COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MUNICIPAL EMPLOYEES ORGANIZATON (MEO) OF PENN HILLS	:	
v.	:	Case No. PERA-C-12-47-W
MUNICPALITY OF PENN HILLS	:	

PROPOSED DECISION AND ORDER

On February 13, 2012, the Municipal Employees Organization of Penn Hills (Union or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Municipality of Penn Hills (Municipality or Respondent) violated Sections 1201(a)(1), (3), (4), (5) and (8) of the Public Employe Relations Act (PERA) by terminating the employment of two union members.

On February 27, 2012, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on July 26, 2012 in Pittsburgh before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

The hearing was held as scheduled, at which time the parties were afforded a full opportunity to present testimony, cross examine witnesses and introduce documentary evidence.

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. The Municipality of Penn Hills is a public employer within the meaning of Section 301(1) of PERA, 43 P.S. §1101.301(1).

2. The Municipal Employes Organization (MEO) of Penn Hills is an employe organization within the meaning of Section 301(3) of PERA, 43 P.S. §1101.301(3).

3. The MEO is the exclusive representative of a unit of Municipality employees comprised of "all Communications Operators (CRO), Custodial Employees, Building Inspectors, Secretarial, Office Personnel Employees, and excluding all professional employees, supervisors, first level supervisors, confidential employees, purchasing agents and guards as defined in Act 195." (N.T. 36, Union Exhibit 8)

4. The Municipality and the Union have been parties to several collective bargaining agreements for the unit, the most recent being the agreement for the period of January 1, 2008 to December 31, 2010. (N.T. 36, Union Exhibit 8)

5. The 2008-2010 CBA contains a residency clause at Article VII, Section 7, which states,

> Section 7 Residency Requirement
>
> All employees must live in the Municipality. In the event an employee is hired who lives outside the Municipality, he/she must, within one (1) year, move into the Municipality. Failure to

comply with this section can result in an employee being discharged.

(N.T. 131, Union Exhibit 28, Article VII, Section 7).

6. The Codified Ordinances of Penn Hills also includes a Residency Requirement, at Section 288.12, stating,

> All employees represented by bargaining units shall comply with the residency provision of their respective labor agreements. Failure to adhere to the residency requirement may subject an employee to disciplinary action up to and including discharge from employment.

(N.T. 187, Municipality Exhibit 3)

7. The residency clause has been in the CBA for approximately 30 years, but was never enforced or even discussed by management until 2009. (N.T. 134-135, Union Exhibit 28)

8. Joseph Probo and Mary Lou Flinn were code enforcement officers for the Municipality until their termination on January 27, 2012. Mr. Probo worked for the Municipality since 1993. Ms. Flinn worked for the Municipality since 1976. (N.T. 20, 81)

9. On August 5, 2009, Mr. Probo and Ms. Flinn each received a letter from Municipal Manager Mohammed F. Rayan stating that "[a] review of Municipal records indicates that you may be in violation of the residency requirement as stated in the Codified Ordinances of Penn Hills." The letter stated that the Municipality is enforcing the residency requirement and that if they were not in compliance they may be subject to termination. They were instructed to provide "proof of [your] residency such as a utility bill, property tax bill or property deed in your name with ten (10) days." (N.T. 22, 82, Union Exhibits 1, 8 and 18)

10. On August 13, 2009 the Union filed a grievance on behalf of Mr. Probo and Ms. Flinn over the threatened terminations. (N.T. 35, Union Exhibit 7)

11. In the interim, Mr. Probo and Ms. Flinn, neither of whom owned real estate, provided other proofs of residency: payment of local earned income taxes, state and federal tax returns, voter registration, driver's licenses and vehicle registration, all showing Penn Hills addresses (N.T. 25-28, 30, 83, 84-89, 111, 127, 84-89; Union Exhibits 2, 3, 4, 5, 19, 20, 21, 22, 23 and 24).

12. On August 21, 2009, Penn Hills responded with a memo to each employee again requiring proof of residency in the form of "a utility bill, property tax bill or property deed" by August 31 and threatening termination if they did not change their residency to Penn Hills. (N.T. 29, 89, Union Exhibits 6, 25).

13. The Union's grievance on behalf of Mr. Probo and Ms. Flinn proceeded to arbitration. A year later, on August 9, 2010, Arbitrator Jennie K. Bullard issued an award, which stated,

> **AWARD**
>
> 1. The grievance filed by the Municipal Employees Organization (MEO) as to the allegation that the Municipality discriminated against the grievants because of their activities with the Union is hereby denied.

2. The grievance filed by the Municipal Employees Organization (MEO)as to the allegation that the Municipality violated the Collective Bargaining Agreement by enforcing the residency requirements against bargaining unit members differently than the residency requirements were enforced against non-union employees is hereby denied.

3. The grievance as to the allegation that the Municipality violated the just cause provisions of the collective bargaining agreement when it sent out letters to the grievants requesting certain proof of residency or be subjected to the possibility of termination from employment is hereby denied.

4. The grievants, Mrs. Mary Lou Flinn and Mr. Joseph Probo, will be provided with an additional period of ninety (90) days from the date of this arbitration decision in which to work toward compliance with the residency requirement applicable to non-property owners.

(N.T. 36, Union Exhibit 8)

14. In the discussion section of the Award, Arbitrator Bullard wrote,

> It is my opinion that Ms. Flinn and Mr. Probo were lulled into a false sense of security by believing that they had complied with the Municipality's requirements and without further guidance they cannot now be punished for doing what they thought was their best effort. There is no evidence that they were being purposely duplicitous. However, they are now under notice and must work toward compliance with the Municipality's requirements. **It is incumbent on Manager Rayan, the Municipality and the Union to develop a reasonable, manageable and enforceable standard for compliance for those who do not own property in the Municipality and therefore cannot comply with the current rigid standards.**

(N.T. 36, Union Exhibit 8, page 27. Emphasis added by hearing examiner)

15. Also in the discussion section of the Award, Arbitrator Bullard wrote,

> The Manager is within his right to provide a waiver or extension to non-union employees, therefore he has not discriminated against bargaining unit employees based on his granting of waivers and/or extensions to non-union employees. He is permitted to grant extensions and waivers to non-union employees.
>
> In addition, although Mrs. Flinn and Mr. Probo have been active with the Union, there was no evidence given that they were singled out for enforcement because of their positions in the Union.

(N.T. 36, Union Exhibit 8, page 29)

16. On August 30, 2010, Manager Rayan sent letters to Mr. Probo and Ms. Flinn asking that they "provide this office evidence that you live within the Municipality" and threatening termination for "[f]ailure to comply…by November 9, 2010." (N.T. 76, 109-110, Municipality Exhibits 1 and 2)

17. In response to Manager Rayan's letter, both Mr. Probo and Ms. Flinn submitted written leases to the Manager. Ms. Flinn submitted a lease for a new Penn Hills address at 5876 Heberton Drive, where she began living on September 1, 2010. Mr. Probo submitted a written lease commencing August 1, 2010 for 160 Claymont Drive in Penn Hills. (N.T. 39, 41-42, 100, 113, Union Exhibits 13 and 26)

18. Neither Mr. Probo nor Ms. Flinn received a response from Mr. Rayan or the Municipality or notice about whether the leases satisfied the residency requirement for non-property owners (N.T. 42, 104)

19. On September 18, 2010, the Union appealed Arbitrator Bullard's award. The reasons for the Union's appeal were that "the Award does not draw its essence from the collective bargaining agreement" and that the Award "is genuinely without foundation in the collective bargaining agreement." As relief, the Union requested the Court to "review, modify and correct" the Award. (N.T. 37, Union Exhibit 9)

20. At no point did the Union request a stay of the arbitration award. (N.T. 196-197)

21. In response to the appeal, Judge Paul Lutty, on March 2, 2011, entered the following Order of Court,

> It is hereby ordered that the Appeal is terminated as premature and the matter is returned to the arbitrator for further proceedings in accordance with her Award.

(N.T. 28, 39, Union Exhibits 10)

22. On March 21, 2011, the Municipality appealed Judge Lutty's order to Commonwealth Court. (N.T. 28, 39; Union Exhibit 11)

23. On December 22, 2011, the Municipality's appeal was quashed by the Commonwealth Court on the basis that the appeal was from an interlocutory order. (N.T. 39; Union Exhibit 12)

24. Approximately one month later, both Mr. Probo and Ms. Flinn received a memo dated January 24, 2012, instructing them to attend a meeting on January 27, 2012 "to discuss serious employment matters." The memo made no mention of the residency requirement.

(N.T. 46, 92; Union Exhibit 15)

25. On January 26, 2012, Arbitrator Bullard wrote to the attorneys for the Municipality and the Union.

> "Please be advised that it is my opinion that when I rendered my arbitration decision I intended it to be my final participation in that process. If I had intended to retain jurisdiction until the parties completed the process, I would have stated so in my decision."

(N.T. 45; Union Exhibit 14)

26. Manager Rayan acknowledges he had received Arbitrator Bullard's January 26 letter by the time of the January 27, 2012 meeting with the employees. (N.T. 202-203)

27. At the January 27, 2012 meeting, both Manager Ryan and the Municipality's labor solicitor, Gretchen Love, were present. Ms. Flinn maintained that she lived at her Penn Hills residence at 4876 Heberton, the property she provided the written lease for the previous August (N.T. 27, 93, 98-99)

28. Attorney Love informed Ms. Flinn that she had been subjected to surveillance, which showed that during the surveillance period she was coming and going to work from her daughter's home in Monroeville. This was the first time the fact of surveillance was revealed to Ms. Flinn or to anyone. Ms. Flinn testified

that it was no secret that she stayed with her daughter who has two children with autism and who needs her help. The surveillance dates were not revealed, so she was not able to respond in any substantive way to the allegation that she did not live in Penn Hills. (N.T. 94-96, 101)

29. Ms. Flinn was then told to clean out her desk and not report to work. She was then escorted out of the building by a police lieutenant. A discharge letter was subsequently sent to her. (N.T. 103, Union Exhibit 27)

30. Ms. Flinn testified that, as a Union board member, she knows the Union was not approached about the standards she or Mr. Probo would be held to in terms of meeting the arbitration award. The Municipality did not even unilaterally announce the standards. (N.T. 103)

31. In 2009 and up to the date of the arbitration hearing on May 21, 2010, Ms. Flinn had an arrangement with a friend to stay in a room at 121 Opal Drive, Verona, PA, in Penn Hills. (N.T. 94-99)

32. Ms. Flinn testified that she then made arrangement to stay on occasion in a room at no charge at in a home at 4876 Heberton Drive, in Penn Hills owned by a friend. She pays no rent but does dog and house watching as well as "some housekeeping." (N.T. 99-102 Union Exhibit 26)

33. From 2009 to 2012, Ms. Flinn stayed at her daughter's home at 112 Briarcrest, Monroeville, approximately 90% of the time. (N.T. 94, 115)

34. Joseph Probo received the same treatment from the employer in a similar meeting on the same day. Manager Rayan and Attorney Love claimed that Mr. Probo was going to his wife's residence in a neighboring community (N.T. 47)

35. At the conclusion of the meeting, Mr. Probo also was told to leave the building, not to report to work, and clean out his desk. He was escorted by a police lieutenant to his car. He subsequently received his own discharge letter. (46-48, 103, Union Exhibit 16)

36. Mr. Probo stays at 160 Claymont Drive in Penn Hills two nights a month. He admitted that he frequently stays overnight at his wife's home at 2033 Haymaker Road in Monroeville. This has been his living pattern from the time of the arbitration hearing on May 21, 2010 to the unfair practice hearing on July 26, 2012. (N.T. 62-63, Union Exhibit 8, page 9)

37. The Union president, Cathy Zegarelli, confirmed that the Union was never informed of whether Mr. Probo and Ms. Flinn had met the requirement of the Bullard Award that they "work toward" residency. The parties did not negotiate the standards for establishing residency. Manager Rayan did not inform the Union or the grievants of what he considered to be "work towards residency" or that surveillance might be the basis for judging the residency of non-property owners. He did not even show the surveillance photos to the grievants or disclose the period of when they were taken or even disclose what determined residence. (N.T. 141-143, 210-211, 225)

38. The Municipality did not give Mr. Probo or Ms. Flinn notice of any kind that would indicate that their leases were not sufficient or what, in the Municipality's eyes, would constitute compliance with the Award and the residency provision. (N.T. 219)

39. The Union filed a grievance over the Flinn and Probo terminations but later withdrew the grievance. (N.T. 18)

DISCUSSION

The Union makes three separate allegations in its specification of charges. The allegations claim that the Municipality violated five sections of PERA when it discharged Joseph Probo and Mary Lou Flinn on January 27, 2012 for not following the Municipality's residency requirement.

I. Refusal to Comply With Arbitration Award

The Union's first allegation in the specification of charges is "the emloyes were discharged in violation of the Respondent-employer's obligations as set forth in the arbitration award of Jennie K. Bullard dated August 9, 2010."

This allegation charges that the Municipality violated section 1201(a)(8) of which prohibits employers from "[r]efusing to comply with the provisions of an arbitration award deemed binding under Section 903 of Article IX." 43 P.S. §1101.1201(a)(8).

An employer commits unfair practices within the meaning of Section 1201(a)(8) of PERA if a grievance arbitration award exists, the employer's right to appeal the award has been exhausted and the employer has refused to comply with the provisions of the award. **Commonwealth v. PLRB**, 478 Pa. 582, 387 A.2d 435 (1978). Once the employer's appellate rights have been exhausted, the merits of the award are no longer at issue. **Id.** Thus, in deciding whether or not the employer has complied with the provisions of the award, the Board looks at the four corners of the award to determine the intent of the arbitrator as expressed in the award. **City of Philadelphia, Office of Housing and Community Development**, 24 PPER ¶ 24052 (Final Order, 1993).

The Municipality argues that this charge is barred by the four month statute of limitations set forth in Section 1505 of PERA, 43 P.S. §1505. This defense has merit. The Union's allegation regarding the refusal to comply with the Bullard Award focuses on the failure to mutually develop a standard for residency following the August 9, 2010 Award. Looking at a date most favorable to the Union, the Union should have filed the 1201(a)(8) charge no later than four months after the 90 days from August 9, 2010, the time given by the Bullard Award to the grievants "to work towards compliance with the residency requirement applicable to non-property owners." The Union did not file this charge until February 27, 2012, well outside the four month statute of limitations.

Following the Bullard Award, this case took an unusual procedural turn. The Union, not the employer, appealed the award. The Union did not request a stay of the award at any point during its appeal. There is no automatic stay pending appeal of an arbitration award. **Lycoming County v. PLRB**, 943 A. 2d 333, 338, 349 (Pa. Cmwlth. 2008). The Union's appeal of the award does not excuse the union from adhering to PERA's statute of limitations for filing a charge within four months of the unfair practice occurring. Accordingly, there will be no finding that the Municipality has violated Section 1201(a)(8) of PERA.

II. Retaliation for Protected Activity

The Union's second allegation is that "the employer acted in retaliation against the employees for engaging in protected concerted activity, including making use of the grievance-arbitration procedures and the Pennsylvania courts in vindication of its rights as secured by Pennsylvania law and the collective bargaining agreement between the parties." Under this allegation, the Union alleges that the employer violated Sections 1201(a)(1), (3) and (4) of PERA.

Section 1201 (a) (1) Allegation

Section 1201(a)(1) of PERA prohibits an employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." 43 P.S. §1101.1201(a)(1). An employer commits an independent violation of section 1201(a)(1) of PERA "where in light of the totality of the circumstances the employer's actions have

a tendency to coerce a reasonable employe in the exercise of protected rights." **Fink v. Clarion County**, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employes have in fact been coerced. **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985); **Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI**, 35 PPER ¶ 97 (Final Order, 2004).

This Board has adopted the "tendency to coerce" test of **NLRB v. Brookwood Furniture Division of the United States Industries**, 701 F.2d. 452 (5th Cir. 1983) to determine whether an independent violation of Section 1201(a)(1) has occurred. In **Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI**, 35 PPER ¶ 97 (Final Order 2004), the Board reiterated the law with respect to Section 1201(a)(1) as follows:

> "An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employe, regardless of whether anyone was actually coerced. **Fink v. Clarion County**, 32 PPER ¶ 32165 (Final Order, 2001). The employer's motive for its actions is irrelevant. **Northwestern Education Association v. Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985)."

35 PPER at 303.

If the employer's conduct was not coercive, then no violation of Section 1201(a)(1) may be found. **Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI**, *supra*. Nor may a violation of section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. **Temple University**, 23 PPER ¶ 23118 (Proposed Decision and Order 1992), **affirmed on another ground**, 25 PPER ¶ 25121 (Final Order 1994); **Philadelphia Community College**, 20 PPER ¶ 20194 (Proposed Decision and Order 1989). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a)(1) must be found. **Ringgold** School District, 26 PPER ¶ 26155 (Final Order 1995).

Turning to the facts of the present dispute, on January 27, 2012, the Municipality terminated Mr. Probo and Ms. Flinn. The terminations occurred one month after the Commonwealth Court quashed the Municipality's appeal of Judge Lutty's order as interlocutory, whichc resulted in the matter being returned to the arbitrator. Before the arbitrator responded to the matter being sent back to her, the Municipality notified the employes to attend a meeting at which they were terminated. Coincidentally, the day before the January 27 meeting, the arbitrator notified the parties that she would say nothing more about her award and that it was final.

The arbitration decision had two sections that are relevant to this matter. The first, one of the specific award clauses, provided the employes "with an additional ninety (90) days from the date of this arbitration decision in which to work toward compliance with the residency requirements applicable to non-property owners." The second, in the decision's Discussion and Opinion section, required the Municipality to develop a standard for residency for employes who did not own property in Penn Hills. It is the Municipality's terminations before it developed a residency standard which triggered this unfair practice charge.

The Board has long recognized that retaliation for employes' successful filing of a grievance is a violation of Section 1201(a)(1) of PERA. In **Richland School District**, 11 PPER ¶ 11221 (Nisi Decision and Order, 1980), the Board held that the school district engaged in interference when it terminated the classification of "preferred substitutes teachers" on the same day the district was notified by an arbitration award that preferred substitutes were entitled to contractual benefits.

Based on some of the circumstances of this case, it could be concluded that the termination of Mr. Probo and Ms. Flinn could tend to coerce them in the exercise of his or her protected rights. They could conclude that the Municipality was taking action

against them so that it did not have to comply with that part of the Bullard Award requiring the Municipality and the Union develop a residency standard for non-property owners.

However, considering the "totality of the circumstances" of this case and not just the facts favorable to the employes, another conclusion must be reached. It is difficult to conclude that these employes were reasonable in their reliance on one part of the arbitration award when they did so little to "work toward compliance with the residency requirement." Ms. Flinn spends only 10% of her time in Penn Hills. Mr. Probo spends only two nights a month in Penn Hills.

Employes who spend such a limited amount of time in Penn Hills cannot seriously consider themselves to "live" in Penn Hills or that they were working "toward compliance with the residency requirement." Unlike **Richland School District**, *supra*. the Municipality did not immediately take action in disregard of the Bullard Award that would be evidence of retaliation. It is true that the Municipality did not set a standard for defining residency. However, the employes, over the entire course of this dispute, from 2009 to their termination in 2012, did not significantly increase the nights they were spending in Penn Hills. Over a year went by in which the employes could have worked toward "compliance with the residency requirement." However, they did nothing more than submit a lease to the manager. Therefore, it is difficult to say that these employes were reasonable when they just waited for the Municipality to develop a standard.

The Municipality also argues that even if the Board finds that the terminations "would have a tendency to coerce a reasonable employe" that any such coercion was outweighed by the legitimate basis of the employer enforcing a residency requirement against violators. **Temple University**, 23 PPER ¶ 23118 (Proposed Decision and Order 1992), **affirmed on another ground**, 25 PPER ¶ 25121 (Final Order 1994); **Philadelphia Community College**, 20 PPER ¶ 20194 (Proposed Decision and Order 1989).

The Municipality argues that it simply took the steps allowed both by the CBA and the Bullard Award. The CBA requires employes to "live" in the Municipality. The Bullard Award stated that Mr. Prebo and Ms. Flinn had to "work toward compliance with the residency requirement." The Municipality contends that a reasonable interpretation of the CBA and the Bullard Award is that if the employee did not meet the residency requirement then the Municipality was able to exercise its managerial authority of enforcing the residency requirement. Enforcement included surveillance to determine whether employes were actually living in Penn Hills. Given this, the Municipality had a legitimate basis for terminating Mr. Probo and Ms. Flinn that outweighed any coercive effect the terminations may have had on the employes. The independent 1201(a)(1) charge will be dismissed.

Section 1201(a)(3) Allegation

As for the Section 1201(a)(3) allegation, this section prohibits an employer from "discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization." 43 P.S. §1101.1201(a)(3).

In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must prove that the employe engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employe. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). The complainant must establish these three elements by substantial and legally credible evidence. **Shive v. Bellefonte Area Board of School Directors**, 317 A.2d 311 (Pa. Cmwlth. 1974). **St. Joseph's Hospital, supra**.

The Union proved the first two elements of the **St. Joseph's** test. Mr. Probo and Ms. Flinn were engaged in protected activity when they became the lead employes for the union's grievances over the Municipality's announced enforcement of a residency

requirement. These two employes testified in the grievance arbitration hearing. The Municipality knew of their involvement.

The disputed issue in this case is the third part of the test for discrimination, employer motivation. The "motive creates the offense" under section 1201(a)(3). **PLRB v. Stairways, Inc.**, 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), **quoting PLRB v. Ficon**, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969).

The Municipality contends that it terminated the employes for their failure to comply with the residency requirement, not for the exercise of their protected activity. Having considered all the evidence, the Municipality has offered a credible explanation for its motivation behind the terminations. First, Arbitrator Bullard noted that the Municipality did not begin the enforcement against Mr. Probo and Ms. Flinn because of their union activities. Second, the Municipality's experienced labor counsel was present at the termination meeting and it is difficult to believe that she would have allowed a personnel action to go forward that was motivated by anti-union animus.

Accordingly, absent proof of a discriminatory motive, the third part of the **St. Joseph's** test has not been met and the section 1201(a)(3) charge must be dismissed.

Section 1201(a)(4) Allegation

Finally, the Union alleges that the Municipality violated Section 1201(a)(4) of PERA, which prohibits an employer from "[d]ischarging or otherwise discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act." 43. P.S. §1101.1201(a)(4). This section is violated when the employer takes adverse action against the employe for using Board processes such as filing an unfair practice charge or a petition for representation or for giving testimony in support of such filings. **William Penn School District**, 2 PPER 170 (1972) and **PLRB v. Municipal Authority of the City of McKeesport**, 3 PPER 161 (1973).

The record contains no evidence that the terminations of Mr. Probo and Ms. Flinn were taken for any actions they had done in connection with Board process. Accordingly, the charge alleging a violation of this section 1201(a)(4) will be dismissed.

III. Refusal to Bargain in Good Faith

The Union's third allegation is "that the Respondent-employer failed to honor its obligation of good faith bargaining in that it unilaterally changed the standards concerning employee residency without bargaining." This allegation contends that the employer violated Sections 1201(a)(5) of PERA, which prohibits an employer from "[r]efusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative." 43 P.S. §1101.1201(a)(5).

However, the Union's brief did not request relief for a Section 1201(a)(5) violation and did not set forth an argument as to how the facts of this case constitute a Section 1201(a)(5) violation. An argument not presented to the hearing examiner is deemed waived. **State System of Higher Education**, 32 PPER ¶ 32118 (Final Order, 2001). Accordingly, the charge alleging a violation of Section 1201(a)(5) has been waived by the Union and is therefore dismissed.

CONCLUSIONS

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

1. That the Municipality of Penn Hills is a public employer within the meaning of Section 301(1) of PERA.

2. That the Municipal Employees Organization of Penn Hills 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 Municipality of Penn Hills has not committed unfair practices in violation of Sections 1201(a)(1),(3),(4), (5) and (8) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 sixth day of February, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner