

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

POCONO MOUNTAIN EDUCATION :
SUPPORT PROFESSIONALS PSEA/NEA :
 :
 : CASE NO. PERA-C-12-94-E
v. :
 :
 :
 :
POCONO MOUNTAIN SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On April 6, 2012, the Pocono Mountain Education Support Professionals (Union, Association or PMSD), filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pocono Mountain School District (District) violated Section 1201(a) (1), (5) and (8) of the Public Employe Relations Act (PERA). The Union specifically alleged that the District failed to properly comply with a grievance arbitration award (Award) directing the reinstatement of Hussein Abou-Mousa.

On April 30, 2012, the Secretary of the Board issued a letter informing the Union's attorney of record that the Board will not process the charge unless the Union submits, within twenty days, copies of the Award, the opinion of the Monroe County Court of Common Pleas vacating the Award and the opinion of the Commonwealth Court reinstating the Award. Those documents were timely filed on May 10, 2012. On June 6, 2012, the Secretary of the Board issued a complaint and notice of hearing designating a hearing date of October 9, 2012, in Harrisburg. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

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

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6).
3. Hussein Abou-Mousa was hired as a school bus driver for the District in 1997. (N.T. 15-16).
4. On March 15, 2006, Edward Battisfore, the District's Director of Support Staff Services, suspended Mr. Abou-Mousa with pay pending the school board's action on Mr. Battisfore's recommendation to dismiss Mr. Abou-Mousa. (N.T. 16-17; Association Exhibit 1).
5. On April 20, 2006, the District terminated Mr. Abou-Mousa. (N.T. 7-8, 15-16).
6. The collective bargaining agreement at the time of Mr. Abou-Mousa's termination was in effect from July 1, 2005 through June 30, 2009. Mr. Abou-Mousa was on pay step 9 of that agreement earning \$15.04 per hour when he was terminated. (N.T. 64-65; Joint Exhibit 4).
7. Before his termination, Mr. Abou-Mousa was advanced a pay step every year. (N.T. 19-20).

8. The parties stipulated and agreed that, provided a bus driver worked at least one-half of his/her scheduled work days in a given school year, he/she will be eligible to move to the next hourly rate the following school year. The District moves eligible bus drivers on the bus driver hourly wage schedule both vertically downward to the next higher step and horizontally to the right to the next applicable school year. (Board Exhibit 1; Joint Exhibits 4 & 5).
9. Mr. Abou-Mousa worked more than one-half of his scheduled work days during the 2005-2006 school year before he was terminated. (N.T. 21).
10. The Union grieved Mr. Abou-Mousa's termination and on March 19, 2008, Arbitrator Scott E. Buchheit issued the Award reinstating Mr. Abou-Mousa. (N.T. 27-28; Joint Exhibit 1).
11. The Award provided that "the District shall reinstate the Grievant with full seniority but without back pay and other benefits lost as a result of his termination." (Joint Exhibit 1 at 31).
12. The parties stipulated and agreed that the District appealed the Award to the Monroe County Court of Common Pleas. (N.T. 7-8, 28).
13. Immediately after the Award was issued, Mr. Abou-Mousa entered District premises several times and attempted to return to work. (N.T. 29, 34-39; Association Exhibit 2).
14. On March 28, 2008, the District's lawyer wrote the Union's attorney, in relevant part, as follows:

Our office has just been advised that Mr. Hussein Abou-Mousa is contemplating reporting to Pocono Mountain School District on Monday, March 31, 2008 with the intention of resuming work.

Given the fact that the time period to file an appeal from the Arbitrator's decision has not expired, it is our office's position that any resumption of work duties at this state would be premature as there are bona fide appealable issues.

We have alerted our client to these issues and therefore would respectfully request that you advise and encourage Mr. Abou-Mousa to not report to work.

(Association Exhibit 2(1)).¹

15. All school bus drivers are required to hold a current commercial driver's license (CDL), a current passenger endorsement and a current school bus endorsement. The school bus endorsement is also known as an "S-endorsement" or "yellow card," because the card itself is yellow. School bus drivers are also required to receive an annual physical. The District pays for the physical for its drivers. Employees hired with a current S-endorsement must still obtain a physical from the District physician. (N.T. 25, 73, 90, 93-94, 97-98; Employer Exhibit 7).

¹ During the hearing, Counsel for the District objected to the letters authored by the District's lawyers and argued that those letters were inadmissible hearsay. (N.T. 30-33). I overruled Counsel's objection because the District's lawyers are the District's agents at law authorized to represent the position of the District and thereby constituted admissions, as offered against the District. As noted by the Union in its post-hearing brief, a statement by a party's attorney falls within the hearsay exception of PA.R.E 803(25)(C) & (D) because it is both a statement by a person authorized by a party to make a statement concerning the subject and a statement by the party's agent concerning a matter within the scope of the agency.

