COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNCREST EDUCATION SUPPORT PROFESSIONALS, PSEA/NEA	:	
v.	:	CASE NO. PERA-C-21-226-W
PENNCREST SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On September 23, 2021, the Penncrest Education Support Professionals, PSEA/NEA (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (PLRB or Board) alleging that the Penncrest School District (District or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) when the District stopped allowing certain employees in the bargaining unit to continue a practice of not working on approximately 12 days a year when students did not report to school while still being paid for those days without using any benefit time such as vacation time.

On October 10, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing assigning the matter to conciliation and designating January 28, 2022, via Microsoft Teams, as the time and manner of hearing.

The hearing date was continued twice at the request of the parties and a hearing was ultimately held April 20, 2022, via Microsoft Teams, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed its post-hearing brief on June 22, 2022. The District filed its post-hearing brief on July 15, 2022.

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

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6).

2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6).

3. The parties are subject to a collective bargaining agreement (CBA) with the effective dates of July 1, 2018 through June 30, 2023. This CBA was not finalized until April, 2020. (Joint Exhibit 1).

4. Included in the Association's nonprofessional bargaining unit are the classifications of secretaries, central clerks, and teacher's aides. The employes work 12 months out of the year and the other classifications in the bargaining unit work 9 months out of the year. These employes are referred to by the parties in the context of this matter as "12-month employees". There are approximately 6 teacher's

aides, 6 secretaries and 6 central clerks in the unit of approximately 180 employes at the time of the hearing. (N.T. 26, 50-51, 98).

5. Prior to July 1, 2021, 12-month employees were not required to work on days that schools were closed for students. They were paid for these days as a normal workday and did not have to use benefit time such as a vacation day or personal day. On their time slips, they would put 7 hours in for the day along with a note such as "holiday". They would send these leave slips for approval. They were routinely approved. These certain days were holidays for students such the days before and after Thanksgiving and the days between Christmas and New Year's. In other words, the 12-month employees did not show up to work on certain holidays the schools were closed for students and were still paid for those days. This practice had been occurring for at least the prior 23 years. This practice did not include summer break. During summer break, the 12-month employes only had July 4th as a paid holiday, even though the students and teachers were not at school. This practice meant the 12-month employes did not work for about 11-12 days a year and were paid for those days without using any benefit time. (N.T. 26-31, 39-40, 113, 127-128).

6. Sondra Hunter is the President of the Association. She is a secretary. She has been employed by the District for almost 24 years. Dr. Timothy Glasspool is the Superintendent of the District. He began working for the District in 2018. In early February 2021, Glasspool learned bargaining unit members (secretaries) did not come into work on days when students did not come to school. On February 8, 2021, Glasspool and Hunter discussed the issue of 12-month employes not working on certain days when the school district is closed for students. On February 9, 2021, Glasspool sent Hunter an email which states in relevant part:

> It has come to my attention on February 8, 2021, that numerous 12-month employees may not be working the required number of days, or did not enter benefit days in accordance with the [CBA].
>
> Specifically: 5/22/20, 10/30/20, 11/25/20, 11/27/20, 11/30/20. 12/23/20, 12/24/20, 12/28-31/20, 1/18/21, 1/25/21.
>
> It is also my understanding that many 12-month employees believe that they do not need to report to work or enter benefit days for 2/12 and 2/15. At this time, I am not asking members to change plans, report to work or enter benefit days. I want to discuss my concerns as related to Article 10 and Article 15.

(N.T. 31, 96-110; Association Exhibit 1).

7. In late February, 2021, the parties had a meeting to discuss the issue of 12-month employees not working on days the District was closed for students without putting in for benefit days. At this meeting the parties agreed there would be no change in the 2021 school year and the Association would send a proposal on the issue to the

District. The Association sent a proposal to the District on February 25, 2021. (N.T. 31-33; Association Exhibit 2).

8. On April 9, 2021, Glasspool responded to Hunter with a letter that states in relevant part:

> It came to my attention on February 8, 2021 that numerous 12-month unit employees may not have worked or planned to work the number of required days as outlined in [the CBA]. My concern is some unit members are following a past practice of not working, but receiving wages for days not designated under Article 10 Holidays. On February 18, 2021, we met via Zoom and discussed my concern. At that meeting, I informed you of my interpretation of the current CBA and potential violation. At the meeting and as a courtesy, I agreed to not enforce the CBA language for the 2020-2021 school year, but state that the issue must be resolved prior to July 1, 2021, for the upcoming school year.
>
> On February 25, 2021, [the Association] submitted a "Work Year Memorandum Proposal". [District Solicitor George Joseph] and I presented the proposal to the Board of School Directors on March 8, 2021, and discussed the proposal and counter proposal options on March 8, March 11 and April 6, 2021. The Board of School Directors is not interested in submitting a counter proposal. Beginning with the 21-22 school year, the Board of School Directors has directed me to enforce the current CBA work year language.

(N.T. 34; Association Exhibit 3).

9. On April 26, 2021, Robert Myers, UniServ representative for the PSEA, sent Glasspool a letter which states in relevant part:

> RE: PENNCREST ESP – Work Year for 12-Month Bargaining Unit Members
>
> Dear Dr. Glasspool:
>
> Your memorandum to [Hunter] dated April 9, 2021, regarding the above was forwarded to my attention, and I am responding thereto.
>
> Please be advised that [the Association] demands bargaining on the matter.
>
> The [CBA] between the parties does not specify the number of work days for 12-month bargaining unit members. Therefore, the District is prohibited from unilaterally implementing this required subject of bargaining.

> Consequently, the parties must maintain the status quo until a ratified agreement is reached on the issue.

(N.T. 59; Association Exhibit 6).

10. On April 30, 2021, Joseph responded to Myers with a letter which states in relevant part:

> First, while I may agree with you that the [CBA] does not expressly state the number of work days for 12-month bargaining unit members, it does specify the days that may be taken as non-workdays. Further, Article 9 specifies the vacation schedule for all employees, including 12-month employees, and Article 10 specifies those holidays which employees may take with pay. . . .
>
> Under the circumstances, we must disagree with your characterization that there is a status quo, as all prior agreements, including any past practices, were terminated by the [CBA] itself. Moreover, the [Association] has waived its rights to bargain anything not included within the agreement during the life of the agreement. . . .

(N.T. 60; Association Exhibit 7).

11. On May 6, 2021, Myers sent Joseph a letter which states in relevant part:

> I am responding to your letter to me dated April 30, 2021.
>
> As you confirmed the [CBA] between the parties does not specify the number of work days for 12-month bargaining unit members.
>
> Work days involve hours on the job, and hours are a mandatory subject of bargaining under [PERA].
>
> [The Association] has demanded bargaining on this matter.
>
> It remains the Association's position that the parties must maintain the status quo regarding work days until a ratified agreement has been reached on the number of days in the work for 12-month bargaining unit members.

(N.T. 35, 61; Association Exhibit 8).

12. On May 18, 2021, Joseph sent Myers a letter which states in relevant part:

> Thank you for your letter dated May 6, 2021. While I certainly appreciate your position on behalf of [the Association], I cannot agree with it. The parties have fully and fairly negotiated terms and conditions of employment, including work days and work years. I pointed out to you before, the parties extensively have negotiated employee unpaid leaves of absence, paid leaves of absence, employee benefits, vacations, and holidays, including language on the work week.
>
> Importantly, the parties negotiated language in [the CBA] terminating all past practices, as specified in Article 15.A and included an integration clause in Article 15.B by which the parties agreed to waive the right to bargain collectively with regard to matters not referred to or covered in [the CBA]. [The Association] cannot unilaterally incorporate additional holidays or compensated time off into [the CBA]; nor can the [the Association] now seek to bargain matters not bargained during the term of [the CBA].

(Association Exhibit 9).

13. On July 15, 2021, Glasspool sent Hunter an email which stated in relevant part: "The Board is not interested in discussing this matter. I have been told to enforce the current contract language." (N.T. 35; Association Exhibit 5).

14. In July 2021, the 12-month employes were required to work on scheduled school holidays or use benefit time in order to be paid. Since July 2021, Hunter and other 12-month employee bargaining-unit members have used benefit time for holidays they had, in the past, been paid for without using benefit time. (N.T. 36-37).

15. Article 8, Section H of the CBA states in relevant part:

> Full-time bargaining unit members shall be given three (3) days unaccountable personal leave annually. . . .
> No more than three (3) personal days may be used to extend scheduled school vacations in conjunction with any holidays (Labor Day, Thanksgiving, Christmas, President's Day, Easter, Memorial Day). . . .

(Joint Exhibit 1, page 11).

16. Article 10 of the CBA states in relevant part:

> Twelve-month employees shall be eligible for the following paid holidays after working for the District for thirty (30) calendar days or more:
>
> 1. New Year's Day
> 2. Good Friday
> 3. Memorial Day
> 4. Independence Day (July 4)
> 5. Labor Day
> 6. Thanksgiving Day
> 7. Christmas Day

(Joint Exhibit 1, page 15).

DISCUSSION

In its charge, the Association alleges that the District violated Section 1201(a)(1) and (5) of the Act by unilaterally changing a mandatory subject of bargaining when, on July 1, 2021, the District stopped allowing certain employees in the bargaining unit to continue a practice of not working on approximately 12 days a year when students did not report to school and still being paid for those days without using any benefit time such as vacation time.

The issues in this matter, the hours required to be worked by the 12-month employees, how they are paid, and the related use of vacation or other benefit time are all clearly mandatory subjects of bargaining under PERA. Section 701 of PERA states that public employers have the obligation to bargain with respect to "wages, hours and other terms and conditions of employment". 43 P.S. Section 1101.701; see Hazleton Area School District, 15 PPER ¶ 15170 (Final Order, 1984)("Hours are one of the most basic terms and conditions of employment, and are clearly mandatory subjects of bargaining."); West Conshohocken Borough, 53 PPER ¶ 60 (Final Order, 2021)("It is undisputed that an employe's hours are a mandatory subject of bargaining."; Middletown Township, 27 PPER ¶ 27203 (Final Order, 1996)(vacation leave is a mandatory subject of bargaining). Indeed, the District does not argue that the issues in this matter are managerial prerogatives.

An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining. Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978); Commonwealth of Pennsylvania v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983); Allegheny County, 52 PPER ¶ 69 (Final Order, 2020). The statutory obligation to negotiate mandatory subjects of bargaining "is applicable regardless of whether the collective bargaining agreement expressly mentions such benefits; whether they have been incorporated into the agreement by reference; or whether the agreement is silent on that mandatory subject of bargaining." City of Erie v. PLRB, 32 A.3d 625, 637 (Pa. 2011). An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining that has been established through a binding past practice. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011); Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 29 PPER ¶ 29041 (Proposed Decision and Order, 1998).

In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27 (1977), the Pennsylvania Supreme Court defined a past practice as follows:

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

The record in this matter shows that there is a long and clear past practice with respect to 12-month employees not working but being paid on certain days when students did not come to school. Hunter credibly testified that the practice had been continuous for the 24 years she worked for the District up until July 1, 2021. Glasspool's February 9, 2021 email to Hunter shows that he recognizes the practice exists and occurred, by his own count, on at least 13 days between May 22, 2020 and February, 2021. Then, in late February 2021, in a meeting between the parties, Glasspool agreed to let the practice continue until July 1, 2021. This is a clear example of a past practice as defined by the Supreme Court in County of Allegheny, 476 Pa. 27.

The record shows that prior to July 1, 2021, the Association demanded to bargain over the issue and attempted to bargain by drafting a proposal which was reviewed by the District's Board. The record is also very clear that the District refused to make any counter-proposals or bargain in any way and unliterally implemented the change to the terms and conditions of employment on July 1, 2021. After that date, the 12-month employees either worked or used benefit time for days when they previously did not work and were sill paid.

At this point of the analysis, the Association has shown that the District unilaterally changed a mandatory subject of bargaining which would be an unfair practice. The District raises many defenses including the affirmative defense of contractual privilege. [District's Brief at 11]. This defense is successful.

The District, as the party asserting the defense of contractual privilege, must establish a sound arguable basis for ascribing a certain meaning to the language of the collective bargaining agreement or other bargained for agreement and that the employer's conduct was in conformity with that interpretation. Fraternal Order of Transit Police v. SEPTA, 35 PPER 73 (Final Order, 2004). An employer's interpretation need not be the correct interpretation as long as a sound arguable basis exists for its interpretation, thus establishing a substantial

claim of contractual privilege. Id. Moreover, it is not the function of the Board to interpret collective bargaining agreements through unfair practice charges. Hatfield Township Police Dept. v. Hatfield Township, 18 PPER ¶ 18226 (Final Order, 1987). A finding of a sound arguable basis in the contract for the employer's actions precludes a finding of a binding past practice that is inconsistent. Abington Heights Education Association v. Abington Heights School District, 37 PPER 144 (Proposed Decision and Order, 2006).

Turning to this case, Article 10 in the CBA lists the number of holidays for the 12-month employees as seven: New Year's Day, Good Friday, Memorial Day, Independence Day (July 4), Labor Day, Thanksgiving Day, and Christmas Day. As Joseph wrote to the Association in April, 2021: "Article 10 specifies those holidays which employees may take with pay." Without having to find that the District's interpretation is correct, I do find that the District has a sound basis in the contract for arguing that these 7 days are the only holidays allowable for 12-month employees per the language of the CBA. To put it another way, I find that the District has a sound arguable basis for declaring that the 12-month employees only have the right to the 7 holidays listed in the CBA, and do not have any right to additional holidays on the days students do not come to school. The District had a sound arguable basis for enforcing said interpretation of the CBA against the Association when it limited 12-month employees to 7 holidays only and made them work on days students were not at school, or otherwise use other bargained-for benefit time. Based on this record, the District may enforce its interpretation of the contract language.

The District raises further arguments based on its interpretation of Article 15 of the CBA which contains termination and waiver clauses. Termination clauses are sometimes called integration clauses. As I can dispose of this matter without addressing arguments based on the integration and waiver clauses in Article 15 of the CBA, I do not decide if the District has valid defenses rooted in Article 15 of the CBA.

Since the District has raised a successful defense to the charge, the charge will be dismissed.

CONCLUSIONS

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

1. The District is a public employer 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 District has not committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, 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 tenth day of August, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner