

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
: CASE NO. PERA-C-16-373-E
v. :
: :
: :
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION, CALIFORNIA UNIVERSITY :
:

PROPOSED DECISION AND ORDER

On December 21, 2016, the Association of Pennsylvania State College and University Faculties (APSCUF or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State System of Higher Education, California University (University or Employer) violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA).

By letter dated January 9, 2017, the Secretary declined to issue a complaint on the charge filed. The Association filed exceptions to the Secretary's decision on January 30, 2017. In its exceptions, the Association withdrew its charge based on Section 1201(a)(3) and requested a complaint be issued on its charge against the University for an alleged violation of Section 1201(a)(1). By Order dated February 21, 2017, the Board directed the Secretary to issue a complaint. On March 8, 2017, the Secretary of the Board issued a complaint and notice of hearing designating June 26, 2017, in Harrisburg, as the time and place of hearing.

A hearing was held on the charge on June 26, 2017, in Harrisburg, before the undersigned Hearing Examiner. A second day of hearing was held on July 26, 2017, in Harrisburg, also before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed its post-hearing brief September 14, 2017. The University filed its post-hearing brief on November 1, 2017.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The University is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5).

2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).

3. Barbara Hess had been a professor at California University for 28 years. She teaches mathematics and secondary math education. She has been President of the local chapter of the Association (local chapter) since approximately 2013. (N.T. 19).

4. The local chapter has an office on the University campus on the first floor of the Keystone building. The Keystone Building also has faculty offices and classrooms. (N.T. 19-20).

5. The local chapter has had a bulletin board outside its office in the hallway for at least 16 years. The local chapter purchased the bulletin board. (N.T. 21-22, 271; Association Exhibits 1, 2A, 2B, 2C).

6. The local chapter has never sought permission from the University to use the bulletin board or sought permission for content to be placed on the bulletin board. (N.T. 25, 271).

7. The Association went on a Commonwealth-wide strike on October 19th, 20th, and 21st of 2016. Many members of the local chapter participated in the strike at the University, but not all did so. (N.T. 26).

8. Around December 8, 2016, the executive committee of the local chapter made the decision to post a list of association members who did not participate in the strike. The executive committee decided to post the list of strikebreakers in the local chapter office and also on the bulletin board outside of the local chapter office. (N.T. 26-27, 47, 135-136, 150).

9. On December 8, 2016, Hess sent an email message to association members informing them that a list of the strikebreakers (the strikebreaker list or the strikebreaker poster) had been posted on the local chapter's bulletin board and in the local chapter office. (N.T. 27-28; Association Exhibit 3, 4).

10. The strikebreaker poster is formatted as follows. Filling the top margin is a picture of what appears to be demonstrating Association members. Below this picture is a heading in large font: "**Strikebreakers 2016**: The Infamous 43". Below the heading are two columns. The left column is titled "Tenure/ Tenure Tracks" and lists 17 names in that column. The right column is titled "Adjunct Faculty" and lists 24 names in that column. Along the left margin, orientated vertically, is the phrase: "Strikebreaker - Management Weapon used for Union Busting". (Employer Exhibit 10) (emphasis in original).

11. The decision to include the word "infamous" in the poster was made by the local chapter's mobilization committee. (N.T. 49-50).

12. On December 8, 2016, Michele Pagen, a professor of music and theater at the University and a member of the Association, received the December 8, 2016, email from Hess regarding the posted list of strikebreakers. Pagen learned she was one of the listed strikebreakers. On October 21, 2016, Pagen had crossed the picket line to meet with Provost Bruce Barnhart regarding concerns she had relating to the theater program. In the afternoon of December 8, 2016, Pagen sent an email to University administration including Barnhart. Pagen's email message states in relevant part:

Sent: Thursday, December 08, 2016 3:52 PM

. . .

Subject: Actions of a colleague

Hello, all-

I think, by now, you are all well aware of the actions taken by Barb Hess as APSCUF President. Allow me to voice my concern that this action was taken for the sole purpose [of] ensuring that "The Infamous 45 [sic]" (which is inaccurate, but I digress) are subjected to further intimidation and attempted public shaming. I would like to think that the faculty across campus would not commit acts of violence or physical retribution in some manner, but I no longer believe that to be so.

It is my hope that the administration will make public their support and protection of those who are named on the list. It is my hope that the administration will make public their condemnation of the actions taken by Dr. Hess, Ken Smelko, and union leadership.

When I crossed the line to meet with administration regarding students, I found myself faced with cyber-bullying from both current and former colleagues. At the time, I was fearful when I knew that I would have to be among groups of faculty. I was referred to as a scab (inaccurately, ironically), on-line and on campus.

. . .

Sincerely,

Michele

(170-180; Employer Exhibit 8).

13. Marcia Hoover is a professor at the university in the Department of Secondary Education and Administrative Leadership. She is a member of the Association. Hoover crossed the picket line and taught two classes during the strike. Hoover's office is in the Keystone Building adjacent to the Association offices. She saw her name listed on the strikebreaker poster when it was posted on December 8, 2016. Shortly after seeing her name on the poster, she called Eric Guiser, Director of Human Resources, about her concerns about the poster. That afternoon, she wrote an email to the administration including Kevin Koury, Dean of the College of Education, and Guiser. The email states in relevant part:

Sent: Thursday, December 08, 2016 12:08 PM

. . .

Subject: Work concern

Kevin,

I am writing to express my concern related to the recent union posting of strike breakers information.

I feel personally threatened and intimidated by this on a variety of levels. First the sign is directly outside my office making me an easy target.

Secondly, I have applied for promotion and the President's Merit Award in Teaching both of which require a peer review process.

I view the posting of the names as encouragement from the union to retaliate against those of us who did not participate in the strike even though numerous people on the list were off for medical reasons.

I have already contacted Eric Guiser and John Burnett on this matter but following appropriate protocol must also make you aware that I feel this action by the union as a direct threat and it is creating a hostile work environment for me.

Thank you for your time
Marcia

(N.T. 194-204, 224; Employer Exhibit 11)

14. On Friday December 9, 2016, there was a conference call with Guiser, Barnhart, the University Labor Relations representatives, and University counsel, to address the concerns brought forth by Pagen and Hoover about the strikebreaker poster. As a result of the discussion in the conference call, the participants agreed to move forward with an investigation of Hess and for Barnhart to direct the Association to remove the strikebreaker poster on the Association bulletin board. Regarding the directive to the Association to remove the strikebreaker poster from the bulletin board, Barnhart believed that the only reason the strikebreaker poster had been posted by the Association was to retaliate against faculty members who crossed the picket line. Barnhart believed it was his duty to protect faculty members who crossed the picket line during the strike. The participants of the conference call felt the University must investigate the circumstances surrounding the posting of the strikebreaker poster since two faculty members came forward with concerns. (N.T. 225-226, 265-268).

15. On Friday December 9, 2016, Hess received an email from Provost Barnhart which instructed Hess to take down the list on the bulletin board. The email states in relevant part:

Subject: Directive for you

Professor Hess and ABSCUF Officers:

With this email, I am issuing you a directive to immediately take down the poster entitled, "Strikebreakers 2016: The Infamous 43", that you have displayed near the local APSCUF office. It is my expectation that you will comply with this directive by the close of business today, Friday, December 9, 2016.

Sincerely,

Bruce Barnhart

(N.T. 30-31; Association Exhibit 5).

16. Barnhart is a member of management and has the authority to discipline faculty members. (N.T. 31).

17. When Hess received the email from Barnhart, she went to the local office to locate the key to the bulletin board in order to take down the poster. She could not find the key and she then informed Barnhart that she could not comply with the directive on Friday, but would on Monday. Barnhart approved of the delay. On the following Monday the office manager for the local chapter took the poster out of the bulletin board. (N.T. 33, 268).

18. On December 12, 2016, Hess received a letter from Eric Guiser stating that she was under investigation. Guiser is the University's Director of Human Resources and part of management. Guiser's letter states in relevant part:

Dear Professor Hess:

Pursuant to Article 43 of [the 2011-2015 CBA], this letter is to notify you that an investigation is being conducted into the allegations that you threatened and intimidated faculty by displaying or causing to be displayed, a poster in Keystone Hall titled "Strikebreakers 2016: The Infamous 43".

You will be notified under a separate letter as to the time and place of an investigatory interview in order to allow you to respond to these allegations. You may have an APSCUF representative present at the investigatory interview if you desire.

As provided by Article 43, you are prohibited from taking any retaliatory action against anyone associated with this investigation, and such action may result in a separate disciplinary action.

Sincerely,

Eric Guiser

(N.T. 34-35, 228; Association Exhibit 6).

19. An Article 43 notice under the 2011-2015 collective bargaining agreement (CBA) referred to an investigation of a faculty member based on complaints. The 2015-2018 CBA has a similar section under Article 42. (N.T. 36; Joint Exhibit 1, 2).

20. On December 13, 2016, Guiser sent an email to the faculty members listed on the strikebreaker poster. The letter states in relevant part:

Your name was included on a list that was posted on the APSCUF bulletin board in Keystone Hall. This list included the names of faculty that crossed the picket line during the strike and chose to work, as determined by APSCUF. The list was entitled "Strikebreakers 2016: The Infamous 43". The University directed APSCUF to take this list down, which they have as of December 12th. Please contact me at [Guiser's University email address] if you wish to share any information related to this posting. Please feel free to contact me at [Guiser's work telephone number] if you wish to do so.

Regards,

Eric Guiser

(N.T. 37-39; Association Exhibit 7).

21. On February 21, 2017, Guiser sent Hess a letter regarding the investigation into allegations against Hess. The letter states in relevant part:

Dear Professor Hess:

This letter is a follow up to the letter sent to you on December 12, 2016 regarding the notice under Article 43 (currently Article 42) of an investigation into allegations that you threatened and intimidated faculty by displaying, or causing to be displayed, a poster in Keystone Hall titled "Strikebreakers 2016: The Infamous 43". This is also notice that California University is investigating allegations that the information posted was inaccurate and your actions were unprofessional.

In an effort to provide you with an opportunity to respond to the allegations above, you are required to attend an investigatory interview on February 28, 2017 In preparation for this meeting, attached are copies of complaints, which must be treated as confidential by all parties and may only be shared with those persons necessary to prepare a response.

Be advised you are prohibited from contacting the individual(s) identified in the complaint(s) or individuals you suspect to have authored the complaint(s) and are prohibited from taking retaliatory action against any person associated with the complaint.

You may have an APSCUF representative present at this meeting if you so desire.

Sincerely,

Eric Guiser

(N.T. 39-40; Association Exhibit 8).

22. The investigatory meeting did occur on February 28, 2017. Present were Hess, Guiser and other Association and University representatives. Guiser was the person directly responsible for the investigation of Hess. (N.T. 40, 242, 252).

23. On March 24, 2017, Barnhart sent Hess a memorandum which states in relevant part:

RE: Article 42 Investigation

After reviewing the transcript of the investigatory interview conducted by Mr. Eric Guiser, Director of Human Resources, and discussing the matter with him I would like to inform you that I am recommending that a pre-disciplinary conference will not be convened. The University considers this matter closed. Thank you for your cooperation with the investigation.

(N.T. 44-45; Association Exhibit 9).

DISCUSSION

The Association charges that the University committed independent violations of Section 1201(a)(1) of PERA when the University: (1) on December 9, 2016, issued a direct order to remove the strikebreaker poster from the Association's bulletin board; (2) began an investigation on December 12, 2016, of Hess regarding the posting of the strikebreaker poster; and (3) sent an email on December 13, 2016, notifying faculty members they had been listed on the poster and solicited information from the listed faculty members.

Section 1201(a)(1) 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) "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 employees 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). 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). However, 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).

In this matter, I find that the Association did not engage in lawful concerted activity when it posted the strikebreaker list on the Association's bulletin board. This conclusion is narrowly based on the fact that the strikebreaker poster used the pejorative "infamous" to describe faculty members who crossed the picket line in the October 2016 strike. Public employees have the right under Section 401 of PERA to refrain from participating in union activities. 43 P.S. §1101.401.

Based on the record as a whole, I find that the use of the pejorative "infamous" transforms the strikebreaker poster into an Association-sponsored public and explicit shaming or humiliation of faculty members who chose to cross the picket line. The strikebreaker poster, due to the inclusion of the pejorative "infamous", thus functions explicitly as Association punishment of faculty members who crossed the picket line, which is a protected activity under Section 401 of PERA. Therefore, the posting of *this particular* strikebreaker poster on the Association bulletin board is not lawful concerted activity under Section 401 because it contravenes the rights of public employees protected by PERA.

Since the posting of the strikebreaker list was not protected activity under PERA, there can be no independent Section 1201 (a)(1) claims arising out of the events connected to the poster, including the University directive to remove the poster and subsequent investigation into Hess regarding the poster. The Association's charge will be dismissed and the complaint rescinded.

CONCLUSIONS

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

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

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

3. The Board has jurisdiction over the parties hereto.
4. The University has not committed unfair practices in violation of Section 1201(a)(1) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint is 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 at Harrisburg, Pennsylvania, this twenty-second day of November, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner