COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLEGHENY INTERMEDIATE UNIT #3 EDUCATION ASSOCIATION	:	
v.	:	Case No. PERA-C-03-142-W
ALLEGHENY INTERMEDIATE UNIT #3	:	

FINAL ORDER

On October 21, 2004, the Allegheny County Intermediate Unit #3 (AIU) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order, dated October 6, 2004 (PDO). In the PDO, the Hearing Examiner concluded that the AIU engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to select an arbitrator and submit a grievance to arbitration. On November 22, 2004, the Allegheny Intermediate Unit #3 Education Association (Union) filed a response to exceptions.

In February 2001, the AIU and the Union executed an agreement (Agreement) settling a grievance (Grievance 1) regarding pay adjustments and placement on the salary schedule of certain named AIU employes/grievants. The Agreement divided the grievants into two groups, giving no relief to one group and backpay and movement on the salary scale to the second group, which received service credit for employment prior to gap(s) in service.[1] The Agreement further provides that the Union will not file "any further claims, grievances, suits, or other causes of action for any individual relative to these issues in the future." (F.F. 4).

In September 2002, the Union filed a grievance (Grievance 2) on behalf of seven former, long-term substitute employes of the AIU who are employed at various school districts within the area of the AIU and who were not grievants in Grievance 1. In Grievance 2, the Union complained that the grievants "were given improper service credit with their new employers, based on the reported records of the [AIU]," (Joint Exhibit 5), and requested that the AIU report their adjusted service credit to the current employers for proper placement on that employer's salary scale. The AIU denied Grievance 2 asserting that it was barred by the Agreement. On December 19, 2002, the Union advised the AIU that it was moving the grievance to arbitration. The AIU then filed a complaint in equity in the Court of Common Pleas of Allegheny County (Allegheny Court) to enforce the Agreement and enjoin the Union from filing grievances involving service credit or salary adjustments. In March 2003, the Union filed preliminary objections to the AIU's complaint. On April 16, 2003, the Union filed a charge of unfair practices with the Board. On June 4, 2003, the Allegheny Court denied the preliminary objections. The

[1] Grievance 1 and Exhibits B and C, which were lists of employes attached to the Agreement, are not in the record.

AIU then filed a motion for judgment on the pleadings, which was denied on December 15, 2003, and the equity suit remains pending.

In its exceptions, the AIU contends that the Examiner erred in concluding that the Union's charge is not barred by collateral estoppel because the Allegheny Court previously disposed of the Union's claim by dismissing the Union's preliminary objections to the AIU's equity suit. The Board, however, affirms the Examiner's conclusion and herein adopts his analysis. As the Examiner concluded, the AIU's case in equity remains pending on the merits and the dismissal of preliminary objections does not constitute a final adjudication of the issues, Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867 (1957), as required for collateral estoppel. City of Pittsburgh v. Zoning Hearing Board of Adjustment, 522 Pa. 44, 55, 559 A.2d 896, 901 (1989). Therefore, the Union is not collaterally estopped from litigating the unfair practice charge before the Board.

In its remaining exceptions, the AIU argues that the Union waived its right to file additional grievances in the Agreement. The AIU claims that the Examiner erred in concluding that the Agreement does not satisfy the Board's standard for intentional, clear, express, unequivocal waiver of arbitration, pursuant to Penn Hills Municipal Employees Ass'n v. Penn Hills Municipality, 34 PPER 135 (Final Order, 2003), rev'd, 35 PPER 64 (Court of Common Pleas of Allegheny County, 2004), appeal pending, (1220 C.D. 2004, Pa. Cmwlth.), for the issues presented in Grievance 2. The AIU maintains that the Agreement expressly forecloses arbitration of service credit issues because the Union agreed therein that it will not file "any further claims, grievances, suits, or other causes of action for any individual relative to these issues in the future." (F.F. 4). Contrary to the Examiner's conclusion, argues the AIU, the issues resolved by the Agreement are identical to those presented by Grievance 2. The AIU also maintains that the disposition of Grievance 2 depends solely on the Agreement, not the CBA. Therefore, argues the AIU, it is not required to submit the determination of substantive and procedural arbitrability in the first instance to an arbitrator, and PLRB v. Bald Eagle Area Sch. Dist., 499 Pa. 62, 451 A.2d 671 (1982), is inapplicable.

In Penn Hills, the employer previously discharged an employe for cause and the employe grieved his dismissal under the collective bargaining agreement. In lieu of immediate discharge for willful misconduct and in settlement of the grievance, the employe and his union entered into what is commonly referred to as a last chance agreement (LCA). The terms of the LCA were unique to the grievant due to his employment history with the employer and did not even arguable apply to any other employe. Under the terms of the LCA, the employer and the union agreed that the employe would submit to substance abuse testing for five years, that the employer would have "sole discretion" to discharge grievant for stated reasons including excessive absenteeism, and the employe expressly "release[d] and waive[d]" any further recourse through the just cause provisions of the collective bargaining agreement. During the expressly provided five-year period for testing, the employer discharged the employe for

excessive absenteeism. On that record, the Board found a clear, express and unequivocal extra-contractual waiver of further recourse through the grievance procedure.

The limited holding in Penn Hills was born of the unique circumstances giving rise to the LCA, which do not exist here, distinguishing this case from Penn Hills. In the LCA in Penn Hills, the grievant waived only his own right to arbitrate a future grievance regarding his dismissal. The LCA was a separate contract delineating discrete terms and conditions of employment for one individual employe, with union approval waiving further recourse through the grievance procedure for that grievant only.

The Agreement here settled Grievance 1 on behalf of a list of similarly situated employes in the bargaining unit. The AIU contends that the Agreement foreclosed "any further claims, grievances, suits, or other causes of action for any individual relative to these issues in the future," (F.F. 4), regarding persons not on the list. However, we believe the Hearing Examiner correctly found on this record that the Agreement did not constitute an intended, clear, express, unequivocal waiver of the Code and contract rights of the individuals in Grievance 2. As noted by the Examiner, those individuals were not on the list resolving the rights of Grievance 1 persons. Also, Grievance 2 does not involve a pay issue for AIU, but rather an issue of proper service credit reported to other employers for placement on their contractual salary schedules. Therefore, questions remain as to the meaning of "these issues" under the Agreement. On this record, we cannot find a clear, express, unequivocal waiver akin to the LCA in Penn Hills.

Our Supreme Court, in Mifflinburg Area Educ. Ass'n v. Mifflinburg Area Sch. Dist., 555 Pa. 326, 724 A.2d 339 (1999), interpreted Sections 11-1121, 11-1142 and 11-1149 of the School Code[2] and held that employes with a gap in employment with the same public school employer must receive credit for all their service time for placement on the salary scale, rather than only the most recent uninterrupted employment period. The Mifflinburg Court, however, also emphasized that Section 1121 of the School Code provides that the statutory mandates of the School Code regarding crediting of prior service cannot be waived 'orally or in writing,'" Mifflinburg, 555 Pa. at 333 n.5, 724 A.2d at 343 n.5 (quoting 24 P.S. § 11-1121). If collective bargaining agreements should be interpreted so as not to violate School Code provisions regarding prior service credit then neither should grievance settlement agreements. The Court further opined that "express language in the [collective bargaining] agreement incorporating the provisions of the School Code is not necessary because such provisions are incorporated, by operation of law." Id. at 333, 724 A.2d at 343 n.5. Consequently, the language relied upon by the AIU, i.e., that the Union will not file "any further claims, grievances, suits, or other causes of action for any individual relative to these issues in the future," should not be construed as a waiver of the School Code rights of the individuals in

[2] Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§ 1-101--27-2702.

Grievance 2.[3] Also, calculating service credit for salary entitlement and scale placement pursuant to the School Code flows from the collective bargaining agreement by operation of law, and therefore jurisdiction to determine arbitrability in the first instance rests with an arbitrator. Bald Eagle, supra.

Under the AIU's view, the Agreement would bar claims by individuals with prior service who may return to the AIU's workforce in the future and who may seek to obtain service credit in compliance with the School Code. We believe such a waiver is contrary to Mifflinburg because "the language contained in Section 1142(a) protects professional school district employees from the patent unfairness of disregarding past years of service with the same school district . . . . The mandates of Section 1142 and 1149 express the legislature's intent to protect valuable years of service performed by employees who sustained breaks in service for a variety of reasons." Id. at 332, 724 A.2d at 343. These protections cannot be waived. Id. at 330-333, 724 A.2d at 342-343. Permitting such a waiver to bar all future grievances by "any individual" regarding service credit would unlawfully empower the AIU to withhold indefinitely proper service credit, and thereby cause lower pay, for broad numbers of employes without third-party review. Such a result is clearly contrary to Mifflinburg, supra, and would thwart the legislative policy and the public interest expressed through the School Code to guarantee prescribed standards and entitlements for school professionals.

In Greater Johnstown Sch. Dist. v. Greater Johnstown Educ. Ass'n, 804 A.2d 680 (Pa. Cmwlth. 2002), the Commonwealth Court held that even a bargained for provision in a collective bargaining agreement, which apparently waived the right of certain employes to challenge service credit or salary placement, was contrary to the School Code within the meaning of Mifflinburg and Penns Manor Area Sch. Dist. v. Penns Manor Educ. Ass'n, 556 Pa. 438, 729 A.2d 71 (1999). The Board accordingly concludes that, even if the Agreement contained a waiver for all future employes of their right to challenge their service credit and salary placement, which it does not, Mifflinburg and Greater Johnstown prohibit such a waiver as a matter of law. Moreover, the Board concludes that, given the Union's and the AIU's admitted familiarity with Mifflinburg and its progeny and that Grievance 1 was settled under the mandate of those two cases, the Union and the AIU did not clearly and unequivocally intend to waive the service credit rights under the School Code of any employes not specifically included in the settlement of Grievance 1 because those cases expressly forbid such a waiver. Accordingly, by acknowledging that Grievance 1 was settled under Mifflinburg, (AIU

[3] The United States Supreme Court has similarly recognized that employe wage and hour rights under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., "cannot be abridged by contract or otherwise waived." Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 101 S.Ct. 1437 (1981). Even a release signed by the employe is not a valid defense or waiver of wage entitlements under FLSA given the strong public interest to protect employe wage entitlements. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 65 S.Ct. 895, 901-902 (1945).

Brief at 2), the AIU undermines its argument that the parties intended the forbidden waiver.

Because "provisions of the School Code are incorporated [in the CBA] by operation of law," and the service credit provisions of the Code cannot be waived, the arbitrability of Grievance 2 must first be determined by an arbitrator within the meaning of Bald Eagle, supra, and Chester Upland Sch. Dist. v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995). Accordingly, the AIU possesses a bargaining obligation under PERA to submit the arbitrability of Grievance 2 to an arbitrator.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this fifteenth day of February, 2005. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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ALLEGHENY INTERMEDIATE UNIT #3	:	

AFFIDAVIT OF COMPLIANCE

The Allegheny Intermediate Unit #3 hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of PERA; that it has made a written offer to the Association to arbitrate the September 2002 grievance; that it has posted the proposed decision and order as directed therein; that it has posted the Final Order in the same manner; and that it has served a copy of this affidavit on the Association 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