

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 776 :
v. : Case No. PERA-C-12-354-E
SUSQUEHANNA TOWNSHIP SCHOOL :
DISTRICT :

PROPOSED DECISION AND ORDER

On November 16, 2012, Teamsters Local 776 (Union or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Susquehanna Township School District (District or Respondent) alleging that the District violated sections 1201(a)(1) and (5) of the Public Employee Relations Act (PERA).

On December 12, 2012, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and January 4, 2013 in Harrisburg was assigned as the time and place of hearing if necessary, before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

The hearing was necessary, but was continued to February 5, 2013 on the motion of the District without objection from the Union. The hearing was held on the rescheduled day, at which time the parties were afforded a full opportunity to present testimony, introduce documentary evidence and cross-examine witnesses. The District submitted a post-hearing brief on February 21, 2013. The Union submitted a post-hearing brief on March 7, 2013.

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

FINDINGS OF FACT

1. Susquehanna Township School District is a public employer within the meaning of Section 301(1) of the Public Employee Relations Act.
2. Teamsters Local 776 is an employee organization within the meaning of Section 301(3) of PERA.
3. The Union is the exclusive representative of the District's nonprofessional employees.
4. The District and the Union are parties to a collective bargaining agreement (CBA) for the period of July 1, 2008 through June 30, 2013 (N.T. 6, 10, Joint Exhibit 1)
5. Robert Reed was a custodian for the District and a member of the unit represented by the Union. The District terminated him in the 2011-2012 school year. (N.T. 7, 10, Joint Exhibit 3)
6. The Union grieved his termination and the grievance moved to arbitration. On May 14, 2012, an arbitrator reinstated Reed to work effective June 4, 2012, without back pay but with all seniority intact and with all benefits to which the Grievant is entitled under the collective bargaining agreement. The arbitrator's award went on to state,

"Should Reed commit any violation of Rule 23 of the work rules set forth in the collective bargaining agreement within twelve (12) months after the date of his reinstatement, he will be subject to immediate termination.

If the Grievant is terminated for violating Rule 23 within this time period, he will have no recourse to or right to access the grievance arbitration procedure contained in the collective bargaining agreement."

(N.T. 8, 10, Joint Exhibit 3)

7. On October 4, 2012, after Reed had been returned to work, Superintendent Dr. Susan M. Kegerise notified Reed that she was recommending to the School Board of Directors that he be removed and dismissed from employment. Kegerise cited two separate occasions when he violated Rule 23 on September 12. First, she charged him with engaging in an "inappropriate, suggestive conversation" with other employees and "aggressively poking" an employee. Second, she charged him with entering an employee's small office and "unnecessarily reaching over" the employee "to reach a piece of paper that could have been reached without contacting" the employee. Kegerise informed Reed that he was suspended without pay pending Board action. (N.T. 7, 10, Joint Exhibit 4)
8. On October 10, 2012, Reed and the Union filed a grievance alleging that the District violated Article 12 of the CBA (Disciplinary Action). (N.T. 7, 10, Joint Exhibit 2)
9. Article 12, provides, inter alia, that "[n]o employee will be disciplined or discharged except for just cause." (N.T. 6, 10, Joint Exhibit 1)
10. Article 13 of the CBA provides for a grievance and arbitration procedure. (N.T. 6, 10, Joint Exhibit 1)
11. On October 11, 2012, Kegerise replied to Union that "Mr. Reed's termination is not subject to the grievance procedure or arbitration." She referred to the May 14 arbitration award and cited Article 13, Step 6 of the collective bargaining agreement which states in part, "The decision of the arbitrator shall be final and binding on both parties." (N.T. 8, 10, Joint Exhibit 5)
12. The parties stipulated that in lieu of Reed testifying in this unfair practice charge hearing, Reed would testify that he did not violate Rule 23. (N.T. 15, 16)
13. Rule 23, part of Addendum II of the CBA, prohibits "Use of abusive language, threatening, coercing or harassing other employees, students and/or supervisors." (N.T. 6, 10, Joint Exhibit 1)

DISCUSSION

The Union's charge of unfair practices alleges that the District violated sections 1201(a) (1) and (5) of PERA by refusing to process a grievance filed on behalf of custodian Robert Reed. The District explained that it refused to process the grievance because of a prior arbitration award that reinstated Reed on the condition that he not violate Rule 23 in the next 12 months and that if he did violate Rule 23, he would have no recourse to the grievance arbitration procedure.

A public employer violates Section 1201(a) (1) and (5) of PERA by refusing to submit a grievance to binding arbitration procedures in the collective bargaining agreement. **PLRB v. Bald Eagle Area School District**, 499 Pa. 62, 451 A.2d 671 (1982). The Supreme Court held that arbitration of grievances is a statutory mandate under Section 903 of PERA., 43 P.S. 1101.903, and that any questions of arbitrability are for the arbitrator to decide.

The District contends that it is excused from processing the grievance to arbitration because of the prior arbitration award that gave it a "sound arguable basis" for its refusal. The District argues that the just cause provision of Article 12 of the CBA and the grievance provisions of Article 13 of the CBA do not apply to Reed's grievance because the arbitration award prohibits grievance arbitration if the District terminates Reed for committing a violation of Rule 23.

The "sound arguable basis" argument has its genesis in **Jersey Shore Education Association v. Jersey Shore Area School District**, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987). In that case the Association charged the District with unilaterally reducing the work year and changing the work schedules of the District's guidance counselors in violation of its duty to bargain under section 1201(a)(5) of PERA. Hearing Examiner Thomas G. McConnell dismissed the District's defense of "substantial claim of contractual privilege," concluding that the District did not have "a sound arguable basis" for its interpretation of the CBA. He found a violation of the duty to bargain and the Board dismissed the District's exceptions. Hearing Examiner McConnell's reasoning and the **Jersey Shore** analysis has served as the basis for several later Board decisions cited in the District brief. See e.g. **Millcreek Education Association v. Millcreek Township School District**, 22 PPER 22185 (Final Order, 1991), aff'd 631 A.2d 734 (Pa. Cmwlth. 1993)

However, the **Jersey Shore** defense of "substantial claim of contractual privilege" is not applicable to the present case because it applies to those situations where an employer defends an action based on mutually agreed language in a CBA. Here, the District is not relying on CBA language but rather an arbitrator's award deciding whether a termination met the just cause provision of Article 12 of the CBA and the grievance procedure in Article 13 of the CBA. This is one step removed from the factual scenario **Jersey Shore**.

Even if this arbitration award is seen as analogous to a last chance agreement (LCA), the law is clear that an LCA must meet certain criteria before it can be used by an employer to refuse to process a grievance over a discharge. In **Municipality of Penn Hills**, 34 PPER 135 (Final Order, 2003), 876 A.2d 494 (Pa. Cmwlth. 2005) the Board held that an LCA could act as a bar to grievance arbitration in certain instances. In that case, the employer, the union and the employee entered into a LCA in lieu of an employee's immediate discharge for willful misconduct. Paragraph 6(f) of the LCA provided that chronic and excessive absenteeism shall constitute grounds for termination and importantly, that the "determination of what is 'chronic or excessive' shall be at the sole discretion of the employer." **Id.** at 499.

In **Municipality of Penn Hills**, the Commonwealth Court reasoned that because the employee was covered by the CBA, and his discharge is a topic covered by the CBA, arbitration is mandatory under Section 903 of PERA unless the union and the employee expressly waived their right to arbitration under the facts of the case. **Id.** at 499. The Court found that the LCA provided that the union and the employee released and waived their rights to "challenge the penalty of discharge or the underlying facts for the imposition of the penalty..." **Id.** at 499.

The facts of the present case are different. Instead of an LCA at issue, Reed was returned to work pursuant to an arbitration award, not reached by the mutual agreement of the parties but instead the sole product of the arbitrator. The Union and Reed were not signatories to the arbitration award. Furthermore, Reed did not waive his right to arbitrate future discipline. Such an award does not fall meet the criteria set forth in **Municipality of Penn Hills**. The District will not be permitted to rely on the arbitration award to refuse to process to arbitration Reed's grievance over his most recent termination.

Having considered the arguments of the District and the Union, the District's refusal to process the Reed grievance to arbitration is a violation of its duty to bargain under Section 1201(a)(5) of PERA and a derivative violation of Section 1201(a)(1) of PERA.

CONCLUSIONS

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

1. That Susquehanna Township School District is a public employer within the meaning of Section 301(1) of PERA.

2. That Teamsters Local 776 is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the District has committed unfair practices in violation of Sections 1201(a)(1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Cease and desist from refuse to bargain collectively with the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:
 - (a) Process Robert Reed's October 10, 2012 grievance under Article 13 of the CBA;
 - (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;
 - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance and
 - (d) Serve a copy of the attached affidavit of compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this first day of October, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner