COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY PRISON EMPLOYEES INDEPENDENT UNION	:	
	:	CASE NO. PERA-C-19-113-W
v.	:	
ALLEGHENY COUNTY	:	

PROPOSED DECISION AND ORDER

On May 13, 2019, the Allegheny County Prison Employees Independent Union (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board alleging that Allegheny County (County) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the County unilaterally eliminated a long-standing practice whereby officers at the Allegheny County Jail (ACJ) were permitted to switch their previously bid-for vacation schedules during the calendar year to days or weeks that subsequently became available or previously had not been taken by more senior officers.

On June 7, 2019, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on Monday, August 26, 2019, in Pittsburgh. The hearing was continued to Monday, December 9, 2019, in Pittsburgh. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. The Union filed its post-hearing brief on February 7, 2020. The case was reassigned from Hearing Examiner Stephen Helmerich to the undersigned Hearing Examiner on Thursday, May 14, 2020. The County filed its post-hearing brief on June 15, 2020.[1]

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

FINDINGS OF FACT

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

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

3. Jason Batykefer is a corrections officer at the ACJ, and he has been the Union President since January 2019. For the three years prior to becoming Union President, Officer Batykefer was the Union Vice President. Officer Batykefer has been a corrections officer at the ACJ since 2005. (N.T. 20)

[1] The County's Brief was probably received on an earlier date, but mail and docketing operations at the Board have been compromised due to the COVID-19 shutdown.

4. Orlando Harper has been the Warden of the ACJ for 7 years. For 24 years prior to becoming the Warden of the ACJ, Warden Harper served in various ranks of corrections. (N.T. 76-77)

5. Jason Beasom is the Deputy Warden who oversees the scheduling captains at the ACJ. (N.T. 89-90)

6. The parties' collective bargaining agreement (CBA) is an agreement from July 1, 1994, through June 30, 1997, as modified by multiple subsequent interest arbitration awards, including the latest award with a five-year term from July 1, 2014, through June 30, 2019. Article XI of the parties' collective bargaining agreement delineates the vacation rights and benefits of officers in the bargaining unit. (N.T. 25; Joint Exhibit 1)

7. Article XI, Section 4 (XI.4) of the CBA provides as follows:

> It is understood that insofar as it is possible at each separate facility, employees shall be permitted to select the periods for their vacation according to their County seniority provided such vacation selected does not interfere with the orderly operations of the facility.

(Joint Exhibit 1)

8. Pursuant to Article XI, Section 6 (XI.6) of the CBA, bargaining unit officers are required to select their vacation for the entire upcoming calendar year by November 30th of each year. This Section provides as follows:

> No later than November 30 of each year of which this Agreement is in effect, employees shall indicate their vacation preference for the following year commencing the first Sunday in January and extending through the first Sunday in January of the following year, on forms supplied by the County. The County shall schedule vacations requested no later than December 20. Any employee who fails to submit a vacation request as set forth in this paragraph shall be scheduled without regard to continuous service [i.e. seniority].

(Joint Exhibit 1, Article XI, § 6)

9. If all the available vacation slots for a given week during the year are filled by more senior officers who already picked that week, a less senior officer who also selected that week for vacation must pick another week. The number of available vacation spots for any given week is at or near 52. (N.T. 30; Union Exhibit 1 at 2)

10. Article XI, Section 7 (XI.7) of the CBA provides the following: "To assure orderly operation of the prison, all vacations and changes in proposed vacation schedules must be requested in advance and have the approval of the Warden or his designee." (Joint Exhibit 1, Article XI, § 7)

11. The officers typically submit their vacation requests for the entire upcoming calendar year during the first week of October. The officers enter their selection for vacation time into a computer program, and they submit a handwritten form that has three carbon copies: one copy stays with the officer; another copy is sent to payroll operations; and the final copy is forwarded to the scheduling captain. (N.T. 27-28)

12. Vacation selection is bid for by seniority across all three shifts in one lot, and not by seniority on a per-shift basis. (N.T. 28-29)

13. After the selection process is complete, there may be a week or a day that was unfilled or that a more senior officer selected but had to give it up due to FMLA leave, ADA leave, sick leave, retirement or termination.

Those vacation spots that are, or become, available are slots into which an officer can switch. A retiree who knows that he or she will retire in the upcoming calendar year must still select his or her vacation for the year. If the officer retires before his or her selected vacation date, that slot opens and another officer may switch into that slot. (N.T. 38-40)

14. Since at least 2005, officers were able to change their vacation selection during the year, from what they chose during the prior fall, to an open slot that becomes available during the year. Originally, an officer could not switch into a vacation slot that he/she could not have chosen during the fall selection process due to seniority. However, in 2008, the County permitted officers to switch into available slots on a first-come, first-serve basis. (N.T. 41)

15. An officer could switch either a day or a week limited to one switch per year. Also, if an officer uses up all of his or her vacation time during the year, he or she may not switch into another slot. (N.T. 41-43)

16. In 2017, an officer was able to switch into the week of July 4th while a more senior officer was denied switching into that week because the more junior officer requested the switch first and, at the time, switching was approved on a first-come, first-serve basis. (N.T. 43-44)

17. The Union meets at least once per month with management per the CBA. At a monthly meeting after that incident, the Union proposed changing the vacation switching approval system to a seniority-based system, instead of a first-come, first-serve switching system, to which management agreed. (N.T. 22-23, 78, 43-44, 56, 70; Union Exhibit 2)

18. On May 1, 2018, at a monthly meeting, the County informed the Union that, in order to address operational concerns, vacation slots would be limited to slots available by seniority per shift, instead of across all three shifts. (N.T. 30-31; Union Exhibit 1)

19. The Union and management were unable to agree to a resolution regarding the County's proposed change in vacation selection procedure. The Union filed a grievance and the parties agreed to proceed directly to arbitration to resolve the issue. (N.T. 31-32)

20. In calendar year 2018, ACJ management was still permitting officers to switch their vacation slots when openings became available. On June 7, 2018, Captain Jamie Merlino issued an email to the corrections and administrative officers which stated as follows:

> The following vacation slots and single days are open for the month of July 2018. If you would like to switch a week or day please submit your request to Major Smith, Major Kohler or Major Vanchieri by Thursday June 21, 2018. All selections will be awarded based on seniority.
>
> *Your request must include what week or day you want to switch, what you would like it switched to[] and if multiple selection what order you wish if you cannot get the original one.

(N.T. 47-49; Union Exhibit 2)

21. Captain Merlino issued several other emails notifying officers of available days for switching for the months of September, October, November and December 2018. Bargaining unit officers did in fact switch vacation slots in 2018. Union President Batykefer switched vacation slots in 2018 from the first week of hunting season to Christmas week. (N.T. 49, 57-58; Union Exhibit 2)

22. Warden Harper admits that vacation switching existed prior to 2019, when management unilaterally eliminated it. He agrees that it was done on a first-come, first-serve basis until the parties agreed that it would be approved by seniority. (N.T. 81-82)

23. Vacation switching is important to the officers because, while they are required to pick all of their calendar year vacation up front in the prior fall, they cannot anticipate the family needs or crises that may develop during the year or certain opportunities that may arise. (N.T. 58)

24. The CBA does not expressly provide for switching; it only provides for the initial selection process, and the agreement between and practice among the parties are not contained in a written document. The CBA does contain a provision that recognizes vacation changes. (N.T. 64-67; Joint Exhibit 1, Art. XI, §7)

25. The arbitration hearing for the grievance challenging management's limitation on vacation selection by shift only was on August 23, 2018. Arbitrator Richard W. Dissen issued his arbitration award (Dissen Award) on December 20, 2018. (N.T. 32-34; Union Exhibit 1)

26. After the arbitration hearing, but before the Dissen Award was issued, the Union worked with the scheduling captains to have officers pick their 2019 vacations under both systems, i.e., the traditional way of seniority across all shifts and the County's proposed new way of seniority per shift, so that the scheduling was done whichever way Arbitrator Dissen decided. (N.T. 34-35)

27. Arbitrator Dissen sustained the Union's grievance and concluded that "the unilaterally revised vacation selection which imposes a per shift limitation on vacation or modifies the manner in which vacations may be selected violates the collective bargaining agreement between the parties." (Union Exhibit 1 at 15-16)

28. Arbitrator Dissen interpreted Article XI, Sections 4 and 7 in the following manner:

> The language of those provisions reserves to the Employer the authority to refuse vacation requests on an *ad hoc* basis whenever an individual employee's vacation selection might interfere with the orderly operation of the facility or, as indicated in XI.7, whenever an employee neglects to request a vacation date or a change in vacation schedules in advance. The contract language does not state that the Employer, in furtherance of the orderly operation of the facility, may establish a rule which voids an existing vacation selection system and institutes a shift-based selection process. The contract language states that employees *shall be permitted* to select the periods for their vacations according to County seniority provided *such selection* does not interfere with the orderly operation of the facility. That is, in each instance, County seniority will dictate vacation eligibility unless, as to that particular vacation request, granting the request will interfere with the orderly operation of the facility.
>
> . . . . In addition to asserting a general reservation of rights, Article XV also states that the Employer retains and reserves any authority conferred upon it by the Commonwealth. In view of that broad statement of authority in Article XV, it makes little sense to construe [Article] XI.4 and XI.7 in the manner the

> Employer has, as a further statement of management's authority. Rather XI.4 must be construed as the statement of a benefit for bargaining unit workers: employees may select a vacation time by seniority and have that selection honored by management except in a particular instance in which a selection may interfere with the orderly operation of the facility.

(Union Exhibit 1 at 12-13)(emphasis in original)

29. Deputy Warden Beasom testified that he believed vacation switching caused a scheduling burden. (N.T. 82, 91-92)

30. On January 24, 2019, approximately one month after the Dissen Award, Officer Jessica Novakowski asked the scheduling captains to switch her vacation week to care for her brother. Captain Matthew Kohler denied her request.(N.T. 49-52, 57; Union Exhibit 3)

31. Officer Novakowski's email provides as follows:

> Majors,
>
> I need to ask if at all possible can I move a week of vacation to this coming week, January 27? I know it's last minute, however I've had a family emergency, my brother is in intensive care and we don't know what is wrong yet. He's paralyzed on one side of his body and has limited control of the other, he can't see or talk well, and he is struggling to breathe on his own. I appreciate your time and consideration.

(Union Exhibit 3)

32. The same day, Captain Kohler responded: "Jess, unfortunately we are not moving vacations this year. But you can file for [FMLA] and that [sic] a week that way." He further stated: "I'm sorry…Hoping your brother recovers from what is ailing him." (Union Exhibit 3)

33. President Batykefer was off on vacation the week that Officer Novakowski informed him of her vacation switch denial. The next week when he returned, in February, he visited with Major Kohler who said: "It's above my pay grade." He further told Batykefer that "This is what I was told to do; you're going to have to go above me to get an answer from this." Officer Novakowski took FMLA leave for the week that she wanted to switch vacation to care for her brother. (N.T. 49, 52-53, 62)

34. By taking FMLA leave, Officer Novakowski forfeited a week of vacation somewhere else in the year because the County requires officers to exhaust sick and vacation time when they use FMLA, after which they can use FMLA leave unpaid. She also would have forfeited that week if she was permitted to switch her vacation. (N.T. 71, 74-75)

35. After meeting with Captain Kohler, President Batykefer met with Chief Deputy Warden Zetwo. Zetwo told Batykefer to bring it up at the next monthly meeting. (N.T. 53-54)

36. No one from the County ever attempted to bargain over eliminating the vacation switches. At the monthly meeting in February 2019, the management representatives present were Warden Harper, Deputy Beasom, Deputy Zetwo, Deputy County Manager Pilarski and one of the County's Solicitors. During the meeting, the Union asked why Kohler denied Officer Novakowski her vacation switch to care for her brother. Warden Harper and County Manager Pilarski stated that it is their right to end the vacation switch policy. They offered no further explanation. Overtime or manpower concerns were never

discussed or offered as an explanation during that meeting. (N.T. 49, 52-56, 59-60, 83)

37. At the hearing, Warden Harper testified that he had difficulty manning the jail due to call offs for FMLA, ADA and sick leave, but he did not offer this as an explanation during meetings with the Union prior to the hearing to support his decision to eliminate vacation switching. The County offered no specific scheduling data to support this claim. (N.T. 52-56, 85)

38. Deputy Warden Beasom also testified that eliminating the vacation switching was necessary because 40% of the jail is on intermittent or continuous FMLA leave and that those call-offs, which can be taken at any time, must be covered with mandatory overtime. (N.T. 93-94)

39. Deputy Warden Beasom conceded that vacation switching has no effect on manpower shortages, or mandatory overtime, due to call-offs for sick and FMLA. In many cases, an officer was already supposed to be off on a vacation during that week and a different officer wants to switch into it, resulting in no change or diminishment of staffing levels. The overtime would be necessary if there was a switch or not. (N.T. 97-98)

40. No one from management ever expressed concern about vacation switching issues either before or after the Dissen Award. At no time during the grievance arbitration over the vacation bidding by shift procedure did anyone from management raise concerns over or make arguments about the vacation switching procedure. Warden Harper admitted that the Dissen Award concluded that ACJ management did not have the right to unilaterally change vacation scheduling. (N.T. 57, 67, 81)

41. The zipper/integration clause contained in the parties' CBA is entitled "Effect of Agreement" under Article XIV of the CBA. (Joint Exhibit 1)

42. Article XIV provides, in relevant part, as follows:

1. The parties mutually agree that the terms and conditions expressly set forth in this Agreement represent the full and complete understanding, agreement and commitment between the [p]arties thereto.
2. All items proposed by the Union, whether agreed to or rejected, will not be subject to renegotiation until negotiations for a new contract commence in accordance with the provisions of Act 195 and items included within the scope of bargaining which were or are not proposed by the Union shall likewise not be subject to negotiation until the period specified above.

(Joint Exhibit 1, Art. XIV, at 13)

43 Article XV of the parties' CBA contains the "Management Rights" clause and provides as follows:

> The County retains and reserves unto itself all powers, rights, authority, duties and responsibilities, including but not limited to the security of the prison, conferred upon and vested in it by the Commonwealth of Pennsylvania, and with regard to all matters not covered by this Agreement.

(Joint Exhibit 1, Art. XV at 31).

44. In 1997, an interest arbitration panel, chaired by Neutral Arbitrator Edward E. McDaniel, issued an interest arbitration award (McDaniel Award) modifying the "Management Rights" clause which now provides as follows:

> The County retains and reserves unto itself all inherent, statutory and other powers, rights, authority, duties and responsibilities of its management status—including but not limited to those of operating, manning and securing its facilities, hiring, scheduling, directing, supervising and, for just cause, disciplining and discharging its employees—which are not expressly modified or restricted by any specific and enforceable terms or conditions of these Agreement provisions.

(Joint Exhibit 1)

DISCUSSION

The Union argues that the subject of vacation leave and the manner in which it is used by employes is a mandatory subject of collective bargaining, as the Board held in Middletown Township Police Benevolent Association v. Middletown Township, 27 PPER 27061 (PDO, 1996), aff'd, 27 PPER 27203 (Final Order, 1996). (Union Brief at 8-12).

In its Brief, the County does not take a position on whether the vacation switching procedure constitutes a mandatory subject of bargaining under Board law or the Board balancing test. The County, however, does argue that the Management Rights clause in the CBA no longer contains boilerplate language, rather it specifically grants ACJ management the discretionary right to control the scheduling of employes and the manning of the ACJ in operating the Jail, as long as management's decisions are not restricted or in conflict with the CBA or other agreement. (County Brief at 15-16). The County additionally contends that the CBA contains a specific clause relating to vacation modifications providing that any modifications to an employe's vacation schedule "must be requested in advance and have the approval of the Warden or his designee." (County Brief at 9-10, quoting Joint Exhibit 1)(emphasis added). In this context, the County maintains that unilaterally eliminating the vacation switching practice was its managerial right and privilege under the CBA and that the Union waived its right to bargain the same. (County Brief at 8-9, 14-20).

The County further emphasizes that the Union President testified that vacation selection and modifications, under the contract, must be and have always been approved by the Warden. (County Brief at 10). The County also asserts that management's actions in the past of permitting vacation switching was always done according to the CBA in that the Warden was exercising his managerial and contractual right of approval every time. Management did not establish a binding past practice simply because the Warden exercised his right of approval by granting vacation switches. If the Union prevails, argues the County, the Warden would have had to periodically deny approval just to preserve his contractual rights and avoid a binding practice. (County Brief at 23). Requiring the Warden to approve all vacation modification requests, contends the County, conflicts with the parties' CBA. (County Brief at 20-23)

The County, in this case, does not dispute the record evidence that, for many years, ACJ management permitted bargaining unit officers to switch vacation slots. Also, there is no dispute that the County entirely eliminated all future vacation switches without bargaining with the Union and without offering the Union any explanation why it eliminated vacation switches, until the hearing. Only a past practice involving a mandatory subject of bargaining will bind the employer. South Park Township Police Ass'n v. South Park Township, 32 PPER 32078 (Final Order, 2001). The first determination,

therefore, must be whether the vacation switching procedure constitutes a mandatory subject of bargaining because, if it is a managerial prerogative, the inquiry and analysis ends with the conclusion of no unfair practice.

In Middletown, the employer unilaterally instituted seven procedural changes to the vacation scheduling policy. These changes summarily included the following: (1) changing employes' deadline for requesting vacation preferences; (2) disallowing two employes per squad to be on vacation if it will necessitate overtime; (3) eliminating the employer's time limit to respond to vacation requests; (4) imposing a seven-day limit on vacation leave between Thanksgiving and New Year's Day; (5) limiting simultaneous vacations for detectives and sergeants to only two of each per squad; (6) disallowing employes to withdraw an already submitted request for their preference week; (7) imposing a seven-day limit advanced notice requirement on leave requests and leave withdrawals.

The Board, in Middletown Township held that, unless the employer offers legitimate managerial interests that substantially outweigh the employes' interest in vacation scheduling procedures, those procedures constitute a mandatory subject of bargaining. In Middletown, the Board sustained the hearing examiner's conclusion that the manpower and overtime concerns raised by the employer with respect to the old vacation procedures, although legitimate concerns, did not outweigh the employes' interests in vacation procedures and constituted a mandatory subject of bargaining. The Board also emphasized that Board examiners had consistently concluded that employe vacation procedures constituted a mandatory subject of bargaining. The Middletown Board also relied on Mifflin County School District, 22 PPER 22229 (Final Order, 1991), wherein the Board concluded that imposing a deadline for requesting sabbatical leave, where there previously was no set deadline, constituted a change to leave procedure and a mandatory subject of bargaining.

The County, at the hearing, offered testimony that it eliminated switches due to the burden on scheduling captains and operational necessities resulting from manpower shortages caused by officers calling off sick or taking FMLA. The County, however, did not produce specific facts or records to establish the alleged burden on scheduling captains or the manner in which operations were compromised by vacation switches. Moreover, even had the County produced evidence to establish administrative burdens with fact-based evidence, the Board has held that, although legitimate concerns, they are not interests that outweigh the employes' interest in maintaining vacation procedures. Middletown Township, supra. *See also*, Commonwealth of Pennsylvania, Department of Public Welfare (Ebensburg Center) v. PLRB, 568 A.2d 730 (Pa. Cmwlth. 1990)(holding that unilateral subcontracting for legitimate economic savings and financial reasons without bargaining constitutes an unfair practice). In some respects, everything an employer does for employes is an administrative burden and costs money. If those matters automatically relieved an employer of its bargaining obligations, there would be very little bargaining.

Similarly, Hearing Examiner Helmerich, in Spring Garden Township Police Officers Association v. Spring Garden Township, 49 PPER 3 (PDO, 2017), concluded that the employer committed an unfair labor practice by unilaterally eliminating the officers' ability to exchange or transfer compensatory and vacation time. In Spring Garden Township, Examiner Helmerich dismissed management's defense that the administrative burden of maintaining the old policy sufficiently outweighed employes' interest in switching vacation time. Spring Garden Township, 49 PPER 3. In this case, the alleged administrative reasons advanced by the County are unsupported by facts of

record and also do not outweigh bargaining unit members' interest in vacation switching to accommodate their unforeseen needs and opportunities.[2] In addition to the alleged administrative burden, the operational and manning concerns advanced by the County were not established with substantial, competent evidence of record. Under Board law, therefore, the vacation switching procedure constituted a mandatory subject of bargaining.

The County, however, is asserting the defenses of contractual privilege and waiver, and the Middletown and Spring Garden Township cases did not involve a potentially conflicting contractual provision arguably authorizing the employer's actions or arguably demonstrating that the parties already bargained for the employer's right to eliminate the vacation switches at issue therein. The County, 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 (PDO, 2006).

Notwithstanding whether the Management Rights clause and Article XI.7 arguably gives the Warden the broad authority to deny vacation modifications indefinitely, the Dissen Award reached a contrary conclusion. Although the Board does not engage in contract interpretation when considering the defense of contractual privilege, the Union admitted the Dissen Award which interpreted the very provisions the County is relying on to establish that it had a sound arguable basis for its actions. Where an arbitrator has interpreted the same language of the parties' contract that the employer is offering as a sound arguable basis or waiver defense, and that interpretation is inconsistent with the employer's ascribed meaning, the arbitrator's interpretation controls. There is no reason for the Board to determine whether the employer's ascribed meaning to the provisions in question are reasonable when an unappealed arbitration award has analyzed and interpreted the same provisions and reached a contrary result.

The County relies on Article XI.4, XI.7 and the Management Rights clause for authority to eliminate vacation switching for the bargaining unit indefinitely. However, Arbitrator Dissen concluded that, under these very same provisions, management has the right to deny vacation or vacation modifications based on operational needs on an individual basis, and it has the burden of establishing operational deficits that exist or will exist during the proposed vacation selection or modification. In this regard, Arbitrator Dissen stated: "The language of those provisions reserves to the Employer the authority to refuse vacation requests on an *ad hoc* basis

[2] It is difficult on this record to understand how vacation switching recently became more burdensome administratively when the practice has been in place for at least 15 years.

whenever an individual employee's vacation selection might interfere with the orderly operation of the facility or, as indicated in XI.7" (F.F. 28).

Arbitrator Dissen interpreted Article XI in conjunction with the Management Rights clause found in Article XV and concluded as follows:

> In addition to asserting a general reservation of rights, Article XV also states that the Employer retains and reserves any authority conferred upon it by the Commonwealth. In view of that broad statement of authority in Article XV, it makes little sense to construe [Article] XI.4 and XI.7 in the manner the Employer has, as a further statement of management's authority. Rather XI.4 must be construed as the statement of a benefit for bargaining unit workers: employees may select a vacation time by seniority and have that selection honored by management except in a particular instance in which a selection may interfere with the orderly operation of the facility.

(F.F. 28)(emphasis added).

Arbitrator Dissen, therefore, concluded that, under the Management Rights clause and the vacation provisions of Article XI, management may not change vacation procedures wholesale for the entire bargaining unit indefinitely based on that language. The County did not provide any long-term operational deficit or necessity for the unit-wide elimination of vacation switching in this case, as required by Arbitrator Dissen. Saliently, Captain Kohler did not deny Officer Novakowski her vacation switch due to any expressed operational needs present, or reasonably threatening, at the time of her requested vacation switch. She was denied because of a wholesale policy change affecting the entire bargaining unit into the indefinite future, contrary to the Dissen Award, without considering whether FMLA or other types of leave for other officers created a manning deficit for the vacation slot she requested.

Moreover, the Board has held that an employer violates its bargaining obligation to the union representative of its employes by expanding the meaning of the contract to institute managerial policy changes affecting the bargaining unit. In this regard, the Board has opined as follows:

> Accordingly, as regards the defense of contractual privilege, the Board distinguishes between action which is application of the contract terms which has a sound arguable basis in the contract, and action by the employer which transcends the contract and constitutes an attempt to expand contractual terms through unilateral adoption of managerial policies which are not in response to a specific claim under the contract and have unit wide application. The Township here is not merely applying the contract language in calculating pension benefits or contributions for a particular employe, but is undertaking a unilateral effort to prescribe certain meaning to the contractual language applicable to all bargaining unit members, in violation of its bargaining obligations.

Wilkes-Barre Township Police Benevolent Association v Wilkes-Barre Township, 35 PPER 137 (Final Order 2004)(emphasis added). In this case, the County did not apply the vacation modification provisions of Article XI.7 to a single individual, as it was instructed by Arbitrator Dissen, due to operational needs at the time Officer Novakowski requested to switch her vacation to care for her brother. Instead, Officer Novakowski's request caused the County to

reveal its unilateral managerial policy of indefinitely eliminating all vacation switches unit-wide without bargaining with the Union.

The County's argument, that approval of vacation switching could not have risen to the level of a past practice simply because the Warden, in exercising his contractual authority, approved rather than denied those vacation switches. The County's argument, however, fails to account for Arbitrator Dissen's contractual interpretation of the CBA (that the Warden's authority requires demonstrating operational and manning needs at the time the vacation modification is requested on an individual basis). Indefinite, unit-wide changes to vacation procedures are beyond the scope of the CBA. Wilkes-Barre Township, supra. The Dissen Award concluded that the very provisions in the CBA relied upon by the County to justify its elimination of vacation switches actually provides the employes with the benefit of vacation modifications that should only be denied on an individual basis for operational needs at the time.

Under the Dissen analysis, the Union did not waive its right to bargain over the elimination of vacation switches or modifications, especially when the switching practice has been consistently utilized by employes and management every year during the course of multiple contracts, including the latest one. Certainly the officers, who are required to pre-select their vacation for the year, do not always have ability to forecast future crises, events or opportunities that may require them to switch their vacation selections. The CBA expressly contemplates that officers would have the benefit of modifying their pre-selected vacation slots to address those unforeseeable circumstances.

The County argues that, under the Pennsylvania Supreme Court decision in County of Allegheny v. Allegheny County Prison Employees Independent Union (ACPEIU), 381 A.2d 849, 476 Pa. 27 (1977), the Union is unable to enforce past practices as binding terms and conditions of employment that are not expressly contained in the parties' collective bargaining agreement where a broad integration clause and a specific (non-boilerplate) Management Rights clause precludes a finding that the parties intended to incorporate the past practices into the written contract that are not specifically referenced therein. (County Brief at 16-20). The Union, however, contends that our Supreme Court's decision in ACPEIU is inapplicable here.

In Harrisburg School District, 13 PPER 13077 (Final Order, 1982), the Board addressed this issue after the Supreme Court's decision in ACPEIU, supra. The Board, in Harrisburg School District, opined that it will not read an integration clause or other contractual provision as a waiver precluding bargaining and justifying unilateral changes in terms and conditions of employment unless a party can demonstrate that the other party clearly and unmistakably waived its right to bargain that subject. Harrisburg School District, 13 PPER 13077.

In Teamsters Local # 401 v. City of Nanticoke Housing Authority,2003 WL 26068623 (PDO, 2003), Examiner Tietze applied the Board's policy of requiring that employer's bargain before changing past practices involving mandatory subjects of bargaining that continue into a new contract term, under facts analogous to the circumstances in the instant case. In this regard, Examiner Tietze stated the following:

> There is no disagreement between the parties that the Authority and the Union have a past practice of allowing employes to use vacation

> time in hourly increments. There is uncontradicted record evidence that this practice was in effect well before the parties signed their first collective bargaining agreement in October of 1998. The 1998-2001 contract states in Article 12 that, "The Authority will allow employees to take single days off for vacation." This language, on its face, does not prohibit employes from taking leave in hourly increments. It merely states that the Authority will allow single days of vacation to be taken. This section then does not address the taking of leave in hourly increments. The parties' action of continuing to allow, on a regular basis, employes to use leave in hourly increments shows their mutual intention to continue that past practice under the 1998-2001 collective bargaining agreement.

City of Nanticoke Housing Authority, 2003 WL 26068623. Examiner Tietze further opined as follows:

> The record shows a fifteen year past practice of allowing employes to use leave in hourly increments. This practice extended through the first contract between the parties (1998-2001) and until April 19, 2002, when it was unilaterally rescinded by the Authority's Board.
>
> It is settled law that an employer's unilateral change to a past practice regarding a mandatory subject of bargaining is an unfair practice. Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order, 1987); Clarion Limestone Area School District, 23 PPER 1 23212 (Final Order, 1992). Since the collective bargaining agreement between the parties was (and the current collective bargaining agreement is) silent as to the usage of hourly increments of vacation time, the Authority has no valid claim of contractual privilege. Jersey Shore Area School District, supra; Mars Area School District, 32 PPER ¶ 32023 (PDO, 2000). Indeed, a claim of contractual privilege is based upon an identification of "a contractual provision which specifically addresses the matter in dispute and [which] is open to two reasonable interpretations." Grove City Borough, 31 PPER ¶ 31160 at 383 (PDO, 2000) (citation omitted). Such is not the case here.

City of Nanticoke Housing Authority, 2003 WL 26068623. This case is more analoguous to Nanticoke because both parties admit that there is no contractual provision on point. To the extent that Article XI.7 and the Management Rights clause would govern the issue, there can be no room for multiple reasonable interpretations after the Dissen Award.

The County maintains that Harrisburg School District, is inapplicable because the parties' agreement in that case did not involve the type of specific and expansive management rights clause that exists in this case. This Management Rights clause gives specific authority to the County over manning, scheduling and directing employes and operations in the Jail. However, the County's argument again ignores the fact that the Dissen Award already concluded that reading Article XI.7 with Article XV (Management Rights) results in employes receiving a contractual benefit favoring vacation modifications and that denials are to be the exception, not the rule, depending on demonstrated operational needs. Here, the CBA is silent regarding vacation switching specifically, but it permits the modification of

vacation schedules with the Warden's approval. The fifteen-year practice of permitting unit-wide vacation switching from year to year survived through the latest CBA/interest award and therefore must be considered a binding past practice, which is a distinguishable fact from ACPEIU, supra.

Furthermore, ACPEIU, supra, is distinguishable because it involved an appeal from a grievance arbitration award. The Supreme Court's decision, that an arbitrator's award does not draw its essence from the contract, where a past practice is not expressly incorporated into the agreement in the presence of a broad integration clause, is very different from concluding that, **under PERA**, a past practice that continues between the parties **and survives the new contract** cannot raise the expectations of the employes and become a term and condition of employment. There is a long history of consistent Board precedent that a past practice, which continues beyond a new collective bargaining agreement and involves a mandatory subject of bargaining, is a binding term of employment that must be bargained before changed. That precedent is consistent with ACPEIU and demonstrates the distinguishability of ACPEIU, on these facts. Therefore, the County's argument (that the broad integration clause and the broad, specific authority contained in the Management Rights clause precludes a finding of a binding past practice under Board and Supreme Court law) must be dismissed on these facts as contrary to Board and Supreme Court precedent. As the Court forebodingly warned in ACPEIU, supra: "What we have said, of course, is not to suggest that in another case the evidence may not justify a contrary conclusion." ACPEIU, 381 A.2d at 855, 476 Pa. at 39. The evidence in this case justifies a contrary conclusion to ACPEIU.

The County argues that the Board, in Whitehall Township, 18 PPER 18024 (Final Order, 1986), expressly limited the application of past practices in unfair practice cases and held that, under the parties' agreement, the union in that case had "limited the extent to which past practices establish conditions of employment." (County Brief at 19)(quoting Whitehall Township, supra). The County further maintains that "[i]t is within this clearly enunciated exception that the Pennsylvania Supreme Court's opinion [in ACPEIU] regarding the Management Rights clause between the current parties continues to serve as a waiver of the [Union's] right to offer past practice as evidence." (County Brief at 19).

However, Whitehall Township is not controlling here because it was decided as a case of waiver by the union in light of unambiguous language that conflicted with, and thereby prohibited, the practice. As previously stated herein, there is no dispute here that the CBA does not specifically address the practice of vacation switching, but it does contemplate vacation modifications as a benefit to employes. In this regard, the Union did not clearly or unambiguously waive its right to bargain the practice of vacation switching. The Board, in Whitehall, stated, in relevant part, as follows:

> This Board had held that terms and conditions of employment can be established by past practice for purposes of a refusal to bargain unfair practice charge. Hazleton Area School District, 15 PPER ¶ 15051 (PDO, 1984), 15 PPER ¶ 15170 (Final Order, 1984).

> Even if this Board were to find that an established practice existed, it would be nullified because it was contrary to the express terms of the collective bargaining agreement. County of Allegheny, supra. In addition to the clause which incorporated the language of Resolution 565, the parties' agreement included other clauses which excluded retirees from eligibility for Blue Cross-Blue Shield benefits, and limited the extent to which past practices establish conditions of employment.

Whitehall, 18 PPER 18024. The County's assertion, that the Management Rights clause from the McDaniel Award conflicts with and thereby prohibits evidence of the past practice of vacation switching, sidesteps the Dissen Award, which interpreted the Management Rights clause with Article XI.7 as supplying the employes with the benefit of vacation modifications, except in circumstances establishing an operational necessity to deny the individual modification. Whitehall Township, supra, did not involve an existing arbitration award that interpreted the applicable and relevant contract provisions in a manner that supported the past practice, as here. Rather, it involved an unambiguous contract provision that incorporated a resolution evidencing a clear and unmistakable waiver by the union. Also, with the benefit of the Dissen Award construing this CBA, this case is not a contractual privilege or a waiver case. The Dissen Award has already interpreted the meaning of the CBA provisions in a manner contrary to what the County reasonably believes they mean and contrary to what the County asserts the Union waived.

Furthermore, it is the County's position that is contrary to and in violation of the CBA. By eliminating all vacation switching modifications for all bargaining unit members indefinitely, the ACJ has eliminated the contractually bargained-for discretion of the Warden and his scheduling captains, as his designees. Under the plain meaning of Article XI.7 and the Dissen Award, the Warden's approval, and implicitly his denial, of vacation modifications requires the Warden to at least examine the operational circumstances involved at the Jail at or for the time requested. Both the Union and the County bargained for and agreed upon a system wherein the Warden and his designees would at least consider the individual vacation modification request and exercise individualized discretion in weighing the circumstances. FOP White Rose Lodge 15 v. City of York, 50 PPER 17 (PDO, 2018)(Hearing Examiner Pozniak holding that, where the employer implements a unit-wide policy, which effectively eliminates individualized discretion for sick leave to cover FMLA absences to care for a family member, the defense of contractual privilege based on a provision that necessitates or embodies individualized discretion in its application must be rejected and the employer has violated the contract).

The Union also argues that the County eliminated the vacation switch practice in retaliation for the Union's success in the Dissen Arbitration (Union's Post-hearing Brief at 12-13). In a discrimination claim, the complainant has the burden of establishing that the employe(s) engaged in protected activity, that the employer knew of that activity and that the employer took adverse employment action that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). An employer's lack of

adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Other factors include: any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employe(s), the effect of the employer's adverse action on other employes and their protected activities. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing of an employer's adverse action alone is not enough to infer animus, when combined with other factors, close timing can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984).

The Union contends that both the timing and insubstantial explanations yield the inference that the County was unlawfully motivated when it eliminated the vacation switch practice. (Union's Post-hearing Brief at 12). The County, argues the Union, invested a substantial amount of time and effort negotiating and arbitrating the issue of changing annual vacation selection from one based on seniority across all shifts to one based on seniority per shift. The Union emphasizes that, during all this time, the County never mentioned its intent to eliminate the vacation switch practice and procedure, and yet it did so approximately one month after the Dissen Award was issued. Furthermore, the Union contends that it only learned of the County's unit-wide elimination of the practice because Officer Novakowski was denied her request to switch vacation weeks in late January 2019. The Union maintains that the County's contention at the hearing, and not before, that management had been discussing the elimination of the vacation switch policy since early to mid-2018 is not credible. (Union's Post-hearing Brief at 13).

The County neglected to provide any explanation for eliminating the vacation switches to the Union prior to the hearing. Captain Kohler said nothing to the Union President when asked why he would not allow Officer Novakowski to switch her vacation to care for her brother, and he directed the Union President up the chain of command. Moreover, when questioned about the change in vacation procedure at a monthly labor-management meeting in February 2019, the Warden and the Deputy County Manager provided no explanation other than that it was their managerial right to simply eliminate the practice.

Although the timing of the County's change, the County's insubstantial explanations for the change and its unwillingness to inform the Union of their operational concerns for eliminating the vacation switches, even after the Union discovered the change, certainly is all very suspect, I am unable to infer unlawful motive on this record. Contrary to the Union's assertion, that I should not credit the testimony of Warden Harper and Deputy Warden Beasom, that they discussed the changes before the Dissen Award, I have no reason to discredit their testimony. Deputy Warden Beasom testified that he initiated discussions regarding the elimination of vacation switching in March or April of 2018, eight months before the Dissen Award. Warden Harper testified that he decided to eliminate the vacation switching procedure in November or early December of 2018, before the Dissen Award. This testimony credibly establishes that management decided to eliminate vacation switches before the Dissen Award and not because of it. Although the County should have bargained with the Union and sought the Union's input for possible solutions before eliminating the vacation switching practice, the decision

could not have been unlawfully motivated by the Dissen Award, as a matter of law because it was made before the Award was issued.

In Paragraph 14 of its specification of charges, the Union alleged that the County's unilateral elimination of the vacation switch practice one-two months after the Dissen Award constitutes an independent violation of 1201(a)(1), interfering and coercing bargaining unit members' rights to engage in grievance arbitration.

An independent violation of Section 1201(a)(1) occurs, "where in light of the totality of the circumstances, the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER 32165 at 404 (Final Order, 2001); Northwest Area Educ. Ass'n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). Under this standard, the complainant does not have a burden to show improper motive or that any employes have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER 26155 (Final Order, 1995).

Under the totality of the circumstances, the County's unilateral elimination of the vacation switch program, 1-2 months after the Dissen Award, constitutes interference with the reasonable employes' protected right to participate in grievance arbitration regarding vacation procedures. The reasonable employe in the bargaining unit, well aware that the Dissen Award concluded that unit-wide vacation procedures could not be unilaterally changed indefinitely, would be intimidated and coerced with respect to filing pursuing grievance arbitration about such matters, which are protected activities. Although timing alone is insufficient to establish unlawful motive in a discrimination claim, the timing here coupled with a complete lack of an explanation during the post-elimination period (when there were numerous intervening monthly labor-management meetings and opportunities to do so) and the County's disregard for the role of the bargaining representative over the course of seven months of planning, indeed provide a sufficient nexus to the Dissen Award to intimidate employes in violation of Section 1201(a)(1). Additionally, the County has not established factually supported reasons that could, on balance, outweigh the coercive effect of its elimination of the vacation switching practice on bargaining unit members.

Accordingly, the County independently violated Section 1201(a)(1) and (5) of PERA when it unilaterally eliminated the vacation switching practice in January 2019, during the effective term of the latest CBA/interest award and within two months of the Dissen Award. That Award interpreted the parties' negotiated Management Rights clause in conjunction with their vacation provisions to give employes the benefit of vacation modifications as well as the Warden's discretion in considering operational needs on an individual basis. The Award further concluded that vacation procedures could not be modified unilaterally without bargaining with the Union. The County, however, did not intentionally retaliate against the Union or its bargaining unit members by unilaterally eliminating the vacation switching practice. The County, therefore, did not violate Section 1201(a)(3).

CONCLUSIONS

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

1. The County a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

5. The County has not committed unfair practices in violation of Section 1201(a)(3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the County shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act;

2. Cease and desist from 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;

3. Take the following affirmative action, which the Hearing Examiner finds necessary to effectuate the policies of PERA:

(a) Immediately return to the status quo ante and immediately reinstate the vacation switching policy based on seniority for bargaining unit members;

(b) Immediately make whole Officer Novakowski and any bargaining unit members who suffered losses as a result of unilaterally eliminating the vacation switching practice;

(c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

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 twenty-fifth day of June 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

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JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY PRISON EMPLOYEES INDEPENDENT UNION	:	
	:	CASE NO. PERA-C-19-113-W
v.	:	
ALLEGHENY COUNTY	:	

AFFIDAVIT OF COMPLIANCE

The County of Allegheny hereby certifies that it has ceased and desisted from interfering with and coercing employes in the exercise of their protected grievance arbitration activities; that it has ceased and desisted from unilaterally changing bargainable terms and conditions of employment, in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has restored the status quo ante regarding the vacation switching practice and reinstated the same; that it has made whole Officer Novakowski and other bargaining unit members; that it has posted a copy of the decision and order as directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public