16. Mr. Abou-Mousa has a Class A CDL with endorsements for school bus, passenger transport, tanker and tractor-trailer. He had his CDL before he started working for the District. (N.T. 72-73, 91-92; Employer Exhibit 6).
17. Every four years, Pennsylvania school bus drivers must be recertified. The recertification process requires the bus driver to take a state-mandated ten hours of training. The ten-hour course is comprised of seven hours of knowledge training and three hours of driving training. The driver must thereafter pass a driving test at the conclusion of his/her training. All these requirements must be satisfied before the recertification date on the Yellow Card or the driver is not allowed by law to drive a school bus. The District provides and pays for all bus driver training for employees. (N.T. 25-26, 95-96).
18. Mr. Abou-Mousa's S-endorsement was valid until March 31, 2008, twelve days after the arbitrator issued his Award reinstating him. Mr. Abou-Mousa could not attend District provided training for his S-endorsement while he was terminated. The Transportation Director can schedule training classes anytime. (N.T. 22-28, 37-38, 79, 116; Employer Exhibit 7 & 16).
19. On April 23, 2008, a District lawyer wrote a letter to the Union's attorney stating, in relevant part, as follows:

As a practical matter, it appears to us that because Mr. Abou-Mousa allowed his certifications to lapse, that he does not actually intend to return to the District. Notwithstanding the School District's appeal, Mr. Abou-Mousa's return to driving [a] bus is impeded by the lapse of his certification. We do not believe that the April reinstatement order has an indefinite life. As such, we wanted to know whether he plans to return to the District, and what his time frame will be for recertification.

(N.T. 42-45; Association Exhibit 2(2)).

20. At this time, the District did not provide the Union or Mr. Abou-Mousa any information about training dates, and Mr. Abou-Mousa was not permitted on District premises. (N.T. 45).
21. The Union's attorney responded that Mr. Abou-Mousa could become certified any time and that if he is not certified it was because the District withheld that opportunity from him. (Association Exhibit 2(3)).
22. On May 14, 2008, the District's attorney responded: "we would still like to know when Mr. Abou-Mousa intends to regain his certification for the purposes of reclaiming his position as a bus driver for the School District." (Association Exhibit 2(4)).
23. On June 19, 2008, the Union again responded: "he will attend the District's next training session. If the District is refusing to train him, please advise. Otherwise, please notify us of the upcoming training dates." (N.T. 47; Association Exhibit 2(5)).
24. On October 30, 2008, the District's lawyer wrote the Union and indicated that it attempted to contact the Union attorney but no new attorney had been reassigned the matter. The letter also stated:

we anticipated that Mr. Abou-Mousa would have applied for the training programs offered by PMSD. This has not happened; Mr. Abou-Mousa has shown no interest in pursuing his employment with the District. As such, if Mr. Abou-Mousa wants to work as a school bus driver for PMSD, he

needs to show that interest by applying for the next class available to bus drivers with the District.

(Association Exhibit 2(6)).

25. On November 18, 2008, the new Union attorney responded as follows:

As Attorney Audi informed you by letter dated June 19, 2008, Mr. Abou-Mousa does intend to participate in the next training program offered by the District.

In his June 19, 2008 letter, Attorney Audi specifically asked that you notify us of upcoming training dates. Neither Attorney Audi nor Mr. Abou-Mousa has received this information. I again ask that you please notify us of the dates of the next available training session. In addition, I ask that you please provide the dates of any additional sessions that have been scheduled for the 2008-2009 school year.

(Association Exhibit 2(7)).

26. Every year the Colonial Intermediate Unit #20 provides new driver training classes and recertification classes. The cost of new driver training class is \$60. The cost for recertification class is \$45. The cost for the driving training is \$25/hour. The Intermediate Unit offers both new driver training and recertification classes four times per year. (N.T. 117-118, 132-133; Employer Exhibit A).
27. By letter dated December 9, 2008, the District's Transportation Director, Kevin Aul, informed Mr. Abou-Mousa of four dates during the week of February 23, 2009, of training classes at the District. (N.T. 49-50, 99-100; Association Exhibit 2(9)).
28. Because Mr. Abou-Mousa's certification had lapsed for more than the one-year grace period by that time, he was required to take the twenty-hour, not the ten-hour, course. Mr. Abou-Mousa completed all four days of his twenty-hour training course in late February 2009. The State Form DL-714 is a PennDot school bus training report form that needs to be signed by the driving instructor, Intermediate Unit #20 Coordinator and the Trainee. Mr. Abou-Mousa and his instructor signed his DL-714 on February 27, 2009. The I.U. #20 Coordinator signed on April 29, 2009, two months later. He did not pass his first driving test; he passed on June 2, 2009. (N.T. 48, 51-54, 103, 107-114, 149; Employer Exhibits 14 & 15).
29. In June 2009, the Union's attorney submitted completed paperwork requested by the District and informed the District's lawyer that Mr. Abou-Mousa passed his driving test and was free to return to work. He also objected to the District's characterization of Mr. Abou-Mousa as a new hire or that he was being rehired. The Union asserted that he is a permanent employe who was reinstated under the Award. (Association Exhibit 4(1-17)).
30. The District required Mr. Abou-Mousa to complete a new Citizenship and Immigration Form I-9. The District had these documents on record from his original hire date in 1997. (N.T. 56-57, Association Exhibit 4(18)).
31. On August 19, 2009, two weeks before the start of the 2009-2010 school year, the District's lawyers, for the first time, informed the Union attorney that Mr. Abou-Mousa must obtain completed background checks from the Pennsylvania State Police and the FBI as well as child abuse clearances from the Pennsylvania Department of Public Welfare (DPW). The District required these

background checks to be completed and submitted one week later, by August 26, 2009. (N.T. 57-58; Association Exhibit 4(18-21)).

32. Mr. Abou-Mousa completed background checks when he was originally hired in 1997. At no time since his original hire date did the District require him to resubmit to background checks, even though the August 19, 2009 letter states that they are required every year. (N.T. 57-58).
33. Section 1-111 of the School Code of 1949 requires criminal background checks for school employes. 24 P.S. § 1-111. The Child Protective Services Act requires school employes to obtain clearances from DPW. 23 Pa. C.S.A. §6355.
34. The Act of July 11, 2006, P.L. 1092, No. 114 (Act 114) amended Section 111. Act 114 requires all applicants for employment in schools, including those of independent contractors and student teachers, to undergo background checks. As of April 1, 2007, the following three background checks are required: (1) Pennsylvania State Police Request for Criminal Records Check (Act 34); (2) Department of Public Welfare Child Abuse History Clearance (Act 151); and (3) Federal Criminal History Record Information (CHRI). (Act of July 11, 2006, P.L. 1092, No. 114 (Act 114)).
35. The cost for the State Police check is \$10. The cost for the Child Abuse check is \$10, and the cost for the FBI check is \$28. (N.T. 182).
36. Act 24 of 2011 (Act 24) contains a number of significant changes to the Pennsylvania Public School Code. One of those changes is that it extends the requirements of Section 111 of the School Code to current employes and not only prospective employe applicants. (Act of June 30, 2011, P.L. 112, No 24 (Act 24)).
37. The Act-114 version of Section 111 was applicable at all times relevant to Mr. Abou-Mousa's reinstatement. The Act 114 version provides, in relevant part, as follows:
38. Section 111 of the School Code, as amended in 2006 by Act 114, provides, in relevant part, as follows:

Section 111. Background Checks of Prospective Employes; Conviction of Employes of Certain Offenses.--(a) This section shall apply to all prospective employes of public and private schools, intermediate units and area vocational-technical schools, including independent contractors and their employes, except those employes and independent contractors and their employes who have no direct contact with children. This subsection shall expire March 31, 2007.

(a.1) Beginning April 1, 2007, this section shall apply to all prospective employes of public and private schools, intermediate units and area vocational-technical schools, including, but not limited to, teachers, substitutes, janitors, cafeteria workers, independent contractors and their employes, except those employes and independent contractors and their employes who have no direct contact with children.

(1) Beginning April 1, 2007, this section shall apply to bus drivers offered employment by a school district, private school, nonpublic school, intermediate unit or area

vocational-technical school or by an independent contractor.

. . .

(c) Where the applicant has not been a resident of this Commonwealth for at least two (2) years immediately preceding the date of application for employment, administrators shall require the applicant to submit with the application for employment a set of fingerprints which may be submitted to the Federal Bureau of Investigation for Federal criminal history record information pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-544, 86 Stat. 1115 or a copy of such Federal criminal history record. Administrators shall forward the set of fingerprints for the Federal criminal history record to the Department of Education. The Department of Education shall be the intermediary for the purposes of this section. The Department of Education shall return the Federal criminal history record to the applicant. When the applicant provides a copy of the Federal criminal history record, it shall be no more than one (1) year old. Administrators shall maintain a copy of the required information and shall require each applicant to produce a Federal criminal history record that may not be more than one (1) year old at the time of employment. The original Federal criminal history record shall be returned to the applicant. This subsection shall expire March 31, 2007.

(c.1) Beginning April 1, 2007, administrators shall require the applicant to submit with the application for employment a copy of the Federal criminal history record in a manner prescribed by the Department of Education. When the applicant provides a copy of the Federal criminal history record, it shall be no more than one (1) year old. Administrators shall maintain a copy of the required information and shall require each applicant to produce a Federal criminal history record that may not be more than one (1) year old at the time of employment. The original Federal criminal history record shall be returned to the applicant.

* * *

(i) Notwithstanding subsections (b) [and (c)], (c) and (c.1), administrators, before April 1, 2007, may employ in-State applicants on a provisional basis for a single period not to exceed thirty (30) days [or, for] and may employ out-of-State applicants[, a period of] on a provisional basis for a single period not to exceed ninety (90) days[, except] and, after March 31, 2007, may employ any applicants on a provisional basis for a single period not to exceed ninety (90) days, except during a lawful strike proceeding under the provisions of the act of July 23, 1970 (P.L.563, No.195), known as the "Public Employee Relations Act," provided that all of the following conditions are met:

- (1) the applicant has applied for the information required under subsection (b) and, where applicable, under subsection (c) or (c.1) and the applicant provides a copy of the appropriate completed request forms to the administrator;
- (2) the administrator has no knowledge of information pertaining to the applicant which would disqualify him from employment pursuant to subsection (e);
- (3) the applicant swears or affirms in writing that he is not disqualified from employment pursuant to subsection (e);
- (4) if the information obtained pursuant to subsection (b) [or (c)], (c) or (c.1) reveals that the applicant is disqualified from employment pursuant to subsection (e), the applicant shall be suspended and subject to termination proceedings as provided for by law; and
- (5) the administrator requires that the applicant not be permitted to work alone with children and that the applicant work in the immediate vicinity of a permanent employe.

39. Mr. Abou-Mousa submitted his three background checks to the District on or about November 9, 2010. (N.T. 120, 157-158; Employer Exhibits 18-21).
40. Mr. Abou-Mousa was reinstated December 10, 2009 at Step 10 for the 2009-2010 school year at \$16.58 per hour. He was sent for a physical with the District's physician when he was reinstated. (N.T. 145-146; Joint Exhibit 5; Employer Exhibit 1).
41. On July 27, 2011, the Commonwealth Court of Pennsylvania reinstated the arbitration award that was vacated by the Monroe County Court of Common Pleas. (Joint Exhibit 3).
42. Since the Commonwealth Court's decision reinstating the Award, the District has not paid Mr. Abou-Mousa any backpay. The District has not given him any sick or vacation days for the 2008-2009 school year. (N.T. 68).
43. Between March 2008 and December 2009, Mr. Abou-Mousa experienced out-of-pocket medical expenses because he lost his District provided health insurance. (N.T. 68; Association Exhibit 7).
44. Through DPW, Mr. Abou-Mousa paid \$45 per month for certain medical coverage. He has diabetes and must be monitored by a physician. He regularly takes prescription medication for his diabetes for which he paid with his own money. (N.T. 69-70).
45. Between March 2008 and December 2009, Mr. Abou-Mousa spent \$907 for medicine and the DPW health plan. (N.T. 70-71).
46. Mr. Abou-Mousa's personal physician decided to discontinue treating Mr. Abou-Mousa when he lost his District provided health insurance. His physician then decided to continue to treat him because Mr. Abou-Mousa paid with his own money. These out-of-pocket expenses for visits to his doctor are in addition to the \$907. The DPW plan did not cover doctor's visits. (N.T. 71-72; Association Exhibit 7).

DISCUSSION

The Union claims that the District failed to comply with the Buchheit Award which ordered the reinstatement of Mr. Abou-Mousa. Both parties recognized in their post-hearing briefs that, in determining whether an employer complied with a grievance arbitration award, the Union has the burden of proving that an award exists, the award is final and binding and that the employer failed or refused to properly implement the award. **State System of Higher Education v. PLRB**, 528 A.2d 278 (Pa. Cmwlth. 1987). The District does not dispute that the Award exists and that the appeal process has been exhausted, rendering the Award final and binding. The parties agree that the dispute involves the third prong of the analysis, i.e., whether the District complied with the Award. Specifically, the parties disagree over when Mr. Abou-Mousa should have been reinstated pursuant to the Award.

The relief provided in an arbitration award that has been affirmed on appeal is effective dating back to the date of the award or another effective date expressly provided in the award. **Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 39 PPER 9 at 32 (Final Order, 2008); **Wyoming Borough Police Department v. Wyoming Borough**, 43 PPER 22 (Final Order, 2011). The Award, dated March 19, 2008, provided as follows: "the District shall reinstate the Grievant with full seniority but without back pay and other benefits lost as a result of his termination." (F.F. 11). Absent express directives or limitations contained in the Award delaying the reinstatement of Mr. Abou-Mousa, the District was obligated to reinstate Mr. Abou-Mousa effective March 19, 2008, or make him whole for not reinstating him as of that date, once the Award was affirmed on appeal. **City of Philadelphia, supra; Wyoming Borough, supra.**

However, the District raises several defenses. The District contends that it was legally unable to reinstate Mr. Abou-Mousa until December 2009, for two reasons: (1) "the grievant himself was not lawfully permitted to drive a school bus after his S endorsement card was no longer valid," (District's Post-hearing brief at 12), and (2) the Award could not have required the District to ignore the School Code requirement that the District obtain three background checks from new hires and refrain from employing individuals with certain criminal offenses in their background. The District maintains that there is no reason to believe that Arbitrator Buchheit required the District to hire someone without a background check when the employe may have committed offenses during a period of non-employment. (District's Post-hearing Brief at 14).

The District argues that this case is controlled by the Commonwealth Court's decision in **City of Philadelphia v. PLRB**, 592 A.2d 823 (Pa. Cmwlth. 1991). In that case, the Commonwealth Court concluded that the City did not engage in unfair practices by requiring a City corrections officer to meet the City's height and weight standards as a precondition to the City's reinstating him pursuant to an arbitration award. The officer had been separated from employment for ten months when the award was issued. Under Philadelphia Civil Service Regulation 9.1411, an employe separated from employment for six months or more must submit to a medical examination prior to returning to physically demanding work. If the examining physician does not approve returning to work, reinstatement may be disapproved. The officer exceeded the weight requirement for his height, and the physician did not approve his reinstatement. The City, therefore, refused to reinstate him.

