

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WAYNE HIGHLANDS :
EDUCATION ASSOCIATION :
v. : CASE NO. PERA-C-18-67-E
WAYNE HIGHLANDS SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On March 23, 2018, the Wayne Highlands Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Wayne Highlands School District (District) violated Section 1201(a)(1), (5) and (6) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that "the District and Association bargaining representatives reached a full agreement on all the terms and provisions of the Part-Time Teacher CBA [collective bargaining agreement]; and no genuine differences of opinions existed between the parties regarding the Part-Time Teacher CBA. However, on or about December 20, 2017, the District suddenly refused to sign and execute the Part-Time Teacher CBA; and the District also refused to implement or honor any of the terms or provision of the Part-Time Teacher CBA."

On April 24, 2018, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on September 7, 2018, in Harrisburg. During the hearing on that day, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On December 3, 2018, the Union filed its post-hearing brief. The District filed its post-hearing brief on February 1, 2019.

The examiner, based upon 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. (N.T. 4)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4)
3. The Union and the District are parties to a collective bargaining agreement [CBA], which is effective from July 1, 2017, through June 30, 2021. (Association Exhibit 1)
4. The CBA contains a "Zipper Clause" which provides as follows:

This Agreement incorporates the entire understanding of the parties which were or could have been the subject of negotiations. During the term of this Agreement, neither party shall be required to negotiate, with respect to any

such matter whether or not covered by this Agreement and whether or not within knowledge or contemplation of either or both of the parties at the time they executed or negotiated this Agreement.

(Association Exhibit 1, Article XXV, at 34)

5. Todd Miller is a retired high school social studies teacher who taught at the District for 32 years. At all times relevant hereto, Mr. Miller was the Union President. (N.T. 12-14)

6. Gregory Frigoletto has been the Superintendent of the District for eight years. (N.T. 106)

7. Memoranda of understanding (MOUs) are side agreements to resolve contract ambiguities and to clarify a collective bargaining agreement when circumstances arise. Since the early 2000s, the Union's Executive Committee approves MOUs. (N.T. 15-17)

8. The alleged "agreement" that the Union claims to have been made between the parties in this case involves an MOU; it does not involve a collective bargaining agreement as alleged in the specification of charges. (N.T. 34-63)

9. Article VI(A) of the parties CBA provides that the "District shall pay the pro-rated costs for PPO Blue for those teachers who are not employed on a full-time basis." (N.T. 19; Association Exhibit 1; Article VI, at 8)

10. The District has applied the duty-free assignment provision on Page 8 of the CBA to part-time teachers. The District has applied the transfer provisions of the CBA to part-time teachers. (N.T. 21-22, 37)

11. The Union has not entered into prior MOUs covering all part-time teachers before. Mr. Miller conceded that the District had no obligation to bargain mid-contract over the part-time teachers. (N.T. 22, 96)

12. The District has, in the past, entered into discussions with the Union regarding individual part-time teachers addressing issues unique to one individual at a time, such as scheduling and the calculation of hours for that individual. (N.T. 112-114; District Exhibits 1-4)

13. At the end of the 2016-2017 school year, the District wanted to demote a full-time teacher to part-time status. Mr. Miller and Mr. Frigoletto agreed to demote a Family Consumer Science teacher (Ms. Tibal) at the Wayne Highlands Middle School to 76% of full-time status. In fact, no one was demoted because another Family Consumer Science teacher resigned and a new teacher was hired as a part-timer. The new part-time teacher was Casey Prudente, who later transferred to a full-time Librarian position at an elementary school and the Middle School. (N.T. 34-36, 98)

14. The District had part-time teachers when the CBA was negotiated and ratified by the parties. (N.T. 36, 80)

15. On or about August 17, 2017, prior to the start of the 2017-2018 school year, Mr. Miller initiated a dialogue with Mr. Frigoletto regarding Ms. Prudente, the new part-time teacher. Ms. Prudente's day was supposed to end at 1:30 p.m., but if she had to stay

for a meeting until 3:00, she would be on her own time unless she was compensated. Mr. Frigoletto was receptive. (N.T. 24, 79-80, 85-86, 88, 110)

16. On August 21, 2017, Mr. Miller sent a letter to Mr. Frigoletto. In the letter, Mr. Miller summarized a meeting between the two of them earlier that day. (N.T. 38-39)

17. Paragraph No. 4 of the August 21, 2017 letter provides, in relevant part as follows:

4. CASEY PRUDENTE-2-HOUR DELAY/ACT 80 DAY-We agreed that the unique requirements of Ms. Prudente's job will require that she be compensated for a full day, not 76% day, on Act 80 Days that do not entail a faculty or department meeting. Additionally, she will be compensated full days for any-2-hour delays which occur, and she will be made whole at the end of the school year for additional compensation due to delays and Act 80 Days as outlined.

(Association Exhibit 2)

18. Paragraph 4 of Mr. Miller's letter summarizing discussions is the only reference to part-time teachers and is limited to Ms. Prudente. Mr. Miller expressly noted in his letter that the parties had an agreement. Although Mr. Miller's summary claims that he and Mr. Frigoletto agreed to a full-day of compensation for Ms. Prudente for two-hour delays, the parties reopened discussions on that topic. (N.T. 39; Association Exhibit 2)

19. In September and early October of 2017, Mr. Miller and Mr. Frigoletto met approximately 3-4 times during which discussions changed focus to include all part-time teachers and not just Ms. Prudente's unique situation. (N.T. 40-41, 85-86)

20. On or about October 13, 2017, Mr. Miller forwarded a draft MOU to Mr. Frigoletto. This draft version included four additional provisions regarding all part-time teachers, as a class of employees, and it is not limited to additional compensation for Act 80 Days or 2-hour delay days for Ms. Prudente only. This draft MOU includes additional provisions regarding the accumulation of shared time and sick time as well as compensation for covering additional classes. (Association Exhibit 3)

21. Mr. Frigoletto did not respond to the October 13, 2017 draft MOU from Mr. Miller. (N.T. 47)

22. On Wednesday, October 18, 2017, Mr. Frigoletto and Mr. Miller had a cell phone text exchange. Mr. Miller text messaged Mr. Frigoletto that he would like a response to his October 13, 2017 proposed draft MOU by that Friday so that he could "prep" it by that Monday. Mr. Frigoletto responded that he was away at a conference. Mr. Miller then asked: "Do we have an agreement?" "Have you reviewed the proposed MOU?" Mr. Frigoletto did not respond. (N.T. 48-49; Association Exhibit 4)

23. Mr. Miller wanted Mr. Frigoletto to review the last draft by Friday so he could prepare a final draft for a vote at the Union's Executive Committee meeting that Monday. Mr. Frigoletto never responded and when he returned from his conference, he stated that he wanted to review some points. Consequently, Mr. Miller and Mr. Frigoletto met at

least three more times going into November 2017. Until this time, Mr. Frigoletto did not at any time indicate that he needed school board review or approval, but as of November 13, 2017, the parties did not have an agreement on an MOU for the part-time teachers. (N.T. 50-52, 122; District Exhibit 9)

24. Mr. Miller prepared another summary letter and included a proposed draft MOU, dated November 30, 2017. The November 30, 2017 draft reflected changes based on the meetings in November. After the November 30, 2017 draft MOU proposal, Mr. Miller and Mr. Frigoletto had at least one more meeting in December 2017. (N.T. 52-54, 60-61; Association Exhibit 5)

25. Some of the items included in the November 30, 2017 draft MOU were addressed during the collective bargaining negotiation process, which were not included in the CBA. The Union also sought to negotiate items which were not addressed when negotiating the CBA. (N.T. 97, 145)

26. In the November 30, 2017 summary letter, Mr. Miller stated, in relevant part, as follows:

We continue our discussions on the concept of permanence with an MOU on part-time teachers. I believe now is the time to conclude such an agreement, before individuals come into play, and we are negotiating issues not tied to a specific person or persons. Toward this end, I am including with this a proposal including language changes that we discussed.

(District Exhibit 10)

27. At a meeting in December 2017, Mr. Miller asked Mr. Frigoletto: "Where are we on this November 30, 2017 draft?" To which Mr. Frigoletto responded: "I don't want to commit the District to this in writing." He also responded: "I don't want to restrict the District too much in the future." Mr. Frigoletto credibly testified that he never told Mr. Miller that he was in agreement with the proposed draft MOU of November 30, 2017. (N.T. 61-62, 72-73)

28. Mr. Frigoletto denies saying: "I don't disagree," as Mr. Miller testified. I resolve the conflict in favor of Mr. Frigoletto that he did not say it. (N.T. 168-169)

29. At this time, Mr. Frigoletto felt that the discussions progressed from addressing the unique situation of an individual part-time teacher to a more comprehensive agreement covering all part-time teachers; the issues were no longer limited to more shared time for Ms. Prudente and her pay for Act 80 days and two-hour delays. Mr. Frigoletto was not comfortable with the "unnecessary and artificial time lines" imposed by Mr. Miller. There were additional items added to the proposed MOU to which Mr. Frigoletto objected, and he was reluctant to agree and have permanence in writing, as so quickly urged by Mr. Miller. (N.T. 124, 127-128, 130-131, 149)

30. Every time Mr. Frigoletto met with Mr. Miller over the proposed MOU, he became more disinterested because every time they met there were new versions to which Mr. Frigoletto could not agree. By December 2017, Mr. Frigoletto no longer had any interest in entering an MOU because he was uncomfortable with the urgency being imposed and increasing number of issues being presented in Mr. Miller's draft proposals. (N.T. 168-169)

31. Past superintendents have agreed to MOUs without school board approval or ratification. Mr. Frigoletto acknowledged that he inherited that history, but as he examined the ramifications of the November 30, 2017 proposed MOU, he realized that there were financial costs that the school board needed to review and approve. (N.T. 146-147)

32. Mr. Frigoletto credibly testified that he never agreed to the draft MOU dated November 30, 2017. Mr. Frigoletto expressed his concerns and his continuing discomfort with new items that continued to surface in discussions for an MOU. Mr. Frigoletto felt that discussions were ongoing because there were always new issues to which he could not agree; he felt that the process was never done. (N.T. 124-125)

33. On February 2, 2018, Mr. Miller sent a letter to Mr. Frigoletto summarizing their February 1, 2018 meeting. During that meeting, Mr. Frigoletto informed Mr. Miller that he was not interested in an MOU at that time. (N.T. 63, 128-129)

34. In the February 2, 2018 letter, Mr. Miller stated, in relevant part, the following: "As I told you in December, I was going to ask UniServe Representative Deborah S. Zabielski to research whether the District's unwillingness to reduce an agreement on part-time teachers which has been tentatively agreed to between you and me constitutes an unfair labor practice." (Association Exhibit 6 at 2)

35. On Friday, February 16, 2018, Mr. Frigoletto responded as follows:

I have reviewed your thoughts summarizing our part-time teacher conversations. In regard to that, I want to let you know that I disagree with your summarization of our part-time teachers issue. You state that you had PSEA UniServ Representative Debbie Zabielski research if it is an unfair labor practice to refuse to reduce an agreement to writing after we have verbally agreed to an item, and that PSEA advises you that such action or inaction would constitute a refusal to reduce an agreement to writing in violation of Act 195.

Like you, I have had the matter reviewed by counsel and have been advised that no such violation has occurred for several reasons. First, I have never agreed on the definitive terms. As you state in your letter there may have been a tentative agreement, but certainly not a definitive agreement. Further, as you know, a change in the contract would require [b]oard approval. I am only authorized to recommend approval or disapproval to the [b]oard. I have not done so, nor am I ready to do so.

(Association Exhibit 7)

36. Mr. Miller responded several minutes later, in relevant part, that he "will ask the Grievance Committee to meet to authorize the filing of a ULP within the necessary time frame." (Association Exhibit 7)

37. The basis for Mr. Miller's filing of the charge in this case was that, immediately following the November 30, 2017 draft MOU,

Mr. Frigoletto did not affirmatively state: "I disagree." After documenting and summarizing all the meetings, at no time did Mr. Miller place in writing or document that there was an actual agreement or a meeting of the minds, as he had done in his August 21, 2017 letter. Mr. Miller testified that Mr. Frigoletto never said that there was an agreement. (N.T. 75-77, 126, 129, 145, 197, 201)

DISCUSSION

The Union contends, *inter alia*, that the District and the Union had an agreement and a meeting of the minds for a part-time teacher MOU and that the District violated the Act when it reneged on that MOU and refused to reduce it to writing.

