COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATION ASSOCIATION	:	
v.	:	CASE NO. PERA-C-11-221-E
ABINGTON HEIGHTS SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On July 21, 2011, the Abington Heights Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Abington Heights School District (District or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by openly discussing unlitigated grievances and unfair practice charges filed by the Association at school board meetings before the press and the public. The Union alleges that the Superintendent's behavior violated the parties' grievance procedure, past practices and had a chilling effect on bargaining unit members who would be afraid to file grievances if they believed their complaints would be publicly aired.

On July 27, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on December 16, 2011, in Harrisburg. After several granted continuance requests, a hearing was held on October 10, 2012. During the hearing on that date, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. On January 24, 2013, the Union filed its post-hearing brief. On March 11, 2013, the District filed its post-hearing brief.

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. 8)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)

3. Article XL of the party's collective bargaining agreement (CBA) contains a grievance procedure. The grievance procedure does not contain language related to the disclosure to the school board of grievances or unfair practices filed by the Union at public school board meetings before members of the press and/or the public. (N.T. 106; Joint Exhibit 1, Article XL)

4. Grievances are filed first with the building principal, then the Superintendent, then the school board. (N.T. 18-19; Joint Exhibit 1, Article XL)

5. Dr. Michael Mahon is the Superintendent of the District. (N.T. 136-137)

6. Marcelle Genovese is the Union's Executive Secretary. (N.T. 15)

7. At a school board meeting in April 2011, Tom Brogan, former grievance chair of the Union, was critical of the District's handling of grievances and the amount of money spent handling grievances. (N.T. 138-139)

8. Grievances and unfair practices potentially impact the health safety and welfare of students of the District or impact District finances and taxpayer dollars. (N.T. 142-144)

9. Dr. Mahon publicly discussed grievances in May 2011, and thereafter, to answer allegations by Tom Brogan and Marcelle Genovese that the District was wasting money fighting grievances and that the District was violating the CBA and the law. (N.T. 146)

10. Dr. Mahon intended to bring the actual grievances to the public and the school board to allow the school board and the public to draw their own conclusions regarding the District's position on fighting those grievances based on the documents themselves. (N.T. 149-150)

11. Dr. Mahon was confident about his position on the issues and wanted the school board and the public to conclude that, based on the documents, the Union was mischaracterizing his handling of the grievances. (N.T. 149-150)

12. At the May 2011 school board meeting, Dr. Mahon stated his intention to bring the grievances to the public school board meetings and Ms. Genovese agreed that he should bring them. (N.T. 150-152)

13. At the June 1, 2011 school board meeting, Dr. Mahon discussed the District's Mandarin Chinese language program. He openly disclosed that the Union filed a grievance about the program and that the District tried to settle the grievance but the Union rejected the District's settlement terms. Dr. Mahon did not state that the Union would have agreed if the District agreed to hire a bargaining unit employe for the third year of the Mandarin Chinese language program. (N.T. 28-33)

14. At the June 22, 2011 school board meeting, Ms. Genovese publicly announced that the District spent money fighting forty-nine grievances and won only two. Ms. Genovese discussed grievances publicly at that school board meeting. She discussed two grievances in detail that were filed and not yet arbitrated. (N.T. 108-109, 122, 125-126, 129)

15. Also at the June 22, 2011 school board meeting, Dr. Mahon made a statement about the unfair practice charge filed by the Union alleging that the District unilaterally transferred bargaining unit work to the Mandarin Chinese language program, which was being taught by a non-unit teacher. (N.T. 41)

16. The elimination of the Mandarin Chinese language program affected the students already in the program, future students who wished to participate in the program and the District. So Dr. Mahon felt the need to disclose the unfair practice charge to the public. Dr. Mahon credibly testified that he did not publicly mischaracterize the Mandarin Chinese grievance or Unfair Practice charge. His intent was to respond to the Union's allegations and to correct his perceived mischaracterizations by the Union. (N.T. 158-159)

17. Also at the June 22, 2011 school board meeting, Dr. Mahon read a letter, from the Executive Director of the Pennsylvania Council for International Education (PaCIE) addressed to the World Languages Coordinator at the District, congratulating the District on its Asian Studies program and awarding the District the 2011 "Bringing the World to Pennsylvania K-16 Collaboration Award." (N.T. 46; Association Exhibit 2, Pg. 4)

18. At the same school board meeting, Dr. Mahon also mentioned several grievances including a grievance regarding a teacher's unsatisfactory rating, which the Union withdrew because the teacher resigned from the District. The actual grievances are included in the school board meeting minutes for June 22, 2011, which were posted on the District's website. (N.T. 48-49; Association Exhibit 2, Pgs. 5-7).

19. One of the grievances discussed at the June 22, 2011 school board meeting was Grievance No. 10:07 regarding teacher planning time. This grievance had progressed through step three of the grievance procedure (i.e., the school board level) when it was withdrawn. (N.T. 50-52; Association Exhibit 2, pg. 6)

20. Ms. Genovese came to the June 22, 2011 school board meeting prepared with a binder to openly discuss grievances. She openly discussed in detail two unlitigated grievances. (N.T. 151-152)

21. On June 23, 2011, Ms. Genovese emailed Dr. Mahon stating that the Union did not give him permission to discuss grievances and arbitrations at school board meetings. (N.T. 56, 122, 163-164, 186; Association Exhibit 4)

22. At the July 20, 2011 school board meeting, Dr. Mahon discussed Grievance No 10:06, which had already been considered by the school board at step 3 of the grievance procedure. The grievance related to teacher's administering medicine rather than only the school nurse. On July 21, 2011, the Union filed the instant unfair practice charge. (N.T. 65-66)

23. At the August 17, 2011 public school board meeting, Dr. Mahon discussed the unfair practice that the Union filed with the Board regarding the Mandarin Chinese language program, which pre-dated the Hearing Examiner's ruling on the charge. He also discussed Grievance No. 10:03 regarding mentor pay and his understanding that the grievance procedure does not forbid public discussion of grievances. (N.T. 76-80; Association Exhibit 7, Pg. 2)

24. At the September 21, 2011 public school board meeting, Dr. Mahon discussed Grievance No. 10:03 regarding the elimination of a one-half-year vacancy. This grievance was withdrawn after the school board considered it at step three of the grievance procedure. (N.T. 80-81)

25. At a public work shop session of the school board on October 5, 2011, Dr. Mahon discussed two grievances. One grievance

related to the administration of Benadryl to a student and the other related to restraint training. (N.T. 92-93

26. At the January 18, 2012 public school board meeting, Dr. Mahon discussed Grievance No. 9:04. (N.T. 82)

27. During the nine years, at the time of the hearing, that Dr. Mahon had been Superintendent, he had discussed grievances at public school board meetings approximately five or six times, prior to May 2011. (N.T. 144-145)

31. The District has not breached employe confidentiality in the discussion of grievances in public. The District redacts names and does not disclose grievances of a personal or disciplinary nature. The District only discusses grievances that affect the District and/or its finances. (N.T. 156)

32. After publicly showing the school board members the forty-nine grievances, none of them were unhappy with the Mahon administration's handling of those grievances. (N.T. 162-163)

DISCUSSION

The Union argues that the District violated PERA by unilaterally discontinuing a longstanding past practice of keeping grievances and unfair practice charges strictly confidential and outside the purview of the public and the press. (Union's Post-hearing Brief at 1). The Union further contends that the District's public disclosure of grievances and unfair practices repudiates the parties' grievance procedure and has a coercive impact on the exercise of employe rights under PERA. (Union's Post-hearing Brief at 1-2).

The Union correctly explains that an employer must bargain a change in a past practice regarding a mandatory subject of bargaining and that issues regarding grievances and grievance procedures are mandatory subjects of bargaining. However, the Union in this case has unsuccessfully attempted to prove a negative, i.e., that the absence of conduct, in the absence of contract language prohibiting the conduct, constitutes an affirmative past practice in violation of the grievance procedure. I disagree that the nonexistence of behavior became a past practice and part of the contractual grievance procedure.

The Supreme Court of Pennsylvania has adopted the following definition of a past practice:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by [m]anagement or the employees on one or more occasions. A custom or a practice is a usage evolved by [individuals] 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 [individuals] involved as the ***normal*** and *proper* response to underlying circumstances presented.

County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 34 n. 12, 381 A.2d 849, 852 n.12 (1977) (emphasis original and added). 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." Ellwood City, 29 PPER at 507. "The Board has also opined that the nature of the underlying circumstances[ ] ... governs the frequency and character of an employer's response to those circumstances." Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087, 193 (Final Order, 2002).

This record shows that the Superintendent publicly disclosed grievances at school board meetings five or six times over a nine-year period. The record, however, does not establish that the lack of public disclosure was an affirmative response to a specific set of circumstances that supplemented the contractual grievance procedure and became part of the parties' expectations. The cases cited by the Union in its post-hearing brief involved changes to established affirmative practices or procedures engaged in by the parties where the contractual grievance procedure was silent as to those practices. Although the contractual grievance procedure in this case is also silent regarding the public disclosure of grievance and unfair practice documents filed by the Union, the lack of such a practice cannot be deemed "a history of similar responses or reactions to a recurring set of circumstances." Ellwood City, 29 PPER at 507. In other words, the lack of a procedure or practice, without an agreement, cannot be deemed an established procedure or practice, as the Union is attempting to argue here.

The Union distinguishes between litigated and unlitigated grievances. The Union contends that the steps of the grievance procedure provide for the filing of grievances at the first step with the building principal, then at the second step with the Superintendent and then with the school board, at the third step. Consequently, argues the Union, there is a contractual requirement that only the people listed in the grievance procedure view the grievance. (Union's Post-hearing Brief at 14-17,22). However, the plain meaning of the language contained in the contractual grievance procedure is to identify the District administrators (including the board) with whom to file a grievance for review, decision and potential disposition (as much as three different times) before a neutral arbitrator decides the grievance. By identifying those individuals with the power to settle, agree to or otherwise dispose of the grievance, the contract does not limit disclosure of the grievance to those individuals. This argument also fails when considering the numerous administrators, students, teachers, parents and Union officials who may be consulted when investigating and deciding upon a given grievance, throughout the various steps.

Moreover, the Union distinguishes between unlitigated and litigated grievances by offering that grievance arbitration awards are published and unlitigated grievances are not subject to the right-to-know law. (Union's Post-hearing Brief at 23). Therefore, litigated grievances are subject to public disclosure but unlitigated grievances are not. This is a distinction without a difference because every unlitigated grievance has the potential to be arbitrated and published.

The prospect of public disclosure after arbitration does not generally influence settlements or withdrawals of grievances or have a chilling effect on the filing of grievances. Therefore, the public disclosure of such information earlier in the process should have no effect on filings either.

The Union also claims that grievances address sensitive workplace issues and often disclose personal, confidential and potentially embarrassing information about employes and their families. However, the record in this case does not establish that those types of grievances or personal information were ever disclosed at a public meeting by Dr. Mahon. The record shows that personal information is redacted and disciplinary grievances are not disclosed. Additionally, arbitration awards dealing with such confidential or sensitive personal information would be subject to such disclosure notwithstanding.

The Union also complains that the District violated a past practice of keeping unlitigated unfair practice charges confidential. (Post-hearing Brief at 19). However, unfair practice charges are not confidential by their very nature. Documents filed with the Board are subject to public audit and right-to-know requests ab initio whether they are pending litigation or have been litigated through to a proposed order or a final order, both of which are published documents.

The Union further contends that the Superintendent's public discussion of unlitigated grievances was coercive and independently violated Section 1201(a)(1) of PERA. An independent violation of Section 1201(a)(1) occurs, "where in light of the totality of the circumstances, the employer's actions has a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 at 404 (Final Order, 2001); Northwest Area Educ. Ass'n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). Under this standard, the complainant does not have a burden to show improper motive or that any employes have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER 26155 (Final Order, 1995).

The Union argues that this case is analogous to Police Benevolent Association of Wilkes-Barre v. City of Wilkes-Barre, 23 PPER ¶ 23221 (Proposed Decision and Order, 1992). In Wilkes-Barre, Hearing Examiner Leonard concluded that the City engaged in unfair labor practices when it issued a press release and advertised in a local newspaper explaining that the City was cancelling refuse services on Good Friday because of a grievance filed by the police association seeking overtime pay for that day consistent with such benefits given to other City employes. The City defended the charge stating that its actions were consistent with prior Board decisions allowing public officials to communicate with the public concerning labor relations and about the cause for the reduction of public services. The City of Wilkes-Barre argued that it would have incurred additional costs by providing the refuse collection services on Good Friday if the police association enforced its contractual right to overtime pay for that holiday. Examiner Leonard concluded that "by blaming the City's exposure for

additional liability and the decision to curtail services on the grievance, the City unfairly places the union in a bad light not only to its own members but to the public as a whole." City of Wilkes-Barre, 23 PPER at 556.

However, I find the instant case distinguishable on the facts. Indeed, the board has held that "the parties to the bargaining process possess ordinary rights of free speech and that the parties have the right to communicate to the media regarding matters involved in collective bargaining." Southeast Delco Education Association v. Southeast Delco School District, 27 PPER ¶ 27258 at 584 (Final Order, 1996). The Board, in Southeast Delco, further concluded that, even where the public employer's broadcast of salary information was allegedly "factually inadequate" or "unbalanced," and where the union did not have the same level of media access, the employer acted within its ordinary rights of free speech. Id.

In PLRB v. City of Easton, 9 PPER ¶ 9109 (Nisi Decision and Order, 1978), the Mayor of the City of Easton, allegedly made a statement attributed to him that was placed in a local newspaper. The statement indicated that layoffs could result if an interest arbitration award awarded more than 6% increases to the City's firefighters. The statement was during contract negotiations while the parties were in the process of selecting their neutral arbitrator. The union, in City of Easton, claimed that the Mayor's alleged statement intimidated and coerced firefighters and evidenced a take-it-or-leave-it approach to bargaining. The Board opined as follows: "As a public official in the midst of contract negotiations it is not unusual and may in fact be his responsibility to keep the public informed as to the progress at the bargaining table." City of Easton, 9 PPER at 229 (emphasis added). The Board held that the statements attributed to the Mayor were "nothing more than an expression of one of the avenues left available to [the City]." Id.

In Brookville Area Education Association v. Brookville Area School District, 38 PPER 44 (Proposed Decision and Order, 2007), the association alleged that the district engaged in unfair practices when it placed and advertisement in a local newspaper that identified by name and address the members of the association's bargaining team, thereby coercing and intimidating the members of the association's team. However, prior to that disclosure, the association had publicly disclosed the names of the district's bargaining team and urged members of the public to contact school board members by name and urge them to bargain seriously and accept non-binding arbitration. Hearing Examiner Wallace dismissed the charge of unfair practices for the following two reasons: 1) the district's advertisement was not coercive because it did not demonstrate a threat and because a reasonable employe would not be less likely to assist the union in bargaining in the future; and 2) The district only placed its advertisement after the union identified members of the district's bargaining team and board of directors by name and address, in an effort to bring public pressure upon the district to settle their contract dispute. Brookville, 38 PPER at 118. Examiner Wallace further concluded that public disclosure of information that is "responding in kind to the tactics employed by the association" is legitimate, non-coercive conduct. Brookville, 38 PPER at 118-119.

The record in the case sub judice demonstrates that the Association publicly challenged the District's handling and processing of grievances and publicly alleged that the District was spending too much money on fighting grievances. Although Tom Brogan was no longer grievance chair for the Union when he publicly challenged the school board, Marcelle Genovese's accusations mirrored those of Tom Brogan. The Union's challenges undermined the school board's faith in Dr. Mahon's administration. In order to defend these charges of mishandling of grievances and District finances, Dr. Mahon discussed grievances in May 2011, and thereafter, to answer allegations by Tom Brogan and Marcelle Genovese that the District was wasting money fighting grievances and that the District was violating the CBA and the law.[1] After having his administration and his relationship with the Union challenged before the school board, Dr. Mahon intended to bring the actual grievances to the public and the school board to allow the school board and the public to draw their own conclusions regarding the District's position on fighting those grievances, based on the documents themselves. Dr. Mahon was confident about his position on the issues and wanted the school board and the public to conclude on their own that, based on the facts and the documents themselves, the Union was mischaracterizing his handling of the grievances.

The District was not only within its rights of free speech to disclose the grievance documents to the public without mischaracterizing the nature of the grievances, where those grievances impacted the District, its finances and the students, but also may have had a responsibility to do so. City of Easton, supra. Although Dr. Mahon may not have disclosed all the information or the information more favorable to the Union in every case, that is not fatal to his free speech right to inform the public about matters related to bargaining, which impact the District and the tax-paying public. Southeast Delco, supra. Moreover, on this record, the District has not breached employe confidentiality in the discussion of grievances in public. The District redacts employes' names and does not disclose grievances of a personal or disciplinary nature.

CONCLUSIONS

The hearing 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 under PERA.

2. The Association is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has not committed unfair practices within the meaning of Section 1201(a)(1) or (5).

[1] The record contains conflicting characterizations and mischaracterizations regarding Dr. Mahon's statements about grievances and unfair practices, none of which I have credited and upon which I have not relied.

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 fifteenth day of December, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner