

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FAIRFIELD EDUCATION ASSOCIATION PSEA/NEA :
:
v. : Case No. PERA-C-06-319-E
:
FAIRFIELD AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On July 14, 2006, the Fairfield Education Association, PSEA/NEA (Association), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Fairfield Area School District (District) violated sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (Act) by unilaterally "promulgat[ing] a memorandum addressing the issue of absences or leave from work." On August 16, 2006, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October 19, 2006, if conciliation did not resolve the charge by then. The hearing examiner thereafter continued the hearing upon the request of both parties. On January 24, 2007, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. Each party made a closing argument. Neither party reserved the right to file a brief. On March 14, 2007, the notes of testimony from the hearing were filed with the Board.

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. On December 11, 1970, the Board certified the Association as the exclusive representative of a bargaining unit that includes teachers employed by the District. (Case No. PERA-R-297-C)
2. Prior to March 21, 2006, teachers at the District's elementary school notified a secretary of their plans to use sick leave for a medical appointment. They did not obtain the approval of the principal or of the superintendent before they used the leave. On the day they used the leave, the secretary placed in their mailboxes a form for them to fill out upon their return. Upon their return, they filled out the form. (N.T. 15-19, 82; Association Exhibit 1)
3. Prior to March 21, 2006, a teacher at the District's middle school (Rodger Benner) verbally requested approval from his principal (Beth Bender) before he used sick leave for a medical appointment. He was not required to obtain the approval of the superintendent before he used the leave. (N.T. 90-92, 106)
4. Prior to March 21, 2006, teachers at the elementary school verbally requested approval from the principal before they used emergency and bereavement leave. (N.T. 21-23)
5. Prior to March 21, 2006, Mr. Benner obtained the approval of Ms. Bender before he used bereavement leave. (N.T. 92-93, 100, 110)
6. Prior to March 21, 2006, teachers at the elementary school notified the principal when they needed to use short-term leave at the end of the day to attend a medical appointment. They used such leave during administrative, non-instructional and instructional time. They did not always make up the time. (N.T. 27-30, 34-35, 38-40)
7. Prior to March 21, 2006, teachers at the elementary school notified the principal verbally if they were not able to attend a mandatory faculty meeting. They were not required to make up the time. (N.T. 43-44)
8. By memorandum dated March 21, 2006, the District's superintendent (Dr. Gary A. Miller) wrote to "All Professional Staff" as follows:

"This memo is provided as a guide to professional staff and administrators who seek to take time off from their professional duties.

Normal Business Hours: A Time Away from Work Form is to be used when seeking time away from normal working hours during the school year. This includes time used from the start of the official day to the end of the day. This form must be submitted by the employee, recommended by the immediate supervisor, and authorized by the Superintendent. If the employee receives an approved copy back with the required signatures he/she is excused from work. The employee does not have to make up the time.

Exceptions to pre-approval are unplanned sick leave; emergencies and bereavement leave all require immediate supervisor notification. Final approval will be determined after the fact by the Superintendent.

Short Term Absences During Normal Hours - Non Instructional Time Only: The 'Blue Form' is for use during administrative time and non-instructional time. It requires an immediate supervisor recommendation and the Superintendent's approval. The approved copy must be in the employee's hands before leaving. The employee must make-up the time.

Absence from Mandated Faculty Meetings: This meeting must be made up regardless of the reason for absence. The employee must get approval from the building principal and make-up the time as agreed upon. There is no form for this action. The building principal must maintain a log and submit a yearly attendance log with attendance and make-up records to the Superintendent by May 15th annually.

Note: Exceptions are to be presented to the immediate supervisor who will contact the Superintendent for direction."

(N.T. 111, 115; Association Exhibit 2)

9. The District did not bargain the memorandum with the Association. (N.T. 49)

DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1) and 1201(a)(5) by unilaterally "promulgat[ing] a memorandum addressing the issue of absences or leave from work." As set forth in the specification of charges, the Association alleges that the memorandum "imposed additional conditions on the use of leave time" as follows:

"[1] with the exception of unplanned sick leave, a form must be submitted by the employees prior to the time that leave is taken; [2] with the exception of unplanned sick leave, employees must obtain pre-approval in writing for the use of their leave time from their immediate supervisor and the superintendent in order to be excused from work; [3] employees who wish to use their emergency or bereavement leave are required to provide immediate notification to their supervisor and to obtain the approval of the superintendent after the fact; [4] employees who require a brief, short term absence from the workplace during their non-instructional time of the work day must submit a form and obtain pre-approval in writing from their immediate supervisor and the superintendent before leaving, [5] such brief, short term absences from the workplace during the work day are limited to administrative time and non-instructional time only; and [6] if employees are unable to attend, for any reason, a mandated faculty meeting, they must obtain the approval of the building principal."¹

According to the Association, the District was under an obligation to bargain before it imposed those conditions because employee use of leave is a mandatory subject of bargaining.

¹ The numbers have been added by the hearing examiner for ease of analysis.

The District contends that the charge should be dismissed because it did not change past practice when it issued the memorandum, because any changes to past practice involved matters of inherent managerial policy, because it has the contractual right to approve or disapprove leave and because the Association did not request bargaining.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it violates its statutory obligation to bargain by unilaterally changing a mandatory subject of bargaining. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). No violation of the statutory obligation to bargain may be found, however, if there has been no change to past practice, Clarks Summit Borough, 29 PPER ¶ 29216 (Final Order 1998), if the change was to a matter of inherent managerial policy, Joint Bargaining Committee of PSSU and PESEA v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983), or if the employer was contractually privileged to make the change. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). In order to meet its statutory obligation to bargain, an employer must request bargaining and bargain with the exclusive representative of its employees before making the change. Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006).

Employee use of leave is a mandatory subject of bargaining, Fairview School District, 22 PPER ¶ 22135 (Final Order 1991); Greater Johnstown School District, 19 PPER ¶ 19112 (Final Order 1988); Richland School District, 2 PPER 195 (Nisi Decision and Order 1972), so the charge must be sustained unless the District did not change past practice when it issued the memorandum or met its obligation to bargain before it issued the memorandum.

In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the court defined a past practice as follows:

"A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the [parties] involved as the *normal* and *proper* response to the underlying circumstances presented."

476 Pa. at 34 n. 12, 381 A.2d at 852 n. 12 (emphasis in original).

As set forth in findings of fact 2-3, the record shows that before the District issued the memorandum employees did not submit a form prior to using planned sick leave. As set forth in finding of fact 8, the record shows that the memorandum requires employees to submit a form prior to using such leave. Thus, the record shows that the memorandum changed past practice by requiring employees to submit a form prior to using planned sick leave.

As set forth in finding of fact 3, the record shows that before the District issued the memorandum an employee was not required to obtain the approval of the superintendent prior to using planned sick leave. As set forth in finding of fact 8, the record shows that the memorandum requires employees to obtain the approval of the superintendent prior to using such leave. Thus, the record shows that the memorandum changed past practice by requiring employees to obtain the approval of the superintendent prior to using planned sick leave.

As set forth in findings of fact 4-5, the record shows that before the District issued the memorandum employees used emergency and bereavement leave subject to the prior approval of a principal. As set forth in finding of fact 8, the record shows that the memorandum subjects their use of such leave to the approval of the superintendent after the fact. Thus, the record shows that the memorandum changed past practice by requiring employees to obtain the approval of the superintendent after using emergency and bereavement leave.

As set forth in finding of fact 6, the record shows that before the District issued the memorandum employees notified a principal when they used short-term leave at the end of a work day and that they did not always make up the time. As set forth in finding of fact 8, the record shows that the memorandum requires employees to obtain the approval of the superintendent prior to using such leave and to make up the time. Thus, the record shows that the memorandum changed past practice by requiring employees to obtain the approval of the superintendent prior to using short-term leave and to make up the time.

As set forth in finding of fact 6, the record shows that before the District issued the memorandum employees used short-term leave during instructional time. As set forth in finding of fact 8, the record shows that the memorandum limits such leave to administrative and non-instructional time. Thus, the record shows that the memorandum changed past practice by limiting the use of short-term leave to administrative and instructional time.

As set forth in finding of fact 7, the record shows that before the District issued the memorandum employees who were unable to attend a mandated faculty meeting notified a principal and were not required to make up the time. As set forth in finding of fact 8, the record shows that the memorandum requires that employees who are unable to attend a mandated faculty meeting must get the approval of the principal and make up the time. Thus, the record shows that the memorandum changed past practice by requiring employees who are unable to attend a mandated faculty meeting to get the approval of the principal and to make up the time.

As set forth in finding of fact 9, the record shows that the District did not bargain the memorandum with the Association.

On that record, it is apparent that the District unilaterally changed past practice and thus committed unfair practices in violation of sections 1201(a)(1) and 1201(a)(5) as charged. See Fairfield Area School District, supra (employer violated sections 1201(a)(1) and 1201(a)(5) when it unilaterally adopted a work rule regarding absence from class); Greater Johnstown School District, supra (employer violated sections 1201(a)(1) and 1201(a)(5) when it unilaterally imposed a condition on employee use of sick leave); Richland School District, supra (employer violated sections 1201(a)(1) and 1201(a)(5) by refusing to bargain over bereavement leave).

The District contends that the charge should be dismissed because the memorandum did not change past practice. The District points out that the form employees are required to submit to use leave was in existence well before it issued the memorandum (N.T. 113, 116-117), that the form itself required employees to obtain the prior written approval of the superintendent to use leave (School District Exhibit 3), that three employees obtained the prior written approval of the superintendent to use leave before it issued the memorandum (School District Exhibits 5-7) and that the standards for using leave did not change when it issued the memorandum (N.T. 116). The District cites Oil City Area School District, 34 PPER 31 (Proposed Decision and Order 2003), for the proposition that an employer is under no obligation to bargain when the procedures and standards for disciplining employees remain the same.

The District's contention is without merit. Where past practice differs from policy, past practice prevails. Stroudsburg Area School District, 24 PPER ¶ 24100 (Final Order 1993), aff'd, 24 PPER ¶ 24160 (Court of Common Pleas of Monroe County 1993). Thus, the fact that the form was in existence prior to the issuance of the memorandum and the fact that the form itself required employees to obtain the prior written approval of the superintendent to use leave are irrelevant because, as noted above, the record shows that past practice differed from policy. The fact that three employees followed policy in the past is irrelevant as well because the record shows that others did not. The fact that the standards for using leave did not change is equally irrelevant because, as noted above, the record shows that the procedures for using leave did change. Oil City Area School District is, therefore, distinguishable on the facts.

The District next contends that the charge should be dismissed because any changes to past practice involved matters of inherent managerial policy. The District cites Commonwealth of Pennsylvania, Department of Public Welfare, 33 PPER ¶ 33055 (Final Order

2002), for the specific proposition that an employer has the managerial right to evaluate the sufficiency of documentation an employee submits in support of a leave request. The District cites City of Reading, 27 PPER ¶ 27259 (Final Order 1996), for the general proposition that an employer has the managerial right to impose matters of inherent managerial policy unilaterally. Neither of those cases dealt with employee use of leave, however. In Commonwealth of Pennsylvania, Department of Public Welfare, the Board found that an employer was under no obligation to bargain over a requirement to submit medical documentation to support a request to be exempted from its dress code that it had the managerial right to impose unilaterally. In City of Reading, the Board found that an employer was under no obligation to bargain over a requirement to submit documentation regarding secondary employment that it had the managerial right to regulate unilaterally. Thus, neither of those cases is apposite, and the District's reliance on them is misplaced. Moreover, the District overlooks that in Fairfield Area School District, supra; Greater Johnstown School District, supra; and Richland School District, supra, the Board found that employee use of leave is a mandatory subject of bargaining. The District's contention is, therefore, without merit.

The District next contends that the charge should be dismissed because it has the contractual right to approve or disapprove leave. The District submits that support for its contention may be found in an arbitration award (School District Exhibit 2) and in section 3.6 of the parties' collective bargaining agreement, which provides in pertinent part as follows: "No Personal Leave shall be taken on the first five days or the last five days of student classes, except when approved by the Superintendent." (Association Exhibit 5). As the court explained in Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000):

"The [Board] has recognized 'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a refusal to bargain in good faith. The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible under the agreement. See [Ellwood City Police Wage and Policy Unit v. Ellwood City Borough], 29 PPER ¶ 29213 (Final Order 1998), aff'd, 736 A.2d 707 (Pa. Cmwlth. 1999)]; Delaware County Lodge #27 of the Fraternal Order of Police on behalf of the Members of the Police Force of the Borough of Prospect Park v. Prospect Park Borough, 27 PPER [¶] 27222 (Final Order 1996); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER [¶] 18117 (Final Order 1987)(quoting NCR Corp., 271 N.L.R.B. 1212 (1984) as saying that 'where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the NLRB will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct')."

761 A.2d at 651. The arbitration award and section 3.6 of the collective bargaining agreement reference approval by the superintendent for the use of personal leave during discrete time periods. As such, they hardly provide a sound arguable basis for contending that the District was contractually privileged to impose the wide variety of conditions on the use of leave as set forth in the memorandum. The District's contention is, therefore, without merit.

The District finally contends that the charge should be dismissed because the Association did not request bargaining. Although the record shows that the Association did not do so (N.T. 132), the obligation to request bargaining in a case of this nature is the employer's, not the exclusive representative's. Snyder County Prison Board, supra. Thus, the fact that the Association did not request bargaining is irrelevant. The District's contention, therefore, is without merit.

CONCLUSIONS

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

1. The District is a public employer under section 301(1) of the Act.
2. The Association is an employe organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. The District has committed unfair practices under sections 1201(a)(1) and 1201(a)(5) 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 District shall:

1. Cease and desist from interfering with, restraining or coercing employes 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 employes in an appropriate unit, including but 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 the Act:
 - (a) Rescind the March 21, 2006, memorandum;
 - (b) Make whole any employe who lost pay or benefits as the result of the issuance of the memorandum;
 - (c) 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
 - (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-eighth day of March 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FAIRFIELD EDUCATION ASSOCIATION PSEA/NEA :
 :
 v. : Case No. PERA-C-06-319-E
 :
 FAIRFIELD AREA SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and 1201(a)(5) of the Act, that it has rescinded the March 21, 2006, memorandum, that is has made whole any employe who lost pay or benefits as the result of the issuance of the memorandum, that it has posted the proposed decision and order as directed and that it has served an executed copy of this affidavit on the Association.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year aforesaid.

Signature of Notary Public