COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NORTH HILLS EDUCATION ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-06-310-W
NORTH HILLS SCHOOL DISTRICT	:	

FINAL ORDER

The North Hills School District (District) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on February 9, 2007, challenging a Proposed Decision and Order of January 23, 2007, in which the Hearing Examiner found that the District violated Section 1201(a)(1) and (8) of the Public Employe Relations Act (PERA). The North Hills Education Association, PSEA/NEA (Association) timely filed a responsive brief on March 1, 2007. After a thorough review of the exceptions and all matters of record the Board makes the following

ADDITIONAL FINDING OF FACT

9. The District and the Association entered into a successor collective bargaining agreement for 2005 through 2011, which provides in Article XVII G:

> Within ten (10) work days after the deadline date to qualify for termination benefits, elementary and secondary building principals may realign assignments within an individual building with the cooperation of each teacher being realigned within the certification required for the position currently held by the employee. Other than during cooperative realignment, any vacancies will be posted and filled in accordance with paragraphs B [Posting of Vacancies] and C [Filling of Vacancies] of this article. The District will continue to implement this section of the contract and seek teacher input for the building staff realignments during the ten (10) work day period, but the District may proceed under Paragraph D of the Article [Involuntary Transfers Not Caused by Reduction in Staff] after the ten (10) work day period, in the event that cooperative realignment is rejected by one or more employees.

(District Exhibit 2; N.T. 10).

10. Article XVII D of the 2000-2005 collective bargaining agreement remained unchanged in the 2005-2011 contract, addressing “Involuntary Transfers Not Caused by Reduction in Staff” in the following manner:

> Any involuntary transfer from one building to another, from one subject area to another or from one grade level to another, will be made only after a conference between the professional employee and his building principal, at which time the specific reasons for the transfer will be examined, and if requested, placed in writing. Thereafter, the teacher will have the right to a conference with the Superintendent or his designee, provided such a conference is requested, in writing, within 72 hours of delivery of a written explanation referred to above. The employee is entitled to have two (2) representatives of the Association present at such meeting.

(District Exhibits 1 and 2).

DISCUSSION

The Association filed a Charge of Unfair Practices with the Board alleging that the District had refused to comply with a grievance arbitration award restoring Linda Berggren to her 9th grade English teaching class. Effective with the 2005-2006 school year several bargaining unit members, including Ms. Berggren, had their teaching assignments “realigned” by the District. The Association filed a grievance asserting that Ms.

Berggren's "realignment" from teaching 9th grade English to teaching 7th grade English was in violation of the 2000-2005 collective bargaining agreement. The grievance proceeded to arbitration and on September 6, 2005, an arbitrator issued an award finding that the District violated the collective bargaining agreement by "realigning" Ms. Berggren from teaching 9th grade English to teaching 7th grade English effective with the 2005-2006 school year. The arbitrator's award provided in part as follows:

AWARD

> The Grievance is sustained in part, and denied in part, as follows:
>
> In that the District violated the provisions of Article XVII, Section F of the Collective Bargaining Agreement when it realigned Ms. Berggren, Ms. Clark and Ms. Washington to teach English at different grade levels than previously taught, such assignments are improper.
>
> Ms. Clark, Ms. Washington and Ms. Berggren are to be returned to their previous grade levels in teaching English within two calendar weeks from receipt of this Award.

(Finding of Fact 3). The District appealed the arbitration award to the Court of Common Pleas of Allegheny County. (Finding of Fact 4).

While its appeal was pending in the court of common pleas, the District and the Association entered into a successor collective bargaining agreement for the school years 2005 through 2011. The successor agreement continued the District's ability to transfer teachers involuntarily under Article XVII D, but amended what had been Article XVII, Section F, which previously read:

> Within ten (10) work days after the deadline date to qualify for termination benefits, elementary and secondary building principals may realign assignments within an individual building with the cooperation of each teacher being realigned within the certification required for the position currently held by the employee. Other than during cooperative realignment, any vacancies will be posted and filled in accordance with paragraphs B [Posting of Vacancies] and C [Filling of Vacancies] of this article.

to add the following:

> The District will continue to implement this section of the contract and seek teacher input for the building staff realignments during the ten (10) work day period, but the District may proceed under Paragraph D of the Article [Involuntary Transfers Not Caused by Reduction in Staff] after the ten (10) work day period, in the event that cooperative realignment is rejected by one or more employees.

(Finding of Fact 9, District Exhibit 1).

On May 17, 2006, the common pleas court issued an order dismissing the District's appeal, and no further appeal was pursued by the District (Findings of Fact 5 and 6). Instead, in a July 24, 2006 letter, the District advised Ms. Berggren:

> Although the arbitration award stated that you were to be returned to a 9th grade English teacher position effective with the 2005-06 school year, the arbitration decision was appealed, and the appeal determination was not made until June 2006, after the conclusion of the 2005-06 school year. Therefore, to comply with the arbitration award, this letter serves to acknowledge a return to a 9th grade English teacher position effective with the 2006-07 school year.
>
> Additionally, this letter serves as notice of an anticipated involuntary transfer from 9th grade English teacher to 7th grade English teacher effective with the 2006-07 school year.

(Finding of Fact 7).

Concluding that the District violated Section 1201(a)(1) and (8) of PERA, the Hearing Examiner directed the District to place Ms. Berggren into the 9th grade classroom

to teach English. The District challenges the Examiner's determination and the finding of an unfair practice.

In City of Philadelphia v. Pennsylvania Labor Relations Board, 759 A.2d 40 (Pa. Cmwlth. 2000), the Commonwealth Court set forth the procedure for determining whether an employer committed an unfair practice by refusing to comply with a grievance arbitration award.

> [T]he Board must first determine whether an arbitration award exists, then, whether the appeal process has been exhausted, and, if so, whether the employer failed to comply with the award. The Board is not permitted to review the merits of the award and it is the party alleging non-compliance with a grievance arbitration award that has the burden of proof to show that the opposing party has failed to comply with the arbitrator's decision. Furthermore, in evaluating whether the [employer] complied with the Arbitration Award, the Board can not transcend the Award or reevaluate the … case…. [A]n arbitration award may not be collaterally challenged in an unfair labor practice enforcement proceeding.

Id., at 42 (*citations omitted)*.

The District's first argument on exceptions is that the arbitration award could not extend beyond the end of the 2005-2006 school year. In this regard the District asserts that because the arbitrator was addressing whether it had properly transferred Ms. Berggren in the 2005-2006 school year, the arbitrator could not have restored her to her prior position after that school year ended. However, the arbitrator simply found that when the District transferred Ms. Berggren to the 7th grade it did so in violation of the contract, and therefore the arbitrator directed the District to restore her 9th grade English teaching assignment. Indeed the "award" and remedy directed make no reference to a particular school year, and thus cannot be read to be limited to any one school year.

The District further relies on cases dealing with police internal affairs records to suggest that the Examiner erred in adding to the relief directed in the award by ordering it to implement the award in the 2006-2007 school year. City of Philadelphia v. Fraternal Order of Police, Lodge No. 5, 777 A.2d 1206 (Pa. Cmwlth. 2001); City of Philadelphia v. Pennsylvania Labor Relations Board, 772 A.2d 460 (Pa. Cmwlth. 2001). This award is unlike the City of Philadelphia cases where Commonwealth Court found that an arbitrator's make-whole relief and expungement of personnel records did not include internal affairs investigations, because although used for personnel decisions, the internal affairs division records were required to be retained by the city pursuant to a federal consent decree. Here, the arbitration award is clear that regardless of the school year, the District is to restore Ms. Berggren to teaching 9th grade English within two weeks -- no federal court order compels otherwise.

The type of relief here is indistinguishable from that in Crawford Central School District v. Pennsylvania Labor Relations Board, 618 A.2d 1202 (Pa. Cmwlth. 1992), where the Commonwealth Court upheld the Board's directive that the school district comply with an arbitration award for the 1991-1992 school year where the award itself addressed a violation of the contract with regard to the scheduling and payment for preparation periods in the 1989-90 school year. As is the case here, the violation in Crawford Central School District also occurred under an expired collective bargaining agreement. Accordingly, the District's exception that an arbitration award may not extend beyond the end of a school year is dismissed.

Second, the District argues that the grievance award was not final and binding until after the District's right to appeal to Commonwealth Court expired June 16, 2006, after the end of the 2005-2006 school year. Having an appeal as of right, however, does not equate to having an automatic supersedeas of the arbitration award. Indeed, the Pennsylvania Rules of Appellate Procedure were amended in 1987 to provide for the enforcement of arbitration awards that have been affirmed in common pleas court and pending on a subsequent appeal in Commonwealth Court. Pa.R.A.P. 1736(a)(2). "Thus, once an arbitration award has been affirmed by a common pleas court, the award becomes enforceable. The aggrieved employer has been stripped of its ability to delay compliance with the award by seeking further redress in subsequent appeals." Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 32 PPER ¶32102 (Final Order, 2001). Accordingly, the grievance arbitration award, directing the District to place Ms. Berggren back teaching 9th grade English, became immediately enforceable before the end of the 2005-2006 school year on May 17, 2006 when the Court of Common Pleas affirmed the

award. As such, by failing to comply with the provisions of an enforceable grievance arbitration award, the District violated Section 1201(a)(1) and (8) of PERA.

Finally, the District argues that a successor collective bargaining agreement entered into with the Association authorized the District's involuntary transfer of Ms. Berggren for the 2006-2007 school year. In raising this argument, the District relies on Pennsylvania Labor Relations Board v. Littlestown Education Association, 70 Pa. D & C 2d 300 (1974), which deals with what has become the Board's policy that bargaining violations under Section 1201(a)(5) of PERA arising out of negotiations for a collective bargaining agreement are rendered moot by the execution of a successor contract. Temple Association of University Professionals, Local 4531 v. Temple University, 25 PPER ¶25121 (Final Order, 1994). This case law however is inapplicable to claims for a failure to implement a grievance award under Section 1201(a)(8) of PERA.

The Board has recognized in prior cases that intervening changed circumstances may excuse a public employer from prospective compliance with an otherwise final and binding grievance arbitration award. Pennsylvania Labor Relations Board v. School District of Bristol Township, 12 PPER ¶12136 (Final Order, 1981). However, the circumstances justifying excusing compliance must not be a self-imposed contrivance to avoid the award. AFSCME, Council 13 v. State System of Higher Education (Edinboro University), 32 PPER ¶32080 (Final Order, 2001); AFSCME, District Council 88 v. Upper Dublin Township, 28 PPER ¶28047 (Final Order, 1997). Subsequent developments since the employer's initial action may permit the employer to apply the collective bargaining agreement to the intervening circumstances. City of Philadelphia v. Pennsylvania Labor Relations Board, 592 A.2d 823 (Pa. Cmwlth. 1991). However, having not prevailed in grievance arbitration, an employer's delay in implementing an arbitration award until after the effective date of new contract language that allegedly justifies its actions, does not constitute such an "intervening circumstance". The employer must first comply with the award.

The arbitrator found that because the staff realignment was done under the "Building Staff Realignment" clause of the contract, and Ms. Berggren objected to her transfer, the District was unable to realign any of the teachers. Instead, the arbitrator concluded that the District was required to post and fill all of the vacancies.

Rather than comply with the arbitrator's award, the District thereafter on July 24, 2006, proceeded with an involuntary transfer of Ms. Berggren to teaching 7th grade English, without actually returning Ms. Berggren to teaching 9th grade English. In doing so, the District is attempting nothing less than to apply the terms of a successor agreement to justify its course of conduct since 2005 in seeking to transfer Ms. Berggren from teaching 9th grade to 7th grade English. Dissatisfied with the results of arbitration for its first choice on how to realign the teachers, the District cannot simply avoid complying with a binding grievance arbitration award by asserting an amended provision of the contract without first complying with the award. Accordingly, the District must actually, not just on paper, return Ms. Berggren to teaching 9th grade English pursuant to the September 6, 2005 grievance arbitration award.

After a thorough review of the exceptions and all matters of record, the Board dismisses the District's exceptions, and sustains the finding of an unfair practice under Section 1201(a)(1) and (8) of PERA, and the Examiner's remedy.

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 exceptions filed by North Hills School District are hereby dismissed, and the January 23, 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 fifteenth day of May, 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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AFFIDAVIT OF COMPLIANCE

The North Hills School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (8) of PERA; that it has complied with the arbitration award and returned Linda Berggren to teaching ninth grade English; that it has posted a copy of the final order and proposed decision and order as directed; and that it has served a copy of this affidavit on the North Hills Education Association, PSEA/NEA 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