

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MONTGOMERY AREA EDUCATION :
ASSOCIATION, PSEA/NEA :
 :
v. : Case No. PERA-C-14-43-E
 :
MONTGOMERY AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On February 10, 2014, the Montgomery Area Education Association, PSEA/NEA (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Montgomery Area School District (District or Employer), alleging that the District violated Section 1201(a)(5) of the Public Employee Relations Act (PERA or Act) by refusing to participate in arbitration of a grievance filed on behalf of an individual bargaining unit member.

On February 24, 2014, the District filed a Petition for Stay, alleging that the District had filed a complaint sounding in declaratory judgment with the Lycoming County Court of Common Pleas on January 23, 2014 and requesting the Board to stay the unfair practices proceedings until resolution of that complaint. On February 25, 2014, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating April 2, 2014, in Harrisburg as the time and place of hearing, if necessary.

On March 6, 2014, the Association filed an Answer to the District's Petition for Stay, opposing the request. On March 12, 2014, I denied the District's Petition for Stay. On March 14, 2014, the District filed an Answer to Complaint and New Matter.

The hearing was necessary and was held as scheduled on April 2, 2014, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief on April 30, 2014, while the District filed its post-hearing brief on May 1, 2014. The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Montgomery Area School District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9-10)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 10)
3. The Association filed a grievance on behalf of a bargaining unit member on November 13, 2013. (Association Exhibit 4)
4. The member of the professional bargaining unit received an unsatisfactory performance evaluation and improvement plan on or about November 8, 2013. (Association Exhibits 2 & 3)
5. The grievance was denied by Principal Michael Prowant on November 18, 2013 and by Superintendent Daphne Bowers on November 22, 2013. (Association Exhibit 4)
6. On December 5, 2013, the Association requested that the grievance be moved to Level Three, a hearing with the School Board. On December 16, 2013, the Board of School Directors denied the request for a Level Three hearing and averred that unsatisfactory performance evaluations are not subject to the grievance procedure. (Association Exhibit 4)

7. By letter dated January 24, 2014, the Association's counsel suggested to the District's counsel a number of arbitrators who be agreeable to the Association to hear and decide the grievance. (Association Exhibit 5)
8. By letter dated February 4, 2014, the District's counsel informed the Association's counsel that the District would not participate in arbitration, asserting that matters concerning teacher evaluations are not proper subjects for grievance arbitration under the collective bargaining agreement. (Association Exhibit 6)
9. The collective bargaining agreement in effect between the parties covers the period of July 1, 2011 through June 30, 2015 and contains the following relevant provisions:

ARTICLE I

RECOGNITION

Section 1.01 The Montgomery Area Education Association hereinafter called the Association, is hereby recognized by the Board of Directors of the Montgomery Area School District, Penn Street, Montgomery Pennsylvania, 17752, hereinafter called the School District, as the bargaining agent for the full-time professional employees identified in the bargaining unit under the conditions of Pennsylvania Law (Act 88) providing for collective bargaining for public employees.

ARTICLE 4

SAVINGS CLAUSE

In the adoption of this agreement, the parties agree that nothing contained herein is intended to be construed so as to delegate or limit the powers, duties, discretions and responsibilities of the board of school directors as prescribed (sic) the school laws of Pennsylvania. If any provision of this agreement, or any application of this agreement shall be found contrary to law, such provision or application shall have effect only to the extent permitted by law.

Nothing contained therein shall be construed to deny or restrict any employee rights presently in effect under School Board rulings or the School Laws of Pennsylvania and such rights shall continue to be applicable during the term of this agreement.

ARTICLE 5

GENERAL PROVISIONS

Section 5.07 Just Cause: No professional employee shall be reduced in rank or compensation without sufficient cause as defined in the Public School Code. All information forming the basis of any disciplinary action shall be made available to the professional employee.

ARTICLE 16

GRIEVANCE PROCEDURE

Section 16.01 Definitions

Grievance: A grievance shall mean a complaint made by a member or members of the bargaining unit or by the Association which involves the interpretation or application of the terms of this agreement.

Grievant: A grievant is a member (or members) having a grievance.

Days: Days shall mean working school days, as per contract.

. . .

Level Four: The Association, if not satisfied with the decision of the Board, may request that the grievance be submitted to arbitration, if done so within thirty (30) days of the level three decision. Within five (5) days of the request, the Board and the Association will attempt to agree upon a mutually acceptable arbitrator and shall obtain commitment from said arbitrator to serve. If the Board and the Association are unable to agree upon an arbitrator or to obtain such a commitment within five (5) days, a request for a list of arbitrators shall be made to the Bureau of Mediation. An arbitrator shall then be selected by striking names until one name remains according to the terms of Section 903 of Act 195. If the selected arbitrator cannot or does not serve within fifteen (15) days of his notification, the last arbitrator stricken from the list may be notified to serve, if mutually agreed upon by both parties.

(Association Exhibit 1)

10. The District filed a declaratory judgment action in the Court of Common Pleas of Lycoming County, Pennsylvania, on or about January 23, 2014, seeking a declaration from the Court of Common Pleas that the grievance as submitted was not arbitrable and that the District was not required to engage in arbitration to address the issue raised in the grievance, i.e., an unsatisfactory evaluation. (Association Exhibit 7)
11. On April 7, 2014, the Lycoming County Court of Common Pleas issued an Opinion and Order, sustaining the preliminary objections of the Association to jurisdiction and dismissing the District's complaint. (See Lycoming County Court of Common Pleas, Civil Action No. 14-00,185)
12. Aside from the instant teacher, no other member of the professional bargaining unit has contacted the Association seeking to grieve an unsatisfactory evaluation. (N.T. 60)

DISCUSSION

In its charge, the Association alleged that the District violated Section 1201(a) (5) of the Act by refusing to participate in arbitration of a grievance filed on behalf of one of the Association's members and by seeking to enjoin the arbitration process through a declaratory judgment action filed in the Lycoming County Court of Common Pleas. The District, meanwhile, contends that it had a sound arguable basis for its refusal to arbitrate, as disputes regarding teacher evaluations are not the proper subject of grievance arbitration under the collective bargaining agreement. The District further contends that the parties have a longstanding past practice of treating evaluations as not being the proper subject of grievance proceedings, which is a defense to the unfair practices charge.

Section 903 of the Act provides, in pertinent part, as follows:

Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final step shall provide for a binding decision by an arbitrator or a tri-partite board of arbitrators as the parties may agree. Any decisions of the arbitrator or arbitrators requiring legislation will only be effective if such legislation is enacted...

43 P.S. § 1101.903.

It is well settled that the question of the scope of the grievance arbitration procedure is for the arbitrator, at least in the first instance. **PLRB v. Bald Eagle Area School District**, 451 A.2d 671 (Pa. 1982). The Commonwealth Court has repeatedly noted how the Supreme Court in **Bald Eagle** interpreted Section 903 of the Act to mean that an arbitrator has sole and exclusive jurisdiction to hear disputes related to collective bargaining agreements, including disputes of whether a matter is arbitrable. **Abington Heights School District v. PLRB**, 709 A.2d 990 (Pa. Cmwlth. 1998); **Chester Upland School District v. McLaughlin**, 655 A.2d 621 (Pa. Cmwlth. 1995). Even frivolous grievances must be submitted to the arbitrator. **Palmerton Area Education Ass'n, PSEA/NEA v. Palmerton Area School District**, 41 PPER ¶ 153 (Proposed Decision and Order, 2010) citing **Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh**, 391 A.2d 1318 (Pa. Cmwlth. 1978). Refusal to submit a grievance to arbitration constitutes a per se bargaining violation. **Indiana Area Education Ass'n, PSEA/NEA v. Indiana Area School District**, 35 PPER ¶ 56 (Final Order, 2004). To permit the employer to unilaterally refuse to submit a dispute to arbitration would in effect allow the employer's interpretation to control. **East Pennsboro Area School District v. PLRB**, 467 A.2d 1356 (Pa. Cmwlth. 1983). Where a school district's defense, based on the language contained in a collective bargaining agreement, is an averment that the dispute is not covered by the contract, the district clearly raises the issue of arbitrability and the district's refusal to submit the question of arbitrability to the arbitrator in the first instance constitutes an unfair practice under PERA. **Indiana Area School District, supra**.

In this case, the record shows that the Association filed a grievance, which it processed through the steps contained in the parties' collective bargaining agreement. The District denied the grievance at each step, asserting that unsatisfactory evaluations are not subject to the grievance procedure. The Association then requested arbitration and even suggested several arbitrators to hear and decide the matter. Once again, however, the District refused to submit the grievance to arbitration, claiming that evaluations are not the proper subject for grievance arbitration. As a result, the District clearly violated Section 1201(a)(5) of the Act. As previously set forth above, the District cannot refuse to submit the dispute to arbitration, but rather must first present its argument regarding arbitrability to a labor arbitrator for decision.

The District contends that it did not violate the Act because it had a sound arguable basis for its refusal to arbitrate based on language contained in the contract. Specifically, the District points out that the collective bargaining agreement defines a grievance as a "complaint made by a member or members of the bargaining unit or by the Association which involves the interpretation or application of the terms of this agreement." See District's brief at p. 7. The District states that the sufficient cause standard of the Just Cause provision applies only to reductions in rank or compensation, as the contract does not mention evaluations at all. The District, in turn, posits that because the agreement did not make evaluations subject to the sufficient cause standard, a grievance regarding an evaluation is not cognizable under the agreement in the absence of a reduction in rank or compensation. Thus, the District concludes that any disagreement as to any evaluation would not be a dispute involving the interpretation or application of the terms of the collective bargaining agreement.

The Board has adopted the sound arguable basis or contractual privilege defense to a claimed refusal to bargain, which calls for the dismissal of a charge when the employer establishes a sound arguable basis in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible, i.e. contractually privileged under the terms of that agreement. **Temple University Hospital Nurses Ass'n et. al. v. Temple University Health System**, 41 PPER ¶ 3 (Final Order, 2010). Where the employer asserts a contractual right to change a mandatory subject of bargaining, as the District asserts here, it must point to specific, agreed-upon contract language which arguably indicates the union expressly and intentionally authorized the employer to take the precise unilateral action at issue. *Id.* citing **Port Authority Transit Police Ass'n v. Port Authority of Allegheny County**, 39 PPER 147 (Final Order, 2008). The Board has required that a waiver of right must be clear, express and unequivocal. **In the Matter of Employes of Chambersburg Area School District**, 20 PPER ¶ 20149 (Final Order, 1989) citing **Commonwealth (Venango County Board of Assistance) v. PLRB**, 459 A.2d 452 (Pa. Cmwlth. 1983).

The District's sound arguable basis or contractual privilege argument is without merit. Indeed, the contract is completely devoid of any language whatsoever indicating that the Association expressly and intentionally authorized the District to refuse to submit grievances to arbitration. In fact, the contract does not contain any language which could even purport to be a waiver, much less the clear, express and unequivocal waiver required by the Board's precedent. The District's contention that the contract's definition of the term "grievance," combined with the "reduction in rank or compensation" language found in the Just Cause provision, falls woefully short of being a clear, express, and unequivocal waiver. What is more, the Board has specifically held that the sound arguable basis defense is inapplicable to a charge of refusal to process a grievance. **Teamsters Local 776 v. Susquehanna Township School District**, 45 PPER 95 (Final Order, 2014). To be sure, the Board in that case expressly noted that the District's reliance on a sound arguable basis defense ignores the underlying rationale of such a defense, i.e., that the dispute involves contract interpretation and thus should be presented to an arbitrator rather than the Board. *Id.* Accordingly, the District's argument in this regard is rejected.

In addition, the District maintains that the parties have a longstanding past practice of treating evaluations as not being the proper subject of grievance proceedings, which is a defense to the unfair practices charge. In **Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre**, 33 PPER ¶ 33087 (Final Order, 2002), the Board noted that it has consistently applied the definition of past practice adopted by the Pennsylvania Supreme Court in **County of Allegheny v. Allegheny County Prison Employees Independent Union**, 381 A.2d 849 (Pa. 1978) and stated as follows:

[A] custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to underlying circumstances presented. *Id.* quoting **County of Allegheny**, at 852, n. 12. In **Ellwood City Police Wage and Policy Unit v. Ellwood City**, 29 PPER ¶ 29214 (Final Order, 1998), *aff'd*, 731 A.2d 670 (Pa. Cmwlth. 1999), the Board stated that '[t]he definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances.' *Id.* at 507. In **Pennsylvania Liquor Control Board Officers III v. Pennsylvania State Police, Bureau of Liquor Control Enforcement**, 24 PPER ¶ 24171 (Final Order, 1993), the Board held that, where evidence of past practice revealed a divergent application of a seniority system in selecting vacation periods, there was no past practice.

In this case, the record shows that aside from the instant teacher, no other member of the professional bargaining unit has contacted the Association seeking to grieve an unsatisfactory performance. As such, it cannot be seriously argued that the parties have an accepted course of conduct characteristically repeated in response to a professional employe filing a grievance over an unsatisfactory performance. If the situation has never arisen, then the parties certainly have not developed a history of similar responses or reactions to a recurring set of circumstances. As a result, the District's argument in this regard is also rejected.

CONCLUSIONS

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

1. The District is a public employer within the meaning of Section 301(1) of PERA.

2. The Association 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) (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall

1. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in an appropriate unit, including but not limited to discussing of grievances with the exclusive representative.
2. Cease and desist from refusing to submit Grievance No. 01-2013 to arbitration;
3. Take the following affirmative action:
 - (a) Submit to the Association in writing an offer to arbitrate Grievance No. 01-2013;
 - (b) Submit Grievance No. 01-2013 for arbitration in accordance with the process contained in Article 16 of the parties' collective bargaining agreement by either mutually selecting an arbitrator or striking names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation until an arbitrator is selected to hear Grievance No. 01-2013; and
 - (c) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (d) 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.
 - (e) Serve a copy of the attached Affidavit of Compliance upon the Union.

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 eleventh day of June, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MONTGOMERY AREA EDUCATION
ASSOCIATION, PSEA/NEA

v.

MONTGOMERY AREA SCHOOL DISTRICT

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Case No. PERA-C-14-43-E

AFFIDAVIT OF COMPLIANCE

The Montgomery Area School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed 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