

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

BANGOR AREA EDUCATION ASSOCIATION :  
:   
v. : Case No. PERA-C-98-560-E  
:  
BANGOR AREA SCHOOL DISTRICT :

**FINAL ORDER**

On January 22, 2002, the Bangor Area Education Association (Association) filed with the Pennsylvania Labor Relations Board timely exceptions with a supporting brief to a Proposed Decision and Order (PDO) issued January 7, 2002. The Bangor Area School District (District) filed a timely response to the Association's exceptions with a supporting brief on February 7, 2002. On February 20, 2002, the Pennsylvania State Education Association (PSEA), an affiliate of the Association, filed an amicus curiae brief in support of the Association's exceptions. Although the Board's rules and regulations do not address the filing of amicus curiae briefs, they are generally permitted. Martinez v. Pennsylvania Human Relations Comm'n, 22 PPER ¶ 22131, p. 524 (Final Order, 1991). However, "such briefs ought to be filed within the time allowed for the party whose position the amicus brief will support." Philadelphia Housing Police Ass'n v. Philadelphia Housing Auth., 22 PPER ¶ 22227 (Final Order, 1991). The Association's exceptions and supporting brief were due on or before January 27, 2002 and accordingly, PSEA's amicus curiae brief should have been filed by that same date. Because it was not filed until February 20, 2002, PSEA's amicus curiae brief has not been considered.

The procedural history of the Association's Charge of Unfair Practices, which was filed on December 10, 1998, is rather protracted. The Secretary of the Board declined to issue a complaint on January 7, 1999. The Association filed exceptions to that decision on January 26, 1999 and the Board remanded the case on March 16, 1999. The Secretary issued a Complaint on April 22, 1999, which was answered by the District on May 10 1999. At the request of the Association and without objection by the District, the hearing in this case was continued on June 11, 1999, pending the outcome of related litigation between the parties before the Supreme Court. At the request of the Association, two days of hearing were held on August 7, 2000 and April 2, 2001. There were two issues before the Hearing Examiner, whether the District violated its bargaining obligations under PERA by unilaterally adopting (1) a personnel file access policy and (2) a teacher tenure portfolio directive. The Hearing Examiner sustained the first charge and dismissed the second. He resolved the first issue by concluding that the District's personnel file access policy was a mandatory subject of bargaining under PERA and that the District violated its duty to bargain by adopting it unilaterally. He ordered the District to cease and desist from refusing to bargain in good faith, to rescind the policy, to post a copy of the PDO and to furnish to the Board within twenty days an affidavit of compliance. The District did not file exceptions to the PDO. The Association filed exceptions to the Hearing Examiner's conclusion regarding the second issue - that the District was acting within its managerial prerogative when it issued a directive requiring non-tenured employees to produce a tenure portfolio for

review by the Superintendent and presentation to the School Board in their third year, prior to attaining tenure.

The Association's twelve separately enumerated exceptions may be summarized as follows. The Association contends that the Hearing Examiner failed to find and conclude that the portfolio directive was an additional requirement of continued employment in conflict with the Pennsylvania School Code, the Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§ 1-101 et seq (School Code), which bestows tenure by law and sets forth the exclusive requirements for tenure and therefore deprives the District of any managerial authorization regarding the granting of tenure. The Hearing Examiner erred by (1) relying on cases that do not conflict with the School Code; (2) concluding that nothing in the School Code prohibited the District from establishing a procedure for arriving at the tenure decision and granting tenure; and (3) concluding that the District exercised its managerial prerogative and therefore did not violate its duty to bargain over this mandatory subject with the Association.

Because the Board agrees with the Hearing Examiner's conclusion that "[t]here is nothing in the School Code to prohibit a District from establishing a process for granting tenure," the Board dismisses the Association's exceptions arguing to the contrary. (PDO, at 10.) The District's directive to its non-tenured employees to create a teacher tenure portfolio neither violates the School Code nor creates criteria prohibited by the School Code. While the Association correctly recites the criteria that the legislature has set forth for the granting of tenure - completion of a three year probationary period and a satisfactory rating during the last four months of the third year - the Supreme Court in Milberry v. Bd. of Educ. of Sch. Dist. of Philadelphia, 467 Pa. 79, 354 A.2d 559 (1976) explained that the School Code "does not define the standards or establish the practices by which teachers are to be rated by school districts." Id., 467 Pa. at 83, 354 A.2d at 562. In that case, the Supreme Court upheld the additional requirement that an unsatisfactory rating of a teacher may be arbitrated, pursuant to the collective bargaining agreement between the union and the employer. Like the Association here, the employer in that case argued that the School Code provided the sole means to address tenure issues. The Court rejected that argument and explained that PERA "does not prevent agreement to, or implementation of, a particular provision merely because the subject matter of that provision is covered by legislation." Id., 467 Pa. at 82, 354 A.2d at 561. Likewise, the Board rejects the Association's similar argument that tenure portfolios are prohibited because they are not expressly provided for in the School Code. The mere fact that the School Code sets forth certain requirements for tenure does not prohibit the District from directing its non-tenured teachers to create tenure portfolios.

Section 702 of PERA provides that public employers are not required to bargain "over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as . . . standards of services . . . and selection and direction of personnel." As the Hearing Examiner explained, the issue of whether the directive is a mandatory subject of bargaining under Section 701 of PERA or a matter within the public employer's inherent managerial prerogative under Section 702 of PERA is decided under the balancing test enunciated by the Supreme Court in PLRB v. State College Area Sch. Dist., 462 Pa. 494, 337 A.2d 262 (1975):

whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of

employment outweighs its probable effect on the basic policy of the system as a whole.

Id., 463 Pa. at 507, 337 A.2d at 268. Superintendent John F. Reinhart revealed that the portfolio directive "was a result of our administration's concern that our Board of Education as well as the community in Bangor itself and the school district had many questions and great doubts about the tenure laws of Pennsylvania." (N.T. p. 16.) He explained that the portfolios were designed to "quantify the success of all of those teachers who were coming before the Board for tenure status [and] would give evidence to the work that was done." (N.T. p. 16.) He further explained that the portfolio "was to show that we were hiring quality people and that public fears of administrative failure to acknowledge poor teaching . . . that that really wasn't the case, and that we were hoping the portfolios would substantiate the quality of the performance of the people we're hiring." (N.T. p. 74; F.F. 15.) The District's desire to substantiate its tenure decisions to the community falls within its "standards of services" and the assignment of the tenure portfolio constitutes the "direction of personnel" under Section 702 of PERA. "[T]he establishment of policy in the areas of organizational structure and direction of personnel is entrusted to the [e]mployer, without the attendant burden of showing that its exercise of discretion is the best means of achieving its goal . . . It is not the public employer's burden to show the wisdom of its exercise of managerial policy to the satisfaction of the union or for that matter, the Board." FOP Lodge No. 9 v. City of Reading, 30 PPER ¶ 30121, p. 263 (Final Order, 1999)(citations omitted). It is sufficient that the District's interests outweigh the teachers' interest in not performing the additional task of creating a portfolio, thus the issue is a managerial prerogative. It is not necessary to inquire into whether the directive actually meets the District's goal of substantiating for the community its tenure decisions and teacher qualifications.

The Board and the appellate courts have consistently held that it is within a public employer's managerial prerogative (both under PERA and Pennsylvania's other collective bargaining statute, Act 111) to evaluate, select and direct personnel to perform assigned duties. See, Delaware County Lodge No. 27, FOP v. PLRB, 722 A.2d 1118 (Pa. Cmwlth. 1998)(public employer's managerial interests in evaluating, selecting and directing employes involve managerial policy that substantially outweighs impact on employes); Association of Pennsylvania State College and University Faculties (APSCUF) v. State System of Higher Educ. (SSHE), 32 PPER ¶ 32138 (Final Order, 2001)(managerial rights under Section 702 include assigning duties and additional duties to its workforce); South Park Township Police Ass'n v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2001)(no more fundamental right than the employer's right to direct personnel by assigning work to its employes during scheduled shifts); City of Reading, supra, (managerial prerogative to assign uniform patrol duties to administrative officers); FOP Lodge No. 5 v. City of Philadelphia, 29 PPER ¶ 29142 (Final Order, 1998)(managerial prerogative to direct officers to review internal affairs investigations of officers under their control); FOP, Liquor Control Board Lodges v. Pennsylvania State Police, 28 PPER ¶ 28183 (Final Order, 1997)(managerial prerogative to direct location for employes to report for work); In the Matter of the Employes of Public Utility Comm'n, 20 PPER ¶ 20047 (Proposed Decision and Order, 1989)(managerial prerogative to assign duties and additional duties to bargaining unit employes).

The Association further charged that the portfolio directive increased the workload of bargaining unit members. However, the Supreme Court has

opined that the determination of public employes' workload falls within the public employer's inherent managerial prerogative. Joint Bargaining Committee of Pennsylvania Social Services Union (PSSU) v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983)(control over caseload is directly determinative of policy particularly in the reserved areas of standards of service and selection and direction of personnel). However, to the extent that exercise of this managerial prerogative may impact employe wages, hours and working conditions, the employer would be required to negotiate the severable, demonstrable impact upon demand by the Association. Lackawanna County Detectives Ass'n v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000); Teamsters Locals 77 and 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001).

Thus, it is well-established that a public employer may assign additional duties to its public employees, even when such duties, like the creation of a tenure portfolio, were not required in the past. In Public Utility Comm'n, supra, the Hearing Examiner explained that "[a]n employer may, within its managerial right under Section 702 to assign duties to its work force, assign additional duties to bargaining unit employees . . . ." Id., p. 131. Likewise, the Board in AFSCME v. SSHE, supra, concluded that the public employer was permitted to exercise its managerial prerogative to assign summer camps to athletic trainers, even though "at the time of their appointments [the employees] understood that their job duties did not include involvement with summer camps . . . ." Id., p. 339. Similarly, the District may direct its non-tenured teachers to create tenure portfolios, regardless of whether they constitute an additional requirement that was not required of non-tenured teachers in the past, without bargaining with the Association. It is not relevant, as the Association argues in its brief, whether "the teacher tenure portfolio policy or directive is a requirement of continued employment . . . ." (Ass'n, Br. at 3.)<sup>1</sup> The employer's managerial prerogative to direct its workforce to perform a particular duty does not transform into a mandatory subject of bargaining merely because an employee's "continued employment" is dependent on the performance of that duty. For instance, in Pennsylvania Social Services Union, Local 668, SEIU v. Department of Labor and Industry (Office of Vocational Rehabilitation), 31 PPER ¶ 31127 (Final Order, 2000), the public employer exercised its managerial prerogative to direct what information its employees were permitted to tell clients about the availability of funds for services. This direction did not become a mandatory subject of bargaining merely because the employees could be subject to disciplinary action for refusing to comply with the direction. Likewise, even if non-tenured teachers' continued employment with the District were dependent upon the creation of the tenure portfolio, the District would not be required by Section 701 of PERA to bargain with the Association over its implementation.

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

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<sup>1</sup> To the contrary, although the Hearing Examiner found the tenure portfolio was "perceived as a requirement" and that the "[t]eachers were afraid not to prepare one" (F.F. 16), the Superintendent revealed that "I don't believe [the School Board] could deny tenure" if a non-tenured teacher met all of the School Code requirements and refused to create a portfolio. N.T. p. 82-83.

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 Member L. Dennis Martire, this sixteenth day of April, 2002. 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.

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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BANGOR AREA SCHOOL DISTRICT :

**AFFIDAVIT OF COMPLIANCE**

The Bangor Area School District (District) hereby certifies that it has ceased and desisted from its violation of section 1201(a)(5) of the Act; that it has rescinded the part of Policy No. 801 giving individual board members the right to look at personnel policies; that it has rescinded Policy No. 424 "Access to Personnel Evaluation Files"; that it has posted the proposed decision and order and final order within five (5) days of its effective date and has remained posted for a period of ten (10) consecutive days; and finally, that it has served an executed copy of this affidavit on the Association at its current address.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

SWORN AND SUBSCRIBED to before me  
The day and year first aforesaid

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Signature of Notary Public