

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED AUTO WORKERS :
INTERNATIONAL UNION :
 :
v. : CASE NOS. PERA-C-20-271-E
 : PERA-C-20-273-E
DELAWARE COUNTY AND DELAWARE COUNTY :
PUBLIC DEFENDER'S OFFICE :

PROPOSED DECISION AND ORDER

On November 13, 2020, the United Auto Workers International Union (Union) filed a charge of unfair practices, at Case No. PERA-C-20-271-E, with the Pennsylvania Labor Relations Board (Board) alleging that Delaware County and the Delaware County Office of Public Defender (Jointly "County") violated Section 1201(a)(1), (5) and (9) of the Public Employee Relations Act (Act or PERA). The Union specifically alleged that the County unilaterally implemented a new policy that bans outside employment for attorneys in the Office of the Public Defender (OPD), including maintaining a private practice and any other employment that may require licensure, where those attorneys have maintained private practices on the side for many years. The specification of charges also alleged that the County failed to provide requested information.

On November 18, 2020, the Union filed a charge of unfair practices, at Case No. PERA-C-20-273-E, with the Board alleging that the County violated Section 1201(a)(1) and (5) of PERA. The Union specifically alleged that the County unlawfully hired new attorneys in the OPD at a new hire rate of \$53,000 per year increased from \$37,000 per year, without Union agreement. The Union also alleged that the County failed to provide requested information.

On December 4, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of May 11, 2021, in Harrisburg, for Case No. PERA-C-20-271-E. On February 19, 2021, the Secretary of the Board issued a complaint and notice of hearing in Case No. PERA-C-20-273-E, also designating a hearing date of May 11, 2021, in Harrisburg, thereby consolidating the two charges for hearing. Due to the closure of Commonwealth property to the public as a result of the COVID pandemic, the parties agreed to conduct the hearing by video conference. During the video hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. Also during the hearing, the Union withdrew its claims in both charges pertaining to the County's alleged bargaining violations for failing to provide requested information. (N.T. 9-10; Union Brief at 2, fn. 3). On July 20, 2021, the County filed its post-hearing brief. The Union filed its post-hearing brief on July 21, 2021.

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

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T.8)

3. On May 14, 2020, the Union filed a petition for representation seeking to represent a bargaining unit of 44 staff attorneys employed by the County at the OPD. On July 10, 2020, the Board issued an order and notice of election. The Board certified the bargaining unit of staff attorneys in the OPD on August 28, 2020, as a court-related unit of employes directly involved with and necessary to the functioning of the courts. (Joint Exhibits 1-3)

4. Christopher Welsh is the Chief Director of the OPD of Delaware County (Director Welsh). He started in that position on or about July 6, 2020. He was hired by and reports directly to County Council, which is the executive branch of County government.¹ (N.T. 65-66, 92, 98-99, 103-104)

5. Kenneth West is a staff attorney in the Mental Health Unit in the OPD. He was hired by the OPD 11 years ago. Mr. West is on the bargaining committee for the Union. Negotiations are ongoing, and there is no first contract. (N.T. 15-17, 64, 90)

6. Lauren Farrell is employed full time by the Union, and she is the Union representative for the OPD bargaining unit. She is the lead organizer for the OPD attorneys. (N.T. 29, 61-63)

7. James Kane is the Chief Personnel Human Resources Officer (Director Kane) for the County. He is the lead negotiator for collective bargaining for the County. (N.T. 75-77, 167-168)

8. Nicholena Lacuzio-Rushton was hired at the OPD in June 2001, and she credibly testified that attorneys in OPD have always been permitted to have secondary employment and side legal practices, during her 20-year tenure at the OPD. Mr. West credibly testified that, for the past 11 years that he has been at the OPD, attorneys were permitted to have secondary employment and side legal practices. Mr. West started his own law practice in 1990, and he has had secondary employment since he started at the OPD. The practice of permitting secondary employment has not changed in the past 11 years. (N.T. 17, 88-89)

9. Mr. West's private law firm is: "Douglas, West and Associates." Mr. West's practice is mainly Chapter 7 & 13 Bankruptcy. He has approximately 100 active clients. His partner practices Domestic Relations law. (N.T. 17-18, 56-57)

10. All OPD staff attorneys are full-time, exempt employes. Management has been well aware of Mr. West's and other attorneys' private law practices. Mr. West and most other OPD attorneys hold a second job to supplement their income from the OPD and make ends meet. The starting salary at the OPD had been \$37,000 for some time. In 2019, the County hired two lawyers to work at OPD at a starting salary of \$37,000 per year. (N.T. 18, 45-46, 74, 85, 143-145, 193-195, 200-201; Union Exhibit 7)

¹ I have taken administrative notice that Delaware County is a "Home Rule" County governed by a County Council rather than a Board of County Commissioners, which is typical in other counties.

11. Mr. West's private practice has never impacted his work at the OPD, and he has never been confronted with a conflict of interest between a private client and an OPD client. Mr. West was not at any time informed by management that his private practice was unacceptable or needed to be limited. Mr. West and the other attorneys at the OPD are salaried. The OPD does not track hours worked for OPD attorneys. They are not required to use leave if they leave early or arrive late. Mr. West has never been told that he was performing below expectations or that he could not handle his workload. The former Director of OPD applauded Mr. West's ability to handle a private practice and his workload at OPD. (N.T. 19, 59, 200-201)

12. Historically, Mr. West did not have defined work hours requiring his presence at the OPD. Some days require his presence longer than others. Mr. West's bankruptcy work involves at least one court appearance for each bankruptcy case. He meets with bankruptcy clients after work hours. Between his OPD work and his bankruptcy work, Mr. West's workday is typically from 8:30 a.m. to 8:30 p.m. (N.T. 56-58)

13. When Mr. West has a time conflict, he has an attorney at his law practice cover for him and represent his private client, while Mr. West personally attends to the OPD matter and appears in common pleas. (N.T. 59)

14. Prior to his start date, Director Welsh learned from County Council during his interviews that a percentage of OPD attorneys had private practices and/or outside employment, and he told County Council at that time that he would like to eliminate secondary employment. (N.T. 99-102)

15. Director Welsh called a special staff meeting with the OPD attorneys on or about July 13, 2020, approximately 1 week after he started in that position. Director Welsh called the meeting to meet the staff and review office matters. During that meeting, Director Welsh announced his new policy relating to secondary employment. (N.T. 19-21, 91-93, 103-104)

16. During the July 13, 2020 staff meeting, Director Welsh informed attorneys that they were no longer permitted to have secondary employment practices. Mr. West understood the policy to be a blanket prohibition on secondary employment. Director Welsh instructed the attorneys to submit their intentions by October 31, 2020, and if they had secondary employment, they were instructed to extract themselves from private practice by December 31, 2021. (N.T. 21-22, 91-93, 103-104)

17. Director Welsh did not distribute a written policy during the July 13, 2020 meeting. A couple of weeks after the meeting, Mr. West met with Director Welsh one on one and discussed the secondary employment policy. (N.T. 22-23)

18. Director Welsh informed Mr. West during this meeting that the attorneys in the Mental Health Unit work well and that Mr. West's private practice did not interfere with his public defender work in Mental Health. During the meeting, Mr. West offered that veteran public defenders with private practices would have a problem if they did not receive a pay increase and had to relinquish their secondary employment. Director Welsh responded that it was "complicated" and doubted whether pay increases would be given. (N.T. 23-24)

19. In late September, early October 2020, with the October 31, 2020 deadline approaching, Mr. West had another conversation with Director Welsh

about secondary employment during which Director Welsh indicated that secondary employment was a Union issue and that the employees had to negotiate their contract. (N.T. 24)

20. On October 16, 2020, Director Welsh and Ms. Farrell had a telephone conversation. That same day, Director Welsh emailed Ms. Farrell to summarize the meeting. During the phone conversation, Director Welsh told Ms. Farrell that he wanted to hire new attorneys and start them at a new pay rate and that he was willing to increase the salaries of existing attorneys if they would stop any side practice of law. Ms. Farrell did not approve or agree. (N.T. 65-66, 71; Union Exhibits 4 & 5; Employer Exhibit 2)

21. Director Welsh's October 16, 2020 email provided, in relevant part, as follows:

As we spoke about, I would like to hire between 3-8 new attorneys to start ASAP. I can send offer letters to those candidates today if we get to agreement.

For the purpose of these offers only, the new starting salary will be \$53,000. Any lawyer currently on staff making less than \$53,000 can have their salary raised to \$53,000 immediately if they are in compliance with the attached policy, or are willing to bring themselves into compliance with the attached policy by the dates previously provided.

There are currently 23 lawyers on staff making less than \$53,00. All of those attorneys would receive a raise ranging from \$959.44 to \$14,890. Of those 23, 11 attorneys would get at least a \$9,000 raise and would receive at least a \$5,000 raise.

We look forward to your response and to future negotiations.

(Union Exhibit 5; Employer Exhibit 2)

22. The attachment to the October 16, 2020 email was the first time that Director Welsh made available the written outside employment policy. (N.T. 39, 67-69; Union Exhibit 2; Employer Exhibit 1)

23. Ms. Farrell consulted with her legal department in Detroit and the bargaining unit members about the new hire rates and the elimination of private practices. She thereafter responded to Director Welsh with a written proposal on October 27, 2020. (N.T. 69-70; Union Exhibit 6)

24. Ms. Farrell's October 27, 2020 proposal stated, in relevant part, as follows:

For us to come to a resolution, there needs to be uniformity and a standard for all. As of now, you are proposing that those with private practices sign away these practices in order to be paid the new hire rate. This does not create any equality; there are those that may receive a small increase, others a larger increase, etc. and they have varying incomes from private practices. Essentially, it is improper for individuals in a bargaining unit to be separated like this, and it suggests you are engaging in direct dealing with these employees, which is not permissible.

We propose we arrive at a wage agreement and separate the private practice issue from it. We also propose that attorneys with seniority receive more than the increase you are proposing for new hires. We would like to discuss step increases that correlate with seniority.

(Union Exhibit 6)

25. The body of Ms. Farrell's October 27, 2020 proposal remains unanswered. (N.T. 73)

26. After the October 31, 2020 deadline passed, Director Welsh did not discipline anyone for not stating their intentions regarding secondary employment. Mr. West did not state his intentions, and he was not disciplined. Ms. Rushton is unaware of anyone providing their intentions or receiving discipline for not having done so. Director Welsh testified that two attorneys provided written responses with their intentions to not engage in outside employment. (N.T. 25-26, 93-94, 104-105)

27. Mr. West did not extract himself from private practice by or since December 31, 2020, and he is not aware of other attorneys in the OPD who extracted themselves from their secondary employment. (N.T. 26)

28. On or about November 9, 2020, the County hired 5 new attorneys in the OPD. The new hires were given a starting salary of \$53,000 per year paid biweekly. (N.T. 37-38, 94-95, 119, 168-169, 180, 189; Joint Exhibit 4; Union Exhibit 8; Employer Exhibits 3 & 5)

29. In December 2020, Director Welsh reduced the salaries of 2 of the 5 new hires to \$33,000, without notice to the Union, because they did not pass the bar exam. (N.T. 46-53, 78, 125; Union Exhibit 3)

30. The new hires earning \$53,000 are making more than attorneys who have been employed at the OPD for some time. Director Welsh identified 23 veteran attorneys making less than \$53,000. The Union did not agree to the starting salary increase for new hires. The salaries for attorneys hired before the new hires in November 2020 were not changed.² (N.T. 54, 80, 183, 193-195; Union Exhibit 5)

31. Non-bargaining unit OPD Supervisor Taylor Dunn informed Ms. Rushton that management clearly prohibited the new hires from any secondary employment. Director Welsh also testified that he implemented and enforced the policy for the new hires, that it is current policy and that he has not taken any disciplinary action against the veteran attorneys who have not complied with the policy because he is waiting for the results of this unfair practice litigation. (N.T. 94-95, 111, 139, 141-142)

32. On February 11, 2021, Director Kane emailed Ms. Farrell and attached the written outside employment policy marked as Union Exhibit 2. (N.T. 78-80)

² Employer Exhibit 5 shows that the new hires were making \$53,530 instead of \$53,000. Director Kane testified that the discrepancy could be the result of a 1% across-the-board wage increase given to all non-bargaining unit County employes. Director Kane is not sure whether the OPD attorneys received the 1% wage increase which, if they had, was not bargained. (N.T. 184-187).

33. The policy provides as follows:

It is the policy of the Office of the Public Defender (OPD) to allow its employees to engage in outside work or hold other jobs, subject to the restrictions outline[d] herein:

1. Employees' activities and conduct away from the job must not compete or conflict with or compromise the interests of the OPD, or adversely affect job performances and the employees' ability to fulfill any responsibilities to the OPD. An employee must notify his/her/their immediate supervisor of outside employment if the job is similar to that performed for the OPD or if the employment is with an agency that interacts with the OPD in a professional capacity.

This policy applies specifically to attorneys and generally to all exempt/salaried staff members:

- (a) No OPD attorney is permitted to represent anyone but him/her themselves in any non-Office of the Public Defender related matter in any state or federal court. This rule applies equally to appearances in court or using one's own name in pleadings. Its application does not depend of [sic] where [sic] or not a fee is involved. There are no exceptions.
- (b) Representation by a OPD attorney of any private client in any court for any fee whatsoever is prohibited. Representation of a relative or close friend where no fee is involved, even if on an attorney's vacation or personal leave time, is strongly discouraged and may be undertaken only with the express, prior consent of the Director or, in his/her/their absence, the First Assistant Defender.
- (c) Private Practice in non-litigation matters in any organized, regular fashion, where [sic] in Delaware County or any other jurisdiction, is also prohibited. This does not mean, however, that Office of the Public Defender attorneys cannot, on occasion, give advice, draw a will, draft a contract, etc. for a family member or friend, provided that such activity takes place on the attorney's own time and does not conflict with any Defender work schedule. Attorneys may also serve as arbitrators through the Court of Common Pleas, but must take vacation time for this purpose.
- (d) No OPD attorney shall engage in any outside employment that would require the employee to obtain a professional license by the Commonwealth of Pennsylvania or any other jurisdiction.

(Union Exhibits 2 & 10)

34. Director Welsh prepared the written policy in connection with collective bargaining negotiations. In preparing the policy, Director Welsh referred to the Defenders Association of Philadelphia to model his outside employment policy. (N.T. 106-109; Union Exhibit 2; Employer Exhibit 1)

35. Director Welsh formerly worked at the Philadelphia Defenders Office. That office had a no-outside employment policy, and Director Welsh believed that there was a benefit to that policy because attorneys could focus on their work as public defenders of indigent, vulnerable defendants. Director Welsh believes that all attorneys' professional energy should be focused on the OPD clients without conflicts or diversions. (N.T. 99, 107)

36. On March 25, 2021, the parties held a bargaining session during which the management team shared a new outside employment policy. The parties tabled the discussion on the policy because the Union wanted agreement on the economics first and because this unfair practice litigation was pending. Director Kane emailed Ms. Farrell and the full bargaining committee later that same day with an attachment asserting that prohibiting outside employment was a managerial prerogative. (N.T. 81-82; Union Exhibit 1)

37. The March 25, 2021 email attachment referring to the outside employment policy stated as follows:

The prohibition or regulation of outsider employment by members of the Officer [sic] of the Public Defender is a managerial prerogative, and the Office of the Public Defender and the County expressly preserves that managerial prerogative with respect to whether it is permissible for any member of the bargaining unit to engage in outside employment. It is the policy of the Office of the Public Defender (OPD) to not allow its employees to engage in outside work or hold other jobs, unless such employment is approved by the Public Defender prior to the time such employment commences, reviewed and approved by the Public Defender on [an] annual basis thereafter, and is in compliance with the County's Outside Employment Policy.

All employees in the Public Defender's Office must comply at all times with the Public Defender's Outside Employment Policy.

(Union Exhibit 1)

38. The policy prohibiting outside employment has been presented to the Union on October 16, 2020 and on March 25, 2021. The March 25, 2021 version refers to an existing outside employment policy, presumably the October 16, 2020 version, and asserts that the matter is a managerial prerogative and non-negotiable. There remains no agreement or resolution about the policy. (N.T. 112)

39. Director Welsh wants to prohibit outside employment because he is concerned that he cannot supervise his attorneys if they are meeting with private clients or attending court on behalf of private clients. Director Welsh believes that he cannot properly check the attorneys' private clients for conflicts with the OPD and its clients. He further believes that he is unable to determine an appropriate caseload for the OPD attorneys if he does not know how many private clients each of them has and what that private workload entails. Director Welsh testified that the purpose of the policy is to require attorneys to focus on the OPD's indigent clients without any potential conflict of interest and to ensure that the attorneys are working solely for the OPD clients during normal work hours and to allow him to better manage his staff attorneys. (N.T. 102-103, 114)

40. From Director Welsh's perspective, there are time and scheduling conflicts about which he gave examples. Director Welsh fears that an OPD attorney, like Mr. West may have to be in bankruptcy court for a private client at the same time he has to be in common pleas for an OPD client. He also gave an example of an OPD attorney who has a real estate closing, where there are significant financial interests at stake, and at the same time that attorney is supposed to be in common please representing an indigent client on a bail motion who may be in jail trying to get out of custody. (N.T. 114-115)

41. Director Welsh is unable to cite to a specific example of a staff attorney who was not in court when he/she was supposed to be because he/she was representing a private client. (N.T. 163)

42. Director Welsh is concerned that he cannot effectively determine whether attorneys in the trial unit, who have approximately 50 cases each, can handle those cases when they have outside clients. Director Welsh believes that determining the proper caseload is more achievable when everyone is dedicating full-time hours to the OPD and that caseload determinations are not accurately determined when attorneys have a variety of outside practices and clients. (N.T. 116, 152-153)

43. Director Welsh believes that the OPD has an obligation to ensure that there is no conflict of interest, but he believes that he has no way of knowing whether a staff attorney's private client representation presents a conflict of interest with the OPD or one of its clients. (N.T. 156-157)

44. Director Welsh determined that the County has not paid competitive wages to attorneys in the OPD for many years. Other public defender offices in the greater Philadelphia area start public defenders between \$50,000 and \$58,000 per year, which provided the market salary rates for Director Welsh to determine the new hire rate at the OPD of \$53,000. Ms. Farrell did not agree to the new salary for the new hires. (N.T. 116, 123, 134-135, 172-173)

45. Director Welsh changed the salaries for new hires knowing that the County has a duty to bargain salaries and knowing that the Union did not agree to the new salary changes that he implemented. The new starting salary for new hires was not bargained with the Union. Director Kane also understands that management cannot make salary arrangements without negotiating with the Union. The offer letters for the new hires were issued without Director Kane's approval, which is the normal practice. (N.T. 135-137, 190-191)

46. Director Welsh has not had to reduce any attorney's caseload due to their outside employment. He also does not know of a specific case or client that has been compromised due to an attorney's outside employment. (N.T. 146-149)

DISCUSSION

PERA-C-21-271-E Outside Employment Policy

The Union contends that County's new policy prohibiting outside employment and the private practice of law is a mandatory subject of bargaining and constitutes a change in a known past practice that existed for at least 20 years. The Union further maintains that the County implemented the new prohibition on outside employment after the certification of the Union and violated its duty to bargain when it unilaterally changed the past practice of permitting outside employment. The Union further argues that the County did not demonstrate on the record specific facts to support its public policy defense or to support its assertion that the matter involves integrity in government. The Union posits that the Board determines secondary employment issues on a case-by-case basis under the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 507, 337 A.2d 262, 268 (1975), to determine whether a matter is a mandatory subject of bargaining or a managerial prerogative. Under a case-by-case application of that test, contends the Union, the Board and its examiners have ruled both ways depending on the facts and circumstances of those cases. The Union further contends that the charge is not premature and that the County implemented the policy after the certification of the Union, which gave rise to a bargaining obligation.

The County parries that the Board and the Commonwealth Court have already ruled that an employer's prohibition of secondary employment constitutes a managerial prerogative, *citing* AFSCME Council 13 v. PLRB, 479 A.2d 683 (Pa. Cmwlth. 1984), where the Court ruled that the Board properly applied the State College balancing test. The County contends that Director Welsh asserted legitimate managerial interests that meet the AFSCME standard for determining that the outside employment policy in this case is a matter of managerial prerogative. The County contends that the policy advances Director Welsh's legitimate interest in preserving integrity in government operations, effective management, focus on public service, the quality defense of indigent defendants and the elimination of potential conflicts of interest, which the OPD has insufficient resources to investigate. Moreover, the County maintains that the outside employment policy does not prohibit all outside employment, which is analogous to the policy in ASCME Council 13. The County acknowledges that, even though it believes that it has a managerial prerogative to implement the policy, it would have to bargain over the disciplinary aspects of violating the policy.

In essence, both parties agree that the outcome of whether the policy constitutes a managerial prerogative or a mandatory subject of bargaining must be determined by applying the State College balancing test to the facts and circumstances of record in this case. (Union Brief at 11-13; County Brief at 4). Indeed, the AFSCME Court specifically opined that the inquiry is a factual one. In surveying the case law on this issue, Hearing Examiner Pozniak properly noted that "[t]he Board has found secondary employment policies to be a mandatory subject of bargaining in some cases, and an inherent managerial prerogative in others," and . . . "[t]hus, the determination is a fact specific inquiry." Indiana County Deputy Sheriff's Association v. Indiana County Sheriff and Indiana County, 51 PPER 3 (PDO, 2019).

As an initial matter, Director Welsh's verbal pronouncement of his intent to prohibit secondary employment at the July 13, 2020 staff meeting did not constitute the implementation of the policy. Although perceived as a blanket prohibition on all secondary employment at the time, the policy was not clearly defined until a written copy of it was sent to Ms. Farrell on October 16, 2020, and was concretely applied to the new hires as of November 9, 2020. Moreover, by the terms of the July 13, 2020 verbal announcement of the intended policy, the policy would not govern behavior until October 31, 2020, when attorneys were supposed to inform Director Welsh of their intent to comply or resign. The application of the policy to staff attorneys as of October 31, 2020, and to the new hires as of November 9, 2020, after a clearly defined written policy document was sent to the Union and employees, constituted the implementation of the policy. Additionally, a review of the October 16, 2020 phone conversation between Director Welsh and Ms. Farrell as well as Director Welsh's October 16, 2020 email to Ms. Farrell demonstrates that Director Welsh had not implemented the policy at the time because he was negotiating salary increases contingent upon the Union attorneys accepting the policy. Implementation of the policy, therefore, occurred after the Union's certification and before the charge was filed.

The fact that non-complying veteran attorneys in OPD have not been disciplined does not render the charge premature or the policy not implemented. Director Welsh testified that the secondary employment policy is "current policy," and it has been applied to the new hires. Discipline has not been imposed because Director Welsh is waiting for the outcome of this litigation. If every time the disciplinary aspects of enforcing a policy were suspended pending unfair practice litigation, then many policies would have to be deemed not implemented and the charges premature. The policy was implemented when the charge was filed and suspending the imposition of discipline is reasonable given that a Board order could require the employer to reverse the discipline. Accordingly, the outside employment policy is current policy implemented after Union certification and before the filing of the charge; it is therefore ripe for consideration. Even if the policy had been deemed implemented as of July 13, 2020, which it was not, changing the status quo by implementing a policy that reduces earnings for employees after an election order and pending an election would violate Section 1201(a)(1) by interfering with and influencing voting and organizing rights and activities.

In State College, supra, our Supreme Court developed the standard for determining whether a matter constitutes a mandatory subject of bargaining under Section 701 of PERA or a managerial prerogative under Section 702 of PERA. The Court articulated the standard as follows:

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 subjects upon request by the public employe's representative pursuant to section 702.

Id. at 507, 337 A.2d at 268.

Secondary employment directly impacts wages, which is a mandatory subject of bargaining. Unilaterally prohibiting secondary employment amounts

to unilaterally reducing earnings for employees with secondary employment, although some of those earnings are derived from another source. In this regard, the Union has established on this record, with substantial competent and credible evidence, that the employees have a substantial interest in their secondary employment, which management has permitted for at least 20 years. However, the Board has recognized a managerial prerogative to unilaterally prohibit certain types of secondary employment in some cases, with a narrowly tailored policy. In those cases, the facts of record showed that the employer had an identifiable concern supported by the facts of record that certain secondary employment actually created a conflict of interest and prohibiting such employment would promote transparency and integrity in government.

However, the County's reasons for implementing the policy do not have support in the record. Director Welsh expressed his desire for prohibiting outside employment during his interviews with the County before he had intimate knowledge of or experience with the County's OPD. He did not communicate with his predecessor and did not receive any complaints of specific problems that the attorneys' outside employment may have caused. One week after starting at the OPD, Director Welsh verbally shared his intent to implement a blanket prohibition on any outside employment, including the practice of law. Although Director Welsh testified that he wants to ensure that the OPD attorneys are focused on their indigent clients and do not miss court appearances on behalf of those clients, Director Welsh could not establish that the OPD attorneys ever missed a filing or court appearance on behalf of OPD clients or that their outside employment interfered in any way with the work at the OPD.

Director Welsh testified that he cannot effectively manage or determine the proper caseload for attorneys when they have an unknown amount of private secondary work. However, the evidence shows that the attorneys with secondary employment have always handled whatever caseload has been assigned to them. There is no concrete evidence that the attorneys with secondary employment are distracted or unfocused when it comes to OPD clients and caseload.

Director Welsh actually informed Mr. West, who has a secondary, private practice as a bankruptcy attorney, that the attorneys in the Mental Health Unit were working well and that Mr. West's private practice did not interfere with his work in Mental Health at OPD. Moreover, Director Welsh told Mr. West that secondary employment was a Union issue and that the Union had to negotiate their contract, thereby recognizing at that time, that it was a negotiable matter.

Director Welsh expressed concerns over conflicts of interest between private clients and the OPD clients. Under the Rules of Professional Conduct, each individual attorney is responsible for vetting conflicts of interest. Although the County asserted that it does not have the resources to investigate conflicts of interest for every private client of its OPD attorneys, the County has not demonstrated that there have been any conflicts of interest in the past and the individual attorneys would be responsible for avoiding such conflicts. On this record, conflicts of interest have never been a problem for OPD attorneys. There is no nexus between the speculation of conflicts and the County's alleged goal of preventing secondary employment for the purpose of improving integrity and transparency in its government operation. Basically, the reasons for eliminating the past practice of permitting lawyers at OPD to engage in private practice is based on Director Welsh's belief system and not any actual conflicts, work deficiencies, or lack of energy toward or focus on OPD clients.

With regard to time conflicts, the OPD attorneys have always been permitted to arrive late and leave early when workload permits and their work is done. Although an OPD attorney may have a meeting or court appearance with a private client during the workday which takes them out of the OPD for some time during the day. However, this practice has been permitted for over twenty years. The OPD lawyers are salaried, exempt employees who are not paid by the hour, but rather are paid for their work performance and production. This record is clear that there are no substantiated work deficiencies among the attorneys at OPD.

The salaries paid to OPD attorneys are modest at best. Supplemental income is a necessity for some. Board examiners have recognized that an employee who has training in a field has a substantial interest in using that training to earn extra money in their field of expertise with outside employment. Those examiners concluded that the prohibition against secondary employment in employees' field of expertise would be devastating to the interests that the employees have "in earning a living by working in the very field . . . for which they have been trained and which offers them the best money." Indiana County, supra (citing Elizabethtown Non-Supervisory Police Negotiating Committee v. Elizabethtown Borough, 29 PPER ¶ 29099 (Proposed Decision and Order, 1998)).

The attorneys in the OPD are trained, licensed attorneys who have a substantial interest in applying those skills to outside employment to supplement their modest income. The County has not demonstrated that anyone's outside law practice interferes with the operations, representation or provision of services at OPD in an ethical, focused manner. As far as caseload, the attorneys are handling the OPD caseloads they are assigned along with secondary employment. Consequently, Director Welsh already knows that the current caseload distribution is manageable without burden for the attorneys with secondary employment and the other attorneys in the OPD. Director Welsh testified that he has not had to reduce anyone's caseload due to their outside employment. He also does not know of a specific OPD client or case that has been compromised due to an attorney's outside employment.

Director Welsh is concerned that Mr. West may have a time conflict when he is supposed to be in common pleas representing an OPD client, but he has a scheduled court appearance for a bankruptcy client. He also fears that an OPD attorney will be required to attend a real estate closing with significant financial interests when the attorney is supposed to be in common pleas to represent an indigent client in custody. However, the record does not support that these fears have been realized or that attorneys could not schedule their private representation matters at times when they have no conflict with the representation of their OPD clients. In fact, Mr. West testified that he makes arrangements for someone to cover for his bankruptcy client if there is a time conflict and that he prioritizes the OPD client. Attorneys are provided advanced notice of court appearances and their private practice can be and is scheduled around their OPD obligations, duties and responsibilities. Indeed, Director Welsh was unable to cite a specific example of when a staff attorney was not in court when he/she was supposed to be because that attorney was representing or meeting with a private client.

Although the assertion that the County has interests in preserving and promoting transparency, integrity in public, taxpayer funded government service are noble, legitimate and laudable managerial interests, those goals have not been shown on this record to be compromised by the past practice of

permitting secondary employment in private legal practice among the OPD attorneys. The specific concerns advanced by Director Welsh are speculative and have not been borne out by the record facts. The outside employment practice has not been shown to interfere with any operations at OPD. It has not presented any known conflicts of interest and has not affected the ability for Director Welsh to manage his staff or ensure that OPD work is getting done. Accordingly, on balance, the significant interest OPD attorneys have in relying on their training and experience to earn supplemental income far outweighs the speculative, unsubstantiated assertion by management that eliminating the ability for those attorneys to engage in private practice would improve OPD services, prevent unsubstantiated conflicts of interest, ensure greater focus on indigent clients or improve staff management and caseload determinations.

Accordingly, the County has violated Section 1201(a)(1) and (5) by unilaterally implementing a policy prohibiting attorneys at the OPD from engaging in the private practice of law and other secondary employment, without bargaining, and by directly dealing with new hires. The County must restore the status quo ante of permitting outside employment and the private practice of law and bargain with the Union over any changes to the existing past practice. Due to the foregoing analysis, the outside employment policy was a mandatory subject of bargaining. Therefore, the County did not have a separate meet-and-discuss obligation to bargain the impact over the policy implementation and did not violate Section 1201(a)(9). The cause of action under Section 1201(a)(9), therefore, is hereby dismissed.

PERA-C-21-273-E
Wage Increase for New Hires

There is no dispute on this record that the County increased the starting salary for the OPD attorneys who began their employment on November 9, 2020 from \$37,000 to \$53,000 without bargaining with the Union. The County argues that it had a managerial prerogative do so under the balancing test because it had an immediate need to fill vacancies with qualified candidates based on salary market studies and, therefore, could not wait for the bargaining process. (County Brief at 8). However, wages and hours are statutorily mandated subjects of bargaining under Section 701 of PERA and are not subject to the balancing test set forth in State College. The balancing test applies to determining whether changes in "terms and conditions of employment," other than wages or hours, under Section 701, are mandatory subjects of bargaining. In this regard, the County's reasons for or interests in unilaterally raising the starting salary for new hires without bargaining are irrelevant. To the extent that the County may be arguing for an emergency exception, the record does not show that the County could not find new attorneys to work for \$37,000 per year or that the need to get 5 more attorneys was a dire, pressing issue because work was not getting done by the existing complement. Accordingly, the County committed unfair practices by unilaterally changing wages without bargaining with the certified representative, as a matter of law.

In fact, both Director Welsh and Director Kane acknowledged that management has a duty to bargain wage changes, but the County changed starting salaries anyway without bargaining. The offer letters to the new hires were sent to the candidates without Director Kane's prior approval, and Director Kane understands that salary changes have to be bargained. More importantly is the devastating impact to the rest of the bargaining unit caused by the unilateral wage increases for new hires who, as a result of the

County's action, are earning more than long-time veteran attorneys at the OPD. Accordingly, the County violated Section 1201(a) (1) and (5) by unilaterally increasing the starting salaries for new hires at the OPD without bargaining with the Union and by engaging in direct dealing with employees. The County also violated the Act by unilaterally reducing the salaries of the two new employees who did not pass the bar exam to \$33,000, without bargaining those wage reductions. Therefore, the County must restore the status quo ante and return the salaries of all the new hires, as of November 9, 2020, to \$37,000, including those who passed the bar and those who did not. The County must bargain with the Union, whether through interest arbitration for the court-related unit or not, before changing the past practice of permitting outside employment, including the private practice of law.

CONCLUSIONS

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

1. The County of Delaware and its Office of Public Defender are public employers 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. The County and its Office of Public Defender have committed unfair practices in violation of Section 1201(a) (1) and (5) of PERA, under Case Numbers: PERA-C-20-271-E and PERA-C-20-273-E.
5. The County has not committed unfair practices in violation of Section 1201(a) (9) under Case Number: PERA-C-20-171-E.

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 County and its Office of the Public Defender shall:

1. Cease and desist from interfering, restraining or coercing employees 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. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:
 - (a) Immediately restore the status quo ante, rescind the outside employment policy as provided to the Union on October 16, 2020, and reinstate the past practice of permitting attorneys in the Office of the Public Defender to engage in outside employment including the private practice of

law for veteran attorneys and the new hires until a new policy is collectively bargained with the Union.

(b) Immediately cease and desist from directly dealing with employes over accepting changes to the past practice of permitting outside employment including the private practice of law.

(c) Immediately cease paying new hires at the rate of \$53,000 per year and reduce the starting salaries for new employes, hired as of November 9, 2020 and thereafter, to \$37,000 per year beginning the first full pay period following receipt of this order, until a new starting salary rate is collectively bargained with the Union. The County will not seek to recoup the difference between the new hires' current salary of \$53,000 and the reduction to \$37,000, received by the new hires between their starting date of employment with the Office of the Public Defender and the beginning of the first full pay period when their salaries are reduced.

(d) Immediately cease and desist from directly dealing with new hires over starting salaries.

(e) Immediately increase the pay of the 2 attorneys who had their salaries reduced for not passing the bar exam from \$33,000 per year to \$37,000 per year beginning the first full pay period following receipt of this order, until a new starting salary rate is collectively bargained with the Union.

(f) Immediately pay backpay to the 2 new attorneys who had their salaries reduced from the December 2020 reduction until they receive their increases to \$37,000 per year; Immediately pay interest at the rate of 6% per annum on the backpay amount, with any withholding calculated on a bi-weekly basis;

(g) 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

(h) 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 twenty-fourth day of August 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED AUTO WORKERS :
INTERNATIONAL UNION :
 :
v. : CASE NOS. PERA-C-20-271-E
 : PERA-C-20-273-E
DELAWARE COUNTY AND DELAWARE COUNTY :
PUBLIC DEFENDER'S OFFICE :

AFFIDAVIT OF COMPLIANCE

The County of Delaware and the Delaware County Office of the Public Defender (collectively "County) hereby certifies that it has ceased and desisted from violating Sections 1201(a) (1) and (5) of PERA; that it has restored the status quo ante and reinstated the past practice of permitting attorneys in the Office of the Public Defender to engage in outside employment, including the private practice of law for veteran attorneys and the new hires; that it has ceased and desisted from directly dealing with employes over accepting changes to the past practice of permitting outside employment, including the private practice of law and starting salaries; that it has ceased and desisted from paying new hires at the rate of \$53,000 per year, and have reduced the starting salaries for new hires to \$37,000 per year, beginning the first full pay period following receipt of this order; that they have not and will not recoup the difference between the two salaries; that it has increased the pay of the two new hires who did not pass the bar exam to \$37,000 per year, beginning the first full pay period following receipt of this order; that it has paid backpay and interest to the 2 new hires that had their salaries reduced consistent with the order; that it has posted a copy of this 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