

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 :

**PROPOSED DECISION AND ORDER**

On September 20, 2005, the Association of Pennsylvania State College and University Faculties (APSCUF) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the State System of Higher Education (SSHE) had violated sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (Act) "by refusing to provide the union with information needed to investigate a grievance and to monitor compliance with the CBA." On October 5, 2005, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on December 2, 2005. The hearing examiner subsequently continued the hearing upon the request of APSCUF and without objection by SSHE. On January 25, 2006, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On March 17, 2006, each party filed a brief.

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

FINDINGS OF FACT

1. On November 12, 1971, the Board certified APSCUF as the exclusive representative of a bargaining unit that includes "all department chairmen, full-time teaching faculty (including librarians with faculty status), part-time teaching faculty, and librarians without faculty status" employed by SSHE. (Case No. PERA-R-775-C)

2. Effective July 1, 2003, the parties entered into a four-year collective bargaining agreement providing at article 3(A) as follows:

"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."

(Complainant Exhibit 2)

3. Article 6(B)(1)(a) of the collective bargaining agreement provides in part as follows:

"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."

4. By petition dated May 31, 2003, faculty in the English and Theatre Arts Department at Edinboro University requested the President (Dr. Frank G. Pogue) to ask Dr. Donald Sheehy to resign as chairperson of the department. (N.T. 39-42; Complainant Exhibit 5)

5. Upon Dr. Pogue's request, the Associate Vice President for Human Resources and Faculty Relations (Janet Dean) conducted a review of the allegations set forth in the petition and prepared a report. (Complainant Exhibits 5 and 11)

6. By letter dated November 24, 2003, Dr. Pogue wrote to Dr. Sheehy as follows:

"I have carefully reviewed the petition presented by certain members of your department for your removal as chair under Article 6, Section A and B of the APSCUF/SSHE Collective Bargaining Agreement. I have not found sufficient evidence to remove you as chair based on the fact-finding report presented to me by Mrs. Janet Dean. However, I recognize the need for you to work productively with all individual members of your department and to develop ways in which the department can flourish and meet the needs of our students. To accomplish this goal, it is essential that mutual respect exist between faculty.

I ask that you work with Dean Smith to develop a plan of action to improve interpersonal communication, develop and focus on department goals that are acceptable to the department, review departmental governance, and meet the needs of our students.

I understand that this has been an extremely difficult semester for the entire department. Please know that I appreciate the fact that the English and Theatre Arts Department has continued to function while all of this fact-finding has been going on. It is my sincere hope that the entire department can learn and grow from this experience to build a more productive and student-centered environment, and to be a model for the entire campus community since it is one of the largest and most viable departments on our campus."

(Employer Exhibit 1)

7. In late 2004, Dr. Pogue rejected Dr. Sheehy as a candidate to be the next the chairperson of the department. The chair of the elections committee for the department (Dr. Robert Hass) asked Dr. Pogue to explain the reason for the rejection. Dr. Pogue wrote, "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." (N.T. 45; Complainant Exhibit 8)

8. By letter dated February 15, 2005, Dr. Pogue wrote to Dr. Hass as follows:

"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."

(Complainant Exhibit 9)

9. By grievance # ED 02-02-2005 dated February 22, 2005, APSCUF alleged as follows:

**Violation:**

Purpose  
Article 6, Section 1b.

**Statement of the grievance:**

In late January 2005, the University President 'redlined' Dr. Donald Sheehy when his name was submitted on the slate for chair of the English/Theatre Arts Department. When Dr. Sheehy requested that the President give him the reason for his 'redlining' in writing, the President did not justify his removal to the satisfaction of Dr. Sheehy. The only communication given by the President was that 'such decisions are difficult.'

**Relief Sought:**

APSCUF is requesting that Dr. Sheehy be notified by the President the explicit reason for his decision to redline Dr. Sheehy.

APSCUF is further requesting that other names of those faculty who have been redlined be given the same consideration provided by Article 6 of the Collective Bargaining Agreement."

(Complainant Exhibit 3)

10. By email dated May 18, 2005, a director in APSCUF's contract department (Mary Beth Hamilton) wrote to a labor relations manager for SSHE (Lisa Sanno) regarding the grievance as follows:

"Please provide me with the fact-finding report from the 2003 investigation of Professor Donald Sheehy that resulted from the petition to remove him as department chair. This report will allow me to investigate the above-referenced grievance and should be provided in accordance with Article 5 of the Collective Bargaining Agreement. Thank[] you for your assistance."

(N.T. 15, 20; Complainant Exhibit 4)

11. By email dated May 20, 2005, Ms. Sanno denied Ms. Hamilton's request for the report. (Complainant Exhibit 4)

DISCUSSION

The positions of the parties

APSCUF has charged that SSHE committed unfair practices under sections 1201(a)(1) and 1201(a)(5) "by refusing to provide information needed for the investigation of a grievance and to monitor compliance with the CBA." According to APSCUF, in order to make an informed judgment about the merits of a grievance it filed over the reason SSHE's President of Edinboro University (Dr. Pogue) gave for rejecting Dr. Sheehy as a candidate for chairperson of the English and Theatre Arts Department, it needs a report that SSHE prepared when SSHE investigated a petition filed by faculty of the department seeking Dr. Sheehy's resignation as chairperson. APSCUF submits that the report is relevant because the report may put into context the reason Dr. Pogue gave for rejecting Dr. Sheehy. APSCUF also submits that it timely filed the charge within four months of May 20, 2005, when SSHE denied its request for the report to investigate the grievance.

SSHE contends that the charge should be dismissed as untimely filed because APSCUF knew as early as April 9, 2005, that SSHE would not provide the report yet did not file the charge within four months thereafter. SSHE also contends that the charge should be dismissed for lack of proof that the report is relevant. In SSHE's view, the report is irrelevant because APSCUF did not show that Dr. Pogue relied on the report when he rejected Dr. Sheehy, because the reason Dr. Pogue gave for rejecting Dr. Sheehy is what it is, regardless of the context in which it was made, and because the reason Dr. Pogue gave for rejecting Dr. Sheehy is not reviewable under the grievance as filed or the testimony APSCUF presented at the hearing.

The applicable law

In order to be timely, a charge must be filed within four months of when the charging party knew or should have known of the unfair practices charged. Thomas v. Commonwealth of Pennsylvania, PLRB, 483 A.2d 1016 (Pa. Cmwlth. 1994).

An employer commits an unfair practice under section 1201(a)(5) if it refuses to provide requested information the exclusive representative of a bargaining unit reasonably needs to process a grievance in an informed manner. Commonwealth of

Pennsylvania v. Commonwealth of Pennsylvania, PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987). An employer is under no obligation to provide information that is irrelevant, however. Rose Tree Media School District, 32 PPER ¶ 32116 (Final Order 2001). As the court explained in Commonwealth of Pennsylvania, "relevancy should be determined under a discovery-type standard wherein the courts of necessity must follow a more liberal standard as to relevancy." 527 A.2d at 1099 (footnote omitted). Thus, in deciding whether or not requested information is relevant, "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. [NLRB v. Acme Industrial Company, 385 U.S. 432] at 437, [87 S.Ct. 565, 568]." Id. Whether or not the grievance has merit is immaterial. Id.

A violation of section 1201(a)(5) of the Act is a violation of section 1201(a)(1) of the Act as well. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). The charging party must prove a charge by substantial evidence. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

#### The timeliness of the charge

SSHE contends that the charge is untimely filed because APSCUF knew as early as April 9, 2005, that SSHE would not provide the report yet did not file its charge within four months thereafter. SSHE points out that on that date it denied a request by APSCUF for the report in relation to another grievance (Complainant Exhibit 4, Employer Exhibit 2). April 9, 2005, of course, is more than four months before the charge was filed on September 20, 2005. SSHE overlooks, however, that under Thomas, supra, the timeliness of a charge is to be measured with respect to the unfair practices charged. APSCUF has not charged that SSHE committed unfair practices by refusing to provide the report in relation to the other grievance; rather, APSCUF has charged that SSHE committed unfair practices by refusing to provide the report in relation to the instant grievance. The record shows that SSHE did not refuse to provide the report in relation to the instant grievance until May 20, 2005 (findings of fact 10-11). May 20, 2005, of course, is within four months of when APSCUF filed the charge on September 20, 2005. Thus, the charge is timely filed. Compare Allegheny County, 28 PPER ¶ 28116 (Final Order 1997)(charging party may not revive a defunct cause of action by repeating a request to arbitrate grievances where the employer had denied a previous request to arbitrate the same grievances more than four months before the charge was filed).

#### The merits of the charge

Under the analysis set forth in Commonwealth of Pennsylvania, supra, the first question for disposition is whether or not APSCUF is advancing a grievance that on its face is covered by the parties' collective bargaining agreement. As set forth in finding of fact 3, the record shows that article 6(B)(1)(a) of the parties' collective bargaining agreement addresses the circumstances under which a president's reason for rejecting a candidate for department chairperson may be reviewed. As set forth in finding of fact 9, the record shows that APSCUF filed the grievance over the reason Dr. Pogue gave for rejecting Dr. Sheehy as a candidate for department chairperson. Given the scope of article 6(B)(1)(a) and the nature of the grievance, it is apparent that APSCUF is advancing a grievance that on its face is governed by the parties' collective bargaining agreement.

Under the analysis set forth in Commonwealth of Pennsylvania, supra, the second question for disposition is whether or not the report will be useful to APSCUF's investigation of the grievance. As set forth in findings of fact 4-5, the record shows that SSHE prepared the report when it investigated a petition filed by faculty in the department seeking Dr. Sheehy's resignation as chairperson. As set forth in findings of fact 6-7, the record shows that Dr. Pogue reviewed the report before he rejected Dr. Sheehy. Given the nature of the investigation and the fact that Dr. Pogue reviewed the report before he rejected Dr. Sheehy, it is apparent that the report may place into context the reason Dr. Pogue gave for rejecting Dr. Sheehy and thus will be useful to

APSCUF's investigation of the grievance. Accordingly, SSHE must be found to have committed unfair practices under sections 1201(a)(1) and 1201(a)(5) as charged.

In support of its contention that the charge should be dismissed for lack of proof, SSHE submits that the report is irrelevant because APSCUF did not show that Dr. Pogue relied on the report when he rejected Dr. Sheehy. Under the analysis set forth in Commonwealth of Pennsylvania, supra, however, the report need not be determinative of the grievance in order to be relevant; rather, the report need only be useful to APSCUF's investigation of the grievance in order to be relevant. Thus, in order to establish the relevancy of the report, APSCUF was under no obligation to show that Dr. Pogue relied on the report; rather, APSCUF only had to show that the report would be useful to its investigation of the grievance. As noted above, APSCUF met its burden in that regard by showing that SSHE prepared the report when it investigated the petition filed by faculty in the department seeking Dr. Sheehy's resignation as chairperson and that Dr. Pogue reviewed the report before he rejected Dr. Sheehy.

SSHE also submits that the report is irrelevant because the reason Dr. Pogue gave for rejecting Dr. Sheehy is what it is, regardless of the context in which it was made. Again, however, under the analysis set forth in Commonwealth of Pennsylvania, supra, the report need not be determinative of the grievance in order to be relevant; rather, the report need only be useful to APSCUF's investigation of the grievance in order to be relevant. As noted above, it is apparent that the report may place into context the reason given by Dr. Pogue for rejecting Dr. Sheehy and thus will be useful to APSCUF's investigation of the grievance.

SSHE further submits that the report is irrelevant because the reason Dr. Pogue gave for removing Dr. Sheehy from the slate is not reviewable under the grievance as filed. SSHE points out that article 6(B)(1)(a) specifically provides that "[s]uch reason(s) shall not be reviewable through the grievance and arbitration procedure under this Agreement unless a violation of Article 3 is alleged" and that the grievance does not allege a violation of article 3 (finding of fact 9). Under the analysis set forth in Commonwealth of Pennsylvania, supra, however, whether or not the grievance has merit is immaterial. See also PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982)(the arbitrability of a grievance is for an arbitrator to decide).

SSHE finally submits that the report is irrelevant because APSCUF presented testimony that it wanted the report to validate its belief that the reason Dr. Pogue gave for rejecting Dr. Sheehy was "vague" (N.T. 21). SSHE would have the Board find that the reason Dr. Pogue gave for rejecting Dr. Sheehy is not reviewable under the parties' collective bargaining agreement even if the reason was vague. Again, however, under the analysis set forth in Commonwealth of Pennsylvania, supra, whether or not the grievance has merit is immaterial.

#### CONCLUSIONS

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

1. SSHE is a public employer under section 301(1) of the Act.
2. APSCUF is an employe organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. SSHE has committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act.

#### ORDER

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

HEREBY ORDERS AND DIRECTS

that SSHE shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in article IV of the Act.

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the Act:

(a) Provide APSCUF with the report;

(b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completing and filing the attached affidavit of compliance.

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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fourth day of April 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

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April 4, 2006

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STATE SYSTEM OF HIGHER EDUCATION  
Case No. PERA-C-05-422-E

Enclosed is a copy of the proposed decision and order that I have issued this date.

Sincerely,

DONALD A. WALLACE  
Hearing Examiner

Enclosure

cc: Mary Beth Hamilton  
Jeffrey Cooper, Esquire  
Thomas Krapsho  
Michael K. Becker  
Andrew C. Lehman, Esquire