

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY,)
 AND MUNICIPAL EMPLOYEES, AFL-CIO,)
 COUNCIL 81, LOCAL 218)
)
 Charging Party,)
)
 v.)
)
 CHRISTINA SCHOOL DISTRICT,)
)
 Respondent.)

ULP No. 15-03-994
Decision on the Merits

APPEARANCES

Lance Geren, Esq., O’Donoghue & O’Donoghue, LLP, for AFSCME Local 218

James H. McMackin, III, Esq., Morris James LLP, for Christina School District

BACKGROUND

The Christina School District (“District”) is a public school employer within the meaning of §4002(q) of the Public School Employment Relations Act (“PSERA”), 14 Del.C. Chapter 40.

The American Federation of State, County and Municipal Employees, AFL-CIO, Council 81 (“AFSCME”) is an employee organization within the meaning of §1302(i) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13, and 14 Del.C. §4002(i). By and through its affiliated Local 218, AFSCME is the exclusive bargaining representative of a unit of custodial employees of the District, within the meaning of 19 Del.C. §1302(j) and 14 Del.C. §4002(j).

On March 25, 2015, AFSCME filed an unfair labor practice charge alleging the District

had engaged in conduct in violation of 19 Del.C. § 1307(a)(1), (a)(5), and/or (a)(6)¹, by unilaterally implementing a Fitness for Duty policy, which it asserts is a mandatory subject of bargaining.

By letter dated April 1, 2015, the parties jointly requested the charge be held in abeyance, pending their efforts to resolve the underlying dispute. The period of abeyance was extended twice by mutual agreement. By letter dated October 16, 2015, however, AFSCME advised this office that the resolution efforts had been unsuccessful in resolving the charge.

On November 2, 2015, the District filed its Answer to the Charge including New Matter. In its Answer, the District admitted sending a memorandum to bargaining unit employees on February 3, 2015, but denied any violation of the statute, as alleged. Under New Matter, the District asserted it is entitled to determine the qualifications and conditions for continued employment of bargaining unit employees under Section 6.12 of the parties' negotiated collective bargaining agreement.

On November 12, 2015, AFCME filed its response to the District's New Matter, denying the District's defense contained therein.

A probable cause determination was issued on February 12, 2016, finding probable cause to believe a violation of 19 Del. C. § 1307(a)(1), (a)(5), and/or (a)(6) as alleged. Because the

¹ § 1307 Unfair labor practices.

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

(6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

charge raised both factual and legal issues, a hearing was scheduled in order to receive a factual record on which argument could be made, conclusions reached and a determination made. A week prior to the scheduled hearing, the parties notified PERB that they would provide a Stipulation of Facts and would submit written argument based thereon.

The parties filed Stipulated Facts and made a simultaneous submission of written argument on March 11, 2016. Only the District exercised its right to file responsive argument on March 28, 2016.

This decision² is based upon review of the stipulated facts submitted by the parties and consideration of their arguments as well as related case law.

STIPULATED FACTS

1. Charging Party AFSCME filed an unfair labor practice charge against the District on March 25, 2015.
2. AFSCME is an employee organization within the meaning of 19 Del. C. § 1302(i) and the exclusive bargaining representative for custodial employees in the District.
3. The District is a public school district and an employer within the meaning of 19 Del. C. § 1302(p).
4. At all relevant times, the Union and District were and are parties to a collective bargaining agreement effective July 1, 2013 through June 30, 2016.
5. The unfair labor practice charge alleges that the District committed an unfair labor practice when on February 9, 2015 it implemented a procedure requiring employees who were out of work for medical or workers' compensation reasons for more than fifteen

² The decision on this Charge has been delayed, through no fault of the parties, by changes and limitations in PERB staffing. In response to a query from PERB in March, 2018, AFSCME confirmed that the underlying issue has not been resolved, reasserted its position, and requested a decision be issued.

days to present documentation that they were fit for duty before allowing such employees to return to work.

6. On September 1, 2015, the District amended the procedure, so that it would not apply unless an employee was out of work for more than twelve weeks.

ISSUE

DID THE EMPLOYER, CHRISTINA SCHOOL DISTRICT, VIOLATE 19 DEL. C. §1307(A)(1), (A)(5), OR (A)(6) IN IMPLEMENTING ITS FIT FOR DUTY POLICY FOR EMPLOYEES SEEKING TO RETURN TO WORK FOLLOWING A MEDICAL OR WORKERS' COMPENSATION LEAVE OF ABSENCE?

DISCUSSION

I. PRELIMINARY ISSUE

A preliminary issue exists as to the applicable law in this case. The Public Employment Relations Act, 19 Del.C. Chapter 13, defines a "public employer" to be:

... the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees. 19 Del.C. §1302(p).

The Public School Employment Relations Act, 14 Del.C. Chapter 40, defines a "public school employee" to mean:

... any employee of a public school employer except public school administrators and confidential employees of a public school employer; provided the exclusive representative of designated appropriate bargaining units certified under Title 19 informs the Secretary of Labor, the Executive Director of the Board and the public school employer in writing, by certified mail, that it elects coverage under the provisions of this chapter; or provided that an employee organization has submitted a petition on behalf of public

school employees pursuant to §4010 or §4011 of this chapter which includes a request to be covered under the provisions of this chapter prior to the submission of a similar petition pursuant to §1304 or §1305 of Title 19. 14 Del.C. §4002(p).

The PSERA also defines a public school employer: "Public school employer" or "employer" means any board of education, school district, reorganized school district, special school district, and any person acting as an agent thereof." 14 Del.C. §4002(q).

It is this agency, the Delaware Public Employment Relations Board, which is responsible to maintain all records related to the determination, modification and representation of appropriate bargaining units of public employees, public school employers, police and firefighters employed by governmental entities in the state.

Administrative notice is taken that AFSCME was certified to represent the bargaining unit of Christina School District custodial employees following an election conducted on July 8, 1981, under the supervision of the Governor's Council on Labor, a division of the Delaware Department of Labor, pursuant to the predecessor 19 Del.C. Chapter 13, Right of Public Employees to Organize. DOL Case 144. At no time thereafter did AFSCME, as the exclusive representative of the designated appropriate bargaining unit certified under Title 19, inform the Secretary of Labor, the Executive Director of this Board, and the public school employer in writing, by certified mail, that it elected coverage under the Public School Employment Relations Act, consistent with the requirements of 14 Del.C. §4002(p).

Most of the provisions of the Public School Employment Relations Act (PSERA) and the later adopted Public Employment Relations Act (PERA) are identical, but there are some provisions which are not. The PERA does not specifically exclude public school employers from its coverage but the PSERA explicitly creates an exception for those units which were certified under the predecessor Chapter 13 of Title 19. That exception applies in this case. Consequently, this decision is based upon application of the Public Employment Relations Act.

II. DECISION ON THE MERITS

At issue in this charge is the policy implemented by the District unilaterally by letter dated February 3, 2015. In pertinent part, that letter stated as follows:

[B]eginning on February 9, 2015, the District will require all employees who have been on a medical/workman's compensation leave of absence for a physical ailment for 15 calendar days³ or more to undergo a Fit for Duty Test through Christiana Care. The Fit for Duty Test will be scheduled through the district and will be provided at no cost to the employee.

When an employee believes he/she will be released from the doctor's care it is important that the employee shares the job description with the treating physician. Once the employee has been approved by their physician to return to work, the employee must contact [named employee "X"] . . . to schedule an appointment for the Fit for Duty Test . . . When the District has received confirmation from Christiana Care of successful completion of the test in addition to the return to work authorization from the employee's treating physician, [X] will contact the employee to provide notification that the employee is eligible to return to work. Employees are not authorize to return to work until both of the previously mentioned documents are received.

During the time in which the District is awaiting the release from the employee's treating physician and the results from the Fit for Duty Test, the employee will continue to use annual leave or remain on an unpaid status if the annual leave balance has been exhausted. *Charge Exhibit B* ("Fit for Duty Policy").

The PERB has held that a unilateral change in the status quo of a mandatory subject of bargaining constitutes a *per se* violation of the duty-to-bargain. *AFSCME Council 81 v. Delaware Dept. of Transportation*, ULP 95-01-111, II PERB 1279, 1290 (1995); affirmed by full PERB, II PERB 1201 (1995); *CWA Local 13101 v. Kent County Levy Court*, ULP 14-08-971, VIII PERB 6321, 6326 (2014). In one of its earliest decisions, PERB held:

While a collective bargaining agreement is in existence, its terms serve to preserve the relationship between the parties and govern the operations and functions of the school system. Thereafter, to permit one party to unilaterally impose a change in the existing terms and conditions of

³ The District later amended the policy to apply only to employees who had been out of work for more than twelve weeks. Stipulated Facts ¶ 6.

employment without prior negotiation, at least to the point of impasse, would be to permit that party to acquire unfair tactical advantage effectively prohibiting the establishment of terms and conditions of employment through bilateral negotiation. *Appoquinimink Education Assn. v. Bd. of Education*, ULP 1-2-84A, I PERB 23, 29 (1984).⁴

Unilateral disruptions of the *status quo* have been held to violate the duty to bargain in good faith because they frustrate the statutory objective of establishing terms and conditions of employment through the collective bargaining process. The *status quo* of a mandatory subject of bargaining is subject to change only through the collective bargaining process. *New Castle County Vo-Tech Education Assn. v. Bd. of Education*, ULP 88-05-025, I PERB 257, 259 (1988); *Christina Education Assn., Inc. v. Bd. of Education*, ULP 88-09-026, I PERB 359, 366 (1988).

The parties in this case do not contest that the new Fit for Duty Policy was implemented unilaterally, without bargaining.⁵

The District argues the Fit for Duty Policy is a matter of inherent managerial policy and is not a mandatory subject of bargaining. Under the PERA, employers are obligated to bargain with certified public employee organizations with regard to “terms and conditions of employment.” 19 Del. C. § 1301(2). “Terms and conditions of employment” are defined as matters concerning or related to “wages, salaries, hours, grievance procedures and working conditions.” 19 Del. C. § 1302(t). Public employers are not, however, required to engage in collective bargaining on matters of inherent managerial policy, which include “such areas of discretion or policy as the functions

⁴ Prior PERB rulings issued under the Public School Employment Relations Act, 14 Del. C. Chapter 40 (1982, 1989) and/or the Police Officers and Firefighters Employment Relations Act, 19 Del. C. Chapter 16 (1986), are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del. C. Chapter 13 (1994). *AFSCME, District Council 81 v. State of Delaware, Department of Transportation, Division of Highways*, ULP No. 95-01-111, II PERB 1279 (1995).

⁵ District Opening Brief, Stipulated Fact at page 2, ¶5.

and the programs of the public employer, its standards of services, overall budget, utilization of technology, the organizational structure and staffing levels and selection and direction of personnel.” 19 Del. C. § 1305.

It has been held by both the U.S. Supreme Court and the National Labor Relations Board that changes to sick leave policies affect terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (U.S. 1962); *Southern Cal. Edison Co.*, 284 NLRB 1205 (1987). In this specific case, the Fit for Duty Policy clearly states an employee remains in unpaid status, or will use his accumulated reserves of either vacation or sick leave, if available, for additional days while the employer awaits both the medical release from the employee’s treating physician and the results of the third party Fitness for Duty test. The policy, therefore, affects wages, which fall within the plain definition of terms and conditions of employment under §1302(t).

The Fit for Duty Policy also arguably implicates inherent managerial policy under §1305, i.e., direction of personnel. Where a policy impacts not only terms and conditions of employment, but also areas of the employer’s policy-making discretion, the *Appoquinimink* balancing test must be applied in order to determine whether the subject constitutes a mandatory or permissive subject of bargaining:

If its probable effect on the [employer] as a whole clearly outweighs the direct impact on the interests of the [employees], it is to be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable.

Woodbridge Educ. Assn. v. Bd. of Educ. of the Woodbridge Sch. Dist., ULP 90-02-048, I PERB 537, 549 (1990) (citing *Appoquinimink Education Association v. Bd. of Education of the Appoquinimink School District*, I PERB 35, 50 (1984)). The test does not seek to balance the interests of an employer and employees but seeks to determine where the greater impact lies. *Red Clay Consol. Sch. Dist. v. Red Clay Educ. Assn.*, DSEA/NEA, V PERB 3751, 3753 (2007). While the PERB

originally applied the *Appoquinimink* balancing test to a case governed by the Public School Employment Relations Act (“PSERA”), it has also routinely applied the test to cases decided under PERA.⁶

The Fit for Duty Policy leaves the affected employees at the mercy of the District and Christiana Care to schedule the test. Until the test is taken and results are received, “the employee will continue to use annual leave or remain on an unpaid status if the annual leave balance has been exhausted.” (emphasis added). Thus, the employee and the employee’s physician may agree the employee is ready to return to work, but that employee may nonetheless be required to remain out of work (and in non-compensable status) until the test is scheduled, completed, and the results reported. Under the Fit for Duty policy, a current employee’s ability to return to gainful employment after a medically required leave of absence depends upon successfully passing a test, scheduled and administered by a third party selected by the employer. This is at its root a change in the conditions a current employee must meet in order to return to work; i.e. it is a new condition of continued employment.

On the other hand, the probable effect on the District as a whole if the policy is not implemented is minimal. The District asserts that it is seeking to ensure employees can “perform their jobs in order to avoid injuries and further the education of children.”⁷ However, the risk that an employee will be a danger to himself or others, when he has been released by his own physician to return to work, is, at best, a debatable proposition. The possibility that a custodian is reinjured after returning to work too soon would have minimal impact on the education of the children. Indeed, it is reasonable to believe that the extended absence of custodians, possibly unnecessarily,

⁶ See *AFSCME, Council 81, Local 218*, ULP 07-05-570, VI PERB 3857 (2007); *AFSCME, Council 81, Local 1443A v. DNREC*, ULP 15-05-998, VIII PERB 6563 (2015).

⁷ District Opening Brief at 4.

while a Fit for Duty Test is scheduled, conducted and the results reviewed, could have a greater negative impact on the environment and facilities in which children are being educated.

The potential loss of wages and an inability or delayed ability to return to gainful employment clearly outweighs the District's concerns of re-injury and the negligible potential impact on the education of students. Therefore, the *Appoquinimink* balancing tips in favor of the employees and the Fit for Duty Policy is determined to be a mandatory subject of bargaining.

The District also argues that even if the Fit for Duty Policy is deemed a mandatory subject of bargaining, AFSCME waived its right to bargain on this issue through clear language in the collective bargaining agreement. Article 6:12 of the applicable negotiated agreement states:

- 6:12 The Christina School Board hereby retains and reserves unto itself all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Delaware and of the United States and including, but without limiting the generality of the foregoing, the right:
- to exercise executive management and administrative control of the school system, its properties and facilities, and direct the work activities of its employees
 - to hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment or their dismissal or demotion, and to promote, place, transfer, and assign all such employees; and
 - to exercise the foregoing powers, rights, authority, duties, and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Delaware and the Constitution and laws of the United States.

The PERB has held that an effective waiver of the statutory right to negotiate a mandatory subject of bargaining must be clear and unmistakable. *Local 1590, IAFF, et al., v. City of Wilmington*, Del. PERB, ULP 89-09-041, I PERB 457, 465 (1990). PERB established this standard

by adopting the U.S. Supreme Court's decision in *Metropolitan Edison Co. v. NLRB*⁸ in its 1995 decision in *AFSCME Council 81 v. State of Delaware Dept. of Transportation*⁹:

In *Metropolitan Edison Co. v. NLRB*, the Supreme Court stated that general contractual provisions would not support the inference that parties intended to waive a statutorily protected right unless that intent was explicitly stated. The National Labor Relations Board has repeatedly held that "generally worded management rights clauses or 'zipper' clauses will be not construed as waivers of statutory bargaining rights." *Johnson-Bateman Co.*, 295 NLRB 26 (1989).

The Management Rights Clause found in Article 6:12 of the parties' negotiated agreement reserves to the District to "hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment or their dismissal or demotion, and to promote, place, transfer, and assign all such employees." The clause expressly limits these rights to be "in conformance with the Constitution and the laws of the State of Delaware and the Constitution and laws of the United States."

The District essentially argues that AFSCME has waived its right to negotiate the Fit for Duty Policy based on the District's reserved right to determine the conditions for employees' continued employment, along with the fact that the job descriptions attached to the collective bargaining agreement include a requirement of "physically able to perform the job."

None of the above-referenced contractual language mentions fit for duty or return to work testing. Thus, none constitute a "clear and unmistakable waiver" of statutory rights to negotiate the impact of the Fit for Duty Policy. While the District may have legitimate concerns which prompted it to implement the Fit for Duty Policy, that does not change the fact that the Fit for Duty Policy and its impact must be negotiated.

⁸ 460 US 693 (1983).

⁹ ULP 95-01-111, II PERB 1279,1293 (1995). *Metropolitan Edison Co.* was also applied by PERB in *AFSCME Council 81, Local 1607 v. New Castle County*, Interim Decision, ULP 01-01-306, IV PERB 2379, 2389 (2001).

Moreover, the Management Rights Clause is limited by its terms to conformance with Delaware law. Once a matter is determined to be a mandatory subject of bargaining under PERA, the management rights clause cannot be construed to limit the duty to bargain in good faith established by the Public Employment Relations Act.

For the reasons set forth above, the Fit for Duty Policy adopted by the Christina School District constitutes a term and condition of employment to which the duty to bargain applies under the Public Employment Relations Act.

CONCLUSIONS OF LAW

1. The Christina School District is a public employer within the meaning of §1302(q) of the Public Employment Relations Act, 19 Del.C. Chapter 13, by operation of exception found in 14 Del.C. §4002(p).

2. AFSCME Council 81 is an employee organization within the meaning of the Public Employment Relations Act (“PERA”), 19 Del. C. §1302(i).

3. By and through its affiliated Local 218, AFSCME is the exclusive bargaining representative of a unit of custodial employees of the District, within the meaning of § 1302(j).

4. The District and AFSCME Local 218 are or were parties to a collective bargaining agreement which was in effect for all times relevant to this unfair labor practice charge.

5. Consistent with the foregoing findings and opinion, it is determined that by unilaterally implementing a Fit for Duty Policy on February 9, 2015 as a condition of employment, the District violated 19 Del.C. § 1307(a)(1), (5), and (6), as alleged.

WHEREFORE, THE CHRISTINA SCHOOL DISTRICT IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE STEPS:

A) Cease and Desist from engaging in conduct which violates the employer's obligation to negotiate in good faith with respect to a mandatory subject of bargaining. The changes to the return to duty from medical leave policy are to be immediately rescinded and returned to the status quo as it previously existed.

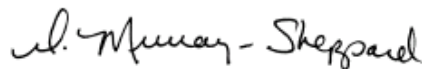
B) Make whole any employee who suffered lost wages or was required to use accrued paid time off prior to returning work after a medical/workman's compensation leave of absence since February 9, 2015 as a result of the implementation of the Fit for Duty Policy.

C) Immediately post the Notice of Determination in all areas where notices affecting employees in the bargaining unit represented by AFSCME Local 218 are normally posted throughout the District and in its administrative offices. These Notices must remain posted for at least 30 days in order to provide notice to all affected employees of the decision in this matter.

D) Notify the Public Employment Relations Board in writing within sixty (60) calendar days of the steps taken to comply with this Order.

IT IS SO ORDERED.

Dated: June 20, 2018



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.