COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STATE COLLEGE & UNIVERSITY PROFESSIONAL ASSOCIATION, PSEA/NEA	:	
	:	CASE NO. PERA-C-15-299-E
v.	:	
PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION	:	

PROPOSED DECISION AND ORDER

On October 16, 2015, the State College & University Professional Association, PSEA/NEA (SCUPA, Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State System of Higher Education (State System, PSSHE or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

On November 5, 2015, the Secretary of the Board issued a complaint and notice of hearing and designated February 19, 2016, in Harrisburg, as the time and place of hearing.

A hearing was held on February 19, 2016, in Harrisburg before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief on April 22, 2016. The Employer filed a post-hearing brief, which included a Motion to Dismiss and supporting brief, on June 10, 2016. The Association filed a reply to the Employer's Motion to Dismiss and supporting brief on July 11, 2016.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The State System is a public employer within the meaning of PERA. (N.T. 4).

2. The Association is an employe organization within the meaning of PERA. (N.T. 4).

3. In response to the Sandusky Scandal and the Freeh Report of 2012, the Board of Governors for the State System became concerned that the State System did not have adequate system-wide policies regarding the protection of minors and whether the individual institutions of the State System followed their own policies with regard to the protection of minors. The Board of Governors was also concerned that it did not have an adequate grasp on the practices of the individual campuses with regard to risks to minors for on-campus activities and in connection with staff-related programs. (N.T. 65-66).

4. To address these concerns, the Board of Governors inquired with State System management as to the current polices which were in place and how they were enforced. In response to this enquiry, the Board of Governors was not satisfied with the State System's then-current policies and practices with regard to the protection of minors, and the Board of Governors decided that it must take strong action and make a response a high priority. (N.T. 66-67).

5. As the Board of Governors was considering its response, it was also aware the General Assembly of the Commonwealth would also have a legislative response to the Sandusky Scandal which eventually resulted in an amendment to the Child Protective Services Law, 23 Pa.C.S. §6301 **et seq.**, (CPSL). (N.T. 68).

6. In developing its new policies to address the protection of minors, the Board of Governors was focused on creating a high degree of uniformity between the individual universities and campuses to address the fact that faculty and staff move from campus to campus, and creating procedures which would be applicable to staff that interacted with minors on campuses. (N.T. 69).

7. The State System estimates approximately 387,000 minor visits (i.e., one instance of a minor being present) to its 14 universities each year during approximately 23,700 annual events. (N.T. 84).

8. On May 28, 2014, Kimberly Barnes from the State System sent Frances Cortez Funk (Cortez Funk) and Carolyn Funkhouser (Funkhouser) of the Association a draft of the State System's "Policy 2014-xx: Protection of Minors". Cortez Funk is the Association president and Funkhouser is the UniServ Representative. (Employer Exhibit 1).

9. On July 8, 2014, The Board of Governors ultimately adopted "Policy 2014-1: Protection of Minors". (N.T. 69; Employer Exhibit 2).

10. "Policy 2014-1: Protection of Minors" states in relevant part:

> C. Policy
> Each PASSHE entity offering or approving programs that involve minors within the scope of this document will establish and implement policies and procedures consistent with this policy by December 31, 2014. The locally established policies and procedures will, at a minimum, include the following requirements. . . .
>
> 4. Criminal Background Screening
> At a minimum, universities will establish and implement criminal background screening policies and procedures consistent with applicable law and Board of Governors' Policy 2009-01: Criminal Background Investigations, for all employees.

(Employer Exhibit 2, pages 3, 5).

11. On July 9, 2014, Michael Mottola, the State System's Assistant Vice Chancellor for Labor Relations, sent Cortez Funk a copy of the State System's approved "Policy 2014-01: Protection of Minors". (Employer Exhibit 2).

12. On October 22, 2014, the Pennsylvania General Assembly passed Act 153 of 2014. Act 153 amended CPSL by: (1) expanding the CPSL to cover"[s]chool employees not governed by the provisions of the Public School Code of 1949", which includes the Association's bargaining unit members, ; (2) Requiring employes covered by the CPSL to provide their employer with FBI, Pennsylvania State Police, and state child abuse background checks at periodic intervals; and (3), requiring employes covered by CPSL to report new arrests or convictions for the crimes enumerated in the Pennsylvania Public School Code to their employer within 72 hours. (Act 153 of 2014 at §6344, §6344.3, §6344.4)

13. The CPSL, as amended by Act 153 of 2014, but before the passage of Act 15 of 2015, stated in relevant part:

> § 6344. Employees having contact with children; adoptive and foster parents.
>
> (a) Applicability. Beginning December 31, 2014, this section applies to the following individuals:
> (a.1) School employees.--This section shall apply to school employees as follows:
> . . .

