

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE COLLEGE :
AND UNIVERSITY FACULTIES :
:
v. : Case No. PERA-C-05-422-E
:
STATE SYSTEM OF HIGHER EDUCATION :

FINAL ORDER

The State System of Higher Education, Edinboro University of Pennsylvania (University) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on April 24, 2006, challenging the Proposed Decision and Order (PDO) of April 4, 2006, in which it was found that the University violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to provide The Association of Pennsylvania State College and University Faculties (Union) with an internal "fact-finding" report previously prepared by the University that the Union requested for the purpose of processing a grievance. The Union filed a timely response to the exceptions on May 12, 2006.

The factual background is briefly stated as follows: Dr. Donald Sheehy was elected as chairperson of the English and Theatre Arts Department (department) at Edinboro State University in May of 2002 for a three year term ending in May of 2005. On May 31, 2003, faculty members in the department sent a petition to Edinboro University President Dr. Frank Pogue in which they requested that Dr. Pogue ask Dr. Sheehy to resign. (Finding of Fact 4). At Dr. Pogue's request, the petition was reviewed by the Associate Vice President of Faculty Relations, Janet Dean, who prepared a fact-finding report. (Finding of Fact 5). On November 24, 2003, Dr. Pogue wrote a letter to Dr. Sheehy informing him that, based on the fact-finding report, Dr. Pogue did not find enough evidence to remove Dr. Sheehy as chair of the department. (Finding of Fact 6). In late 2004, the process for selecting the next chair of the department began and Dr. Pogue rejected Dr. Sheehy as a candidate in accordance with Article 6(B)(1)(a) of the collective bargaining agreement, which provides, in relevant part, that:

The President or his/her designee and a committee selected by the department shall designate the individual or individuals who is (are) mutually acceptable to serve in the post of department chairperson. Upon request, the President or his/her designee will communicate the reason(s) for rejection of the candidate(s) to the department and the candidate(s). Such reason(s) shall not be reviewable through the grievance and arbitration procedure under this Agreement unless a violation of Article 3 is alleged ...

(Findings of Fact 3 and 7; emphasis added). Article 3(A) of the collective bargaining agreement provides that:

Neither party hereto nor any FACULTY MEMBER shall discriminate against any other FACULTY MEMBER or candidate for employment on the basis of race, creed, color, sex (including discrimination by sexual harassment), handicap or disability, life style, family status, age, national origin, APSCUF membership or activity or lack thereof, political belief and/or affiliation, or on account of any other basis prohibited by law. Where existing laws against discrimination require accommodation, the STATE SYSTEM will accommodate to the extent required by law.

(Finding of Fact 2). The chair of the department's election committee asked Dr. Pogue to explain why he rejected Dr. Sheehy, and he responded by letter that "Decisions such as these are always difficult. I believe that any one of the individuals on the approved slate will provide excellent leadership for the department." (Finding of Fact 7). By letter dated February 15, 2005, Dr. Pogue wrote that: "Please allow this correspondence

to provide the documentation required under Article 6 of the PASSHE/APSCUF CBA. I believe the English and Theatre Arts Department is in need of a more inclusive leadership approach, and therefore Dr. Sheehy's name was removed from the slate of candidates for Department Chairperson." (Finding of Fact 8). On February 22, 2005, the Union filed a grievance alleging that the University violated Article 6(B) of the collective bargaining agreement because Dr. Pogue "did not justify his removal to the satisfaction of Dr. Sheehy." The grievance further requested that "Dr. Sheehy be notified by [Dr. Pogue of] the explicit reason for his decision to redline Dr. Sheehy." (Finding of Fact 9). On May 18, 2005, the Union requested the fact-finding report for the purposes of investigating the grievance. (Finding of Fact 10). On May 20, 2005, the Union's request was denied. (Finding of Fact 11).

The Union filed a Charge of Unfair Practices on September 20, 2005 claiming that the University's refusal to provide the fact-finding report was a violation of Section 1201(a)(1) and (5) because the fact-finding report was information it needed to investigate the grievance. A complaint was issued and, following a request for a continuation by the Union, a hearing was held on January 25, 2006. In the April 4, 2006 Proposed Decision and Order, the Hearing Examiner concluded that the University violated Section 1201(a)(1) and (5) of PERA by refusing to provide the Union with a copy of the report.

The University argues in its exceptions to the PDO that the Hearing Examiner erred by 1) finding that the Union was advancing a grievance that on its face is governed by the collective bargaining agreement and 2) finding that the fact-finding report will be useful to the Union's investigation of the grievance.

An employer commits an unfair practice under Section 1201(a)(1) and (5) when it refuses to provide a union with relevant information it needs to process a grievance. In Commonwealth of Pennsylvania v. Labor Relations Board, 527 A.2d 1097 (Pa. Cmwlth. 1987), the Commonwealth Court stated:

... state employers have a duty to furnish information which would enable unions to make informed decisions about whether to pursue such grievances. See, e.g., San Diego Newspaper Guild v. National Labor Relations Board, 548 F.2d 863 (9th Cir. 1977). Furthermore, the duty to provide information has been said to be a statutory obligation which exists independent of the agreement between the parties. National Labor Relations Board v. Designcraft Jewel Industries, Inc., 675 F.2d 493 (2d Cir. 1982). We believe Section 1201(a)(5) of PERA creates a similar statutory obligation. As in National Labor Relations Board v. Acme Industrial Co., 385 U.S. 432 (1967), where the Supreme Court held that unions were entitled to reasonable discovery of relevant materials in order to make an intelligent evaluation of the merits of the underlying claim, it is clear that the PNA must be allowed to obtain relevant information in order to perform its duties as specified in the parties' collective bargaining agreement (agreement).

...

The Supreme Court in Acme stated that relevancy should be determined under a discovery-type standard wherein the courts of necessity must follow a more liberal standard as to relevancy. Further, since the PNA is seeking information in connection with its pursuit of grievances, the Board need only find: (1) that the union is advancing a grievance which on its face is governed by the parties' agreement, and (2) that the information will be useful to the union. Acme at 437.

The University argues that the fact-finding report is not discoverable because the Union has failed to show that it is advancing a grievance which, on its face, is governed by the collective bargaining agreement. The basis for the University's argument that the fact-finding report is not discoverable is the fact that the grievance fails to allege that any violation of Article 3 has occurred and that Article 6 provides that the reasons for rejection are only reviewable if a violation of Article 3 is alleged.

Pursuant to the collective bargaining agreement negotiated by the University and the Union, the allegation of an Article 3 violation is a condition precedent to filing a grievance over the rejection of a candidate for chairmanship of a department. Because the Union does not allege a violation of Article 3 in its grievance, it is not advancing a grievance which on its face is governed by the collective bargaining agreement and therefore the report is not relevant. Therefore, because the Union has failed the first part of the relevancy test, the information it seeks, which is the fact-finding report, is not relevant and therefore not discoverable. As such, the University's refusal to supply the fact-finding report does not rise to the level of a refusal to bargain in good faith under Section 1201(a)(1) and (5) of PERA.¹

In reaching this result, the Board draws the important distinction between its role in enforcing the obligation to resolve disputes through the grievance procedure, PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982), Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), and its role in directing the provision of "relevant" information by management to the union to carry out the union's collective bargaining duty. This matter does not come before the Board in the context of a refusal to arbitrate a grievance, a claim which the Board would direct to arbitration to the extent that the interpretation of the contract is placed at issue. Here, however, the issue is the employer's statutory duty to provide "relevant" evidence to the Union to carry out its collective bargaining duty, which duty includes the processing of employee grievances. Commonwealth of Pennsylvania, Department of Corrections v. Pennsylvania Labor Relations Board, 541 A.2d 1168 (Pa. Cmwlth. Ct. 1988). While the Board would normally sustain an obligation to refer the grievance to the forum (arbitration) provided for contract interpretation, the Board's role in directing the provision of "relevant" information is statutory in nature and a threshold burden exists in such an unfair practice proceeding to demonstrate relevancy. Because an allegation of Article 3 is a condition precedent to the grievance and arbitration procedure and the Union has not "alleged" a violation of Article 3, it has failed to demonstrate relevance under the standard set forth in Commonwealth of Pennsylvania, supra.

Accordingly, for the reasons set forth above, the Hearing Examiner erred in finding that the Union met the two part test set forth in Commonwealth of Pennsylvania. Therefore, the fact-finding report is not discoverable.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the exceptions and reverse the Hearing Examiner's conclusion that the University engaged in unfair labor practices in violation of Section 1201(a)(1) and (5) of PERA.

CONCLUSIONS

Conclusion numbers 1 through 3 set forth in the Proposed Decision and Order are hereby affirmed and incorporated herein by reference and made a part hereof. Conclusion number 4 of the Proposed Decision and Order is hereby vacated and set aside.

5. The University has not committed unfair practices under Sections 1201(a)(1) and (5) of the Act.

ORDER

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

¹ Although the Board finds that the failure to produce the fact-finding report is not a refusal to bargain in good faith under PERA because the report does not meet the relevancy test, it is noted that once a grievance reaches the arbitration stage, an arbitrator may issue a subpoena for the production of documents and other evidence. See Section 7309(a) of the Uniform Arbitration Act, 42 Pa. C.S. § 7309(a). Once a grievance reaches the arbitration stage, enforcement of an arbitrator's subpoena is governed by the Uniform Arbitration Act. See Wallingford-Swarthmore Education Association v. Wallingford-Swarthmore School District, 31 PPER ¶ 152 (Final Order, 2000) (the Secretary correctly determined that the appropriate mechanism for enforcement of a subpoena which had reached the arbitration stage was through the filing of an action in a court of appropriate jurisdiction and not through the filing of a charge of unfair practices.)

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 sustained; and that the Order on page 7 of the Proposed Decision and order be, and hereby is, vacated and set aside, the complaint is rescinded and the Charge is dismissed.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this eighteenth day of July, 2006. 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.