COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 776	:	
	:	
v.	:	Case No. PERA-C-12-354-E
	:	
SUSQUEHANNA TOWNSHIP SCHOOL DISTRICT	:	

FINAL ORDER

Susquehanna Township School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on October 21, 2013, challenging a Proposed Decision and Order (PDO) issued on October 1, 2013. In the PDO, the Board's Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to process a grievance filed by Teamsters Local 776 (Union) concerning the discharge of Robert Reed. The Union filed a timely brief in opposition to the exceptions on October 30, 2013.

The facts of this case are summarized as follows. The Union is the exclusive representative of the District's nonprofessional employes. The parties' collective bargaining agreement (CBA), effective from July 1, 2008 to June 30, 2013, provides for a grievance and arbitration procedure at Article 13.

Robert Reed was a custodian for the District and a member of the unit represented by the Union. The District discharged Mr. Reed in the 2011-2012 school year. The Union grieved Mr. Reed's discharge and the grievance moved to arbitration. On May 14, 2012, an arbitrator reinstated Mr. Reed to work, effective June 4, 2012, without back pay, but with all seniority and benefits to which he was entitled under the CBA. The arbitrator's award also stated as follows:

> Should Reed commit any violation of Rule 23 of the work rules set forth in the collective bargaining agreement within twelve (12) months after the date of his reinstatement, he will be subject to immediate termination. If the Grievant is terminated for violating Rule 23 within this time period, he will have no recourse to or right to access the grievance arbitration procedure contained in the collective bargaining agreement.

On October 4, 2012, after Mr. Reed had been returned to work, Superintendent Dr. Susan M. Kegerise notified Mr. Reed that she was recommending to the School Board that he be removed and dismissed from employment. Dr. Kegerise cited two separate occasions on September 12, 2012 where Mr. Reed allegedly violated Rule 23. She first charged him with engaging in an "inappropriate, suggestive conversation" with other employes and "aggressively poking" an employe. She then charged him with entering an employe's small office and "unnecessarily reaching over" the employe "to reach a piece of paper that could have been reached without contacting" the employe. Dr. Kegerise informed Mr. Reed that he was suspended without pay pending School Board action.

On October 10, 2012, Mr. Reed and the Union filed a grievance alleging that the District violated Article 12 of the CBA, which provides, among other things, that "[n]o employee will be disciplined or discharged except for just cause." On October 11, 2012, Dr. Kegerise replied to the Union's grievance stating that "Mr. Reed's termination is not subject to the grievance procedure or arbitration." She referred to the May 14, 2012 arbitration award and cited Article 13, Step 6 of the CBA, which states in part, "[t]he decision of the arbitrator shall be final and binding on both parties."

Rule 23, which is part of Addendum II of the CBA, prohibits the "[u]se of abusive language, threatening, coercing or harassing other employees, students and/or supervisors." The parties stipulated that Mr. Reed would testify that he did not violate Rule 23.

The Union filed its Charge of Unfair Practices on November 16, 2012, alleging that the District violated Section 1201(a)(1) and (5) of PERA by refusing to process Mr. Reed's grievance. After a continuance, a hearing was held before the Board's Hearing Examiner on February 5, 2013, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The District and the Union filed post-hearing briefs on February 21 and March 7, 2013, respectively.

The Hearing Examiner concluded in the PDO that the District violated Section 1201(a)(1) and (5) of PERA by refusing to process the grievance filed by the Union on behalf of Mr. Reed. The Hearing Examiner further concluded that the District's claim of a sound arguable basis in the CBA to refuse to process the grievance was misplaced because the District relied on the language in the May 14, 2012 arbitration award and not upon any mutually agreed to language in the parties' CBA. Additionally, the Hearing Examiner determined that **Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills**, 876 A.2d 494 (Pa. Cmwlth. 2005), **appeal denied**, 586 Pa. 731, 890 A.2d 1062 (2005), where the Board found no duty to process a grievance, was inapplicable because the present case did not involve a last chance agreement entered into by the parties and the employe, outside of the CBA, expressly waiving arbitration. By way of remedy, the Hearing Examiner ordered the District to, among other things, process Mr. Reed's grievance.

In its exceptions, the District initially alleges that the Hearing Examiner failed to make various findings of fact. The Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached, but need not make findings summarizing all of the evidence presented. **Page's Department Store v. Velardi**, 464 Pa. 276, 346 A.2d 556 (1975). The Board finds that the Hearing Examiner made the findings that are necessary to support the proposed decision, and that the District's suggested findings of fact are not necessary or relevant. Therefore, the Hearing Examiner did not err in failing to make the District's proffered findings of fact.

The District further alleges that the Union's Charge is an impermissible collateral attack on the May 14, 2012 arbitration award and that the Board has no authority to consider a challenge to an unappealed award. However, the Board, in this unfair practice case, is not reviewing the merits of the May 14, 2012 arbitration award. Rather, under Section 1301 of PERA, the Board has exclusive jurisdiction "to prevent any person from engaging in any unfair practice listed in [Section 1201] of [PERA]." 43 P.S. § 1101.1301. Because the Union filed a Charge of Unfair Practices alleging that the District violated Section 1201(a)(1) and (5) of PERA, the Board has jurisdiction to make a determination on the allegations set forth in the Union's Charge.

Pursuant to Section 903 of PERA, arbitration of grievances arising out of interpretation of provisions of a collective bargaining agreement is mandatory. 43 P.S. § 1101.903. Thus, it is well-settled that all disputes concerning arbitrability of a grievance under a collective bargaining agreement must first be presented to an arbitrator for determination. **PLRB v. Bald Eagle Area School District**, 499 Pa. 62, 451 A.2d 671 (1982); **Chester Upland School District v. McLaughlin**, 655 A.2d 621 (Pa. Cmwlth. 1995), **aff'd per curiam**, 544 Pa. 199, 675 A.2d 1211 (1996). Accordingly, as a general proposition, where an employer refuses to process a grievance to arbitration, it commits an unfair practice, and neither the Board nor the courts on appeal from a Board order finding a refusal to arbitrate may decide the merits of the parties' dispute over arbitrability. **Id.** As the Supreme Court stated in reaffirming the holding in **Bald Eagle in Township of Sugarloaf v. Bowling**, 563 Pa. 237, 759 A.2d 913 (2000):

> In **Bald Eagle Area School District** … we held that it was the arbitrator who was to first determine the arbitrability of a dispute arising under PERA. We declared that it was "folly [to allow] a full preliminary bout in the courts over the issue of an arbitrator's jurisdiction…." 451 A.2d at 673. We stated that to permit such preliminary wrangling in the courts over the issue of whether a matter was arbitrable would permit these labor disputes to become mired down in litigation; the **Bald Eagle** court declared

> that such a scenario was to be avoided in light of the fact that the legislature demanded that these disputes be settled via arbitration rather than litigation.

759 A.2d at 915-916.

The record shows that the Union filed a grievance on behalf of Mr. Reed challenging his discharge for an alleged violation of Rule 23 of the parties' CBA and that the District refused to process the grievance on the ground that the May 14, 2012 arbitration award precluded contesting Mr. Reed's discharge through the contractual grievance arbitration procedure. However, under the well-settled case law, whether Mr. Reed's grievance is arbitrable is for an arbitrator to determine in the first instance, and the refusal to process the grievance is an unfair practice. **Bald Eagle Area School District, supra; Chester Upland School District, supra; Township of Sugarloaf, supra.** The District's argument that the previous arbitration award precludes the filing of Mr. Reed's grievance can be advanced before the arbitrator.

Further, the Union states in its response to the exceptions that it is not challenging the validity of the May 14, 2012 arbitration award, but is merely contesting the District's allegation that Mr. Reed violated Rule 23. Indeed, the Union conceded at the hearing in this matter that the May 14, 2012 arbitration award would preclude Mr. Reed from challenging his discharge if an arbitrator finds that he violated Rule 23. Therefore, the District's allegation of a collateral attack on the arbitration award is meritless.

The District additionally alleges that the Hearing Examiner erred in concluding that it failed to establish a sound arguable basis in the parties' CBA to support its refusal to process Mr. Reed's grievance. The District asserts that its contractual privilege defense was based upon Article 13, Step 6 of the CBA and that it did not solely rely on the May 14, 2012 arbitration award.

A refusal to bargain charge alleging a unilateral change by the employer will be dismissed if the employer establishes that it had a sound arguable basis in the collective bargaining agreement for the right to act unilaterally regarding a mandatory subject of bargaining. **Wilkes-Barre Township v. PLRB,** 878 A.2d 977 (Pa. Cmwlth. 2005); **Pennsylvania State Troopers Association v. PLRB,** 761 A.2d 645 (Pa. Cmwlth. 2000). As the Commonwealth Court stated in **Wilkes-Barre Township,** 878 A.2d at 983 (quoting **Pennsylvania State Troopers Association,** 761 A.2d at 651):

> The defense "calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement … for the claim that the employer's action was permissible under the agreement." *Id. See also Jersey Shore Area Education Association v. Jersey Shore Area School District*, 18 PA. PUB. EMP. R. P18117 (Final Order 1987)(quoting *NCR Corporation*, 271 N.L.R.B. P1212)("Where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the NLRB will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.").

The sound arguable basis defense is inapplicable here because the District did not take unilateral action concerning a mandatory subject of bargaining, but rather refused to process a grievance. Also, review of the record and the District's post-hearing brief submitted to the Hearing Examiner shows that the District only relied on the May 14, 2012 arbitration award to support its refusal to process Mr. Reed's grievance and did not cite to any provisions in the parties' CBA. Because the District's argument was not based upon a provision in the parties' CBA, the Hearing Examiner properly concluded that the District did not have a sound arguable basis to refuse to process Mr. Reed's grievance. Therefore, the District's assertion in its exceptions that Article 13, Step 6 of the parties' CBA supports its sound arguable basis defense has been waived because the

District did not cite to this provision before the Hearing Examiner. **AFSCME v. PLRB,** 514 A.2d 255 (Pa. Cmwlth. 1986)(issue not raised before Hearing Examiner is waived); **Bucks County Schools, Intermediate Unit No. 22 v. PLRB,** 466 A.2d 262 (Pa. Cmwlth. 1983).

Even if the District did not waive this issue, it has failed to demonstrate that it had a sound arguable basis in the parties' CBA to refuse to process Mr. Reed's grievance. Article 13, Step 6 is the last step in the grievance and arbitration procedure in the parties' CBA, and provides that if the District or Union is not satisfied with the determination made in the prior step of the grievance procedure, "either party may … refer the matter to arbitration." Thus, rather than support the District's claim of a sound arguable basis to refuse to process the grievance, the contract indicates that the District has a duty to proceed to arbitration upon request by the Union. The District's misplaced reliance on a sound arguable basis defense also ignores the underlying rationale of such a defense, i.e. that the dispute involves contract interpretation and thus should be presented to an arbitrator rather than the Board.

The District asserts that the Hearing Examiner erred in applying **Penn Hills** to this matter and overturning the May 14, 2012 arbitration award based upon the holding in that case. However, the Hearing Examiner did not overturn the May 14, 2012 arbitration award, but merely held that the District could not rely on that award to support its refusal to process Mr. Reed's grievance challenging the allegation that he violated Rule 23. Moreover, the Hearing Examiner did not err in discussing **Penn Hills** because that case involved an employe's waiver of the right to grieve his discharge and the District asserts that Mr. Reed's right to grieve his discharge for violating Rule 23 was waived.

In **Penn Hills,** the Board set forth a limited exception to the general rule that disputes concerning the arbitrability of a grievance must be submitted to an arbitrator. In that case, the Board did not decide whether a grievance was arbitrable under a collective bargaining agreement; rather, the Board determined that an employe and the exclusive bargaining representative clearly, expressly and unmistakably waived any right to challenge the employe's discharge in a last chance agreement settling prior disciplinary action against the employe, which only covered the particular employe and not the entire bargaining unit. **See Pennsylvania State System of Higher Education v. Association of Pennsylvania State College and University Faculties,** 39 PPER 101 (Final Order, 2008)(**Penn Hills** only applies to cases involving claims of waiver in an individual employe's last chance agreement); **Allegheny Intermediate Unit #3 Education Association v. Allegheny Intermediate Unit #3,** 36 PPER 17 (Final Order, 2005)(same); **Avonworth Education Association, PSEA/NEA v. Avonworth School District,** 35 PPER 44 (Final Order, 2004)(same).

Notably, a provision in the last chance agreement in **Penn Hills** provided that the employer had the sole discretion to determine whether the employe violated the absenteeism rule at issue. In contrast, here the arbitration award provides that a Rule 23 violation is grounds for discharge, but does not provide that the District may unilaterally determine whether such violation has occurred, and the Union and the employe assert that no such violation has occurred. Moreover, this case does not involve a claim of waiver in an individual employe's last chance agreement that was agreed to by the employer, the employe representative and the employe. Indeed, the District concedes this fact and agrees that **Penn Hills** is inapplicable to the present case. The District's argument that Mr. Reed or the Union clearly, expressly or unmistakably waived his right to grieve whether he violated Rule 23 is simply unsupported by the record. Accordingly, the District must proceed to arbitration on the Union's grievance and committed an unfair practice by refusing to do so. Thus, the Hearing Examiner properly concluded that the District violated Section 1201(a)(1) and (5) of PERA.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 by Susquehanna Township School District are hereby dismissed, and the October 1, 2013 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this eighteenth day of March, 2014. 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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AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (5) of PERA, that it has processed Robert Reed's October 10, 2012 grievance under Article 13 of the collective bargaining agreement, that it has posted a copy of the Proposed Decision and Order and Final Order as directed and that it has served a copy of this affidavit on the Union.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public