The Court concluded that the duties of a corrections officer were physically demanding and that "[i]t would be absurd for this court to conclude that the City must ignore an applicant's actual physical condition, even obvious physical inability to perform prospective duties, merely because the applicant's reinstatement is directed by an arbitrator. **City of Philadelphia**, 592 A.2d at 826. Accordingly, the Court held that the officer's "reinstatement was properly subjected to the requirement of Regulation 9.1411." **Id.**

The **City of Philadelphia** case, however, is inapposite. In **City of Philadelphia**, the civil service regulation that prevented the City from reinstating the officer until he passed a physical exam applied on the date of the arbitration award because he had

already been separated from his job for more than six months. Here, unlike in **City of Philadelphia**, the law preventing Mr. Abou-Mousa from driving a bus without his S-endorsement did not apply on the date of the Award. On March 19, 2008, Mr. Abou-Mousa was certified to drive a school bus. There was no legal or practical impediment to his reinstatement at that time. Had the District reinstated Mr. Abou-Mousa pursuant to the Award, he would have been legally qualified to drive a school bus and receive the shorter ten-hour recertification training, which can be accomplished in two days. He could have been recertified before March 31, 2008, the date his endorsement lapsed, especially since the District provided the training any time it was necessary for its employees. Thus, the Abou-Mousa reinstatement is unlike the **City of Philadelphia** reinstatement because there was no law or legal requirement that would have prevented or interfered with Mr. Abou-Mousa's reinstatement when the Award was issued.

Moreover, this case is governed by the Commonwealth Court's more recent reasoning in **City of Beaver Falls v. Beaver Falls Police Association**, ___ A.3d ___, 45 PPER 38, 2205 C.D. 2012 (Pa. Cmwlth. 2013), which implicitly overruled **City of Philadelphia**, *supra*. In **Beaver Falls**, a supplemental arbitration award directed the City of Beaver Falls to reinstate a police officer but upheld the separation from employment as a one-year suspension without pay. The award ordered the City to reinstate promptly without loss of seniority. During his separation, the officer's certification by the Municipal Police Officers Education and Training Commission (Commission) lapsed. The City informed the officer that he needed a psychological evaluation before reinstatement. The officer did not pass his psychological evaluation and the police chief informed the Commission. The Commission did not take formal action because the officer was not currently certified or requesting certification. The City eventually notified the grievant that City Council would hold a hearing on whether he was fit for duty and whether he had abandoned his position. The officer elected to return to the arbitrator who retained jurisdiction for compliance. In a supplemental award, the arbitrator concluded that the City did not make a valid offer of reinstatement and reinstated the officer with backpay since the date of the original award. The City argued that the supplemental award was illegal because it directed the City to reinstate the officer and give backpay for the time when he was not certified as a police officer.

The City of Beaver Falls maintained that Section 2167(b) of the Municipal Police Education Training Law (MPETL) made backpay for an uncertified police officer illegal. Judge Brobson, writing for the Court, rejected this argument as follows:

The City appears to argue that Section 2167(b), which prohibits uncertified police officers from being paid "for the performance duties of a police officer," also prohibits an arbitrator (or court for that matter) from awarding damages in the form of back pay to an officer who is presently not certified by the Commission. The City fails to recognize, however, that payment of an award of back pay is not the same as payment "for the performance of duties as a police office." Here, the Arbitrator awarded Grievant back pay to compensate him for damages arising as a result of the City's improper termination of his employment—not "for the performance of duties as a police officer." The City, itself, prevented Grievant from performing police duties when it improperly discharged him from employment. **Moreover, if we were to interpret Section 2167(b) of the MPETL as prohibiting an award of back pay to an individual whose certification lapses during the grievance process, we would effectively limit the type of relief that an arbitrator may award under Act 111. Section 2167(b) of the MPETL has never been interpreted to impose limits on the relief available under Act 111, and we decline to do so today, given that the language of Section 2167(b) is clearly limited to prohibiting a police officer from receiving "salary, compensation or other consideration for the performance of duties as a police officer "and does not in any manner address damages that may be awarded through arbitration.** Thus, we reject the

City's argument that the arbitrator's award of back pay would require the City to perform an illegal act. We agree with Grievant that, because the Arbitrator determined that the City failed to make a valid offer of reinstatement to Grievant, the Arbitrator did not exceed his authority by concluding that the City continued to remain liable to Grievant for back pay.

City of Beaver Falls, Slip Op. at 12-14 (citations omitted) (emphasis added). Clearly, the Commonwealth Court has spoken directly to the issue presented here. In this case, as in **Beaver Falls**, the District did not make a valid offer of reinstatement to Mr. Abou-Mousa. Although there is no supplemental arbitration award ordering backpay for that period, under the rationale of **Beaver Falls**, this Board, as opposed to an arbitrator who retained jurisdiction, is now in the position to determine compliance with the original award and may award backpay for the period the District did not reinstate Mr. Abou-Mousa, as damages and make-whole relief, not as compensation for performance of bus driving duties.

The Court's decision is further buttressed in footnotes six and seven of its opinion. In footnote six, Judge Brobson opined as follows:

[A]n arbitrator's award of "back pay" to any officer, whether the officer is certified or not, would necessarily fall outside the prohibition of Section 2167(b) of the MPETL, because, in both cases, the officer is not being compensated "for the performance of duties as a police officer." Rather, he is receiving damages as a result of the improper actions of his employer.

City of Beaver Falls, Slip Op. at 13 n.6. Judge Brobson's analysis in footnote seven is even more dispositive of the instant matter and provides as follows:

We also note that had the City not improperly terminated Grievant's employment, Grievant would not have been in a situation where his certification lapsed. Furthermore, as the Arbitrator found, had the City reinstated Grievant following the 2009 award or taken steps to allow him to maintain his certification pending reinstatement, his certification also would not have lapsed. **Thus, it is because of the City's improper firing of Grievant and resistance to reinstate him following the 2009 award that Grievant's certification lapsed. The City should not be permitted to benefit financially from its improper termination and subsequent delay.**

City of Beaver Falls, Slip Op. at 14 n.7 (emphasis added).

Here, the District refused to reinstate Mr. Abou-Mousa in March 2008. There is a conflict between the testimony of Mr. Abou-Mousa and Mr. Ferraioli regarding Mr. Abou-Mousa's attempts to return to work which I resolve in favor of Mr. Abou-Mousa. Mr. Abou-Mousa testified that he went to the District on multiple occasions and tried to return to work but District administrators would not discuss his returning to work. This testimony is corroborated by the statements made by the letters from the District's lawyers. In this regard, the District's position in March 2008 was not that Mr. Abou-Mousa was not certified to drive a bus, but that he was not entitled to reinstatement because the Award was being appealed, and was therefore unenforceable.

On March 28, 2008, before Mr. Abou-Mousa's S-endorsement lapsed, the District's attorney wrote to the Union attorney that they have been informed that Mr. Abou-Mousa is attempting to report for work at the District. "Given the fact that the time period to file an appeal from the Arbitrator's decision has not expired, it is our office's position that any resumption of work duties at this state would be premature as there are bona fide appealable issues." (F.F. 14). This letter further stated that "**we . . . would respectfully request that you advise and encourage Mr. Abou-Mousa to not report to work.**" (F.F. 14) (emphasis added). The District, therefore, blocked Mr. Abou-Mousa's reinstatement in March 2008, causing the lapse in his certification.

It was not until April 2008, after Mr. Abou-Mousa's S-endorsement expired that the District took the position that he could not return to work until he became recertified. Mr. Abou-Mousa was not permitted to attend District provided training to maintain his S-endorsement during the period of time that he was terminated, and he could not afford to pay for the training offered at the Intermediate Unit because he was already paying for his own prescription medicine and regular physician visits, both necessary to control his diabetes, due to the lapse in his health insurance. By letter dated April 23, 2008, the District's lawyer wrote the Union's attorney that, due to the lapse in his certification, it appeared to the District that Mr. Abou-Mousa did not want to return to work for the District. (F.F. 19) The letter further provided that "[n]otwithstanding the School District's appeal, Mr. Abou-Mousa's return to driving [a] bus is impeded by the lapse of his certification." (F.F. 19). This position was clearly calculated to place obstacles in the path of Mr. Abou-Mousa's return to work. After recognizing that Mr. Abou-Mousa was attempting to return to work in their March 28, 2008 letter, the District's lawyers on April 23, 2008, disingenuously tried to make it appear that Mr. Abou-Mousa did not want to return to work because his certification lapsed.

Throughout the spring of 2008, the Union repeatedly informed the District's lawyers that Mr. Abou-Mousa intended to return to work and become recertified as soon as possible. The Union also requested training dates. The Union's June 19, 2008 letter to the District's lawyer stated that "he will attend the District's next training session. If the District is refusing to train him, please advise. Otherwise, please notify us of the upcoming training dates." (F.F. 23). Three months later, on October 30, 2008, the District again wrote: "we anticipated that Mr. Abou-Mousa would have applied for the training programs offered by PMSD. This has not happened; Mr. Abou-Mousa has shown no interest in pursuing his employment with the District." (F.F. 24). However, the Union requested training dates as early as June 19, 2008, and the District did not at any time provide those dates so that Mr. Abou-Mousa could attend. On November 18, 2008, the Union's lawyer again requested dates for training and specifically referenced the June 19, 2008 request for training dates, five months earlier. The lawyer stated: "I again ask that you please notify us of the dates of the next available training session. Not until December 9, 2008, did the District's Transportation Director inform Mr. Abou-Mousa of training dates, which the District would not provide until the end of February 2009, another two months later.² The District pushed Mr. Abou-Mousa away under the guise of blaming the delays on Mr. Abou-Mousa for not pursuing his reinstatement.

The District used one pretext after another to delay Mr. Abou-Mousa's reinstatement when it was the District's obligation to reinstate him as a paid trainee, if not reinstated prior to his certification lapse, and get him certified. Mr. Abou-Mousa's certification lapsed due to the District's unlawful termination of his employment and delays in his reinstatement. The policies of PERA cannot be undermined by the District's transparent subterfuges. Too many public employes in the Commonwealth are required to hold some type of certification to perform their job duties. To agree with the District here would undermine many arbitration awards where employes' certifications or licenses have lapsed during the time-consuming grievance arbitration process. Under the Commonwealth Court's recent holding and rationale in **City of Beaver Falls**, loss of Mr. Abou-Mousa's certification, due to his unlawful termination, cannot interfere with the District's obligation to comply with an arbitration award issued under PERA's Article IX mandate. As the Commonwealth Court opined in **City of Beaver Falls**, "if we were to interpret Section 2167(b) of the MPETL as prohibiting an award of back pay to an individual whose certification lapses during the grievance process, **we would effectively limit the type of relief that an arbitrator may award under Act 111.**" **City of Beaver Falls**, 45 PPER at 6 (emphasis added). Similarly, the lapse of Mr. Abou-Mousa's certification as a result of the grievance process cannot limit the relief granted by the Buchheit Award under PERA. Such a limitation would be to place unsanctioned limits on

² Although Mr. Ferraioli testified that orally communicating with Mr. Abou-Mousa through Union President Peechatka was difficult and created an obstacle to returning him to work in the Spring of 2008, I do not credit this testimony. Mr. Ferraioli further stated that he did not attempt to write any letters to Mr. Abou-Mousa. (N.T. 140). As demonstrated by Mr. Aul's letter of December 9, 2008, communication with Mr. Abou-Mousa by written letters proved to be simple and effective.

PERA itself. In most cases, employers pay for continuing certification and education because it is too expensive for the average employe to maintain and pay for on their own. Losing the job, by its very nature, often means losing the certification. Arbitration awards reinstating employes cannot be limited or compromised by lost or lapsed licensing and certification requirements that would not have been lost but for the employer's unlawful conduct. **City of Beaver Falls, supra.**

The District's proffered excuses for delaying Mr. Abou-Mousa's reinstatement were not lawful impediments to reinstatement. They were pretextual obstacles artificially calculated to delay reinstatement. The delays were an attempt to foreclose the backpay liability that would have accrued if they had simply refused to reinstate Mr. Abou-Mousa pending the exhaustion of the appeals of the Award and they were an attempt to cause Mr. Abou-Mousa to abandon his efforts to become reinstated. Once the Award was issued, it was the District's obligation to validly reinstate him and not invent obstacles requiring him to expend effort and time to achieve reinstatement.

Mr. Abou-Mousa successfully completed his recertification requirements in time for the 2009-2010 school year. At no time from March 2008 until August 2009, after all the delays and the communications between Mr. Ferraioli and Union President Peechatka, and between the parties' attorneys, did the District mention that a new round of background checks would be required for Mr. Abou-Mousa. Raising the issue for the first time two weeks before school began was yet another delay tactic. If the District had been exercising good faith instead of playing the games of delay and gotcha, they would have raised the issue of background checks at the same time as they raised the issue of the S-endorsement, in April 2008. They did not. The inference to be drawn is that both the S-endorsement and the Background checks were pretexts to delay Mr. Abou-Mousa's reinstatement and limit the District's backpay liability.

With respect to the background checks, Mr. Abou-Mousa completed background checks when he was originally hired in 1997. At no time since his original hire date did the District require him to resubmit to background checks, even though the August 19, 2009 letter inexplicably states that they are required every year. Section 111 of the School Code, as it existed in 2008 and 2009, required background checks on **prospective employes only**, not current employes. Mr. Abou-Mousa was reinstated by the Arbitrator with full seniority. Full seniority means that Mr. Abou-Mousa should be treated, for purposes of pay, benefits and reinstatement, as if he was never separated from the District. The Arbitrator did not intend for the District to treat Mr. Abou-Mousa as a new hire subject to the three background check requirements of Section 111. Although the District introduced evidence that it has a practice of requiring background checks for employes who have been separated for two years or more, such a practice cannot override an arbitrator's award ordering immediate reinstatement with full seniority, where the law does not require the background check.³ Although the District maintains that the Award should not be interpreted as ignoring a law that protects our school children from criminals, the Award did not ignore the law; rather it complied with the law and its policies at the time. Mr. Abou-Mousa was simply not a new hire, especially when the Award preserved his seniority from 1997 through 2008. A new hire does not have eleven years of seniority. Mr. Abou-Mousa is an Egyptian immigrant who did not have a computer or the resources to obtain background checks online like some others. For the District to wait until two weeks before school started in August 2009 to even mention the background checks was a patent attempt to delay his reinstatement in violation of the Award.

Moreover, had the District reinstated Mr. Abou-Mousa in March 2008 when he was reinstated by Arbitrator Buchheit, even the District's own two-year rule would not have been triggered and a background check would have been deemed unnecessary. The District must not invoke a self-serving practice, not sanctioned by law, to override the directive of an arbitration award. Prior to the 2011 amendments to the School Code, there was no legal requirement to perform background checks on current, and therefore reinstated

³ Given my conclusion that the District's practice is not a legitimate basis for requiring a background check in contravention to the reinstatement order of the Award, I need not consider the parties' post-hearing submissions, which I have marked for identification purposes as Association Exhibit 9 and Employer Exhibits B, C, D, E and F. The evidence and the parties' arguments pertaining to them are not relevant.

employees. Repeating the rationale of **City of Beaver Falls** is appropriate here again. Just like the lapse of Mr. Abou-Mousa's certification as a result of the grievance process cannot limit the relief granted by the Buchheit Award under PERA, the grievance process itself should not be used as a sword by employers to delay reinstatement by requiring background checks where such is not required by law. **City of Beaver Falls, supra.**⁴

Accordingly, the District owes Mr. Abou-Mousa backpay from March 2008, because the lapse in his S-endorsement was caused by the District's unlawful termination of his employment and refusal to provide the required training during his separation. Furthermore, neither the law nor the Arbitrator even suggested treating Mr. Abou-Mousa as a new hire subject to background checks, which the District failed to mention for almost a year and a half. Mr. Abou-Mousa will be placed on Step 9 of the pay scale, where he was when he was terminated, as of March 19, 2008. He must therefore be made whole for all wages lost as a result of his not being reinstated until December 2009, and the difference in the wages earned and the wages he should have earned since December 2009, as well as any and all out-of-pocket medical, dental, optical, physician and prescriptions expenses and expenses for background checks.

CONCLUSIONS

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

1. The Pocono Mountain School District is a public employer within the meaning of Section 301(1) of PERA.
2. The Pocono Mountain Education Support Professionals, PSEA/NEA is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has committed unfair practices in violation of Section 1201(a)(1), (5) and (8) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Pocono Mountain School District shall

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under Section 903 of Article IX of PERA.
4. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

⁴ A different result may obtain for post-2011 reinstatement awards because the 2011 amendments to Section 111 apply to current employes. However, a school district should not wait a year and half to request the background checks.

- (a) Immediately pay Hussein Abou-Mousa and make him whole for all lost wages and benefits that he would have earned from March 19, 2008 to December 10, 2009, including but not limited to wage increases received by the bargaining unit during the backpay period, seniority, out of pocket dental, medical and optical expenses, for himself and responsible family members, holiday pay and accrued sick and vacation time as well as background check expenses.
- (b) Immediately place Mr. Abou-Mousa at Step 9 for the 2007-2008 school year, effective March 19, 2008 at the hourly rate of \$15.43/hour for the remainder of the 2007-2008 school year and pay him the amount of money he would have earned at that rate of pay for the remainder of that school year.
- (c) Immediately place Mr. Abou-Mousa on Step 10 for the 2008-2009 school year at the rate of \$16.12/hour for that entire school year and pay him the amount of money he would have earned at that rate of pay for the that entire school year.
- (d) Immediately place Mr. Abou-Mousa on Step 11 for the 2009-2010 school year at the rate of \$16.87/hour for fall semester of that school year and pay him the amount of money he would have earned at that rate of pay for the fall semester of that school year.
- (e) Immediately pay Mr. Abou-Mousa the difference between the money he was paid at step 10 for the spring semester of the 2009-2010 school year at 16.58/hour and what he would have earned at step 11 for the 2009-2010 school year at \$16.87/hour for the spring semester.
- (f) Immediately pay Mr. Abou-Mousa the difference between the money he was paid at step 11 for the 2010-2011 school year at 17.58/hour and what he would have earned at step 12 for the 2010-2011 school year at \$17.87/hour for that entire year.
- (g) Immediately pay Mr. Abou-Mousa the difference between the money he was paid at step 12 for the 2011-2012 school year at 18.38/hour and what he would have earned at step 13 for the 2011-2012 school year at \$18.67/hour for that entire year.
- (h) Immediately pay Mr. Abou-Mousa the difference between the money he was paid at step 13 for the 2012-2013 school year at 19.18/hour and what he would have earned at step 14 for that year at \$19.47/hour for that entire year.
- (i) Immediately pay Mr. Abou-Mousa the difference between the money he was paid at step 14 for the 2013-2014 school year at 19.98/hour and what he would have earned at step 15 for that year from the beginning of school until he receives payment at \$20.27/hour for that period of time.
- (j) Immediately place Mr. Abou-Mousa on Step 15 of the pay scale for bus drivers in the current collective bargaining agreement.
- (k) Immediately reimburse Mr. Abou-Mousa for out-of-pocket expenses due to lost insurance coverage in the amount of \$1,527.00.
- (l) Immediately give Mr. Abou-Mousa ten vacation days, ten sick days and three personal days.
- (m) Immediately pay interest at the simple rate of six percent per annum on any and all backpay and reimbursements due Mr. Abou-Mousa.

- (n) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
- (o) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fifth day of October 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

POCONO MOUNTAIN EDUCATION
SUPPORT PROFESSIONALS PSEA/NEA

v.

POCONO MOUNTAIN SCHOOL DISTRICT

:
:
:
: CASE NO. PERA-C-12-94-E
:
:
:
:

AFFIDAVIT OF COMPLIANCE

The Pocono Mountain School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1), (5) and (8) of the Public Employe Relations Act; that it has paid Hussein Abou-Mousa and make him whole for all lost wages, out-of-pocket expenses and benefits in the manner directed and prescribed in the attached Order, including but not limited to wage increases received by the bargaining unit during the backpay period, seniority, out of pocket dental, medical and optical expenses, for himself and responsible family members, holiday pay and accrued sick and vacation time as well as background-check expenses; that it has placed Mr. Abou-Mousa on Step 15 of the pay scale for bus drivers in the current collective bargaining agreement for the 2013-2014 school year; that it has reimbursed Mr. Abou-Mousa for out-of-pocket expenses due to lost insurance coverage in the amount of \$1,527.00 plus expenses for responsible family members; that it has given Mr. Abou-Mousa ten vacation days, ten sick days and three personal days that it has paid interest at the simple rate of six percent per annum on any and all backpay due Mr. Abou-Mousa and his out-of-pocket expenses; that it has posted a copy of the decision and order as directed therein; and that it has served a copy of this affidavit on the Union 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