

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
 :
 v. : Case No. PERA-C-00-148-E
 :
 STATE SYSTEM OF HIGHER EDUCATION :
 EAST STROUDSBURG UNIVERSITY :

FINAL ORDER

On March 23, 2001 the Association of Pennsylvania State College and University Faculties (APSCUF) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions to a March 5, 2001 Proposed Decision and Order (PDO) and requested a thirty-day extension, to April 24, 2001, to file a supporting brief. On March 30, 2001, the Secretary of the Board granted this request and set April 24, 2001 as the new due date. However, the brief was hand-delivered to the Board on April 25, 2001 and is untimely and therefore has not been considered. In the PDO, the Hearing Examiner made 39 findings of fact and concluded that: (1) the State System of Higher Education (SSHE) did not take retaliatory action against athletic trainers because of a discriminatory motive or anti-union animus; (2) APSCUF failed to allege interference, restraint or coercion with the athletic trainers' alleged right to bargain directly with SSHE in its Charge; (3) the athletic trainers' attempt to directly bargain with SSHE after becoming part of APSCUF's bargaining unit is not protected activity under the Public Employee Relations Act (PERA) and therefore SSHE's response to that attempt did not interfere with, restrain or coerce the trainers during the exercise of any statutorily protected rights; (4) SSHE had a managerial right under Section 702 of PERA to assign additional duties, including summer camps, to the athletic trainers; (5) APSCUF failed to charge or prove that SSHE violated its obligation to bargain over the impact of its managerial prerogative to assign additional duties on a mandatory subject of bargaining; and (6) APSCUF did not prove the timeliness of its charge that SSHE unilaterally changed the trainers' entitlement to compensatory time. The Hearing Examiner further concluded that SSHE violated Section 1201(a)(1) and (5) of PERA by engaging in direct dealing with athletic trainers represented by APSCUF. SSHE did not file exceptions to the PDO. However, on May 17, 2001, it filed a brief in opposition to APSCUF's exceptions.

APSCUF set forth 26 separately enumerated exceptions to the PDO. Sixteen of those exceptions regard the Hearing Examiner's failure to make various findings of fact. (APSCUF's Exceptions 1-2,12-24, 26.) As the Board has repeatedly held, its hearing examiners are not required to make findings summarizing all of the evidence presented in the record. Rather, an examiner need only make those findings that are both relevant to the decision and necessary to resolve the issues presented. AFSCME, Council 13 v. Office of Attorney General, 30 PPER ¶ 30214 (Final Order, 1999); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order 1997); PSSU Local 668, SEIU v. Dep't of Public Welfare (Allegheny County Assistance Office), 27 PPER ¶ 27188 (Final Order, 1996); see also Page's Dep't Store v. Velardi, 464 Pa 276, 346 A.2d 445 (1975). The Hearing Examiner's findings of fact are fully supported by substantial evidence in the record and accurately reflect the underlying facts necessary to decide the issues presented in this case,

as required by the Supreme Court in PLRB v. Kaufmann Dep't Stores, Inc., 345 Pa 398, 29 A.2d 90 (1942). The Hearing Examiner's alleged failure to make the sixteen additional findings proffered by APSCUF was not error.

This case concerns two 12-month, non-faculty, athletic trainer positions that were created in 1999 at East Stroudsburg University (University). Dr. Keith Vanic and Mr. Jonathan Swart were appointed to these newly created positions in August of 1999. At the time of their appointments, the trainers were classified as state university administrators and believed that they were entitled to the benefits of the collective bargaining agreement between the State College and University Professional Association (SCUPA) and SSHE, which includes compensatory time. Also at the time of their appointments, Dr. Vanic and Mr. Swart understood that their job duties did not include involvement with summer camps and they believed that they would be permitted to use accrued leave time during the summer months. However, by letters dated September 29, 1999, the University informed them that they had been incorrectly classified as administrators. They were informed that their classification was being changed to "non-faculty athletic trainer" and that their salaries would not be affected by the change. These letters revealed that the misclassification was made while the appropriate placement of SSHE's non-faculty athletic trainers into an existing bargaining unit was pending before the Board. The trainers were notified that with the corrected classification, they would be covered by SSHE's management benefit plan (which does not provide for compensatory time) and not the SCUPA contract. (PDO, F.F. 20, Union Ex. 6 and 24.) The trainers were instructed to contact an employe in the human resources department, who in late September 1999, informed Dr. Vanic that he was not entitled to compensatory time. Dr. Vanic relayed this information to Mr. Swart.

On October 19, 1999 the Board issued a Final Order amending the certification of a collective bargaining unit represented by APSCUF to include athletic trainers with and without faculty status. In the Matter of the Employes of the State System of Higher Education, 30 PPER ¶ 30222 (Final Order, 1999). In that Final Order, the Board found that both faculty and non-faculty athletic trainers employed by SSHE work long, irregular hours and are not eligible for overtime or overload compensation and that the unrepresented non-faculty athletic trainers share a community of interest with the faculty athletic trainers represented by APSCUF. Id., at 479-480. Following the Board's Final Order, there is no record evidence that either APSCUF or SSHE approached the other to bargain over Dr. Vanic or Mr. Swart's wages, hours or terms and conditions of employment. Rather, the evidence reveals that the trainers remained covered by the management benefit plan and that by letter dated April 12, 2000, Mr. Jerry Levanowitz, the University's human resources director, returned their applications to join APSCUF to them, citing a lack of authority. The Board's Final Order was affirmed by the Commonwealth Court in SSHE v. PLRB, 757 A.2d 422 (Pa. Cmwlth. 2000) and the Supreme Court denied SSHE's Petition for Allowance of Appeal at SSHE v. PLRB, 2001 Pa. Lexis 382 (No. 534 W.D. Alloc. Dkt. 2000)(2001).

Through several meetings and a series of e-mails with Valerie Hodge, the University's vice president of student affairs, and Mr. Levanowitz, the trainers were informed that: (1) they were hired into 12-month positions so that they could be assigned to work summer camps; (2) their primary summer responsibility would be the summer camps; (3) they were not entitled to compensatory time; (4) their proposal to receive additional compensation for working summer camps was rejected; (5) they would not be reimbursed for any undocumented, unapproved compensatory time; and (6) the University would

approve a schedule that allowed them to take time off during the spring and summer. The text of these e-mails is reproduced in the PDO at F.F. 24, 29, 32-34. The University eventually approved a summer schedule that provided both Dr. Vanic and Mr. Swart with time off.

In its third exception, APSCUF asserts that the Hearing Examiner failed to hold that, "as a matter of law, a violation of Section 1201(a)(1) and (3) [of PERA] may be based upon an employer's discriminatory treatment of an employee based upon the employee's classification in one union as opposed to another or no union at all, rather than actually proof of specific protected activity by the employees who have been discriminated against." (APSCUF, Exceptions, p. 2.) This exception will be dealt with simultaneously with APSCUF's tenth exception, to the Hearing Examiner's conclusion that SSHE did not violate Section 1201(a)(3). Section 1201(a)(3) prohibits an employer from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization." 43 P.S. § 1101.1201(a)(3). APSCUF cites no support for its theory that proof of an employe engaging in protected activity is unnecessary to establish a violation of this section. To the contrary, the law specifically requires APSCUF to prove three things: (1) the employes engaged in protected activity; (2) the employer was aware of this activity; and (3) the employer took adverse action against the employes because of a discriminatory motive or anti-union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977); PSSU, Local 668 v. Dep't of Labor and Industry (Office of Vocational Rehabilitation), 31 PPER ¶ 31127 (Final Order, 2000); PLRB v. Dep't of Public Welfare (South Mountain Restoration Center), 17 PPER ¶ 17079 (Final Order, 1986). Like the Hearing Examiner, the Board finds that APSCUF failed to meet its burden of proof.

First, APSCUF was required to prove that the trainers were engaged in protected concerted activity and its charge fails to allege that either trainer engaged in any statutorily protected activity. Instead, APSCUF merely alleges that SSHE was retaliating against the trainers for their "union affiliation." The Board has found that union affiliation constitutes protected activity when an individual employe has, for example: (1) engaged in organizational activity in support of a union, Keystone Educ. Center Charter Sch. Educ. Ass'n v. Keystone Educ. Center, Inc., 30 PPER ¶ 30167 (Final Order, 1999); (2) solicited authorization cards, AFSCME, Council 13 v. Bensalem Township, 19 PPER ¶ 19010 (Final Order, 1987); (3) acted as chief negotiator for the union, Kevin Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); (4) held an office in a union, Dennis Schmehl v. City of Reading, 20 PPER ¶ 20069 (Final Order, 1989); or (5) filed grievances on behalf of union members, Leighton Area Educ. Support Personnel Ass'n v. Leighton Sch. Dist., 26 PPER ¶ 26115 (Final Order, 1995), aff'd 682 A.2d 439 (Pa. Cmwlth. 1996). Each of these examples cites to an affirmative action by an individual employe, or at a minimum, an intent by the employer to discriminate based on perceived protected activity. Notably, APSCUF's charge is devoid of any affirmative action that these trainers took on behalf of any labor organization. Thus, there is no record evidence that the trainers were "affiliated" with any union whatsoever at the time that SSHE allegedly "unilaterally abolish[ed] compensatory time"; "chang[ed] conditions of employment to prohibit future accrual of compensatory time"; "assign[ed] additional work"; "threatened to reduce the pay of the athletic trainers"; "reduc[ed] funds available to the trainers for equipment and supplies"; "threaten[ed] to discharge the athletic trainers"; or "threaten[ed] to demote [the] head athletic trainer" as charged by APSCUF. (APSCUF's Charge.)

In this exception, APSCUF asserts that the mere "classification in one union as opposed to another or no union at all," is a sufficient substitute for proof of protected activity. (APSCUF, Exceptions, p. 2.) Presumably, APSCUF is referring to the Board's 1999 Final Order accreting SSHE's non-faculty athletic trainers into APSCUF's unit. There is no merit in APSCUF's argument that the Board's own decision could be substituted for proving protected concerted activity in a discrimination case, as required by St. Joseph's Hospital; PSSU, Local 668 v. Dep't of Labor and Industry; PLRB v. Dep't of Public Welfare, supra. Nor is there any merit to an argument that SSHE discriminated against Dr. Vanic and Mr. Swart because of APSCUF's activity in litigating its unit clarification petition that resulted in the Board's 1999 decision. The Board has specifically held that general union activity of the union is insufficient to prove protected activity of particular employees. Halfhill v. Private Industry Council of Westmoreland/Fayette, Inc., 28 PPER ¶ 28138 (Proposed Decision and Order, 1997), aff'd, 29 PPER ¶ 29004 (Final Order, 1997). Thus, any action taken by either APSCUF or the Board that resulted in SSHE's non-faculty athletic trainers being accreted into APSCUF's bargaining unit does not constitute the protected concerted activity of Dr. Vanic or Mr. Swart necessary to prove this charge. Therefore, the Hearing Examiner correctly concluded that APSCUF did not meet its burden of proof.

Second, APSCUF was required to prove that SSHE knew of the protected concerted activity. Logically, because APSCUF failed to prove that the trainers were engaged in any statutorily protected activity, it also failed to prove this element of the test.

Third, APSCUF was required to prove that SSHE took adverse action against the trainers because of a discriminatory motive or anti-union animus, to encourage or discourage membership in an employe organization. The Hearing Examiner properly concluded that there was no such evidence in the record. The fact that SSHE participated in the litigation of APSCUF's unit clarification petition that resulted in the non-faculty athletic trainers' accretion into the APSCUF bargaining unit, does not establish a discriminatory motive or anti-union animus. Further, "with regard to allegations of discrimination . . . a charge of unfair practice must allege a causal connection between participation in protected activity by alleged discriminatees and the respondent's alleged discriminatory action." Blue Ridge Educ. Support Personnel Ass'n v. Blue Ridge Area Sch. Dist., 28 PPER ¶ 28161 (Final Order, 1997)(citing York Paid Firefighters Ass'n v. City of York, 22 PPER ¶ 22226 (Final Order, 1991)). As there is no evidence of the trainers engaging in protected activity, there can be no causal connection to any action that SSHE took in this case. Even if APSCUF had established that Dr. Vanic and Mr. Swart were engaged in protected activity, it has neither alleged nor proved a causal connection between such activity and a discriminatory action by SSHE. The University's letters of September 1999 reveal that the change in classification from administrators to non-faculty athletic trainers was made because the trainers' placement into a bargaining unit was being litigated before the Board. There is no evidence that the University reclassified the trainers to discriminate against the trainers or to discourage membership in APSCUF. Thus, this exception is dismissed for APSCUF's failure to establish all of the three required elements of a Section 1201(a)(3) violation of PERA.

APSCUF's remaining exceptions will be addressed together because they involve a common issue. (APSCUF's Exceptions 4-9, 11, 25.) These exceptions concern the Hearing Examiner's "characterization" and analysis of APSCUF's

charge that SSHE violated Section 1201(a)(1) of PERA, Section 1201(a)(5) of PERA, as well as the timeliness of the Charge. APSCUF asserts that the Hearing Examiner failed to note that APSCUF charged SSHE with "bargaining individually" and "changing terms of employment 'without bargaining with APSCUF.'" (APSCUF, Exceptions, p. 2.) To the contrary, the Hearing Examiner found evidence of bargaining between the University and the trainers concerning mandatory subjects of bargaining after the Board ruled that non-faculty athletic trainers are part of the bargaining unit represented by APSCUF. The Examiner concluded that SSHE did bargain individually with the trainers in violation of Section 1201(a)(1) and (5) (PDO, at 12). The fact that the Hearing Examiner found a derivative rather than independent violation of Section 1201(a)(1) is irrelevant to the remedy. Thus, this portion of APSCUF's exception is without merit.

In its Charge, APSCUF alleges that SSHE unilaterally changed the trainers' terms and conditions of employment, a mandatory subject of bargaining, by (1) requiring them to work during summer camps, an assignment that it argues is outside the employees' classifications; (2) abolishing compensatory time and prohibiting future accrual of compensatory time; (3) reducing funds for equipment and supplies. The Board will address each alleged change individually. First, regarding the issue of summer camps, the Hearing Examiner explained, "a public employer's managerial rights under Section 702 of PERA include assigning duties to its workforce and assigning additional duties to bargaining unit employees." (PDO, at 11)(citing In the Matter of the Employees of Public Utility Comm'n, 20 PPER ¶ 20047 (Final Order, 1989)). The record reveals that the non-faculty athletic trainers' positions were advertised as 12-month positions; the individual appointment letters sent to Dr. Vanic and Mr. Swart revealed that their positions were 12-month positions; and employees in 12-month positions are expected to work 12 months per year. Thus, SSHE was permitted to assign athletic training duties to these employees during the summer months without bargaining with APSCUF. In FOP, Lodge 5 v. City of Philadelphia, 29 PPER ¶ 29142 (Final Order, 1998) the Board explained that a public employer has the managerial right to direct the workforce to perform duties identified by the public employer, without prior bargaining with the union over management's right to assign the performance of those duties. APSCUF's argument that the summer camps duties are outside of the employees' classifications is without merit. There is no dispute that these athletic trainers were hired to perform athletic training duties for SSHE. The fact that SSHE expected them to perform athletic training duties during the summer months at camps does not in any way remove those athletic training duties from their classifications. APSCUF loses sight of the fact that these non-faculty athletic training positions did not even exist prior to 1999. Thus, any argument that their summer duties changed cannot be substantiated. Further, even if it had been established that non-faculty athletic trainers in 12-month positions do not work summer camps, the public employer has the managerial prerogative to assign duties not previously required of their employees. See Reading Fraternal Order of Police Lodge #9 v. City of Reading, 30 PPER ¶ 30121 (Final Order, 1999). The record reveals that the trainers were notified that they were hired into 12-month positions to perform athletic training duties, months before the Board certified APSCUF as their collective bargaining representative. SSHE was certainly not required to bargain with APSCUF over the trainers' 12-month assignments and it was likewise not required to bargain with APSCUF over the assignment of athletic training duties during those 12 months.

Second, regarding the issue of compensatory time, the record reveals that SSHE notified the trainers that they were misclassified as administrators by letters dated September 27, 1999, when it informed them that they were to be covered by the management benefits plan rather than the SCUPA contract. "Reclassification is a matter of inherent managerial authority . . . As such, it is subject to meet and discuss rather than being a mandatory subject of bargaining." AFSCME, Council 13 v. Commonwealth of Pennsylvania (Dep't of Transportation), 16 PPER ¶ 16019, p. 51-52, n.5 (Final Order, 1984)(citing PLRB v. Commonwealth of Pennsylvania, 9 PPER ¶ 9061 (Nisi Decision and Order, 1978)). Even if this reclassification constituted a unilateral change in a mandatory subject of bargaining, APSCUF was not the certified bargaining representative of these trainers until the Board's Final Order of October 19, 1999. SSHE cannot be held to have violated its duty to bargain with its employees' representative, because they did not even have a collective bargaining representative at that time. APSCUF's assertion that SSHE changed the trainers' working conditions in February of 2000 is without merit. The record clearly reflects that SSHE's reassignment of these trainers resulted in compensatory time being unavailable to them and that this reassignment occurred in September 1999, the month prior to APSCUF's amended certification. Further, even if APSCUF had been the certified bargaining representative at the time of this alleged change, its Charge would have been untimely filed. Section 1505 of PERA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge."

Third, regarding the \$8000 budgetary supplement for equipment and supplies, Section 702 of PERA expressly provides that a public employer's budget is a managerial prerogative. Thus, the decision to grant a budgetary supplement is a managerial prerogative and not a mandatory subject of bargaining. SSHE did not unilaterally change Dr. Vanic's or Mr. Swart's working conditions when it decided not to grant the athletic training department a budgetary supplement, nor was it required to bargain with APSCUF before making this managerial decision.

After a thorough review of the exceptions and all matters of record and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions be and the same are dismissed, and the Proposed Decision and Order be and the same is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle, Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this tenth day of July, 2001. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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AFFIDAVIT OF COMPLIANCE

The State System of Higher Education, East Stroudsburg University hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of PERA; that it has posted the Proposed Decision and Order and Final Order as directed therein; and that it has served a copy of this affidavit on APSCUF 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