COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CORRECTIONAL INSTITUTION VOCATIONAL EDUCATION ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-05-544-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL	:	

PROPOSED DECISION AND ORDER

On November 22, 2005, the Correctional Institution Vocational Education Association/PSEA/NEA (CIVEA) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania, Pennsylvania Department of Corrections, Governor Edward Rendell, Secretary of Corrections Jeffrey Beard (Commonwealth), violated sections 1201(a)(2), 1201(a)(5), 1201(a)(6) and 1201(a)(9) of the Public Employe Relations Act (Act) by "issu[ing] an email to DOC Deputy Secretaries and DOC Superintendents changing the working conditions concerning institutional telephones in the CIVEA Teachers' classrooms." "This," according to CIVEA, "was done contrary to grievance settlements and without first meeting and discussing and negotiating the impact of the proposed changes with CIVEA[.]"[1] On December 22, 2005, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 7, 2006. The hearing examiner subsequently continued the hearing because of a scheduling conflict. On March 7, 2005, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On May 22, 2006, CIVEA filed a brief by mail, and the Commonwealth filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The Commonwealth operates a system of correctional institutions to securely house inmates for the protection of the public. In order to prevent inmates from making threats, deals and scams, the Commonwealth prohibits them from using telephones with access to and from outside the institutions. (N.T. 75, 85-86, 97-99, 109, 112-113)

2. CIVEA is the Board-certified exclusive representative of a bargaining unit that includes teachers employed by the Commonwealth to instruct inmates. (Case No. PERA-R-11,593-C)

3. For years prior to the Summer of 2005, teachers had telephones in their classrooms to make calls to and receive calls from outside the institutions while they were instructing inmates. The teachers used the telephones to transact work, to conduct union business and to maintain contact with their families. (N.T. 15-16, 18-22, 26, 30-37, 44-46, 50, 58, 74, 79-80, 89-90, 92-94, 129-131)

4. During the Summer of 2005, the Commonwealth installed a new telephone system at the State Correctional Institution at Mercer (SCI-Mercer). Teachers were no longer able to use the telephones in their classrooms to make calls to and receive calls from outside the institution. (N.T. 50)

5. CIVEA filed a grievance at SCI-Mercer. (N.T. 50-51)

6. By letter dated August 11, 2005, a representative of the Commonwealth (William R. Ponton) wrote to a representative of CIVEA (Sherry O'Rourke) regarding the grievance at SCI-Mercer as follows:

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[1] As framed, the charge does not state a cause of action under either section 1201(a)(2) or section 1201(a)(6). Accordingly, the Commonwealth cannot be found to have committee unfair practices under those sections.

"We propose to settle the referenced grievance as outlined below:

1. In reference to above grievance, management agrees to immediately assign all classroom telephones as Class 3 'Switchboard Operator Abilities' upon agreement and signature of all parties.

2. This settlement will resolve all issues encompassed in the grievance.

3. This settlement will neither establish precedent nor prejudice the rights of either party in any other matter.

If you agree to the above terms of settlement, please so indicate by signing below and returning the original to me as soon as possible. A signed copy will be provided for your Local's records."

(Association Exhibit 2)

7. On August 12, 2005, Ms. O'Rourke agreed to the proposed settlement. The Commonwealth has been in compliance with the grievance settlement ever since. (N.T. 50, 52; Association Exhibit 2)

8. By email dated November 8, 2005, Secretary Beard wrote to deputy secretaries, superintendents and superintendent secretaries as follows:

"It seems that every so often we have to revisit the whole issue of telephone security. Long standing Department policy does not permit direct dial out or in nor does it permit voice recognition access to outside lines on any telephone with inmate access. Thus phones in cell blocks (except secure control areas), classrooms, shops, food preparation areas and other such areas which may have telephones for intra-institutional business may not have access, in or out, of the secure perimeter of the facility. The reason for this longstanding policy is that inmates may gain access to the phones which then creates a whole host of potential security concerns which may put other staff or inmates in danger and/or adversely affect public safety. While voice recognition allows for some control there is no way that any one person can recognize the voice of all employees and this concern is even greater when the regular operator is off or otherwise unavailable.

It is well known that some facilities have been in violation of this policy and that voice recognition does not work because central office staff in doing spot checks have found violations of this policy and have been able to place outside calls. In such cases facilities have been advised to come into compliance with the policy.

More recently this issue has become the subject of a grievance at a facility over voice recognition access for teachers from the classroom. The fact that other facilities are not following this policy is making it difficult to defend the grievance. While arrangements should be in place to allow teachers to have access to a telephone with outside access from a secure area (such as an office) for business and other purposes no outside access should be permitted under any condition from a classroom.

Please advise me by 11/14/05 if you are in compliance with this long standing policy in your education department and other areas of your facility. If not where and how are you not in compliance and what is your plan of action to come into compliance. Please insure that you comply with any labor/management requirements in coming into compliance. I would further ask that you review all phones and faxes in your facility to ensure that you are complying with longstanding policy.

Deputy Secretaries and their staffs will be checking on compliance with this important security issue and Superintendents will be held responsible for any violations of institutional phone security. If you have any questions relative to how phone security is to operate do not hesitate to ask me or your regional Deputy."

(Association Exhibit 1)

9. Since November 8, 2005, teachers have had to use telephones in locations other than their classrooms to make calls to and receive calls from outside their institutions, with an attendant inconvenience of arranging for other employes to cover their classrooms when they do so and with an attendant delay of receiving messages that calls from outside the institution have been made to them. (N.T. 22-23, 26, 34-35, 47, 57-58, 61, 80-81, 84-85, 110-111, 118-120)

DISCUSSION

CIVEA has charged that the Commonwealth committed unfair practices under sections 1201(a)(2), 1201(a)(5), 1201(a)(6) and 1201(a)(9) of the Act by "issu[ing] an email to DOC Deputy Secretaries and DOC Superintendents changing the working conditions concerning institutional telephones in the CIVEA Teachers' classrooms." The email provides that "phones in . . . classrooms . . . may not have access, in or out, of the secure perimeter of the facility" (finding of fact 8). "This," according to CIVEA, "was done contrary to grievance settlements and without first meeting and discussing and negotiating the impact of the proposed changes with CIVEA[.]" In its brief, however, CIVEA does not contend that the Commonwealth committed unfair practices by issuing the email contrary to multiple grievance settlements and without meeting and discussing and negotiating the impact of proposed changes; rather, CIVEA only contends that the Commonwealth committed unfair practices by issuing the email unilaterally and contrary to a grievance settlement at SCI-Mercer.

The Commonwealth contends that the charge should be dismissed because it changed a matter of inherent managerial policy rather than a term and condition of employment when it issued the email, because it is not in violation of the grievance settlement at SCI-Mercer and because CIVEA never requested to meet and discuss.

Turning first to the charge that the Commonwealth committed unfair practices by unilaterally issuing the email, it is noted that an employer commits an unfair practice under section 1201(a)(5) if it unilaterally changes a term and condition of employment, Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978), but not if it unilaterally changes a matter of inherent managerial policy. Joint Bargaining Committee of PSSU and PESEA v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983). It also is noted that the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), is to be applied to determine if an employer has changed a term and condition of employment or a matter of inherent managerial policy. As the court held in that case:

> "where an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy. 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."

461 Pa. at 507, 337 A.2d at 268.

Application of the State College balancing test to the facts of record leads to the conclusion that the Commonwealth changed a matter of inherent managerial policy rather than a term and condition of employment when it issued the email. As set forth in finding of fact 1, the record shows that the Commonwealth operates a system of correctional institutions to securely house inmates for the protection of the public and that in order to prevent inmates from making threats, deals and scams the Commonwealth prohibits them from using telephones with access to and from outside the institutions. As set forth in finding of fact 9, the record shows that since the Commonwealth issued the email teachers

have had to go from their classrooms to other locations to make calls to and receive calls from outside their institutions, with an attendant inconvenience of arranging for other employes to cover their classrooms when they do so and with an attendant delay of receiving messages that calls from outside the institution have been made to them. Notably, then, employes still may make calls to and receive calls from outside their institutions, albeit at a different location with the attendant inconvenience of finding another employe to cover their classrooms and with the attendant delay of receiving messages that calls from outside the institution have been made to them, so the impact of the email on their terms and conditions of employment is nominal. By contrast, the probable effect of the email on the basic policy of the system as a whole is substantial in that a ban of the use of telephones in the classrooms to make calls to and receive calls from outside an institution limits the means by which inmates may make threats, deals and scams. Thus, the impact of the email on employe terms and conditions of employment does not outweigh its probable effect on the basic policy of the system as a whole. Accordingly, the Commonwealth did not commit unfair practices by unilaterally issuing the email.

On a substantially similar record in Upper Southampton Township, 36 PPER 112 (Final Order 2005), the Board found that an employer did not change a term and condition of employment when it imposed a policy that prohibited cell phone usage by employes during work time except in emergencies, in which case employes had to report their cell phone usage to the employer. Applying the State College balancing test, the Board found that "the only impact the new policy has on the bargaining unit members who use their cellular or landline telephones during an emergency is the requirement that they inform their department head of this use." 36 PPER at 321. The Board reasoned that "[t]his impact is at most nominal and does not outweigh the [employer's] legitimate managerial prerogative of directing their personnel during assignment hours." Id.

CIVEA contends that application of the State College balancing test is not necessary because the Commonwealth changed a past practice of long-standing and because a matter involving employe security is a mandatory subject of bargaining. The fact that the Commonwealth changed a past practice is irrelevant standing alone, however, because an employer only commits an unfair practice under section 1201(a)(5) if it changes a term and condition of employment. Appeal of Cumberland Valley School District, supra; Joint Bargaining Committee of PSSU and PESEA, supra. Thus, it is necessary to apply the State College balancing test to determine if the past practice involved a term and condition of employment or a matter of inherent managerial policy. See also Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 3 (Final Order 2005), where the Board explained that the State College balancing test had to be applied to determine if a past practice changed by the Commonwealth involved a involved a term and condition of employment or a matter of inherent managerial policy. Moreover, the interest of employes in their own security is not at issue here.[2] CIVEA's contention is, therefore, without merit.

CIVEA alternatively contends that application of the State College balancing test to the facts of records leads to the conclusion that the Commonwealth changed a term and condition of employment rather than a matter of inherent managerial policy. CIVEA posits that "[t]o the extent that a balancing test is appropriate, the balance must tip heavily in favor of the union position" (brief at 15). According to CIVEA,

> "[o]n the Association's side of the balance beam, the evidence is very clear that the restriction on telephone access during work hours has both a significant and adverse impact on the individual members of the bargaining unit. For some, it has significantly restricted the way in which they do their assigned tasks in that they are no longer able to make work-related calls while in their classroom – requiring them to make work-related calls during other non-scheduled or non-duty times. For others, the restrictions have adversely affected their otherwise preexisting ability to receive information about and respond to individual personal or family exigencies as they arise. For others, who are associated with the management and operation of CIVEA at both the local and statewide level, the

[2] Even if the security of employes was at issue here, the record shows that the telephones in the classrooms may be used to call inside the institutions for security (N.T. 84), so it is apparent that the email had no impact on the security of employes.

> restrictions have adversely affected their ability to interact with both union and employer representatives in the handling and settlement of grievances and other related issues."

Brief at 16. Noting that the Commonwealth did not establish that it ever had a problem with inmates using telephones in the classrooms to make calls to or receive calls from outside the institutions, CIVEA also submits that "the Commonwealth's 'security concerns' have no basis in reality" (brief at 15). Citing Monessen School District, 35 PPER 33 (Proposed Decision and Order 2004), for the proposition that a distinction is to be made between incoming and outgoing telephone calls, CIVEA further submits that whatever security interest the Commonwealth may have relates more to outgoing than incoming telephone calls. In addition, CIVEA submits that Upper Southampton Township, supra, is inapposite because "this is not a cell phone case" (brief at 14).

Again, CIVEA's contention is without merit. In Joint Bargaining Committee of PSSU and PESEA, supra, the court held that an employer has the managerial right to increase the work load of its employes, so the fact that the email has adversely affected the ability of employes to complete their work assignments during work hours is irrelevant. See also Bangor Area School District, 33 PPER ¶ 33088 (Final Order 2002), where the Board explained that a managerial decision affecting the work load of employes is only subject to impact bargaining. Although employes have an interest in maintaining contact with their families, the impact of the email on their interest in that regard is, as noted above, nominal. In Ellwood City Police and Wage and Policy Unit v. PLRB, 736 A.2d 707 (Pa. Cmwlth. 1999), the court held that an employer has the managerial right to prohibit employes from conducting union business during work hours, so the fact that the email has adversely affected the ability of employes to conduct union business during work hours is irrelevant. See also Upper Southampton Township, supra, where the Board explained that the fact that the cell phone policy adversely affected the ability of employes to conduct union business during work hours was irrelevant. Under the State College balancing test, the Board is to consider a matter's "probable effect on the basic policy of the system as a whole," 461 Pa. at 507, 337 A.2d at 268, not its actual effect on the basic policy of the system as a whole, so the fact that the Commonwealth did not establish that it ever had a problem with inmates using telephones in the classrooms to make calls to or receive calls from outside the institutions is irrelevant. See also PSSU v. PLRB, 763 A.2d 560 (Pa. Cmwlth. 2000), where the court held that the Commonwealth had the managerial right to impose a dress code even though the record did not show that the Commonwealth had a problem with how employes dressed; Upper Southampton Township, supra, where the Board found the cell phone policy to be a matter of inherent managerial policy even though the record did not show that the employer had a problem with employes using cell phones during work hours. As noted above, the impact of the email on the basic policy of the system as a whole is substantial. Accordingly, application of the State College balancing test to the facts of record does not does not lead to the conclusion that the Commonwealth changed a term and condition of employment rather than a matter of inherent managerial policy.

Nothing in Monessen School District, supra, suggests otherwise. Indeed, given that the telephones in the classrooms may be used for both incoming and outgoing calls, the fact that the Commonwealth's security interest relates more to outgoing than incoming telephone calls is hardly noteworthy. See also Upper Southampton Township, supra, where the Board in finding the cell phone policy to be a matter of inherent managerial policy made no attempt to distinguish between incoming and outgoing calls. Moreover, the analysis set forth in Upper Southampton Township is wholly applicable here, so CIVEA's attempt to distinguish it on the facts is unavailing. See also City of Reading, 30 PPER ¶ 30121 at 262 (Final Order 1999), where the Board opined that "[d]isruption of one's personal life is an inevitable consequence of employer direction of the work force[.]" 30 PPER at 262.

CIVEA contends that the Commonwealth nevertheless committed unfair practices when it issued the email because the email is not narrowly tailored to meet the Commonwealth's security interest. CIVEA points out that the record shows that an IT manager was able to access an outside line from a telephone in a classroom by entering a code (N.T. 39-40) and submits that an electronic measure of that sort would more than meet the Commonwealth's security interest. CIVEA cites Abington Transportation Association v. Abington School District, 18 PPER ¶ 18188 (Proposed Decision and Order 1987), 19 PPER ¶

19067 (Final Order 1988), aff'd sub nom. Abington Transportation Association v. Commonwealth of Pennsylvania, PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990), for the proposition that in order to be a matter of inherent managerial policy a work rule must be narrowly tailored to meet the employer's needs.

Again, CIVEA's contention is without merit. It should be apparent that access codes may be compromised. Moreover, the record does not show that an access code would meet the Commonwealth's security interest in prohibiting inmates from receiving calls from outside the institutions. There is, therefore, no basis for finding that the Commonwealth's security interest would be served by anything less than an absolute ban on the use of telephones in the classroom to make calls to and receive calls from outside the institutions.

Turning next to the charge that the Commonwealth committed unfair practices by issuing the email contrary to the grievance settlement at SCI-Mercer, it is noted that an employer commits an unfair practice under section 1201(a)(5) if it refuses to comply with a grievance settlement. Moshannon Valley School District v. PLRB, 597 A.2d 229 (Pa. Cmwlth 1991). It also is noted that the record shows that the Commonwealth is in compliance with the settlement agreement at SCI-Mercer (finding of fact 6). Accordingly, the Commonwealth did not commit unfair practices as charged. East Stroudsburg School District, 29 PPER ¶ 29230 (Final Order 1998)(no violation of section 1201(a)(5) occurred where the employer was in compliance with a grievance settlement).

CIVEA contends that the Commonwealth is not in compliance with the settlement agreement at SCI-Mercer because it issued the email to avoid the application of that settlement at other institutions. As set forth in finding of fact 6, however, the record shows that the settlement agreement "neither establish[es] precedent nor prejudice[s] the rights of either party in any other matter." Thus, by the express terms of the settlement agreement, the Commonwealth was under no obligation to apply it to any other institution. CIVEA's contention is, therefore, without merit.

Turning last to charge that the Commonwealth committed unfair practices by issuing the email without meeting and discussing and without negotiating the impact of proposed changes, it is noted that any contention not presented to a hearing examiner is waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). CIVEA does not contend in its brief that the Commonwealth committed unfair practices by refusing to meet and discuss and by refusing to impact bargain, so any contention that the Commonwealth committed such unfair practices is waived.

In any event, the record does not show that the Commonwealth committed any such unfair practices. An employer is only obligated to meet and discuss upon request, State College Area School District, supra, and is only obligated to impact bargain upon request, Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001), but the record does not show that CIVEA ever requested to meet and discuss or to impact bargain. There is, therefore, no basis for finding that the Commonwealth refused to meet and discuss or to impact bargain. Upper St. Clair School District, 29 PPER ¶ 29194 (Proposed Decision and Order 1998)(no violation of section 1201(a)(9) occurred where there was no request to meet and discuss); Reading School District, 36 PPER 53 (Final Order 2005)(no violation of section 1201(a)(5) occurred where the union did not make a proper request to impact bargain).

CONCLUSIONS

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

1. The Commonwealth is a public employer under section 301(1) of the Act.

2. CIVEA is an employe organization under section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

4. The Commonwealth has not committed unfair practices under sections 1201(a)(2), 1201(a)(5), 1201(a)(6) and 1201(a)(9) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this nineteenth day of June 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

Direct Dial
717-783-6025

Fax Number
717-783-2974

June 19, 2006

Thomas W. Scott, Esquire
KILLIAN & GEPHART LLC
218 Pine Street
PO Box 886
Harrisburg, PA 17108-0886

Keith A. Herbster, Esquire
Assistant Counsel
Commonwealth of Pennsylvania
Office of Administration, Legal Office
405 Finance Building
Harrisburg, PA 17120

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS ET AL
Case No. PERA-C-05-544-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Frank Fisher, Esquire
Timothy Musser
Marc C. Kornfeld
Donald Adams
Jeffrey A. Beard
Honorable Edward Rendell