COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On September 25, 2015, the Abington Heights Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Abington Heights School District (District) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that, on August 25, 2015, the District refused to arbitrate a grievance, filed on behalf of William Yelland, alleging that the District terminated Mr. Yelland without just cause.

On November 12, 2015, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on December 10, 2015, in Harrisburg. After two granted continuance requests, the hearing was held on Friday, April 1, 2016, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On April 25, 2016, the attorney for the Union filed Joint Stipulations of Fact on behalf of both parties.[1] On May 25, 2016, the Union timely filed its post-hearing brief. On June 21, 2016, I granted the District's request for a 30-day extension to file its post-hearing brief, with the consent of Union counsel. On July 21, 2016, I granted the District's request for a three-week extension, with the consent of Union counsel. On August 15, 2016, the Board received the District's post-hearing brief, which was mailed on August 12, 2016, as evidenced by a U.S. Postal Form 3817, Certificate of Mailing.

The examiner, based upon the Joint Stipulations of Fact and all matters of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (NT6; JS3)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (NT6; JS1)

3. Prior to April 9, 2015, William Yelland was a teacher employed by the District and was a member of the Association's bargaining unit. (NT24; JS2; Joint Exhibit 2)

4. At all relevant times, the Association and the District have been parties to a collective bargaining agreement (CBA) governing terms and conditions of employment for the Association's bargaining unit employes. (JS4)

5. The CBA contains a grievance procedure for resolving disputes arising under the CBA which culminates in final and binding arbitration. The CBA expressly incorporates all the laws of the Commonwealth including the Public School Code of 1949 and its provisions regarding the dismissal of public school teachers. The CBA also contains a provision requiring just cause for any

[1] References and citations to the Joint Stipulations of Fact will be designated as "JS," and references to the transcript will be designated as "NT."

discipline or discharge of the Association's bargaining unit members. (JS5)

6. On April 9, 2015, the District suspended Mr. Yelland indefinitely without pay, with the intent to terminate his employment with the District. (JS6)

7. On April 14, 2015, the Lackawanna County Department of Human Services, Office of Youth and Family Services, sent a letter to Mr. Yelland informing him that he was reported to the County and that they would conduct an investigation. The letter also delineated his rights and the consequences of a "founded" report of child abuse after investigation. (NT42-43)

8. 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. (JS7)

9. 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 a school board hearing. (NT26; JS8; Joint Exhibit 3)

10. 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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> . . . .
>
> 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.

(Joint Exhibit 3)(emphasis original)

11. 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.

12. 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. The District's Superintendent, Dr. Michael Mahon, understood at the time that the District would be arbitrating Mr. Yelland's dismissal. (NT27-28, 72, 98-99; JS9; Joint Exhibit 4)

13. 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.

(Joint Exhibit 4(1)).

14. 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. (NT33; JS10)

15. 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. (NT38-39)

16. On May 19, 2015, Mr. Yelland's criminal defense counsel wrote the District and requested a hearing before the school board.[2] Yelland's defense lawyer's letter was sent four days beyond the statutory deadline for requesting a school board hearing. Mr. Yelland did not authorize the untimely letter. He was not informed of the letter, nor did he receive a copy of the letter. The Union's attorney also did not receive a copy of this letter. (NT33-34, 40-41, 50-51, 58-60, 100; JS11; Joint Exhibit 4(2))

17. Mr. Yelland specifically requested of his defense counsel that he inform the District that he wanted to pursue grievance arbitration. His defense counsel never did so. (NT52)

18. 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. (NT50-51; JS12; Joint Exhibit 4)

19. A jury acquitted Mr. Yelland of all charges in November 2015. An evidentiary hearing before the school board has not taken place. (NT41-42, 50-51; JS13)

20. Dr. Michael Mahon is the District's Superintendent. 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. (NT53, 71; JS14; Joint Exhibit 4(4))

[2] Although the letter is dated March 19, 2015, this is a typographical error, and the letter was actually sent on May 19, 2015, as evident by the contents of the letter and the other dates contained therein. (NT34; Joint Exhibit 4(2))

21. 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. (JS15; Joint Exhibit 4)

22. The Union'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.
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> 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.

(Joint Exhibit 4(5))(emphasis original)

23. 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 including its request for 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].

(Joint Exhibit 4(8))

24. At all times thereafter, the District has refused to select an arbitrator or arbitrate Mr. Yelland's grievance reasoning that Mr. Yelland waived his right to arbitrate his dismissal by electing a school board hearing under the school code. (JS16)

25. Mr. Yelland's grievance has been processed through the steps of the grievance procedure. 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. The District has refused to strike names and select an arbitrator from the list. (JS 17 & 18; Joint Exhibit 5)

26. The Union has not withdrawn the grievance and it has not indicated that it wished to waive its right to arbitrate the grievance. The Union has at all times maintained that it wishes to arbitrate the grievance. (JS19)

27. On July 28, 2015, the Union's attorney wrote the District's counsel stating 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. (NT107-108; Joint Exhibit 4(9))

28. 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.

(Joint Exhibit 4(9))

DISCUSSION

The District argues that Mr. Yelland's grievance is not arbitrable because he elected to have a school board hearing and thereby waived his right to grievance arbitration. (District's Post-hearing Brief at 1, 5-6). The District claims that this case is not a refusal-to-arbitrate case; rather it is an election-of-remedies case. (District's Post-hearing Brief at 7-8). The District maintains that Mr. Yelland's alleged election of remedies under Section 1133 of the School Code voids his right to grievance arbitration. (District's Post-hearing Brief at 5-7).

I disagree with the District for two reasons: (1) even if the factual record supports the District's position, that Mr. Yelland timely elected a school board hearing in lieu of arbitration, the question of arbitrability remains for an arbitrator; and (2) Mr. Yelland's election is factually disputed which means that an arbitrator could conclude that he did not elect a school board hearing. The point is that the District does not have the authority to decide arbitrability, and I am constrained to quote at length my earlier decision in **Palmerton Area Education Association v. Palmerton Area School District**, 41 PPER 153 (Proposed Decision and Order, 2010). In **Palmerton**, I stated the following:

> The Board and the courts have been absolutely, unequivocally, unwaveringly, unyieldingly, inflexibly, immutably, irrevocably, unalterably and inveterately consistent in repeatedly holding that
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> **ARBITRABILITY IS FOR THE ARBITRATOR TO DECIDE!**
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> **Pennsylvania Labor Relations Board v. Bald Eagle Area School District**, 499 Pa. 62, 451 A.2d 671 (1982); **Chester Upland School District v. Pennsylvania Labor Relations Board**, 655 A.2d 621 (Pa. Cmwlth. 1995); **Danville Area School District v. Danville Area Education Association**, 562 Pa. 238, 754 A.2d 1255 (2000); **Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh**, 481 Pa. 66, 391 A.2d 1318, 1320 (1978); **York County Area Vo-Tech Educ. Ass'n v. York County Area Vo-Tech Sch.,** 570 A.2d 105 (Pa. Cmwlth. 1990); **Indiana Area School District v. Indiana Area School District**, 35 PPER 56 (Final Order, 2004); **Avonworth Education Ass'n v. Avonworth School District**, 35 PPER 44 (Final Order, 2004); **International Brotherhood of Electrical Workers Local #385 v. Center Township Sewer Authority**, 32 PPER ¶ 32038 (Final Order, 2001); **Ringgold Education Association, v. Ringgold School District**, 24 PPER ¶ 24064 (Final Order, 1993).
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> Indeed, even frivolous grievances must be submitted to the arbitrator. **City of Pittsburgh**, 481 Pa. 66, 391 A.2d 1318; **Bald Eagle, supra** (holding that, under the mandate of PERA, arbitrability must be decided by an arbitrator even though PERA explicitly prohibits the relief requested in the grievance); **York County Vo-Tech., supra** (holding that an arbitrator properly determined arbitrability in favor of the grievant even though the agreement was silent on the grievance issue because an arbitrator may base his conclusions on the implications of the agreement). The employer simply does not have the authority to unilaterally determine which grievances are arbitrable in the first instance because that would empower the employer's interpretation to control and would permit employers to effectively deny any and all grievances. **East Pennsboro Area School District v. PLRB**, 467 A.2d at 1358, 1359. In **Center Township Sewer Authority**, the Board stated the following:

> The Board cannot usurp the jurisdiction of arbitrators by encouraging employers to refuse to submit arbitrability to an arbitrator in the hopes of having the Board decide that an employe is outside a particular bargaining unit or outside the protection of PERA when the Union eventually files an unfair practice charge for refusing to arbitrate. ***Such a policy would empower the employer to choose another forum, i.e., the Board, to decide whether an issue is arbitrable and to delay the arbitration process***; a process that is favored, in part, for its expediency and cost effectiveness.
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> **Center Township**, 32 PPER at 102 (emphasis added). The record in this case clearly establishes that the Union submitted class action Grievance No. 2009-01 to the District at the Superintendent level and it was essentially denied for lack of information. The Union subsequently requested and received a panel of arbitrators. Although the District received the list of arbitrators, it unequivocally refused to proceed to arbitration stating that "[i]t is impossible to prepare for or conduct arbitration proceedings about unknown events and individuals. **We will not do so**." (F.F. 9)(emphasis added). It does not matter whether the District's position regarding the arbitrability of this Grievance is correct. As veteran and experienced labor counsel for the District is very well aware, THE DISTRICT ABSOLUTELY MUST SUBMIT THE GRIEVANCE TO ARBITRATION AND ARGUE ARBITRABILITY TO THE ARBITRATOR.

Palmerton, 41 PPER at 469 (emphasis original).

In this case, the Association filed a grievance, on Mr. Yelland's behalf, on April 23, 2015, challenging his unpaid suspension and dismissal. On May 7, 2015, the District issued a notice of dismissal to Mr. Yelland. The notice of dismissal explicitly cited to Section 1133 of the Public School Code and stated that Mr. Yelland must make a request for a school board hearing which must be received by the District administration office no later than 4:00 p.m. on Friday, May 15, 2015. On May 14, 2015, before the expiration of the time limit set by the District, the Union's attorney unequivocally and timely notified the District that Mr. Yelland decided to request ***GRIEVANCE ARBITRATION*** to challenge his dismissal pursuant to the parties' CBA and ***NOT*** a school board hearing.[3] Both the filing of the grievance and Union counsel's May 14, 2015 letter clearly notified the District of Mr. Yelland's decision to pursue grievance arbitration. Indeed, Dr. Mahon conceded during his testimony that it was his understanding that the District and the Union were going to arbitrate Mr. Yelland's dismissal.

By letter dated July 23, 2015, the District refused to arbitrate Mr. Yelland's grievance positing that the District had no reason to doubt the authority of Mr. Yelland's criminal defense counsel to submit a request for a school board hearing and that Mr. Yelland had thereby waived his right to grievance arbitration. The District further posited that, as a result, the Union has no standing to pursue grievance arbitration on Mr. Yelland's behalf.

However, an arbitrator could conclude that Mr. Yelland elected arbitration on May 14, 2015, and that as of 4:01 on Friday, May 15, 2015, Mr. Yelland's opportunity to elect a school board hearing had lapsed. Arguably, under the terms of the District's own dismissal letter, Mr. Yelland had already elected his remedy, and he could not seek a school board hearing after May 15, 2015. The notice of dismissal further provides that "[i]f the attached [acknowledgment] page is not returned, it will be assumed that you have waived you right to a hearing before the [b]oard." The attached acknowledgement further provides: PLEASE RETURN NOT LATER THAN 4:00 P.M. May 15, 2015." It also states: "IF YOUR WRITTEN RESPONSE IS NOT RECEIVED, YOU WILL BE DEEMED TO HAVE WAIVED YOUR RIGHT TO A HEARING BEFORE THE BOARD OF DIRECTORS." An arbitrator could certainly conclude that, by the District's own terms and understanding, Mr. Yelland's failure to return the acknowledgment by 4:00 p.m. on May 15, 2015

[3] The District's notice of dismissal inexplicably designated a response deadline of May 15, 2015, which is only eight days from the mailing date of the notice. Section 1133 of the School Code provides that an employe has ten days from the date that he/she receives the notice to elect a school board hearing. As such, Mr. Yelland should have had until on or sometime after May 18, 2015, which would have been ten days after the earliest date he could have received the notice, especially since May 17, 2015 was a Sunday. In this case, however, whether the explicit terms of the May 7, 2015 notice, and the deadline of 4:00 p.m., on May 15, 2015, arguably controlled the behavior and understanding of the parties involved or whether Section 1133 controlled, are questions that should be answered by an arbitrator.

resulted in a waiver of his right to a hearing before the school board and that Mr. Yelland's election of remedy in favor of grievance arbitration was irreversible after 4:00 p.m. on Friday May 15, 2015.

An arbitrator could also conclude that Mr. Yelland's criminal defense attorney's May 19, 2015 letter, submitted to the District without client or Union counsel's authorization, could not change the election in favor of arbitration or revive the school board hearing waiver. An arbitrator could also conclude that the letter arguably does not change the fact Mr. Yelland, his criminal defense attorney and Union counsel were without power or authority, under the District's notice of dismissal, to elect a school board hearing after 4:00 p.m. on Friday, May 15, 2015. On July 9, 2015, Union counsel again wrote the District reiterating Mr. Yelland's position that he was challenging his dismissal through the grievance arbitration process and emphasizing which remedy had been elected.

The larger point, however, is that any inquiry into whether the District is either correct or incorrect is not relevant to the determination here because, as the Board's case law consistently makes extremely clear: ARBITRABILITY IS FOR THE ARBITRATOR TO DECIDE! "The employer simply does not have the authority to unilaterally determine which grievances are arbitrable in the first instance because that would empower the employer's interpretation to control and would permit employers to effectively deny any and all grievances." **Palmerton**, 41 PPER at 469 (citing **East Pennsboro Area School District v. PLRB**, 467 A.2d at 1358, 1359)).

There is only one exception recognized by this Board in relieving an employer of its duty to submit the issue of arbitrability to an arbitrator, and those facts are not presented here. In **Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills**, 876 A.2d 494 (Pa. Cmwlth. 2005), the public employer entered into a grievance settlement agreement referred to as an "Alternative Discipline Agreement (ADR)" also commonly known as a "Last-Chance Agreement." In exchange for immediately discharging an employe for willful misconduct resulting from excessive absenteeism, the employer entered the ADR with the employe ***AND*** the union. The ADR provided, in relevant part, that "upon returning to work, the Employee and Union understand and agree that the employee shall be immediately discharged from employment with no recourse for appeal, hearing, trial or ***arbitration*** under the labor agreement . . . if he violates any of the following regulations or conditions." **Penn Hills**, 34 PPER at 415 (emphasis added). The employer and the union, in **Penn Hills**, were parties to a collective bargaining agreement that contained a grievance procedure culminating in binding arbitration. Subsequent to the employe's reinstatement under the ADR, the employer discharged the employe for again engaging in excessive absenteeism. The union filed a grievance, and the employer refused to process the grievance relying on the waiver provision in the ADR. **Id.**

In **Penn Hills**, the Board created the only exception to its bright-line rule (that arbitrability must in every case be submitted to the arbitrator in the first instance) and therein opined as follows:

> Where the disputed language in a settlement agreement involves the question of whether a party has waived any statutory or contractual rights, for the waiver to be upheld, it must be intentional, clear, express and unequivocal. Turning to the language of the Alternative Discipline Agreement, the waiver provisions in Paragraphs 6 and 7 are unambiguous and clear. The Organization and [the employe] ***BOTH*** stated explicitly that they "[understood and agreed] that the employee shall be immediately discharged from employment with no recourse for appeal, hearing, trial or arbitration under the labor agreement..." Furthermore, the assurances in Paragraph 7 that [the employe] and the Organization read and understood the waiver provision indicates that the agreement was entered into intentionally and unequivocally. Under the express language of the Alternative Discipline Agreement, we find that the Organization and [the employe] had waived their rights to seek redress of a termination from employment for [the employe's] subsequent violation.

Penn Hills, 34 PPER at 416 (emphasis added).

The District contends that **Penn Hills** establishes that "refusing to arbitrate in every single matter is not a *per se* violation of Act 195." (District's Post-hearing Brief at 8). The District maintains that **Penn Hills** "stands for the proposition that wherein arbitration has been excluded

as an option, then a refusal to arbitrate is not a violation. (District's Post-hearing Brief at 8). The District strongly posits that "Mr. Yelland knowingly and willingly elected a local agency hearing, and, therefore, under the law a right to arbitration is void." (District's Post-hearing Brief at 8).

However, the record contains substantial evidence that competently challenges the factual and legal conclusions posited by the District and with which an arbitrator could disagree. The Union timely and unequivocally demanded arbitration before the election of remedies deadline imposed by the District. Moreover, Mr. Yelland did not timely waive the Union's right by electing a school board hearing by May 15, 2015, arguably waiving his right to a school board hearing under the terms of the District's notice of dismissal. The Union and Mr. Yelland, therefore, arguably preserved their right to pursue arbitration in lieu of a school board hearing. Accordingly, the record does not necessarily support only the District's claims that "arbitration has been excluded as an option" or that Mr. Yelland and the Union knowingly waived the Union's right to arbitrate disciplinary grievances on Mr. Yelland's behalf, within the meaning of **Penn Hills, supra**.

In **Penn Hills**, the agreement by both the Union and the employe to knowingly waive any future arbitration and the determination of discipline was indisputably clear on the face of the agreement. In this case, there is no such indisputable evidence to waive arbitration under the election of remedies provision of the School Code. Moreover, the law is clear that frivolous grievances must be submitted to arbitration and that arbitrability of grievances must be submitted to an arbitrator in the first instance, even where the employer's position regarding arbitrability is eventually deemed correct by the arbitrator. **Palmerton, supra**. An employer may not unilaterally determine arbitrability and the factual determinations to support such a conclusion. If a school district is legally correct about the election of remedies, it must allow an arbitrator to resolve any factual disputes supporting either side's legal position and to make that determination. **East Pennsboro, supra**; **Palmerton, supra**. Mr. Yelland, at least arguably, did not timely request a school board hearing before May 15, 2015. He, therefore, arguably did not waive his right to arbitrate, and there is no **Penn Hills** waiver of arbitration rights. Thus, the District's unilateral determination regarding arbitrability here is untenable.

Accordingly, the District engaged in unfair practices in violation of Section 1201(a)(1) and (5) of PERA by unilaterally determining arbitrability and refusing to submit the question of arbitrability of the Yelland grievance to an arbitrator.

CONCLUSIONS

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

1. The District is a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the District shall

1. Cease and desist from interfering, restraining and coercing employes in the exercise of the rights guaranteed in Article IV of PERA;
2. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in an appropriate unit, including but not limited to discussing of grievances with the exclusive representative.

3. Cease and desist from refusing to strike names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation and from refusing to submit the question of arbitrability of the Yelland Grievance to an arbitrator;

4. Take the following affirmative action:

   (a) Immediately submit to the Union in writing an offer to arbitrate the Yelland Grievance;

   (b) Immediately strike names of arbitrators from the list of arbitrators provided by the Pennsylvania Bureau of Mediation until an arbitrator is selected to hear the Yelland Grievance;

   (c) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days; and

   (d) 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.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fifth day of August, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner

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 Union in writing an offer to arbitrate the Yelland Grievance; that it has posted a copy of the proposed decision and order as directed therein; and that it has served an executed copy of this affidavit on the Union 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