COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LOWER MERION EDUCATION ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-04-429-E
	:	
LOWER MERION SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on September 13, 2004, by the Lower Merion Education Association (Association), alleging that the Lower Merion School District (District) violated Section 1201(a)(1), (3), (5) and (8)[1] of the Public Employe Relations Act (Act). On October 26, 2004, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on October 26, 2004[2], in Ardmore, Pennsylvania. After myriad unopposed continuance requests, a hearing was scheduled and held on September 20, 2006, during which all parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The examiner, on the basis of the testimony and exhibits presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is an employer within the meaning of Section 301(1) of the Act.

2. The Association is an employe organization within the meaning of Section 301(3) of the Act.

3. The District hired Denise O'Hara in 1984. The District terminated her in 2003 and the Association filed a grievance over that termination. That grievance went to arbitration on March 18, 2004. However, instead of taking testimony the parties entered into a consent agreement that the arbitrator issued as a Consent Award. That Consent Award required the District to reinstate O'Hara to an instructional aide position within thirty days of the Award's issuance. (District Exhibit 2, 5).

4.On April 15, 2004, in compliance with the Award, the District sent O'Hara a letter offering her reinstatement to an instructional aide position in the Vanguard school. (District Exhibit 3).

5. By letters dated April 27, April, 30, And May 5, 2004, Gerald S. Berkowitz, O'Hara's privately retained attorney protested O'Hara's assignment to the Vanguard school, alleging it was outside the District's geographic boundaries, and that the position was not in the bargaining unit. On or about May 12, 2004 the District informed O'Hara that unless she accepted the offered Vanguard position by May 17, 2004, the District would consider itself free of any further obligation to offer her employment. The District's attorney asked the Association's attorney to request clarification of the Consent Award from the original arbitrator. That was done and the arbitrator was recalled for that purpose. (District Exhibit 5).

6. The stipulated issue to be decided in the second arbitration, held on August 4, 2004, was whether the District complied with the prior award when it offered O'Hara the instructional aide position at Vanguard; and if not, what the remedy should be. (District Exhibit 5 p. 5).

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[1] At the outset of the September 20, 2006 hearing, the Association's attorney withdrew all but the allegation that the District violated Section 1201(a)(8) of the Act. (N.T. 3, 4).

[2] This was a *vitium clerici*. By letter dated October 29, 2004, the case was listed for hearing on December 29, 2004.

7. In an award issued on August 15, 2004, the arbitrator found that "[n]othing suggests that Ms. O'Hara retained any right to decline a position offered to her within the thirty-day period, just as nothing gave her the right to her choice of jobs within the thirty-day period. . . ." The arbitrator went on to deny the Association's claim since the District had fully complied with the prior award. (District Exhibit 5 p. 6).

8. On August 25, 2004 the District again sent to O'Hara a letter offering her an instructional aide position at Vanguard school starting September 1, 2004. Along with the letter was a form upon which O'Hara could accept or reject the offered position. The District sent the letter and accompanying form to the address O'Hara's Association president supplied. In conversations with the Association's representative, Yoder made it clear that the start date for the Vanguard position was not flexible. (N.T. 40, 41, 51; District Exhibit 6, 12).

9. On August 31, 2004, Marty Yoder, director of human resources, called O'Hara on O'Hara's cell phone. The reason Yoder called was that she had been told that O'Hara was willing to forego accepting the Vanguard position in return for a favorable letter of recommendation from the District. During that telephonic conversation O'Hara told Yoder that in exchange for a letter of recommendation she, O'Hara, would reject the District's offer of an instructional aide position. Yoder made contemporaneous notes reflecting the contents of that telephone call. Yoder composed a letter of reference for O'Hara and sent it by facsimile to her on September 1, 2004, along with another copy of the form so O'Hara could note in writing her rejection of the Vanguard position. (N.T. 52-54; District Exhibit 9, 10).

10. On September 3, 2004, O'Hara sent a five-page document to Yoder by facsimile. The document included a cover letter informing Yoder that O'Hara's address had changed along with her fax number. It also included a copy of Yoder's August 25, 2004, letter describing the Vanguard position and a completed form. O'Hara was to have rejected the Vanguard position. She did not do so on the returned form, but rather indicated her acceptance of the Vanguard position. Moreover, O'Hara crossed out the September 1 starting date and over-wrote September 7 as her new starting date. (N.T. 16-19; Association Exhibit 1, District Exhibit 11).

DISCUSSION

The Association charges the District with violating Section 1201(a)(8) of the Act when it failed to comply with a settlement agreement and a grievance arbitration award. The District, of course, asserts that it has complied with both. A recitation of the convoluted facts is essential to understanding the issue the parties ask to have decided in this charge.

The issue to be decided is whether O'Hara, on or about August 31, 2004, in return for a letter of reference, chose not to accept a position offered her by the District. How that comes to be the issue in dispute is clear only after the saga of O'Hara's employment history is set forth.

On April 24, 2003, the District discharged O'Hara. The Association grieved that action and grievance arbitration was scheduled for March 18, 2004. On that date the parties reached a voluntary agreement and asked the arbitrator to issue their agreement as a Consent Award. He did so. The Consent Award required the District to reinstate O'Hara to "an instructional aide position . . . within no longer than thirty days of March 18, 2004." (District Exhibit 2, p. 2).

By letter dated April 15, 2004 the District offered O'Hara an instructional aide position at the Vanguard school, working with special needs students, effective April 19, 2004. Accompanying this letter was a form which O'Hara was to return, indicating her preference of accepting the appointment and starting on April, 19, 2004; accepting the appointment but discussing a revised start date; or declining the position altogether. (District Exhibit 3).

O'Hara asserted, through a privately retained attorney, that the District could not under the Consent Award assign her to the Vanguard position because it was located outside the geographical boundaries of the District, and because it was not a bargaining

unit position. The District then informed O'Hara that unless she accepted the Vanguard position by 5:00 p.m. on May 17, 2004, the District would "consider itself free of any further employment obligation to [O'Hara]."[3] (District Exhibit 5, p. 5). She did not report to Vanguard, and the District's attorney asked the Association to petition the prior grievance arbitrator to interpret his Award. The Association did, and the arbitrator issued a second clarifying award. (District Exhibit 5).

The issue to be decided in the clarifying award, as stipulated by the parties was:

> Did the District implement Paragraph 3 of the Consent Award issued in O'Hara I when it offered the Grievant, Denise O'Hara, a position as an instructional aide at the Vanguard School in Paoli, Pennsylvania? If not, what shall the remedy be?

(District Exhibit 5, p.5).

On August 15, 2004, the arbitrator denied the Association's claim and concluded that the District had, indeed, fully complied with the Consent Award when it offered O'Hara the Vanguard position. As of that date, the District's legal obligation to reinstate O'Hara was extinguished and any further offer of employment constituted little more than a *nudum pactum* by the District. Therefore, the District could not have violated Section 1201(a)(8) of the Act, regardless of what occurred on August 31, 2004, since the District's offer on that date was not pursuant to any arbitration award, but was simply a gratuitous offer of employment. Nevertheless, to the extent there is jurisdiction to decide the issue as presented, the narrative continues.

Despite the August 15, 2004 award, on August 25, 2004, the District again wrote O'Hara to "reconfirm your assignment for the 2004-2005 school year." (Association Exhibit 1, District Exhibit 11). The August 25 letter goes on to again reference the starting date as September 1, 2004, for the Vanguard position.

On August 31, 2004, Yoder made a telephone call to O'Hara. The reason Yoder called O'Hara was that Yoder had been told that O'Hara would like to have a letter of recommendation rather than accept the Vanguard position.[4] The crux of this charge is whether O'Hara agreed not to accept the Vanguard position during that telephonic conversation with Yoder, the District's director of human resources, on August 31, 2004, in exchange for a positive letter of recommendation. O'Hara says she did not decline the Vanguard position. Yoder testified that she did. Balancing the credibility of the two witnesses involved, along with a close reading of the record, leads to the clear conclusion that O'Hara did, indeed, decline to accept the Vanguard position in return for the letter of recommendation.

There is a significant divergence of testimony between O'Hara and Yoder. Such divarication requires crediting one witness's testimony and discrediting the other witness's testimony. Witness credibility determines the worth of testimony. A witness's appearance, bearing, demeanor, candor, frankness, manner of answering questions, general conduct on the stand, and certainty with respect to facts all help determine credibility. Ross Township, 23 PPER ¶ 23175 (Proposed Decision and Order, 1992)(citing In Re Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949)). The overall demeanor of a witness is the very touchstone of credibility. Robinson v. Robinson, 183 Pa. supra 174, 133 A.2d 259 (1957).

O'Hare's testimony is simply too hazy and too conclusory to be of much evidentiary value. In response to a question about whether she informed the District of her new address, O'Hara's cryptic answer was, "I'm sure I did, because eventually I must have, because I would have said something, because I never received the originals of everything and, finally, they show up on my door." (N.T. 26).

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[3] Nevertheless, the District, in a letter to O'Hara, dated July 29, 2004, wrote that her "assignment for the 2004-2005 school year" is an instructional aide at the Vanguard school, and that the first day of school was Wednesday, September 1, 2004. (District Exhibit 4).

[4] District Exhibit 8 contains those documents from which Yoder formed her state of mind. District Exhibit 8 contains classic hearsay evidence. I have not accepted the facts set forth therein for the truth of the matters asserted, but rather, merely as evidence of Yoder's state of mind and motivation for calling O'Hara on August 31, 2004. Commonwealth v. Marshall, 287 Pa. 512, 135 A. 301 (1926); Commonwealth v. Collins, 550 Pa. 46, 703 A.2d 418 (1997).

Not only was Yoder's testimony clear, concise, logical, and specific in detail, it was supported by written documentation. O'Hara's testimony, on the other hand, simply was not logical and did not jibe with the accompanying documents. There is only one operant fact about which the parties disagree concerning the August 31, 2004 telephonic conversation and that is whether O'Hara agreed not to accept the Vanguard position in return for the letter of recommendation.

The letter of recommendation Yoder sent to O'Hara opens with the line, "Ms. O'Hara was employed by the school district from May 14, 1984 until August 31, 2004." (Association Exhibit 2). Yet, O'Hara made no mention of any surprise over the revelation that even though she had either accepted the Vanguard position, or kept the issue open, her requested letter of recommendation described her as an ex-employe of the District. Additionally, O'Hara offers no rational reason of why she wanted a letter of recommendation if she were to continue in the District's employ. Her rambling testimony (N.T. 20,21) about why she wanted the recommendation is obfuscatory.

If O'Hara were under the impression that she was still in the District's employ, the letter of recommendation should have raised her concerns enough to at least mention it during her testimony, especially since it directly supports the District's contention that O'Hara declined the Vanguard position. If she had accepted the Vanguard position on the phone, or kept the issue open, yet gotten a letter indicating the District had somehow misunderstood and thought she turned down the job, logically she would have tried to contact the District, to make the mistake known. According to O'Hara, this job was of the uppermost importance. Indeed, O'Hara testified "I made a lot of changes in my life to take this job." (N.T. 22). The fact that O'Hara ignored this discrepancy when she testified is telling. Yet, as Aldous Huxley observed, "Facts do not cease to exist because they are ignored."[5] Taking into consideration all the above-mentioned factors in assessing O'Hara's credibility, Yoder's rendition of that conversation is much more likely the accurate version.

Yoder's testimony about the August 31, 2004 conversation was specific, unhesitating, logical, and had the ring of truth. Yoder remembered specific questions she asked O'Hara and O'Hara's specific responses. Moreover, Yoder made contemporaneous notes about the conversation that corroborate her version of the event (District Exhibit 9), and the wording of the letter of recommendation clearly supports Yoder's testimony. Astonishingly, when asked directly if she told Yoder, during the August 31 conversation, that she was accepting the position, O'Hara simply never answered the question. (N.T. 36, 37).

When the District faxed the letter of recommendation to O'Hara it also included another copy of the offer letter for the Vanguard position. According to Yoder, that was so O'Hara could reject the position and the District would have a written record of that event. For whatever intervening reason, O'Hara, on September 2, 2004, sent to the District, by facsimile, the offer letter indicating her acceptance of the Vanguard position, but unilaterally changing the start date from September 1 to September 7, 2004. Along with that, she sent a cover letter telling the District for the first time that both her address and facsimile number had changed.

O'Hara makes much ado about the fact that the District did not always use her current address. When the District did, evidently, send a writing to O'Hara's then current address, her Association's president misinformed the District that O'Hara's address was different. Regardless of which address the District used, it was incumbent upon O'Hara to see that the District had her correct address, especially in the face of this protracted litigation.[6]

The Association argues that assuming, without admitting, that O'Hara "expressed an intent to resign" during the August 31, 2004, telephonic conversation, "that resignation was effectively withdrawn. . . ." (Association brief at 8). That argument conveniently overlooks the fact that O'Hara was not resigning from anything, but rather, giving up her

[5] Aldous Leonard Huxley, *Proper Studies*, (Chatto and Windus, London, 1927)

[6] Moreover, O'Hara was present at the August 4, 2004, second arbitration when letters enumerating the Vanguard position's start date were introduced into the record clearly showing her incorrect, two-year old address. (District Exhibit 4). Evidently, that fact went unnoticed by O'Hara.

right to accept a position gratuitously offered. It is definitionally impossible to resign before being employed.

The Association also calls attention to Franklin Township Sanitary Authority, 12 PPER ¶ 12260 (Proposed Decision and Order, 1981), 13 PPER ¶ 13055 (Final Order, 1982), for the proposition that where an employe does not receive notice of reinstatement from the employer, that employer violates Section 1201(a)(8) of the Act. The Association argues that O'Hara did not receive notice until after the date she was to report to Vanguard school, and "thus, she cannot be faulted for the District's failure to use the correct address in its offer." (Association brief at 8).

In Franklin Township Sanitary Authority, the employer and the union received an arbitration award in March of 1980 that granted reinstatement to employe Romano. For the next four months the union representative contacted the employer, attempting to ascertain Romano's status. The employer refused to give a start date for reemployment. By November of that year, despite the union's entreaties, the obstreperous employer still had not reinstated Romano. Thereafter, the employer wrote the union that Romano had abandoned his position since it was months after the award was issued and still Romano had not reported to work. Those facts are glaringly different from the facts here.

As of August 15, 2004, the date the second arbitration award was issued, the District had no further legal duty to offer reinstatement to O'Hara. Yet, for whatever reason, it gratuitously chose to do so by letter of August 25, 2004. By telephonic communication on August 31, 2004 O'Hara declined that offer in exchange for a favorable letter of recommendation. Based upon these facts the District did not refuse to implement any part of any arbitration award or settlement agreement, and consequently, did not violate Section 1201(a)(8) of the Act. Therefore, this charge is dismissed.

CONCLUSION

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The District is a public employer within the meaning of Section 301(1) of the Act.

2. The Association is an employe organization within the meaning of Section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

4. The District has not committed unfair practices within the meaning of Section 1201(a)(8)of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-ninth day of November, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, HEARING EXAMINER