(2) School employees not governed by the provisions of the Public School Code of 1949 shall be governed by this section.
(b) Information to be submitted.--An individual identified . . .in subsection . . . (a.1) prior to the commencement of employment or service shall be required to submit the following information to an employer, administrator, supervisor or other person responsible for employment decisions or involved in the selection of volunteers:
(1) Pursuant to 18 Pa.C.S. Ch. 91 (relating to criminal history record information), a report of criminal history record information from the Pennsylvania State Police or a statement from the Pennsylvania State Police that the State Police central repository contains no such information relating to that person. The criminal history record information shall be limited to that which is disseminated pursuant to 18 Pa.C.S. § 9121(b)(2) (relating to general regulations).
(2) A certification from the department as to whether the applicant is named in the Statewide database as the alleged perpetrator in a pending child abuse investigation or as the perpetrator of a founded report or an indicated report.
(3) A report of Federal criminal history record information. The applicant shall submit a full set of fingerprints to the Pennsylvania State Police for the purpose of a record check, and the Pennsylvania State Police or its authorized agent shall submit the fingerprints to the Federal Bureau of Investigation for the purpose of verifying the identity of the applicant and obtaining a current record of any criminal arrests and convictions.
. . .

§ 6344.3. Continued employment or participation in program, activity or service.
. . .
(g) Written notice of new arrest, conviction or substantiated child abuse.--
(1) If an employee or volunteer subject to section 6344 (relating to employees having contact with children; adoptive and foster parents) or 6344.2 (relating to volunteers having contact with children) is arrested for or convicted of an offense that would constitute grounds for denying employment or participation in a program, activity or service under this chapter, or is named as a perpetrator in a founded or indicated report, the employee or volunteer shall provide the administrator or designee with written notice not later than 72 hours after the arrest, conviction or notification that the person has been listed as a perpetrator in the Statewide database.
(2) If the person responsible for employment decisions or the administrator of a program, activity or service has a reasonable belief that an employee or volunteer was arrested or convicted for an offense that would constitute grounds for denying employment or participation in a program, activity or service under this chapter, or was named as a perpetrator in a founded or indicated report, or the employee or volunteer has provided notice as required under this section, the person responsible for employment decisions or administrator of a program, activity or service shall immediately require the employee or volunteer to submit current information as required under subsection 6344(b). The cost of the information set forth in subsection 6344(b) shall be borne by the employing entity or program, activity or service.
(h) Effect of noncompliance.--An employee or volunteer who willfully fails to disclose information required by subsection (g)(1) commits a misdemeanor of the third degree and shall be

> subject to discipline up to and including termination or denial of employment or volunteer position.
> . . .
>
> § 6344.4. Certification compliance.
> New certifications shall be obtained in accordance with the following:
> (1) Effective December 31, 2014:
> (i) A person identified in section 6344 (relating to employees having contact with children; adoptive and foster parents) shall be required to obtain the certifications required by this chapter every 36 months.
> . . .
> (iii) Any person identified in section 6344 with a current certification issued prior to the effective date of this section shall be required to obtain the certifications required by this chapter within 36 months from the date of their most recent certification or, if the current certification is older than 36 months, within one year of the effective date of this section.

(http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2014&sessInd=0&act=153)(language deleted by Act 153 not included above).

14. On December 22, 2014, Lisa Sanno (Sanno), the new State System Assistant Vice Chancellor for Labor Relations, sent Cortez Funk a letter enclosing the draft version of the State System's Board of Governors adopted "Policy 2014-01: Protection of Minors" and a document entitled "Procedures/Standard Number 2015-xx" that were to be presented to the State System Board of Governors at its January 21, 2015, meeting. The documents enclosed were amended to take into account Act 153's mandates. (N.T. 18, 94-96, 104; Employer 7).

15. The document "Procedures/Standard Number 2015-xx" states:

> History: Board of Governors' Policy 2014-01-A: Protection of Minors, was initially approved in July 2014. Act 153 of 2014 was passed in November 2014, which significantly changed background check clearance requirements for employees and volunteers. This procedure is intended to provide direction for implementation of these changes.

(Employer Exhibit 7).

16. The draft procedures in "Procedures/Standard Number 2015-xx" required all employes submit three background screening clearances: (1) a criminal history check from the Pennsylvania State Police; (2) certification from the Department of Human Services whether the individual is named as a perpetrator in an indicated or founded report of child abuse with the last five years; and (3) a federal criminal history check. The draft procedures required these reports at least every three years for current employes. These required reports are the same reports required by § 6344 of the CPSL. (Employer Exhibit 7).

17. The draft procedures also required that all employees provide written notice to their employer within 72 hours of their arrest for certain criminal offenses, or if the person had been identified as a perpetrator of child abuse in an indicated or founded report of child abuse. The requirements match the legal requirements of section §6344.3 of the CPSL. (Employer Exhibit 7).

18. The Association understood that the draft version of the State System's Board of Governor adopted "Policy 2014-01: Protection of Minors" was created to comply with Act 153 in requiring the expanded background checks and clearances and mandatory reporting requirements for all Association employes. (N.T. 19).

19. Around December 22, 2014, the Association discussed how to respond to the draft version of the State System's Board of Governor adopted "Policy 2014-01 Protection of Minors", including possibly requesting meet-and-discuss with the State System or demanding impact bargaining. However, the Association decided that there was no reason to object because the Association had to comply with Act 153 of 2014. (N.T. 19-20).

20. In January of 2015, the Board of Governors modified "Policy 2014-01 Protection of Minors" in order to accommodate the actions taken by the General Assembly when it passed Act 153 of 2014. (N.T. 73).

21. When developing the procedures documents to implement "Policy 2014-01-A: Protection of Minors", the State System incorporated Act 153 of 2014. (N.T. 90).

22. "Policy 2014-01-A: Protection of Minors", as amended on January 22, 2015, states in relevant part:

> C. Policy
> Each State System entity offering or approving programs that involve minors within the scope of this document will establish and implement policies and procedures consistent with this policy. The chancellor . . . may promulgate procedures, standards, and guidelines as necessary to ensure the proper implementation of this policy. The locally established policies and procedures will, at a minimum, include the following requirements.
> . . .
> 4. Criminal Background Screening
> All employees and volunteers are required to have criminal background screening clearances in accordance with applicable procedures, standards, and guidelines as established by the chancellor.
> . . .
> 7. Reporting Obligations
> . . .
> b. Reporting of Arrests and Convictions
> All employees, volunteers, and program administrators must provide written notice to the designated person in charge at the university if they or an authorized adult or program staff are: (1) arrested for, convicted of, an offense that would constitute grounds for denial of employment or participation in a program, activity, or service; or (2) are named as a perpetrator in a founded or indicated report under the Child Protective Services Law (23 Pa.C.S. §6301, *et seq*.). The employee, volunteer, or program administrator shall provide such written notice within 72 hours of arrest, conviction, or notification that the person has been listed as a perpetrator in the statewide database. The failure of an employee or program administrator to make a written notification, as required, is a misdemeanor of the third degree.
> If the employer or program administrator has a reasonable belief that an employee or volunteer has been arrested or convicted of a reportable offense or was named as perpetrator in a founded or indicated report under the Child Protective Services Law, or if an employee or volunteer has provided notice of activity that would be sufficient to deny employment or program participation, the employer must immediately require the employee or volunteer to immediately submit current information for required criminal background screening clearances in accordance with applicable procedures, standards, and guidelines as established by the chancellor.

(Employer Exhibit 3).

23. When the Board of Governors approved "Policy 2014-01-A: Protection of Minors", as amended on January 22, 2015, it was anticipated by the State System that more work in the form of the promulgation of procedures would have to be accomplished in order to create a more detailed outline as to how its policies were to be implemented. The State System intended for procedures to be established in order to implement the specific requirements of "Policy 2014-01-A: Protection of Minors". (N.T. 78, 90).

24. On February 3, 2015, Sanno sent Cortez Funk a letter enclosing "Policy 2014-01-A: Protection of Minors," which was amended on January 22, 2015. (Employer Exhibit 3).

25. The State System began requiring background clearances of current employes as described in the draft procedures documents in April of 2015, before the final, signed version of the procedures document was issued in September, 2015. This decision by State System universities to begin requiring background checks of current bargaining unit members was not communicated to the Association. (N.T. 99-100, 146).

26. On July 1, 2015, the Pennsylvania General Assembly passed Act 15 of 2015. Act 15 of 2015 amended the CPSL to exempt employees of higher education institutions from the background check and arrest reporting requirements of the CPSL as long as their direct contact with minors is limited to matriculated students enrolled in the institution or prospective students visiting campus. (Act 15 of 2015 at §6344).

27. The CPSL, as amended by Act 15 of 2015 states in relevant part:

> (a.1) School employees.--This section shall apply to school employees as follows:
> . . .
> (2) (i) School employees not governed by the provisions of the Public School Code of 1949 shall be governed by this section.
> (ii) This paragraph shall not apply to an employee of an institution of higher education whose direct contact with children, in the course of employment, is limited to either:
> (A) prospective students visiting a campus operated by the institution of higher education; or
> (B) matriculated students who are enrolled with the institution.

(http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2015&sessInd=0&act=15).

28. Act 15 of 2015 exempted certain Association bargaining unit members from the background check and arrest reporting requirements of the CPSL. (N.T. 23, 31).

29. Certain bargaining unit members would be subject to the Child Protective Services law, as amended by Act 15, background checks by virtue of their duties. (N.T. 51).

30. The Association understood that the July 1, 2015, Act amended Act 153 changed some of the definitions of who was required to submit to expanded background checks and to mandatory reporting requirements. (N.T. 22).

31. When Act 15 was passed on July 1, 2015, Funkhouser told the Association leadership that the CPSL had now changed, and that not every bargaining unit member was required to submit to expanded background checks. Funkhouser told the Association that the Association needed to wait to see if the State System modified its policies or implemented its policies to determine how the policy would affect the Association. (N.T. 22-23).

32. On July 17, 2015, Sanno sent an email to Cortez Funk and Funkhouser that enclosed a draft of the procedures document as of July 2, 2015. (N.T. 54-55; Employer Exhibit 4).

33. The July 17, 2015, email from Sanno states in relevant part:

> Policy 2014-01-A: Protection of Minors, provides under C. Policy, that the chancellor may promulgate procedures, standards and guidelines as necessary to ensure proper implementation of the policy. Attached for your review and comment is Draft/Procedure Number 2015-xx, Background Clearances and Reporting Requirements. If you have any questions or comments or wish to request a meet and discuss please contact me. . . no later than July 31, 2015.

(Employer Exhibit 4).

34. The July 2, 2015, draft procedures document contained the similar requirements for all State System employes to submit to three background checks and report arrests and convictions of certain offenses within 72 hours as the draft December 17, 2014, draft procedures document required. The only significant change from the December 17, 2014, draft procedures was that background checks were required every at least every five years, instead of at least every three years, which matched changes made by the CPSL by Act 15 of 2015. (N.T. 55; Employer Exhibits 4, 7).

35. On September 14, 2015, Sanno sent Cortez Funk a letter which notified the Association that the document "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" been approved and signed on September 2, 2015, by the Chancellor of the State System. The letter also enclosed a copy of the document "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements." (N.T. 24; Association Exhibit 3).

36. With regard to criminal background screening, "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" states in relevant part:

> G. Any result or finding denoted as a reportable offense (listed below) or nonreportable offense, or any questions about errors, convictions, or any other reportable condition shall be addressed to University Legal Counsel.

(Association Exhibit 3, page 5).

37. With regard to reporting of arrests and convictions, "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" states in relevant part:

> IV. Reporting of Arrests and Convictions
>
> A. All employees, volunteers, and program administrators must provide written notice to the designated person in charge at the university if they or an authorized adult or program staff are: (1) arrested for, or convicted of, a reportable offense (see paragraph IV.B below) that would constitute grounds for denial of employment or participation in a program, activity, or service; or (2) named as a perpetrator in a founded or indicated report of child abuse. The employee, volunteer, or program administrator shall provide such written notice within 72 hours of arrest, conviction, or notification that the person has been listed as a perpetrator in the statewide database. The failure of an employee or volunteer to make a written notification as required above is a misdemeanor of the third degree, pursuant to 23 Pa.C.S. § 6344.3(h); the employee shall be subject to discipline up to and including termination or denial of employment or volunteer position.

(Association Exhibit 3, page 5).

38. The Association became aware that background checks for all bargaining unit members began in the end of August or beginning of September of 2015, coinciding with the start of the 2015-2016 academic year. (N.T. 46).

39. "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" required all Association bargaining unit members to comply with all of the reporting requirements and expanded background checks that were required under Act 153, which was modified by Act 15 on July 1, 2015. (N.T. 26).

40. The State System did not consult with the Association leadership about the changes to Act 153 on July 1, 2015, or the adoption of the "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" on September 2, 2015. (N.T. 26-27).

41. When Funkhouser found out about the "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" was being implemented, she asked William Helzlsouer of the State System if the procedure was an implementation of Act 153 style background checks and reporting requirements for all bargaining unit members. She did not receive a straight-forward answer. At this point, the Association filed the instant unfair practice charge. (N.T. 27).

42. Bargaining unit members would be subject to discipline if they failed to comply with the requirements to obtain background checks and report certain arrests and convictions. These requirements were new grounds for discipline. (N.T. 102-111; Association Exhibit 3, page 5).

DISCUSSION

The Association alleges that the State System violated Section 1201 (a)(5) of PERA by unilaterally implementing policies which requires bargaining unit members to obtain background checks and certifications, and make certain reports about arrests and convictions, which are not required by law. As this matter is somewhat nuanced, the Association's specific language regarding its charge is set forth in full:

> The [State System] violated Section 1201(a)(1) and 1201 (a)(5) of [PERA] when it unilaterally changed certain terms and conditions of employment by implementing a policy which requires certain employees to obtain background checks and certifications, and to make certain reports, which are not required by law. Specifically, the policy requires employees whose direct contact with children is limited to matriculated and prospective students to: (1) obtain criminal history checks from the Pennsylvania State Police and Federal Bureau of Investigation; (2) obtain child abuse certifications from the Pennsylvania Department of Human Services; and (3) report their arrest or conviction for any of twenty specific crimes enumerated in Section 6344 of the Child Protective Services Law, 23 PA.C.S. 6301 et seq. These requirements go beyond the scope of the law as amended on July 1, 2015.
> The [Association] learned on September 14, 2015 that the [State System] had approved and begun to enforce this policy on September 2, 2015. The [State System] has informed the [Association] that it will enforce the policy through discipline, up to and including discharge.

(Specification of Charges).

The State System made a Motion to Dismiss on the grounds that the Association's chare is untimely. (N.T. 5). Section 1505 of PERA states: "[n]o charge shall be entertained, which relates to acts which occurred or statements which were made more than four months prior to the filing of the charge." 43 P.S. §1101.1505.

The four-month limitations period for the filing of an unfair labor practice charge under Section 1505 of the PERA is triggered when the complainant has reason to believe that the unfair practice has occurred. **Lancaster Cty. v. Pennsylvania Labor Relations Bd.**, 62 A.3d 469, 473 (Pa. Commw. Ct. 2013); **Commonwealth v. Pennsylvania Labor Relations Board**, 438 A.2d 1061, 1063 (1982). The complainant has the burden to show that the charge was filed within four months of the occurrence of the alleged unfair practice. **Hazleton Area Education Support Professionals v. Hazleton Area School District**, 45 PPER ¶ 20 (Final Order, 2013).

As a general matter, the nature of the unfair practice claim alleged frames the limitations period for that cause of action. **Bensalem Township Police Benevolent Association v. Bensalem Township**, 47 PPER ¶ 109 (Proposed Decision and Order, 2016); **Upper Gwynedd Township Police Dept. v. Upper Gwynedd Township**, 32 PPER § 32101 (Final Order, 2001). In this matter, the Association has alleged that the Employer refused to bargain and violated Section 1201 (a)(5) of PERA by unilaterally implementing policies which require bargaining unit members to obtain background checks and certifications, and make certain reports about arrests and convictions, when not required by law. For a refusal to bargain a change in terms and conditions of employment, notice to the union of the implementation of the challenged policy or directive triggers the statute of limitations. **Bensalem Township, supra, citing Harmar Township Police Wage and Policy Committee v. Harmar Township**, 33 PPER § 33025 (Final Order, 2001). Implementation is the date when the directive becomes operational and serves to guide the conduct of employes, even though no employes may have been disciplined or corrected for failure to abide by the directive. **Id.**

However, notice to employes is not considered notice to the union unless it is shown that the employes are the union's agents. **Teamsters Local 77 v. Delaware County**, 29 PPER ¶ 29087 (Final Order, 1998), **aff' d sub nom., County of Delaware v. PLRB**, 735 A.2d 131 (Pa. Cmwlth. 1999), **appeal denied**, 561 Pa. 679, 749 A.2d 473 (2000); **AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Department of Military Affairs**, 22 PPER ¶ 22205 (Final Order, 1991). Moreover, the burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. **Teamsters Local 77 v. Delaware County**, 29 PPER ¶ 29087 (Final Order, 1998); **see also International Longshoremen's Union (Sunset Line and Twine Co.)**, 79 NLRB 1487 (1984).

The record shows that the Association had notice of the implementation of the charged policies in late August or early September, 2015. In late August or early September, 2015, the Association became aware that the State System was requiring background clearances of all bargaining unit members and by September 14, 2015, the Association knew that the "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" was formally adopted on September 2, 2015, by the chancellor, without being modified to account for the changes made to the CPSL by Act 15 of 2015. It is at this time that the Union had reason to believe that the unfair practice has occurred. Thus, I find that notice of implementation of the policy in this matter happened – at the earliest – in August, 2015, when the Association knew that the State System was implementing the draft procedures relating to "Policy 2014-01-A: Protection of Minors." Late August, 2015, is well within the four-month period before the filing date of the charge. Therefore, the Employer's Motion to Dismiss is denied.

While the Employer in this matter does provide evidence that bargaining unit members were submitting background clearances in April of 2015, I find that the record does not support the conclusion that the Association received notice of these background clearances in April of 2015. Additionally, there is no evidence on this record that shows the State System implemented the mandatory reporting policy against bargaining unit members before September, 2015.

Other factors from the record also support the conclusion that the "Policy 2014-01-A: Protection of Minors" was not implemented until September of 2015 when the chancellor adopted "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements."

"Policy 2014-01-A: Protection of Minors", as adopted, states that: "[t]he chancellor . . . may promulgate procedures, standards, and guidelines as necessary to ensure the proper implementation of this policy." Further, with regard to the required criminal background screening, the policy states: "[a]ll employees and volunteers are required to have criminal background screening clearances in accordance with applicable procedures, standards, and guidelines as established by the chancellor." The same document also requires that, relating to arrests or convictions for reportable offenses, an employee may be required to submit "criminal background screening clearances in accordance with applicable procedures, standards, and guidelines as established by the chancellor". Thus, on its face, "Policy 2014-01-A: Protection of Minors," clearly contemplates and foresees the adoption, by the chancellor, of additional procedures for the purpose of implemention. Moreover, the record shows that the State System intended that more work, in the form of the promulgation of procedures, would have to be accomplished in order to create a more detailed outline as to how the policy was to be implemented.

The draft "Procedures/Standard Number 2015-xx" and final, adopted "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" also all contain the following language:

> History: Board of Governors' Policy 2014-01-A: Protection of Minors, was initially approved in July 2014. Act 153 of 2014 was passed in November 2014, which significantly changed background check clearance requirements for employees and volunteers. This procedure is intended to provide direction for implementation of these changes.

Thus, the face of the various drafts and final procedures indicate that it is the procedures document, which was finally adopted on September 2, 2015, which would implement the changes to background checks clearances and reporting requirements for bargaining unit members.

Finally, the July 17, 2015, email from Sanno to Cortez Funk, which copied, among others, Funkhouser, states in relevant part:

> Policy 2014-01-A: Protection of Minors, provides under C. Policy, that the chancellor may promulgate procedures, standards and guidelines as necessary to ensure proper implementation of the policy. Attached for your review and comment is Draft/Procedure Number 2015-xx, Background Clearances and Reporting Requirements. If you have any questions or comments or wish to request a meet and discuss please contact me. . . no later than July 31, 2015.

The clear inference from this July 17, 2015, letter from Sanno to the Association is that the attached procedures were being promulgated by the chancellor to implement "Policy 2014-01-A: Protection of Minors," and that Sanno apparently considered the adoption of the procedures as an implementation of the policy because she asks the Association if they would like to schedule a "meet and discuss" over the procedures.

I turn now to the merits of the Association's charge, which is set forth above. In response, the Employer argues that the State System has an inherent managerial prerogative to implement the background clearance and mandatory reporting requirements of the State System's policy.

As an initial matter, where the State System's policies with regard to background clearances and mandatory reporting for arrests and convictions match the CPSL, as amended, the State System has clear authority to implement its policies and such implementation is not bargainable as long as it matches what is directed by the law. This is not contested by the Association. Therefore, to the extent that the State System's policies with regard to background clearances and mandatory reporting for arrests and convictions match the CPSL, as amended, I find that the State System has the managerial authority to implement such policies as required by law. Thus, in this

matter, the State System, at the minimum, has the managerial authority to require Association bargaining unit members covered by CPSL, as amended, to complete the background checks as required by CPSL and also require such bargaining unit members to report arrests and convictions as required by the CPSL, as amended.

With that in mind, it is clear from the record that the policies implemented by the State System go beyond what is required by the CPSL, as amended, and, therefore, the State System's argument that it has the inherent managerial authority to implement its policies requiring the background clearance and mandatory reporting for all bargaining unit members cannot solely rely on compliance with the CPSL.

The Board will find an employer in violation of Section 1201(a) (5) of the Act if the employer unilaterally changes a mandatory subject of bargaining under Section 701 of the Act. **Appeal of Cumberland Valley School District**, 483 Pa. 134, 394 A.2d 946 (1978). Section 701 provides as follows:

> Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . .

43 P.S. § 1101.701. If, however, the employer changes a matter of inherent managerial policy under Section 702 of the Act, then no refusal to bargain may be found. **PLRB v. State College Area School District**, 461 Pa 494, 337 A.2d 262 (1975). Section 702 of PERA provides, in relevant part, as follows:

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion of policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

43 P.S. § 1101.702. In **State College**, **supra**, our Supreme Court addressed the relationship between Sections 701 and 702 and therein developed the analysis that the Board must apply in determining whether a matter is bargainable under Section 701 or a non-bargainable managerial prerogative under Section 702. The Court opined that determinations in this area must strike a balance between employes' interests in the terms and conditions of their employment on the one hand and the employer's interests in performing managerial functions on the other. 337 A.2d at 268. "In striking this balance the paramount concern must be the public interest in providing for the effective and efficient performance of the public service in question." **Id.** The Court, in **State College**, further held as follows:

> [W]here an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours or 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 employes in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole.

Id.

Reviewing past Board and Court decisions on similar matters, I find that the Board's decisions in **Commonwealth of Pennsylvania (Governor Dick Thornburgh)**, 13 PPER ¶ 13097 (Final Order, 1982), **aff'd**, 84 Pa. Commonwealth Ct. 458, 479 A.2d 683 (1984) (**Code of Conduct)**, and **Cambria County Transit Authority**, 21 PPER ¶ 21007 (Final Order, 1989),

aff'd, 22 PPER ¶ 22056 (Court of Common Pleas of Cambria County, 1991), to be most relevant to the issues presented in this matter.

In **Code of Conduct**, the Unions charged that Governor Thornburgh violated Section 1201(a)(5) of PERA by unilaterally implementing a code of conduct which generally prohibited conflicts of interest, outside employment, acceptance of significant gifts and favors, misuse of information or equipment, and certain kinds of political activities. The code of conduct also established procedures and disciplinary provisions to be utilized when employes are charged with or convicted of criminal conduct. The Commonwealth argued that the unilateral imposition of a code of conduct by the Governor is a managerial prerogative. The unions argued that the Code substantially changes conditions of employment and thus should be mandatory subject of bargaining. In its review of the various work rules implemented by the Commonwealth in **Code of Conduct**, the Board applied **State College** and held:

> In attempting to ascertain the impact that a decision has upon the policy and overall operation of a public employer, the functions, duties and obligations of that public employer must be considered by the Board. It is not for the Board or the courts to decide whether a particular rule implemented by an employer is the most reasonable or the best regulation possible. The Board must decide whether this rule or regulation comes under the rubric of managerial prerogative and evaluate its impact on wages, hours and terms and conditions of employment. The Pennsylvania Supreme Court has defined managerial prerogatives with regard to what are the duties and obligations of the public employer. Those are relevant considerations in determining the impact that a decision has upon the employer's policy.
>
> In view of the foregoing we find the thrust of Executive Order 1980-18 impacts directly on basic policy of the Commonwealth within the meaning of **State College** . . . since its ***provisions go to the heart of the function*** of democratic government. Since we find [the code of conduct] ***fulfills a vital function of government***, its impact on employe wages, hours, terms and conditions of employment must be compelling to find such a code to be a mandatory subject of bargaining. . . .

Code of Conduct, **supra**. (internal citations omitted)(emphasis added). With this frame work of analysis set forth, the Board went through each of the separate work rules contained in the code of conduct and weighed the impact each rule on employe wages, hours, terms and conditions of employment. With respect to the rules on reporting of criminal convictions, the Board held that the rule was not a mandatory subject of bargaining because:

> The unions failed to show how many people would be affected or how these individuals would be harmed by the imposition of regular, uniform rules applicable to all executive employes. Thus, we find these provisions governing criminal . . . activity to have minimal impact on employes' wages, hours, terms and conditions of employment.

Id.

