiencing intermittent childcare emergencies could not take advantage of it and would be assessed points instead, while the pandemic attendance policy allowed for unpaid leave with little or no notice. The Union posits that the pandemic attendance policy and the intermittent childcare leave policy are mandatory subjects of bargaining under PERA. (Union Brief at 6-8). The Union further contends that by June 8, 2020, the pandemic attendance policy had become an established term and condition of employment because a reasonable employe would have expected that policy to continue as long as schools remained closed due to COVID. (Union Brief at 8-11).

SEPTA argues that the Union's charges and claims related to the Authority's temporary suspension and then resumption of the Point System are outside the scope of the original charge filed on August 5, 2020, and the amended charge filed on March 17, 2021. SEPTA further contends that claims relating to the Point System were untimely raised for the first time in the Union's brief. (Authority Brief at 7-8).

In its reply brief, the Union argues that, with respect to the allegation that SEPTA unlawfully changed the Point System, the Board's regulations do not require the Union to include in its specification of charges a reference to the state of affairs to which the Union is seeking to return, which is the Point System in effect between March 16, 2020, and June 8, 2020. The Union asserts that the allegation in the charge is that SEPTA changed from one childcare leave policy and process to a less favorable one. The Union's reply brief states: "Petitioner alleged that one childcare leave policy, the Pandemic Attendance Policy, was unilaterally changed to a less favorable one, the Childcare Policy, and that said change was completed on or about June 16, 2020, with the unilateral implementation of the Intermittent Childcare Leave Process; that Respondent voluntarily adopted and applied to both FFCRA leave and its voluntarily instituted 'SEPTA 80 leave.'" (Union Reply Brief at 2). In the nutshell, the Union is arguing that the implementation of the intermittent childcare leave policy on June 16, 2020, effectuated changes to the pandemic Point System policy already in effect at the time and the two policies are inextricably linked.

However, neither the original charge filed on August 5, 2020, nor the amended charge filed on March 17, 2021, mentioned any changes to the Point System, either directly or as a consequence of the implementation of the intermittent childcare leave policy. In its charge, the Union alleges that "on or about June 16, 2020, SEPTA repudiated its obligation to bargain with the Union over a unilaterally developed and imposed intermittent childcare leave process, providing for an unduly burdensome procedure to obtain

intermittent childcare leave and an unreasonable notice requirement for employees having to take intermittent childcare leave." The Union attached to its charge SETPA's intermittent childcare leave policy which delineates the requirements for employes to obtain approval for intermittent childcare leave. The Union did not attach or reference the Point System and there is no telling from the charge that the intermittent childcare policy may have had any alleged effect on the pandemic Point System already in place. The specification of charges is explicitly limited to the new "burdensome" procedures for obtaining approval for intermittent childcare leave.

In its brief, the Union clearly complained about the point system being changed on June 16, 2020, when SEPTA began "abruptly" assessing attendance points for childcare absences. However, whatever changes to the pandemic Point System that resulted from the implementation of the intermittent childcare leave process were not raised or preserved in the charge. Accordingly, neither SEPTA nor the Board was placed on notice by the Union that changes to the pandemic Point System were part of the Union's claims for relief. Therefore, any claims related to the alleged changes to the Point System between March 16, 2020, and June 16, 2020, were waived and were untimely raised in the Union's brief which was filed on July 8, 2021.

In its reply brief, the Union argues that the point system was in fact discussed during a pre-hearing video conference with me and the attorney for SETPA, thereby placing both SEPTA and the Board on notice of its claims related to changes in the point system. The Union also contends that its subpoena requests for documents clearly placed SEPTA and the Board on notice of the Union's intent to include claims regarding the point system changes. However, the pre-hearing conference on April 6, 2021, and the subpoena requests about 2 weeks later are well beyond the four-month statute of limitations period to preserve a claim under PERA and are inadequate means of officially preserving those claims. As the Union recognizes, the Board's regulations require that the initial pleading be a well-articulated recitation of the alleged nature of each particular act, 34 Pa. Code § 95.31(b)(3), and the Board's charge form requires that those allegations be properly notarized. Accordingly, any claims relating to the point system changes are out of time and beyond the Board's subject matter jurisdiction, whether raised for the first time in the Union's July 2021 brief or the April 2021 video conference and subpoena requests. Therefore, I will not address any alleged changes to the Point System as a separate bargaining violation.

