

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UPPER ST. CLAIR EDUCATION SUPPORT :
PROFESSIONAL ASSOCIATION, PSEA/NEA :
 : CASE NO. PERA-C-14-265-W
v. :
 :
UPPER ST. CLAIR SCHOOL DISTRICT :

FINAL ORDER

The Upper St. Clair School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on August 17, 2015, challenging a July 27, 2015 Proposed Decision and Order (PDO). In the PDO, the Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to submit a grievance to arbitration. The Upper St. Clair Education Support Professional Association, PSEA/NEA (Association) filed a brief in response to the exceptions on September 8, 2015. The Hearing Examiner's Findings of Fact, based on the stipulations of the parties, are summarized as follows.

The Association is the exclusive collective bargaining representative for a unit of the District's employes including bus drivers and bus attendants. The Association and the District are parties to a collective bargaining agreement (CBA) with effective dates from July 1, 2013 through June 30, 2017. The CBA contains a just cause provision which provides, in relevant part, that "the board shall not discharge any employee without just cause except during the employee's 60 work day probationary period." The CBA also contains a provision which provides, in relevant part, that "[t]he Association shall have the right to take up the suspension and/or discharge, except the suspension or discharge of a probationary employee, as a grievance..." In addition, the CBA contains a statutory savings clause which provides, in relevant part, that "nothing contained herein shall be construed to deny or restrict to any employee such rights as he/she may have under the Public School Code of 1949, as amended, or the Public Employe Relations Act ("Act 195") or other applicable law or regulations. The rights granted to employees hereunder shall be deemed in addition to those provided elsewhere."

On or about April 11, 2014, the District terminated the employment of Terry Rayman (Rayman). At the time of his dismissal, Rayman was a probationary employe working as a bus driver. The Association timely filed a grievance on behalf of Rayman alleging that he was terminated in violation of the CBA and incorporated laws. Specifically, the grievance alleges that the District failed to provide due process as required by the Public School Code of 1949 including, but not limited to, failing to provide a Loudermill hearing, union representation and the opportunity for a School Board hearing. The grievance further alleges that Rayman was discriminated against on the basis of disability and that the District lacked just cause for the dismissal. The District denied the grievance on May 22, 2014. On May 27, 2014, the Association appealed the denial to arbitration. On May 27, 2014, the District notified the Association that it would not agree to arbitrate the grievance, and continues to refuse to arbitrate the grievance.

Before the Hearing Examiner, the District argued that the Association waived the right to pursue arbitration under the collective bargaining agreement. Based on the findings above, the Hearing Examiner determined that there was a dispute under the terms of the collective bargaining agreement as to the arbitrability of the grievance. Based on the well-established black letter principle that disputes arising under a collective bargaining agreement regarding the arbitrability of a grievance must be decided in the first instance by an arbitrator, **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); **Susquehanna Township School District**, 45 PPER 46 (Final Order, 2014), the Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of PERA by refusing to proceed to arbitration under Section 903 of PERA.

On exceptions, the District argues that the Hearing Examiner erred in distinguishing this case from **Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills**, 876 A.2d 494 (Pa. Cmwlth. 2005). We disagree. Indeed, the facts in **Penn Hills** are clearly distinguishable. Unlike here, **Penn Hills** did **not** involve a dispute of arbitrability arising under a collective bargaining agreement. As the Board stressed in **Penn Hills**, the question posed in **Penn Hills** was not a dispute under the collective bargaining agreement, but whether the parties waived the ability to challenge the employee's violation of the last chance agreement.¹ Unlike **Penn Hills**, the dispute in this case does not involve a last-chance settlement that is outside the terms of the collective bargaining agreement. Here, the dispute is firmly rooted exclusively in the collective bargaining agreement.

In accordance with the express language of Section 903 of PERA, "[a]rbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory." 43 P.S. §1101.903. Regardless of how clear the contractual language may appear to one of the parties, the Pennsylvania Supreme Court stated as follows:

arbitration is not improper simply because the arbitrator might fashion an invalid award The aggrieved party's interests, however, are still protected by its statutory right to appeal from the final determination and award made by the arbitrator.

Commonwealth, Office of Administration v. PLRB, 528 Pa. 472, 478-479, 598 A.2d 1274, 1277 (1991). Whether a party has expressly waived the right to grieve and arbitrate a particular dispute under the terms of a collective bargaining agreement requires an interpretation of the collective bargaining agreement, and thus, as a matter of law, must be answered in the first instance by an arbitrator. See e.g. **East Pennsboro Area School District v. PLRB**, 467 A.2d 1356 (Pa. Cmwlth. 1983). Thus, it has become black-letter labor policy that questions under the collective bargaining agreement as to the arbitrability of a grievance must first be submitted to an arbitrator. E.g. **Davis v. Chester Upland School District**, 786 A.2d 186 (Pa. 2001); **State System of Higher Education (Cheyney University) v. State College and University Professional Association**, 743 A.2d 405 (Pa. 1998); **Montgomery County Intermediate Unit v. Montgomery County Intermediate Unit Education Association**, 797 A.2d 432 (Pa. Cmwlth. 2002). Any refusal to arbitrate a dispute concerning arbitrability is *per se* an unfair labor practice. **East Pennsboro Area School District**, *supra*.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA by refusing to submit the issue of arbitrability of the Rayman grievance to the arbitration process as mandated under Section 903 of PERA. Accordingly, the District's exceptions shall be dismissed, and the July 27, 2015 PDO is made absolute and final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Upper St. Clair School District are hereby dismissed, and the July 27, 2015 Proposed Decision and Order, be and hereby is made absolute and final.

¹ The dispute under the collective bargaining agreement in **Penn Hills** arose in 1998 with the termination of the employee. That contractual dispute was settled during the grievance process prior to arbitration by way of an extra-contractual settlement agreement, the last-chance agreement, entered into between the employer, union and the discharged employee. The matter before the Board in 2003 was whether the employee's subsequent termination for violation of the last-chance agreement was in accordance with that grievance settlement.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this fifteenth day of September, 2015. 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.

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AFFIDAVIT OF COMPLIANCE

The Upper St. Clair School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a) (1) and (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 Final Order and Proposed Decision and Order as directed; and that it has served an executed copy of this affidavit on the Association 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