

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :
: :
: Case No. PERA-D-16-106-E
: (PERA-R-777-C)
: :
COMMONWEALTH OF PENNSYLVANIA :

FINAL ORDER

On July 18, 2017, Keith Grube (Petitioner) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Order of Dismissal (POD) issued by the Board's Hearing Examiner on June 29, 2017. In the POD, the Hearing Examiner concluded that the Secretary of the Board properly relied on the employee list submitted by the Commonwealth of Pennsylvania (Commonwealth) in determining that Petitioner's decertification petition was not supported by a thirty percent showing of interest among the employees in the bargaining unit, as mandated by Section 607 of the Public Employee Relations Act.¹ Accordingly, the Hearing Examiner upheld the Secretary's dismissal of the Petition for Decertification. The Commonwealth filed a brief in response to the Petitioner's exceptions on August 4, 2017. The American Federation of State, County and Municipal Employees, Council 13 (AFSCME) filed a response to the exceptions and a supporting brief on August 10, 2017.

The Petition for Decertification was filed on April 28, 2016, alleging that thirty percent or more of the Commonwealth employees in the unit certified at Case No. PERA-R-777-C no longer wish to be represented by AFSCME² and requesting that the Board schedule a hearing and order an election. The Petition was accompanied by a showing of interest consisting of written authorization cards to support the contention that at least thirty percent of the unit members wished to decertify AFSCME as their bargaining representative.

The Board issued an acknowledgement of the filing of the Petition and directed the Commonwealth to provide a list of the employees in the unit who were on the payroll immediately prior to the filing of the Petition. The Commonwealth submitted a list on May 12, 2016, which contained the names of 1524 employees. Accordingly, to establish a showing of interest of at least thirty percent or more of the unit, as required by Section 607 of PERA, Petitioner was required to submit at least 458 valid authorization cards.

¹ Section 607 of PERA provides in relevant part that "[i]f there is a duly certified representative . . . (i) a public employe or a group of public employes may file a petition for decertification provided it is supported by a thirty percent showing of interest...." 43 P.S. § 1101.607.

² On January 4, 1972, the Board certified AFSCME as the exclusive representative of a bargaining unit of the Commonwealth's professional inspection, investigation and safety services employes (Case No. PERA-R-777-C).

Section 95.1 of the Board's Rules and Regulations provides that a showing of interest "shall consist of written authorization cards or petitions, signed by employes and dated" 34 Pa. Code § 95.1. Bradford Area School District, 11 PPER ¶ 11228 (Final Order, 1980); Chartiers-Houston School District, 10 PPER ¶ 10258 (Nisi Order of Dismissal, 1979). Further, the showing of interest must contain original signatures, and not copies. Bucks County, 27 PPER ¶ 27027 (Final Order, 1995); Neshannock School District, 17 PPER ¶ 17153 (Final Order, 1986).

After comparing the employe list to the authorization cards submitted by the Petitioner, it was determined that Petitioner did not submit a sufficient number of valid authorization cards completed by employes in the unit with an original signature and date, 34 Pa. Code § 95.1, to demonstrate the minimum thirty percent showing of interest. Therefore, on May 16, 2016, the Secretary dismissed the Petition as unsupported by the requisite showing of interest.

On June 3, 2016, Petitioner filed exceptions with the Board alleging that the Commonwealth had submitted an inaccurate list of employes for use in reviewing the showing of interest. Enclosed with Petitioner's exceptions was a list of 1305 names whom Petitioner contended were the members of the certified unit.

By order issued on August 16, 2016, the Board remanded the matter to the Secretary with direction to order a hearing, limited to the accuracy of the Commonwealth's list of employes. The Board noted in its remand order that while the accuracy of the employe list may be challenged in a hearing,³ the adequacy of the showing of interest, i.e. whether there are enough valid authorization cards to demonstrate a showing of interest of at least thirty percent, is an administrative matter that is not subject to collateral attack in a hearing. Section 95.17 of the Board's Regulations states that:

"The showing of interest submitted will not be furnished to any of the parties. The Board or its agents will determine the adequacy of the showing of interest and such decision will not be subject to collateral attack in a hearing."

34 Pa. Code § 95.17. Plains Township Sewer Authority, 8 PPER 318 (Final Order, 1977), aff'd, 9 PPER ¶ 9153 (Court of Common Pleas of Luzerne County, 1978); Pennsbury School District, 15 PPER ¶ 15202 (Order and Notice of Election, 1984); County of Berks, 4 PPER 8 (Order and Notice of Election, 1974). Enclosed with the Board's remand order served on all parties in interest, including Petitioner and his attorney of record, was a copy of the employe list submitted by the Commonwealth.

A hearing was scheduled for September 23, 2016, but was continued at the request of the parties. A hearing was subsequently held on February 23, 2017, at which time all parties in interest were afforded a full opportunity

³ Pennsylvania Department of Corrections, 20 PPER ¶ 20148 (Order Directing Remand to Hearing Examiner for Further Proceedings, 1989); Temple University, 20 PPER ¶ 20136 (Order Directing Remand to Hearing Examiner for Further Proceedings, 1989); Bucks County, 17 PPER ¶ 17081 (Order Directing Remand to Secretary for Further Proceedings, 1986).

to present testimony, cross-examine witnesses, and introduce documentary evidence. The parties filed post-hearing briefs in May and June 2017.

On June 29, 2017, the Hearing Examiner issued the POD, in which he found that Petitioner failed to establish any inaccuracy in the employe list provided by the Commonwealth. Further, based on testimony and documentary evidence offered by the Commonwealth, which the Hearing Examiner found credible, the Examiner determined that the Commonwealth's list accurately represented the employes in the unit who were on the payroll immediately prior to filing of the decertification petition. The Hearing Examiner also indicated in the POD that he had reviewed the authorization cards submitted by Petitioner in camera and concurred with the Secretary's determination that Petitioner failed to establish the requisite thirty percent showing of interest because a substantial number of the cards were duplicative of another card completed by the same employe, were completed by persons whose names were not on the employe list, or lacked an original signature and/or date. Consequently, the Hearing Examiner dismissed the Petition for Decertification.

Petitioner claims for the first time in his exceptions to the POD that he has never seen the employe list submitted by the Commonwealth. However, the Board mailed a copy of the list to Petitioner and his legal counsel along with a copy of the remand order. If Petitioner did not have a copy of the list in his possession at the time of the hearing in this matter, he certainly failed to exercise due diligence by not requesting that the Board provide him with an additional copy, especially where the remand was limited to the accuracy of that list. Moreover, Petitioner waived this issue by not raising it before the Hearing Examiner, either at the hearing or in his post-hearing brief. Independent State Store Union v. PLRB, 18 A.3d 367 (Pa. Cmwlth. 2011), appeal denied, 610 Pa. 628, 22 A. 3d 1035 (2011); AFSCME Council 13 v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986); 34 Pa. Code § 95.98(a)(2).

Petitioner also excepts to the Board's use of the employe payroll list provided by the Commonwealth, and contends that he reasonably relied on a list obtained through a Right to Know Law (RTKL) request, which contains only 1305 names. However, the Commonwealth's response to the RTKL request indicated that the RTKL list did not include all of the employes in the unit because some employes were covered by exemptions from disclosure under the RTKL. (N.T. 29-39; AFSCME Exhibits 4-5, 8-9). Further, as already noted, the Hearing Examiner found, based on substantial, credible evidence of record, that the Commonwealth's payroll list was accurate. Given the statutory mandate that a decertification petition be supported by at least a thirty percent showing of interest, 43 P.S. § 1101.607(i), the Board is clearly precluded from relying on an incomplete list of the employes in the unit as urged by Petitioner.

Petitioner also asserts that the Commonwealth's list includes the names of individuals who are only in the unit for payroll purposes and have no voting rights for purposes of decertification. Petitioner does not clearly articulate his argument in this regard, but asserted in his brief filed with the Hearing Examiner that only union members have the right to vote in a decertification election, that some unspecified number of employes on the Commonwealth's list are not members of AFSCME, and that such employes are neither eligible to vote in a decertification election, nor properly included on an employe list to check the adequacy of the showing of interest.

Union membership or lack thereof does not affect eligibility to vote in a Board-conducted election. Rather, eligibility to vote is based on inclusion in the unit, which is the reason that the Board directed the Commonwealth to submit a payroll list of "all employees in the unit" for use in reviewing the adequacy of the showing of interest. All employees in the unit who are hired and working as of the payroll period immediately preceding a Board-conducted election are eligible to vote. Catchment Area 094 Corporation, 9 PPER ¶ 9143 (Order Directing Canvassing of Challenged Ballots, 1978); Bucks County I.U. No. 22 v. PLRB, 466 A.2d 262 (Pa. Cmwlth. 1983); 34 Pa. Code § 95.54. Thus, whether the employees on the Commonwealth's payroll list of unit members are also members of AFSCME is immaterial.

Petitioner takes exception to the fact that any authorization cards are invalid, and if any cards are indeed invalid, the number is not substantial enough to affect the thirty percent showing of interest threshold. Petitioner further argues that while the Board has indicated that certain authorization cards are invalid, it has not indicated which cards, or even how many cards, are in fact invalid.

Petitioner is clearly attempting to collaterally attack the Board's determination that the showing of interest is inadequate, contrary to the Board's regulations and caselaw cited above. As discussed in Board decisions such as Pennsbury School District, *supra*, the Board's policy of not permitting a hearing over the validity of particular authorization cards prevents disclosure of the preferences of individual employees for or against union representation. In this manner, the Board's policy protects employees from reprisals by their employer or an incumbent union merely for exercising their statutory right under PERA to freely choose whether to support, or not support, an employee bargaining representative.

Further, Petitioner should be well aware of why his showing of interest is insufficient, as he gathered the authorization cards and filed them with the Board. Given the number of employees on the Commonwealth's payroll list (1524), the Petitioner was required to submit at least 458 valid authorization cards completed by employees in the unit with an original signature and date, 34 Pa. Code § 95.1, to establish a showing of interest of thirty percent or more. 43 P.S. § 1101.607(i). However, Petitioner alleges that only 457 cards were filed, and thus by his own admission fell short of the minimum 458 cards required. Moreover, as the Hearing Examiner discussed in the POD, Petitioner fell substantially short of the required showing due to his submission of (1) duplicate cards for some employees, (2) cards for persons not on the list, and (3) cards lacking an original signature and/or date. Because Petitioner failed to comply with PERA's express requirement for a thirty percent showing of interest among the employees in the bargaining unit, the Hearing Examiner properly dismissed the Petition for Decertification.

Accordingly, after a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and affirm the Proposed Order of Dismissal.

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 by Petitioner Keith Grube to the June 29, 2017 Proposed Order of Dismissal are dismissed, and the Proposed Order of Dismissal is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this nineteenth day of December, 2017. 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.