

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JERSEY SHORE AREA EDUCATION
ASSOCIATION, PSEA/NEA, and
FRANK GIRARDI, Jr.,

v.

JERSEY SHORE AREA SCHOOL DISTRICT

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CASE NO. PERA-C-15-359-E

PROPOSED DECISION AND ORDER

On December 24, 2015, the Jersey Shore Area Education Association, PSEA/NEA (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Jersey Shore Area School District (District or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

On March 18, 2016, the Secretary of the Board issued a complaint and notice of hearing, designating May 20, 2016, in State College, as the time and place of hearing.

The hearing was held on May 20, 2016, in State College, before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief on June 29, 2016. The District filed a post-hearing brief on July 27, 2016.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of PERA. (N.T. 5).
2. The Association is an employe organization within the meaning of PERA. (N.T. 4).
3. Frank Girardi, Jr., (Girardi) at all times relevant to this matter, has been employed as a tenured professional employe of the District and a member of the Association. (J.S.F. ¶ 1)¹.
4. In 2014, the District terminated Girardi from his position based on two unsatisfactory performance ratings, incompetence, and willful neglect under Section 122 of the Public School Code. The Association grieved this action by the District. (J.S.F. ¶ 2).
5. In lieu of arbitration, on January, 16, 2015, the parties executed a "Last Chance Agreement" (LCA). (J.S.F. 3; Joint Exhibit 2).
6. The LCA states in relevant part:

WHEREAS, the District terminated Girardi's employment, based on performance issues, and particularly two unsatisfactory evaluations in accordance with the School Code;

WHEREAS, Girardi and the Association have grieved the termination and have requested arbitration, which is scheduled for January, 2016;

¹ The parties submitted a Joint Stipulation of Facts as Joint Exhibit 1. References to the Joint Stipulation of Facts shall be made as "J.S.F." with the relevant paragraph number.

WHEREAS, in order to resolve their differences and avoid the costs and uncertainty of arbitration, the parties wish to enter into this Last Change Agreement;

WHEREAS, this Last Chance Agreement will obviate the need for an arbitration and resolve any pending disciplinary matters that exists as of the date of this Agreement

. . . .

Based on the agreement by Girardi and the Association to the terms and conditions of this Agreement, the District will return Girardi to a teaching position. . . .

. . . .

Girardi agrees that any other conduct in the future which violates the provisions of Section 1122 of the School Code will be grounds for immediate termination, without recourse under the grievance or disciplinary procedure of the collective bargaining agreement.

(Joint Exhibit 2).

7. Pursuant to the LCA, Girardi returned to work at the beginning of the 2015-2016 school year. (J.S.F. ¶ 4).
8. On October 30, 2015, the District placed Girardi on administrative leave with pay retroactive to October 23, 2015. (Joint Exhibit 5).
9. On November 2, 2015, the District filed a Statement of Charges and Notice of Hearing against Girardi, again seeking his termination for alleged acts which occurred subsequent to the LCA upon Girardi's return to work. (Joint Exhibit 6).
10. Girardi was placed on administrative leave without pay, effective November 2, 2015. (Joint Exhibit 6, page 11).
11. Girardi, through Association counsel, notified the District by letter dated November 6, 2015, that he chose to "grieve/arbitrate" the Statement of Charges. (Joint Exhibit 7).
12. The District has refused to arbitrate and instead petitioned the Court of Common Pleas for Lycoming County seeking to enjoin the arbitration requested by Girardi. (J.S.F. ¶¶ 8,9; Joint Exhibits 8, 9).

DISCUSSION

The Association charges that the District has committed an unfair practice by refusing to process to arbitration Girardi's grievance. The facts in this matter are not in dispute and the parties submitted joint stipulations and exhibits. Girardi was terminated by the District in 2014. In lieu of arbitrating this termination, the parties agreed to the LCA, which placed Girardi back to work for the 2015-2016 school year. In the fall of 2015, the District moved to terminate Girardi again and placed him on administrative leave without pay. Girardi, through Association counsel, demanded that the issue be arbitrated.² The District has refused to arbitrate and petitioned the Court of Common Pleas of Lycoming County to seek an injunction against the Association.

² Pursuant to the Public School Code, professional employes, when facing a statement of charges seeking dismissal, have the right to elect his or her remedy including the grievance and arbitration process. 24 P.S. § 11-1133.

The law on this issue is well settled. Pursuant to Section 903 of PERA, arbitration of grievances arising out of interpretation of provisions of a collective bargaining agreement is mandatory. 43 P.S. § 1101.903. All disputes concerning arbitrability of a grievance under a collective bargaining agreement must first be presented to an arbitrator for determination. **PLRB v. Bald Eagle Area School District**, 499 Pa. 62, 451 A.2d 671 (1982); **Chester Upland School District v. McLaughlin**, 655 A.2d 621 (Pa. Cmwlth. 1995), **aff'd per curiam**, 544 Pa. 199, 675 A.2d 1211 (1996); **see also Township of Sugarloaf v. Bowling**, 563 Pa. 237, 759 A.2d 913 (2000) (holding that the arbitrator has jurisdiction to make the initial determination of whether an issue is arbitrable). When an employer refuses to process a grievance to arbitration, it commits an unfair practice. **Bald Eagle Area School District, supra**.

The District has refused to process the grievance on the grounds that arbitration under a collective bargaining agreement may be waived by an agreement: a so-called "last chance agreement." In its brief, the District relies on **Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills**, 876 A.2d 494 (Pa. Cmwlth. 2005), to argue that arbitration is not mandatory in this matter because the plain terms of the LCA waive Girardi's right to arbitrate his termination. The District points to the following language from the LCA:

Girardi agrees that any other conduct in the future which violates the provisions of Section 1122 of the School Code will be grounds for immediate termination, without recourse under the grievance or disciplinary procedure of the collective bargaining agreement.

(Joint Exhibit 2, page 2).

Under **Penn Hills**, an employer may only be excused from proceeding to arbitration where the employer, the union, and the employee enter into a last chance settlement of the employee's discharge, and the union and the employee intentionally, clearly, expressly, and unequivocally waive their respective rights to file a grievance over any violation of the last chance agreement. **Pennsylvania State System of Higher Education v. Association of Pennsylvania State College and University Faculties (APSCUF)**, 39 PPER ¶ 101, (Final Order, 2008). Where there is no clear, intentional, express and unequivocal waiver of the right to grieve, the issue of whether the terms of the parties' settlement bars arbitration is not a matter to be decided by the Board, but rather a matter of interpretation for an arbitrator. **Id.**

This matter is clearly distinguishable from **Penn Hills**. The last chance agreement in **Penn Hills** differs from the LCA in this matter because the last chance agreement in **Penn Hills** included an express waiver which allowed the employer the exclusive right to determine if the employee had committed a violation worthy of termination. The **Penn Hills** Court explained:

Thus, the LCA expressly provides that Employer determines the threshold question of whether [the employee] violated the LCA and that such determination cannot be challenged by filing a grievance. Accordingly . . . the Union and [the employee] expressly waived their right to arbitrate the penalty imposed as well as the threshold question of whether [the employee's] actions constituted chronic and excessive absenteeism, a violation of the LCA.

Penn Hills, supra (internal citations omitted). Thus, the limited holding in **Penn Hills** was specific to the circumstances which gave rise to a last chance agreement which specifically gave the employer the exclusive right to determine if a violation had in fact occurred. Those facts do not exist in this matter. The LCA in this matter states: ". . . any other conduct in the future which violates the provisions of Section 1122 of the School Code will be grounds for immediate termination, without recourse under the grievance or disciplinary procedure of the collective bargaining agreement." Critically, the language does not define who shall decide the "threshold question" of whether such conduct violates Section 1122 of the School Code. That is, unlike **Penn Hills**, the LCA in this matter does not reserve to the District the exclusive right to determine if Girardi has committed violations of Section 1122 of the School Code. Since there is no clear, intentional, express and unequivocal waiver of the determination of the "threshold question" of whether Girardi committed violations of Section 1122 of the Public School Code, the matter is properly

before an arbitrator, and the District's refusal to arbitrate is a violation of PERA. **Bald Eagle Area School District, supra.; APSCUF, supra; see also Teamsters Local 776 v. Susquehanna Township School District**, 45 PPER ¶ 95 (Final Order, 2014)(holding that **Penn Hills** does not apply where employer may not unilaterally determine whether a violation has occurred).

The District argues that the LCA is in fact clear and unambiguous. The District argues: "While the LCA here does not expressly state who determines whether Girardi's conduct violates Section 1122 of the School Code, the District submits that the silence is immaterial because the School Code grants that privilege to the Board of School Directors." (Employer's Brief, page 12). The District argues that under 24 P.S. § 11-1122 a professional employe only has two remedies: arbitration or a hearing before the school board. The District argues that Girardi waived arbitration and therefore, then, by logical necessity, that leaves only the School Board to determine if he committed any violations. However, **Penn Hills** demands that there be a "clear, intentional, express and unequivocal waiver" of the right to arbitrate, and even the District admits in its brief that the LCA "does not expressly state" who will determine if Girardi violated Section 1122 of the School Code. Therefore, the District's argument, which is based on inference, is not sufficient to fit this case into the **Penn Hills** exception.

I therefore find that the District has committed an unfair practice in violation of Section 1201(a)(1) and (5) by refusing to process Girardi's grievance to arbitration.

CONCLUSIONS

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

1. The Jersey Shore Area School District is a public employer within the meaning of Section 301(1) of PERA.
2. The Jersey Shore Education 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 Jersey Shore Area School District has committed an unfair practice in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the Jersey Shore Area 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. Take the following affirmative action:
 - (a) Immediately process Girardi's grievance to arbitration;
 - (b) 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;

- (c) 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; and
- (d) 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 pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifteenth day of August, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The Jersey Shore Area School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employee Relations Act; that it complied with the Proposed Decision and Order as directed therein; that it has immediately processed Frank Girardi's grievance to arbitration; 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