

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WARRIOR RUN EDUCATION ASSOCIATION :
: :
: :
: CASE NO. PERA-C-16-42-E
v. :
: :
: :
WARRIOR RUN SCHOOL DISTRICT :

FINAL ORDER

The Warrior Run School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on November 2, 2016, from a Proposed Decision and Order issued on October 13, 2016, in which the Hearing Examiner found that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by dealing directly with Brian Linaburg for a pay increase while he was represented by the Warrior Run Education Association (Association). The Association filed a response to exceptions and a brief on November 15, 2016.

A hearing was held on June 15, 2016, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and summarized as follows.

The collective bargaining agreement (CBA) between the District and the Association provides that "[t]he District reserves the right to establish the entry step of any new employee. This District, in its sole discretion, may or may not give credit for prior teaching experience attained outside the District." Thus, pursuant to the CBA, when a new professional employee is hired their starting salary is determined by Superintendent Dr. John Kurelja, who decides the step on which that new bargaining unit member starts under the salary schedule in the CBA based on the new employee's past experience. (FF 4).

The "school psychologist" position is within the bargaining unit represented by the Association and is on the same salary schedule as all professional employees. (FF 5). Brian Linaburg (Linaburg) was hired by the District as a school psychologist on January 20, 2015, on Step 1 with a Master's +30, at an annual salary of \$40,808.00. Linaburg started at Step 1 because he did not have previous experience. (FF 7).

At some point in 2015, Dr. Kurelja told Linaburg that the only way the District could pay him more money was for Linaburg to resign and be rehired by the District. (FF 8). The Association was not aware of Dr. Kurelja's discussions with Linaburg. (FF 10). On or about October 19, 2015, Linaburg tendered his resignation as a school psychologist, effective in 60 days.

The School Board approved Linaburg's tender of resignation on October 26, 2015. (FF 9). The District advertised to hire a school psychologist in the local paper, and on the District's website, for approximately one week. (FF 11). Within that week, the District did not receive any applications for the position other than Linaburg's, who applied for the position from which he had tendered his resignation. (FF 12).

At some point within the two weeks after Linaburg tendered his resignation, but while he was still employed by the District, Linaburg and Dr. Kurelja negotiated Linaburg's new salary placement at Step 8 under the CBA, which was negotiated by Dr. Kurelja and Linaburg outside of the presence and knowledge of the Association. (FF 14). In early November 2016, over a month prior to Linaburg's resignation becoming effective (December 23, 2015), Dr. Kurelja decided to "re-employ" Linaburg. (FF 12). On November 16, 2015, the School Board approved Dr. Kurelja's recommendation to employ Linaburg at a new salary placement at Step 8, with a Masters +36 credits. (FF 13). By being placed at Step 8 with an additional six educational credits from when he was first hired less than a year earlier, Linaburg's increase in annual salary from when he was first hired on

January 20, 2015, to when the School Board approved a new salary on November 16, 2015, was \$5,136.00. (FF 15).¹

Based on the evidence of record, the Hearing Examiner found that the District committed a bargaining violation when it engaged in direct dealing with Linaburg for a salary increase. The Hearing Examiner therefore concluded that the District violated Section 1201(a)(1) and (5) of PERA.

The majority of the District's arguments on exceptions challenge the Hearing Examiner's credibility determinations and the Findings of Fact that are based on those determinations. Specifically, the District contends that the Hearing Examiner erred in finding that Dr. Kurelja devised a plan with Linaburg to increase his salary through a resignation and rehiring. The District contends that there was no plan, nor any guarantee, that Linaburg would be rehired, and thus there was no direct dealing as found by the Hearing Examiner.

Initially, we note that the Hearing Examiner makes relevant findings of fact and conclusions based on credibility determinations. **Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Rockview SCI**, 47 PPER 43 (Final Order, 2015). In that respect, it is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and to weigh the probative value of the evidence presented. **Mt. Lebanon Education Association v. Mt. Lebanon School District**, 35 PPER 98 (Final Order, 2004). The Board will not disturb the Hearing Examiner's credibility determinations absent the most compelling of circumstances. *E.g. Id.*

There are no compelling reasons warranting reversal of the Hearing Examiner's credibility determinations and resultant factual findings. Indeed, as found by the Hearing Examiner, Linaburg's situation was not the first time Dr. Kurelja devised such a scheme to increase an employee's wages. In the beginning of 2014, Dr. Kurelja approached Association President Michael Freeborn to discuss Shaina Vasbinder, a school psychologist, stating "[t]his girl has been working very hard for the District. We want to do something. We want to see if she would resign and then we would hire her at a higher wage." (N.T. 12). The Hearing Examiner also found that in 2015, Dr. Kurelja made a similar statement to Linaburg that the only way Dr. Kurelja could pay Linaburg more money was for him to resign and be rehired by the District. Indeed, Dr. Kurelja testified as follows:

Q. So you testified that there was no discussion with Mr. Linaburg regarding this, that he would resign and then be rehired?

A. No. We talked to Mr. Linaburg about what the options were that were available to us in terms of there was no way for us to pull him out of the agreement because that would be a violation.

Q. Sure.

A. We talked about the idea that the only way that we have any latitude is the starting salary for someone. That was certainly discussed. And the only option that I had available would be if someone is hired into the District. And the only way for him to be hired again would be to resign.

Q. So you had a discussion with him prior to him resigning about this?

¹ The CBA states that "[p]rofessional . . . employees employed by the District ninety (90) or more consecutive school days in the school year in which they work with the District will be entitled to a full increment for the succeeding year." A full increment means one step along the salary scale, and thus, bargaining unit members move one step along the salary scale every year. Therefore, under the CBA, it is not possible for a bargaining unit member to progress seven steps in one year. (FF 14).

A. We definitely discussed the options that were available to try and correct what I thought was an inequity in the way he was being compensated.

(N.T. 51). Thus, the Hearing Examiner's finding that Dr. Kurelja devised a plan with Linaburg to increase his salary through a resignation and rehiring is supported by the Hearing Examiner's credibility determinations and by substantial record evidence including Dr. Kurelja's own testimony.

The District also argues in its brief in support of the exceptions that the Hearing Examiner erred in relying on **Highland Sewer and Water Authority**, 4 PPER 116 (Final Order, 1974) because, according to the District, the employe in that case had not resigned before receiving a pay increase. However, the Board expressly found in that case "[t]hat on March 27, 1973 [Josephine] Patrick wrote a letter of resignation to the Respondent wherein she ... asked that her resignation be effective on April 13, 1973." **Highland Sewer and Water Authority**, 4 PPER at 117 (Finding of Fact 19). The Board stated as follows:

The final charge has to do with the granting of a unilateral wage increase to Patrick. The testimony is quite clear that the employer ... without consulting [the union], granted a \$.50 an hour increase to Patrick. This unilateral action on their part is a violation of the Respondent's obligation to bargain in good faith with the representative of its employes. The facts disclose that the increase granted to Patrick was not done with any thought in mind of discrediting the union or attempting to undercut the union's authority with employes, but was done for the purpose of retaining the employment of Patrick who was considered by the Respondent to be a valuable and indispensable employe.

Id. As the employer's good reasons for wanting to increase Patrick's wages were no defense for its failure to bargain with the union, the Board concluded that the employer violated Section 1201(a) (5) of PERA by making a unilateral wage increase to one employe without discussing the issue of the wage increase with the union. **Id.** at 118.

While **Highland** is nearly on all fours with this case, there are slight differences. However, those differences further support the finding of an unfair practice in this case. For example, in **Highland**, the employer at least waited until May 14, 1973, after Ms. Patrick's resignation was effective, to unilaterally award her a pay increase. Here, as noted by the Hearing Examiner, and which is fatal to the District's defense of direct dealing, is that Dr. Kurelja negotiated with Linaburg concerning his salary while Linaburg was still employed and a member of the bargaining unit. Indeed, Linaburg was "rehired" by the District at the new salary before his resignation even took effect. Linaburg submitted his letter of resignation on October 19, 2015, to be effective on December 23, 2015. Sometime before November 16, 2015, while Linaburg was still employed by the District, Dr. Kurelja and Linaburg negotiated his salary placement and academic credits for his "rehire", and on November 16, the District approved Linaburg's "rehire" at the salary and academic credits negotiated between Dr. Kurelja and Linaburg. All the negotiations between Dr. Kurelja and Linaburg concerning his wages occurred while Linaburg remained an employe of the District and a member of the professional bargaining unit represented by the Association. Thus, the District's negotiations with Linaburg over his wages while he was employed by the District constitutes unlawful direct dealing in violation of PERA. See **Highland**, *supra*. As succinctly stated by the Hearing Examiner:

The record in this matter is clear that Dr. Kurelja devised a plan to pay a bargaining unit member more than the CBA would normally allow. The plan apes the formality of a resignation and separation from the District in order to invoke the Superintendent's authority under the CBA to set salaries for "new" employees. However, it is clear from this record that Linaburg was in no way a "new" employe. Linaburg never stopped working for the District. Indeed, his new salary was approved by the School Board more than a month before his resignation would have been effective. While Linaburg was still a bargaining unit member, he and Dr. Kurelja directly negotiated Linaburg's new salary outside of the knowledge and participation of the Association. This is a refusal to bargain and a bald

violation of PERA which requires that public employers exclusively bargain wages with the bargaining representative for all employees. While the District has concerns about the salary of school psychologists for the purposes of retention, these concerns are properly discussed with the exclusive collective bargaining representative.

(PDO at 4).

During the hearing, in its briefs to the Hearing Examiner, and on exceptions to the Board, the District emphasizes its claim that there was no other way to provide Linaburg with a pay increase. However, the District admits on the record (N.T. 55-56) that it never even sought to ask the Association about adjusting Linaburg's salary.² As correctly pointed out by the Hearing Examiner, the District's obligation regarding modification of an employee's wages is to raise that issue with the Association, and not to devise a scheme directly with the individual employee to circumvent its statutory duty of collective bargaining.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner's finding that the District devised a plan with Linaburg to increase his salary and negotiated directly with Linaburg regarding his wages, step and credit placement, is supported by substantial evidence of record. On the facts of record, the Hearing Examiner, therefore did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA by not bargaining wages through the Association, and engaging in direct dealing with Linaburg. Accordingly, the exceptions filed by the District shall be dismissed, and the PDO made absolute and final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Warrior Run School District are hereby dismissed, and the October 13, 2016 Proposed Decision and Order, be and hereby is 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, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this twenty-first day of March, 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.

² The fact the Association said nothing in response to Dr. Kurelja's discussion regarding Ms. Vasbinder, is not a waiver of the District's obligation to refrain from direct dealing, nor is it a waiver of the Association's right to bargain over employe wages. **Crawford County v. Pennsylvania Labor Relations Board**, 659 A.2d 1078 (Pa. Cmwlth. 1995).

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AFFIDAVIT OF COMPLIANCE

The Warrior Run School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a) (1) and (5) of the Public Employe Relations Act; that it complied with the Final Order and Proposed Decision and Order as directed; that it rescinded its October 26, 2015, approval of Linaburg's tender of resignation, its November 16, 2015, approval to hire Linaburg, and restored the *status quo ante* by returning Linaburg, on a prospective basis only, to the salary he would be entitled to but for the District's unfair practices; that it has posted a copy of the Final Order and Proposed Decision and Order as directed; and that it has served an executed copy of this affidavit on the Warrior Run Education 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