

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILLIAM C. PLOUFFE, JR. :
 :
 v. : Case No. PERA-C-09-460-E
 :
 STATE SYSTEM OF HIGHER EDUCATION :
 KUTZTOWN UNIVERSITY :
 F. JAVIER CEVALLOS :
 SHARON PICUS :
 ANNE ZAYAITZ :

PROPOSED ORDER OF DISMISSAL

On November 16, 2009, Wm. C. Plouffe, Jr. (Professor Plouffe), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Anne Zayaitz, Dean of the College of Liberal Arts and Sciences of Kutztown University, and Sharon Picus, Executive Director of Human Resources of Kutztown University, had violated sections 1201(a)(1), (2) and (4) of the Public Employee Relations Act (PERA) by "interviewing [Marc] Renzema, [Pietro] Toggi[a], and Plouffe concerning issues relative to the Union and using this confidential information and/or privileged information against Plouffe," that Ms. Picus and F. Javier Cevallos, the President of Kutztown University, had violated sections 1201(a)(1), (3) and (4) of the PERA "by essentially approving and/or endorsing the actions of Zayaitz and Picus . . . [in] subsequently terminating Plouffe" and that Kutztown University had violated sections 1201(a)(1), (2) and (4) and (b)(1), (2) and (4) of the PERA by "all of the previous acts and/or omissions of its employees and/or officers."¹

On December 9, 2009, the Secretary of the Board refused to issue a complaint on the charge. Construing the charge as having been filed against the State System of Higher Education (SSHE), the Secretary noted that Professor Plouffe had charged "that SSHE has violated Section 1201(a) and (b) of PERA" but had "not properly indicated which subsection you believe SSHE has allegedly violated." She also explained that the charge did not state a cause of action to the extent that he filed it under sections 1201(a)(1), (2) and (4) of the PERA.

On December 29, 2009, Professor Plouffe filed exceptions alleging that the Secretary erred in refusing to issue a complaint on the charge under section 1201(a)(1) of the PERA. He also requested to amend the charge to allege violations of sections 1201(a)(3) and (5) of the PERA.

On May 18, 2010, the Board issued an order directing remand to secretary for further proceedings, explaining that it was "hereby remanding this matter to the Secretary with direction to issue a complaint concerning the Complainant's allegations that the University by and through its agents, violated Section 1201(a)(1) and (3) of PERA."

On May 21, 2010, the Secretary issued a complaint and notice of hearing directing that a hearing be held on October 13, 2010.

On June 29, 2010, SSHE requested a continuance of the October 13, 2010, hearing. SSHE represented that "there is a conflict regarding witness availability" and that Professor Plouffe had not responded to a June 11, 2010, letter it sent to him seeking his

¹ Professor Plouffe also charged that three professors of criminal justice at Kutztown University (Mr. Toggia, Jonathan Kremser and Mr. Renzema) had committed unfair practices under sections 1201(b)(1) and (2) of the PERA "when they improperly and/or necessarily revealed confidential and/or privileged information revealed to them by Plouffe during the course of his attempts to obtain advice and assistance [from them]." The Board, however, docketed the charge as to the three professors to separate case numbers (Case Nos. PERA-C-09-462, 463 and 464-E), so the charge as to them is not before the Board here.

position relative to its request. SSHE also proposed five alternate dates for the hearing, four of which were earlier than October 13, 2010.

On June 30, 2010, the hearing examiner, upon the request of SSHE and without apparent objection by Professor Plouffe, continued the October 13, 2010, hearing. The hearing examiner also rescheduled the hearing to an earlier date: October 8, 2010.

On July 6, 2010, Professor Plouffe represented that he had never received a letter from SSHE requesting his agreement to a continuance of the October 13, 2010, hearing. He also objected to SSHE's request because "subpoenas have already been issued for the October 13, 2010, date."

On July 13, 2010, the hearing examiner again continued the October 13, 2010, hearing, this time over Professor Plouffe's objection, explaining that the subpoenas were enforceable for the October 8, 2010, hearing date.

On September 3, 2010, Professor Plouffe filed a motion for continuance and request for reissuance of subpoenas. He represented that for lack of funds he was "not able to arrange for witnesses on October 9, 2010." He also represented that he "wrote to the attorney for the Respondents several weeks ago and has received no objection."

On September 8, 2010, the hearing examiner, without apparent objection by SSHE, granted Professor Plouffe's motion for a continuance of the October 8, 2010, hearing. The hearing examiner also rescheduled the hearing to January 11, 2011. The hearing examiner denied Professor Plouffe's request to reissue subpoenas, explaining that "by their own terms the subpoenas are returnable for any continued hearing and therefore do not need to be reissued."

On September 9, 2010, SSHE represented that it had never received correspondence from Professor Plouffe "related to his continuance request" and objected to a continuance of the October 8, 2011, hearing because its "witnesses have been confirmed and their availability is very limited during the academic year."

On September 10, 2010, the hearing examiner again granted Professor Plouffe's motion for a continuance of the October 8, 2011, hearing, this time over SSHE's objection. The hearing examiner also agreed to participate in a pre-hearing conference with the parties prior to the January 1, 2011, hearing if SSHE made the appropriate arrangements.

On September 23, 2010, SSHE requested a continuance of the January 11, 2011, hearing because "several of [its] witnesses are unavailable for the hearing[.]" On September 27, 2010, SSHE proposed three alternate dates for the hearing, one of which was March 2, 2011.

On October 5, 2010, the hearing examiner asked Professor Plouffe if he objected to SSHE's request for a continuance of the January 11, 2011, hearing and if he was available on the alternate dates proposed by SSHE.

On October 14, 2010, Professor Plouffe faxed that "[t]he March date appears to be the best for me."

On October 19, 2010, the hearing examiner, upon SSHE's request and without apparent objection by Professor Plouffe, continued the January 11, 2011, hearing to March 2, 2011.

On February 24, 2011, Professor Plouffe filed a motion for continuance. He represented that he was to be hospitalized on March 2, 2011, that he was unable to "schedule transportation for that date as he does not have a car," that he "has been unable to secure his witnesses attendance for that date or serve his subpoenas" and that "this matter may be joined to Plouffe's current federal civil rights law suit instead of having it heard in this forum." SSHE objected to the motion unless Professor Plouffe provided medical documentation that he was unable to attend the hearing. The hearing

examiner granted the motion over SSHE's objection and rescheduled the hearing to August 1, 2011.

On March 1, 2011, SSHE requested that the August 1, 2011, hearing be rescheduled because "at least two witnesses are not available that day" and proposed two alternate dates for the hearing.

On March 21, 2011, Professor Plouffe faxed that neither of the alternate dates proposed by SSHE was good for him.

On March 22, 2011, the hearing examiner, upon SSHE's request and without apparent objection by Professor Plouffe, continued the August 1, 2011, hearing. The hearing examiner proposed 13 dates in August 2011 for the hearing.

On March 29, 2011, SSHE requested additional dates for the hearing.

On March 30, 2011, Professor Plouffe faxed that "[o]nly the last date in August might be good for me. I would prefer a later date. Thank you."

On April 4, 2011, the hearing examiner provided additional dates for the hearing.

On April 14, 2011, Professor Plouffe faxed that he agreed with SSHE that no dates in August 2011 were acceptable. He also asked "for a later date."

On May 5, 2011, SSHE agreed to a hearing date of September 14, 2011.

On May 9, 2011, Professor Plouffe faxed that September 14, 2011, "is not good for me" and that "[l]ater dates would be better."

On June 1, 2011, the hearing examiner asked the parties for their available dates in October 2011 "[i]n order to bring this matter to a conclusion."

On June 10, 2011, SSHE agreed to a hearing date of October 11, 2011.

On June 20, 2011, Professor Plouffe faxed that October 11, 2011, "will not do for me as I have been discovering more information that indicates I will need a least two days, based on the number of witnesses for me and the University." He also alleged that "there is a problem with what appears to be witness tampering by Kutztown University" and that he had asked a federal judge to help track down and subpoena his primary witness. He further alleged that "I have discovered evidence and believe that other evidence is about to be revealed that will show that in the previous hearing before you, Kutztown University and/or their attorney lied." He asked "to place this entire matter on indefinite stay, as I am looking into the possibility of transferring this entire matter to the federal court where the admission of relevant evidence will not [be] so difficult[.]"

On June 22, 2011, the hearing examiner denied Professor Plouffe's request for an indefinite stay unless SSHE agreed to it. The hearing examiner also rescheduled the August 1, 2011, hearing to October 11, 2011.

On June 29, 2011, SSHE informed the hearing examiner that it did not join in Professor Plouffe's request for an indefinite stay because "this tribunal should not be delayed based upon conjecture that the matter may be consolidated with another action." SSHE's attorney also took "serious exception to Mr. Plouffe's assertion that my client or I lied."

On October 4, 2011, Professor Plouffe requested that the October 11, 2011, hearing be continued and/or moved from Harrisburg to a location closer to Kutztown. He represented that "my unemployment has expired and my resources are even more limited, that "I do not have a car and have been unable to obtain a ride to the upcoming hearing, despite many attempts to do so," that his primary witnesses "have apparently been intimidated by the University," that he does not have the funds to subpoena them at this

time and that "no prejudice will accrue to t[h]e Defendants, as there is an ongoing related federal case which concerns the same basic factual issues, although it encompasses different claims."

On October 5, 2011, the hearing examiner denied Professor Plouffe's request that the October 11, 2011, hearing be continued and/or moved to Kutztown. The hearing examiner noted that SSHE faced on-going potential backpay liability and would be prejudiced by a continuance and that current Board policy is to hold all hearings in Harrisburg or Pittsburgh.

On October 11, 2011, SSHE appeared for the hearing (N.T. 3). Professor Plouffe did not. Id. The hearing examiner explained that he had unsuccessfully attempted to contact Professor Plouffe to account for his absence (N.T. 3-4). SSHE represented that it was present with five witnesses and thereupon moved to dismiss the charge for lack of prosecution (N.T. 4). The hearing examiner took the motion under advisement pending a response by Professor Plouffe. Id. By letter, the hearing examiner gave Professor Plouffe 20 days to respond to the motion.

On October 25, 2011, Professor Plouffe responded that "[s]imply because you refused to grant my request for a continuance does not mean that transportation would magically appear. Indeed, in fact, it did not." He also responded that he was ill on the day of the hearing, that "it does not seem to be a problem to obtain a differ[ent] date when the University's witnesses cannot be present" and that "as a pro se in forma pauperis litigant, I would suggest that your treatment of me is not reasonable." He further responded that

"the claim that the University is suffering prejudice because of the delays is simply without merit, as my corresponding federal law suit has been delayed by the University and its personnel for a much longer time, where they are potentially liable for millions more in damages than they are before you. Thus, there was and is no prejudice to them for a delay [i]n this matter, where the potential liability is much less."²

In Commonwealth of Pennsylvania, 9 PPER ¶ 9144 (Nisi Order of Dismissal 1978), the Board dismissed a charge for failure to prosecute, explaining that when it "issues a Complaint and Notice of Hearing setting a date for a hearing it anticipates that the parties, and counsel for the parties, will make every effort possible to be present at the hearing and present their case." Id. at 309. See also Mid County Transit Authority dba Town and Country Transit, 40 PPER 40 (Proposed Decision and Order 2009) (same); Mansfield Borough, 30 PPER ¶ 30072 (Proposed Decision and Order 1999)(same). Compare Painters Local #6, 26 PPER ¶ 26031 (Proposed Decision and Order 1995)(motion to dismiss charge for lack of prosecution because the charging party did not appear at the hearing denied where the charging party had not received notice of the hearing).

In responding to SSHE's motion to dismiss the charge for lack of prosecution, Professor Plouffe seemingly contends that he made every effort possible to be present at the hearing but justifiably did not appear for two reasons: (1) because he reasonably requested a continuance of the hearing which the hearing examiner unreasonably denied and (2) because he was ill on the day of the hearing. Neither of his justifications has merit, however. Accordingly, SSHE's motion to dismiss the charge for lack of prosecution must be granted.

As to his first justification for not being present at the hearing, Professor Plouffe essentially posits that (1) his limited resources, (2) continuances granted to SSHE by the hearing examiner evidencing unfair treatment of him and (3) an asserted lack of prejudice to SSHE if the hearing had been continued show that he reasonably requested a continuance of the hearing which the hearing examiner unreasonably denied, but a close review of the record shows that not to be the case.

²In addition, Professor Plouffe asked "for a list of all people that were present at the hearing." As the notes of testimony from the hearing reflect, the hearing examiner, counsel for SSHE, a court reporter and five witnesses were present at the hearing.

Having filed the charge, Professor Plouffe was obligated to prosecute it in a timely fashion even though his resources may be limited as unresolved labor disputes are injurious to the public. See section 101 of PERA. By the time he requested the continuance, however, the charge was almost two years old, with no end in sight. Moreover, as set forth in the procedural history, he had indicated on two prior occasions (February 24, 2011, and June 20, 2011) that he might be transferring this matter to federal court where he has another action pending against SSHE, which begs the question whether he has any present intention of prosecuting the charge in a timely fashion. Also, as explained below, SSHE would have been prejudiced by a continuance. Under the circumstances, Professor Plouffe's request for a continuance was unreasonable, and the hearing examiner reasonably denied it.

As set forth in the procedural history, the hearing examiner continued the hearing for both parties when they claimed that witnesses were not available: (1) from October 13, 2010, upon SSHE's request, (2) from October 8, 2010, to January 11, 2011, upon Professor Plouffe's request, (3) from January 11, 2011, to March 2, 2011, upon SSHE's request and (4) from August 1, 2011, to October 11, 2011, upon SSHE's request. In the first instance, the hearing examiner moved the hearing to an earlier date (October 8, 2010), which was to Professor Plouffe's benefit in having his charge heard in a timely fashion. In the latter two instances, he had the opportunity to object but did not. In the remaining instance, the hearing examiner granted his request over an objection by SSHE. No evidence of unreasonable treatment of him by the hearing examiner is apparent on that record.

Professor Plouffe has charged that SSHE terminated him in violation of PERA, which raises the prospect of a backpay order against SSHE. Thus, although SSHE may not be facing here the millions in damages he is seeking in federal court, SSHE nevertheless faces on-going potential backpay liability here. Consequently, SSHE would have been prejudiced by a continuance of the hearing, making Professor Plouffe's request for a continuance unreasonable. Moreover, the pace with which his federal action against SSHE is progressing is beyond the control of the Board, so whether or not SSHE might be the cause of any delay in that proceeding hardly makes his request for a continuance of the hearing in this proceeding any more reasonable. The hearing examiner's denial of his request was, therefore, reasonable.

As to his second justification for not being present at the hearing, the record does not show that he ever requested a continuance of the hearing because he was ill. Moreover, he offers no explanation for why he made no such request. As set forth in the procedural history, the record shows that when the hearing was scheduled for March 2, 2011, he requested a continuance for illness which the hearing examiner granted over an objection by SSHE that he provide documentation of his illness, so it is apparent that he knew how to request a continuance if illness prevented him from being present at the hearing. Thus, his second justification for not being present at the hearing finds no support in the record.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-seventh day of October 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner