Labor Relations and Legal Updates

Human Resources and Social Equity Conference

Thursday, June 8, 2017
Termination – Sleeping on the Job

Background

- Grievant was a Custodial Worker 1 with 5.5 years of service.
- After a work related injury, the grievant was assigned to a light duty position in the Koehler Fieldhouse at East Stroudsburg.
- The light duty assignment involved monitoring access to the Fieldhouse, performing desk duty, and ensuring that others in the building adhere to the building policies.
- There were two (2) other AFSCME represented employees also performing similar light duty assignments.
- Approximately one (1) month after the beginning of the light duty assignment, an incident occurred that led to his discharge.
Termination – Sleeping on the Job

University Position

- Either the grievant was sleeping at the front desk or was completely inattentive to his job duties. Either way, he was neglecting his job duties.
- There were witnesses that observed him sleeping and woke him up.
- The grievant’s job was to be the face of the University for visitors to the Fieldhouse.
- Sitting slouched in a chair with earphones on and sleeping or watching a movie are not part of the grievant’s duties.
- Grievant was given several opportunities that day to be attentive.
Termination – Sleeping on the Job

University Position

❖ Witness 1
  ▪ AFSCME represented employee (AA) had tapped the desk to get his attention when she walked by. He did not respond.
  ▪ AA had to unplug the headphone jack from the computer to get his attention.
  ▪ AA reported issue to union president and her supervisor.

❖ Witness 2
  ▪ Supervisor (Acting Athletic Director) came from lunch and saw him with his head down and got his attention.
  ▪ Several minutes later his supervisor had to nudge him to get his attention and subsequently told him to leave.
  ▪ Acting Athletic Director reported issue to Human Resources.
Termination – Sleeping on the Job

AFSCME Position

- The University failed to prove that the grievant was in fact sleeping on the job. Grievant denies he was asleep.
- Grievant did not have any prior discipline.
- Grievant was meeting with his union steward at the time that the University stated he was observed to be sleeping.
- There was a due process violation because the investigation was not done a timely manner.
- The grievant was not given a fair opportunity to explain his actions. In addition, he was never trained on how to do his job.
- Discipline was too severe if it is found that he was sleeping and employee was treated equitably.
Termination – Sleeping on the Job

Arbitrator Findings

• Procedural due process argument is denied.
• Equal treatment argument is denied.
• Witnesses that testified against the grievant were credible.
• There is no doubt the grievant was not paying attention to his duties and the evidence strongly suggests he was sleeping.
• “The grievant’s inattention to his job and willful continuation of his inappropriate behavior are sufficient to justify the Employer’s decision to terminate him.”
• “Given the Grievant’s flagrant and continued disregard of his job duties, the Employer’s penalty was not excessive…”
Job Descriptions – Make it Make Sense

Unfair Labor Practice

• SCUPA has filed multiple ULP charges seeking to include current management positions within their bargaining unit.

University Reorganization

• Several initiatives underway to meet current challenges and opportunities
• Don’t forget Meet and Discuss obligations
Job Descriptions – Make it Make Sense

Updated job descriptions are the building blocks and the first step to support management’s decision on the nature of the work performed.

- There should be an ongoing process (minimal every year) to review changes to duties of all employees.
- Evaluation Cycles are a good time to do this.
- Reorganizations should include updated job descriptions.
- Keep in mind bargaining unit implications before job descriptions are finalized.
Protection of Minors Policy
Labor and Legal Challenges
APSCUF Injunction – Commonwealth Court
SCUPA Unfair Practice Charge – PLRB
APSCUF Unfair Practice Charge – PLRB
APSCUF Grievance
Court Challenge – Injunction

- **August 2015** – Injunction filed by APSCUF to stop the background screenings.
- **September 2015** – Commonwealth Court (Judge Pellegrini) granted APSCUF’s relief.
- **October 2015** – State System filed an appeal to Judge Pellegrini’s order to the Supreme Court.
- **January 2016** – Commonwealth Court (Judge Pellegrini) modified the injunction.
- **January 2016** – APSCUF filed an appeal to Judge Pellegrini’s modified order.
- **April 2017** – Supreme court affirms the Commonwealth Court’s decision.

*Where does this leave us?*
SCUPA Unfair Practice Charge – PLRB

- Charge filed on October 16, 2015
- Alleged the State System violated PERA by unilaterally implementing (Refusing to Bargain) a policy requiring background checks and reporting of arrests when not required by law.
- One day of testimony – record closed February 19, 2016.
- August 2, 2016 – Proposed Decision and Order by Hearing Examiner
- Relying on the Balance Test (managerial interest outweighs the employees’ interest), the Hearing Examiner determines the policies in question were within the State System’s inherent managerial right to implement and no unfair practice occurred.
Thus, the record in this matter clearly shows that the State System was reasonably concerned over risks to minors on its campuses and the consistency of policy throughout its entire system. These concerns “go to the heart of the function” of the State System, which is to provide secondary education, and accordingly, I find that the policy in question in this matter is directly responsive to the managerial concerns of safeguarding minors and providing the effective and efficient performance of higher education in the Commonwealth, and that the unilateral implementation of the policies in question in this matter were well within the Employer’s inherent managerial authority.
SCUPA Unfair Practice Charge – PLRB

- The Hearing Examiner further determined the policies in question created new grounds for employee discipline.
- Prior to the policy, compliance with the requirements for background checks and mandatory reporting was not a ground for discipline.
- Hearing Examiner determined the State System committed an unfair practice by failing to negotiate over the employee discipline and ordered:
  - Suspend any disciplinary provisions related to the policies (when not required by the CPSL).
  - Bargain with SCUPA on matters of discipline.
SCUPA Unfair Practice Charge – PLRB

- August 22, 2016 – State System files exceptions to proposed decision and order regarding only the Hearing Examiner’s determination of failure to bargain issues of employee discipline
- Exceptions based on:
  - To trigger impact bargaining over the disciplinary consequences SCUPA must demand bargaining – SCUPA failed to demand to bargain.
  - Discipline for violating the policy’s requirements is treated in the same manner as any other violation of a work rule or policy - follow the CBA.
Final Order-May 16, 2017: State System has not committed unfair practices.

Affirmed the Hearing Examiner’s Decision: Implementation of the policy was a managerial prerogative.

Vacated the Hearing Examiner’s Decision: An unfair practice occurred when the State System failed to negotiate over employee discipline.
APSCUF Unfair Practice Charge – PLRB

- August 18, 2015 – Charge filed.
- Alleged the State System violated PERA by unilaterally implementing (Refusing to Bargain) a policy requiring background checks and reporting of arrest when not required by law.
- Testimony taken over three (3) days – record closed July 16, 2016.
- During the proceedings, the State System raised a timeliness argument.
- October 3, 2016 – State System filed motion to dismiss based on timeliness.
APSCUF Unfair Practice Charge – PLRB

State System’s Position:

• Association knew of the policy’s implementation by February 25, 2015.

• The charge would have to be received before June 25, 2015 (4 months) to be timely filed.

APSCUF’s Position:

• Filed 49 days after the State System disrupted the status quo (expiration of the CBA).

• Filed 30 days after learning the policy was implemented on exempt employees (Act 15 of 2015).

• Filed 11 days after the State System refused APSCUF’s demand to bargain over the application of its policy that exceeded the scope of the law.
APSCUF Unfair Practice Charge – PLRB

February 8, 2017 – Proposed Decision and Order

- Hearing Examiner granted State System’s Motion to Dismiss – charge untimely filed.
APSCUF Unfair Practice Charge – PLRB

APSCUF filed exceptions to the Hearing Examiner’s proposed decision and order.

What’s next?

Full Board’s Review

• Affirm or Vacate
  o If affirmed, the charge is dismissed without determination on the merits.
  o If vacated, the Hearing Examiner must examine and make determination on the charge.
APSCUF Unfair Practice Charge – PLRB

When will it be over?
APSCUF Grievance

Alleges the State System is violating the CBA.

- Applying the Protection of Minors policy to employees who are exempt by Act 15 of 2015.
- Applying renewal of background checks more frequently than provided in Act 15 of 2015.
- Threatening employees with discharge and discipline for failing to comply with the improper policy.

Testimony taken over three (3) days - record closed May 2, 2017.
Labor Unions Asserting Third Party Interest in RTKL Requests

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Overview

- RTKL Crash Course
- Unions Asserting Third Party Interest in RTKL Requests
- Best Practices
RTKL Crash Course

- Right-to-Know Law (RTKL)
  - All records of an agency are presumed to be public and available to requesters who ask for access to them.
    - **Records**: Information, regardless of form or characteristics, that documents a transaction or activity of an agency and that is created, received, or maintained pursuant to law or in connection with a transaction, business, or activity of the agency.
    - Some records of an agency may contain information about the university’s relationship with a union or union members who are also employees of the university.
RTKL Crash Course

• Third Parties of Interest
  ○ Individuals (or entities) that are NOT a requester or agency but have a legal or safety interest in records being requested.
  
  ▪ Examples:
    ▪ Agency Employees
      ▪ Home addresses, etc. (Constitutional Informational Privacy)
    ▪ Agency Contractors
      ▪ Trade secrets, proprietary business info, etc., usually in procurement records (Statutory or Common Law Informational Protection)
  
  ▪ NOT Labor Unions
Unions Asserting Interest in RTKL Requests

• Information/records about the union (particularly its relationship with an agency)
  o CBAs, aggregate dues/fair share fees, etc.

• Information/records about the union’s members (the agency’s employees)
  o Individual dues/fair share fees, union membership information, etc.
Best Practices

• Possible Steps with Potential Third Parties
  o Employees who are also union members
    ▪ Legal or Safety Interest:
      ▪ At time of initial request prior to responding (allow third party to object to release of records or seek a protective order)
      ▪ At time of appeal
        • **Required** for all third parties with a legal or safety interest to provide them an opportunity to participate in the appeal
    ▪ No Legal or Safety Interest: Optional at time of request or response as a courtesy
Best Practices

- Possible Steps with Potential Third Parties
  - Unions – as a courtesy or FYI (not required as they do not have a “legal or safety interest” in our records)
  - Any request: If legal or safety interest, advance courtesy notification results in objection, or uncertainty about policy nature of records, university may deny request and third party can/must defend appeal to OOR or the courts
Best Practices

• Contact System LR and/or RTKL Legal Liaison regarding any requests that name or target unions or union-related activities
  o Evaluate request
  o Determine whether some notice of the request is required or advisable as a courtesy
    ▪ To the union
    ▪ To the employee/member
  o Determine whether to withhold the requested records/information (plainly public or possibly protected for legal or safety reasons, or let third party make the case)
  o Provide notice if appealed to OOR
Questions?
Pennsylvania’s State System of Higher Education

14 universities. Infinite opportunities.