In **Cambria County**, the Union alleged that the Employer committed an unfair practice when it unilaterally promulgated a mandatory drug and alcohol testing program for drivers and mechanics of the Employer. The Hearing Examiner initially found that Employer had not refused to bargain in good faith regarding its unilateral promulgation of the drug and alcohol policy because the drug and alcohol policy promulgated by the Employer was a matter of inherent managerial prerogative. On exceptions, the Board, in its Final Order, rigorously applied the test in **State College** and, following **Code of Conduct**, found the

Employer's managerial authority was supported because the drug and alcohol testing policy directly serves the public interest by ensuring efficient and effective mass transit services.[1]

However, even though the Board in **Cambria County** found that the Employer's managerial authority to implement the policy in question was supported by the Employer's managerial right to serve the public interest, the Board still found that the Employer committed an unfair practice when it unilaterally implemented the drug and alcohol policy because the policy ". . .create[d] an entirely **new ground for employe discipline** including discharge for failing to submit to a drug/alcohol test under several prescribed circumstances. . ." which triggered the Employer's duty to bargain because "matters of employe discipline and disciplinary procedures in both the public and private sectors are mandatory subjects of bargaining". **Cambria County**, **supra**. (emphasis added).[2] Thus, the Board in **Cambria County** held:

> We thus find that a public employer may, under limited circumstances, unilaterally decide that its employes may be randomly tested for drug or alcohol abuse which impairs public services. However, prior to the promulgation of any drug or alcohol testing program, the public employer must negotiate with the exclusive representative of its employes regarding consequential matters which more directly affect employe working conditions than matters of managerial prerogative. Included among those matters are . . . matters of employe discipline which follow a positive test result.

Id. This result with respect to discipline in **Cambria County** differed from **Code of Conduct**, where no duty to bargain discipline was found. The **Cambria County** Board reached a different result because the policy in **Code of Conduct** ". . .did not, on balance, address new or novel areas of employe conduct but rather in large measure was a codification of existing standards" whereas, in **Cambria County**, the policy ". . .**creates an entirely new ground for employe discipline** including discharge for failing to submit to a drug/alcohol test under several prescribed circumstances." **Id.**, (emphasis added).

Turning to the matter of this case, applying the reasoning and holdings of **Code of Conduct** and **Cambria County**, I find that, while the Employer had the inherent managerial authority to implement the policy in question, the Employer committed an unfair practice under Section 1201 (a)(5) of PERA when it implemented the charged policies and did not offer to bargain the issue of discipline with the Association.

The record in this case shows that the State System has a strong inherent managerial right to implement the policies at issue because the polices at issue "go to the heart of the function" of the State System and "fulfil a vital function" of the State System. The State System's broad Protection of Minors policy, from which the specific charged policies in question in this matter eventually flowed, was developed in the wake of the Sandusky Scandal and the Freeh Report of 2012. The concern generated by those events in the State System are completely reasonable considering how, in many ways, the State System is similar to the Pennsylvania State University, and the risks and dangers to minors on State System campuses and to the State System as a whole was directly relatable to the experience of Pennsylvania State University. Further, the State System

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[1] The Board also found the Employer's managerial prerogative to be supported by factual impact because of strong evidence of drug and alcohol use among employes prior to promulgation of the drug and alcohol policy and the impact of that drug and alcohol use on the Employer's ability to provide a safe and efficient transit system. In other words, the Employer had cause to implement the policy. The issue of the factual evidence of impact of Employer's interest is not at issue in this matter because, unlike **Cambria County**, where the Board was specifically concerned with a strong privacy impact on the employes due to the invasive nature of drug testing, no such privacy impact has been put forth by the Association. Thus, I find it would be improper to apply the specific drug and alcohol balancing test as put forth in **Cambria County** to this matter.

[2] Additionally, the Board found the employes' ". . .interest in the accuracy and integrity of the process to outweigh the employer's interest in acting unilaterally without negotiations with the employes over the nature and reliability of the testing process." **Id.** However, the Association in this matter has not advanced these or similar arguments therefore they are not germane to the case at hand.

was aware of a legislative attention to the very public issue and rightfully concerned of legislative attention and action concerning its practices, and felt a strong, responsible reaction was proper.

In response to these events, the State System's Board of Governors became concerned that the State System did not have adequate system-wide polices regarding the protection of minors and whether the individual institutions of the State System followed their own polices with regard to the protection of minors. Indeed, the State System estimated that there are approximately 387,000 minor visits to its 14 universities each year during approximately 23,700 annual events. To address these concerns, the Board of Governors inquired with State System management as to the current polices which were in place and how they were enforced. In response to this inquiry, the Board of Governors was not satisfied with the State Systems' then-current policies and practices with regard to the protection of minors and the Board of Governors decided that it must take strong action and make a response a high priority. In developing its new policy to address the protection of minors, the Board of Governors was focused on creating a high degree of uniformity between the individual universities and campuses in the State System, to address the fact that faculty and staff more often move from campus to campus, and on creating procedures which would be applicable to staff that interacted with minors on campuses.

I move from the general State System policy on protecting minors to the specific policies at issue in this matter. First, the policy that all employes, including those not covered by the CPSL, as amended, should complete regular background checks addresses the State System's concerns by ensuring that the State System is aware of employes with criminal pasts or have been involved in situations where the welfare of children was put in danger, and, also, by maintaining a high degree of uniformity and efficiency on the State System campuses by ensuring that all staff are properly checked no matter what role or on what campus they are assigned. Second, the policy that all employes, including those not covered by the CPSL, as amended, should report arrests and convictions of a certain subset of crimes addresses the State System's concerns by ensuring that the State System is immediately aware of when an employe may be a risk to minors and allow the State System to make prompt, responsible determinations and actions and, also, ensures that standards with regard to reporting of arrests and convictions are uniform throughout the State System.

Thus, the record in this matter clearly shows that the State System was reasonably concerned over risks to minors on its campuses and the consistency of policy throughout its entire system. These concerns "go to the heart of the function" of the State System, which is to provide secondary education, and, accordingly, I find that the policy in question in this matter is directly responsive to the managerial concerns of safeguarding minors and providing the effective and efficient performance of higher education in the Commonwealth, and that the unilateral implementation of the policies in question in this matter were well within the Employer's inherent managerial authority.

Since I find that the policies in question in this matter fulfill a vital function of the State System, their impact on employe wages, hours, terms and conditions of employment must be compelling to find such policies to be mandatory subject of bargaining. The record in this matter does not show that the unilateral implementation of the State System's policies at issue have had a compelling impact on the employes' term and conditions of employment. With respect to the requirement to report arrests and convictions, this issue has already been reviewed by the Board in **Code of Conduct**, and the Board found that the Employer's managerial interest outweighs the employes' interest on their terms and conditions of employment, and I follow the holding in that matter. With regard to requiring regular background checks, the record in this matter does not indicate any substantial impact on the employes' terms and conditions of employment, let alone a compelling impact, and I find that the State System's interest in this matter outweighs the employes' interest. Thus the policies in question were within the State System's inherent managerial right to implement and no unfair practice occurred when the State System did so implement them.

However, as in **Cambria County**, this does not end the analysis of the matter. The record shows that the policies in question in this matter clearly create new grounds for employe discipline. The record in this matter shows that the State System would discipline bargaining unit members who do not comply with the new polices. With respect to reporting requirements, "Procedure/Standard Number 2015-21: Background Clearances and Reporting Requirements" states that an employe "shall be subject to discipline up to and including termination or denial of employment" on the "failure" of an employe to comply. Further, the record in this matter shows that, prior to the implementation of the policy at issue in this matter, compliance with the requirements for background checks and mandatory reporting for bargaining unit members was not grounds for discipline. Thus, there are new grounds of discipline. There is no dispute on the record that the State System did not bargain the disciplinary aspect of the policies in question prior to implementation.

Since the record in this matter shows that the policies implemented by the Employer in this matter instituted new grounds of discipline, even though the Employer had the inherent managerial authority to implement the policies in question, and that the State System did not bargain the new grounds of discipline with the Association, I find that the Employer in this matter violated Section 1201(a)(5) of PERA.

As a remedy, inspired by the remedy used in **Cambria County**, I will order the State System to suspend any disciplinary provisions relating to the policies in question as they apply to bargaining unit members not covered by the CPSL, as amended, and, prior to reimplementation of any disciplinary provisions, order the State System to bargain with the Association over the issue of discipline.

CONCLUSIONS

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

1. The State System is a public employer within the meaning of Section 301(1) of PERA.

2. The Association is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. That the State System has committed an unfair practice in violation of Section 1201(a)(1) and (5) of the PERA by failing to negotiate over employe discipline when it unilaterally implemented polices which require certain bargaining unit members obtain background checks and certifications, and to make certain reports, where not required by the Child Protective Services Law, 23 PA.C.S. § 6301 **et seq**.

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 State System 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 the employe organization which is the exclusive representative of employes in an appropriate unit.

3. Take the following affirmative action which the Board finds necessary to effectuate the policies of the Act:

(a) Suspend any disciplinary provisions relating to its policies which require certain bargaining unit members obtain background checks and certifications, and to make certain reports, where not required by the Child Protective Services Law, 23 PA.C.S. § 6301 **et seq.**

(b) Prior to reimplementation of any disciplinary provisions relating to its policies which require certain bargaining unit members obtain background checks and certifications, and to make certain reports, where not required by the Child Protective Services Law, 23 PA.C.S. § 6301 **et seq.**, bargain with the Association regarding related matters of discipline consistent with the Discussion portion of this Order.

(c) 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 its employes and have the same remain so posted for a period of ten (10) consecutive days;

(d) 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

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

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 at Harrisburg, Pennsylvania, this second day of August, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STATE COLLEGE & UNIVERSITY PROFESSIONAL ASSOCIATION, PSEA/NEA	:	
	:	CASE NO. PERA-C-15-299-E
v.	:	
PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION	:	

AFFIDAVIT OF COMPLIANCE

The Pennsylvania State System of Higher Education hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has suspended any disciplinary provisions relating to its policies which require certain bargaining unit members obtain background checks and certifications, and to make certain reports, where not required by the Child Protective Services Law, 23 PA.C.S. § 6301 **et seq.**; that prior to reimplementation of any disciplinary provisions relating to its policies which require certain bargaining unit members obtain background checks and certifications, and to make certain reports, where not required by the Child Protective Services Law, 23 PA.C.S. § 6301 **et seq.**, it has bargained with the Association regarding related matters of discipline; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed 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