

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES UNION, :  
LOCAL 668, SEIU, AFL-CIO :  
 :  
v. : Case No. PERA-C-01-463-E  
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COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF PUBLIC WELFARE :

**FINAL ORDER**

On November 28, 2001, the Pennsylvania Social Services Union, Local 668, SEIU, AFL-CIO (PSSU) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions to a November 16, 2001 decision of the Secretary declining to issue a complaint on PSSU's October 26, 2001 Charge of Unfair Practices against the Commonwealth of Pennsylvania, Department of Public Welfare (Commonwealth). Pursuant to an extension of time granted by the Secretary, PSSU filed a timely brief in support of its exceptions on December 20, 2001.

In the Charge, PSSU alleged that the Commonwealth violated PERA when it (1) established a Reasonable Dress Standard (RDS) for its County Assistance Offices (CAOs); (2) clarified the requirements for employee requests for exemption from the RDS; (3) required employees to provide medical documentation for exemption from the RDS; (4) infringed upon the employees' right to privacy; (5) issued discipline when it determined that employees did not provide sufficient medical documentation for noncompliance with the RDS.

In deciding whether to issue a complaint, the Board "assume[s] the factual assertions set forth in the 'Specification of Charges' to be true [and] match[es] the allegations with the unfair practices charged . . . to determine if the allegations would clearly establish a prima facie case if true." PSSU, Local 558 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978). See also, Bittner v. Schaper and State College Area Sch. Dist., 31 PPER ¶ 31018 (Final Order, 1999). The Secretary declined to issue a complaint on PSSU's Charge because "it has already been established that the Commonwealth did not violate PERA by establishing a reasonable standard of dress for its CAOs." (Secretary's decision, p.1.) The Secretary relied on the Commonwealth Court's affirmance of a Board Final Order, wherein the Court held that the dress code "which outlines specific minimum standards of appropriate attire, is appropriately within the employer's managerial prerogative and is not subject to collective bargaining." PSSU, Local 668 of SEIU, AFL-CIO v. PLRB, 763 A.2d 560 (Pa. Cmwlth. 2000), affirming, PSSU v. Commonwealth of Pennsylvania (Department of Public Welfare), 31 PPER ¶ 31020 (Final Order, 1999). While in its brief, PSSU asserts that the Secretary erred, it does concede that "[t]he Commonwealth's decision to implement a dress code was a lawful exercise of its managerial prerogative." (PSSU, Br. at 6.) PSSU further acknowledges that "establishing the means by which employees may seek exemption from the dress code may be within the Commonwealth's managerial prerogative . . ." (PSSU, Br. at 7.) PSSU first argues that the Commonwealth violated its bargaining obligations by refusing to bargain over the "demonstrable impact on wages and working conditions, matters that are severable from the managerial decision" (PSSU, Br. at 6) and that "it is the

means for obtaining an exemption, rather than the actual decision, that has the greatest impact upon the employees." (PSSU, Br. at 8.)

It is settled that the Commonwealth "had a substantial interest in the professional delivery of services which substantially outweighed the impact of the [dress code] on the employees." PSSU v. PLRB, 763 A.2d at 563. Thus, the Commonwealth's managerial interests outweighed the employees' interest in wearing "halter tops, t-shirts and sweatshirts bearing slogans, shorts, tattered jeans and sneakers." Id. If the Commonwealth was acting within its managerial prerogative when it established the dress code in the first place, it is reasonable to suggest that it was likewise acting within its managerial prerogative when it required its employees seeking exemption from the dress code for medical reasons, to provide medical documentation. PSSU contends that the means by which employees are required to obtain the exemption is a separate negotiable impact of the managerial prerogative. The Board has held that the impact of an exercise of managerial prerogative may present a bargaining duty under the following circumstances: first, the employer must lawfully exercise its managerial prerogative; second, there must be a demonstrable impact on wages, hours and working conditions, matters that are severable from the managerial decision; third, the union must demand to negotiate these matters following management's implementation of its prerogative; fourth, the employer must refuse the union's demand. Lackawanna County Detectives Ass'n v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000).

Our review of the Charge as amended in the exceptions leads to the conclusion that PSSU has failed to state a cause of action under the second element. Rather than setting forth factual allegations of a demonstrable, severable impact to support its Charge, PSSU argues that "the second element can only be demonstrated through evidence and testimony obtained through a full hearing." (PSSU, Br. at 6.) However, the Board will not issue a complaint absent factual, rather than conclusory, allegations that would support a prima facie case if true. In its Charge, PSSU asserted that employe Anne Mates, who was under doctor's orders to wear "white Reebok Classics" at work, was given an oral reprimand for noncompliance with the CAO RDS policy.<sup>1</sup> In the original dress code case, both the Board and the Commonwealth Court approved a dress code which provided that:

[e]mployees wearing unacceptable attire will be subjected to the following:

- (1) First occurrence - Advised that their attire is inappropriate for our office setting . . .
- (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.

PSSU v. Commonwealth, 31 PPER ¶ 31020, p.50, n.1 (Final Order, 1999). The Court further explained that the dress policy "plainly delineates the directives of the employer and is neither vague nor overbroad" and "the

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<sup>1</sup> We note that the RDS provides (Charge, Attachment B) that the Commonwealth may, at its expense, provide for further medical examinations to verify the medical necessity in a particular situation. However, it is not known on the basis of the Specification of Charges whether this option was utilized in the two examples provided by PSSU.

parties' collective bargaining agreement delineates their negotiated disciplinary system and the [dress code] does not alter or conflict with that agreement." PSSU v. PLRB, 763 A.2d 563. The fact that Ms. Mates, subsequent to the lawful promulgation of the RDS, was given an oral reprimand for noncompliance, does not set forth a prima facie case for a refusal to bargain charge of unfair practices. To the contrary, it establishes that the Commonwealth followed the disciplinary scheme already approved by both the Board and the Commonwealth Court for noncompliance with the dress code. In its exceptions, PSSU further alleges that a "diabetic was not permitted to wear the footwear ordered by her doctor because management was not satisfied that the footwear was necessary." (PSSU, Br. at 8.) Anytime an employer requires documentation to support an employee's claim, the employer is placed in the position of evaluating the sufficiency of that documentation. In Fraternal Order of Police Lodge 9 v. City of Reading, 27 PPER ¶ 27259 (Final Order, 1996), the Board sanctioned the employer's policy of requiring its employees to provide information concerning their secondary employment so that the employer could approve or disapprove of that employment. The Board concluded that the impact on the employees of providing the information did not outweigh the employer's interests in enforcing its work rules. Likewise, the impact on CAO employees required to provide medical documentation to support an exemption is not outweighed by the Commonwealth's interests in enforcing its RDS policy. The decision to allow exemptions from the policy for medical reasons is not severable from the requirement that such medical reasons be substantiated with documentation. Further, any individual applications of discipline following lawful implementation of a broad standard, such as the oral reprimand of Ms. Mates, are more appropriately addressed through the parties' negotiated grievance procedure. See PLRB v. Commonwealth of Pennsylvania, Governor Dick Thornburgh, 13 PPER ¶ 13097 (Final Order, 1982)(if there is a wrongful discharge or discipline by the employer in an individual case, employees have grievance procedures available) aff'd, AFSCME v. PLRB, 479 A.2d 683 (Pa. Cmwlth. 1984).

The circumstances of this filing amply demonstrate the soundness of this approach because there are myriad variations of medical conditions, temporary and long term therapies and their impact on an employee's ability to work and under what circumstances, which are fact driven and should be addressed on a case by case basis, rather than through an attempt to tailor the basic ground rule to accommodate all situations. In the end, the Commonwealth, in evaluating the medical documentation submitted by employees and in deciding individual exemptions, must be guided by its duty to have adequate cause for discipline under the contract in lieu of further medical examination under the terms of the RDS. Obviously under such circumstances, a rule of reason must be applied. For example, page 2 of the RDS addresses other types of footwear in lieu of sneakers "more in keeping" with professional office attire. It is not uncommon following foot surgery or similar medical treatments for patients to wear a surgical boot and thereafter a sneaker for a brief period during recuperation. The therapeutic value of a sneaker under such circumstances is its comfort during an important period of recuperation and would hardly be the time for breaking in a new pair of shoes because they would appear "more in keeping" with office attire.

PSSU next argues that the Commonwealth's exemption policy alters the parties' negotiated sick leave policy by requiring a doctor's excuse to support an exemption from the RDS for medical reasons. The Board has held that sick leave policies and changes to sick leave policies are mandatory subjects of bargaining, because sick leave impacts more heavily on employees'

wages, hours and terms and conditions of employment than on the basic direction of the employer's enterprise so as to constitute a matter of managerial prerogative. Cleona Borough Police Officers Ass'n v. Cleona Borough, 28 PPER ¶ 28065 (Final Order, 1997). However, it has already been established that the impact of the dress code on the employees' interests does not outweigh the Commonwealth's "substantial interest in providing professional services to the public." PSSU v. PLRB, 763 A2d at 563. The fact that the Commonwealth requires medical documentation from an employee claiming to be exempt from the RDS, does not mean that the Commonwealth has unilaterally altered the parties' negotiated sick leave policy, merely because that policy similarly "require[s] a doctor's excuse under certain circumstances." (PSSU, Br. at 8.) There exists an important distinction between the examples provided by PSSU of the negotiability of the need for a doctor's excuse after three days' absence (PSSU, Br. at 8) and the medical documentation required here. PSSU appropriately indicates the out-of-pocket costs as one important factor in the negotiability of the former. An employee may legitimately be ill for three or more consecutive days with a debilitating illness that may require such duration for recovery, but may not be serious enough to require a doctor's care. In the latter situation, an employee alleging medical necessity for exemption will already be under a doctor's care and will be on notice pursuant to the RDS to obtain medical justification at that time and should incur no additional medical out-of-pocket expense. Further, as above-noted, the RDS provides for additional medical evaluation at the Commonwealth's expense and the Commonwealth assumes the risk of disciplining employees for noncompliance without adequate cause.

PSSU next argues that the Secretary erred in declining to issue a complaint on PSSU's Charge that the RDS exemption procedures infringe on the employees' right to privacy. The Board affirms the Secretary's conclusion that "whether or not such a requirement infringes on a constitutional right of privacy is not for this Board to decide, but for the Courts who are authorized and empowered to make the judgment as to the violation of constitutional privileges." (Secretary's decision, p.2)(citing PLRB v. Commonwealth of Pennsylvania, Governor Dick Thornburgh, *supra*). The Board is without power to attach a mandatory bargaining duty to a matter if it is not within the matters deemed negotiable under the test announced in PLRB v. State College Area Sch. Dist., 461 Pa. 494, 337 A.2d 262 (1975), wherein the Supreme Court interpreted the inter-relationship of Sections 701 and 702 of PERA and explained that:

[i]t 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.

Id., 461 Pa. at 507, 337 A.2d at 268. Although employees have a certain privacy concern under appropriate circumstances as a matter of working conditions, issues of constitutional rights to privacy are addressed in a court of appropriate jurisdiction and not before this Board. Further, "the rule has long been that where, as here, a party places his or her physical or mental condition in issue, the privacy right against disclosing private medical information is waived." Doe v. Workmen's Compensation Appeal Bd. (USAIR, Inc.), 653 A.2d 715 (Pa. Cmwlth. 1995). When a CAO employee attempts to attain exemption from the RDS for medical reasons, such as Ms. Mates or the diabetic referenced in PSSU's brief, that employee places his or her

physical condition at issue. Such an employee cannot claim an exemption from the RDS for medical reasons, and at the same time assert that the employer's request for documentation to substantiate that claim infringes on a privacy right. See also, Moses v. McWilliams, 379 Pa.Super. 150, 549 A.2d 950 (1988)(there is a qualified right to privacy in medical records and a reduced expectation of privacy as a result of filing personal injury suit), appeal denied, 521 Pa. 630, 558 A.2d 532 (1989).

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and affirm the decision of the Secretary declining to issue a complaint on PSSU's Charge of Unfair Practices.

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 be and the same are hereby dismissed, and the Secretary's decision declining to issue a complaint be and the same is hereby made absolute and final.

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 nineteenth day of February, 2002. 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.