

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF :  
:  
: Case No. PERA-R-17-302-E  
: (PERA-R-03-246-E)  
:  
PENNSYLVANIA STATE SYSTEM OF :  
HIGHER EDUCATION :

**FINAL ORDER**

The International Union of Security, Police and Fire Professionals of America (Incumbent Union) filed exceptions with the Pennsylvania Labor Relations Board (Board) on September 28, 2018, from a Nisi Order of Certification issued on September 13, 2018, certifying the PASSHE Officers Association (Petitioner) as the exclusive representative of a bargaining unit of full-time and regular part-time security guards employed by the Pennsylvania State System of Higher Education (PASSHE) under the Public Employee Relations Act (PERA). The Petitioner filed a response to the exceptions on October 11, 2018. For purposes of the exceptions, the factual and procedural history of the case is as follows.

On October 3, 2003, in Case No. PERA-R-03-246-E, the Board certified the Incumbent Union as the exclusive bargaining representative for a unit of certain PASSHE employees, which was amended in Case No. PERA-U-07-487-E to include "[a]ll full-time and regular part-time security guards, including but not limited to Patrol Officer and Police Specialist; and excluding management level employees, supervisors, first level supervisors, confidential employees and prison guards as defined in the Act." PASSHE and the Incumbent Union were parties to a collective bargaining agreement (CBA), which was effective from September 1, 2014 through August 31, 2017. Prior to the August 31, 2017 expiration of the CBA, PASSHE and the Incumbent Union began negotiating for a successor agreement. PASSHE and the Incumbent Union reached a tentative agreement for a successor CBA on October 19, 2017.

On October 23, 2017, after PASSHE and the Incumbent Union had a tentative agreement, the Petitioner filed a Petition for Representation with the Board. In the Petition for Representation, the Petitioner alleged that thirty percent or more of the employees in the bargaining unit desire to be represented by the Petitioner, and that the Incumbent Union's agreement with PASSHE covering those employees expired on August 31, 2017. Neither the petition nor the record show that PASSHE's Board of Governors entered into or ratified the October 19, 2017 tentative agreement at any time prior to the October 23, 2017 filing of the Petition for Representation.

After the petition was filed, the Incumbent Union ratified the successor CBA on October 24, 2017. On the same day, October 24, 2017, the Board acknowledged the filing of the petition and directed PASSHE to furnish the Board with a list of the employees in the unit on the payroll immediately prior to the filing of the petition. On October 27,

2017, the Board received an employee list from PASSHE, and based on that list, it was determined that the Petitioner had failed to submit a thirty percent showing of interest as required by Section 607 of PERA. Therefore, on October 31, 2017, the Secretary declined to direct a hearing and dismissed the Petition for Representation.

On November 6, 2017, the Petitioner filed timely exceptions with the Board challenging the Secretary's dismissal of the Petition for Representation, and alleging that the employee list submitted by PASSHE included individuals who are not employed in the job classifications that are included in the bargaining unit.

On November 13, 2017, PASSHE and the Incumbent Union executed the successor agreement, which purportedly has a term of September 1, 2017 through August 31, 2020.

On December 19, 2017, the Board remanded the matter to the Secretary with direction to order a hearing on the petition, limited solely to the accuracy of PASSHE's list of employees. The Secretary issued an Order and Notice of Hearing scheduling a hearing on January 17, 2018. In lieu of a hearing, the parties submitted stipulations. On February 9, 2018, the Hearing Examiner issued an order, finding that the Petitioner had demonstrated a requisite showing of interest based on the parties' stipulation to a corrected list of employees in the unit, and transferred the matter back to the Secretary for further proceedings consistent therewith.

On February 15, 2018, the Secretary issued an Order and Notice of Hearing pursuant to Section 603 of PERA. The hearing was held as scheduled on May 2, 2018, during which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. Following submission of post hearing briefs by Petitioner and the Incumbent Union,<sup>1</sup> the Hearing Examiner issued an Order Directing Submission of Eligibility List on July 19, 2018. The list of employees in the bargaining unit was filed by PASSHE, and on August 9, 2018, the Board Representative issued an Order and Notice of Election scheduling a mail ballot election for September 5, 2018.

On August 16, 2018, Incumbent Union filed with the Board a Request for Review and Stay of Election under Section 95.91(k)(2)(iii) of the Board's Rules and Regulations.<sup>2</sup> Upon review of the Incumbent

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<sup>1</sup> PASSHE did not file a post-hearing brief.

<sup>2</sup> Section 95.91(k)(2)(iii) of the Board's Rules and Regulations provide, in part, as follows:

Request for review. Prior to the conduct of a representation election, an aggrieved party may file a written request for review with the Board accompanied by a statement of service. A request for review will be granted only where the order or direction of the Board Representative is clearly erroneous and prejudicially affects the rights of the party seeking review. The filing of a request for review with the Board will not operate,

Union's Request for Review, during its regularly scheduled meeting on August 21, 2018, the Board issued a letter denying Incumbent Union's Request for Review and Stay of the Election.

The mail ballots were canvassed and counted by the Board on September 5, 2018. Following the election, the Board Representative found "that of the ninety-seven (97) ballots, forty-nine (49) ballots were cast in favor of representation by [Petitioner,] PASSHE Officers Association; forty-two (42) ballots were cast in favor of representation by [the Incumbent Union,] International Union of Security, Police and Fire Professionals of America; two (2) ballots were cast for No Representative; and four (4) ballots were cast by persons whose votes were challenged. No (0) ballots were void." Accordingly, on September 13, 2018, the Board Representative issued a Nisi Order of Certification certifying Petitioner as the exclusive representative of a bargaining unit including all full-time and regular part-time security guards employed by PASSHE. On September 28, 2018, the Incumbent Union filed exceptions to the Nisi Order of Certification.

In its response to the exceptions, the Petitioner argues that the Incumbent Union's exceptions are untimely because they were not filed within twenty days of the Hearing Examiner's July 19, 2018 ODSEL. However, exceptions to an ODSEL are not permitted under the Board's Rules and Regulations. Instead, the Board's Rules and Regulations provide that exceptions in a representation case are to be filed with the Board following the Nisi Order of Certification. Hopewell School District, 11 PPER ¶11241 (Order Denying Request for Review, 1980).

In representation cases, an ODSEL is not a 'proposed order', but is the hearing examiner's recommendation under Section 95.91(k)(2)(i), leading to the Board Representative's Notice and Order of Election under Section 95.91(k)(2)(ii) of the Board's Rules and Regulations. 34 Pa. Code §95.91(k)(2).<sup>3</sup> Section 95.96(a) expressly provides that "[n]o

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unless otherwise ordered by the Board, as a stay of any order or direction of the Board Representative.

34 Pa. Code §95.91(k)(2)(iii).

<sup>3</sup> Section 95.91(k) provides as follows:

Proposed decision or recommendation shall be issued as follows:

(1) Unfair Practice and unit clarification proceedings. After the close of the formal hearing, if any, the hearing examiner or Board agent conducting the hearing shall issue a proposed decision or may submit the record of the case to the Board for decision under instructions, if any, from the Board. The proposed decision shall be in writing and shall contain a statement of the case, findings of fact, conclusions of law and the order. The hearing examiner or Board agent shall cause a copy of the proposed decision to be served upon the parties.

(2) Representation proceedings. Proposed decisions or recommendations shall be issued as follows for representation proceedings:

exceptions may be filed to orders directing elections issued by the Board Representative under §95.91(k)(2) (relating to hearings)....” 34 Pa. Code §95.96(a). Once the election is held pursuant to an Order and Notice of Election, the Board Representative issues a nisi order certifying the results of the election under Section 95.96(b) of the Board’s Rules and Regulations.<sup>4</sup> Section 95.98(a) of the Board’s Rules and Regulations expressly provides that, in an election case, the opportunity to file exceptions with the Board arises upon issuance of the nisi order of the Board Representative, stating as follows:

Filing of statements of exceptions to a hearing examiner decision will be as follows: (1) A party may file with the Board within 20-calendar days of the date of issuance with the Board an original and four copies of a statement of exceptions and a supporting brief to a proposed decision issued under §95.91(k)(1) (relating to hearings) or a nisi order issued under §95.96(b) (relating to exceptions) certifying a representative or the results of an election.

34 Pa. Code §95.98(a)(1). Indeed, in Hopewell Area School District, *supra*, the Board explained the exceptions procedure for Board review of representation cases as follows:

Orders which are issued pursuant to the above-mentioned Sections, 95.91(k)(2)(i) and (ii), are *not* subject to the filing of exceptions as is indicated in Sections 95.91(k)(2)(ii) and 95.96(a). We believe that a narrow scope of pre-election review is consistent with the Board's obligation to expeditiously conduct representation proceedings and our responsibility to protect and preserve

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- (i) Hearing examiner recommendations. After the close of the formal hearing in representation proceedings, the hearing examiner or Board agent conducting the hearing shall submit his recommendations and record to the Board Representative of the Board designated for the purpose of review of representation cases....
  - (ii) Board Representative. Upon receipt of the recommendation and record of the hearing examiner the Board Representative shall adopt, reject or modify the recommendation and shall be authorized to issue and cause to be served on the parties an order directing an election or other appropriate action....

<sup>4</sup> Section 95.96(b) of the Board’s Rules and Regulations provides as follows:

When an election has been held, the Board Representative will issue a nisi decision and order stating findings on the conduct and results of the election and will certify the representative that has been designated, certify the results of the election or issue another appropriate order as the facts of the case may warrant.

34 Pa. Code §95.96(b).

the statutory rights of employees involved. However, we are also cognizant of our duty to preserve the rights of the parties involved. Therefore, we have adopted a policy in these rules which we believe strikes an equitable balance between the sometimes competing interests of the parties.

Additionally, pursuant to Section 95.96(b) and 95.98(a) of the rules, exceptions may timely be interposed at such time as the Board issues a Nisi Order certifying a representative or the results of an election.

Hopewell Area School District, 11 PPER at 421-422.

In accordance with the Board's Rules and Regulations, the Incumbent Union's exceptions were filed with the Board on September 28, 2018, within twenty-days of the Board Representative's September 13, 2018 Nisi Order of Certification. 34 Pa. Code §95.98(a)(1); Hopewell Area School District, *supra*. Accordingly, in this representation proceeding, the Incumbent Union's exceptions to the Board are timely filed.

On exceptions, the Incumbent Union relies on federal private sector labor law contract bar principles under the National Labor Relations Act. The Incumbent Union argues that for purposes of the contract bar, absent an express agreement to reserve a right to ratify a collective bargaining agreement, a negotiated tentative agreement is a bar to a representation or decertification petition. See Scott Township, 33 PPER ¶33150 (Final Order, 2002) (noting adoption of Appalachian Shale Products Company, 121 NLRB 1160 (1958)).

As relevant to the exceptions, Section 605(7) of PERA provides in part as follows:

(i) No election shall be conducted pursuant to this section... during the term of any lawful collective bargaining agreement between a public employer and an employe representative.... (ii) Petitions for elections may be filed with the board ... after the expiration date [of any collective bargaining agreement] until such time as a new written agreement has been entered into...

43 P.S. §1101.605(7).

In Scott Township, the Board addressed whether, under Section 605(7), subsequent ratification by the union membership was required for there to be a written agreement of the parties sufficient to constitute a contract bar to a representation petition. In that case, the Scott Township Board of Supervisors voted to accept the terms of a new collective bargaining agreement that was negotiated with the union. Following the Township Supervisor's ratification vote, the union secretary/treasurer and business representative signed the new contract. After the union representative signed the contract, but before the contract was ratified by the union membership, an employee in the bargaining unit petitioned the Board for decertification of the union. After the decertification petition was filed with the Board, the union membership voted to accept the terms of the new contract. In

finding a contract bar, the Board, quoted Appalachian Shale, 121 NLRB at 1163, as follows:

Where ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar.

Scott Township, 33 PPER at 344. The Incumbent Union urges the Board to extend that same principle to PASSHE in this case, and hold that a formal ratification vote by a public employer is not required to constitute a contract bar under Section 605(7) of PERA.

However, there is a fundamental difference between a union's reservation of a right to ratify, which is governed by internal union by-laws or rules, and a public sector governmental employer whose contract ratification requirements are prescribed by statute. As the Board explained in Teamsters Local 107 v. Upper Moreland-Hatboro Joint Sewer Authority, 30 PPER ¶30220 (Final Order, 1999):

However, these cases are not on point because they did not involve the issue presented here of whether a public employer must expressly reserve a right of ratification where the employer's enabling legislation statutorily requires that its governing body take any action regarding the matter in dispute. Indeed, [Northampton School District, 22 PPER ¶ 22202 (Proposed Decision and Order, 1991) and Richland School District, 22 PPER ¶ 22077 (Proposed Decision and Order, 1991)] involved the different question of whether union representatives had apparent authority to bind the union to an agreement with the employer, and there was no claim of a statutorily-imposed ratification right. ...

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[W]here a public employer's enabling legislation has mandated that its governing body take any action regarding the disputed matter, the Board has declined to enforce alleged agreements between the employee representative and employer absent proof that a majority of the employer's governing body approved the agreement. See, e.g., [City of Farrell, 6 PPER 102 (Nisi Decision and Order, 1975); City of Johnstown, 22 PPER ¶ 22199 (Proposed Decision and Order, 1991)]; County of Erie, 10 PPER ¶ 10174 (Nisi Decision and Order, 1979). Yet in none of these cases was there a finding that the employer's negotiators expressly reserved a right of ratification by the employer's governing body. In effect, the Board has determined that the public employer's enabling legislation may statutorily place the employee representative on notice of the need for ratification by its governing body.

The above-cited decisions of the Board are consistent with longstanding appellate authority, in which the courts have repeatedly stated that persons who contract with municipalities or municipal authorities do so at their peril and must inquire into the powers of the municipal officers or agents with whom they are negotiating to reach a binding agreement. See, e.g., Alco Parking Corporation v. Public Parking Authority of Pittsburgh, 706 A.2d 343 (Pa. Super. 1998); Pittsburgh Baseball, Inc. v. Stadium Authority of City of Pittsburgh, 630 A.2d 505 (Pa. Cmwlth. 1993); Edmondson v. Zetuskys, 674 A.2d 760 (Pa. Cmwlth. 1996); Moore v. Reed, 559 A.2d 602 (Pa. Cmwlth. 1989), *appeal denied*, 527 Pa. 639-660, 593 A.2d 428 (1991); Pittsburgh Paving Co. v. City of Pittsburgh, 332 Pa. 563, 3 A.2d 905 (1938). For example, in Moore v. Reed, Commonwealth Court held that negotiation of a contract is a legislative function and that a contract negotiated by the city's mayor was not binding without the assent of its legislative body (city council). Similarly, in Pittsburgh Baseball, Judge Doyle of Commonwealth Court (now President Judge) authored an opinion that concurred with the conclusion in the majority opinion that the city was not bound by a contract negotiated by the city's mayor to which city council did not assent. Judge Doyle observed that "no Pennsylvania case has been cited as authority that mere municipal inaction can constitute ratification of a defective contract" and that "such a policy would be unwise." 630 A.2d at 510.

Upper Moreland-Hatboro Joint Sewer Authority, 30 PPER at 473-474.

The Board has with unflagging consistency required that, for purposes of the contract bar under Section 605(7) of PERA, there must be a contract between the parties. *E.g.* Steel Valley Area Technical School Joint Board, 7 PPER 231 (Order and Notice of Pre-Election Conference, 1976); Elizabeth Forward School District, 10 PPER ¶10156 (Order and Notice of Election, 1979); Lehigh County Vo-Tech School, 18 PPER ¶18038 (Order Directing Submission of Eligibility List, 1987). In this regard, while a union may lawfully allow its representative to enter into a binding contract without prior member ratification, a public employer's obligation to have its governing body ratify a tentative agreement may be mandated by law. In such circumstances, a "new written agreement" or "lawful collective bargaining agreement" for purposes of Section 605(7) cannot have been entered into by both parties unless and until the public employer's governing body has ratified the tentative agreement in accordance with the law. Upper Moreland-Hatboro Joint Sewer Authority, *supra*.<sup>5</sup> Accordingly, where the

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<sup>5</sup> Unlike a union's internal by-laws or rules, a negotiator for a public employer cannot waive the public employer's statutory right and obligation to ratify a collective bargaining agreement by failing to articulate that statutory obligation in a tentative agreement. The Incumbent Union's arguments to the contrary are inconsistent with the purposes and policies of PERA. See 43 P.S. §1101.703 ("[t]he parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in

public employer's enabling legislation requires ratification of collective bargaining agreements by the legislative or governing body of the public employer, a contract bar to a representation petition under Section 605(7) of PERA does not arise from a tentative agreement reached at the bargaining table, but only upon the employer's ratification of a lawfully adopted collective bargaining agreement.

In this regard, PASSHE's enabling legislation, Act 188, 24 P.S. §§20-2001-A to 20-2017-A, includes provisions expressly governing the negotiation of collective bargaining agreements under PERA. Section 20-2003-A(c) provides that "[t]he [Board of Governors of the State System of Higher Education] shall make a coalition bargaining arrangement with the Commonwealth [of Pennsylvania] for the negotiation of new collective bargaining agreements with noninstructional employees." 24 P.S. §20-2003-A; see also 24 P.S. §20-2001-A(1) (defining "board") and §20-2001-A(3) (defining "coalition bargaining"); and Conference of Pennsylvania College Police Lodges, FOP v. PLRB, 760 A.2d 1233 (Pa. Cmwlth. 2001) (explaining coalition bargaining as not a joint employer relationship, but that in bargaining PASSHE is the sole employer of employees at PASSHE campuses and the Commonwealth is the sole employer of employees at Commonwealth facilities). In accordance with the bargaining obligation in Section 20-2003-A, Section 20-2005-A(11) of Act 188 provides that "[t]he chancellor shall negotiate or cause to be negotiated on behalf of the [Board of Governors] and subject to its final approval collective bargaining agreements pursuant to [PERA]." 24 P.S. §20-2005(11). With respect to the powers and duties of the PASSHE Board of Governors regarding collective bargaining, Section 20-2006-A(8) of Act 188 provides that it is the Board of Governors that "enter into collective bargaining agreements pursuant to [PERA]." 24 P.S. §20-2006-A(8). As clearly evidenced by Act 188, in order for there to be a new written contract entered into, or a lawful collective bargaining agreement, a negotiated tentative agreement must be approved and ratified by the PASSHE Board of Governors. Accordingly, a petition for representation or decertification concerning employees of PASSHE is not barred under Section 605(7) of PERA if filed prior to the Board of Governors' lawful ratification of a new written collective bargaining agreement.

In this case, Petitioner filed the Petition for Representation on October 23, 2017. As found by the Hearing Examiner, the record does not show that PASSHE's Board of Governors approved or ratified the October 19, 2017 tentative agreement at any time prior to the October 23, 2017 filing of the Petition for Representation. Additionally, the Incumbent Union ratified the successor collective bargaining agreement on October 24, 2017, also after the Petition for Representation was filed in this case. Finally, PASSHE and the Incumbent Union did not execute a new successor agreement until November 19, 2017, which was well after the date on which the Petition for Representation was filed. As such, the Petition for Representation was filed before PASSHE's Board of Governors' ratification of the tentative agreement, and therefore was not barred by Section 605(7) of PERA.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the

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conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania...").



Petition for Representation filed by the Petitioner on October 23, 2017, was not barred under Section 605(7) of PERA. Therefore, the exceptions filed by the Incumbent Union shall be dismissed, and the Nisi Order of Certification is made absolute and final.

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 the International Union of Security, Police and Fire Professionals of America are hereby dismissed, and the September 13, 2018 Nisi Order of Certification, 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, James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this twentieth day of November, 2018. 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.