The Union also argues that the Authority's unilateral implementation of its intermittent childcare process and policy violated SEPTA's bargaining obligations under the Act because there was no bargaining to agreement over a mandatory subject of bargaining and there was no bargaining to impasse along with a work stoppage. (Union Brief at 12-13). The Union maintains that the childcare leave policy became an established term and condition of employment by December 31, 2020, and that a reasonable employe would have expected the policy to continue as long as the ESPL reasons for leave continued, that being the closure of childcare and school facilities, or unavailability of a childcare provider, because SEPTA did not announce durational limits to the policy. (Union Brief at 11). Because SEPTA announced that it was voluntarily giving employes intermittent leave and an additional 80 hours of paid leave not required by the FFCRA, employes did not expect that those benefits would have expired with the FFCRA, but rather would expect those benefits to continue as long as schools remained closed. (Union Brief at 11-12).

SEPTA argues that it was not required to bargain over its compliance with the FFCRA and the process by which employes could apply for intermittent EFML childcare leave. SEPTA additionally contends that compliance with the FFCRA, which contained a sunset provision expiring on December 31, 2020, was inherently temporary and never became an established term or condition of employment. (Authority Brief at 18-22). SEPTA also posits that the Union's requested remedies are inappropriate because there is no evidence that any employes were negatively impacted by the Authority's alleged unilateral changes, where the FFCRA is no longer in effect and where Philadelphia area schools and childcare facilities have returned to in-person learning and care, rendering the continuation of the emergency changes moot. (Authority Brief at 23-24).

The Board has held that policies affecting the discretionary aspects or procedures of the FMLA (i.e., not statutorily mandated) are mandatory subjects of bargaining. Officers of Towamencin Township Police Department v. Towamencin Township, 52 PPER 75 (Final Order, 2020). The Board has also held that an employer may be excused from what would otherwise constitute a bargaining violation where the activity complained of was a reasonable means to fulfill the public employer's statutory duty to provide public services during an exigent circumstance not of its own creation. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 37 PPER 4 (Final Order, 2006). In Nazareth Borough Police Association v. Nazareth Borough, 40 PPER 51 (Final Order, 2009), the Board held that an exigent circumstance may constitute a defense to a failure to bargain charge where compliance with the collective bargaining agreement, interest award or other bargaining obligations would cause the employer to be unable to timely perform an essential public function. Nazareth Borough, 40 PPER at 212. *See also*, FOP, Lodge 24 v. City of Jeannette, 36 PPER 68 (Final Order, 2005).

Effective April 1, 2020, the FFCRA mandated that SEPTA provide emergency paid sick leave and emergency family medical leave for COVID related qualifying reasons, which included caring for a child whose school or childcare facility was closed or their childcare provider was unavailable for COVID related reasons. The FFRCA, however, did not mandate intermittent childcare leave, which SEPTA recognized in its own intermittent childcare leave policy. In this regard, the intermittent childcare policy and the processes contained therein were bargainable. Towamencin Township, supra. The question remains whether SEPTA's implementation of the policy was an emergency measure to ensure the continuing function of its operations without losing employes by keeping them safe and not subjecting them to possible discharge under its then existing policies.

As of June 16, 2020, SEPTA had already made accommodations for any employe to take leave without points for childcare purposes and the FFCRA did not mandate the provision of an intermittent childcare policy. SEPTA issued a notice, effective March 29, 2020, stating that "all sick call offs will be excused from the assessment of points under the Point System. Additionally, call offs by an employee to care for their child that resulted from a COVID-19 related school closing will also be excused." On June 8, 2020, SEPTA partially resumed the Point System. Under this iteration, SEPTA did not assess points against any employe who was sent home due to a temperature screening, who was using FFCRA leave (including sick leave for childcare), or using the SEPTA 80, which is the two weeks of pay provided by SEPTA in addition to the two weeks mandated by the FFCRA, EPSL.

When SEPTA implemented the intermittent childcare process on or about June 16, 2020, there was no threat of accumulating points, discipline or suffering discharge for employes calling off for childcare. The intermittent childcare policy allows employes, who personally need less than a full-time absence from work to care for their child, to husband their allotted paid and unpaid leave without exhausting it over the next six months or more. Clearly, based on Mr. Cuneo's November 13, 2020 letter, there were employes who exhausted their 12 weeks family and medical leave for childcare purposes by the fall of 2020. In June 2020, the process for obtaining intermittent childcare leave, however, did not rise to the level of an emergency, requiring the **immediate** protection of employes and the continuation of SEPTA's operation to justify not bargaining with the Union, especially after SEPTA changed the point system and after the FFRCA injected more leave time into the bank for employes.

Although SEPTA argues that the Union never requested bargaining over the intermittent childcare leave process, the burden is on the employer to seek out the Union and bargain before changing a mandatory subject of bargaining. Snyder County Prison Board v. PLRB, (Pa. Cmwlth. 2006) (stating that when a public employer seeks to make changes to wages, hours or working conditions, it has "a duty to seek out its bargaining counterpart and engage in good faith negotiations without prompting or prodding from the Union."); *see also*, International Association of Firefighters, Local No. 713 v. City of Easton, 20 PPER ¶ 20098 (Final Order, 1989) (noting that shifting the burden to the union would permit a public employer to avoid its statutory obligation to bargain changes regarding mandatory subjects, thereby forcing the union to bargain out from under a fait accompli which the employer has already implemented).

The normal remedy for a bargaining violation of unilaterally adopting a policy or procedure that affects leave is to order the rescission of the policy and restore the status quo ante. However, the Union does not wish to revert to a condition where there is no intermittent leave policy. The Union contends that the intermittent childcare leave policy became a term and condition of employment that SEPTA again unilaterally changed, as of December 31, 2020, when it rescinded the intermittent childcare leave policy and the FFCRA expired. The Union maintains that the childcare leave policy became an established term and condition of employment by December 31, 2020, and that a reasonable employe would have expected the policy to continue as long as the ESPL reasons for leave continued, that being the closure of childcare and school facilities, or unavailability of a childcare provider, because SEPTA did not announce an end to the policy at its inception. (Union Brief at 11). Because SEPTA announced that it was voluntarily giving employes intermittent leave and an additional 80 hours of paid leave not required by the FFCRA, employes did not expect that those benefits would have expired with the FFCRA, but rather would expect those benefits to continue as long as schools remained closed. (Union Brief at 11-12).

The Union did not rebuke the availability of intermittent childcare; rather it wanted to bargain a less burdensome process for qualifying for and attaining intermittent childcare for employes. In its amended charge, the Union alleged, in relevant part, that: "Subsequently, Respondent made various changes to the policy without providing Complainant with notice and an opportunity to bargain, including unilaterally rescinding the intermittent childcare leave, on or about December 31, 2020, after it had become an established term and condition of employment."

However, the evidence on this record concerning the status of the intermittent childcare leave policy after the expiration of the FFCRA is in two places. First, there is Mr. Cuneo's January 19, 2020 letter. This letter states that, "With the expiration of the FFCRA on December 31, 2020, **SEPTA continues to allow employees to utilize leaves of absences to attend to childcare needs subject to approval by their manager**." (emphasis added). Also, Factual Stipulation No. 27 states: "Consistent with the FFCRA, SEPTA provided EPSL and EFML until December 31, 2020. SEPTA did not solicit, or receive, the agreement of Local 234 with respect to the statutory end of the FFCRA." Mr. Cuneo's January 19, 2021 letter and Stipulation of Fact No. 27 demonstrates that the ability to apply for and take intermittent childcare leave did not end when the FFCRA ended on December 31, 2020, and had not been rescinded when the Union filed its amended charge on March 17, 2021. However, although SEPTA continued to permit intermittent childcare leave, it does not continue to provide FFRCA mandated leave time for intermittent childcare leave, since the expiration of the FFRCA. Rather SEPTA permits the use of contractually provided leave for intermittent childcare leave.

Accordingly, the record lacks substantial evidence that SEPTA rescinded the policy permitting intermittent childcare, and that part of the amended charge is dismissed. The record does establish that after December 31, 2020, SEPTA no longer recognized the bank of allotted leave for the intermittent childcare leave policy that was funded or provided by FFCRA and the SEPTA 80 pay for intermittent childcare.

Although not properly bargained for with the Union, the voluntary intermittent childcare leave policy became a term and condition of employment that raised expectations of employes that they could continue to take intermittent childcare leave as long as schools were closed and childcare was unavailable, to prevent the exhaustion of their allotted time unnecessarily. The Union here likes the benefit of intermittent childcare leave but not the unilaterally imposed process. The intermittent childcare leave policy did not expire with the FFCRA, after raising employes' expectations while schools and childcare facilities remained closed. However, SEPTA did not terminate the intermittent leave policy and had modified the process to eliminate the two weeks' notice requirement for applying for the intermittent leave in favor of Union demands. The question is whether SEPTA had an obligation to continue funding the leave with ESPL and EFML time and money after the FFRCA expired.

To the extent that ESPL and EFML leave was given to employes who took intermittent childcare leave under the voluntary policy, that leave, a function of the FFRCA expired with the statute, and SEPTA is not required to provide more than contractually provided leave for post-December 31, 2020 intermittent childcare leave. ESPL and EFML were creatures of a statute, which from its effective date, was temporary. The statute was the umbilical cord supplying life to the benefits mandated by the statute. Those benefits therefore died with the statute and there is no reasonable expectation that the FFRCA mandated leave allotment or bank would survive the statute that supplied and required the extra leave time and pay. Since that leave was mandated by the FFCRA and was not voluntarily provided by SETPA, that leave did not become a term and condition of employment and expired with the statute. While employes reasonably expected that a voluntarily provided intermittent leave policy would become a term and condition of employment as long as school remained closed, the time and money funded by ESPL and EFMLEA was solely a creature of the temporary statute and employes had no such expectation. However, for the same reasons, the voluntarily provided SEPTA 80 paid leave must remain as a term and condition of employment that did not

terminate with the FFCRA. Employes taking or who have taken intermittent childcare leave post December 31, 2020, have and had an expectation to receive SEPTA 80 benefits for intermittent childcare leave.

SEPTA must retain the intermittent childcare leave policy until the schools reopen and childcare becomes available. SEPTA must also bargain with the Union, the process for applying and obtaining approval for intermittent childcare leave, although the allegedly burdensome notice requirement was ended in August 2020. Since the intermittent childcare leave policy does not, in itself, change entitlements to allotted leave under the CBA or the FFRCA, and because the parties agree that no employe was denied requested intermittent childcare leave, there is no remedy for the restoration of or granting of leave time or pay that the Union has established on this record, except for employes who may have been denied SEPTA 80 leave, while taking intermittent childcare leave.

SEPTA argues that schools and childcare facilities have reopened making the retention of the intermittent childcare policy moot. The record, however, does not establish that all schools and childcare facilities in the greater Philadelphia area are open or operating in the same way or the same level at which they operated before the pandemic. The record also does not establish that childcare providers are available to the extent they were available before the pandemic. It may take a long time for those levels to be reached. Therefore, SEPTA will have to maintain its intermittent childcare policy. In this regard, bargaining the process of applying for and obtaining intermittent leave, as complained of in the initial charge, is not moot.

Accordingly, the Authority has engaged in unfair practices in violation of Section 1201(a)(1) or (5) for not bargaining the process for intermittent childcare leave benefits under the original charge. The Union has sustained it burden of proving the amended charge limited to SEPTA 80 paid leave, but has not met its burden of proving the alleged recission of the intermittent childcare leave policy itself. SEPTA did not violate its bargaining obligations when it ceased funding intermittent childcare leave with time and money mandated by the FFRCA, after December 31, 2020.

CONCLUSIONS

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

1. The Authority 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 Authority has violated Section 1201(a)(1) and (5) 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 the Authority 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 employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative;

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

(a) Immediately bargain the process for applying and attaining approval for intermediate childcare leave and any future limitations on the program;

(b) Immediately reinstate SEPTA 80 time and pay for employes taking intermittent childcare leave after December 31, 2020;

(c) Immediately make whole employes by providing and paying for SETPA 80 time for those employes who took intermittent childcare leave after December 31, 2020, and did not receive SEPTA 80 time or pay;

(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 employes 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 sixth day of October 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

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JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TRANSPORT WORKERS UNION OF AMERICA LOCAL 234, AFL-CIO	:	
v.	:	CASE NOS. PERA-C-20-188-E
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

AFFIDAVIT OF COMPLIANCE

The Authority hereby certifies that it has ceased and desisted from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act; that it has ceased and desisted from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, under Section 1201(a)(1 and (5) of the Act; that it has bargained the process of applying and attaining approval for intermediate childcare leave and any future limitations on the program; that it has reinstated SEPTA 80 time and pay for employes taking intermittent childcare leave after December 31, 2020; that it has made whole employes by providing and paying for SETPA 80 time to those employes who took intermittent childcare leave after December 31, 2020, and did not receive SEPTA 80 time or pay; that it has posted a copy of this decision and order in the manner 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