COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

The Association of Pennsylvania State College and University Faculties (APSCUF) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on September 10, 2012, to a Proposed Decision and Order (PDO) issued on August 20, 2012.[1] In the PDO, the Board Hearing Examiner dismissed the Charge of Unfair Practices in which APSCUF alleged that the Pennsylvania State System of Higher Education, West Chester University (PASSHE or University) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to sign or implement a grievance settlement agreement. Following an extension of time granted by the Secretary of the Board, APSCUF filed a brief in support of the exceptions on October 10, 2012. PASSHE also obtained an extension of time to respond, and timely filed a brief in opposition to the exceptions on November 30, 2012. The Hearing Examiner's Findings of Fact (FF) relevant to the disposition of the exceptions, are as follows.

Article 11 of the parties' expired collective bargaining agreement (CBA) is titled "APPOINTMENT OF FACULTY." Subsection F sets forth "Regulations Regarding The Hiring Of Temporary and Regular Part-Time FACULTY MEMBERS," and provides in relevant part as follows:

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

(FF 10). Several times during the term of the CBA, a committee convened to investigate the University's exceeding the 25% cap. (FF 15). In November 2010, APSCUF received the numbers of temporary and regular part-time faculty at the University, which exceeded the 25% cap. (FF 12).

Article 5 of the CBA contains a four-step grievance procedure. (FF 8). On December 23, 2010, Dr. Clifford Johnston, an associate professor of mathematics and the then president of the local APSCUF chapter, hand delivered a written, step-two grievance, designated Local Grievance No. 10-015, to Dr. Greg Weisenstein, the University President. (FF 13).[2]

After filing the grievance, Dr. Johnston had discussions about the 25% cap with Linda Lamwers, the University Provost and Vice President of Academic Affairs, President Weisenstein and Human Resources Director of Labor Relations, Michael Maloy.(FF 14). APSCUF twice agreed to extend the contractually designated grievance response time, ultimately to April 1, 2011. (FF 14). During those extensions, Dr. Johnston requested that the committee investigating the University's exceeding the 25% cap restart its work. (FF 15). On March 31, 2011, the committee issued a report which generated more discussions between Dr. Johnston, Provost Lamwers and President Weisenstein. (FF 16).

[1] September 9, 2012, the twentieth day following issuance of the PDO, was a Sunday and therefore excluded from computation of the twenty-day period for filing exceptions. 34 Pa. Code §95.100(b).
[2] Typically, a step-two grievance is presented to the Provost at the University as the designated agent of the President. (FF 9).

On April 13, 2011, Dr. Lamwers e-mailed Dr. Johnston and Dr. Weisenstein an attachment containing "the latest version that we have agreed to following conversation this afternoon." She further wrote that "[t]he yellow highlight is a section in which there is not agreement. Cliff [Johnston] would prefer that it not be in the agreement, I would like it in." (FF 18). In response, Dr. Johnston indicated confusion over the lack of a provision regarding the replacement of retirees. One and a half hours later, Dr. Johnston e-mailed the same group of people and indicated that he had spoken to Dr. Lamwers about retirement replacements. The same e-mail included proposed language as part of a grievance settlement agreement regarding the retirement replacements. (FF 19). Dr. Lamwers responded on Thursday morning, April 14, 2011, as follows:

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

(FF 20). At 5:03 p.m. on April 14, 2011, Dr. Johnston responded as follows:

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

(FF 21). On Thursday, April 14, 2011, after a meeting with the Council of Trustees from 4:00 p.m. until approximately 9:00 p.m., Dr. Weisenstein was tired and getting ready for bed when, at 9:33 p.m., without reviewing Dr. Johnston's e-mail, he responded to Dr. Johnston as follows: "Thanks Cliff. See you on Monday." (FF 22 and 23).

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

Based on the testimony and evidence presented, the Hearing Examiner found that PASSHE and APSCUF had not entered into a final and binding agreement regarding APSCUF's grievance over the 25% cap on temporary and part-time faculty at West Chester University. APSCUF argues on exceptions that the Hearing Examiner erred in failing to find that the parties reached a grievance settlement agreement. The Hearing Examiner, however, credited the testimony of Dr. Weisenstein and Dr. Lamwers to find that there was no actual meeting of the minds on the final wording of the agreement. Thus, APSCUF's exceptions are a challenge to the Hearing Examiner's credibility determinations.

The Board has long held that, absent the most compelling of circumstances, the Board will not overturn the Hearing Examiner's fact finding based on credibility determinations. **Mt. Lebanon Education Association v. Mt. Lebanon School District**, 35 PPER 98 (Final Order, 2004); **Hand v. Falls Township**, 19 PPER ¶ 19012 (Final Order, 1987); **AFSCME District Council 84 v. Department of Public Welfare**, 18 PPER ¶ 18028 (Final Order, 1986). It is the function of the Hearing Examiner to make reasonable inferences, based upon the credible evidence of record, to find whether a settlement agreement has, in fact, been reached between the parties. **Pennsylvania State Corrections Officers Association v. Commonwealth, Department of Corrections, SCI Fayette**, 40 PPER 104 (Final Order. 2009). Upon review of the record, there are no compelling circumstances warranting the Board's reversal of the Hearing Examiner's credibility determinations.

Where it is found that a meeting of the minds had in fact been reached between the parties, with no genuine difference of opinion as to the substance of the agreement, then the parties' agreement will be enforced by the Board. **Teamsters Local 205 v. Donora Borough**, 29 PPER ¶29069 (Proposed Decision and Order, 1998). In **Radnor Township School District PSEA/NEA v. Radnor Township School District**, 40 PPER 44 (Final Order, 2009), the Board held as follows:

> In order to establish that a binding settlement agreement exists, the complainant must prove that the parties reached a meeting of the minds concerning the subject matter at issue. … The Board will examine the underlying facts to determine whether the parties reached an agreement. … The Board will determine that the parties have not reached a binding settlement where the parties reach agreement on some terms, but are unable to come to a complete resolution of their dispute. …

Radnor Township School District, 40 PPER at 189.

While the lack of signatures on a written agreement is not an absolute bar to the Board's finding of an enforceable agreement, **Donora Borough**, *supra,* the lack of signatures may, as here, be indicative of the parties' intent to engage in a further final review. Indeed, Dr. Weisenstein testified that his understanding on the night of April 14, 2011 was that a final review would take place before signing the agreement on Monday, April 18, 2011. Further, Dr. Johnston's initial reaction to Dr. Weisenstein's email indicating that he would not sign the agreement, was that Dr. Johnston would move APSCUF's grievance to the next step, raising the reasonable inference that there had been no resolution at step two. As the Hearing Examiner found, the testimony of Dr. Weisenstein and Dr. Johnston concerning the need to sign off on the agreement "supports the objective determination that the parties understood that a final review and approval of the latest changes … was required." (PDO at 6).

Furthermore, the Hearing Examiner credited Dr. Lawmers' testimony, finding that her statement that if Dr. Johnston made the suggested changes to the agreement "then we would be done", did not mean that a final review was not required or intended. Indeed, Dr. Lawmers' email, wherein she notes that she "just talked to [Dr. Weisenstein] regarding this", is indicative that she sought, and would seek, Dr. Weisenstein's final review of the agreement's terms. Additionally, the Hearing Examiner credited the testimony of Dr. Weisenstein that his email to Dr. Johnston -- "Thanks … See you on Monday" – was merely a polite acknowledgement, made late in the day and prior to his review of the terms of the proposed agreement, and was not intended as a final agreement to the settlement terms. On this record, the Hearing Examiner did not err in concluding that "[h]aving not reviewed the latest version of the proposed agreement, Dr. Weisenstein cannot be said to have agreed to all the terms of the proposed agreement." (PDO at 6).

Moreover, we note that the record in this case supports the finding that PASSHE and APSCUF did not have a true meeting of the minds with respect to the alleged settlement agreement. Dr. Weisenstein became aware that the 25% cap on part-time and temporary faculty was being negotiated in connection with the state-wide bargaining for a successor CBA only after the emails which APSCUF claims formed the agreement. Such a change in the factual underpinnings of the alleged agreement would constitute a factual mistake suggesting that the parties never had a true meeting of the minds. *See* **Donora Borough**, *supra.*

Furthermore, the testimony of Dr. Weisenstein and Mr. Mottola, found credible by the Hearing Examiner, suggests that there was no common understanding on the terms of the alleged agreement. Dr. Johnston testified that a successor CBA would supercede the parties' grievance settlement. The proposed settlement that APSCUF seeks to enforce states that "West Chester University and APSCUF may modify by mutual consent the above terms of this settlement with relevant changes in the CBA…." Upon review of this clause, Mr. Mottola and Dr. Weisenstein understood this language to mean that the settlement is not automatically superseded, but may be changed only through mutual consent between West Chester University and APSCUF. Regardless of who may be correct in their interpretation of this language, this difference of opinions on the meaning of this pertinent language in the agreement is fatal to the finding that the parties had reached a meeting of the minds and an enforceable agreement. *See* **Radnor Township School District**, *supra.*

After a thorough review of the exceptions and all matters of record, APSCUF has presented no compelling reasons for the Board to overturn the Hearing Examiner's credibility determinations. Based on those credibility determinations, the Hearing Examiner did not err in concluding that PASSHE and APSCUF had not entered into a final settlement agreement, and thus PASSHE did not violate Section 1201(a)(1)

and (5) of PERA. Accordingly, APSCUF's exceptions shall be dismissed, and the PDO dismissing APSCUF's Charge of Unfair Practices, shall made absolute and final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Association of Pennsylvania State College and University Faculties are hereby dismissed, and the August 20, 2012 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr, Member, this fifteenth day of January, 2013. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.