IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State System of Higher Education, California University, Petitioner	:	
v.	:	
Pennsylvania Labor Relations Board, Respondent	:	No. 2159 C.D. 2011
	:	Argued: June 4, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: August 15, 2012

The Association of Pennsylvania State College and University Faculties (APSCUF) filed an unfair labor practice with the Pennsylvania Labor Relations Board (PLRB) which alleged that Pennsylvania State System of Higher Education (PASSHE) violated Sections 1201(a)(1) and (a)(5) of the Pennsylvania Labor Relations Act[1] (PERA).

[1] Act of June 1, 1937, P.L. 1168, *as amended*, 43 P.S. §§1101.1201(a)(1) & 1101.1201(a)(5). Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from:

> (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act.
> ****
> (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(a)(1) and (5).

The Hearing Examiner concluded that PASSHE committed unfair labor practices. PASSHE and APSCUF filed exceptions to the Hearing Examiner's Proposed Decision and Order. The Board dismissed both parties' exceptions and affirmed the Proposed Decision and Order.

PASSHE petitions for review of the decision of the PLRB.

The CBA and Parking at California State University Campus

PASSHE and APSCUF were parties to collective bargaining agreements which covered PASSHE's faculty (Faculty Agreement) and athletic coaches (Coaches Agreement) at PASSHE's 14 universities.

Neither the Faculty Agreement nor the Coaches Agreement addressed the location of, or fees for faculty/coaches' parking at university campuses. Each university determined the location of, availability of, and cost of parking independently. There was no uniform method used by all 14 universities.

At California University (CALU) there are 400 faculty members and 40 athletic coaches. Historically, CALU permitted parking on the main campus for faculty, staff, students and coaches at no charge, although the location of the permitted parking varied. No spaces were reserved for APSCUF's bargaining unit members. Prior to 2008, CALU altered the location, availability and allocation of free parking without negotiating with APSCUF. Parking spaces were added through the acquisition of streets and eliminated during renovations and various building expansions.

In 2007, the decision was made by CALU officials to build a new Convocation Center on the location of the Hamer Parking Lot, which had 400 available spaces. With the projected loss of 400 parking spaces, CALU ultimately approved the construction of a parking garage. Construction began in October 2009.

In a bargaining session held on February 18, 2010, PASSHE proposed to charge faculty and coaches a *per diem* fee for parking depending on the location of the lot.[2] At a bargaining session on April 8, 2010, APSCUF responded to PASSHE's proposal with a counteroffer of, *inter alia*, free parking spaces for faculty/staff on the main campus in Tier One and Tier Two locations. In addition, paid parking would be made available to those faculty and coaches interested in guaranteed reserved spaces.

At a bargaining session on June 3, 2010, PASSHE presented to APSCUF "the following final offer … regarding the parking tiers and fees at the University." The offer stated that free parking would continue to be provided for all California University employees at the Roadman Stadium Parking area including free transportation to and from the Roadman Stadium Parking area. The offer also included the parking fees for Tier One, Tier Two and Reserved parking.

The same day, PASSHE posted the following on California University's website:

[2] Specifically, the proposal included "Reserved Tier" parking at a rate of $3.99 per day, "Tier One" parking at $2.99 per day, and "Tier Two" parking at $1.99 per day. The proposal also included a "Tier Three" where parking would be free at a remote campus known as Roadman Park, with shuttle service.

June 3, 2010

All Cal U students, faculty and staff who intend to park in University parking lots, including the Roadman Lot, in Fall 2010 must pre-register for parking between June 21 and July 6.

Pre-registration is the chance for drivers to indicate which parking areas they prefer and to select one of the proposed parking plans.

Beginning August 2 through August 11, drivers will be able to go online and purchase a parking permit. Once this is complete, the permit/RFID hang tag will be mailed to the address identified during pre-registration.

Beginning on August 26, all drivers who wish to park on the main campus or at Roadman Park must have an RFID card to access parking areas, including all lots at Roadman Park.

Both pre-registration and registration forms will be posted online at https://parking.calu.edu, effective June 18, 2010. Both forms must be completed during the appropriate time periods.

The fee structure, a parking map, answers to Frequently Answered Questions, key dates, details on how to get your RFID card and other information also will be posted at https://parking.calu.edu, effective June 18, 2010.

Updated parking information will be posted at this address, as well. The campus community is encouraged to check their campus email and the parking website regularly.

Parking Registration Update, June 3, 2010; Reproduced Record (R.R.) at 444a.

Another bargaining session with a mediator was held on July 6, 2010. APSCUF presented a response to PASSHE's June 3, 2010, proposal which sought 355 free parking spaces at the main campus for faculty and coaches, and reserved parking at the 2010-2011 Tier Two rate, and free ADA parking accommodations. The proposal also provided that the agreement would expire on June 30, 2011, along with the current collective bargaining agreement. PASSHE responded that a one-year agreement was a "deal breaker" and walked out.

In response to APCSUF's July 6, 2010 proposal, in a letter dated July 16, 2010, PASSHE's assistant vice chancellor for labor relations, Michael Mottola, wrote to APSCUF's president at CALU, Dr. Michael Slavin, and stated:

> While we are not in agreement with any of the five points you proposed in your July 6, 2010, response, California University and the Office of the Chancellor managers continue to be willing to meet with APSCUF in an attempt to resolve the parking issues at California University.

Letter from Michael A. Motolla to Dr. Michael Slavin dated July 16, 2010 at 3; R.R. at 443a.

On August 30, 2010, without any additional bargaining and while the faculty and coaches were on on strike, PASSHE began charging faculty and coaches to park on campus at CALU, including payment of a $20 parking permit fee.

APSCUF's Unfair Labor Charge

APSCUF filed a Charge of Unfair Labor Practices with the Board and alleged that PASSHE violated Section 1201(a)(1) and (5) of PERA when it

implemented a mid-contract change to the terms and conditions of employment, eliminated free employee on-campus parking, imposed a fee for on-campus parking for faculty and coaches, insisted that any agreement regarding parking be for three-years, and refused to bargain over a mandatory subject of bargaining.

PASSHE countered that the charge should be dismissed because PASSHE had the managerial prerogative to eliminate free on-campus parking and to impose a fee for parking; it was contractually privileged to do so; and it met its bargaining obligations.

The Hearing Examiner concluded that PASSHE violated PERA by unilaterally implementing a fee to park on campus for bargaining unit faculty and coaches. The Hearing Examiner recommended that PASSHE be ordered to reinstate the status quo and reimburse parking fees that were paid by bargaining unit members.

PASSHE filed exceptions which were denied by the PLRB.

On appeal[3], PASSHE raises four issues: **(1)** whether PASSHE had a "sound arguable basis" in the parties' Faculty and Coaches Agreements for the change it made to its parking polices at CALU; **(2)** whether the change in parking polices was a mandatory subject of bargaining or a subject for impact bargaining; **(3)** whether PASSHE was authorized to implement the change to its parking

[3] When reviewing a final order of the PLRB, this Court's scope of review is limited to determining whether there was a violation of constitutional rights, whether an error of law was committed or whether the PLRB's necessary findings are supported by evidence. Capitol Police Lodge No. 85 v. Pennsylvania Labor Relations Board, 10 A.3d 407 (Pa. Cmwlth. 2010).

policies once the parties reached an impasse; and **(4)** whether the PLRB abused its discretion when it directed PASSHE to rescind parking fees and reimburse bargaining unit employees with interest?

I.

Sound Arguable Basis – Contractual Privilege Defense

First, PASSHE argues that the PLRB erred when it failed to dismiss the unfair labor practice charge based on the "contractual privilege" affirmative defense because PASSHE had a "sound arguable basis" in the parties Faculty and Coaches Agreements to change the parking policies at CALU.

An employer will not be charged with unfair labor practices if the employer shows that it had a sound arguable basis for ascribing a particular meaning to the parties' contract, and the actions taken by that employer coincide with its interpretation of the contract. Cheltenham Township v. Pennsylvania Labor Relations Board, 846 A.2d 173 (Pa. Cmwlth. 2004). To support a contractual privilege defense, the employer must point to contract language that provides a sound arguable basis for the employer's actions. Pennsylvania State Troopers' Association v. Pennsylvania Labor Relations Board, 761 A.2d 645 (Pa. Cmwlth. 2000). The language must specifically address the wage, hour or working condition at issue and why the employer was arguably authorized to take unilateral action.

An employer may not rely on general or boilerplate language in the contract to effect a specific change in employee wages, hours and working conditions that are mandatorily negotiable. Commonwealth (Venango County Board of Assistance) v. Pennsylvania Labor Relations Board, 459 A.2d 452 (Pa.

Cmwlth. 1983). This Court has noted that there is a fundamental difference between the employer applying specific contract language to a particular circumstance versus using general terms in an agreement to effectuate a unit-wide change in a mandatory subject of bargaining. Wilkes-Barre Township v. Pennsylvania Labor Relations Board, 878 A.2d 977 (Pa. Cmwlth. 2005).

Here, PASSHE contends that the "past practice" clause in the Faculty Agreement addressed the specific matter at issue and was sufficient for a sound arguable basis defense for the unilateral imposition of parking fees. Specifically, PASSHE relies on Article 41(F) of the Faculty Agreement[4] negotiated by the parties, which provided as follows:

> F. **Past Practice.** Rules, regulations, **policies** or practices **relating** to wages, hours and terms and conditions of employment now existing and not in conflict with this Agreement shall remain in effect unless modified, amended or eliminated **in the same manner as they have been adopted**. The provisions of this section of this Article shall be subject to the provisions of Article 5, GRIEVANCE PROCEDURE AND ARBITRATION, but only with respect to whether the procedure used to modify, amend or eliminate the rules, regulations, policies or practices was the same as it was used to establish the rules, regulations, policies or practices.

Agreement Between APSCUF and PASSHE, July 1, 2007, to June 30, 2011, at 97; R.R. at 347a. (Emphasis added).

[4] Article 15, Section 4 of the "Coaches Agreement" contained a virtually identical provision.

PASSHE argues that under the Faculty and Coaches Agreements PASSHE was given express authority to modify or change "past practices," as long as it did so "in the same manner as they have been adopted." According to PASSHE, the language of Article 41(F) is very specific regarding the way in which "past practices" may be changed during the term of the agreement. PASSHE contends that it implemented parking policies unilaterally; therefore, it was entitled to change them unilaterally. It contends under Article 41(F), it had a sound arguable basis for its actions, so the unfair labor charges should have been dismissed. This Court must disagree.

First, PASSHE's authority to unilaterally eliminate free parking and unilaterally impose parking fees was not addressed in Article 41(F) or elsewhere in the Faculty or Coaches Agreements. The contractual language must sufficiently address the specific wage, hour or working condition matter at issue to support a contractual privilege defense. Here, it does not. Rather, the clause addresses a broader issue of "past practices" which may potentially encompass a myriad of other issues.

In Commonwealth (West Chester State College) v. Pennsylvania Labor Relations Board, 467 A.2d 1187 (Pa. Cmwlth. 1983), this Court rejected PASSHE's claim that a "past practices" clause was sufficient to support a sound alternative basis defense for imposing changes to mandatory subjects of bargaining, such as parking fees. This Court held:

> Petitioner [PASSHE] argues that the past practice clause preserves the right of Petitioner [PASSHE] to change existing working conditions via its managerial rights and, therefore, Petitioner [PASSHE] had the authority to change the past parking policy of no fee, to implementing

> a $20.00 parking fee. Relying on a past practice clause to make unilateral changes in matters which are not expressly included in a collective bargaining agreement is not a novel theory. In a footnote to our decision in Commonwealth v. Pennsylvania Labor Relations Board, 74 Pa. Commonwealth Ct. 1, 459 A.2d 452 (1983), we noted that it would be 'problematic in the extreme' for us to permit unilateral alterations in working conditions based on a past practice clause, while at the same time excusing the employer from bargaining over an issue in the agreement based on the zipper clause. We did not allow the petitioner to unilaterally change an issue which was not included in the collective bargaining agreement based on the past practice clause in that case, and we will not allow it in the case *sub judice*.

West Chester State University, 467 A.2d at 1190-1191.

Because the "past practice" clause relied on by PASSHE did not adequately address the specific matter at issue, i.e., employee parking fees, PASSHE failed to sustain its burden of proving a sound arguable basis in the contract for its unilateral imposition of parking fees for faculty and coaches.

The PLRB did not err when it concluded that PASSHE failed to establish a sound arguable basis defense for the fees.

II.

Mandatory Subject of Bargaining Or Subject for Impact Bargaining?

Next, PASSHE argues that the underlying decision to construct a new convocation center and parking garage, and the resulting adjustments to CALU's parking policies, were within PASSHE's managerial prerogative and were not mandatory subjects of bargaining. PASSHE contends that the issue of parking fees

was not a separate issue for bargaining, but merely an "impact" of its decision to relocate parking spaces eliminated by the construction of the convocation center. Therefore, the issue of employee parking fees was subject to Section 702's lesser "meet-and-discuss" mandate, 43 P.S. § 1101.702, which provides:

> 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 or 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. Public employers, however, shall be required to **meet and discuss** on policy matters affecting wages, hours and terms and conditions of employment as well as the **impact thereon** upon request by public employe representatives (emphasis added).

