

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :
ASSOCIATION :
 :
v. : Case No. PF-C-98-61-E
 :
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

FINAL ORDER

On July 27, 1999, the Pennsylvania State Troopers Association (Association) filed timely exceptions to a proposed decision and order (PDO) entered on July 9, 1999. Along with the exceptions the Association included a request for an extension of time in which to file its brief in support of exceptions. The Secretary of the Board granted the Association's request and directed the Association to file its brief on or before August 12, 1999. Thereafter, the Association filed its brief in support of exceptions on August 11, 1999. On September 1, 1999, the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth) filed its brief in response to exceptions.

In the PDO the hearing examiner dismissed the Association's unfair labor practice charge alleging that the Commonwealth violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by failing to offer Corporal Alexander Roy promotion to sergeant as a helicopter pilot. In dismissing the charge, the hearing examiner concluded that the Association did not prove that the Commonwealth's failure to promote Corporal Roy to sergeant was inconsistent with the parties' September 10, 1997 side letter of agreement, the collective bargaining agreement or a prior grievance arbitration award. In addition, the hearing examiner concluded that the failure to promote Roy was not in retaliation for his participation in protected activities. The Association has filed 23 separately enumerated exceptions to the PDO. After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

7. That after filing two more grievances (HQ-145 and HQ-142) and one unfair labor practice charge alleging failure to comply with the arbitration award, Roy was returned to pilot status some 27 months later in April 1998. (N.T. 25, 28, 29, 36; Association Exhibits 1, 2, 3)

9. That in March 1996,¹ Roy requested a transfer to the aviation division's Latrobe facility. When that transfer was not granted Roy filed grievance HQ-145. Later Roy was transferred to the Latrobe facility. Transfers are discretionary in the State Police. (N.T. 28, 167; Association Exhibit 2, Commonwealth Exhibit 2)

¹ The record shows Roy requested a transfer in March 1996, not August 1996.

13. That on September 26, 1996, at Hague's request Roy met with Hague to discuss his recent arrest on September 23, 1996. Hague's manner was "firm and direct."² (N.T. 168-174)

28. That in the summer of 1997, the Association became aware of the Commonwealth's practice of offering certain corporal and sergeant vacancies to selected members who were lower on the promotional eligibility list than those who were higher on the list and not offered the same vacancies. (N.T. 68; Joint Exhibit 2)

29. That Corporal Foss accepted the promotion to sergeant in the aviation unit in Harrisburg. (N.T. 48-49, 92)

30. That Corporal Foss had 19 years of service with the state police, eight of those years as midnight corporal at the busiest state police barracks in Pennsylvania. Foss received letters of commendation and had never been disciplined. (N.T. 102-103, 142)

31. That On August 2, 1996, Roy filed a grievance (HQ-142) over the alleged refusal by the Commonwealth to return him to pilot status as required by the arbitration award. On October 18, 1996, the Association filed an unfair labor practice charge alleging a refusal to comply with the arbitration award. The parties subsequently settled the charge by way of agreement. (Association Exhibits 1 and 3)

DISCUSSION

In the summer of 1997, the Association became aware of the Commonwealth's practice of offering certain corporal and sergeant vacancies to selected members who were lower on the promotional eligibility list than those who were higher on the list and not offered the same vacancies. The Association objected to this practice and as a result the parties entered into a promotional procedures agreement on September 10, 1997. This side letter of agreement applied to the ranks of corporal and sergeant for the duration of the then current corporal and sergeant promotional eligibility list and provided in pertinent part:

1. The Department's practice of offering certain Corporal and Sergeant vacancies to selected members on the promotional eligibility list will be discontinued. If the Department, at its discretion, includes vacancies in the promotion process that are exempt from Article 37 of the collective bargaining agreement, these vacancies will be offered to all members according to their ranking on the current promotional eligibility list.

2. At the sole discretion of the Commissioner, the Department may promote, in place, any member assigned to a specialized position, as outlined in Article 37 of the collective bargaining agreement, when that member becomes eligible for promotion.

* * *

6. By making this agreement, the Department or the PSTA

² Due to a typing error, finding 13 mistakenly referred to Roy's second arrest and his meeting with Hague as having occurred in 1997.

does not waive any of its rights under the collective bargaining agreement with the PSTA or any applicable employment or labor law. All of the provisions of the current collective bargaining agreement between the Commonwealth and the PSTA will remain in full force and effect.

(FF4).

Pilot positions are considered specialized positions in the Pennsylvania State Police. Article 37 of the parties' July 1, 1995 to June 30, 1998 collective bargaining agreement is entitled "Specialized Positions or Training" and sets forth the agreed upon procedure to be followed for the filling of vacancies for specialized positions. Section 2 of Article 37 provides that where skill, ability and job performance are substantially equal among bidding members, seniority is the determining factor. Moreover, because the appointing officer exercises "particularized judgement" in the filling of specialized position vacancies, only "abuse or unlawful criteria" can overturn his or her decision. Section 3 of Article 37 demands appointing officers issue a written reason why a less senior applicant is chosen for the specialized position. Finally, Section 5 of Article 37 provides that:

"The Board of Arbitration believes that a uniform, statewide system should be established for specialized positions, and the Commonwealth and the Pennsylvania State Troopers Association are hereby directed to negotiate over the establishment of such a program. In the event the parties are unable to mutually agree upon such a program within ninety (90) days after the issuance of this Award, then this Board shall retain jurisdiction over this issue and shall meet in executive session and, if deemed necessary, hold additional evidentiary hearings and then order the implementation of a specialized position program."

(FF3). Neither the parties nor the arbitration panel ever implemented a uniform specialized position system.

In or about 1988, Corporal Alexander Roy became a member of the Pennsylvania State Police. He has been a helicopter pilot in the aviation division of the bureau of emergency and special operations (BESO) since March 1994.³ In August 1994, while still on probationary status, Roy was arrested for simple assault, criminal mischief, harassment and disorderly conduct as a result of a physical altercation with a co-worker of his wife. After an investigation by the Bureau of Professional Responsibility, during which Roy stayed in the aviation division, the department disciplinary officer, on March 7, 1995, recommended a 20-day suspension without pay. However, the BESO director terminated Roy's probationary status and returned him to his prior assignment with Troop D. Roy filed a grievance over his return to Troop D (D-149) and a grievance over his suspension (HQ-123). These two grievances resulted in an arbitration award dated January 16, 1996. The grievance award provided inter alia:

³ The Hearing Examiner mistakenly referred to Roy's having entered the aviation division in March 1944 in finding 5. Accordingly, finding 5 is amended to reflect that Roy entered the aviation division in March 1994.

The Grievant is to be returned to BESO for any refresher training required. He is to be assigned to BESO as a helicopter pilot as if no disciplinary action had been taken to remove the Grievant from detached status. The State Police are directed to complete and process the necessary personnel forms to make this remedy possible.

* * *

Grievance HQ-123 is denied and the twenty (20) day suspension is upheld. Grievance D-149 is sustained and the State Police are to reinstate the Grievant to a position as a helicopter pilot in BESO, in accordance with the directives set forth herein.

(FF6). Roy served his 20-day suspension from April 29 to May 24, 1996.⁴

On August 2, 1996, Roy filed a grievance (HQ-142) over the alleged refusal by the Commonwealth to return him to pilot status as required by the arbitration award. In addition, on October 18, 1996 the Association filed an unfair labor practice charge alleging a refusal to comply with the arbitration award. The parties subsequently settled the charge by way of agreement. Roy was returned to pilot status some 27 months later in April 1998.

In March 1996, Roy requested a transfer to the Latrobe facility of the aviation division. When the Commonwealth did not grant the transfer, Roy filed grievance HQ-145 on September 30, 1996. Within the State Police, transfers are within the discretion of the Commissioner. Later, the Commonwealth transferred Roy to its Latrobe facility.

On September 23, 1996, Roy was arrested and charged criminally because of a domestic dispute involving his wife. On September 26, 1996, Captain Robert Hague met with Roy at Hague's request to discuss Roy's recent arrest on September 23. Hague's manner was "firm and direct." Captain Hague was director of the aviation and special services division from July 18, 1992 to November 14, 1997. As a result of the ensuing investigation, the Commonwealth suspended Roy for 25 days without pay on March 25, 1997. Roy served this second suspension from June 30 to August 1, 1997.

On February 17, 1998, two aviation units, Harrisburg and Hazleton, were supervised by corporals. Corporal Donnini supervised Hazleton and Corporal Lawver supervised Harrisburg. Neither of those corporals was eligible for promotion, but Corporal Foss, who was assigned to Harrisburg's aviation unit, was eligible for promotion. Roy was at the top of the promotion list and Foss was second on the list. Under the state police promotion system, the first individual on the list is offered certain positions for advancement. If the first person declines the positions, he or she remains at the top of the list for the next round of choices. The process is the same for the second person on the list. On February 17, 1998, Roy received a call from Captain Garofalo. Garofalo was a lieutenant and sections commander of the aviation special services division from

⁴ The Hearing Examiner mistakenly referred to the 20-day suspension as having been served from April 29 - May 4, 1996. Therefore, Finding 8 of the PDO is amended to reflect May 24, 1996 as the final day of suspension.

November 19, 1994 until January 10, 1998 when he became director of the aviation and special services division. Captain Garofalo offered Roy a promotion to sergeant with various troop assignments, but no promotion was offered in the aviation division. Roy declined the offered promotions because he wanted to stay in the aviation division. Captain Garofalo then called Corporal Foss and offered him a promotion to sergeant in the aviation division in addition to the same troop assignments that were previously offered to Roy. Foss accepted the promotion to sergeant with the aviation unit in Harrisburg. Corporal Foss had 19 years of service with the State Police, eight of those years as midnight corporal at the busiest State Police barracks in Pennsylvania. Foss received letters of commendation and had never been disciplined. Captain Garofalo considered Roy's conduct underlying both of his prior suspensions in his decision to recommend the promotion of Foss over Roy.

When the Aviation section falls below its complement of 19 helicopter pilots and six fixed-wing pilots, it posts a specialized position vacancy. A list is created and the new pilot is hired from that specialized list. In contrast, a promotion list includes individuals other than pilots. A promotional vacancy is offered to all eligible people on the promotion list. However, a promotion in place is only offered to the person of lower rank who has the necessary expertise (e.g., a pilot's license). Although promotions in place are discretionary under the side letter of agreement, such promotions are discretionary only insofar as they are offered to individuals who qualify on the promotion list. Since 1994, all promotions to sergeant in the aviation division have been promotions in place. On only one prior occasion in the aviation division, which was the first time Foss was eligible for promotion in place to sergeant in aviation, was an aviation unit supervised by a corporal when there was someone in aviation who was promotable to sergeant.

As of August 26, 1998, sergeants supervised all aviation sections with the exception of Hazleton where Roy was stationed. A supervisory sergeant in aviation has responsibilities that demand great independence because aviation sections do not have the next level of onsite supervision. Other sergeant positions in troops may be administrative, may not involve supervision of other troopers, or may have the next level of supervision onsite.

In the majority of its exceptions, the Association either challenges multiple findings of fact made by the examiner or alleges error in the examiner's failure to make additional findings that the Association deems critical to the resolution of its charge. After a thorough review of the record, however, the Board concludes that each of the findings to which the Association has filed an exception, including findings 13, 21, 24 and 27 in the PDO, is supported by substantial and legally credible evidence. Thus, the examiner's findings will not be disturbed. Moreover, the additional findings urged by the Association, with the exception of those findings the Board has amended or added for purposes of clarification or further background, are unnecessary to resolve the Association's unfair labor practice charge. The Board's hearing examiner is only required to make findings of fact that support the legal conclusions reached in the determination of the outcome of the charge. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975); Birriel v. Workmen's Compensation Appeal Board, 435 A.2d 292 (Pa. Cmwlth. 1981). The examiner is not required to make findings that summarize the entire record or that

merely support one side's argument. These exceptions do not demonstrate factual error and are therefore dismissed.

The Association next excepts to the failure of the hearing examiner to find discrimination by the Commonwealth in violation of Section 6(1)(c) of the PLRA. The Association contends that the Commonwealth's refusal to promote Corporal Roy to sergeant in the aviation division was based on anti-union animus rather than mere personal animus as found by the hearing examiner in the PDO. The Association asserts that the examiner recognized that the Commonwealth was reticent to return Roy to pilot in command status after the arbitration award and that it went to unreasonable lengths to avoid compliance and yet failed to find discrimination. Despite the examiner's recognition of the Commonwealth's unreasonable delay in complying with the arbitration award, the Association points out that the PDO simply concludes that the Commonwealth offered a justifiable non-discriminatory reason why Roy was not offered a promotion in aviation and further notes this justification to be within the Commonwealth's discretion under the side letter of agreement.

In order to prove a charge of discrimination under Section 6(1)(c) of the PLRA, the complainant must show by substantial and legally credible evidence that the employee engaged in protected activity, that the employer knew of the protected activity and that the employer's actions were motivated by anti-union animus. St. Joseph's Hosp. v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Because union animus is rarely obvious and is therefore often hard to prove with direct evidence, the Board may draw inferences from the facts of record to conclude that the employer's actions or decision was based on union animus. Child Development Council of Centre County, 9 PPER ¶ 9188 (Final Order, 1978). However, the inference must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311, 313 (Pa. Cmwlth. 1974). After a review of the record and the reasons set forth by the hearing examiner in the PDO, the Board is satisfied that the Association failed to prove that the Commonwealth's failure to offer Roy promotion in aviation was based on anti-union animus.

As recognized by the PDO, the unreasonable delay by the Commonwealth in scheduling Roy for helicopter training and returning him to active pilot status as required by the arbitration award does not support the causal nexus between Roy's protected activity and the Commonwealth's supposed retaliatory motivation. Rather, the examiner found such evidence at best would support a Section 6(1)(a) violation for unreasonable delay in compliance with an arbitration award, South Butler County School District, 22 PPER ¶ 22068 (Final Order, 1991), and provided only an inference of personal animus by high-ranking officers against Roy. Part of the basis for this conclusion rested on the examiner's credibility determination regarding Roy's meeting with Captain Hague on September 26, 1996. The examiner specifically recognized that Roy was vague in his recollection of how the meeting came about and that Roy's rendition of the conversation with Hague conveniently omitted any reference to his second arrest on September 23, 1996 (PDO at 8). Accordingly, the examiner found that the reason Hague was "firm and direct" with Roy during their September 26, 1996 meeting was because of Roy's recent arrest rather than a grievance Roy had filed two months prior to the meeting.

Credibility determinations rest with the hearing examiner and the Board's long-standing policy is not to disturb those determinations absent compelling reasons. Upper Merion Area School District, 30 PPER ¶ 30091 (Final Order, 1999); Haverford Township, 27 PPER ¶ 27130 (Final Order, 1996); Springfield Township, 12 PPER ¶ 12354 (Final Order, 1981). Although Hague's rendition of the September 26, 1996 conversation may contradict Roy's version, such contradictory evidence may support the hearing examiner's decision as long as that evidence is found to be credible. City of York, 29 PPER ¶ 29235 (Final Order, 1998). The Association has set forth no compelling reason for the Board to overturn the examiner's credibility determination regarding the September 26 meeting between Hague and Roy. Moreover, the Commonwealth points out that Captain Hague was not even in a position at the time promotions were being considered here to make a recommendation regarding Roy. Captain Garafolo, who recommended that Foss be promoted in place instead of Roy, was not shown to hold and/or convey union animus. Instead, Garafolo credibly testified that his recommendation was based on Foss's exemplary record versus Roy's personal history of misconduct. Although Garafolo and Hague may have been shown to have unreasonably dragged their feet in returning Roy to pilot in command status, the examiner did not infer from their actions that such delay was based on union animus. The Association has presented no compelling reasons for the Board to disturb the examiner's refusal to find discrimination.

The Association further argues that the Commonwealth was obliged to present testimony from the Commissioner of the State Police because only the Commissioner has the sole right under the side letter of agreement to offer an individual promotion in place. Without testimony from the Commissioner as to why he chose not to offer Roy a promotion in place within aviation, the Association contends that the Board is left with an unrebutted prima facie case of discrimination and no explanation for the Commonwealth's actions. The Association's contention is without merit, however, because the Association failed to make out a prima facie case of discrimination and instead raised only a mere suspicion. The charging party can prove unlawful motive, which in itself creates the offense of discrimination, with anti-union statements by those who are ultimately responsible for the action taken against the employe or those who recommend said action. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993). The Association presented no evidence of anti-union statements on the part of the Commissioner, with whom the discretion to promote in place rests; nor did the Association present credible evidence that Captain Garafolo recommended Foss instead of Roy for promotion within aviation based on Roy's protected activities. The Association is attempting to shift the burden to the Commonwealth to disprove anti-union animus before the Association has even established its own prima facie case. However, the burden of production cannot shift to the Commonwealth to show that it would have taken the action absent the protected activity until the Association meets its initial burden. Perry County.

Even if the Association had made out its prima facie case, the Commonwealth presented justifiable non-discriminatory reasons for not offering Roy a promotion within aviation. Captain Garafolo credibly testified that he did not recommend Roy for promotion to sergeant in aviation because Roy's prior misconduct raised serious concerns regarding his maturity, composure and trustworthiness as a pilot and his ability to be an effective supervisor. Contrasted with Corporal Foss's record of no discipline and his prior experience, Garafolo's failure to recommend Roy for promotion in aviation was justifiable. Moreover, the Commonwealth

presented evidence that Corporal Doninni, who is the supervisor of the Hazleton aviation unit where Roy is now stationed, has many years of experience and an exemplary record. Based on the above evidence, the examiner was free to conclude that the Commonwealth's failure to offer Roy promotion to sergeant in aviation was not based on anti-union animus. The Association's exceptions to the contrary are dismissed.

The Association next excepts to the hearing examiner's conclusion that the Commonwealth complied with the January 16, 1996 arbitration award. When an unfair labor practice charge alleges a refusal to comply with a grievance arbitration award, the Board must determine whether an arbitration award exists, whether the appeal process has been exhausted and, if so, whether the employer failed to comply with the award. PLRB v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (1978). The party alleging non-compliance with a grievance arbitration award has the burden of proof to show that the opposing party has indeed failed to comply with the arbitrator's decision. Id. The Association contends that the Commonwealth's consideration of the discipline referred to in the award as part of the basis for not offering Roy promotion within aviation violated the award's requirement that Roy be reinstated as a helicopter pilot "as if no disciplinary action had been taken."

Despite the Association's contentions, the hearing examiner thoroughly and adequately addressed the issue of compliance with the arbitration award. The hearing examiner reviewed the language of the award and determined that the award did not preclude the Commonwealth from considering the two suspensions and the underlying conduct in future decisions as to whether Roy would make a good supervisor. The arbitration award does not address the issue of future promotions. The express language of the award directs that Roy be assigned "to BESO as a helicopter pilot as if no disciplinary action had been taken to remove Roy from detached status" (FF 6). As noted by the examiner, there is no evidence that Roy's removal from detached status was a factor in the decision not to offer him promotion to sergeant in aviation. At the time of the hearing on this charge, Roy was in fact serving as a helicopter pilot with the State Police. This exception is therefore dismissed.

The Association's final exception challenges the examiner's conclusion that the refusal to promote Roy within aviation did not violate the September 10, 1997 side letter of agreement or the parties' collective bargaining agreement. Initially, however, the Board must emphasize that it is not within its jurisdiction to determine if an agreement of the parties, whether such agreement be a collective bargaining agreement, a side letter of agreement or any other type of agreement, has been violated. Allegations that an employer breached a collective bargaining agreement do not ordinarily rise to the status of an unfair labor practice. Penn Hills School District, 15 PPER ¶ 15120 (Final Order, 1984). It is not the function of the Board to interpret agreements of employers and unions through the filing of an unfair labor practice. Id. The interpretation of collective bargaining agreements is a matter that is typically reserved for the grievance arbitration procedure set forth in the parties' collective bargaining agreement. Ellwood City Borough, 29 PPER ¶ 29213 (Final Order, 1998), *aff'd*, ___ A.2d ___ (Pa. Cmwlth. 2757 C.D. 1998, filed June 9, 1999). It is well established that the Board exists to remedy violations of statute (i.e., unfair labor practices) and not violations of contract. Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978).

However, the Board will review a collective bargaining agreement in order to determine whether the parties have in fact bargained over a certain issue or to ascertain whether one party has altered the terms and conditions of employment. Indeed, repudiation of the provisions of a collective bargaining agreement may be an unfair labor practice. Millcreek Township School District, 22 PPER ¶ 22185 (Final Order, 1991), *aff'd*, 631 A.2d 734 (Pa. Cmwlth. 1993). In certain situations, such as where there is repudiation, the same action by a public employer may constitute both an unfair labor practice and a grievance. Id.; Port Authority of Allegheny County, 27 PPER ¶ 27184 (Final Order, 1996). As the hearing examiner recognized in the PDO, the Commonwealth's refusal to promote Roy to supervisory sergeant of an aviation unit is not a clear repudiation of the side letter of agreement or the collective bargaining agreement. The examiner determined that pilots are specialized positions and under paragraph 2 of the side letter of agreement the Commissioner has the discretion to promote in place under the procedures outlined in Article 37 of the collective bargaining agreement. Article 37 allows the appointing officer to choose candidates based on skill, ability and recent job performance. When comparing Foss's 19 years of experience, which included eight years with the State's busiest barracks, letters of commendation and no discipline, to Roy's ten years of experience, which was marred by two recent suspensions that showed a lack of composure and maturity, and understanding that pilots are specialized positions, it appears that the Commonwealth followed the process set forth in the collective bargaining agreement and based its decision on reasonable job related criteria in deciding not to promote Roy to sergeant in aviation.

Without a clear repudiation, the Board is faced with determining which party's interpretation is correct, a matter not within the Board's unfair labor practice jurisdiction. The Association's contention is that there was a vacancy for sergeant within aviation and therefore the Commonwealth was required pursuant to the side letter of agreement to offer the promotion to Roy because he was first on the promotion list. On the other hand, the Commonwealth's position here is that Foss rather than Roy was promoted in place because he possessed the necessary experience and maturity to be a good supervisor. The parties disagree whether a promotion to sergeant in aviation is a vacancy promotion or a promotion in place. The examiner was not obliged to resolve this dispute and therefore reasonably concluded that the Commonwealth had a sound arguable basis under the provisions of the side agreement to promote Foss instead of Roy. The examiner did not decide whether the Commonwealth's interpretation was correct but instead determined only that the Commonwealth set forth a reasonable basis under the agreement for its actions. The examiner was required at that point to go no further in analyzing contract provisions and the Board will not disturb that determination.

The Association relies on PennDOT, 19 PPER ¶ 19107 (Final Order, 1988) for the proposition that the failure of a party to comply with a side letter of agreement constitutes a failure to bargain. Although PennDOT does not necessarily support this proposition, the Board would agree that a clear repudiation of a side letter of agreement or the alteration of terms and conditions of employment as established by the provisions of such an agreement, could indeed constitute a failure to bargain in good faith. However, the Association failed to prove repudiation and/or the alteration of established terms and conditions of employment.

The Association also contends that the doctrine of sound arguable basis does not apply here because the side letter of agreement is not subject to grievance arbitration. In support, the Association makes reference to a July 1998 grievance arbitration award that is not a part of the record in this case. In resolving exceptions to a PDO, the Board cannot take cognizance of matters outside the evidence of record that were available to the parties at the time of the hearing. Northeast Regional Police Board, 21 PPER ¶ 21041 (Final Order, 1990). Nonetheless, the Board will address the Association's argument. According to the Association, the issue here is not whether the Commonwealth had a sound arguable basis for its actions, but whether the Commonwealth violated the side letter of agreement. As already mentioned, however, the interpretation of agreements is not a matter for the Board to decide. Whether the parties have agreed in their side letter of agreement to submit disputes concerning that side letter to grievance arbitration is not of the Board's concern. Although the Board's decisions regarding sound arguable basis often refer to the fact that grievance arbitration is typically available to resolve contract disputes, Prospect Park Borough, 27 PPER ¶ 27222 (Final Order, 1996); Port Authority of Allegheny County, supra, these decisions do not preclude the Board from applying the concept of sound arguable basis or contractual privilege to situations like here where the parties have not agreed to make disputes concerning the interpretation of their side letter of agreement subject to the grievance arbitration process of their collective bargaining agreement. Whether the parties negotiate and agree to submit grievances concerning a side agreement to an arbitrator is a matter subject to negotiation between the parties. The Board will not act as a fallback or substitute for the lack of a grievance arbitration procedure. Accordingly, the Association's exceptions are dismissed.

After a thorough review of the exceptions and brief in support, the brief in response to exceptions and all matters of record, the Board shall dismiss the exceptions and make the proposed decision and order as amended herein final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the proposed decision and order in the above-captioned matter be and the same are hereby dismissed and the proposed decision and order as amended be and the same is hereby 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 nineteenth day of October, 1999. 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.

L. DENNIS MARTIRE, BOARD MEMBER DISSENTS