

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 :

PROPOSED DECISION AND ORDER

On February 27, 2006, the Corry Area Education Association, PSEA/NEA (Association), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Corry Area School District (District) violated sections 1201(a)(1), 1201(a)(5) and 1201(a)(8) of the Public Employee Relations Act (Act) by refusing to comply with the provisions of a grievance arbitration award involving Chad French. On April 11, 2006, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on June 6, 2006, if conciliation did not resolve the charge by then. The hearing examiner thereafter continued the hearing upon the representation of the parties that they would be filing stipulated facts. On February 5, 2007, the parties filed stipulated facts. On February 7, 2007, the Association filed a motion in limine and a motion to strike to exclude from the Board's consideration a stipulated fact regarding Mr. French's earnings in alternative employment. On April 13, 2007, the Association filed a brief. On April 19, 2007, the District filed a brief.

The hearing examiner, on the basis of the stipulations presented by the parties and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On January 10, 1972, the Board certified the Association as the exclusive representative of a bargaining unit that includes teachers employed by the District. (Case No. PERA-R-1428-W)

2. At the conclusion of the 2002-2003 school year, the District discharged Mr. French. (Stipulations 3, 5)

3. On June 18, 2004, the Association filed a grievance on behalf of Mr. French. (Stipulation 6)

4. On April 7, 2005, an arbitrator issued an award disposing of the grievance as follows:

"The grievance is sustained.

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.

The amounts payable to the Grievant under this Award shall bear interest in accordance with the provisions of the Pennsylvania Public School Code.

The April and June 2004 evaluations of the Grievant shall be removed from the District's records."

(Stipulation 7)

5. The District did not reinstate Mr. French at the beginning of the 2005-2006 school year. (Stipulations 13, 17)

6. On October 28, 2005, the District reinstated Mr. French. (Stipulation 23)

7. From the beginning of the 2005-2006 school year through October 28, 2005, Mr. French suffered no out-of-pocket financial losses as the result of not being reinstated by the District at the beginning of the 2005-2006 school year. (Stipulation 17)

DISCUSSION

The Association has charged that the District committed unfair practices by refusing to comply with the provisions of a grievance arbitration award involving Mr. French. The Association contends that the District violated sections 1201(a)(1) and 1201(a)(8) because the award directed it to reinstate Mr. French by the beginning of the 2005-2006 school year and because it did not reinstate Mr. French by the beginning of the 2005-2006 school year. The Association also contends that the District violated section 1201(a)(1) on an independent basis because it chilled employees in the exercise of their rights when it refused to comply with the provisions of the award. The Association further contends that the District violated section 1201(a)(5) because it repudiated a provision in the parties' collective bargaining agreement when it refused to comply with the provisions of the award. In addition, the Association contends that Mr. French is entitled to make whole relief for the earnings he lost and the health insurance premiums he paid as the result of not being reinstated by the District at the beginning of the 2005-2006 school year.

The District contends that the charge should be dismissed because it complied with the provisions of the award when it reinstated Mr. French on October 28, 2005. The District also contends that there is no basis for make whole relief because Mr. French suffered no out-of-pocket financial losses as the result of any unfair practices it may have committed by not reinstating him at the beginning of the 2005-2006 school year.

The motion in limine and the motion to strike

As noted above, the Association has filed a motion in limine and a motion to strike to exclude from the Board's consideration a stipulated fact regarding Mr. French's earnings in alternative employment. According to the Association, because the award only provides for an offset for his earnings in alternative employment if the District reinstated him by the beginning of the 2005-2006 school year and because the District did not reinstate him by the beginning of the 2005-2006 school year, his earnings in alternative employment are irrelevant. As support for its contention, the Association cites Minersville Area School District, 19 PPER ¶ 19197 (Final Order 1988), appeal dismissed as moot, 568 A.2d 979 (Pa. Cmwlth. 1989), where the Board found that an employer was only entitled to the offsets against back pay set forth in a grievance arbitration award. Regardless of what an award provides, however, an employee's earnings in alternative employment are relevant insofar as the relief to be ordered by the Board to remedy an employer's unfair practices is concerned. Delaware County, 27 PPER ¶ 27039 (Final Order 1996). Thus, Mr. French's earnings in alternative employment are relevant to the extent that the District may have committed unfair practices by refusing to comply with the provisions of the award. The Association's motions are, therefore, denied.

Nothing in Minersville Area School District, supra, compels a contrary result. In that case, the offsets at issue related to the question of whether or not the employer had complied with the provisions of an award. By contrast, in this case, the offsets at issue relate to the question of whether or not Mr. French is entitled to make whole relief as a remedy for any unfair practices the District may have committed by refusing to comply with the provisions of the award. Thus, Minersville Area School District, supra, is distinguishable on the facts, and the Association's reliance on that case is misplaced.

The alleged violations of sections 1201(a)(1) and 1201(a)(8)

An employer commits an unfair practice under 1201(a)(8) if it refuses to comply with the provisions of a grievance arbitration award. PLRB v. Commonwealth of

Pennsylvania, 478 Pa. 582, 387 A.2d 475 (1978). A violation of section 1201(a)(8) also constitutes a violation of section 1201(a)(1) on a derivative basis. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). Thus, if the District refused to comply with the provisions of the award as charged, it committed unfair practices under sections 1201(a)(1) and 1201(a)(8).

The award provides that the District was to reinstate Mr. French "no later than the beginning of the 2005-2006 academic term" (finding of fact 4). The District, however, did not reinstate Mr. French by the beginning of the 2005-2006 school year (finding of fact 5); rather, the District only reinstated him on October 28, 2005 (finding of fact 6). Thus, it is apparent that the District refused to comply with the provisions of the award and thereby committed unfair practices under sections 1201(a)(1) and 1201(a)(8).

The District contends that it complied with the provisions of the award by reinstating Mr. French on October 28, 2005. In the District's view, it was under no obligation to reinstate Mr. French at the beginning of the 2005-2006 school year because his teaching certificate was due to expire on September 30, 2005 (stipulation 8) and because it was "educationally unsound and certainly disruptive to our students" to reinstate him at the beginning of the 2005-2006 school year if he might have to be replaced shortly thereafter (stipulation 10). As support for its contention, the District relies on City of Philadelphia, 38 PPER 26 (Proposed Decision and Order 2007), where a hearing examiner wrote as follows:

"It has long been established that the failure to comply with the terms of a grievance arbitration award occurs only after exhaustion of appellate rights and the expiration of a reasonable or expressly provided time period for compliance. Commonwealth of Pennsylvania, 8 PPER ¶ 233 (Nisi Decision and Order, 1977). To determine whether a particular lapse of time is a reasonable period for compliance with an arbitration award, the Board will consider such factors as: 1) The nature and complexity of the compliance required under the award, 2) The length of time before compliance occurred, 3) The employer's ability to comply with the award including legitimate obstacles to compliance, 4) Steps taken by the employer toward compliance and 5) The employer's explanation or lack thereof for the delay. City of Philadelphia, 19 PPER ¶ 19069 at 185 (Final Order, 1988); Commonwealth of Pennsylvania (Department of Community Affairs), 19 PPER ¶ 19165 (Proposed Decision and Order, 1998); Commonwealth of Pennsylvania (Office of Administration), 17 PPER ¶ 17151 (Proposed Decision and Order, 1986)."

38 PPER at 72. According to the District, "factors two and five of the Board's criteria all militate strongly in favor of a conclusion that the District's brief delay in reinstating French was reasonable under the circumstances" (brief at 5).

As noted above, however, the award expressly provides that Mr. French was to be reinstated "no later than the beginning of the 2005-2006 academic term." Thus, in order to be in compliance with the award, the District had to reinstate him by then. See McKean County, 16 PPER ¶ 16139 (Proposed Decision and Order 1985) (unfair practices found where the award provided that an employe was to be reinstated "upon receipt of the award" and the employer did not reinstate the employe until eight days after it received the award).

Nothing in City of Philadelphia, supra, or the cases cited therein compels a contrary result. Unlike the award in this case, the awards in those cases did not specify a particular date for compliance. Thus, those cases are distinguishable on the facts, and the District's reliance on City of Philadelphia, supra, is misplaced.

The alleged violation of section 1201(a)(1) on an independent basis

A close review of the charge does not show that the Association alleged that the District committed an independent violation of section 1201(a)(1). Thus, there is no basis for finding the District in violation of section 1201(a)(1) on an independent basis. See Kennett Consolidated School District, 37 PPER 89 (Final Order 2006) (no independent violation of section 1201(a)(1) may be found where the charging party did not allege as much in its specification of charges). Moreover, given that the District

violated section 1201(a)(1) on a derivative basis by refusing to comply with the provisions of the award, there is no need to find that it also violated section 1201(a)(1) on an independent basis. See SSHE, 32 PPER ¶ 32138 (Final Order 2001)(a finding of a derivative violation of section 1201(a)(1) obviates the need to address whether or not an independent violation of section 1201(a)(1) should be found as well).

The alleged violation of section 1201(a)(5)

A close review of the charge does not show that the Association alleged that the District committed an unfair practice by repudiating the parties' collective bargaining agreement. Thus, there is no basis for finding the District in violation of 1201(a)(5). Moreover, none of the stipulated facts sets forth the contents of the parties' collective bargaining agreement. Thus, the record does not show that the District repudiated the parties' collective bargaining agreement in any event.

The remedy

The Board has the power to issue a make whole order to remedy an employer's unfair practices. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). An employe, however, is not entitled to a windfall. Commonwealth of Pennsylvania, PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Thus, if an employe's earnings in alternative employment are greater than the earnings lost as the result of the employer's unfair practices, the employe is not entitled to back pay. Delaware County, supra. Similarly, 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. Philadelphia Housing Authority, 38 PPER 14 (Proposed Decision and Order 2007). Otherwise, the employe would be made more than whole for the employer's unfair practices.

The Association contends that Mr. French is entitled to make whole relief for the earnings he lost and the health insurance premiums he paid as the result of not being reinstated by the District at the beginning of the 2005-2006 school year. The Association points out that in McKean County, supra, a hearing examiner ordered make whole relief for the employe who was not reinstated upon the employer's receipt of the award. The record shows, however, that Mr. French suffered no out-of-pocket financial losses as the result of not being reinstated by the District at the beginning of the 2005-2006 school year (finding of fact 7). Accordingly, no make whole relief will be ordered.

Nothing in McKean County, supra, compels a contrary result. Unlike the record in this case, the record in that case did not show the employe had any earnings from alternative employment after the employer committed unfair practices. Thus, McKean County, supra, is distinguishable on the facts, and the Association's reliance on that case is misplaced.

CONCLUSIONS

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 under section 301(1) of the Act.
2. The Association is an employe organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. The District has committed unfair practices under sections 1201(a)(1) and 1201(a)(8) of the Act.
5. The District has not committed an unfair practice under section 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 the District shall:

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

2. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.

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

(a) 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

(e) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of 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 ninth day of May 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner