COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SOMERSET AREA EDICATION ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-02-309-W
	:	
SOMERSET AREA SCHOOL DISTRICT	:	

FINAL ORDER

The Somerset Area Education Association (Association) filed exceptions and a supporting brief on June 9, 2003 to a Proposed Decision and Order (PDO) issued May 22, 2003. In the PDO the hearing examiner dismissed the Association's charges under Section 1201(a)(3) and (5) of the Public Employe Relations Act (PERA) and sustained the Association's charge under Section 1201(a)(1). The Association claims that the hearing examiner erred in dismissing its claims that the Somerset Area School District (District) violated Section 1201(a)(3) and (5) of PERA. On June 23, 2003, the District filed a timely response to the Association's exceptions.[1] After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

27. At the school board meeting on March 14, 2002, public concerns were raised over the possibility of a strike extending the school year beyond the currently scheduled school year. (N.T. 161).

DISCUSSION

On July 1, 2002, the Association filed a Charge of Unfair Practices alleging that the District violated Section 1201(a)(1), (3) and (5) of PERA. The Specification of Charges included claims that the District's characterization of March 15, 2002 as a strike day was an unfair practice. The Association also claimed that the District unlawfully ceased employes' health care benefits, and did not bargain in good faith over the rescheduling of the school calendar. In addition, the Association claimed that the District's conduct in threatening to seek legal action against it for the alleged strike was unlawful. The Secretary of the Board issued a Complaint and Notice of

[1] Incorporated with its response, the District also filed a "counter exception" to the hearing examiner's finding of a violation of Section 1210(a)(1) of PERA. The Association filed a response to these "counter-exceptions" on July 9, 2003. However, the Board's Rules and Regulations do not provide for the filing of "counter-exceptions", and under Section 95.98, any exceptions must be filed within twenty days of the issuance of the PDO. Accordingly, the District's "counter-exceptions" filed June 23, 2003 are untimely.

Hearing on July 19, 2002. A hearing was held, as scheduled, on October 24, 2002, at which time, both parties presented evidence and testimony.

In relevant part, the testimony and evidence presented at the hearing established that the parties had been engaged in negotiations for a successor collective bargaining agreement since expiration of their contract on June 30, 2000. (Finding of Fact No. 4). During a bargaining session on March 12, 2002, the Association provided the District with notice of its intent to strike on Friday, March 15, 2002. (Finding of Fact No. 5). Following that bargaining session, the Association sent a letter to the school board members advising them of the strike notice and indicating that the Association would rescind the strike if the District agreed to binding or non-binding arbitration. (Finding of Fact No. 6). On March 13, 2002 the District announced to the students that there would be no school on Friday, March 15, 2002, and provided the students with a letter to take home to their parents. (Finding of Fact No. 7).

The next public school board meeting was held Thursday evening, March 14, 2002. At that meeting the District discussed proceeding with non-binding arbitration if the Association would agree not to engage in any work stoppage for the remainder of the school year. (Finding of Fact No. 8). None of the Association's negotiating team were present at the school board meeting, however the Association's president, Barbara Lynch, arrived after close of the meeting. The school board president, John Coleman, advised Lynch of the board's resolution. While Lynch requested that the parties resolve the agreement to return to work and proceed to arbitration, Coleman indicated that they could meet Friday, and it would give everyone "a chance to think about things and not rush into anything and work out an agreement that was acceptable to both sides." (Finding of Fact No. 9). After the Thursday school board meeting, the chief negotiator for the Association, Jon Critchfield, spoke to Mr. Coleman on the telephone regarding the possibility of resolving the return to work issue that evening. The parties discussed the logistical problems of calling school back in session for Friday, and Mr. Coleman indicated that it would not be possible to conduct an in-service day that day either. In addition, Mr. Critchfield acknowledged that the Association's staff representative (Dr. Lonnie Luna) could not approve any written return to work or arbitration agreement until Friday morning. (Finding of Fact No. 10). The teachers did not report for work on Friday. (Finding of Fact No. 11).

The parties met at 10:30 am on Friday March 15, 2002, where the Association presented a draft proposed return to work agreement to the District. (Finding of Fact No. 12). After hours of discussion, the parties reached an agreement, which provided in paragraph three that "the strike shall end at 12:00 midnight, March 15, 2002[, and] [t]eachers shall return to work on March 18, 2002." (Finding of Fact No. 13). In the afternoon on Friday, March 15, 2002 the Association took the agreed upon language to its membership for approval, and pursuant to the agreement, the employes reported for work on Monday March 18, 2002. (Finding of Fact No. 14).

Upon receipt of the Association's strike notice, the District contacted its insurance carrier to cancel the bargaining unit employes' health care coverage effective March 15, 2002, and sent out COBRA notices to the employes that day. When the employes returned to work on

Monday, March 18, 2002, the District contacted the carrier to reinstate the employes' coverage as of March 16, 2002. (Finding of Fact No. 17).

In addition, on March 21, 2002, the District advised the Association that pursuant to the Pennsylvania Department of Education "Basic Education Circular (Instructional Time & Act 80 Exceptions 24 P.S. 15-1504)" (BEC) it was rescinding previously approved and future Act 80 days because of the strike.[2] Therefore, to make up the four previously approved Act 80 days,[3] March 27th, April 1st, and June 5th, 2002 would be full-days of student instruction, and March 28th, and May 17th, 2002 would be a half-day of instruction and half in-service day. (Finding of Fact No. 19). Under the original school calendar, the employes were scheduled to work 184 days total, with 180 days of student instruction and four in-service days, but the revised schedule required the teachers to work 186 days. (Finding of Fact No. 23). A grievance filed by the District's support staff over the schedule change was sustained by the District on May 13, 2002, resulting in compensation to the affected employes for the additional days worked. (Finding of Fact No. 25). The Association filed a similar grievance, which was pending at the time of the hearing. (Finding of Fact No. 24).

At the May 13, 2002 school board meeting, the board also resolved to investigate whether the Association could be held liable for costs incurred by the District as a result of the March 15, 2002 strike. That resolution was reported by a local newspaper on May 15, 2002, under the headline "Board warns union, Threatens suit over strike costs." (Finding of Fact No. 26).

Based upon the above findings, the hearing examiner determined that March 15, 2002 was, in fact, a strike day for the Association, and that the parties' return to work agreement reflected Friday as a strike day. The hearing examiner deferred the refusal to bargain charge regarding the unilateral change to the school calendar to the resolution under the parties' grievance process. Also, the hearing examiner found no evidence of anti-union animus, and thus dismissed the Association's claims under Section 1201(a)(3) of PERA. In addition, the hearing examiner did not find that the District coerced employes in the exercise of their rights, by declaring March 15, 2002 a strike day, ceasing health care benefits for March 15, 2002, or altering the school calendar in response to the BEC. The hearing examiner did, however, find that the school board's resolution to inquire into legal action against the Association would have a tendency to coerce employes from engaging in a lawful strike, and thus was a violation of Section 1201(a)(1) of PERA.

The Association filed exceptions, the crux of which is that the hearing examiner erred in concluding that the Association engaged in a strike on March 15, 2002. The Association argues that under Act 88 it

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[2] 24 P.S. §15-1504 grants the Secretary of Education discretion to approve less than 180 days of student instruction where those days are used for approved purposes.

[3] The Pennsylvania Department of Education had approved as Act 80 days for the District, one day on October 1, 2001, an all-county in service day on October 15, 2001, a parent conference day on November 12, 2001, and the upcoming prom scheduled for May 10, 2002.

is within the Association's prerogative to rescind its strike notice at any time, and therefore the District's refusal to allow the teachers to work on Friday, March 15, 2002, and canceling their health insurance for that day, constituted a lockout.[4] We disagree.

The hearing examiner has found several facts which support that March 15, 2002 was a strike day. The hearing examiner's findings will be sustained if there is substantial evidence in the record to support those finding. Substantial evidence is such "`relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Review of some of the more salient findings is sufficient to constitute substantial evidence supporting the hearing examiner's determination.

The Association gave notice on March 12, 2002, that it intended to strike on March 15, 2002. Its letter of March 12, 2002 provided for rescinding the strike notice if the District agreed to arbitration, but did not indicate that the Association would forego striking for the remainder of the school year. (Association Exhibit D). The resolution passed by the school board on March 14, 2002 did not unconditionally accept the Association's offer of non-binding arbitration, but was a counter-offer that the Association not strike for the remainder of the school year as a condition of the arbitration process.[5] (District

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[4] Section 1101-A of Act 88 defines a strike in the following manner:

> "Strike" shall mean concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown or the abstinence, in whole or in part, from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment. The employe organization having called a strike once and unilaterally returned to work may only call a lawful strike once more during the school year. A written notice of the intent to strike shall be delivered by the employe organization to the superintendent, executive director or the director no later than forty-eight (48) hours prior to the commencement of any strike, and no strike may occur sooner than forty-eight (48) hours following the last notification of intent to strike. Upon receipt of the notification of intent to strike, the superintendent, executive director or the director may cancel school for the effective date of the strike. A decision to cancel school may, however, be withdrawn by the superintendent, executive director or the director. Any subsequent change of intents to strike shall not affect the decision to cancel school on the day of the intended strike. For the purposes of this article, the decision to cancel school on the day of the intended strike shall not be considered a lockout.

[5] Act 88 would only preclude the Association from striking during the arbitration process until an award was issued, and rejected. 24 P.S. §§ 11-1125-A(m) and 11-1131-A.

Exhibit 4). While the Association's representatives offered to have the employes report for work to avert a strike, the March 12, 2002 strike notice was not automatically rescinded by an unconditional agreement to its terms, and the Association did not rescind the strike notice before Friday, March 15, 2002. Mr. Critchfield conceded on Thursday evening that no return to work agreement could be finalized without the Association's staff representative's approval, which could not be obtaining until Friday morning. (N.T. pg 151-152). Thus, no agreement to avert the scheduled strike was reached prior to Friday.

The employes did not report for work on Friday, March 15, 2002. The parties met to further discuss a return to work agreement Friday morning, but did not reach an agreement until that afternoon. The agreement reached provided that the strike would end on midnight March 15, 2002. (District Exhibit 6).

Upon review of the record, there was no agreement to return to work until Friday, March 15, 2002. The hearing examiner's findings in this regard are supported by substantial evidence, and the facts as found are adequate support for the hearing examiner's determination that on March 15, 2002 there was a strike as announced by the Association. Accordingly, this finding was not in error and will not be disturbed.

The Association argues that the District discriminated against the Association members for their engaging in the protected activity of issuing the March 12, 2002 strike notice, and therefore, the hearing examiner erred in dismissing the Association's claims under Section 1201(a)(3) of PERA. To establish a claim of discrimination under Section 1201(a)(3) of PERA, it must be shown that 1) the employes were engaged in protected activity; 2) the employer knew of that protected activity; and 3) there was an adverse employment action motivated by anti-union animus. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977).

The Association's claims of anti-union animus are premised on the allegation that on March 14, 2002, school board president Coleman stated that he would not rescind the cancellation of school or schedule an in-service day on March 15, 2002, because the Association needed time "to think about it". However, the hearing examiner found Lynch's testimony credible that what Coleman actually stated was that "everybody would have a chance to think about things and not rush into anything and work out an agreement that was acceptable to both sides." (PDO pg. 10). The hearing examiner found that neither this statement, nor any other evidence offered by the Association evidenced any anti-union motives on the part of the District. Upon review of the record, we agree with the hearing examiner's conclusion.

The hearing examiner found that that there were acknowledged non-discriminatory logistical problems in notifying the students or scheduling an in-service day, and that there was a mutual concern that both parties still needed to reach a amicable return to work agreement, which could not be done until Friday, March 15, 2002. Furthermore, there was no indication in the record of discriminatory motive in the District reporting March 15, 2002 as a strike day to the Department of Education since the parties had agreed that there had been a strike that day.

With regard to the cancellation of health care benefits, the Association agreed on March 15, 2002 that the strike would end at midnight, and therefore the District was statutorily obligated under Section 1006 of PERA to cease all compensation, including health care benefits for the duration of the strike. Woodland Hills Education Association PSEA/NEA v. Woodland Hills School District, 508 A.2d 365 (Pa. Cmwlth. 1986). In addition, the District's rescheduling of the school calendar to accommodate the BEC, took into consideration public concerns over extending the school year into the summer vacation, as opposed to any unsubstantiated discriminatory reason. Neither does the record support a finding that the District acted with anti-union animus in investigating whether to initiate an action against the Association for "costs" incurred in the March 15, 2002 strike. Based on the totality of the circumstances as evidenced in the record, the hearing examiner's finding of no anti-union motivation for the District's conduct is supported by substantial evidence, and accordingly the hearing examiner did not err in dismissing the Association's claims under Section 1201(a)(3) of PERA.

Even if there is no anti-union animus found, the Association argues that reporting March 15, 2002 as a strike day to the Department of Education and eliminating Easter vacation in response to the BEC, as well as the cancellation of health care benefits, and the failure of the District to rescind the cancellation of school on March 15, 2002 actions all have a tendency to coerce bargaining unit employes in the exercise of their protected rights, and therefore the hearing examiner erred in dismissing these parts of Section 1201(a)(1) claims. Generally, an independent violation of Section 1201(a)(1) of PERA may occur where, in light of the totality of circumstances, the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights. Pennsylvania Labor Relations Board v. Montgomery County Community College, 15 PPER ¶15038 (Final Order, 1984), aff'd, 16 PPER ¶ 16156 (Montgomery County, 1985). However, for the same reasons we have found the District's actions to be non-discriminatory, they likewise, under the circumstances, would not have any tendency to coerce employes. Accordingly, the hearing examiner did not err in not finding violations of Section 1201(a)(1) of PERA in this regard.

Finally, the Association argues that the hearing examiner erred in finding that the District did not refuse to bargain in good faith over the scheduling of the school calendar in response to the BEC.[6]

[6] With regard to the District's rescheduling of the school calendar in response to the BEC, we note that the Association's argument in this regard is that the District had eliminated the Easter vacation to unlawfully coerce bargaining unit employes. The Association does not argue that the BEC itself, which by its terms rescinds previously approved Act 80 days because the employes had engaged in a protected strike under Act 88, was an unfair labor practice.

Nevertheless, we note that the BEC is merely a pronouncement of policy, and not a formal regulation adopted by the Department of Education. See, Central Dauphin School District v. Department of Education, 608 A.2d 576 (Pa. Cmwlth. 1992). While the provisions of the BEC are not before us, its provision regarding retroactively rescinding Act 80 days because of a strike may be incompatible with the policies

However, the hearing examiner properly deferred that matter to the pending grievance process to address and resolve that issue. See Pennsylvania Labor Relations Board v. Pine Grove Area School District, 10 PPER ¶10167 (Order Deferring Unfair Labor Practice Charge, 1979).[7]

After a thorough review of the exceptions, the proposed decision and order and all matters of record, the Board shall dismiss the Association's exceptions and make the proposed decision and order, as modified herein, final.

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 Somerset Area Education Association are hereby dismissed, and the "counter-exceptions" filed by the Somerset Area School District are dismissed as untimely. The Proposed Decision and Order of May 22, 2003, as modified herein, is hereby made absolute and final.

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 fifteenth day of July, 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.

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and explicit language of PERA. PERA and Act 88 statutorily authorize the employes to engage in a lawful strike and PERA expressly protects the employes from retaliation for engaging in protected activity. To the extent the BEC appears to punish employes for engaging in protected strike activity by requiring them to work additional days by rescinding approved Act 80 days, the BEC may conflict with PERA and Act 88.

[7] Moreover, the Board has held that it is within a school district's managerial prerogative to adjust the school calendar to effectuate an educational policy or goal. Mars Area Educational Support Personnel Association ESPA/PSEA/NEA v. Mars Area School District, 32 PPER ¶32089 (Final Order, 2001).

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AFFIDAVIT OF COMPLIANCE

The Somerset Area School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of PERA; that it has posted the final order and proposed decision and order as directed; and that it has served a copy of this affidavit on the Association 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