

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PSSU LOCAL 668, SEIU, AFL-CIO, CLC :
:
v. : Case No. PERA-C-98-353-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF PUBLIC WELFARE :

FINAL ORDER

On September 28, 1999, the Commonwealth of Pennsylvania (Commonwealth) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a proposed decision and order (PDO) issued September 15, 1999, in the above-referenced case. Pursuant to an extension of time granted by the Secretary to the Board, a brief in support of such exceptions was filed on November 4, 1999. The Pennsylvania Social Services Union, Local 668, SEIU (PSSU) filed its response and brief in opposition on November 19, 1999.

This case concerns the bargainability of dress code policies for Commonwealth employes. PSSU filed an unfair practice charge on August 3, 1998, alleging that the Commonwealth violated the Public Employee Relations Act (PERA) Section 1201(a)(1) and (a)(5) by unilaterally implementing dress code policies at various county assistance offices (CAO) within the Department of Public Welfare (DPW) without bargaining with PSSU. In the PDO, the hearing examiner found that the Commonwealth unilaterally changed the status quo regarding a mandatory subject of bargaining and committed an unfair practice when it issued memoranda on dress code policy at the Luzerne CAO. (PDO at 5-6)(citing Commonwealth of Pennsylvania, Dep't of Transportation, 22 PPER ¶ 22015 (Final Order, 1990)). The hearing examiner further determined that the policy was not a matter of managerial prerogative, and that the impact of the dress code policy on the employes' terms and conditions of employment was greater than the Commonwealth's interest in requiring employes to adhere to office attire standards in CAOs. (PDO at 6-8); PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975).

The unfair practice charge arises out of Edward Nowak, the executive director at the Luzerne CAO, issuing a memorandum on April 24, 1998, that outlined the CAO's expectations regarding appropriate attire for office employes.¹ The hearing examiner limited his decision to the dress code

¹ The text of this memorandum is as follows:

The Luzerne County Assistance Office provides services directly to the public and its image is a matter of priority. As a result, the CAO has a legitimate interest in ensuring that the public be served in a professional environment. An employee's conduct and appearance must contribute to the professionalism at all times.

All employees, through their appearance and conduct, should reflect the image that the public holds of this office. Everyone is asked to dress and work in a manner that dignifies the serious role of this agency. In our

policy at the Luzerne CAO because the testimony and documentary evidence presented by PSSU related to the policy at that office. (n.2, PDO at 4).

After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

14. In June 1996, the Department of Public Welfare issued workplace guidelines that included dress. (Commonwealth Ex. 3; N.T. 50, 55, 93).

15. Prior to the issuance of the dress code memos of 1991, 1997 and 1998, the employees were expected to dress appropriately and employees were required to change their clothes when their dress was determined to be inappropriate. (N.T. at 68, 84).

16. CAO employees meet with clients, members of the public, lawyers, and community service agencies such as United Way and Red Cross. CAO employees also conduct workshops where they instruct clients regarding grooming, appearance and appropriate dress for the workplace. (N.T. 67, 80-82).

DISCUSSION

In its exceptions, the Commonwealth argues that under the balancing test set forth in State College, supra balancing test, the issuance of the

efforts to help clients aspire to self-sufficiency, it is necessary for us to project this responsible and professional image.

All employees should wear clothing that is considered appropriate attire for a business atmosphere. Clothing that is tight, short, and/or revealing is not consistent with the professional image that we want to project. 'Recreational clothing,' such as halter tops, T-shirts or sweatshirts with slogans or advertisements, shorts, sandals without socks or foot coverings, sweat suits, frayed or tattered jeans and sneakers, or similar apparel is not acceptable attire.

It is up to the manager within each area to monitor the units' attire and to make the decision as to what is professional and appropriate in nature. Employees wearing unacceptable attire will be subjected to the following:

- (1) First occurrence -- Advised that their attire is inappropriate for our office setting. Unless attire is outrageous, the employee will be allowed to work out the shift.
- (2) Second occurrence - Employee will be required to leave work on their own chargeable time and change to suitable attire before returning to duty.
- (3) Third occurrence - Disciplinary action will be instituted.

Do not hesitate to ask your supervisor or manager if there are any questions regarding this matter.

FF 9, PDO at 3.

office attire policy is a managerial prerogative. It also argues that the hearing examiner's determination that the office attire policy had an impact on the terms and conditions of employment is unsupported by substantial and legally credible evidence. The hearing examiner distinguished several dress code cases because they involved school district employes and police officers. He explained that school teachers act as role models for their students, and how they dress is of greater importance to the public employer in pursuing its educational objectives. Portage Area School District, 29 PPER ¶ 29032 (Proposed Decision and Order). Similarly, he explained that in police uniform cases, the identity of police officers is vitally important to the public employer in carrying out its police functions. City of Reading, 26 PPER ¶ 26165 (Proposed Decision and Order, 1995); City of Chester, 22 PPER ¶ 22026 (Proposed Decision and Order, 1990). In each of these cases, the dress code policy was found to be a managerial prerogative.

Because the Board has not addressed the issue of whether dress code policies for Commonwealth employes must be bargained, the hearing examiner was guided by a New York case in which the Public Employment Relations Board (PERB) determined that an office attire policy, not involving uniformed and/or para-military personnel is a mandatory subject of negotiation. State of New York (Dep't of Taxation and Finance), 20 PERB ¶ 3028 (Board Decision and Order, 1997). In that case, a general policy on dress was in place, and the employer changed the policy when it imposed greater restrictions on its employes' dress, thereby unilaterally changing the terms and conditions of employment without bargaining. The Commonwealth argues that State of New York is not instructive because the PERB did not conduct the type of analysis required under PERA and State College, supra.

After a thorough review of the caselaw, the Board agrees that State of New York does not provide sufficient guidance. Unlike the hearing examiner's conclusion that teacher dress codes are managerial prerogative in Pennsylvania, Portage Area School District, supra, under New York law, teacher dress codes are a mandatory subject of bargaining.² Several other New York dress code cases focused on the employes' increased monetary expenditures for clothing purchase, replacement, cleaning and repairs under new dress codes. Dress codes were found to be mandatory subjects of bargaining when increased costs affected terms and conditions of employment, so as to outweigh the employers' managerial interests. For instance, in County of Suffolk, 20 PERB ¶ 4539 (Decision of ALJ, 1987) bargaining was mandatory because the employes at issue were engaged in fieldwork that required them to enter wet and muddy well pits/crawlspace or work with acid and other chemicals. The dress code requiring slacks, ties, skirts or dresses resulted in increased costs for maintenance and replacement of clothing, an interest the PERB found outweighed the employer's interest in maintaining a professional appearance. Similarly, in County of Putnam, 18 PERB ¶ 4565 (Decision of ALJ, 1985) a dress code requiring business suits, ties, dresses and skirts was a mandatory subject

² Catskill CSD, 18 PERB ¶ 4565 (Board Decision and Order, 1985)(dress codes do not have a major impact on managerial responsibilities as to outweigh the direct and immediate interest the union has in bargaining the subject); Caledonia-Mumford Central School District, 25 PERB ¶ 4624 (Decision of ALJ, 1992)(school district violated its bargaining obligation by unilaterally adopting revised faculty dress code).

of bargaining because of new expenditures that the employes would have to make to comply with the code. Unlike these cases, even were it assumed that a more costly wardrobe necessitated bargaining, PSSU has presented no evidence that the employes at the CAO would be required to expend excessive amounts of money to comply with the policy. The Luzerne CAO policy does not require suits, ties or dresses, it merely requires that employes dress in appropriate attire relative to the role of the agency. See supra n.1. There is no evidence of record that clothing that is not frayed, tattered, bearing advertisements or slogans, or is not tight, short, or revealing will require the employes to expend substantial sums of money to comply. The dress code at issue here authorized the use of casual clothing by employes observing certain minimal standards. These cases do not support the conclusion that this dress code policy was a mandatory subject of bargaining.

Other jurisdictions have also addressed dress code issues. In American Train Dispatchers v. Burlington Northern R.R., 855 F.Supp. 168 (N.D. Tex., 1994), the parties' collective bargaining agreement (CBA) was silent on the matter of attire, yet it implied that the employer had the right to impose work rules. This case was decided under the Railway Labor Act and concerned the employer's implementation of a dress code for dispatchers working in a consolidated dispatching center. From the parties' CBA, the Court determined that implementing a dress code was an exercise of managerial prerogative in enforcing or modifying rules that were already in place when the CBA was made. Even though the employer in that case never actively enforced a particular dress code in the past, it had the authority to do so. Like that case, there is evidence in the record that the Luzerne CAO already had an office attire policy in place prior to Mr. Nowak's 1998 memo. The record reflects that two other memoranda were issued that outlined the CAO's expectations regarding appropriate attire for office employes. The first memorandum was issued by Nicholas Volpetti on May 28, 1991.³ The second was issued by acting executive director Jonathan Witmer on August 12, 1997.⁴ In 1996, the

³ The text of the memorandum is as follows:

Although the Commonwealth does not prescribe standards of dress nor does this office have a dress code, the ultimate consideration is common sense. This is an office which provides a service and is open to the general public. We should dress accordingly. I am therefore requesting your cooperation by using discretion in wearing clothing appropriate to an office setting.

FF 5, PDO at 2.

⁴ The text of this memorandum is as follows:

The Luzerne County Assistance Office provides services directly to the public and its image is a matter of priority. As a result, the CAO has a legitimate interest in ensuring that the public be served in a comfortable and professional environment. An employee's conduct and appearance should contribute to this professionalism at all times.

All employees through their appearance and conduct should reflect the image that the public holds of this office. Everyone is asked to dress and work in a manner that dignifies the serious role of this agency.

Commonwealth issued workplace guidelines that included dress. (FF. 15 supra). Mr. Witmer testified that there has always been an expectation that employees dress appropriately. He recalled an instance in 1975 or 1976 where a woman was sent home for dressing inappropriately. (FF 15, supra; N.T. at 68). Mr. Nowak testified that prior to all of the dress code memos, the employees were required to change their clothes when their dress was determined to be inappropriate. (FF 15, supra; N.T. at 84). Under the analysis in American Train Dispatchers, the dress code policy was an exercise of managerial prerogative in enforcing or modifying dress code rules that were already in place, and as such was a matter of managerial prerogative.

In Ottawa County Riverview Nursing Home, 13 OPER ¶ 1446 (Board Order, 1996), the Ohio State Employment Relations Board determined that the establishment of a dress code for a workforce of nursing home employees involves an employer's inherent managerial rights. It further reasoned that portraying a certain professional or authoritative look in its dealings with the public or with other employees may be essential to the employer's mission or its ability to effectively manage the workforce. It added that when a dress code involves expenditures of employees' funds to purchase uniforms, employees' wages and conditions of employment may be materially affected. Thus, in Ohio, the determination of whether a dress code policy is a mandatory subject of bargaining becomes a case-by-case determination in which the employer's inherent managerial prerogative is balanced with how the policy affects employees' wages, hours, and terms and conditions of employment. Ohio's approach more closely resembles what is required by PERA and State College. The Board will not make the sweeping conclusion that dress codes for all Commonwealth employees are matters of managerial prerogative. Indeed, uniforms and equipment required for a position which are not normally part of an employee's wardrobe may be required as a matter of managerial prerogative, but their cost and/or provision is a matter of mandatory bargaining. Under such circumstances, it is the cost of such clothing or equipment that is negotiable, not the employer's right to require it. Rather, the Board will apply the case-by-case analysis of whether impact on the employees' wages, hours and terms and conditions of employment outweighs the effect of the policy on the employer's system as a whole.

PSSU had the burden of proving its charge by substantial and legally credible evidence. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 323 A.2d 1069 (1977). Under State College, PSSU was required to demonstrate on the record that the dress code policy impacted the interests of the employees, and that that impact outweighed the effect of the policy on the employer's system as a whole. PSSU argues that the policy impacts upon the employees' terms and conditions of employment. However, Mr. Tomaselli, a Luzerne CAO

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In our efforts to help clients aspire to self-sufficiency, it is necessary for us to project this responsible and professional image.

Do not hesitate to ask if there are any questions regarding this matter.

FF 6, PDO at 2.

income-maintenance caseworker and PSSU chief shop steward was the only employe to testify. He testified that "I think there is appropriate attire for offices . . . I don't think tight fitting clothing or T-shirts that say bad words on them should be worn in an office." (N.T. at 33). He did not testify that the dress code impacted his duties in any way. In fact, he said that he has not personally observed any relationship between the clothing that he wears and the reaction of the clients he serves as an income maintenance caseworker. (N.T. at 18). He also testified that on a normal day, he typically wears a golf shirt with dress slacks. He also testified that he sometimes wears a coat and tie, jeans and a T-shirt or sweatshirt. (N.T. at 17-18). This attire fully complies with the terms of the policy, which indicates that the issuance of the policy did not impact on the terms or conditions of his employment. We note in this regard that the dress code at issue here which allows denim jeans, provided they are not frayed or tattered, and sweatshirts, provided they do not have advertisements or slogans is less restrictive than the dress code at issue in State of New York (Dep't of Taxation and Finance), supra. Although the hearing examiner determined that the policy had an impact on the employes' interests regarding their physical comfort by restricting what they could wear, that determination was made under the State of New York analysis, and there is no evidence of record that this policy impacts upon the physical comfort of the CAO employes. For instance, there was no testimony that T-shirts without slogans were significantly less comfortable than T-shirts with slogans, or that business attire is less comfortable than tight, short, and/or revealing clothing. As such, the Board will not engage in a physical comfort analysis because there is no evidence in the record regarding any impact the policy may have on the CAO employes' physical comfort.

PSSU argues that the hearing examiner was permitted to take official notice of the fact that the physical comfort of the employes constitutes a term and condition of employment and that restricting an employe's choice of clothing will impact upon that term and condition of employment. (PSSU br. at 4). The Board is not persuaded by this argument. The hearing examiner did not express that he was taking official notice of any matters. As discussed above, it was PSSU's burden to prove its charge by substantial and legally credible evidence. St. Joseph's Hospital v. PLRB, supra. PSSU properly noted that the Board may take official notice of any matter that may be judicially noted by the courts of this Commonwealth, Pennsylvania Dep't of Public Welfare (Warren State Hospital), 30 PPER ¶ 30021 (Final Order, 1998)(citing 1 Pa. Code § 35.173⁵). However, matters that may be judicially noted by the Courts of this Commonwealth have three material requisites:

⁵ 1 Pa. Code § 35.173 provides:

Official notice of facts

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. Any participant shall, on timely request, be afforded an opportunity to show the contrary. Any participant requesting the taking of official notice after the conclusion of the hearing shall set forth the reasons claimed to justify failure to make the request prior to the close of the hearing.

- (1) the matter must be a matter of common and general knowledge;
- (2) it must be well and authoritatively settled; and
- (3) it must be known within the limits of the jurisdiction of the court. If there is uncertainty with respect to a matter in question, the court will not take judicial notice.

8 Standard Pennsylvania Practice 2d § 49.68 (1982); City of Philadelphia v. Pennsylvania Human Relations Commission, 684 A.2d 204 (Pa. Cmwlth. 1996). Clearly, the matter is not a matter of common and general knowledge. If it were common knowledge that the dress code affected employes' physical comfort, and therefore had a greater impact on employe terms and conditions of employment than the employer's interest, the parties would not be pursuing this charge before the Board. The matter is not well and authoritatively settled. PSSU presented no authority to this effect. The uncertainty of the matter is evidenced by the lack of Pennsylvania caselaw in this area. It is unlikely that a court would take judicial notice of this matter. As such, the Board declines to interpret the hearing examiner's determination as a matter that was officially noticed. PSSU did not meet its burden of proving that the policy had any impact upon employe terms and conditions of employment, and the Board will not accept the hearing examiner's determination in lieu of substantial and legally credible evidence.

Conversely, the Commonwealth submitted legally credible evidence that the office attire policy is directly related to its mission of effectively and efficiently serving the public. The record supports the Commonwealth's argument that the CAO has a substantial interest in the professional delivery of services, and that appropriate office attire by employes who deal with the public furthers that interest. Mr. Witmer testified that clients of the CAO rely on the caseworkers to be professional and to conduct themselves in an appropriate manner, and that the CAO wants to instill confidence in their clients that they are getting professional social services from the caseworkers and DPW. (N.T. at 64-66). He further explained that CAO employes not only meet with clients in the office, but that they also meet with community service agencies such as United Way and Red Cross. The CAO is concerned that the employes' will send a negative message to such agencies and the community about the CAO and DPW if they are dressed in halter tops, tight, revealing clothes and cutoff jeans. (N.T. 67). Mr. Nowak testified that caseworkers must dress appropriately not only because they interact with the general public, clients, lawyers, social service agencies, but because they provide workshops where they instruct clients regarding grooming, appearance and appropriate dress for the workplace. (N.T. 80-82). After a thorough review of the record, the Board finds substantial legally credible evidence to support the Commonwealth's position that the dress code policy is a matter of managerial prerogative that relates to the CAO's mission of effectively and efficiently serving the public. The record supports the Commonwealth's argument that the CAO has a substantial interest in the professional delivery of services, and that appropriate office attire by employes who deal with the public furthers that interest. There is no evidence to support that the dress code policy's impact on employes outweighs the

employer's interests. State College, supra. The employer is therefore not required to bargain over the impact of the policy on its employes.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the exceptions and vacate the proposed decision and order consistent with the above discussion.

CONCLUSIONS

That CONCLUSIONS numbers 1 through 3 as set forth in the Proposed Decision and Order are hereby affirmed and incorporated herein by reference and made a part hereof.

That CONCLUSION number 4 of the Proposed Decision and Order is vacated and set aside.

5. That the Commonwealth has not committed unfair practices within the meaning of Section 1201(a)(1) and (a)(5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the above case number be and the same are sustained, that the Order of page 8 of the Proposed Decision and Order be and the same is hereby vacated and set aside.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the charge of unfair practices at Case No. PERA-C-98-353-E is dismissed and the complaint issued thereon is rescinded.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of December, 1999. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

DISSENT BY MEMBER L. DENNIS MARTIRE

I dissent from the view of the majority and find that the result is an unwarranted expansion of managerial prerogative. I would find the written codification of the dress code at issue here to be a mandatory subject of collective bargaining.