PASSHE argues that under the procedures governing "impact bargaining," it "met and discussed" the issue with APSCUF and when the parties reached impasse, it was permitted to unilaterally implement its final offer. PASSHE believes less stringent bargaining requirements of impact bargaining should apply to its decision to impose new parking fees on its employees. The problem with PASSHE's position is that its decision to implement new parking policies was not a regular consequence or effect of the decision to build the convocation center.

When a managerial decision has an impact on the terms and conditions of employment, the parties are required to engage in impact bargaining. City of Philadelphia v. Pennsylvania Labor Relations Board, 588 A.2d 67 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 528 Pa. 632, 598 A.2d 285

(1991). Impact bargaining is required to mitigate the negative impacts which flow from that decision.

For example, in City of Philadelphia, the City advised the local firefighters union that it intended to implement a first responder program which designated certain fire companies to respond to medical emergencies. The "impact" of this managerial decision to implement first responder programs affected the firefighters' workload adjustments, training, stress management, compensation adjustment and staffing requirements. City of Philadelphia, 588 A.2d at 69. This Court held that the City's managerial decision to unilaterally implement a first responder program clearly concerned many aspects of the firefighters' employment. Therefore, the City had an obligation to impact bargain with the union.

This Court does not agree that PASSHE's imposition of employee parking fees was an "impact" of its decision to build the convocation center. There is no dispute that an employer has the managerial prerogative to undertake capital improvements, including the construction of a new convocation center. However, unlike in City of Philadelphia, PASSHE's managerial decision to construct a convocation center did not concern any aspect of the faculty or coaches' employment. Rather, the decision to impose new parking fees, where they did not exist before, was an entirely separate and distinct decision by PASSHE to require its employees to fund, at least in part, CALU's convocation center. While it is a managerial prerogative for a public employer to make construction improvements, the decision to require its employees to participate in funding that improvement was not a direct result or consequence of the managerial decision.

The imposition of parking fees, where none previously existed, is a mandatory subject of bargaining. It is well-settled that employee parking fees are matters of employee wages and working conditions and are a ***mandatory*** subject of bargaining. West Chester State College.

PASSHE's decision to have its faculty and coaches pay parking fees to fund capital improvements did not transform what was clearly a matter of "employee wages, hours and working conditions" into a managerial decision or otherwise eliminate the employees' statutory right to bargain.

III.

Unilateral Changes to CBA Once Impasse is Reached

Next, PASSHE argues that the PLRB erred when it concluded PASSHE was not authorized to implement the changes to its parking policies once the parties reached an "impasse." PASSHE maintains that it bargained in good faith, but once the parties reached an "impasse," it had the ability mid-contract to implement its last best offer, even absent a strike. This Court disagrees.

There is no express authority in PERA for unilateral implementation of changes to wage, hour or working conditions after an impasse has occurred.

Before an employer may implement a unilateral change to wages and benefits there must be: (1) an impasse; and (2) a strike, i.e., a work cessation. Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 620 A.2d 594 (Pa. Cmwlth. 1993). As long as union employees continue to work, and the collective bargaining is in process, an employer's unilateral change in wage, hour,

or working condition matters is an unfair labor practice "irrespective of whether the employer's unilateral action takes place during the term of a collective bargaining agreement or following the expiration of such an agreement or during the course of negotiations intended to culminate in an agreement." Commonwealth (Venango County Board of Assistance) v. Pennsylvania Labor Relations Board, 459 A.2d 452, 454 (Pa. Cmwlth. 1983) (involving a unilateral ban on smoking at work stations). See also Pennsylvania Labor Relations Board v. Williamsport Area School District, 486 Pa. 375, 406 A.2d 329 (1979); Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978) (employer's unilateral change in conditions of employment while such conditions are under negotiation is unfair labor practice).

Here, there is no question that the faculty and coaches remained employed and were not on strike at the time of PASSHE's unilateral action. Furthermore, this Court is not persuaded that the parties were at an "impasse" in the negotiations about parking fees.

An impasse in negotiations may arise where "the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless…[and] all that can be said with confidence is that an impasse is a state of facts in which the parties, dispute the best of faith, are simply deadlocked." Norwin School District v. Belan, 510 Pa. 255, 268 n.9, 507 A.2d 373, 380 n. 9 (1986).

Upon review of the record, this Court finds that the PLRB did not err in concluding that the parties were not at an impasse. Prior to PASSHE's implementation of the parking fees, APSCUF made a proposal regarding parking

for faculty and coaches on April 8, 2010. PASSHE amended its previous proposal and presented APSCUF with a proposal on June 3, 2010. On that same day, PASSHE implemented its proposal by sending out notice to the employees that they must begin to register and pay parking fees, including a $20 registration fee. Thereafter, the parties continued to bargain, and on July 6, 2010, APSCUF amended its proposal and presented a counter-proposal to PASSHE. Then on July 16, 2010, PASSHE, while rejecting APSCUF's July 6, 2010, proposal, expressly stated that it was still willing to meet with APSCUF in an attempt to resolve the parking issues.

There is ample evidence in the record to support the PLRB's finding that PASSHE committed an unfair labor practice. APSCUF employees were not on strike, and the parties were not at an "impasse" but were engaged in collective bargaining negotiations at the time PASSHE unilaterally implemented its new parking policies.

"Subcontracting" Cases Are Not Applicable

In an attempt to invoke a less stringent bargaining standard, PASSHE argues this controversy is governed by cases which recognize an employer's right to "subcontract" bargaining unit work after negotiating to an impasse. See, e.g., Morrisville School District v. Pennsylvania Labor Relations Board, 687 A.2d 5 (Pa. Cmwlth. 1996) (decision whether to retain in-house employees or subcontract out custodial and secretarial services); Mars Area Association of School Service Personnel v. Pennsylvania Labor Relations Board, 538 A.2d 585 (Pa. Cmwlth. 1987) (decision whether to retain in-house employees or subcontract out its transportation services).

Relying on "subcontracting" cases, PASSHE argues that it was entitled to unilaterally implement changes to its parking policies, mid-contract, so long as it bargained in "good faith" to "impasse" with APSCUF. It claims that once the parties reached an impasse PASSHE had the authority to unilaterally implement its last best offer.

As explained by the PLRB, "subcontracting" cases are not applicable to this controversy. An employer's decision whether to subcontract out work previously done by employees in a bargaining unit is a matter of "inherent managerial policy" which is excluded from the scope of mandatory bargaining by Section 702 of PERA, 43 P.S. § 1101.702. In a subcontracting situation, the employer is faced with a "political or managerial decision" to determine the quality and quantity of public services to be provided to its citizens, which necessarily includes the decision whether to eliminate positions. The duty to bargain in that situation is subject to Section 702's less stringent "meet-and-discuss" requirement. Section 702 of PERA, 43 P.S. § 1101.702, provides:

> 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 or 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. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.

This controversy, unlike the subcontracting cases, involved the unilateral change **in the terms and conditions of employment**, which is a

mandatory subject of bargaining. PASSHE was not permitted to unilaterally impose parking fees while the parties were still negotiating and absent an impasse and work stoppage.

IV.

Reimbursement of Parking Fees

Last, PASSHE argues that the PLRB abused its discretion by ordering PASSHE to take affirmative action to rescind the parking fees and reimburse the bargaining unit members especially in light of APSCUF's efforts to delay the bargaining process. Again, this Court must disagree.

The remedy for unfair practice is within the PLRB's discretion. Pennsylvania Labor Relations Board v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948); Pennsylvania State Police v. Pennsylvania Labor Relations Board, 912 A.2d 909 (Pa. Cmwlth. 2006), *petition for allowance of appeal denied*, 593 Pa. 730, 928 A.2d 1292 (2007). Where an unlawful unilateral implementation of a mandatory subject of bargaining is found to be an unfair practice, the PLRB generally will direct a reinstatement of the *status quo*. Appeal of Cumberland Valley School District.

The PLRB did not abuse its discretion when it directed PASSHE to reimburse the faculty and coaches for parking and registration fees incurred as the result of its unfair practice. A restoration of the *status quo* was warranted to foster good faith collective bargaining.

The order of the PLRB is affirmed.

_____

BERNARD L. McGINLEY, Judge

Senior Judge Colins dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State System of Higher Education, California University, Petitioner	:	
v.	:	
Pennsylvania Labor Relations Board, Respondent	:	No. 2159 C.D. 2011

O R D E R

AND NOW, this 15th day of August, 2012, the order of the Pennsylvania Labor Relations Board in the above-captioned matter is hereby affirmed.

_____

BERNARD L. McGINLEY, Judge