COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SAYRE AREA EDUCATION SUPPORT PROFESSIONAL ASSOCIATION	:	
v.	:	Case No. PERA-C-22-82-E
SAYRE AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On March 7, 2022, the Sayre Area Education Support Professional Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Sayre Area School District (District), alleging that the District violated Section 1201(a)(5) of the Public Employe Relations Act (PERA or Act) by unilaterally changing District Policy #335 regarding leave under the Family Medical Leave Act (FMLA) without bargaining with the Association.

On May 20, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on July 27, 2022, if necessary. On July 21, 2022, the hearing was continued to November 4, 2022, at the Association's request and without objection by the District. On November 3, 2022, the hearing was again continued to May 3, 2023, at the Association's request and over the objection of the District. On April 20, 2023, the hearing was continued indefinitely at the request of both parties. By letter dated October 29, 2024, the Association requested that the matter be relisted for hearing. On November 1, 2024, the hearing was rescheduled for December 18, 2024. By letter dated December 3, 2024, the parties elected to proceed by way of joint stipulations of fact in lieu of the December 18, 2024 evidentiary hearing. The Board received the duly executed joint stipulations of fact on January 7, 2025. The parties each filed separate post-hearing briefs in support of their respective positions on February 5, 2025.

The Hearing Examiner, on the basis of all matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (Joint Exhibit 1)[1]

2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (Joint Exhibit 1)

3. The Association is the exclusive bargaining representative for a unit of nonprofessional employes at the District. (Joint Exhibit 1)

4. At the December 6, 2021 regular public meeting, the District held a first reading of a proposed change to District Policy #335, the FMLA Policy. (Joint Exhibit 1)

5. The proposed change was to update the sentence: "[w]hen an employee requests an FMLA leave and qualifies for and is entitled to any

[1] The joint stipulations of fact have been marked as Joint Exhibit 1.

accrued paid sick, vacation, personal or family leave, the employee may utilize such paid leave concurrent with the FMLA leave," to read: "[w]hen an employee requests an FMLA leave and qualifies for and is entitled to any accrued paid sick, vacation, personal or family leave, the employee shall utilize such paid leave concurrent with the FMLA leave." (Joint Exhibit 1)

6. The District received an email from a Union representative on January 30, 2022, relative to the proposed change. (Joint Exhibit 1)

7. The District met with a Union representative on February 1, 2022, to discuss the proposed change. (Joint Exhibit 1)

8. The District's Board of Directors voted to pass the change to Policy #335 at its regular public meeting held on January 18, 2022. (Joint Exhibit 1)

9. The Union filed a charge of unfair practices, alleging that the District violated Section 1201(a)(5) of PERA by unilaterally amending the District's FMLA policy to read: "[w]hen an employee requests an FMLA leave and qualifies for and is entitled to any accrued paid sick, vacation, personal or family leave, the employee shall utilize such paid leave concurrent with the FMLA leave." (Joint Exhibit 1)

DISCUSSION

The Association has alleged that the District violated Section 1201(a)(5) of the Act[2] by unilaterally changing District Policy #335 regarding leave under the Family Medical Leave Act (FMLA) without bargaining with the Association. Specifically, the Association contends that the District made a unilateral policy change mandating the concurrent use of FMLA leave with other paid forms of leave, which is a mandatory subject of bargaining. The Association emphasizes how the impact of the District's unilateral policy change is to effectively prohibit employes from being able to use their contractually earned paid leave followed by their statutory FMLA leave, which significantly impacts the total leave available to employes. The Association maintains that there is nothing in the Family Medical Leave Act which requires the District to implement and apply FMLA leave in the manner indicated in the policy revision, which precludes a finding that FMLA leave is a managerial prerogative. The Association cites a number of cases, including Righi v. SMC Corp. of America, 632 F.3d 404 (7th Cir. 2011), Escriba v. Foster Poultry Farms, 743 F.3d 1236 (9th Cir. 2014), and Gravel v. Costco Wholesale Corp., 230 F.Supp. 3d 430 (E.D. Pa. 2017), for the proposition that it is the employe's choice whether he or she wishes to invoke the protection of the FMLA and that an employe may decline to do so, even if the underlying reason for the leave is qualifying under the statute. The District, meanwhile, argues that the charge should be dismissed because the requirement that employes use paid leave concurrently with FMLA leave is a managerial prerogative pursuant to the Commonwealth Court's decision in Towamencin Twp. V. PLRB, 288 A.3d 136 (Pa. Cmwlth. 2022)(Memorandum Opinion). The District

