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SECOND STRIKES ARE AVOIDABLE

Recently, this firm successfully challenged the long-held presumption that a union has a guaranteed right to employ two strikes per school year in an arbitration involving Old Forge School District, in Lackawanna County, Pennsylvania.[1]

As most in the education law industry know, the Collective Bargaining Law for School Employees (Act 88) generally permits the union to take two strikes during the school year if necessary. Act 88, however, provides that if a strike prevents a school from having 180 days of instruction by June 15 or the last day of the school's scheduled year, the strike must end. A second strike, therefore, must be concluded by June 30th, allowing for 180 days of instruction by that date. Typically, once a strike is over, school districts will use all available scheduled holidays as school days. After a strike, classes are often held on scheduled holidays such as the day before and after Thanksgiving and the winter and spring holiday breaks, so that school can be completed by June 15th. This allows for the days between June 15th and June 30th to remain available as strike days should the union call a second strike.

The practice exists because Act 88 has been historically interpreted in Pennsylvania to guarantee the union two strikes in any given school year. As stated above though, the presumption that two strikes are guaranteed has been debunked by the recent Old Forge arbitration ruling. In short, blocking a second strike is now as easy as delaying the last day of school by the number of days the first strike lasted and not using the scheduled holidays as make-up days for the lost instruction resulting from the strike. This will most likely use up any available days for a possible second strike since 180 days of instruction will not be able to be completed by the statutory deadline of June 30th.

A district can implement a calendar change and leave no days left for a second strike based on the following three concepts as explained by the arbitrator in the Old Forge School District case:

1. School Calendars are Managerial Prerogative

The law is well settled that a school calendar is a managerial subject of bargaining in which unilateral implementation is allowed, unless restricted in the collective bargaining agreement. Section 702 of PERA extends managerial rights to establishing working calendars. Setting of a school calendar has been recognized as a managerial prerogative since the beginning of collective bargaining rights under Act 195. Northern Cambria School District 3 PPER ¶ 03180 (Final Order, 1973) (school board's refusal to bargain about school calendar does not violate Act 195 since establishment of school calendar is a matter of managerial policy within meaning of Section 702).

2. Past Practice Cannot Abridge a Managerial Prerogative

School calendars are not a mandatory subject of bargaining.

A past practice may not abridge a managerial prerogative. If the past practice in question is not a subject requiring mandatory bargaining, then the practice is irrelevant because it cannot override a managerial prerogative. The law is well settled that setting and revising school calendars is a managerial prerogative which

JOHN G. AUDI
jaudi@sweetstevens.com

331 East Butler Avenue, New Britain, PA 18901 phone 215 345 9111
2 South Main Street, Suite 303, Pittston, PA 18640 phone 570 654 2210

does not require bargaining. As such, a past practice argument on changing a school calendar to accommodate a strike should fail. The arbitrator in the Old Forge arbitration case referenced agreed that a past practice on a managerial prerogative is irrelevant.

3. Act 88 Makes No Restriction on Changing School Calendars

In addition to the Act 195-provided managerial right to set and alter a school calendar, Act 88 makes no restriction on setting and changing the last day of school prior to a second strike. The teacher unions have long held that a district is prohibited from scheduling school past June 15th without the advent of a second strike that year. Nothing in the school code or any case law interpreting the school code stands for that proposition. As stated above, Act 88 provides that if a strike prevents a school from having 180 days of instruction by June 15 or the last day of the school's scheduled year, the strike must end. Nowhere in the law does it say that a school cannot schedule 180 days of instruction to go beyond June 15 in the absence of a second strike. This law simply provides that if a strike would require a school to go beyond its last scheduled day or June 15, the strike must end and final best-offer arbitration needs to take place before a second strike may commence. The arbitrator in the Old Forge arbitration decision agreed with this conclusion.

Conclusion

It is now clear that Act 88 does not prohibit the district from selecting an end date past June 15th to make up days from the first strike. Extending the last day of school past June 15th instead of the customary practice of using all scheduled holidays for instruction, will usually leave the union without days to conduct a second strike. Also, a district, by amending its calendar to past June 15th to accommodate for the first strike, ensures that the 180-day requirement can be met while also guaranteeing that students will not be in school during traditional holiday breaks.

It is time to rethink second strikes and the destructive impact they have on education. There is no reason to further punish students and their families by cramming all educational days in before June 15th, thus eliminating any holidays and breaks for the students. This practice only serves to provide the union with time to call a second strike and furthers its agenda rather, consider reserving those dates for the students instead.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

1. The PSEA has recently filed an appeal on this decision.