

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE EDUCATION ASSOCIATION :  
 :  
 v. : Case No. PERA-C-11-237-E  
 :  
 COMMONWEALTH OF PENNSYLVANIA :

**PROPOSED DECISION AND ORDER**

On July 29, 2011, PSEA/NEA, Local Assns. at the Scotland School for Veterans' Children & The Scranton School for the Deaf (PSEA), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania (Commonwealth) violated section 1201(a)(8) of the Public Employee Relations Act (PERA) by refusing to comply with the provisions of a grievance arbitration award involving sabbatical leaves for employees it furloughed at the Scranton State School for the Deaf (SSSD) and at the Scotland School for Veteran's Children (SSVC). On August 17, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October 7, 2011. On September 28, 2011, PSEA requested a continuance of the hearing, representing that the Commonwealth had no objection to its request provided that no interest on any monies due employees under the award if the charge was sustained would accrue between the date of the hearing as originally scheduled and the date of the hearing when actually held and that it was agreeable to the Commonwealth's proviso. On September 29, 2011, the hearing examiner continued the hearing subject to the proviso. On December 21, 2011, the hearing examiner held the hearing and gave both parties a full opportunity to present evidence and to cross-examiner witnesses. On December 30, 2011, each party filed a brief by hand-delivery or deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

**FINDINGS OF FACT**

1. On March 21, 1972, the Board certified PSEA as the exclusive representative of a bargaining unit that includes teachers employed by the Commonwealth at the SSSD and at the SSVC. (N.T. 12; Case No. PERA-R-1363-C)

2. On November 29, 2010, an arbitrator issued an award sustaining a grievance filed by PSEA alleging that the Commonwealth had violated the parties' collective bargaining agreement in denying teachers at the SSSD and the SSVC sabbatical leave for the 2009-2010 school year because it had furloughed them effective June 26, 2009, and closed the SSSD and the SSVC effective June 30, 2009. "As a remedy," the arbitrator directed that "the Commonwealth shall grant sabbatical leaves to all SSSD and SSVC teachers who applied for the same prior to the closing of the State Schools, and who met the statutory eligibility requirements at the time of application" and "shall also provide such teachers with all of the benefits afforded to teachers taking sabbatical leaves pursuant to the Collective Bargaining Agreement and the Public School Code." (N.T. 17-19; Association Exhibit 2)

3. The Commonwealth did not appeal the award. (N.T. 19)

4. The Commonwealth decided to make affected employees whole by paying them a lump sum for the wages and benefits they would have earned if they had been on sabbatical leave during the 2009-2010 school year less any unemployment compensation received by them and interim earnings they may have had while furloughed during that period. (N.T. 61-63, 67-68; Commonwealth Exhibit 2)

5. On April 26, 2011, the director of the Commonwealth's bureau of labor relations in the office of administration (John P. Gasdaska) emailed a representative of PSEA (Marc Kornfeld) as follows:

"Marc:

As promised, listed below are details of the sabbatical payments transacted for the affected employees of SSSD. I requested the same information for the affected employees of SSVV and will forward upon receipt:

Ruth Gerrity = \$75,840 (this includes her salary of \$72,853, sick leave pay \$1,799.76 & personal leave \$1,187.82). Ms. Gerrity had received \$6,495.12 in UC.

Mari[e] Bowen = \$72,224.53 (this includes her salary of \$71,067 & personal leave \$1,157.58). Ms. Bowen had received \$6,138.00 in UC.

Please let me know if you have any questions. Thanks."

(N.T. 22, 54; Association Exhibit 3)

6. On April 28, 2011, Mr. Gasdaska emailed Mr. Kornfeld with "details of the sabbatical payments transacted for the affected employees of SSVV." For Diann Ryan, the "Sub Total (Salary, leave, PSERS/SERS etc)" was \$41,090.27, the "UC Amount Deducted" was \$5,022.00 and the "Award Total" was \$36,068.27. For Deborah Tewell, the "Sub Total (Salary, leave, PSERS/SERS etc)" was \$40,082.94, the "UC Amount Deducted" was \$15,624.00 and the "Award Total" was \$24,548.94. For Suwan Kongkeattikul, the "Sub Total (Salary, leave, PSERS/SERS etc)" was \$38,924.55, the "UC Amount Deducted" was \$0.00 and the "Award Total" was \$38,924.55. For Loyce Alexander, the "Sub Total (Salary, leave, PSERS/SERS etc)" was \$41,658.21, the "UC Amount Deducted" was \$14,664.00 and the "Award Total" was \$26,994.21. For Ray Smith, the "Sub Total (Salary, leave, PSERS/SERS etc)" was \$41,638.03, the "UC Amount Deducted" was \$7,254.00 and the "Award Total" was \$34,384.03. For Doris Scott, the "Sub Total (Salary, leave, PSERS/SERS etc)" was \$66,100.42, the "UC Amount Deducted" was \$28,407.53 and the "Award Total" was \$37,692.89. (N.T. 22; Association Exhibit 3)

7. By letters dated June 13, 2011, Curt A. Byerly from the comptroller operations of the Commonwealth's office of the budget wrote to the affected employes as follows:

"Our office received a Back Pay Settlement due to you for the period August 15, 2009 through June 18, 20[10].

Please submit a statement indicating any earnings from any job that you worked during the period of the back pay except prior approved supplementary employment. Copies of earnings statements or W2's should be attached. If you had no earnings, please submit a letter to that

effect. The statement may be faxed to my attention at [fax number omitted], mailed to the above address, or E-mail me at [email address omitted].

Thank you for your cooperation. We look forward to a fast response so the processing of the Back Pay Settlement can proceed.

If you have any questions, please contact me at [phone number omitted]."

(N.T. 24, 47, 57; Association Exhibit 4)

8. On June 23, 2011, Ms. Scott emailed Mr. Byerly that she had no earnings from a job during the first and second semesters of the 2009-2010 school year. (N.T. 41-42; Commonwealth Exhibit 1)

9. On October 28, 2011, the Commonwealth paid Ms. Scott under the award. The Commonwealth deducted unemployment compensation she had received while furloughed. (N.T. 40-42, 64-66; Association Exhibit 6)

10. The Commonwealth has not paid any of the other affected employees for their sabbatical leaves because none of them responded to Mr. Byerly's letter. (N.T. 64-65)

#### DISCUSSION

PSEA has charged that the Commonwealth committed an unfair practice under section 1201(a)(8) of the PERA by refusing to comply with the provisions of a grievance arbitration award involving sabbatical leaves for employees it furloughed at the SSSD and at the SSVV. According to PSEA, the refusal occurred when the Commonwealth (1) deducted from the monies due employees under the award unemployment compensation the employees received after they were furloughed and (2) would not pay any employee under the award unless they accounted for earnings they might have had after they were furloughed.<sup>1</sup> In PSEA's view, any unemployment compensation received by and interim earnings of the employees after they were furloughed resulted from the fact that they were furloughed and, therefore, may not be deducted from the monies due them for their sabbatical leaves. PSEA cites Central Bucks School District v. Workers' Compensation Appeal Board (Belz), 824 A.2d 387 (Pa. Cmwlth. 2003), Burley v. Pennsylvania Department of Public Welfare, 773 A.2d 230 (Pa. Cmwlth. 2001), and Panaci v. Commonwealth of Pennsylvania, Workmen's Compensation Appeal Board and Scranton School District, 443 A.2d 881 (Pa. Cmwlth. 1982), for the proposition that deductions of that sort are not to be taken from monies due employees on sabbatical leave.

The Commonwealth contends that the charge should be dismissed because the employees would be made more than whole if it did not deduct from monies due them under the award the unemployment compensation they received and any interim earnings they may have had after they were furloughed. The Commonwealth cites Corry Area School District, 38 PPER 155 (Final Order 2007), for the proposition that an award of back pay is to make employees whole, not to give them a windfall, Commonwealth of Pennsylvania, Department

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<sup>1</sup> As the Commonwealth points out in its brief at footnotes 2 and 5, PSEA has not charged that the Commonwealth refused to comply with the provisions of the award by not reinstating the affected employees and allowing them to take their sabbaticals or by deducting taxes, health insurance contributions and union dues from monies due them under the award.

of General Services, 38 PPER 162 (Proposed Decision and Order 2007), quoting Commonwealth of Pennsylvania, PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981), for the proposition that unemployment compensation is to be deducted from back pay awards, and Wyoming Borough, 43 PPER 22 (Final Order 2007), for the proposition that interim earnings are to be deducted from back pay awards. The Commonwealth also submits that if it committed an unfair practice the remedy should not include interest on any monies due the employes under the award because the employes did not account for any interim earnings they may have had while furloughed and thus are themselves responsible for any delay in payments to them.

In Hazle Township, 38 PPER 157 (Final Order 2007), the Board restated the applicable law in a case of this nature as follows:

"When the complainant alleges a refusal to comply with a grievance arbitration award, the Board must determine whether (1) an award exists; (2) the appeal period available to the aggrieved party has been exhausted; and (3) the respondent failed to comply with the provisions of the arbitration award. AFSCME, District Council 88 v. Upper Dublin Township, 27 PPER ¶ 27262 (Proposed Decision and Order, 1996)(citing PLRB v. Commonwealth of Pennsylvania, 478 Pa. 582, 387 A.2d 475 (1978)). The complainant bears the burden of establishing that the respondent has failed to comply with the arbitration award. McCandless Police Officers Association v. Town of McCandless, 30 PPER ¶ 30141 (Final Order, 1999). The Board's review is limited to ascertaining the arbitrator's intent from the four corners of the award, and it may not review the merits of the award. AFSCME, Local 1971 v. City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶ 24052 (Final Order, 1993); Upper Dublin Township, supra. A collateral attack on the validity of an arbitration award is not an affirmative defense to a Section 1201(a)(8) charge. Id."

Id. at 462. See also Commonwealth of Pennsylvania, Department of General Services, supra (same).

There is no dispute that an award exists and has not been appealed by the Commonwealth. The dispositive question, then, is whether or not the Commonwealth refused to comply with the provisions of the award.

A close review of the record shows that the arbitrator directed the Commonwealth to "grant sabbatical leaves to all SSSD and SSVC teachers who applied for the same prior to the closing of the State Schools, and who met the statutory eligibility requirements at the time of application," and to "provide such teachers with all of the benefits afforded to teachers taking sabbatical leaves pursuant to the Collective Bargaining Agreement and the Public School Code" (finding of fact 2). A close review of the record also shows that the Commonwealth (1) decided to make affected employes whole by paying them a lump sum for the wages and benefits they would have earned had they been on sabbatical during the 2009-2010 school year less any unemployment compensation received by them and interim earnings they may have had while furloughed during that period and (2) has only paid one such employe to date because none of the others has accounted for any interim earnings they may have had (findings of fact 4-10).

Notably, in directing the Commonwealth to grant sabbatical leaves to affected employes and to provide them with benefits while on such leave, the

arbitrator was referencing a future period of time. Not surprisingly, then, the arbitrator made no mention of make whole relief for lost pay and benefits. Thus, the arbitrator did not issue a classic make whole award for a past period of time as in Corry Area School District, supra, Commonwealth of Pennsylvania, Department of General Services, supra, and Wyoming Borough, supra. Those cases are, therefore, inapposite, and there is no basis for the Commonwealth to deduct from the monies due employes under the award any unemployment compensation they received or earnings they may have had while furloughed. Under the circumstances, the Commonwealth must be found to have committed an unfair practice under section 1201(a)(8).

Support for such a finding may be found in APSCUF v. Commonwealth of Pennsylvania, PLRB, 532 A.2d 60 (Pa. Cmwlth. 1987), where the court held that an employer could not deduct unemployment compensation from monies due a discharged employe under a grievance arbitration award reinstating him. As the court explained, the unemployment compensation was for a period during which he would not have been working, so he would have been entitled to the unemployment compensation as a matter of law even if he had not been discharged. Similarly, the unemployment compensation received by the employes here was for a period during which they were not working, so they were entitled to the unemployment compensation as a matter of law, too. The same analysis applies to any interim earnings the employes may have had while on furlough as the furlough was for a period when they were not on sabbatical leave.

The Commonwealth contends that PSEA's reliance on Panaci, supra, is misplaced because that case is inapposite. The hearing examiner, however, has not relied on that case or on the other two cases cited by PSEA. Accordingly, the Commonwealth's contention need not be addressed.

The remedy for unfair practices involving monies that should have been paid customarily includes a direction to pay interest on the monies due in order to make the employes whole. Lycoming County v. PLRB, 943 A.2d 333 (Pa. Cmwlth. 2007). As noted above, however, the arbitrator did not issue a classic make whole award, so there is no basis for directing the Commonwealth to pay interest to remedy its unfair practice.

#### CONCLUSIONS

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

1. The Commonwealth is a public employer under section 301(1) of the PERA.
2. PSEA is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has committed an unfair practice under section 1201(a)(8) of the PERA.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Commonwealth shall:

1. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.

2. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PERA:

(a) Comply with the provisions of the award;

(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 its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixth day of January 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE EDUCATION ASSOCIATION :  
v. : Case No. PERA-C-11-237-E  
COMMONWEALTH OF PENNSYLVANIA :

**AFFIDAVIT OF COMPLIANCE**

The Commonwealth hereby certifies that it has ceased and desisted from its violation of section 1201(a)(8) of the PERA, that it has complied with the provisions of the award, that it has posted the proposed decision and order as directed and that it has served an executed copy of this affidavit on PSEA.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

SWORN AND SUBSCRIBED TO before me  
the day and year aforesaid.

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Signature of Notary Public