

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENN HILLS MUNICIPAL EMPLOYEES :
ORGANIZATION :
 :
 v. : Case No. PERA-C-02-583-W
 :
PENN HILLS MUNICIPALITY :

FINAL ORDER

Penn Hills Municipality (Penn Hills) filed exceptions with the Pennsylvania Labor Relations Board (Board) on August 26, 2003 to a Proposed Decision and Order of August 6, 2003. In the PDO, the hearing examiner determined that Penn Hills had violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by refusing to process a grievance filed by the Penn Hills Municipal Employees Organization (Organization) on behalf of John Rogan. On September 17, 2003, the Organization filed its response to the exceptions. After a thorough review of the record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

10. The 1998 "Alternative Discipline Agreement" provided that

Upon returning to work, the Employee and Union understand and agree that the employee shall be immediately discharged from employment with no recourse for appeal, hearing, trial or arbitration under the labor agreement ... if he violates any of the following regulations or conditions. The Employee and Union also agree and waive any pre-discipline hearing.

* * *

f. Chronic or excessive absenteeism. The determination of what is "chronic or excessive" shall be at the sole discretion of the Employer.

* * *

By signature on this Agreement, the Employee and the union acknowledge that they have read and understand all the terms and conditions of this entire agreement. They specifically understand the immediate discharge provision set forth in paragraph 6, and further understand that the Union and Employee release and waive the Union's and/or Employee's right to challenge the penalty of discharge or the underlying facts for the imposition of the penalty by filing a court action or grievance pursuant to the

collective bargaining agreement. The Employee and Union understands that they waive any pre-discipline hearing.

(Joint Stipulation Exhibit D ¶ 6 & 7).

DISCUSSION

The undisputed facts are that on January 9, 1998, in lieu of Rogan's immediate discharge for willful misconduct, the Organization, Rogan, and Penn Hills entered into an "Alternative Discipline Agreement", which provided that "upon returning to work, the Employee and Union understand and agree that the employee shall be immediately discharged from employment with no recourse for appeal, hearing, trial or arbitration under the labor agreement ... if he violates any of the following regulations or conditions." (Finding of Fact 10). The Organization and Penn Hills are also parties to a collective bargaining agreement effective January 1, 2001 through December 31, 2003, which provides for a four-step grievance process culminating in binding arbitration. (Finding of Fact 3). On September 27, 2002, Penn Hills terminated Rogan's employment for chronic and excessive absenteeism, as set forth in paragraph 6 of the Alternative Discharge Agreement. (Finding of Fact 5). On September 30, 2002, the Organization orally grieved Rogan's discharge from employment, and filed a formal written grievance on October 4, 2002. (Findings of Fact 6 and 8). Penn Hills has since refused to process the grievance relying on the waiver provisions of the Alternative Discipline Agreement. (Finding of Fact 9).

The Organization filed a Charge of Unfair Practices alleging that Penn Hills violated Section 1201(a)(1), (5) and (8) of PERA by refusing to process the Rogan grievance and submit the issues to arbitration. Based upon the stipulated facts, the hearing examiner found no violation of 1201(a)(8),¹ but concluded that Penn Hills had violated Section 1201(a)(1) and (5) of PERA by refusing to submit the question of arbitrability to an arbitrator.

Penn Hills argues in its exceptions that the hearing examiner erred in finding that it must process and submit the Rogan grievance to arbitration, because the Organization and Rogan had waived any right to challenge a dismissal based on a violation of the last chance agreement. While it is true that questions involving the interpretation of a collective bargaining agreement, and whether those issues are arbitrable, must first be submitted to an arbitrator, East Pennsboro Area School District v. Pennsylvania Labor Relations Board, 467 A.2d 1356, 1358, 1359 (Pa. Cmwlth. 1983), the "Alternative Discipline Agreement" at issue here is not an extension of the collective bargaining agreement, but a separate and independent agreement resolving and settling the earlier disciplinary action against Rogan.

¹ The hearing examiner dismissed the Section 1201(a)(8) charge on the basis that there was no binding grievance arbitration award, and no exceptions have been filed to this determination.

Generally, where a disciplinary grievance results in an arbitration award, the Board must interpret, if possible, any ambiguous language in the award to determine whether there has been compliance. City of Philadelphia v. PLRB, 772 A.2d 460 (Pa. Cmwlth. 2001); Joint Bargaining Committee of the Pennsylvania Employment Security Employees Association, PSSU, SEIU v. Commonwealth of Pennsylvania, Bureau of Labor Relations, 17 PPER ¶ 17177 (Final Order 1986). Similarly, where the grievance is resolved by way of a settlement agreement, the Board may look to the agreement, and interpret ambiguous provisions, in order to determine whether the parties have complied with their obligations concerning the resolution of the grievance. AFSCME, Council 13 v. State System of Higher Education (Edinboro University), 32 PPER ¶32080 (Final Order, 2001), affirmed unreported, No. 839 C.D. 2001 (Pa. Cmwlth. 2001).²

Where the disputed language in a settlement agreement involves the question of whether a party has waived any statutory or contractual rights, for the waiver to be upheld, it must be intentional, clear, express and unequivocal.³ Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983). Turning to the language of the Alternative Discipline Agreement, the waiver provisions in Paragraphs 6 and 7 are unambiguous and clear. The Organization and Rogan both stated explicitly that they "[understood and agreed] that the employee shall be immediately discharged from employment with no recourse for appeal, hearing, trial or arbitration under the labor agreement...." Furthermore, the assurances in Paragraph 7 that Rogan and the Organization read and understood the waiver provision indicates that the agreement was entered into intentionally and unequivocally. Under the express language of the Alternative Discipline Agreement, we find that the Organization and Rogan had waived their rights to seek redress of a termination from employment for Rogan's subsequent violation of the agreement.

Because in 1998 the Organization and Rogan had agreed with Penn Hills that they would waive future grievance and arbitration rights in lieu of Rogan's immediate termination from employment, Penn Hills had satisfied its bargaining obligations in reaching a settlement over Rogan's termination. See Annville-Cleona Educational Support Personnel

² In State System of Higher Education (Edinboro University), SSHE and the union resolved a grievance by reinstating an employe to a certain position with a 180-day probationary period. At the expiration of the 180 days, SSHE transferred the employe to a less desirable position arguing that the grievance settlement only required reinstating the employe to that position for 180 days. The Board and the court, interpreting the grievance settlement agreement found that by agreeing to a probationary period, the parties intended that absent unsatisfactory performance or changed circumstances, the employe was to remain in that position upon completion of the 180-day probationary period.

³ The Organization contends that because arbitration is mandatory under Section 903 of PERA, the Organization could not have waived its statutory right to demand arbitration of the Rogan grievance. However, it is well recognized by the Board that an employe or union may waive statutory rights under PERA. Chambliss v. City of Philadelphia, 17 PPER ¶17018 (Final Order, 1985).

Association v. Annville-Cleona School District, 28 PPER ¶ 28205 (Final Order, 1997). Penn Hill's compliance with the terms of that agreement, by declining to submit itself to the very arbitration which the Organization and Rogan had clearly and unequivocally waived, is not a violation of PERA.

After a thorough review of the exceptions and all matters of record, the Board concluded that Penn Hills did not violate Section 1201(a)(1) and (5) of PERA in declining to submit the Rogan grievance to arbitration. Accordingly, the Board will sustain Penn Hills' exceptions and vacate the hearing examiner's finding of an unfair practice.

CONCLUSIONS OF LAW

That CONCLUSIONS number 1 through 3, and 5 as set forth in the Proposed Decision and Order, are hereby affirmed and incorporated herein by reference and Conclusion number 4 is hereby vacated.

6. Penn Hills has not committed an unfair practice within the meaning of Section 1201(a)(1) and (5) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Penn Hills Municipality are hereby sustained, and the Order on page 4-5 of the Proposed Decision and Order is hereby vacated and set aside.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Charge of Unfair Practices is dismissed and the Complaint issued thereon is rescinded.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Anne E. Covey, Member, this twenty-first day of October, 2003. 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.