The District argues, *inter alia*, that the part-time teachers are not in the professional bargaining unit and that the Union lacks standing to be the exclusive collective bargaining representative of the part-time teachers. The District further maintains that the professional bargaining unit certification only refers to "teachers," and it does not include part-time teachers. (N.T. 7). The District also argues that, assuming that part-time teachers are part of the bargaining unit, the District did not have any obligation to bargain with the Union over the part-time teachers' terms and conditions of employment mid-contract and that the Superintendent, who voluntarily participated in mid-contract discretionary discussions, was entitled to walk away from those discussions without reaching an agreement. (N.T. 8-9; District's Post hearing Brief at 4-5). The District further contends that the facts do not establish that an agreement formed between Mr. Frigoletto and Mr. Miller. (N.T. 9, 203-209; District's Post-hearing Brief at 5-8).

The District's lack of standing defense is dismissed. The Board has held that, where the Board's bargaining unit certification refers to teachers without reference to part-time teachers, the certification includes regular part time teachers. Cranberry Area Education Association v. Cranberry Area School District, 16 PPER ¶16216 (Proposed Decision and Order, 1984) (citing Clairton City School District, 12 PPER ¶ 12375 (Nisi Order of Unit Clarification, 1981)). Moreover, the record establishes that the District treated the part-time teachers as part of the professional bargaining unit. The District bargained a provision in the CBA that requires teachers who are not employed on a full-time basis to pay pro-rated costs for PPO Blue health insurance. Also, the District has applied the duty-free assignment provision and the transfer provision of the CBA to the part-time teachers. And, the District has entered into prior MOUs with the Union for individual part-time teachers regarding scheduling and the calculation of hours. Additionally, the recognition clause of the parties' CBA provides that "classroom teachers" are included in the bargaining unit, and part-time teachers are indeed "classroom teachers." Accordingly, the Union is the exclusive representative for the part-time teachers, and it has standing in this matter to represent the part-time teachers.

However, the facts of record support the conclusion that Mr. Frigoletto did not enter into an agreement with Mr. Miller. In August 2017, Mr. Miller approached Mr. Frigoletto to discuss the unique circumstances of an individual part-time teacher. Ms. Prudente's part-time teaching schedule was such that her work day typically ended at 1:30. Mr. Miller wanted to discuss some manner of compensation for Ms.

Prudente if she would have to remain after 1:30 for meetings. Mr. Frigoletto voluntarily entertained the discussion.

On August 21, 2017, Mr. Miller sent a letter to Mr. Frigoletto summarizing the compensation for Ms. Prudente for Act 80 days and 2-hour delay days. The letter references other discussions, but the discussions related to part-time teachers were limited to Ms. Prudente. This summary does not mention the manner of compensation for Ms. Prudente if she stays late for meetings on a regular work day, which is the issue that initiated the dialogue.

In September and October of 2017, Mr. Miller and Mr. Frigoletto met 3-4 more times. During these meetings, the discussions regarding Ms. Prudente's unique circumstances changed to include all part-time teachers. On October 13, 2017, Mr. Miller forwarded a draft MOU to Mr. Frigoletto that included four additional provisions that applied to all part-time teachers, not just Ms. Prudente, dealing with the accumulation of shared time, sick time and extra compensation for covering additional classes. Mr. Frigoletto did not respond to the October 13, 2017 draft MOU.

On Wednesday, October 18, 2017, while Mr. Frigoletto was away at a conference, Mr. Miller texted Mr. Frigoletto asking if there was an agreement on the October 13, 2017 draft MOU. Mr. Miller urged a response by that Friday. Mr. Frigoletto responded only that he was away at the conference. He did not agree to the MOU. Mr. Frigoletto and Mr. Miller met 3 more times in November 2017.

Following the November meetings, Mr. Miller drafted another proposed MOU, dated November 30, 2017. At a subsequent meeting in December 2017, Mr. Miller inquired about Mr. Frigoletto's position on the November 30, 2017 draft MOU. There is a conflict in the testimony regarding what was actually said at this point, which conflict I resolve in favor of Mr. Frigoletto. Mr. Miller claims that Mr. Frigoletto said: "I don't disagree with anything that's there." Mr. Frigoletto denies saying that, which denial I have credited. Moreover, even if Mr. Frigoletto had made that statement, such a statement does not constitute an affirmative agreement or assent to the draft MOU. The statement is equivocal at best, and it implies that Mr. Frigoletto needed more time to consider the proposal and/or discuss it with others. Additionally, Mr. Frigoletto told Mr. Miller that he did not want to commit the District or restrict the District in the future. Clearly, Mr. Frigoletto did not agree to the MOU. Accordingly, there was never any meeting of the minds or agreement on the November 30, 2017 draft MOU, which is at issue here.

Mr. Frigoletto credibly testified that he became concerned about the manner in which discussions changed from addressing the unique situation of one part-time teacher to a comprehensive agreement on all part-time teachers that involved financial terms, such as the accumulation of sick leave and shared time, and that he was uncomfortable with the pressure to make a deal imposed by Mr. Miller. Mr. Frigoletto credibly emphasized that every time he met with Mr. Miller there were new versions, which included increasing financial costs to the District and to which Mr. Frigoletto could not agree without school board approval.

During a meeting on February 1, 2018, Mr. Frigoletto informed Mr. Miller that he was no longer interested in an MOU at that time. In a February 2, 2018 letter summarizing their meeting the day before, Mr.

Miller informed Mr. Frigoletto that he was looking into whether the Union could file an unfair practice charge for the District's refusal to reduce to writing the MOU as presented on November 30, 2017. On Friday, February 16, 2018, Mr. Frigoletto denied that he violated the Act and asserted that he never agreed to the MOU. He further stated that he was not authorized to agree to the MOU without school board approval and that, at that time, he was unprepared to recommend school board approval for the MOU.

Regardless of whether past superintendents and Mr. Frigoletto entered into MOUs without school board approval previously, and regardless of whether Mr. Frigoletto neglected to inform Mr. Miller that he needed school board approval before Mr. Miller added terms with considerable financial ramifications, Mr. Frigoletto was entitled to seek his school board's approval on this particular MOU before making a deal. Once Mr. Frigoletto understood the financial impact of the MOU before reaching a deal, he conveyed to Mr. Miller, on February 16, 2018 that he did need school board approval. On this record, there was no agreement reached on the November 30, 2017 MOU drafted by Mr. Miller, and Mr. Miller's significant expansion of the original discussions warranted Mr. Frigoletto's change from entering a deal in August 2017 without school board approval to, after reopening discussions, needing school board approval after Mr. Miller expanded terms and conditions. Accordingly, the District did not agree to the MOU, and it had no obligation to reduce the MOU to writing.

Moreover, the District did not have any duty to bargain terms or conditions of employment for the part-time teachers mid-contract. Article XXVI of the CBA contains a "Zipper Clause" which expressly provides that there was no bargaining obligation. The Zipper clause provides as follows:

This Agreement incorporates the entire understanding of the parties which were or could have been the subject of negotiations. During the term of this Agreement, neither party shall be required to negotiate, with respect to any such matter whether or not covered by this Agreement and whether or not within knowledge or contemplation of either or both of the parties at the time they executed or negotiated this Agreement.

(F.F. 4). Union President Miller acknowledged that the District did not have any duty to bargain or negotiate MOUs or terms of employment on behalf of the part-time teachers mid-contract. Consequently, having not agreed to the proposed MOU of November 30, 2017 (because he was feeling uncomfortably pressured with the artificial timelines imposed by Mr. Miller and the ever-increasing financial terms proposed) Mr. Frigoletto was within his rights to abandon further discussions because there was no mid-term obligation to bargain.¹ Accordingly, the Union's claims under Section 1201(a)(1), (5) and (6) must be dismissed.

¹ The record demonstrates that Mr. Frigoletto did engage in further discussions throughout the spring of 2018, however, the Union contends that these were ULP settlement negotiations rather than continued discussions. Notwithstanding Mr. Frigoletto's intent or purpose for continuing discussions, he did not have an obligation to do so.

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 under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has not committed unfair practices within the meaning of Section 1201(a) (1), (5) or (6) 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 with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixth day of February, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner