

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
 :
v. : CASE NO. PERA-C-11-239-E
 :
PENNSYLVANIA STATE SYSTEM OF :
HIGHER EDUCATION, WEST CHESTER :
UNIVERSITY :

PROPOSED DECISION AND ORDER

On July 27, 2011, the Association of Pennsylvania State College and University Faculties (Union or APSCUF) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State System of Higher Education, West Chester University (State System or University) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by allegedly refusing to sign or implement an express grievance settlement agreement to which authorized University and Union personnel allegedly assented.

On August 11, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on January 18, 2012, in Harrisburg. During the hearing on that day, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties timely filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The University is one of 14 universities that comprise the State System which is governed by the State Office of the Chancellor. The State System is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9-10, 29-30).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 9-10).
3. Dr. Greg Weisenstein is the University President. (N.T. 30, 83).
4. Dr. Linda Lamwers is the University Provost and Vice President of Academic Affairs. (N.T. 31, 47-48).
5. Dr. Clifford Johnston is an associate professor of mathematics at the University and was the president of the local APSCUF chapter there from the fall of 2005 to the spring of 2011. (N.T. 27-29).
6. Collective bargaining agreements between bargaining unit faculty and the State System are negotiated at the state level. The Chancellor's Office negotiates on behalf of the State System and State APSCUF negotiates on behalf of faculty. (N.T. 32).
7. The parties are currently operating under the expired collective bargaining agreement (CBA) effective from July 1, 2007 through June 30, 2011. (N.T. 32-33; Joint Exhibit 1).
8. Article 5 of the CBA contains a four-step grievance procedure. Step one involves an oral presentation of an alleged contract violation to the lowest management level person at the local university. Step one is a conversation. If not resolved at step one, the Union presents a step two grievance in writing to the president of the local university. Step three requires the Union to appeal the

grievance to the state level in the Chancellor's Office. Step four is arbitration. (N.T. 33-35; Joint Exhibit 1, Art. 5).

9. A step-two grievance is usually presented to the Provost at the University as the designated agent of the President. Dr. Johnston has negotiated grievance settlements at step 2 with the Provost and the President in the past. At no time has Dr. Johnston been informed that either the President or the Provost lacks authority to settle grievances. (N.T. 34-36).
10. Article 11 of the CBA is titled "APPOINTMENT OF FACULTY." Subsection F sets forth "Regulations Regarding The Hiring Of Temporary and Regular Part-Time FACULTY MEMBERS," and provides in relevant part as follows:

1. The full-time equivalent (FTE) of temporary and regular part-time FACULTY MEMBERS at any University shall not exceed twenty-five percent (25%) of the full-time equivalent (FTE) of all FACULTY MEMBERS employed at that University as of October 31 of the previous year. A UNIVERSITY and local APSCUF may, by written local agreement, exceed the limit provided herein.

(Joint Exhibit 1, Article 11.F.1).

11. Article 11.F.1 of the CBA provides for a 25% cap on temporary and regular part-time faculty members, calculated as follows: the number of temporary and regular part time faculty members divided by the number of members of the entire faculty. (N.T. 36-37; Joint Exhibit 1, Art. 11.F.1).
12. In November 2010, the Union received the numbers of temporary and regular part-time faculty at the University, pursuant to the requirements of Article 11.F.3, and the number exceeded the 25% cap. (N.T. 38-39, 84-86; Joint Exhibit 1, Art. 11.F.3).
13. On December 23, 2010, Dr. Johnston hand delivered a written, step-two grievance, designated Local Grievance No. 10-015, to President Weisenstein's office, and it was received by Larry Dowdy, the President's Senior Deputy Executive Secretary. (N.T. 40-41; Union Exhibit 1).
14. After filing the grievance, Dr. Johnston had discussions about the 25% cap with the Provost, the President and Human Resources Director of Labor Relations, Michael Maloy. The Union agreed with Provost Lamwers and Director Maloy to extend the contractually designated grievance response time, on two occasions, to April 1, 2011. (N.T. 42-43).
15. Several times during the term of the CBA, a committee convened to investigate the University's exceeding of the 25% cap. When the Union granted the grievance extension, Dr. Johnston requested that the Union representative on that committee restart the committee work. (N.T. 44-45).
16. On March 31, 2011, the committee issued a report which generated more discussions between Dr. Johnston, Provost Lamwers and President Weisenstein. (N.T. 44-45, 111-112; Employer Exhibit 7).
17. On April 13, 2011, e-mails were exchanged between Dr. Lamwers, Dr. Johnston and Dr. Weisenstein. Director Maloy and Senior Deputy Executive Secretary Dowdy were copied on most of the e-mails. (Union Exhibit 2; Employer Exhibit 8).
18. On April 13, 2011, Dr. Lamwers e-mailed Dr. Johnston and Dr. Weisenstein an attachment containing "the latest version that we have agreed to following conversation this afternoon." She further wrote that "[t]he yellow highlight is a section in which there is not agreement. Cliff [Johnston] would prefer that it

not be in the agreement, I would like it in." (Union Exhibit 2; Employer Exhibit 7).

19. In response, Dr. Johnston indicated confusion over the lack of a provision regarding the replacement of retirees. An hour-and-one-half later, Dr. Johnston e-mailed the same group of people and indicated that he spoke to Dr. Lamwers about retirement replacements. The same e-mail included proposed language as part of a grievance settlement agreement regarding the retirement replacements. (N.T. Union Exhibit 2; Employer Exhibit 7).

20. Dr. Lamwers responded on Thursday morning, April 14, 2011, as follows:

Cliff [Johnston]- I just talked with Greg [Weisenstein] regarding this. He is comfortable with the language you suggested to replace the highlighted section sent earlier. A condition of hire may include the expectation of a terminal degree at the time of tenure. Are you comfortable making the two changes (above and below in your email) and getting it back to all of us. Then we would be done! Linda.

(Union Exhibit 2; Employer Exhibit 7).

21. At 5:03 p.m. on April 14, 2011, Dr. Johnston responded as follows:

OK, here is the document with the changes as agreed. I will inform state APSCUF we have an agreement and I will see you on Monday to sign-off. Cliff.

(Union Exhibit 2; Employer Exhibit 7).

22. On Thursday, April 14, 2011, Dr. Weisenstein had a meeting with the Council of Trustees from 4:00 p.m. until approximately 9:00 p.m. After the meeting, at 9:33 p.m., Dr. Weisenstein was tired and getting ready for bed when he responded to Dr. Johnston as follows: "Thanks Cliff. See you on Monday." (N.T. 88-90; Union Exhibit 2; Employer Exhibit 7).

23. President Weisenstein did not review the proposed agreement that was attached to Dr. Johnston's e-mail when he responded to Dr. Johnston that he would see him on Monday. He did not verify that the changes to the agreement were made to the Provost's satisfaction. He did not have an opportunity to check with Director Maloy. President Weisenstein always confers with Provost Lamwers and Director Maloy regarding labor matters. (N.T. 88-90).

24. The next morning, on Friday, April 15, 2011, Dr. Lamwers informed Dr. Weisenstein that Michael Mottola, the Director of the Labor Relations Department for the Office of the Chancellor, informed her that Article 11.F and the 25% cap were the subjects of statewide negotiations for a new CBA. Thereafter, Dr. Weisenstein e-mailed Dr. Johnston that he would hold the proposed agreement in abeyance pending statewide negotiations. Dr. Johnston responded that he would appeal the grievance to step three. (N.T. 90-92, 140-141; Employer Exhibit 3, Employer Exhibit 11 at 2).

25. At no time did Dr. Lamwers or Dr. Weisenstein inform Dr. Johnston that either one would sign the proposed agreement. (N.T. 88, 128).

26. On April 8, 2011, Mr. Mottola sent a letter to both the Union President and its Chief Negotiator. In that letter, Mr. Mottola identified issues to be negotiated and objectives to be met through bargaining a new CBA. The letter contains a section that identifies "Structural Issues." Subsection f provides as follows:

Develop exceptions to the Article 11F 25% temporary and regular part-time faculty member cap specifically exclude sabbatical replacements, sick leave

replacements, grant funded faculty replacements or acknowledge the ability to develop local agreements to exceed the 25% limit. (Article 11F, 1 and 2).

(Employer Exhibit 11).

DISCUSSION

As an initial matter, during the hearing the Union objected to the admission of Employer Exhibits 6, 8 and 11 on relevancy grounds. (N.T. 160-162). Employer Exhibit 6 is a September 20, 2004 letter from another Union Attorney stating the Union's position that local agreements regarding regular part-time faculty are invalid. The University offered Employer Exhibit 6 to establish that State APSCUF has held the position that local grievance settlement agreements regarding matters subject to collective bargaining at the state level are invalid.

The Union's attorney argued that the letter is irrelevant because it is limited to the issue of local agreements regarding regular part-time faculty at a time when the CBA did not address the terms and conditions of employment of part-timers and different, inconsistent local agreements were cropping up throughout the State System. The letter, argues the Union, does not establish that APSCUF believes that all local agreements are invalid. I conclude that, although the letter addresses the specific issue of local agreements concerning part-time faculty, the letter does have a tendency to show that the Union recognizes that local agreements resolving issues subject to collective bargaining at the state level are invalid, which was the purpose of the University's introduction of the letter. Therefore, I am admitting Employer Exhibit 6 into the record over the Union's objection.

The Union's objection to Employer Exhibit 8 was limited to the relevancy of the last e-mail at the top of the first page from Dr. Lamwers. I agree and sustain that objection. Employer Exhibit 8 is admitted into the record, except for the last e-mail transmission.

I am also admitting Employer Exhibit 11 over the Union's objection. This Exhibit is an April 8, 2011 letter written by, and offered at the hearing through, Mr. Mottola stating the bargaining objectives of the State System for a new CBA. In offering the Exhibit, the University referenced "Structural Issues" subsection f on page 2. This subsection identifies Article 11.F and the 25% cap as an express issue for collective bargaining. Therefore, I conclude that the Exhibit is relevant to establish (1) that the State System was of the position that modifications to Article 11.F of the CBA were to be negotiated at the State level and (2) that Mr. Mottola informed the State APSCUF and its negotiators of that position as of April 8, 2011.

The issue presented is whether the University entered into a settlement agreement with the Union to resolve Local Grievance No. 10-015 and, if so, whether Dr. Weisenstein and/or Dr. Lamwers were authorized to enter an agreement at the local university level addressing matters presently subject to statewide negotiations. I conclude that the University did not enter a settlement agreement and, therefore, I need not address the second part of the issue.

In **Radnor Township School District PSEA/NEA v. Radnor Township School District**, 40 PPER 44 (Final Order, 2009), the Board stated the following:

The Board has held that a public employer commits an unfair practice when it refuses to comply with a grievance settlement agreement. **AFSCME District Council 47 Local 2187 v. City of Philadelphia**, 36 PPER 124 (Final Order, 2005). In order to establish that a binding settlement agreement exists, the complainant must prove that the parties reached a meeting of the minds concerning the subject matter at issue. **PLRB v. Drivers and Dairy Employes, Local Union No. 205**, 4 PPER 52 (Nisi Decision and Order, 1974); **AFSCME District Council 88 v. Northampton County**, 38 PPER 19 (Proposed Decision and Order, 2007). The Board will

examine the underlying facts to determine whether the parties reached an agreement. **Id.** The Board will determine that the parties have not reached a binding settlement where the parties reach agreement on some terms, but are unable to come to a complete resolution of their dispute. **Id.** It is the objective conduct of the parties and not subjective beliefs that establishes the presence or absence of a meeting of the minds. **Northampton County, supra.**

Radnor, 40 PPER at 189.

The underlying facts of this case demonstrate that neither the President nor the Provost reached a final meeting of the minds concerning the subject matters at issue. The fact that neither Dr. Weisenstein nor Dr. Lamwers actually signed an agreement is significant proof that there was no agreement, especially since Dr. Johnston expected that a signature was required for a deal. In his April 14, 5:03 e-mail, Dr. Johnston specifically stated: "I will inform state APSCUF we have an agreement and I will see you on Monday to sign-off." This statement supports the objective determination that the parties understood that a final review and approval of the latest changes, as evidenced by signatures, was required. There are no signatures and, neither Dr. Weisenstein nor Dr. Lamwers told Dr. Johnston that they would sign the proposed settlement agreement. Therefore, there is no deal. Dr. Johnston's unrequited pronouncement that "we have an agreement" does not make it so. Also, the fact that Dr. Lamwers indicated that, if Dr. Johnston made two changes to the proposed agreement "Then we would be done!" does not mean that final review and approval, as evidenced by signatures, was not required or intended, after he made the two changes.

The Union contends that there was a meeting of the minds because Dr. Johnston claimed, in his 5:03 e-mail, that there was an agreement and the parties simply would meet on Monday to "sign-off," to which Dr. Weisenstein responded "Thanks Cliff. See you on Monday." However, the underlying facts demonstrate that Dr. Weisenstein did not intend to agree to anything with this response. Dr. Weisenstein credibly testified, and I have found, that his response was made late at night after a five-hour meeting with the Council of Trustees. He was very tired and looked forward to getting to bed. His response was merely a polite acknowledgment that they would get together on Monday. Indeed, Dr. Weisenstein had not even reviewed the changes to or the final manifestation of the proposed agreement when he responded: "Thanks Cliff. See you on Monday."

Dr. Weisenstein also credibly testified, and I have found, that he always confers with Dr. Lamwers and Director Maloy regarding labor matters and he had planned on so conferring before agreeing to the proposed settlement agreement. He did not confer with the Director or the Provost when he told Dr. Johnston that he would see him on Monday. The next morning, when Dr. Weisenstein finally did confer with Dr. Lamwers, he learned that Article 11.F and the 25% cap were the subjects of statewide negotiations for a new CBA. With the advice of Dr. Lamwers and Mr. Mottola, he decided not to agree to the settlement terms at that time.

The substantial, credible evidence of record establishes that Dr. Lamwers and Dr. Weisenstein never intended to bind the University to the proposed settlement agreement until it was finally reviewed and approved by them after consultation with Director Maloy and as evidenced by the President's or the Provost's signature, which did not occur. Having not reviewed the latest version of the proposed agreement, Dr. Weisenstein cannot be said to have agreed to all the terms of the proposed agreement. Accordingly, the University did not enter into a settlement agreement with the Union, and the objective conduct of the parties establishes an absence of a meeting of the minds on the final proposal. I also conclude that the University bargained in good faith toward a mutually acceptable resolution of the 25% cap grievance between December 2010 and April 2011, at which time the Chancellor's Office assumed that responsibility.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The University is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The University has **not** committed unfair practices within the meaning of Section 1201(a)(1) either independently or derivatively.
5. The University has **not** committed unfair practices within the meaning of Section 1201(a)(5).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twentieth day of August, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner