COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF STATE COLLEGE AND UNIVERSITY FACULTIES	:	
	:	CASE NO. PERA-C-15-240-E
v.	:	
PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION	:	

PROPOSED DECISION AND ORDER

On August 18, 2015, the Association of Pennsylvania State College and University Faculties (APSCUF, 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 (PASSHE, State System, or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

On September 30, 2015, the Secretary of the Board issued a complaint and notice of hearing designating January 25, 2016, in Harrisburg, as the time and place of hearing.

Due to office closures relating to winter weather, the hearing scheduled for January 25, 2016, was continued. The first day of hearing was held on April 19, 2016, in Harrisburg, before the undersigned Hearing Examiner. Additional days of hearing were held on May 17, 2016, and July 21, 2016, also in Harrisburg. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The State System filed a post-hearing motion to dismiss on October 3, 2016. The Association filed a reply to the State System's motion to dismiss and also its post-hearing brief November 14, 2016. The State System filed its post-hearing brief on January 18, 2017.

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. 8).

2. The Association is an employe organization within the meaning of PERA. (N.T. 8).

3. The parties were subject to a collective bargaining agreement which expired on June 30, 2015. (N.T. 8).

4. On December 22, 2014, Dr. Kenneth Mash, President of the Association, received a letter from Lisa Sanno, the State System's Assistant Vice Chancellor for Labor Relations. Sanno's letter states in relevant part:

> On July 8, 2014, [the State System's] Board of Governors (BOG) adopted Policy 2014-01: Protection of Minors. This policy was developed to promote the safety and security of children who participate in programs on university property and required universities to establish and implement criminal background screening policies and procedures consistent with applicable law and the BOG policy 2009-01: Criminal Background Investigations. Since the issuance of BOG Policy 2014-01, the Pennsylvania Legislature has passed and the Governor has signed Act 153 of 2014 (HB 435), effective December 31, 2014, providing for expanded clearance checks for employees and volunteers who have direct contact with children, as defined by the Child Protective Services Law. Act 153 also requires employees and volunteers to notify their

employer within 72 hours of an arrest or conviction of a criminal act covered by the statute.

As previously conveyed at the statewide Meet and Discuss between the parties on December 19, 2014, the State System's universities offer programs and activities involving minors and in light of the expanded clearance checks and reporting requirements provided in Act 153, the BOG will amend Policy 2014-01: Protection of Minors to include:

- All employees will be required to have criminal background screening clearances in accordance with applicable procedures, standards, and guidelines as established by the chancellor.

- All employees will provide written notice within 72 hours if arrested for or conviction [sic] of a Reportable Offense enumerated under the Child Protective Services Law or named as a perpetrator in a founded or indicated report of child abuse.

Enclosed for your review are draft copies of the amended Policy 2014-01-A: Protection of Minors and the related Procedures and Standards for University Operations document which establishes the procedures and standards for implementation of the Protection of Minors Policy. The amended Protection of Minors Policy will be presented to the BOG for adoption at its January 21, 2015 meeting.

(Association Exhibit 7; N.T. 47)

5. The December 22, 2014, letter from Sanno to Mash attached the most recent draft of the amended Policy 2014-01-A: Protection of Minors [the Protection of Minors Policy] and the related Procedures and Standards for University Operations document. (N.T. 135; Employer Exhibit 6).

6. "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

a. Reporting of Child Abuse
In a situation of suspected child abuse, all State System administrators, faculty, coaches, staff, student workers, independent contractors, and volunteers are mandated reporters under this policy. Everyone who is deemed

a mandated reporter pursuant to this policy shall be trained as if designated a mandated reporter by Pennsylvania law. . . .

. . .

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.

(Association Exhibit 8; N.T. 49-50).

7. The State System began requiring faculty and coaches in the Association's bargaining unit to have background checks completed pursuant to the Protection of Minors Policy in January, 2015. (N.T. 61-62, 140-141, 237).

8. The parties conducted one impact bargaining session on January 28, 2015. The meeting concerned the implementation and impact of the Protection of Minors Policy. On February 25, 2015, Mary Rita DuVall, Head of Labor Relations for the Association, wrote a letter to Sanno which summarized the meeting and requested follow-up on unanswered issues raised at the meeting. DuVall's February 25, 2015, letter states in relevant part:

This correspondence is in follow up to our joint negotiation session held on January 28, 2015 for the implementation and impact of the Protection of Minors Policy / Background Checks. Since the Protection of Minors Policy has been implemented as written, it is imperative that faculty members and coaches have knowledge who is a minor in their classes, sports and other programs. Accordingly please immediately provide each faculty member and coach with a list of names of minor students currently enrolled in their classes, programs, sports and/or who are assigned to faculty members as advisees. In addition to seeking immediate response to the above request, below you will find a list of unanswered questions for which [the Association] seeks response. [The Association] requests [the State System's] responses prior to any further negotiation sessions on these issues.

Background Checks
- The OOC has stated that Criminal Background checks costs are being covered for faculty members and coaches. Who will pick up the costs of the background checks required for temporary faculty members, who have a break in service?

- How will the costs of background checks for employees in sports camps be assessed in the context of Coaches' fundraising duties?
- Has the OOC created a draft copy of Protection of Minors / Background Checks guidelines? It was our understanding that the guidelines were to be established by the BOG pertaining to the costs for background checks and who pays for same.
- What procedures will PASSHE follow checking for errors and/or addressing clearances [sic] false positives? Will PASSHE assist the faculty/coach if the if [sic] faculty/coach believes the report is incorrect?

Reporting Requirements
- At our last session PASSHE advised that the OOC would provide a response to APSCUF's questions regarding the reporting requirements in Section C.7.b.9(1) of the Protection of Minors Policy. Please clarify whether the offenses that are to be reported are limited only to those listed in the Child Protective Services Law.
- What is the PASSHE procedure when a faculty member or coach self-reports an arrest? What if the arrest results in no conviction?
- What is PASSHE's definition of arrest under this policy?

. . .

Our hope is that the parties will reach mutual joint agreement on the impact and implementation of these polices on our faculty and coaches as quickly as possible.

(Association Exhibit 9; N.T. 51-56, 140, 442-445).

9. On June 11, 2015, DuVall sent Sanno an email which states in relevant part:

Good afternoon. After review of my demand to bargain (see attached) letter dated February 25, 2015 for the implementation and impact of the Protection of Minors Policy/Background checks, I am writing to arrange another bargaining session in regards to the outstanding issues not yet addressed as of today's date. Please let me know what dates work for you in June.

(Association Exhibit 10; N.T. 62-64, 455-456).

10. On June 18, 2015, Sanno responded to DuVall's email by writing: "As we in currently [sic] bargaining for a successor collective bargaining agreement, this topic is appropriate for discussion at the main table."

(Association Exhibit 10).

11. On July 1, 2015, the Pennsylvania General Assembly passed Act 15 of 2015. Act 15 of 2015 amended the Child Protective Services Law [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).

12. Act 15 of 2015 exempted certain Association bargaining unit members from the background check and arrest reporting requirements of the CPSL. The Association believed that its bargaining unit coaches were covered by the amended law because they have direct contact with non-matriculated minors with few exceptions. Further, the Association believed that some faculty members would still be covered by the law such as those faculty members who visit primary or secondary schools (N.T. 65-66).

13. The State System did not change its Protection of Minors Policy in response to the changes made to the CPSL on July 1, 2015. The Policy had not changed since January 22, 2015. (N.T. 151, 458).

14. After the CPSL was amended in July, 2015, DuVall again wrote to Sanno on July 21, 2015. DuVall's letter states in relevant part:

> On July 1, 2015, amendments to the [CPSL] went into effect. These amendments eliminate or modify certain provisions of the pre-existing law that imposed legal obligations on members of the bargaining units represented by APSCUF, including but not limited to the necessity to obtain criminal history information and certifications as a condition of employment and the frequency of obtaining updated criminal history information and certifications.
>
> The current policy of the [State System], issued under the pre-July 1, 2015 law, imposed requirements on members of our bargaining units that the law no longer requires. We believe, and hereby notify you, that the imposition of those terms and conditions of employment not required by the [CPSL] that the State System has imposed on our bargaining unit members is not subject to bargaining.
>
> Because the State System never previously bargained with APSCUF over the imposition of those terms and conditions of employment, due to their having been imposed by the previous version of the law, it is our belief that the policy is not null and void insofar as it exceeds the requirements of the current law. If the State System wished to apply any such terms and conditions of employment on employees who are not subject to the requirements of the law, it is incumbent on the State System to bring that request to the bargaining table.
>
> In the alternative, APSCUF demands to bargain over the application of the above-described policy to employees not subject to the requirements of the [CPSL], or impact thereof. Insofar as any such matters are not subject to the duty to bargain, APSCUF demands meet and discuss.
>
> (Association Exhibit 13; N.T. 69, 459).

15. Sanno responded to DuVall with a letter dated August 7, 2015. Sanno's letter states in relevant part:

> It is the State System's position that the Policy is not null and void as APSCUF claims, as the Board of Governors has, in accordance with Act 188, the prerogative to establish personnel policies. There is nothing in Act 15 of 2015 rendering any part of the State System's policy on background checks to be unlawful. As such, the State System has a valid, lawful policy in place.
>
> Furthermore, it is the State System's position that requiring background screenings for current employees is a matter of inherent managerial prerogative and is not a mandatory subject of bargaining. That being said, the State System is and remains willing to bargain over the impact of conducting criminal background screenings for current faculty and coaches. Such was communicated to APSCUF via correspondence dated June 30, 2014 and July 30, 2014 . . . . In fact, the parties . . . met on January 28, 2015 for the purposes of bargaining over the impact of the State System's decision to require current employees to undergo those criminal background screenings required by the Policy. Most recently, on June 8, 2015, you contacted me to arrange another bargaining session regarding outstanding issues not yet addressed as of that date, to which I replied, as APSCUF and the State System are currently engaged in bargaining for a successor collective bargaining agreement this topic is appropriate for discussion at the main table.
>
> The State System has been and remains willing to bargain over the impact of conducting criminal background screenings for current faculty and coaches or meet and discuss, as appropriate.

(Association Exhibit 14; N.T. 70, 460).

16. After receipt of Sanno's August 7, 2015, letter the Association filed the unfair practice charge for this matter. (N.T. 71).

DISCUSSION

The State System made a Motion to Dismiss on the grounds that the Association's charge is untimely. The State System argues that the Protection of Minors policy was effective as of January 22, 2015, and that the Association knew of the Policy's implementation by February 25, 2015, at the latest. Thus, the State System argues, the Association's charge is untimely as the Association did not file its charge before June 25, 2015, which would have been four months from February 25, 2015. (State System's Motion to Dismiss, page 9).

The Association responds that its charge is not untimely because the Association filed its charge ". . . 49 days after the State System unilaterally disrupted the status quo following the expiration of the parties' contract, less than 30 days after learning the Policy was implemented on exempt employees and ll days after the State System refused ASPCUF's demand [to] bargain over the application of its Policy that exceeded the scope of the law." (Association's Post-Hearing Brief, page 31).

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 alleged unfair practice claim 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). The Board will find an employer in violation of its bargaining obligation enforceable under Section 1201 (a)(5) of PERA if the employer unilaterally changes a mandatory subject of bargaining. **PLRB v. Mars Area School District**, 389 A.2d 1073 (Pa. 1978).

Accordingly, the Board normally looks to the date of implementation of a unilateral change in evaluating timeliness of a claim that a policy was unlawfully, unilaterally implemented. **Upper Gywnedd Township, supra**. 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). Once four months elapses from the time when that policy is initiated, a cause of action based on the continued existence and application of that policy expires. **Pennsylvania Nurses Association v. Commonwealth of Pennsylvania, Department of Public Welfare**, 24 PPER ¶ 24083 (Final Order, 1993).

In its charge, the Association claims that the State System violated Section 1201(a)(5) of PERA on July 24, 2015, when the State System "refused APSCUF's demand to bargain over application of its policy requiring (1) criminal background checks of current faculty members and (2) requiring faculty members to report arrest or conviction for 20 listed crimes, even though those faculty members are not subject to the background

checks and reporting requirements of the Child Protective Services Law, as amended effective July 1, 2015."

Counsel for the Association further clarified the Association's charge at the hearing by stating ". . . this charge is for failing and refusing to bargain over the unilateral implementation of a policy that exceeds the scope of the requirements of the law and changes the working conditions of employees" and ". . . the State System's unilateral adoption and implementation of those policies imposing background checks and reporting requirements on faculty members who are statutorily exempt under the law [is a violation of PERA]". (N.T. 10, 20-21). Counsel for the Association also alleged at the hearing that the "unilateral implementation of this policy upon exempt employees during the status quo period" was an unfair practice under Section 1201(a)(5). (N.T. 20).

Additionally, in its Post-Hearing Brief, the Association argues that the charge was filed ". . . 49 days after the State System unilaterally disrupted the status quo following the expiration of the parties' contract, less than 30 days after learning the Policy was implemented on exempt employees . . . ." (Page 31).

The Association has thus framed its charge such that the State System's "application" or "unilateral implementation" of the Protection of Minors Policy on CPSL exempted bargaining unit members occurred after July 1, 2015.

However, the record in this matter is clear that the Protection of Minors Policy was applied and implemented by February 25, 2015, at the latest, on all bargaining unit members, including those later exempted from the requirements of the CPSL. The Protection of Minors Policy was amended on January 22, 2015, and immediately effective. The State System began requiring faculty and coaches in the Association's bargaining unit to have background checks completed pursuant to the Protection of Minors Policy in January, 2015. The parties conducted one impact bargaining session on January 28, 2015, concerning the implementation and impact of the Protection of Minors Policy. On February 25, 2015, DuVall wrote a letter to Sanno which summarized the meeting and requested follow-up on unanswered issues raised at the meeting. DuVall's February 25, 2015, letter states: "This correspondence is in follow up to our joint negotiation session held on January 28, 2015 for the implementation and impact of the Protection of Minors Policy / Background Checks. . . ."

Thus, the record is clear in this matter that the Protection of Minors Policy was implemented by February 25, 2015, at the latest, which is the date the Association's agent, DuVall, expressed her awareness of the Policy's implementation. The Association's charge was filed on August 18, 2015, well beyond the four-month limitation beginning on February 25, 2015.

It is quite clear from the record that the CPSL did change on July 1, 2015, to exempt many of the Association's bargaining unit members who were previously covered by the CPSL. However, on this record, critically, the State System did not change its Protection of Minors Policy. Thus, in July, 2015, there was no unilateral implementation or application of the Protection of Minors Policy. There was no change in July, 2015.[1] The exempted employees were covered by the State System's Protection of Minors Policy before the CPSL was amended on July 1, 2015, and they were covered by the State System's Protection of Minors Policy after the CPSL was amended. The July 1, 2015, amendments to the CPSL may have exempted certain bargaining unit members from complying with the CPSL, but it did not exempt bargaining unit members from complying with the State System's Protection of Minors Policy. The unilateral change to what the Association alleges were

[1] Mary Rita DuVall testified on cross:
Q. The policy hasn't changed at all since January 22nd, 2015; correct?
A. 2015?
Q. 2015.
A. Yeah, it has not, but the law has.
Q. And throughout that time period from January of 2015 to July of 2015, no change in the work policy?
A. Not to my knowledge.
(N.T. 151)

terms and conditions of employment happened in February, 2015, at the latest, when the Association had unambiguous knowledge of the implementation of the Protection of Minors Policy.

Additionally, there was no "unilateral disruption" of the status quo in July, 2015, as the Policy had been implemented with respect to bargaining unit members since February 25, 2015, at the latest, including those later exempted under the CPSL on July 1, 2015.

The State System's Motion to Dismiss is granted as to the Association's charge based on the unilateral implementation of the Protection of Minors Policy, and that charge therefore is dismissed as untimely. The Association's charge with respect to disruption of the status quo, which was raised by the Association for the first time at hearing and again in its Post-Hearing Brief, is dismissed as there was no change to the status quo through the State System's continued enforcement of an existing policy.

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. The Association's charge is dismissed as it is untimley.

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 charge is dismissed and the complaint rescinded.

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 twenty-eighth day of February, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner