COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL No. 8	:	
	:	CASE NO. PERA-C-18-303-E
v.	:	
THE PENNSYLVANIA STATE UNIVERSITY	:	

PROPOSED DECISION AND ORDER

On November 15, 2018, the International Brotherhood of Teamsters, Local No. 8 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State University (University or Employer) violated Section 1201(a)(1),(5) and (8) of the Public Employe Relations Act (PERA).

On December 12, 2018, the Secretary of the Board issued a complaint and notice of hearing, in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating March 6, 2019, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was held on March 6, 2019, in Bellefonte, 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 Union filed its post-hearing brief on May 13, 2019. The University filed its post-hearing brief on June 10, 2019.

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. 6).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6).

3. The Union has represented technical service employes at the University since 1968. It is a grandfathered unit that existed before PERA and included blue collar food service, housekeeping, mail delivery and maintenance workers. The Union was certified by the Board in 1978 at PERA-R-11,403-C to be the exclusive representative of the following unit: "In a subdivision or the employer unit comprised of all regular technical-service employes wherever employed by the University in the Commonwealth of Pennsylvania, guards and other security employes located at the University Park campus. . . ." (N.T. 15-17, Union Exhibit 1).

4. The parties' collective bargaining agreement (CBA) contains an Article 21.6 which has provisions allowing the Union to seek

inclusion into the bargaining unit of certain job classifications which the Union believes to be misclassified. The provisions in Article 21.6 have been in successive CBAs between the parties since at least 1990. The current CBA has the effective dates of July 1, 2017 through June 30, 2020. Article 21.6 states:

> The Union may submit to the University the title of any position which the Union may believe properly should be classified as technical-service. The University shall study such position and respond to the Union indicating the University's findings with respect to the appropriateness of the classification. Disputes in regard to such findings shall be settled in the manner provided in Section 8.3, Job Evaluation Grievance. . . .

(N.T. 41; Joint Exhibit 1).

5. On or about June 14, 2014, the parties executed an agreement entitled "Article 21.6 Agreement" which was attached to the then-current CBA. The Article 21.6 Agreement provides for a mechanism for implementing Article 21.6. (N.T. 10-11; Joint Exhibit 3).

6. Pursuant to the Article 21.6 Agreement, approximately 27 job classifications were moved into the bargaining unit. (Union Exhibits 9, 10, 12-19, 24).

7. On July 17, 2018, Arbitrator Robert Creo issued an Award in a grievance between the parties over the Article 21.6 Agreement. The Award denied the University's request to nullify the Article 21.6 Agreement. (Joint Exhibit 27).

8. On August 27, 2018, Hearing Examiner Marino issued a Proposed Order of Dismissal in the matter PERA-U-16-173-E. PERA-U-16-173-E concerned the same parties to this matter and dealt with the Union's unit-clarification petition to accrete 177 ITSS employes into its existing bargaining unit of approximately 2,643 technical-service employes. The order dismissed the Union's petition and required the Union to "obtain a proper showing of interest from all unrepresented, nonprofessional technical-service employes instead of cherry picking one classification at a time." Marino's Proposed Order of Dismissal was not excepted to and became a final order. (N.T. 12; Joint Exhibit 9; Proposed Order of Dismissal (PERA-U-16-173-E)).

9. On September 21, 2018, Jonathan Light, President and Business Agent for the Union, sent a letter to Susan Rutan, Senior Director of Labor and Employee Relations for the University, which states in relevant part:

> Dear Susan,
> We need to reconvine [sic] second step on the following article 21 grievances:
> TLU8 Dated 6/23/2016 Sills, Christopher – Eng Support Spec 5
> TLU8 Dated: 6/23/2016 Gabel, Paul – Eng Support Spec 5

(Joint Exhibit 5).

10. On September 21, 2018, Light sent a letter to Arbitrator Robert Creo which states in relevant part:

> Dear Arbitrator Creo:
> Teamsters Local Union No. 8 and The Pennsylvania State University wish to assign you to hear Article 21 cases.
> Please be advised that the captioned Article 21 grievances have been appealed to arbitration and have been assigned to you for hearing.

(Joint Exhibit 4).

11. The Union's letter to Arbitrator Creo contains a list of names and jobs that the Union believes are misclassified and have previously been presented to the University. (N.T. 151-152).

12. On September 21, 2018, Light sent another letter to Rutan which states in relevant part:

> Dear Susan,
> Please schedule the following article 21 grievances to be heard:
> TLU8 Instr Serv Sp Dated: 01/11/2011
> TLU8 Multi-Media Sp Dated: 01/11/2011
> TLU8 Multi-Media Tech Sp Dated: 01/11/2011

(joint Exhibit 6).

13. On September 25, 2018, Light sent Rutan another letter which attached a priority list of thirty-six job titles. The letter states in relevant part:

> Dear Susan,
> The attached list regarding Article 21.6 agreement. The jobs are listed in numerical order per the agreement.
> Please move forward in completing your part in reviewing these jobs as per the agreement. . . .

(Joint Exhibit 7).

14. A priority list is a list of positions that the Union believes should be added to the bargaining unit in the order the Union wants the University to review the positions. (N.T. 109).

15. The jobs identified at rows one through thirteen in the priority list are information technology specialists which are the same jobs in the Union's unit-clarification petition. There are approximately 1,100 jobs referenced by the priority list in total. (N.T. 69-70, 113).

16. On October 16, 2018, Rutan responded to Light with a letter that states the University's position and requests more information from the Union. The letter states in relevant part.

> Dear Jon,
> This is in response to the following letters you recently sent:
>
> [1] September 21, 2018 (to the University) – requesting the scheduling of three Article 21 grievances dated January 11, 2011, which you describe as:
> TLU8 Instr Serv Sp
> TLU8 Multi-Media Sp
> TLU8 Multi-Media Tech Sp;
>
> [2] September 21, 2018 (to the University) – requesting the reconvening of two second step grievance hearings for two Article 21 grievances dated June 23, 2016, which you describe as:
> Sills, Christopher – Eng Support Spec 5
> Gabel, Paul – Eng Support Spec 5
>
> [3] September 21, 2018 (to Arbitrator Creo)- requesting dates for 15 Article 21 arbitration hearings for five groups of jobs and 10 individual employees;
>
> [4] September 25, 2018 – providing a priority list of jobs to be reviewed pursuant to the parties' June 18, 2014 Article 21.6 Agreement (Agreement).
>
> Following Arbitrator Das' July 17, 2018 decision denying the University's request to nullify the Agreement, we met on July 30th at your request. During that meeting you indicated that you wished to begin having positions reviewed under the Agreement again. I explained that the University did not have a priority list from the Union as required by the Agreement. In your September 25th letter, you provided this list and requested the review of over 1000 employees' positions.
>
> However, between our July meeting and the receipt of the Union's September 25th letter and priority list, Pennsylvania Labor Relations Board (PLRB) Hearing Examiner Marino issued his proposed order in Case No. PERA-U-16-173-W [sic] on August 27, 2018. The Union did not file exceptions to the proposed order and it is now a final order.
>
> The order dismissed Teamsters Local Union 8's attempt to accrete a number of positions through a Unit Clarification Petition, including many positions on your September 25th priority list.

. . .

> The decision makes clear, as the University has asserted, that it is up to the PLRB, not the parties or an arbitrator, to decide if the unit should be expanded beyond what the PLRB has certified. Accordingly, it supports the University's view that the only proper use of Article 21 of the [CBA] is to determine whether an individual employee's job was misclassified because their primary duties fall within the work performed by existing bargaining unit members. Article 21 should not, and indeed, the PLRB has made clear, cannot, be used to expand the unit to work that the unit has never performed, as the Union has consistently sought to do. Article 21 was never intended to be used, and cannot be used, to reclassify groups of jobs, to add new job classifications to the bargaining unit, or do redefine the boundaries of the bargaining unit.
>
> Therefore, we will not proceed with further consideration of the jobs listed in your September 21, 2018 letters and the September 25, 2018 priority list unless the Union identifies for each individual employee's position the existing bargaining unit job the Union believes accurately describes the work the employee is currently performing. If the Union believes the employee's work encompasses more than one existing bargaining unit position, please identify each job that you believe the employee is performing. We will separately respond to Arbitrator Creo regarding the status of the cases for which you are demanding arbitration.

(N.T. 117; Joint Exhibit 8).

17. The parties met on or about October 22, 2018. At this meeting the University continued to seek information from the Union consistent with Rutan's letter. The University requested the Union identify what current bargaining unit jobs the Union believed the challenged work belonged to. The University's position was that the Union cannot submit a job for review and the University will not schedule cases for arbitration under Article 21.6 unless the Union provides information which shows the duties of alleged misclassified jobs were identical to a separate job which is already in the bargaining unit. The University asserted that this was a requirement of the Union under Article 21.6 for the first time in October, 2018, after Hearing Examiner Marino's decision. Prior to October, 2018, the University had not asserted this position. (N.T. 61-62, 121-122, 124, 137-138, 142-148, 153-154, 164).

18. During the October 22, 2018, meeting, Susan Rutan told the Union that the University would refuse to process any grievances based on Article 21.6 and would continue to refuse to process any grievances unless the Union identified, for each allegedly mistakenly classified

individual employee's position, the existing bargaining unit job the Union believes accurately describes the work the allegedly mistakenly classified individual employee is currently performing. (N.T. 61-62).

DISCUSSION

This matter is a continuation of a series of disagreements between the parties over the Union's attempt to accrete additional University employes into its bargaining unit.

Except for the issue of whether the University refused to proceed to arbitration (discussed below), the facts in the matter are largely uncontested. The parties have been engaged in a long struggle over the accretion of positions into bargaining unit, Article 21.6 of the CBA and the related Article 21.6 Agreement. In 2016, the Union filed a Petition for Unit Clarification with the Board seeking to accrete 117 information technology positions into its unit. A July 17, 2018, Arbitrator Das Award denied the University's request to nullify the Article 21.6 Agreement. On August 27, 2018, Hearing Examiner Marino dismissed the petition and ordered that the Union must obtain a proper showing of interest from all unrepresented, nonprofessional technical-service employes at the University in order to accrete job classifications into its unit. After this order, which became final, the Union again attempted to accrete new positions into its unit through the parties' contractual provisions at Article 21.6 of the CBA. These requests were in the form of two letters to Susan Rutan dated September 21, 2018 (Joint Exhibits 5 and 6) and the letter dated September 25, 2018 (Joint Exhibit 7). At the same time, the Union sent a September 21, 2018 letter to Arbitrator Robert Creo (Joint Exhibit 4) requesting to proceed to arbitration on a list of employes and jobs it believed are misclassified.

These issues were discussed by the parties at an October 22, 2018 meeting. The Union's unfair practice charge followed in which the Union alleged the University violated Section 1201(a)(5) by refusing to process grievances pursuant to Article 21.6 of the CBA and the Article 21.6 Agreement and that the University violated Section 1201(a)(8) by refusing to comply with Arbitrator's Das' Award.

The charge relating to Arbitrator Das' Award and based on Section 1201(a)(8) of PERA was not developed at the hearing and appears to be dropped in the Union's Brief. Furthermore, the record in this matter does not support a charge under Section 1201(a)(8) and that charge against the University is dismissed.

Turning to the Union's allegation under Section 1201(a)(5), the Union summarized its argument as follows:

> [The Union] alleges the University's refusal to process grievances arising under the parties' Collective Bargaining Agreement (Article 21.6), and their negotiated Article 21.6 Agreement, constitutes a clear violation of Section 1201(a)(1) and (5) of the Act. . . .
>
> . . .

> When viewed at its core, the common thread running through all of the University's defenses can easily be characterized as a garden variety refusal to bargain, wherein each of the University's defenses merely raises a question of arbitrability. The Board long has held such questions are ones to be resolved by an arbitrator. . . .
>
> . . .
>
> The essential nature of this dispute is a garden variety attempt to process grievances through a contractual grievance procedure. This effort has been blocked by [the University] which contends that those grievances should not be so processed [and] raised procedural and legal challenges. Hence, the dispute is one of arbitrability, which is determined by an arbitrator. The issue is not novel, nor is it one which the Board has not had to speak on in the past. Arbitrability issues can arise in various forms or iterations. Regardless of the form, the Board requires issues of arbitrability to be decided by an arbitrator.

(Union's Brief at 2-5). The University argues that the Union's attempts accrete job classifications into the bargaining unit is void as a violation of Hearing Examiner Marino's Proposed Order of Dismissal. The University argues in its brief:

> Penn State's primary defense to the Union's unfair labor charges is that the Union was improperly attempting to violate the UCP Decision. It was seeking to accrete the same employees it was directed to pursue, if at all, through Westmoreland procedures; but it was attempting to pursue them through Article 21.6, in a manner that would not afford them a vote. To the extent the Union believes Article 21.6 permits it to violate the UCP Decision, that interpretation is unsupportable. 43 P.S. § 1101.502. It denies the employees of their right to choose their representatives and to refrain from Union activities under 43 P.S. § 1101.401. It deprives the Board of its exclusive authority to determine the appropriateness of bargaining units under 43 P.S. § 1101.604, and it violates the express policy of Pennsylvania to allow employees to "choose freely their representative" set forth in 43 P.S. § 1101.1101. It also violates the UCP decision, now a final order, and should not be sanctioned by the Board.

(University's Brief at 19-20). With respect to the Union's attempts to accrete job classifications, I disagree with the Union's argument that this is a garden-variety refusal to bargain case which concerns a dispute over arbitrability. I agree with the University's argument

above and I find that the Union's attempts to accrete job classifications to its existing bargaining unit has already been ruled on by the Board through its exclusive jurisdiction and that the only method the Union may use to accrete job classifications to its unit is through a Westmoreland election. Therefore, the University's refusal to cooperate with the Union with respect to accreting job classifications to the unit through contractual language is in compliance with the law and Board policy.

It is clear that the Board has exclusive jurisdiction over the issues determining the appropriateness of units and determining which positions should be included in or excluded from bargaining units. Richland Education Association v. PLRB, 403 A.2d. 1008 (Pa. Cmwlth. 1979). It is also clear that arbitrators and the Board share jurisdiction over determinations over whether a particular employe is within a job class classification within a bargaining unit. Id. Section 604 of PERA plainly states: "The Board shall determine the appropriateness of a unit. . . ." In Riverside School District, 10 PPER ¶ 10312 (Nisi Decision and Order, 1979), the Board held:

> This Board has the responsibility of determining which job classifications are within the certified unit. Richland Education Association v. PLRB and Richland School District, 403 A.2d 1008 [(Pa. Cmwlth. 1979)]. Once we determine that a class is within the certified unit, an arbitrator may lawfully determine if a particular employe falls within an included classification. Cumberland County, PERA-C-12,071-C, 10 PPER ¶ 10146 (1979).

Turning to this matter, it is clear that the Board has already conclusively spoke on this issue of the Union's attempts to accrete job classifications into its unit and Hearing Examiner Marino's Proposed Order of Dismissal was not excepted to by the Union or the University and became final. Hearing Examiner Marino's order is clear:

> The Union seeks to accrete approximately 177 ITSS employes into an existing certified nonprofessional bargaining unit of approximately 2,643 technical-service employes. . . .
>
> [The] ITSS employes share and identifiable community of interest with the technical-service employes in the existing bargaining unit as certified by the Board. . . .
>
> There are another 611 employes in nonprofessional information-technology positions at the University that presumably share an identifiable community of interest with the ITSS employes and the technical-service employes already in the bargaining unit. Indeed, ITSS employes share job duties with IT Generalists, IT Consultants, System Administrators, and Network System Specialists. The Union President believes that all nonprofessional, non-clerical positions

> should be included in the bargaining unit and has systematically sought the inclusion, at different times, of over 20 different positions, including many other information and computer technology positions. Moreover, there are at least 15 grievances pending for arbitration under Article 21.6 of the CBA wherein the Union is seeking the inclusion in the bargaining unit of a variety of non-professional technical service positions.
>
> Given the clear evidence demonstrating the Union's recent past and current interest in representing many more employes than just the ITSS employes, many of whom are in other information and computer technology related positions, the Union has improperly invoked the Board's unit clarification process which, if permitted, would deprive many other employes, who eventually will be targeted for inclusion into the unit, of their right to choose whether they want representation, in violation of [Westmoreland Intermediate Unit, 12 PPER ¶ 12347 (Order and Notice of Election, 1981)] and the policies of PERA, and which would burden the Board with the processing of many unit clarification petitions. **Consequently, the petition for unit clarification in this case is dismissed. The Union is required to obtain a proper showing of interest from all unrepresented, nonprofessional technical-service employes instead of cherry picking one classification at a time.**

(Proposed Order of Dismissal, PERA-U-173-E)(emphasis added). Thus, the Board has spoken conclusively on the broad issue of whether certain job classifications at the University can be included within the Union's certification and ruled that the Union must obtain a proper showing of interest from all unrepresented, nonprofessional technical-service employes in order to satisfy Westmoreland. This ruling is squarely within the Board's exclusive jurisdiction to decide the appropriateness of bargaining units. The Union may no longer avail itself to arbitration to accrete job classifications to its unit as that right has been precluded by Board action. When the Union filed its petition for unit clarification in PERA-U-173-E, it chose its forum and to be bound by the exclusive jurisdiction of the Board. The University followed the law when it did not accept the Union's attempts to accrete job classifications outside of the method dictated by the Board. Therefore, the University did not commit an unfair practice by refusing to bargain or refusing to proceed to arbitration with respect to the Union's two letters to Susan Rutan dated September 21, 2018 (Joint Exhibits 5 and 6) and the letter dated September 25, 2018 (Joint Exhibit 7).

In contrast to the above issue of accreting new classifications to the existing unit, I find that the Union does have a contractual right to pursue alleged misclassifications. The Union's actions to attempt to have jobs reviewed to see if they have been mistakenly

included or excluded from the already existing bargaining unit is clearly within an arbitrator's jurisdiction determine if a particular employe falls within an included classification. Thus, the contractual rights the Union had with respect to this issue still exist.

We now turn to the one major factual dispute in this matter. The Union argues that the University refused to arbitrate. The University argues that it never refused to arbitrate and that it merely requested additional information from the Union. I find above in Finding of Fact Number 17 that at the October 22, 2018, meeting, Susan Rutan told the Union that the University would refuse to process any grievances based on Article 21.6 and would continue to refuse to process any grievances unless the Union identified, for each allegedly mistakenly classified individual employee's position, the existing bargaining unit job the Union believes accurately describes the work the allegedly mistakenly classified individual employee is currently performing. With respect to this Finding of Fact, I credit the testimony of Jonathan Light at N.T. 61-62 and discredit the testimony of Dovizia Long at N.T. 153 based on her demeanor on the stand at that time and the context of the case as a whole.

It is clear from the record that the Union has requested arbitration on a list of names and jobs it argues are misclassified. (Joint Exhibit 4). It is clear then that the University is refusing to proceed to arbitration on the names and jobs listed on Joint Exhibit 4. Pursuant to Section 903 of PERA, arbitration of grievances arising out of interpretation of provisions of a collective bargaining agreement is mandatory. 43 P.S. § 1101.903. It is well-settled that all disputes concerning arbitrability of a grievance under a collective bargaining agreement must first be presented to an arbitrator for determination. PLRB v. Bald Eagle Area School District, 499 Pa. 62, (1982); Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), aff'd *per curiam*, 544 Pa. 199 (1996). The University argues that it did not refuse to proceed to arbitration and that it has "a clear contractual right rooted in the Article 21.6 Side Agreement and the parties' established past practices, to request information from the Union regarding the classification grievance." (University's Brief at 29). However, as I have found above that the University did in fact refuse to proceed to arbitration, the University cannot rely on a sound arguable basis defense as that defense does not excuse a refusal to arbitrate. Therefore, the University has committed an unfair practice by refusing to proceed to arbitration on the issues referenced in the Union's September 21, 2018 letter to Arbitrator Robert Creo (Joint Exhibit 4).

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 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 University has not committed unfair practices in violation of Section 1201(a)(1) and (8) of PERA.

5. The University has not committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA with respect to its response to the Union's attempts to accrete new job classifications into its unit.

6. The University has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA by refusing to proceed to arbitration over the alleged misclassification of jobs referenced in the Union's September 21, 2018 letter to Arbitrator Robert Creo (Joint Exhibit 4).

ORDER

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

HEREBY ORDERS AND DIRECTS

that the University 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 refusing 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.

3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of PERA:

(a) Immediately proceed to arbitration over the alleged misclassified jobs mentioned in the Union's September 21, 2018, letter to Arbitrator Creo;

(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 the bargaining unit 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 at Harrisburg, Pennsylvania, this twenty-ninth day of August, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

_____
STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL No. 8	:	
	:	CASE NO. PERA-C-18-303-E
v.	:	
	:	
THE PENNSYLVANIA STATE UNIVERSITY	:	
	:	

AFFIDAVIT OF COMPLIANCE

The Pennsylvania State University 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 immediately proceeded to arbitration over the alleged misclassified jobs mentioned in the Union's September 21, 2018, letter to Arbitrator Creo; that it has complied with the Proposed Decision and Order as directed therein; 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