

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

CORRY AREA EDUCATION ASSOCIATION, :  
PSEA/NEA :  
v. : Case No. PERA-C-06-86-W  
CORRY AREA SCHOOL DISTRICT :

**FINAL ORDER**

On May 29, 2007, the Corry Area Education Association, PSEA/NEA (Association) filed timely exceptions with the Pennsylvania Labor Relations Board (Board)<sup>1</sup> challenging the remedy issued by a Board Hearing Examiner in the May 9, 2007 Proposed Decision and Order (PDO). In accordance with an extension of time granted by the Secretary of the Board, the Association timely filed its brief in support of the exceptions on June 28, 2007. On July 19, 2007, the Corry Area School District (District) filed a timely brief in response to the exceptions. After a thorough review of all matters of record, the Board makes the following

AMENDED AND ADDITIONAL FINDING OF FACT

7. If the District had complied with the award and reinstated Mr. French at the beginning of the 2005-2006 school year, he would have worked an additional forty-three days before his actual reinstatement by the District on October 28, 2005. During that time, Mr. French retained interim employment with wages in excess of what he would have earned with the District. (Stipulations 17 and 26).

8. Mr. French's interim employer required him to pay \$27.90 per week towards health insurance premiums. The District required no premium co-pay for health insurance. (Stipulation 26).

DISCUSSION

In lieu of a hearing, the parties stipulated to the facts. The Findings of Fact, which are based on those stipulations, are summarized as follows. The District had discharged Chad French from his employment with the District at the end of the 2002-2003 school year. The Association filed a grievance which proceeded through arbitration. An arbitration award was issued on April 7, 2005 that sustained the grievance and directed:

The District shall reinstate the Grievant to his former position without loss of seniority no later than the beginning of the 2005-2006 academic term. The Grievant shall be made whole for all loss of wages, benefits, seniority and other emoluments of employment he would have received but for his improper discharge. The District shall be entitled to credit against this monetary award for any sums the Grievant received through interim earnings, employment compensation or other governmental benefits, to the extent that the Grievant is not required under law to reimburse such governmental agencies for such benefits.

However, the District did not reinstate Mr. French until October 28, 2005, causing him to miss forty-three workdays in the 2005-2006 school year. Following his discharge from the District in 2003, until his reinstatement on October 28, 2005, Mr. French held interim employment where his wages exceeded the pay he would have received through the District. The District would have provided Mr. French with health insurance at no cost to him, whereas Mr. French's interim employer charged \$27.90 per week in premium co-pay for health insurance coverage.

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<sup>1</sup> Although the Board received the association's exceptions May 31, 2007, a United States Postal Form 3817 Certificate of Mailing, dated May 29, 2007, accompanied the exceptions. Section 95.98 of the Board's Rules and Regulations provides, in pertinent part, that "[e]xceptions will be deemed received upon actual receipt or the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions." 34 Pa. Code §95.98(a)(1).

The Hearing Examiner found that the District violated Section 1201(a)(1) and (8) of the Public Employe Relations Act (PERA) by not reinstating Mr. French as of the first day of the 2005-2006 school year, in accordance with the April 7, 2005 grievance arbitration award.<sup>2</sup> In remedying the District's unfair practice, the Hearing Examiner limited the relief to directing that the District cease and desist from violating Section 1201(a)(1) and (8) of PERA. The Hearing Examiner concluded that Mr. French was not entitled to any monetary relief as a result of the District's unfair practice. The Hearing Examiner based that conclusion on the fact that Mr. French's interim earnings from the first day of the 2005-2006 school year to his October 28, 2005 reinstatement were greater than the amount of District wages he would have earned, even including his out-of-pocket health care premiums.

On exceptions, the Association initially contends that the Hearing Examiner erred in failing to exclude Stipulation 17, regarding Mr. French's interim earnings from the start of the 2005-2006 school year to his reinstatement with the District, as irrelevant to the alleged unfair practice. The District counters that the Hearing Examiner properly considered Stipulation 17 as evidence of mitigation in the context of remedying the unfair practice.

Fashioning an appropriate remedy for an unfair practice is a matter of Board discretion. PLRB v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948); Pennsylvania State Police v. PLRB, 912 A.2d 909 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, \_\_\_ Pa. \_\_\_, 928 A.2d 1292 (2007). Accordingly, where the issue of remedy is placed before the hearing examiner in the context of an unfair practice charge, the hearing examiner may take into consideration mitigation and offsets in determining the appropriate remedy for the alleged unfair practice. As such, the Hearing Examiner did not err in denying the Association's Motion in Limine and Motion to Strike Stipulation 17 regarding Mr. French's interim earnings between the start of the 2005-2006 school year and his reinstatement on October 28, 2005.

Nevertheless, the Association next argues that the Hearing Examiner erred in issuing only a cease and desist order. The Association asserts that Mr. French is entitled to forty-three days of full backpay from the District without offsets for interim earnings between the start of the 2005-2006 school year and October 28, 2005. In support of this contention, the Association claims that the April 7, 2005 grievance arbitration clearly defined the bookends for purposes of the remedy as Mr. French's termination from employment and the first day of the 2005-2006 school year. The Association thus claims that because the award allowed the District to offset interim employment only up to the beginning of the 2005-2006 school year, the District was not permitted to offset Mr. French's earnings beyond that date.

We agree with the Association that the arbitration award directed relief from the day of Mr. French's termination from employment up to the first day of the 2005-2006 school year. The District's failure to comply with the award by not reinstating Mr. French as of the start of the school year was an unfair practice. Any prospective remedial relief beyond the first day of the 2005-2006 school year would be a Board remedy for the violation of Section 1201(a)(1) and (8) of PERA. Northwestern Education Association v. Northwestern School District, 24 PPER ¶24141 (Final Order, 1993).

The Board's authority to remedy an unfair practice under Section 1303 of PERA is to fashion an award that is remedial, not punitive. In re Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). The Association claims that Board should award full backpay without offsets because of the District's violation of the collective bargaining agreement, and equitable consideration of the District's unclean hands. However, a Board remedy is designed to make the employe whole for losses suffered as a result of the employer's unfair practices. Thus, the Board does not remedy violations of a contract, Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978), nor does it apply equitable doctrines in remedying an unfair practice. Crawford Central School District v. PLRB, 618 A.2d 1202 (Pa. Cmwlth. 1992).

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<sup>2</sup> The Association and the District do not dispute the finding of an unfair practice, and both parties acknowledge on exceptions that an award exists, that no appeal of the award was filed, and that the District failed to comply with the award by not reinstating Mr. French at the start of the 2005-2006 school year. See City of Philadelphia v. Pennsylvania Labor Relations Board, 759 A.2d 40 (Pa. Cmwlth. 2000).

The Board has previously recognized that its policy of making employes whole for losses suffered as the result of unfair practices is similar to that of the National Labor Relations Board (NLRB) in the private sector. See Cumberland Valley School District, supra. Indeed, the Board has for decades utilized the method of calculating backpay liability that accounts for interim earnings, as announced by the NLRB in F.W. Woolworth Co., 90 NLRB No. 41, 26 LRRM 1185 (1950). See David Braymer, Mary Jane Braymer v. Beaver Valley Intermediate Unit, 21 PPER ¶21,006 (Final Order, 1989).<sup>3</sup> Were an employe to get backpay without an offset for interim earnings, there would be a windfall to the employe over and above what the employe lost in wages. Such relief would make the employe more than whole and thus is punitive, and beyond the authority of the Board. Cumberland Valley School District, supra. As such, the Hearing Examiner did not err in allowing the District to offset Mr. French's interim earnings between the first day of school and October 28, 2005 from its backpay liability arising from its violation of Section 1201(a)(1) and (8) of PERA.

Even if the District is permitted to offset wages for the period between the start of the 2005-2006 school year and October 28, 2005, the Association contends that Mr. French should be made whole for all benefits and emoluments of employment offered by the District during that period of time. The Association asserts that Mr. French would not have been required to pay for health insurance but for the District's unfair practice, and thus he is entitled to reimbursement for health insurance premium co-payments made since the start of the 2005-2006 school year. The Association also claims that Mr. French should be made whole for the forty-three days of lost pension contributions and seniority in the Pennsylvania Public School Employees Retirement System (PSERS).

Based on Stipulation 17, the Hearing Examiner found that Mr. French's interim earnings were sufficient to cover both the wages he would have earned plus his additional premium co-payments for health insurance. Relying on a recent Proposed Decision and Order issued by a hearing examiner in Philadelphia Housing Authority, 38 PPER 14 (Proposed Decision and Order, 2007), modified in part, 38 PPER 79 (Final Order 2007),<sup>4</sup> the Hearing Examiner stated that "an employer may offset alternative earnings against monies paid by an employe to continue benefits lost as the result of the employer's unfair practices." (PDO at 5). In determining that Mr. French had fully mitigated his losses, the Hearing Examiner lumped all benefits as wages to be factored into, and offset, in the backpay calculation.

However, allocating a present day cash value for employe benefits packages, such as health care and retirement, does not make an employe whole. In fact it may penalize an employe for mitigating lost wages. For instance, but for an employer's unfair practice, discharged employes would not have been required to endure any out-of-pocket cost for medical expenses that would have been covered by the employer's insurance regardless of their pay. Likewise, a cash payment equal to a lost pension contribution does not come close to compensating the loss of contributions into a statutorily-regulated pension, which impact on a retirement date or ultimate pension benefit.

As noted above, federal sector policies in this regard are similar, and the NLRB provides guidance as to appropriate make-whole relief. For the NLRB, make-whole relief requires comparing each emolument of employment separately, and employer offsets for a particular benefit are permitted only where that same benefit is offered through an interim employer. Similarly, the Board's remedial relief, issued in accordance with Section 1303 of PERA, should require, as much as possible, that employes be made whole as to each and every emolument of employment.

In this regard, concerning make-whole relief for medical insurance, Section 10544.2 of the NLRB Compliance Manual (III) provides that:

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<sup>3</sup> This method of calculating backpay offsets interim earnings from the employer's backpay liability in calendar quarter increments, and is designed to make employes whole for lost wages, as well as taking into consideration matters such as tax implications and periodic wage adjustments.

<sup>4</sup> In the final order in Philadelphia Housing Authority, the Board did not condone the notion of utilizing a cash value of non-monetary benefits in a backpay remedy. Accordingly, Philadelphia Housing Authority does not support the Hearing Examiner's decision here.

[E]xpenses [employees] incurred due to the loss of medical insurance resulting from an unlawful action ... include charges they paid for medical services that would have been reimbursed under terms of the gross employer's medical insurance plan, and premiums paid ... to maintain comparable health insurance, to the extent the premiums exceeded those paid when employed prior to the unlawful conduct.... *Reimbursable medical expenses are not offset by interim wage earnings in determining net backpay.*

NLRB Compliance Manual (III) §10544.2 (*emphasis added*). As regards pension and retirement, the compliance manual states that "[w]hen the gross employer made contributions to a pension fund, retroactive contributions and appropriate credit should be obtained from respondent. .... *Retirement benefits are not offset by interim wage earnings.*" NLRB Compliance Manual (III) §10544.3 (*emphasis added*).

Applying make-whole relief as discussed above to the facts of this case, Mr. French would have received health insurance through the District at no cost to him. To obtain health insurance through his interim employer, Mr. French was required to pay \$27.90 per week. Thus, in order to make Mr. French whole for lost health insurance benefits resulting from the District's violation of Section 1201(a)(1) and (8) of PERA, Mr. French must be reimbursed for the medical insurance premium payments he was required to pay in order to maintain health insurance coverage between the start of the school year and his reinstatement on October 28, 2005.

The same result must be reached concerning Mr. French's pension benefits. In order to make Mr. French whole as to his pension, the District must make the necessary employer contributions to PSERS for the period from the start of the 2005-2006 school year until it reinstated Mr. French on October 28, 2005.

Accordingly, after a thorough review of the exceptions and all matters of record, the Association's exceptions shall be sustained in part and dismissed in part. The Hearing Examiner's remedy shall be amended to direct reimbursement for Mr. French's payment of health insurance premiums in the amount of \$27.90 per week, and the necessary employer pension contributions to PSERS on behalf of Mr. French for the period from the start of the 2005-2006 school year through October 28, 2005.

#### ORDER

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

#### HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Corry Area Education Association are hereby dismissed in part and sustained in part. In addition to the relief directed by the Hearing Examiner on page 6 of the May 9, 2007 Proposed Decision and Order, the District shall, for the period between the start of the 2005-2006 school year through October 28, 2005, reimburse Mr. French for health care premium co-payments he made to secure health insurance through his interim employer, and submit required employer pension contributions on behalf of Mr. French to the Pennsylvania Public School Employees Retirement System. As amended herein, the May 9, 2007 Proposed Decision and Order be and hereby is made absolute and final.

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 twentieth day of November, 2007. 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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CORRY AREA SCHOOL DISTRICT :

**AFFIDAVIT OF COMPLIANCE**

The District hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and 1201(a)(8) of the Act; that for the period from the first day of the 2005-2006 school year through October 28, 2005, it has reimbursed Mr. French for health care premium co-payments he made and has submitted the required employer pension contributions to PSERS; that it has posted the final order and proposed decision and order as directed; and that it has served an executed copy of this affidavit on the Association.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

SWORN AND SUBSCRIBED TO before me  
the day and year aforesaid.

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Signature of Notary Public