

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

MINERSVILLE AREA EDUCATIONAL :  
SUPPORT PERSONNEL ASSOCIATION :  
: :  
v. : Case No. PERA-C-09-7-E  
: :  
MINERSVILLE AREA SCHOOL DISTRICT :

**PROPOSED DECISION AND ORDER**

On January 12, 2009, the Minersville Area Educational Support Personnel Association (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Minersville Area School District (District) alleging that the District violated Sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

On February 6, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and April 20, 2009, in Harrisburg was scheduled as the time and place of hearing if necessary.

A hearing was necessary and was held as scheduled, at which times all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Association submitted a post-hearing brief on June 10, 2009 and the District did the same on June 29, 2009.

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

FINDINGS OF FACT

1. The Minersville Area School District ("District") is a public employer subject to the provisions of the Public Employe Relations Act, 43 P.S. § 1101.101, et. seq. ("the Act" or "PERA"). (N.T. 7.)

2. The Minersville Area Educational Support Personnel Association, PSEA/NEA ("the Association") is a public employe organization subject to the provisions of the Act. (N.T. 7.)

3. The Association is the exclusive bargaining representative for a unit of the District's nonprofessional employes as certified by the Pennsylvania Labor Relations Board in Case No. PERA-R-4295-C. (N.T. 8, Joint Exhibit 1)

4. The parties' collective bargaining agreement is for the term of October 22, 2007 to June 30, 2010. (N.T. 8, Joint Exhibit 1)

5. Under the CBA, the full-time custodians are guaranteed 40 hours per week and the part-time custodians are guaranteed 20 hours per week. (N.T. 76)

6. On September 14, 2008, the district unilaterally issued a weekend coverage schedule for custodial and maintenance employes which was to take effect on September 20, 2008. (N.T. 15-16, Joint Exhibits 2 and 3)

7. The newly-issued weekend coverage schedule required that full-time employes work two to four fewer hours during their customary Monday-Friday work week and work Saturdays and/or Sundays, both on a rotating basis. The weekend coverage schedule also required part-time employees to work two additional hours beyond their customary twenty-hour work week on the week that they were scheduled to work the weekend shift. (N.T. 16-18, 20, 37-38, 38-40, 44-51; Joint Exhibits 2 and 3)

8. In operation, the schedule deprived full-time custodial/maintenance employees of two to four hours of overtime for those weeks that an employee worked a weekend shift. During part-time employees' scheduled weekend shift, they gained two additional hours beyond the twenty (20) hours provided for part-time positions. (N.T. 16, 76)

9. Prior to issuing the new schedule requiring rotating weekend shifts, the District did not bargain with the Association. (N.T. 18, 22, 73, 78)

10. That prior to the change in weekend assignments, the District had been providing building maintenance and custodial work on weekends by paying overtime to a full time employee who volunteered for the assignment. Custodial coverage in the buildings is necessary to avert damages during the weekends, and is therefore a safety issue in the District's opinion. (N.T. 62-63)

11. On September 22, 2008, the Association filed a grievance protesting the district's unilateral change of hours. (N.T. 11, Joint Exhibit 5)

12. On October 10, 2008, Association President James Quinn and PSEA-NEA UniServ Representative Terry Burnett met with the district's superintendent, Michael J. Brady and High School Principal McBreen to discuss the pending grievance and underlying issues. (N.T. 22-24.)

13. At the October 10<sup>th</sup> meeting, Superintendent Brady advised Association President Quinn that he, along with two other employees, John Lazarchick and Joseph Krasinsky, would now work from 7:30 a.m. to 3:30 p.m., instead of 7:00 a.m. to 3:00 p.m. (N.T. 25.)

14. That same day, Superintendent Brady unilaterally issued a memorandum to the head custodian stating that, "In view of a recent discussion with the custodial association representative and the association president, an issue was raised relative to changing shifts. In light of this disagreement, until further notice, the custodians will remain on their assigned shift through all vacation periods." (N.T. 26, Joint Exhibit 6)

15. The effect of superintendent Brady's October 10, 2008, memorandum was that second shift custodial and maintenance employees would no longer be permitted to work the first shift during school vacation periods, thus deviating from the parties' established past practice which was in existence "for as long as [Mr. Quinn was employed at the District]" or for "almost 18 years." (N.T. 27-28.)

16. The Association filed a second grievance on November 25, 2008, protesting the change in Mr. Quinn, Mr. Lazarchick and Mr. Krasinsky's shift start times announced on October 10, 2008. (N.T. 36.)

17. The first grievance was withdrawn at the October 10<sup>th</sup> meeting with the District's administration and the second grievance was withdrawn on December 4, 2008. (N.T. 36-37.)

18. On December 3, 2008, PSEA-NEA UniServ Representative Terry Burnett filed a demand to bargain with the District over changes in bargaining unit members' hours on behalf of the Association. (N.T. 12, Joint Exhibit 8)

19. On December 16, 2008, the District, by and through Superintendent Brady, refused to bargain with the Association over any changes to work hours or schedules. (N.T. 12, 74, Joint Exhibit 9)

#### DISCUSSION

The first part of the Association's charge of unfair practices alleges that the District violated Sections 1201(a)(5) of PERA by unilaterally implementing a new weekend work schedule for full- and part-time custodial and maintenance employees without first bargaining with the Association.

The Association, as the complainant, bears the burden of proving the elements of the alleged violations by substantial and legally credible evidence. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A. 2d 1069 (1977). Substantial evidence means evidence that does more than just create a suspicion of the existence of the fact necessary to establish each element of the unfair practice charge. Township of Upper Makefield, 10 PPER ¶ 10299 (Nisi Order of Dismissal, 1979).

The first step in the analysis is to determine if the matter in dispute is a mandatory subject of bargaining under Section 701 of PERA, 43 P.S. 1101.701, which specifies the matters required to be submitted to bargaining as "wages, hours and other terms and conditions of employment." 43. P.S. 1101.701. In Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494,, 507 337 A.2d 262, 266 (1975)

"Thus we hold that 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.

337 A.2d 262, at 268

There is no dispute that the District failed to bargain with the Association before changing the schedule. The District defends its action by arguing that the management rights clause in the collective bargaining agreement gives it the right to assign and direct employes without having to first bargain changes in schedules with the Association.

However, broad management rights language, alone, cannot be used to justify unilateral employer decisions that impacts employes wages and hours. Commonwealth of Pennsylvania, Petitioner v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Board, 459 A.2d 452; (Pa. Cmwlth. 1983) Where the employer argues, as here, that the matter has been bargained by the parties and is therefore a Section 702 management prerogative, the Commonwealth Court in Commonwealth of Pennsylvania, id. stated that the proper interpretation of this provision as well as of PERA is to be mindful of balancing test in State College Area School District, supra.

The District argues that the State College balancing test for this case has been done in an earlier case involving the same parties, Minersville Area School District, 18 PPER ¶ 18025 (Final Order, 1986). The District cites this case as authority for justifying its unilateral decision in the present case.

In that earlier case, the Board held that the District was excused from bargaining over the decision to schedule certain custodians an afternoon/night shift (1:00 pm to 9:00 pm) in the summer. In that case, the Board held that the public employer was under no obligation to bargain a change in the times when employes began a new shift. Under the State College balancing test, the Board concluded that there was no impact on the employe's hours because they worked the same number of hours. Also, the Board reasoned that any impact on employes' wages was dealt with in the parties' collective bargaining agreement when the parties bargained a shift differential for working night shift. "The Employer's expressly reserved right to direct the work force in Section 702 is protected while at the same time he employes' Section 701 interest in hours and wages has been negotiated and agreed upon in the contract." 18 PPER ¶ 18026 at p. 78.

The facts of the present case are distinguishable from Minersville School District, supra. Here, the District altered the work schedules for an entire bargaining unit. By doing this, the decision changed the distribution of work between full time employes and part-time employes. The decision hurt the full-time employes by depriving them of two to four hours of overtime during those weeks when they were assigned to either Saturday or Sunday work. The decision helped the part-time employes by giving them two additional hours beyond the twenty (20) hours they were guaranteed.

More importantly, this decision directly impacted the wages of the full-time custodial/maintenance employes by removing the chance to get overtime pay for working

weekends. The decision also impacted the employees' personal lives by requiring them to work weekend days that would traditionally be spent with family and in worship.

As for the impact on the District's policy, the District asserts that the decision allowed the District to have a custodian on duty to maintain safety in the buildings on weekends when they would otherwise be vacant. However, this policy could have been achieved by simply continuing the prior practice of paying the custodians overtime to work in the buildings.

Reviewing all of the evidence and the opposing interests of the employees and the District, it is clear that this decision had a greater impact on employees' wages than on the management's policy of maintaining safe buildings. The District's unilateral decision constitutes a violation of its duty to bargain.

The second part of the Association's charge is the allegation that on October 10, the District unilaterally eliminated the longstanding past practice of permitting second shift custodial and maintenance employees to work on the first shift during school vacation periods. (Joint Exhibit 6). Unilaterally changing an established past practice without bargaining will constitute an unfair practice when the underlying subject of the practice is a mandatory subject of bargaining. Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order, 1987); District 1193, Nat'l Union of Hosp. & Health Care Employees v. Temple Univ., 23 PPER ¶ 23034 (Final Order, 1992), aff'd. 23 PPER 23094 (Ct. of Common Pleas, Phila. Cty., 1992)

Under Pennsylvania law, in order for a particular practice to constitute a past practice, it "must be shown to be an accepted course of conduct characteristically repeated in response to the given set of underlying circumstances." County of Allegheny v. Allegheny County Prison Employes Indep. Union, 476 Pa. 27, 381 A.2d 849 (1977). Regarding parties' acceptance of a practice, the Allegheny Court went on to note, "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 the [parties] involved as the normal and proper response to the underlying circumstances presented." Id.

The Board requires two conditions prior to finding that there has been a refusal to bargain over a change in past practice. There must be (1) an established past practice (2) regarding a term or condition of employment upon which the employer is obligated to bargain. Temple University, 23 PPER ¶ 23034, citing Ass'n of Mifflin Cty. Educators v. Mifflin Cty. Sch. Dist. 21 PPER ¶ 21117 (Final Order, 1990).

The Association has satisfied these two elements in the present case. The Association has proven that the parties have mutually agreed to the practice of permitting the second shift custodial and maintenance employees to work the first shift during school vacation periods. The practice has taken place for "almost 18 years." It is also clear that the parties practice concerns a mandatory subject of bargaining, employees' shift schedules during vacation. Hazleton Area School District, 15 PPER ¶ 15170 (Final Order, 1984).

The District's failure to bargain with the Association prior to the issuance of the October 10 memorandum concerning shifts on vacation days constitutes a violation of the District's duty to bargain.

Finally, the Association has also charged the District with violating Section 1201(a)(1) of PERA, which prohibits public employers from "interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act." 43 P.S. 1101.1201(a)(1). An independent violation of Section 1201(a)(1) of PERA occurs, "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employee in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employees have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER ¶ 97 (Final Order, 2004).

By that standard, reviewing the totality of the particular circumstances of the case, the decision to change the past practice of allowing second shift custodians to

work first shift on vacation days and the decision to start the work day a half hour earlier for Messrs, Quinn, Lazarchik and Krasinsky had a tendency to coerce the employees in the exercise of their rights. The timing of the decisions so close to the Association filing a grievance on behalf of the employees sent a message to discourage future grievance filings. This constituted a violation of Section 1201(a)(1) of PERA.

#### CONCLUSIONS

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

1. That the District is a public employer within the meaning of Section 301(1) of PERA.
2. That the Association is an employee organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the District has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA..

#### ORDER

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

#### HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering with restraining or coercing employees in the exercise of the rights guaranteed in Article IV of the Act.
2. Cease and desist from refusing to bargain with the employee representative which is the exclusive representative of the custodial and maintenance employees in the District.
3. Take the following affirmative action:
  - (a) Restore the schedules, hours and shift start times for the custodial and maintenance employees as they existed prior to September 14, 2008;
  - (b) 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 employees and have the same remain so posted for a period of ten (10) consecutive days.
  - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and
  - (d) Serve a copy of the attached affidavit of compliance upon the Association.

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this twentieth day of October, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner