COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JERSEY SHORE AREA EDUCATION ASSOCIATION, PSEA/NEA, and FRANK GIRARDI, Jr.,	:	
v.	:	Case No. PERA-C-15-359-E
JERSEY SHORE AREA SCHOOL DISTRICT	:	

FINAL ORDER

The Jersey Shore Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on September 6, 2016, from a Proposed Decision and Order issued on August 15, 2016, in which the Hearing Examiner found that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to arbitrate a grievance. The Jersey Shore Area Education Association, PSEA/NEA (Association) filed a response to the exceptions and a supporting brief on September 27, 2016.

A hearing was held on May 20, 2016, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and summarized as follows.

In 2014, the District terminated Frank Girardi, Jr., from his position based on two unsatisfactory performance ratings, incompetence, and willful neglect under Section 1122 of the Public School Code. The Association grieved this action by the District. In lieu of arbitration, on January, 16, 2015, the parties executed a "Last Chance Agreement" (LCA). 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;
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> WHEREAS, Girardi and the Association have grieved the termination and have requested arbitration, which is scheduled for January, 2015;
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> WHEREAS, in order to resolve their differences and avoid the costs and uncertainty of arbitration, the parties wish to enter into this Last Chance Agreement;
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> 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 . . . .
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> . . .
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> 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.

Pursuant to the LCA, Mr. Girardi returned to work at the beginning of the 2015-2016 school year. On October 30, 2015, the District placed Mr. Girardi on administrative leave with pay retroactive to October 23, 2015. On November 2, 2015, the District placed Mr. Girardi on administrative leave without pay and filed a Statement of Charges and Notice of Hearing seeking Mr. Girardi's termination for alleged acts which occurred subsequent to the LCA.

Mr. Girardi, through Association counsel, notified the District by letter dated November 6, 2015, that he chose to "grieve/arbitrate" the Statement of Charges. The District refused to arbitrate the grievance.[1] The Hearing Examiner concluded that the District committed an unfair practice by refusing to process the grievance to arbitration.

On exceptions, the District argues that the Hearing Examiner erred in finding that there was no clear and express waiver of arbitration, and in distinguishing the LCA in this case from **Municipality of Penn Hills v. PLRB**, 876 A.2d 494 (Pa. Cmwlth. 2005). Accordingly, the District argues that the Hearing Examiner erred in concluding that it committed an unfair practice in violation of Section 1201(a)(1) and (5) of PERA by refusing to process Mr. Girardi's grievance to arbitration. However, as stated by the Hearing Examiner:

> 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**.
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> Under **Penn Hills**, an employer may only be excused from proceeding to arbitration where the employer, the union, and the employe enter into a last chance settlement of the employe's discharge, and the union and the employe 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.**

(PDO at 3 - 4).

As correctly found by the Hearing Examiner, this case is distinguishable on the facts from **Penn Hills** due to differences in the provisions of the last chance agreements in the two cases. The limited holding in **Penn Hills** was specific to the last chance agreement in that case which expressly and unmistakably, on its face, gave the employer the exclusive right to determine if a violation had in fact occurred. Indeed, in the

[1] The District petitioned the Court of Common Pleas of Lycoming County seeking to enjoin the arbitration. On February 3, 2016, Judge Richard A. Gray denied the injunction, holding in part that the Court of Common Pleas lacks jurisdiction to determine the issue of arbitrability. On March 4, 2016, the District filed a Notice of Appeal to the Commonwealth Court, which is pending at Docket No. 379 CD 2016.

final order in **Penn Hills**, the Board made the additional finding of fact that "the 1998 'Alternative Discipline Agreement' provided that… *[t]he determination of what is 'chronic or excessive' [absenteeism] shall be at the sole discretion of the Employer*, [and that] the Union and Employee release and waive the Union's and/or Employee's right to challenge the penalty of discharge *or the underlying facts* for the imposition of the penalty by filing a … grievance pursuant to the collective bargaining agreement." **Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills**, 34 PPER 135 at 415 (Final Order, 2003)(emphasis added). Thus, in affirming the Board in **Penn Hills**, the Commonwealth Court held as follows:

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

Penn Hills, 876 A.2d at 499-500.

Upon review of the exceptions and evidence of record, including the LCA in this case, the Hearing Examiner did not err in finding and concluding as follows:

> 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).
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> 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.

(PDO at 4-5).

We agree. In accordance with **Penn Hills** and well-settled law, questions of arbitrability must be presented to an arbitrator. If one must make inferences or argue for interpretation of an agreement to find a waiver of arbitration, the alleged waiver,

if any, is not clear, express and unmistakable, and the determination of whether a grievance is arbitrable must be presented to an arbitrator. *E.g.* **Chester Upland School District**, *supra.* Thus, 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 present its arguments, including whether the Authority waived its right to arbitrate Mr. Girardi's grievance, to an arbitrator. Accordingly, the exceptions filed by the District shall be dismissed, and the PDO 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 Jersey Shore Area School District are hereby dismissed, and the August 15, 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, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this fifteenth day of November, 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

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JERSEY SHORE AREA SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The Jersey Shore Area School District hereby certifies that it has complied with the Proposed Decision and Order and Final Order and ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has immediately processed Frank Girardi's grievance to arbitration; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served an executed copy of this affidavit on the Jersey Shore Area Education Association, PSEA/NEA 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