

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LINCOLN UNIVERSITY CHAPTER :
AMERICAN ASSOCIATION OF UNIVERSITY :
PROFESSORS :
 :
 :
v. : Case No. PERA-C-05-574-E
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LINCOLN UNIVERSITY :

FINAL ORDER

Lincoln University (University) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on November 7, 2006, challenging a Proposed Decision and Order of October 19, 2006, in which the Hearing Examiner concluded that the University violated Section 1201(a)(5) of the Public Employe Relations Act (PERA) by instituting a new form of discipline without first negotiating with the Lincoln University Chapter of the American Association of University Professors (AAUP). The AAUP filed a brief in response to the exceptions on November 20, 2006.

Consistent with Section 9.04 of the Faculty By-Laws, incorporated into the collective bargaining agreement, since 2001, the University has sent a form to faculty members requesting them to indicate whether or not they engaged in outside employment, and on August 24, 2005, Grant D. Venerable, II, Ph.D., then Vice President for Academic Affairs, sent the outside remunerative activity forms to full-time faculty members. When Drs. Safford and Dade had not returned the forms, Dr. Venerable wrote to them on October 10, 2005, instructing them to return the outside remunerative activity forms within five days and indicate whether or not they held outside employment. When no forms were filed in response to the October 10, 2005 letters, those letters were then filed in Drs. Safford and Dade's Official Acedeme File (OAF) personnel files.

The AAUP then filed this Charge of Unfair Practices with the Board alleging that the University's requirement that the forms be returned was a mandatory subject of bargaining and violated past practices. In addition, the AAUP asserted that the University unlawfully disciplined Drs. Safford and Dade by placing the letters in their OAF personnel file since the manner of discipline imposed was not previously negotiated with the AAUP.

After hearing and submission of briefs, the Examiner weighed the respective interests of the University and the AAUP under the balancing test of Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), and concluded that requiring faculty members to return the outside remunerative activity forms was a managerial prerogative. However, the Examiner found that the placing of letters in the personnel files of faculty members who did not return the forms was a disciplinary policy, a mandatory subject of bargaining, and concluded that the University violated Section 1201(a)(5) of PERA when it unilaterally implemented this new policy by disciplining Drs. Safford and Dade by placing the letters in their personnel files. In doing so, the Examiner noted that no bargaining unit member has in the past been disciplined (by placement of the letters in OAF personnel files) for not returning the forms, and rejected the University's claim of a "sound arguable basis" for imposing discipline, finding that Article X of the collective bargaining agreement only addressed "adequate cause" for dismissals or denying a bargaining unit member permanent tenure, not lesser forms of punishment.

In its exceptions, the University argues that Article X of the contract, covering adequate cause for dismissal, of necessity includes any and all lesser forms of discipline. The University thus claims that it had a sound arguable basis in the contract to discipline Drs. Safford and Dade for refusing to return the outside remunerative activity forms by placing letters in their OAF personnel file.

Generally, although the employer's implementation of a work rule may be within its managerial prerogative, consequential matters of employe discipline are mandatory subjects for negotiation. Abington Transportation Association v. Abington School District, 19 PPER

¶19,067 (Final Order, 1988), *affirmed sub nom. Abington Transportation Association and Abington School District v. Pennsylvania Labor Relations Board*, 20 PPER ¶20,064 (Court of Common Pleas, 1989); *Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority*, 21 PPER ¶21007 (Final Order, 1989). If a disciplinary scheme has been negotiated in an existing collective bargaining agreement, when an employe violates a work rule, the employer is generally contractually privileged to impose discipline in accordance with the terms of the collective bargaining agreement. *Pennsylvania Labor Relations Board v. Commonwealth, Governor Dick Thornburgh*, 13 PPER ¶13097 (Final Order, 1982), *affirmed sub nom. American Federation of State County and Municipal Employees v. Pennsylvania Labor Relations Board*, 479 A.2d 683 (Pa. Cmwlth. 1984); *Jersey Shore Area Education Association v. Jersey Shore Area School District*, 18 PPER 18117 (Final Order, 1987).

Here, the collectively bargained for disciplinary scheme refers to dismissals from employment. However, the discipline imposed on Drs. Safford and Dade was the placement of the October 10, 2005 letters in their OAF personnel files. As recognized by the Examiner, placing letters in bargaining unit member's personnel files as a form of discipline was not arguably within the terms of the collective bargaining agreement to supersede a binding past practice of a disciplinary policy short of dismissals.

A past practice with regard to mandatory subjects of bargaining such as disciplinary policies, may be created by the parties' engaging in an accepted conduct that either 1) clarifies ambiguous contract language; 2) establishes a general rule; 3) creates or establishes a separate enforceable condition of employment; or 4) waives a specific contract term. *County of Allegheny v. Allegheny County Prison Employees Independent Union*, 476 Pa. 27, 381 A.2d 849 (1977). The credible testimony of Drs. Safford and Dade support a past practice where no discipline would be imposed for failure to return the outside remunerative activity forms. Indeed, the Examiner credited the testimony of Drs. Safford and Dade that since Dr. Venerable began "requiring" the return of the outside remunerative activity forms, Drs. Safford and Dade had not returned the form when they held no outside employment, and no discipline had been imposed on them for their prior observance of rules regarding the return of the form.¹

Until the discipline of Drs. Safford and Dade in 2005, the practice had been that there was no discipline for a faculty member's failure to report the fact that they had no outside employment. The binding past practice of not imposing discipline could not be unilaterally altered by the University without prior negotiation. Thus, by placing the October 25, 2005 letters in Drs. Safford and Dade's personnel files as a form of discipline without prior bargaining of that disciplinary policy with the AAUP, the University violated Section 1201(a)(5) of PERA. Accordingly, after a thorough review of the exceptions and all matters of record, the University's exceptions to the PDO are dismissed and the PDO is made absolute and final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that exceptions filed by Lincoln University are hereby dismissed, and the Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this nineteenth day of December, 2006. 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.

¹ Absent the most compelling of circumstances the Examiner's credibility determinations are conclusive on exceptions to the Board. *Mt. Lebanon Education Association v. Mt. Lebanon School District*, 35 PPER 98 (Final Order, 2004).