[2] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from...(5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative." 43 P.S. § 1101.1201.

asserts that, although Towamencin was decided under the Act 111 balancing test set forth in Borough of Ellwood City v. PLRB, 998 A.2d 589, 600 (Pa. 2010), the same reasoning should apply here under PERA, since the proper staffing at public schools affects the District's ability to provide effective and efficient educational services to its students, as well as to ensure their safety.[3]

In Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011), the Board specifically outlined the relevant law as follows:

> An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining, whether established by a collective bargaining agreement or past practice. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), *appeal denied,* 569 Pa. 727, 806 A.2d 864 (2002); Utility Workers of America, Local 416, AFL-CIO v. Municipal Authority of the Borough of West View, 32 PPER ¶ 32187 (Final Order, 2001). Where the charge concerns a mandatory subject allegedly established through past practice, the complainant has the burden of proving by substantial, credible evidence that the employer has unilaterally changed an established practice. Delaware County Lodge No. 27, Fraternal Order of Police v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997); Fraternal Order of Police Fort Pitt Lodge 1 v. City of Pittsburgh, 37 PPER 84 (Proposed Decision and Order, 2006). In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the Pennsylvania Supreme Court defined a past practice as follows:
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> A custom or practice is not something which arises simply because a given course of conduct has been pursued by [m]anagement or the employees on one or more occasions. A custom or practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the *accepted* course of conduct

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[3] In PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975), the Pennsylvania Supreme Court described the balancing test under PERA as follows:

> [W]hen an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours, and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the Courts thereafter to determine whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours, and terms and conditions of employment, the public employer shall be required to meet and discuss such subject upon request by the public employes' representative pursuant to Section 702.

Id. at 268.

> 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. 476 Pa. at 34 n. 12, 381 A.2d at 852 n. 12

43 PPER at 179 (emphasis in original).

In this case, the Association has not sustained its burden of proving that the District violated the Act. The record does not show that the District's Policy #335 was a bargained-for agreement between the parties or that the parties incorporated the Policy into the collective bargaining agreement (CBA). As a result, an alleged change to the Policy is not a unilateral change violating Section 1201(a)(5) of PERA unless it can be shown that by consistently applying the Policy in a certain manner, the District has established a binding past practice.[4] Commonwealth of Pennsylvania, Pennsylvania State Police, *supra*. The record is devoid of any evidence whatsoever that the District has ever permitted a bargaining unit employe to choose whether he or she wishes to utilize paid leave before or after FMLA leave in even one instance, much less that the bargaining unit employes have repeatedly been given that option in response to an FMLA-qualifying event, notwithstanding the previous language of the Policy. Although the previous language of the Policy did seem to permit such an option for the bargaining unit employes, the Board has held that an existing unnegotiated policy, which has never been acted upon, is insufficient to establish a past practice. AFSCME Council 13 v. Pennsylvania State System of Higher Education, PERA-C-15-98-E (Final Order, 2017). Without evidence of how the Policy has actually been applied, I am simply unable to conclude that the Association satisfied its burden of proving that there was a binding past practice of permitting such a choice for the bargaining unit employes. Therefore, the Association has failed to prove that the District violated the Act.

The Association cites several alleged provisions of the CBA in its post-hearing brief to presumably show a potential repudiation of that contractual language by the District. However, the parties did not admit the CBA into the evidentiary record as an attached exhibit to the joint stipulations of fact, nor did the parties include any stipulations regarding the content of the CBA and its various provisions. Furthermore, even if these alleged provisions of the CBA could arguably be read as ensuring that the bargaining unit employes are entitled to use their accrued sick leave, vacation time, and personal days prior to invoking their statutory leave under the FMLA, the Association did not allege a repudiation of the CBA, or any other bargained-for agreement between the parties, as a cause of action in its specification of charges. Instead, the Association limited its charge to a traditional unilateral change or refusal to bargain averment and does not expressly make a repudiation argument in its post-hearing brief. Thus, the Board is without jurisdiction to entertain any such alleged repudiation

[4] This, of course, is assuming the question of when to implement FMLA leave is a mandatory subject of bargaining in this instance. However, it is not necessary to reach this issue given the ultimate disposition of the charge here.

claim at this point.[5] Accordingly, the charge under Section 1201(a)(5) of the Act must be dismissed.

CONCLUSIONS

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

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)(5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded, and the charge is dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 15th day of April, 2025.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

[5] Of course, this would certainly not preclude the Association from grieving the District's potential denial of such leave with regard to each individual employe who requests it under the CBA if those provisions are applicable.