

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

UNITED AUTO WORKERS INTERNATIONAL :  
UNION :  
 :  
v. : Case No. PERA-C-20-271-E  
 : PERA-C-20-273-E  
DELAWARE COUNTY :  
DELAWARE COUNTY PUBLIC DEFENDER'S :  
OFFICE :

**FINAL ORDER**

Delaware County and the Delaware County Public Defender's Office (collectively County) filed timely exceptions and supporting brief with the Pennsylvania Labor Relations Board (Board) on September 9, 2021, challenging a Proposed Decision and Order (PDO) issued on August 24, 2021.<sup>1</sup> The County excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally implementing a policy prohibiting attorneys from engaging in outside employment in a private law practice. The United Auto Workers International Union (Union) filed a response to the exceptions and supporting brief on September 29, 2021.

On November 13, 2020, the Union filed a Charge of Unfair Practices docketed at Case No. PERA-C-20-271-E, alleging that the County violated Section 1201(a)(1), (5) and (9) of PERA by unilaterally implementing an outside employment policy banning the attorneys of the Public Defender's Office from engaging in the private practice of law and failing to furnish requested documents concerning that policy. On November 18, 2020, the Union filed a second Charge of Unfair Practices docketed at Case No. PERA-C-20-273-E, alleging that the County had violated Section 1201(a)(1), (5) and (9) of PERA by unilaterally increasing the salaries of five new attorneys and failing to provide information concerning such increase to the Union.<sup>2</sup> The Secretary issued Complaints and Notices of Hearings in both charges, and the charges docketed at Case Nos. PERA-C-20-271-E and PERA-C-20-273-E were consolidated.

The hearing was held on May 11, 2021, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and for purposes of the exceptions, are summarized as follows.

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<sup>1</sup> The County's request for oral argument is denied because the exceptions raise no novel issues of law or fact and all arguments are adequately addressed in the parties' briefs.

<sup>2</sup> The Union withdrew its claims in both charges concerning the County's alleged refusal to provide requested information and documents at the hearing in this matter. Therefore, those allegations are no longer before the Board.

On May 14, 2020, the Union filed a petition for representation seeking to represent a bargaining unit of staff attorneys employed by the Delaware County Public Defender's Office. On July 10, 2020, the Board issued an Order and Notice of Election indicating that the election would be held through mail ballot. On August 28, 2020, the Board certified the Union as the exclusive representative of the court related unit of staff attorneys directly involved with and necessary to the functioning of the courts employed in the Public Defender's Office. (FF 3).

Christopher Welsh started his position as the Chief Director of the Public Defender's Office on or about July 6, 2020. Mr. Welsh was hired by and directly reports to the County Council. (FF 4). During his interview with the County Council, Mr. Welsh learned that a percentage of the attorneys had private practices and he indicated that he wished to eliminate outside employment during the interview. (FF 14).

On or about July 13, 2020, Mr. Welsh called a special meeting to meet the staff and review office matters. During that meeting, Mr. Welsh announced his new policy relating to outside employment. (FF 15). Mr. Welsh informed the attorneys that they were no longer permitted to have private practices. Mr. Welsh instructed the attorneys to submit their intentions with regards to outside employment by October 31, 2020, and to end their private practices by December 31, 2020. (FF 16). Mr. Welsh did not distribute a written policy during this meeting. (FF 17).

Nicholena Lacuzio-Rushton has worked for the Public Defender's Office as an attorney since June 2001. She stated that the attorneys in the Public Defender's Office have always been permitted to have outside employment for the past 20 years. (FF 8). Kenneth West is an attorney in the Mental Health Unit of the Public Defender's Office and has worked there for 11 years. (FF 5). Mr. West stated that attorneys were permitted to have outside employment since he started working for the County and that the practice of permitting outside employment has not changed. (FF 8).

Mr. West has engaged in outside employment in his private law practice from the beginning of his employment at the Public Defender's Office. (FF 8). His private practice mainly focuses on Chapter 7 and 13 bankruptcy. At the time of the hearing, Mr. West had 100 active clients in his private practice. (FF 9). Mr. West's private practice has not impacted his work at the Public Defender's Office and he has never been informed that he was performing below expectations. He has not had a conflict of interest between a private client and a client he represents as a public defender. (FF 11). Mr. West does not have defined work hours at the Public Defender's Office and some days require his presence longer than others. Mr. West's bankruptcy work involves at least one court appearance per case and he meets with his bankruptcy clients after work hours. (FF 12). When Mr. West has a conflict in his schedule, he has an attorney from his law practice represent his private client while he appears in court for the client he represents as a public defender. (FF 13).

The attorneys at the Public Defender's Office are full-time, salaried-exempt employees and, therefore, the County does not track the hours they work. (FF 10, FF 11). The attorneys also are not required to use leave if they leave early from or arrive late to work. (FF 11). Mr. West and other attorneys hold a second job to supplement their income. Management has been aware of the attorneys engaging in outside employment through private law practices. (FF 10).

Mr. West met with Mr. Welsh a couple weeks after the July 13, 2020 meeting to discuss the outside employment policy. Mr. Welsh informed Mr. West during this meeting that his private practice did not interfere with his public defender work in the Mental Health Unit. (FF 17, FF 18).

On October 16, 2020, Mr. Welsh and Lauren Farrell, a Union representative, had a telephone conversation in which Mr. Welsh indicated his desire to hire new attorneys and to start them at a higher pay rate. Mr. Welsh offered to increase the salaries of existing attorneys if they would cease any private practice of law. Ms. Farrell did not approve or agree to Mr. Welsh's proposed pay increase for newly hired attorneys. (FF 20). On that same date, Mr. Welsh sent an email to Ms. Farrell summarizing their telephone conversation stating, in relevant part, as follows:

As we spoke about, I would like to hire between 3-8 new attorneys to start ASAP. I can send offer letters to those candidates today if we get to agreement.

For the purpose of these offers only, the new starting salary will be \$53,000. Any lawyer currently on staff making less than \$53,000 can have their salary raised to \$53,000 immediately if they are in compliance with the attached policy, or are willing to bring themselves into compliance with the attached policy by the dates previously provided.

There are currently 23 lawyers on staff making less than \$53,000. All of those attorneys would receive a raise ranging from \$959.44 to \$14,890. Of those 23, 11 attorneys would get at least a \$9000 raise and would receive at least a \$5000 raise.

(FF 21).

The attachment to Mr. Welsh's October 16, 2020 email was the first time the written outside employment policy was made available to the Union. (FF 22). The outside employment policy stated as follows:

It is the policy of the Office of Public Defender (OPD) to allow its employees to engage in outside work or hold other jobs, subject to the restrictions outline[d] herein:

1. Employees' activities and conduct away from the job must not compete or conflict with or compromise the interests of the OPD, or adversely affect job performances and the employees' ability to fulfill any responsibilities to the OPD. An employee must notify his/her/their immediate supervisor of outside employment if the job is similar to that performed for the OPD or if the employment is with an

agency that interacts with the OPD in a professional capacity.

This policy applies specifically to attorneys and generally to all exempt/salaried staff members:

- (a) No OPD attorney is permitted to represent anyone but him/her/themself in any non-Office of the Public Defender related matter in any state or federal court. This rule applies equally to appearances in court or using one's own name in pleadings. Its application does not depend of [sic] where [sic] or not a fee is involved. There are no exceptions.
- (b) Representation by a OPD attorney of any private client in any court for any fee whatsoever is prohibited. Representation of a relative or close friend where no fee is involved, even if on an attorney's vacation or personal leave time, is strongly discouraged and may be undertaken only with the express, prior consent of the Director or, in his/her/their absence, the First Assistant Defender.
- (c) Private Practice in non-litigation matters in any organized, regular fashion, where [sic] in Delaware County or any other jurisdiction, is also prohibited. This does not mean, however, that Office of the Public Defender attorneys cannot, on occasion, give advice, draw a will, draft a contract, etc. for a family member or friend, provided that such activity takes place on the attorney's own time and does not conflict with any Defender work schedule. Attorneys may also serve as arbitrators through the Court of Common Pleas, but must take vacation time for this purpose.
- (d) No OPD attorney shall engage in any outside employment that would require the employee to obtain a professional license by the Commonwealth of Pennsylvania or any other jurisdiction.

(FF 33).

Ms. Farrell consulted with her legal department and the bargaining unit members about the new hire rates and the elimination of private law practices. Ms. Farrell responded to Mr. Welsh by a written proposal dated October 27, 2020, stating the Union's intent to bargain over the wages of the current attorneys and rates for new attorneys. (FF 23, FF 24). The Union

did not agree to the proposed starting salary increase for the new attorneys. (FF 30).

After the October 31, 2020 deadline passed, Mr. Welsh did not discipline any attorney for not stating their intentions regarding outside employment. Mr. Welsh stated that only two attorneys provided written responses with their intentions to not engage in outside employment. (FF 26). Mr. West did not cease his private law practice by December 31, 2020. (FF 27).

On or about November 9, 2020, the County hired 5 new attorneys for the Public Defender's Office. The new attorneys were given a starting salary of \$53,000 per year paid biweekly. (FF 28). In December 2020, Mr. Welsh reduced the salaries of 2 of the new attorneys to \$33,000, without bargaining with the Union, because those attorneys did not pass the bar exam. (FF 29). The new attorneys earning \$53,000 are making more than the attorneys who had been employed by the Public Defender's Office for some time. Mr. Welsh identified 23 attorneys making less than \$53,000. (FF 30). In 2019, the County hired two attorneys to work in the Public Defender's Office at a starting salary of \$37,000 per year. (FF 10).

Mr. Welsh indicated that he implemented and enforced the outside employment policy on the new attorneys and that it is current policy. Mr. Welsh stated that he has not disciplined any attorneys who have not complied with the policy because he is waiting for the results of the unfair practice litigation. (FF 31).

On March 25, 2021, the parties held a bargaining session during which the management team shared a new outside employment policy. The parties tabled the discussion on the policy because the Union wanted agreement on the economics first and resolution of the pending unfair practice. James Kane, the Chief Personnel Human Resources Officer and lead negotiator for the County, emailed an attachment to Ms. Farrell and the bargaining committee later that same day asserting that prohibiting outside employment was a managerial prerogative. (FF 7, FF 36). The attachment specifically stated as follows:

The prohibition or regulation of outside employment by members of the Office[] of the Public Defender is a managerial prerogative, and the Office of the Public Defender and the County expressly preserves that managerial prerogative with respect to whether it is permissible for any member of the bargaining unit to engage in outside employment. It is the policy of the Office of the Public Defender (OPD) to not allow its employees to engage in outside work or hold other jobs, unless such employment is approved by the Public Defender prior to the time such employment commences, reviewed and approved by the Public Defender on [an] annual basis thereafter, and is in compliance with the County's Outside Employment Policy.

All employees in the Public Defender's Office must comply at all times with the Public Defender's Outside Employment Policy.

(FF 37).

Mr. Welsh wants to prohibit outside employment because he is concerned that he cannot supervise his attorneys if they are meeting with private clients or attending court on behalf of private clients. Mr. Welsh believes that he cannot properly check the attorneys' private clients for conflicts with the Public Defender's Office and its clients. He further believes that he is unable to determine an appropriate caseload for the attorneys if he does not know how many private clients each of them has and what that private workload entails. Mr. Welsh stated that the purpose of the policy is to require attorneys to focus on the Office's indigent clients without any potential conflict of interest, to ensure that the attorneys are working solely for the clients during normal work hours, and to allow him to manage his attorneys. (FF 39).

Mr. Welsh is concerned that an attorney may have to be in court for a private client or a real estate closing at the same time they have to be in court for a client they represent as a public defender; concerned that he cannot effectively determine whether attorneys in the trial unit can handle those cases when they have outside clients; and believes that determining the proper caseload is more achievable when everyone is dedicating full-time hours to the Public Defender's Office and that caseload determinations are not accurately determined when attorneys have a variety of outside practices and clients. (FF 40, FF 42). However, Mr. Welsh is unable to cite to specific examples of an attorney who was not in court due to representing a private client; has not had to reduce any attorney's caseload due to their outside employment; and does not know of a specific case or client that has been compromised due to an attorney's outside employment. (FF 41, FF 46).

Concerning the Charge filed at Case No. PERA-C-20-271-E, the Hearing Examiner concluded in the PDO that the attorneys' interest in earning supplemental income outweighed the County's speculative interest in preventing conflicts and improving staff management and caseload determinations. As such, the Hearing Examiner held that the County had violated its duty to bargain under Section 1201(a)(1) and (5) of PERA because its outside employment policy was a mandatory subject of bargaining.<sup>3</sup> With regard to the Charge filed at PERA-C-20-273-E, the Hearing Examiner found that the County violated Section 1201(a)(1) and (5) of PERA by hiring 5 new attorneys at increased wages that were not bargained with the Union. By way of remedy, the Hearing Examiner ordered the County to restore the *status quo ante* by rescinding the outside employment policy and to change the salaries of the 5 new attorneys to \$37,000, which was the salary given to new attorneys hired in 2019.

The County initially asserts that Finding of Fact 10 stating that "most other OPD attorneys hold a second job to supplement their income from the OPD and make ends meet" is not supported by substantial evidence in the record. For purposes of the exceptions, the Hearing Examiner's Findings of Fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v.

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<sup>3</sup> The Hearing Examiner dismissed the Union's allegation under Section 1201(a)(9) of PERA because he found the outside employment policy to be a mandatory subject of bargaining. No exceptions were filed by the Union to the Hearing Examiner's decision dismissing its 1201(a)(9) claims. 34 Pa. Code § 95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942). Further, absent compelling circumstances, the Board will defer to its Hearing Examiner's credibility determinations supporting findings of fact. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). A review of the record supports the Hearing Examiner's finding concerning the attorneys engaging in outside employment to supplement their income from the County (N.T. 85) and there are no compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations in this regard. Accordingly, the County's exception to the Hearing Examiner's factual finding is dismissed.

On exceptions to the decision at Case No. PERA-C-20-271-E, the County argues that the Hearing Examiner erred in concluding that its outside employment policy was a mandatory subject of bargaining. The Board will find an employer has violated its duty to bargain if it unilaterally changes a term and condition of employment that is a mandatory subject of bargaining under Section 701 of PERA. Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978); Commonwealth of Pennsylvania v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983). In PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975), the Supreme Court articulated the standard to be applied in determining whether a matter is a mandatory subject of bargaining under Section 701 or a managerial prerogative under Section 702 as follows:

[W]here an item of dispute is a matter of fundamental concern to the employees' 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 at 268. The Board's determination of whether an outside employment policy is a mandatory subject of bargaining or a managerial prerogative is a fact specific one. In deciding this issue on a case-by-case basis, the Board has found outside employment policies to be mandatory subjects in some cases,<sup>4</sup> and matters of inherent managerial prerogative in others.<sup>5</sup>

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<sup>4</sup> Indiana County Deputy Sheriffs Association v. Indiana County, 51 PPER 3 (Proposed Decision and Order, 2019) (policy prohibiting deputy sheriffs from having secondary law enforcement employment mandatory subject of bargaining); Elizabethtown Non-Supervisory Police Negotiating Committee v. Elizabethtown Borough, 29 PPER ¶ 29099 (Proposed Decision and Order, 1998) (policy

In applying the State College balancing test to the underlying facts, the Hearing Examiner concluded, in relevant part, as follows:

Although the assertion that the County has interests in preserving and promoting transparency, integrity in public, taxpayer funded government service are noble, legitimate and laudable managerial interests, those goals have not been shown on this record to be compromised by the past practice of permitting secondary employment in private legal practice among the OPD [Office of Public Defender] attorneys. The specific concerns advanced by Director Welsh are speculative and have not been borne out by the record facts. The outside employment practice has not been shown to interfere with any operations at OPD. It has not presented any known conflicts of interest and has not affected the ability for Director Welsh to manage his staff or ensure that OPD work is getting done. Accordingly, on balance, the significant interest OPD attorneys have in relying on their training and experience to earn supplemental income far outweighs the speculative, unsubstantiated assertion by management that eliminating the ability for those attorneys to engage in private practice would improve OPD services, prevent unsubstantiated conflicts of interest, ensure greater focus on indigent clients or improve staff management and caseload determinations.

(PDO at 12-13). The County argues that the Hearing Examiner's conclusion is contrary to the decision in AFSCME Council 13 v. Commonwealth of Pennsylvania (Code of Conduct), 13 PPER ¶ 13097 (Final Order, 1982), *aff'd sub. nom*, AFSCME Council 13 v. PLRB, 479 A.2d 683 (Pa. Cmwlth. 1984), where the Board found an outside employment policy a matter of managerial prerogative. Specifically, the County asserts that, as in Code of Conduct, its outside employment policy is meant to preserve integrity in government by providing effective representation to its clients.

In Code of Conduct, the Commonwealth promulgated standards that its employes were required to follow in order to prevent public corruption and conflicts of interest. The Board found that the Commonwealth's Code of Conduct ensured integrity and increased confidence in government, which outweighed the impact on employes terms and conditions of employment. One standard concerned an outside employment policy that required prior approval by the Commonwealth before an employe could engage in outside employment.

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prohibiting police officers from having secondary law enforcement employment mandatory subject of bargaining).

<sup>5</sup> AFSCME Council 13 v. Commonwealth of Pennsylvania, 13 PPER ¶ 13097 (Final Order, 1982), *aff'd sub. nom*, AFSCME Council 13 v. PLRB, 479 A.2d 683 (Pa. Cmwlth. 1984) (policy prohibiting outside employment without prior approval matter of managerial prerogative); PSSU Local 668, SEIU, AFL-CIO v. Bucks County, 25 PPER ¶ 25036 (Final Order, 1994) (ban on outside employment that raised a conflict of interest a matter of managerial prerogative).



The Board found the outside employment policy to be a managerial prerogative concluding that “[r]equiring prior approval is not a flat prohibition[;] [r]ather, it requires employes to secure in advance the consent of the employer before such an employe may undertake outside employment.” 13 PPER at 174.

Here, unlike in Code of Conduct, the County’s outside employment policy institutes an absolute ban on the attorneys of the Public Defender’s Office from engaging in any private practice of law. Indeed, the outside employment policy prohibits the attorneys from representing anyone in state or federal court regardless of whether a fee is involved, representing a private client in any court for a fee whether in Delaware County or any other jurisdiction, and even requires prior approval to represent a relative or close friend where no fee is involved. (Union Exhibit 2). The County alleges that its ban on the attorneys engaging in the private practice of law furthers its goal of providing efficient and effective representation to its clients. However, as found by the Hearing Examiner, the County failed to present any evidence that a staff attorney’s private practice has affected or compromised their representation of an indigent client. (FF 46). Further, Mr. Welsh stated that he was unable to cite to specific examples of an attorney who was not in court due to representing a private client and has not had to reduce any attorney’s caseload due to their outside employment. (FF 41, FF 46).<sup>6</sup>

Moreover, contrary to the County’s assertion, the holding in Indiana County Deputy Sheriff’s Association v. Indiana County, 51 PPER 3 (Proposed Decision and Order, 2019), is applicable to the instant matter. In that case, the sheriff unilaterally implemented a policy banning the deputy sheriffs from working in secondary law enforcement positions thereby changing the 19 year practice of permitting such secondary employment. In concluding that the policy was a mandatory subject of bargaining, the Hearing Examiner found that the ban on secondary law enforcement employment would have a deleterious impact on the deputy sheriffs as it precludes them from earning a living in the very field they had been trained in, which outweighed the sheriff’s speculative reasons, i.e. to ensure the availability of the deputy sheriffs during an emergency and avoid conflicts of interest, in implementing the policy. See also Elizabethtown Non-Supervisory Police Negotiating Committee v. Elizabethtown Borough, 29 PPER ¶ 29099 (Proposed Decision and Order, 1998) (policy prohibiting police officers from having secondary law enforcement employment mandatory subject of bargaining).

Similarly, the County’s outside employment policy precludes the Public Defender’s Office attorneys from engaging in the private practice of law, the very field they have been trained to perform. Further, Mr. Welsh’s reasons for implementing the policy (conflicts of interest, determining appropriate

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<sup>6</sup> The County asserts that its failure to present evidence to support the existence of conflicts of interest between the staff attorneys’ private clients and Public Defender’s Office clients should not be determinative in finding its outside employment policy to be a managerial prerogative, citing Association of Pennsylvania State College and University Faculties v. PLRB, 226 A.3d 1229 (Pa. 2020). However, the County’s reliance on the decision in Association of Pennsylvania State College and University Faculties is misplaced because the Court found in that case that the Pennsylvania State System of Higher Education had a legitimate and factually supported interest in protecting minors on its campuses when it implemented its policy requiring background checks for all its employes.

caseload and effective representation of indigent clients) is not borne out by the record. Indeed, Mr. Welsh stated at his interview with the County Council that he planned to eliminate outside employment without having any indication that the private practices of the attorneys in the Public Defender's Office posed a problem. (FF 14). Additionally, after starting in his position as Director, Mr. Welsh did not attempt to discover which attorneys had private practices, what areas of law those practices concerned, or whether the attorneys' private practices had affected their representation of indigent clients. (N.T. 102, 153). Therefore, the Hearing Examiner properly concluded that the County violated its duty to bargain under Section 1201(a)(1) and (5) of PERA because its policy banning the private practice of law is a mandatory subject of bargaining.

The County has made a request to reopen the record pursuant to Section 95.98(f)(2) of the Board's rules and regulations in order to submit evidence concerning alleged ethical and constitutional violations of a staff attorney in representing a client that was discovered after the May 11, 2021 hearing in this matter. The County asserts that the staff attorney's private practice negatively impacted the representation of the client. When a request to reopen the record for additional evidence is made, the party making such a request must establish that the evidence sought to be admitted (1) is new; (2) could not have been obtained at the time of the hearing through the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purpose of impeachment; and (5) is likely to compel a different result. Minersville Area School District v. Minersville Area School Service Personnel Association, 518 A.2d 874 (Pa. Cmwlth. 1986). The County's request must be denied because the alleged facts surrounding the staff attorney's secondary employment conflicting with the representation of an indigent client after the hearing in this matter is not relevant. Further, the alleged facts do not support Mr. Welsh's reasons for implementing the outside employment policy in October 2020 and, therefore, would not compel a different result. Accordingly, the County has failed to demonstrate that the five criteria necessary to reopen the record have been satisfied, and its request to reopen the record is denied.

Concerning the decision under Case No. PERA-C-20-273-E, the County did not file an exception to the Hearing Examiner's conclusion that the County violated its duty to bargain under Section 1201(a)(1) and (5) of PERA by increasing the salaries of newly hired attorneys without bargaining with the Union and, therefore, the County has waived that issue. 34 Pa. Code § 95.98(a)(3). However, the County excepts to the remedy issued by the Hearing Examiner concerning the salaries of the new attorneys. The County specifically asserts that the Hearing Examiner's order to immediately decrease the salaries of the new attorneys receiving \$53,000 to \$37,000 would cause irreparable harm to the Public Defender's Office if those attorneys leave employment due to the decrease in salary. The County further alleges that the Hearing Examiner's order to immediately increase the salary of the new attorneys who failed to pass the bar from \$33,000 to \$37,000 is not supported by the record.

In order to effectuate the policies of PERA, the Board is authorized under Section 1303 to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action ... as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000). It is within the Board's discretion to determine the appropriate

relief for an employer's unfair practices. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994). Moreover, it is well established that the Board and its hearing examiners possess authority to issue "make whole" remedial orders restoring the *status quo ante* which existed prior to the commission of the unfair practices. Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978).

The Board's typical remedy in cases concerning a unilateral change in wages is to restore the *status quo ante* by returning the employe to the proper salary on the salary schedule negotiated by the parties. See Shamokin Area Education Association, PSEA/NEA v. Shamokin Area School District, 50 PPER 54 (Final Order, 2019). However, in this matter, the parties were negotiating for an initial collective bargaining agreement at the time of the occurrence of the unfair practice and there was no salary schedule that applied to attorneys employed in the Public Defender's Office prior to the certification of the Union as the exclusive representative of these employes. Therefore, the Board will modify the Hearing Examiner's remedy to permit the 3 new attorneys who are receiving salaries of \$53,000 to remain at those salaries until the parties negotiate an appropriate salary schedule and starting salaries for those attorneys. Concerning the 2 new attorneys whose salaries were unilaterally reduced to \$33,000 for failure to pass the bar, there is not ample record evidence to support a binding past practice with regard to persons in the Public Defender's Office who have not passed the bar, therefore their salary is \$33,000, until negotiated otherwise. Therefore, the County's exceptions to the remedy are granted in part and denied in part.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the County violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing an outside employment policy banning the attorneys of the Public Defender's Office from engaging in private practice. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final as modified herein.

#### 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 filed by Delaware County and the Delaware County Public Defender's Office are hereby granted in part, dismissed in part, and the August 24, 2021 Proposed Decision and Order be and the same is hereby made absolute and final, as modified herein.

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that Delaware County and the Delaware County Public Defender's Office shall:

1. Cease and desist from interfering, 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 the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussion of grievances with the exclusive representative.

3. Take the following affirmative action:

(a) Immediately restore the *status quo ante*, rescind the outside employment policy as provided to the Union on October 16, 2020, and reinstate the past practice of permitting attorneys in the Office of Public Defender to engage in outside employment including the private practice of law;

(b) Post a copy of the Proposed Decision and Order and Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit 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 the Final Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached Affidavit of Compliance upon the Union.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this fifteenth day of March, 2022. 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.

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

UNITED AUTO WORKERS INTERNATIONAL :  
UNION :  
v. : Case No. PERA-C-20-271-E  
DELAWARE COUNTY : PERA-C-20-273-E  
DELAWARE COUNTY PUBLIC DEFENDER'S :  
OFFICE :

**AFFIDAVIT OF COMPLIANCE**

Delaware County and the Delaware County Public Defender's Office (collectively "County") hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has restored the *status quo ante* and reinstated the past practice of permitting attorneys in the Public Defender's Office to engage in outside employment, including the private practice of law; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on the Union at its principal place of business.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Signature of Notary Public