COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATION ASSOCIATION	:	
v.	:	CASE NO. PERA-C-15-277-E
ABINGTON HEIGHTS SCHOOL DISTRICT	:	

FINAL ORDER

Abington Heights School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on September 14, 2016, to a Proposed Decision and Order (PDO) issued on August 25, 2016. In the PDO, the Hearing Examiner found that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to proceed to arbitration over a grievance concerning the discharge of William Yelland that was filed on his behalf by the Abington Heights Education Association (Association). Following an extension of time granted by the Secretary of the Board, the District filed a brief in support of the exceptions on September 26, 2016. The Association filed a timely response to the exceptions and a brief on October 13, 2016. The facts found by the Hearing Examiner in the PDO are summarized as follows.

The Association and the District are parties to a collective bargaining agreement (CBA) that contains a grievance procedure for resolving disputes arising under the CBA. (FF 4 and 5). The grievance procedure culminates in final and binding arbitration in accordance with Section 903 of PERA. (FF 5). The CBA contains a provision requiring just cause for any discipline or discharge of the Association's bargaining unit members. (FF 5).

The CBA also expressly incorporates all the laws of the Commonwealth, including the Public School Code of 1949 and its provisions regarding dismissal of public school teachers. (FF 5). Section 11-1133 of the Public School Code provides for an election of remedies, in relevant part, as follows:

> Nothing contained in Sections 1121 through 1132 shall be construed to supersede or preempt a provision of a collective bargaining agreement ... which agreement provides for the right of the exclusive representative to grieve and arbitrate the validity of a professional employe's termination for just cause or for the causes set forth in section 1122 of this act; however, no agreement shall prohibit the right of a professional employe from exercising his or her rights under the provisions of this act except as herein provided. However, if within ten (10) days after receipt of the detailed written statement and notice as required by section 1127, the professional employe chooses to exercise his or her right to a hearing, any provision of the collective bargaining agreement relative to the right of the exclusive representative to grieve or arbitrate the termination of such professional employe shall be void. Professional employes shall have the right to file a grievance under the collective bargaining agreement or request a hearing pursuant to Section 1121 through 1132, but not both.

25 P.S. § 11-1133. (FF 11).

On April 9, 2015, the District suspended Mr. Yelland, a teacher and member of the Association's bargaining unit, indefinitely without pay with the intent to terminate his employment. (FF 3 and 6). On April 23, 2015, the Association filed a grievance claiming a lack of just cause, as required by the CBA, for Mr. Yelland's unpaid suspension and dismissal. (FF 8). On May 7, 2015, the District issued a notice of dismissal to Mr. Yelland containing various allegations of misconduct. The notice of dismissal advised Mr. Yelland that he had the right under the Public School Code to challenge his dismissal by way of a school board hearing, and that he had ten days from the date of the notice to request a school board hearing or he would waive his right to such hearing. (FF 9).

In the notice of dismissal, the District explicitly cited to Sections 1108, 1122, 1126, 1127, 1128, 1129, 1130 and 1133 of the School Code, and stated, in relevant part, as follows:

> You are hereby notified and advised that you have a right to a hearing either in person or by counsel or both, before the Board of Directors prior to the Board making its decision on your proposed dismissal. Should you choose to exercise your right to a hearing, you or your representative must make a request for a hearing in writing to the Board of Directors. **Your request for a hearing must be received by the Abington Heights School District administration office not later than 4:00 p.m. on Friday, May 15, 2015, located at 200 E. Grove Street, Clarks Summit, PA. Failure to make a request for hearing prior to that time will be deemed to be a waiver of your right to a hearing and the Board of Directors will make its decision at its next regularly scheduled meeting, May 20, 2015 based on the recommendation submitted to it by the Administration.**
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> . . . .
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> Please return the original of the attached **ACKNOWLEDGMENT OF RECEIPT AND REQUEST/ WAIVER OF HEARING** together with your signature acknowledging that you have received this letter and indicating whether you wish a Board hearing under the Local Agency Law, to **Board Secretary, Abington Heights School District, 200 E. Grove Street, Clarks Summit, PA.** If the attached page is not returned, it will be assumed that you have waived your right to a hearing before the Board.

(FF 10)(emphasis in original).

On May 14, 2015, the Union's legal counsel informed the District that Mr. Yelland decided not to request a hearing before the School Board and had decided, instead, to utilize the grievance and arbitration procedure under the CBA to challenge his dismissal. (FF 12). In that letter, the Union's attorney stated, in relevant part, as follows:

> I have had an opportunity to confer with Mr. Yelland. Please be advised that Mr. Yelland has decided to challenge his dismissal by filing a grievance under the Collective Bargaining Agreement between his union and the School District. It will therefore not be necessary to hold a School Board hearing in this matter.

(FF 13). The District's Superintendent, Dr. Michael Mahon, understood at the time that the District would be arbitrating Mr. Yelland's dismissal. (FF 12).

In addition, a criminal proceeding had been brought against Mr. Yelland relating to the allegations stated in the District's notice of dismissal. Mr. Yelland obtained separate legal counsel for the criminal proceeding. (FF 14). On May 18, 2015, Mr. Yelland met with his defense counsel and discussed his approaching preliminary hearing. At the end of that meeting, Mr. Yelland and defense counsel briefly discussed the idea of using a school board hearing to obtain discovery from the student witnesses to use at the preliminary hearing. By the end of this meeting, Mr. Yelland had not authorized a school board hearing and wanted more discussion with his Union lawyer. (FF 15). Nevertheless, on May 19, 2015, Mr. Yelland's criminal defense counsel wrote the District and requested a hearing before the school board. Mr. Yelland's criminal defense lawyer sent this letter four days beyond the statutory deadline for requesting a school board hearing. Mr. Yelland did not authorize the untimely letter, was not informed of the letter, and did not receive a copy of the letter. The Union's attorney also did not receive a copy of this letter. (FF 16). Mr. Yelland specifically requested that his defense counsel inform the District that he wanted to pursue grievance arbitration. His defense counsel never did so. (FF 17).

The District scheduled a school board hearing for June 3, 2015. On May 26, 2015, Mr. Yelland's defense counsel requested that the school board postpone the June 3, 2015 school board hearing pending the outcome of Mr. Yelland's criminal proceedings. (FF 18).

On June 22, 2015, Dr. Mahon informed Mr. Yelland that the District was amending its notice of dismissal to include an additional allegation of insubordination for refusing to answer investigation questions. (FF 20). On July 9, 2015, the Association's legal counsel wrote the District to inform the administration again that Mr. Yelland wished to challenge his dismissal through the grievance arbitration process rather than a school board hearing. (FF 21). The Association's July 9, 2015 letter provides, in relevant part, as follows:

> On May 7, 2015, you wrote a letter to one of the Association's members, William Yelland, informing him that the District is seeking his dismissal and advising Mr. Yelland of his right to a School Board hearing. Thereafter, I sent you a letter (on May 14) advising that Mr. Yelland wished to challenge his dismissal by filing a Grievance under the Association's Collective Bargaining Agreement (rather than through a School Board hearing). Then, however, on May 19, Mr. Yelland's private legal counsel sent you another letter requesting a School Board hearing.
>
> I am now writing you, again, to dispel any confusion in this matter. I have confirmed with both Mr. Yelland and his private counsel that Mr. Yelland wishes to challenge his dismissal by way of grievance arbitration under the Association's CBA. Therefore, it will not be necessary to hold a School Board hearing in this matter. I will also be the attorney of record handling Mr. Yelland's grievance at arbitration.

(FF 22)(emphasis in original).

The Association requested a list of arbitrators from the Pennsylvania Bureau of Mediation. On July 10, 2015, Bureau of Mediation Director William D. Gross issued a list of arbitrators. (FF 25).

The District has refused to select an arbitrator or arbitrate Mr. Yelland's grievance, asserting that Mr. Yelland waived his right to arbitrate his dismissal by electing a school board hearing under the School Code. (FF 24 and 25). On July 23, 2015, counsel for the District sent a letter to Union counsel citing, inter alia, the May 19, 2015 letter from Mr. Yelland's criminal defense counsel stating that the criminal defense firm represented Mr. Yelland on all pending matters and requesting a school board hearing. The letter further provides, in relevant part, as follows:

> In summary, the District had and still has no reason to doubt that the [defense firm] had the authority it claimed it had on behalf of Mr. Yelland, and further, that Mr. Yelland understood that [the defense attorneys] were representing him and seeking a Board hearing. Consequently, the Association does not have standing to pursue this grievance on Mr. Yelland's behalf at this late stage. Mr. Yelland willingly chose to opt for a Board hearing, apparently contrary to the Association's advice, and had every right to do so. His counsel notified the District of this decision and the District acted accordingly. Mr. Yelland's election of remedies to choose grievance arbitration has been waived since May 19, 201[5].

(FF 23).

By letter dated July 28, 2015, the Union's attorney informed the District's counsel that within the ten-day statutory period for electing a remedy, Mr. Yelland clearly requested arbitration and not a school board hearing, and that within that same ten-day period no other communication was sent or received. (FF 27). The July 28, 2015 letter provided, in relevant part, as follows:

> In this case, Mr. Yelland received his Notice of Charges on May 7. Thereafter, less than ten days later (May 14), I appeared on Mr. Yelland's behalf and sent a letter waiving the School Board hearing and opting for grievance arbitration. No further communication occurred during the ten day period of Section 1133 (whether from me, Mr. Yelland, or any other legal counsel). (You refer to another letter from private counsel . . . but admit that the letter was not sent until May 19—twelve days after the Notice of

> Charges.) Clearly, when the ten day period passed with no communication other than my letter (electing grievance arbitration), Mr. Yelland made his choice.

(FF 28).

In November 2015, a jury acquitted Mr. Yelland of all criminal charges. (FF 19). The Union has not withdrawn the grievance concerning Mr. Yelland's termination from employment and it has not indicated that it wishes to waive its right to arbitrate the grievance. To the contrary, the Union has at all times maintained that it wishes to arbitrate the grievance. (FF 26). An evidentiary hearing before the school board has not taken place. (FF 19).

Based on the facts presented, the Hearing Examiner found that the question of whether or not Mr. Yelland elected a school board hearing or grievance arbitration, is an issue of arbitrability. The Hearing Examiner therefore concluded, in accordance with black-letter Pennsylvania labor law, that arbitrability of the grievance is for an arbitrator to decide, rather than the Board. *E.g.* Palmerton Area Education Association v. Palmerton Area School District, 41 PPER 153 (Proposed Decision and Order, 2010).

On exceptions, the District challenges Findings of Fact 15 and 16 as not supported by substantial evidence. More specifically, the District excepts, *inter alia*, to the findings that Mr. Yelland did not authorize his criminal defense counsel to request a school board hearing and did not know that defense counsel had done so, as well as the finding that defense counsel's letter requesting a school board hearing was submitted after the statutory deadline for requesting a school board hearing. Upon review of the record, the Hearing Examiner's factual findings are supported by substantial record evidence, as cited in the Findings of Fact. Indeed, the Hearing Examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania (Department of Corrections Pittsburgh SCI), 34 PPER 134 (Final Order, 2003). The fact that there may be conflicting evidence does not render the Hearing Examiner's credibility determinations and factual findings unsupported by other evidence of record. AFSCME, District Council 88 v. Warminster Township, 31 PPER ¶ 31156 (Final Order, 2000); Sugarloaf Township Police Department v. Sugarloaf Township, 33 PPER ¶33023 (Final Order, 2001). Accordingly, the District's exceptions to Findings of Fact 15 and 16 as not being supported by substantial evidence of record are dismissed.

Moreover, the District's argument before the Hearing Examiner and on exceptions, that Mr. Yelland changed his election of remedies to a school board hearing is, as noted by the Hearing Examiner, simply made in the wrong forum. Indeed, the collective bargaining agreement, by its terms, "expressly incorporates … the Public School Code and its provisions regarding the dismissal of public school teachers." (Joint Stiplulation 5); *see also* Mifflinburg Area Education Association v. Mifflinburg Area School District, 555 Pa. 326, 724 A.2d 339 (1999) ("express language in the agreement incorporating the provisions of the School Code is not necessary because such provisions are incorporated, by operation of law"). Accordingly, any question concerning Mr. Yelland's election of remedies, and whether under the School Code the District could allow Mr. Yelland to elect a school board hearing more than ten days after the date of the notice of termination, and after Mr. Yelland had already selected grievance arbitration, involves a "[dispute] or [grievance] arising out of the interpretation of the provisions of a collective bargaining agreement[, and thus,] is mandatory." 43 P.S. §1101.903.

Our Supreme Court has definitively stated, as follows:

> Whether the dispute between appellees and Chester Upland is in fact a grievance that can be arbitrated under the collective bargaining agreement must, at least initially, be left to an arbitrator to decide. As we stated in Pennsylvania Labor Relations Bd. v. Bald Eagle School District, 499 Pa. 62, 65, 451 A.2d 671, 672 (1982), "[w]e have consistently held that '[t]he question of the *scope* of the grievance arbitration procedure is for the

> arbitrator, at least in the first instance.' Pittsburgh Joint Collective Bargaining Committee v. Pittsburgh, 481 Pa. 66, 75, 391 A.2d 1318, 1323 (1978)". Thus, pursuant to the PERA, 43 P.S. § 1101.903, supra, all questions of whether a matter is arbitrable must be decided in the first instance by an arbitrator, not a trial court. Id.; Chester Upland School District v. McLaughlin, 544 Pa. 199, 675 A.2d 1211 (1996) (affirming on the opinion of Commonwealth Court, 655 A.2d 621 (Pa.Cmwlth.1995)).

Davis v. Chester Upland School District, 567 Pa. 157, 161–62, 786 A.2d 186, 188–89 (2001). Indeed, in Chester Upland School District v. McLaughlin, 544 Pa. 199, 675 A.2d 1211 (1996), the Supreme Court affirmed the Commonwealth Court's holding as follows:

> Section 903 of PERA, as found by our Supreme Court in *Bald Eagle,* requires that all disputes arising out of the collective bargaining agreement, including disputes as to whether issues are arbitrable under the Agreement, are to be arbitrated before an arbitrator. … Section 903 of PERA requires an arbitrator to hear these disputes and after an arbitrator has decided, the trial court then has jurisdiction to make an independent judgment as to whether the matter is arbitrable.
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> We hold that Section 903 of PERA is not silent as to whether the arbitrator has jurisdiction because our Supreme Court in *Bald Eagle* has interpreted that section to mean that the arbitrator has sole and exclusive jurisdiction to hear disputes related to collective bargaining agreements, including disputes of whether a matter is arbitrable.

Chester Upland School District v. McLaughlin, 655 A.2d 621, 629 (Pa.Cmwlth. 1995), *affirmed,* 544 Pa. 199, 675 A.2d 1211 (1996). Indeed, in Bald Eagle School District, the Pennsylvania Supreme Court specifically denounced the "practice of preliminary litigating through one forum the power of another to decide the substantive issue", and stated that "[w]e condemn that practice and hold that hereafter issues involving conflicts between a public sector collective bargaining agreement and fundamental statutory policies of this Commonwealth must be presented first to arbitration for determination, subject to appropriate court review of any award in conflict with such policies." Bald Eagle Area School District, 499 Pa. at 68, 451 A.2d at 674. Under controlling Pennsylvania Supreme Court case law there can be no dispute here that the question of whether grievance arbitration or a school board proceeding has been elected is a question of arbitrability that must, in the first instance, be presented to an arbitrator.

Contrary to the District's argument, Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills, 876 A.2d 494 (Pa. Cmwlth. 2005), is wholly inapplicable here. Penn Hills involved the settlement of an employe's termination from employment by way of a "last chance agreement". The last chance agreement in that case was a free standing settlement agreement, separate and apart from the collective bargaining agreement, in which the union and employe expressly waived any factual dispute or discipline arising under the last chance agreement. As the dispute in Penn Hills solely involved the four-corners of the last chance agreement without reference to the collective bargaining agreement, Section 903 of PERA did not apply. In Penn Hills, the Board stated as follows:

> While it is true that questions involving the interpretation of a collective bargaining agreement, and whether those issues are arbitrable, must first be submitted to an arbitrator, East Pennsboro Area School District v. Pennsylvania Labor Relations Board, 467 A.2d 1356, 1358, 1359 (Pa. Cmwlth. 1983), the "Alternative Discipline Agreement" at issue here is not an extension of the collective bargaining agreement, but a separate and independent agreement resolving and settling the earlier disciplinary action against [the employe].

Penn Hills Municipal Employees Organization v. Penn Hills Municipality, 34 PPER 135 at 416 (Final Order, 2003). In cases where, as here, a question under the collective bargaining agreement is implicated, either expressly or by way of incorporation, Section 903 of PERA controls and arbitration, including a dispute over whether the grievance is arbitrable, is mandatory. 43 P.S. §1101.903; Davis v. Chester Upland School District, *supra*.; Chester Upland School District v. McLaughlin, *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 process Mr. Yelland's grievance to arbitration, and presenting its dispute over the election of remedies to an arbitrator, in accordance with Section 903 of PERA. Accordingly, the District's exceptions shall be dismissed and the PDO shall be made 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 Abington Heights School District are hereby dismissed, and the August 25, 2016 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, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this twentieth day of December, 2016. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATION ASSOCIATION	:	
v.	:	CASE NO. PERA-C-15-277-E
ABINGTON HEIGHTS SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The Abington Heights 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 ceased and desisted from interfering, restraining and coercing employes in the exercise of the rights guaranteed in Article IV of PERA; that it has ceased and desisted from refusing to strike names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation and from refusing to submit the Yelland Grievance to arbitration; that it has submitted to the Abington Heights Education Association in writing an offer to arbitrate the Yelland Grievance; that it has posted a copy of the Final Order and Proposed Decision and Order as directed therein; 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