

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE SYSTEM OF :
HIGHER EDUCATION :
 :
v. : Case No. PERA-C-05-377-E
 :
ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :

FINAL ORDER

The Pennsylvania State System of Higher Education (PASSHE) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on May 22, 2008, challenging a Proposed Decision and Order (PDO) issued on May 2, 2008. In the PDO, the Board Hearing Examiner dismissed PASSHE's Charge of Unfair Practices alleging that the Association of Pennsylvania State College and University Faculties (APSCUF) violated Section 1201(b)(3) of the Public Employe Relations Act (PERA) by refusing to comply with the terms of a grievance settlement and demanding arbitration over the subject matter of the grievance. APSCUF filed a timely brief in response to the exceptions on June 17, 2008. The relevant facts, as found by the Hearing Examiner, are summarized as follows.

On September 21, 2004, APSCUF entered into an agreement with PASSHE, as follows:

Local Agreement APSCUF/West Chester University

Tuition Fee waiver Regular Part-Time Faculty August 2004

This agreement concerns the payment of tuition fee waiver to the following individuals who are on a regular part-time contract.

Ed Kubachka

This settlement applies to those regular part-time faculty members who are currently in receipt of tuition waivers. This waiver will continue until the end of the academic year 2004/2005 and will apply to the semesters in which the faculty member fulfills the criteria for benefits eligibility. Faculty with a regular part-time contract who have not received tuition waivers and those who have received the waiver in the past but have not done so in the 2003/2004 academic year are excluded.

This settlement recognizes that this benefit was granted erroneously to regular part-time faculty. It does not apply to members of the bargaining unit who are not named in this document.

This settlement is in accordance with the guidance provided in the Commonwealth document dated August 1983.

Subsequently, on September 27, 2004, APSCUF submitted a grievance alleging that "the university violated the contract when they modified the advertised benefits, including a tuition waiver, of Mr. Kubachka's contract after he had signed the permanent contract and without his knowledge or agreement." By letter dated May 6, 2005, APSCUF advised PASSHE that "APSCUF wishes to arbitrate the above-referenced grievance in accordance with the Collective Bargaining Agreement between the State System/Universities and APSCUF."

Upon review of the evidence, the Hearing Examiner dismissed PASSHE's claim that APSCUF violated Section 1201(b)(3) of PERA. Finding no clear, express and unequivocal waiver of the union's right to seek arbitration, the Hearing Examiner concluded that APSCUF did not violate its statutory bargaining obligation by demanding arbitration over the eligibility of a regular part-time faculty member for a tuition waiver.

PASSHE argues on exceptions that the Hearing Examiner should have followed the Board's holding in Penn Hills Municipality, 34 PPER 135 (Final Order 2003), aff'd sub

nom. Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills, 876 A.2d 494 (Pa. Cmwlth. 2005), to find that APSCUF was precluded from seeking arbitration of Professor Kubachka's grievance. PASSHE also argues that the Hearing Examiner erred in relying on AFSCME, District Council 47, 13 PPER ¶ 13248 (Final Order, 1982), to find that the issue of whether the grievance is arbitrable is reserved for an arbitrator, after noting that the holding in that case had been overruled in part by Allegheny Intermediate Union #3, 36 PPER 17 (Final Order, 2005).

However, the Hearing Examiner's analysis of the facts of this case is in accord with the Board's holding in Penn Hills. In Penn Hills the Board recognized a very limited exception to the general principle that a public employer violates its statutory duty to bargain in good faith by refusing to proceed with the union's demand for arbitration. AFSCME, District Council 47, *supra*; PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982). Under Penn Hills, an employer may only be excused from proceeding to arbitration where the employer, the union, and the employee enter into a last chance settlement of the employee's discharge, and the union and the employee intentionally, clearly, expressly, and unequivocally waive their respective rights to file a grievance over any violation of the last chance agreement. See also, Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983).¹ Here there is no clear, intentional, express and unequivocal waiver of the right to grieve. Therefore, the issue of whether the terms of the parties' settlement bars APSCUF from pursuing arbitration is not a matter to be decided by the Board, but rather a matter of interpretation for an arbitrator.

PASSHE also argues that the Hearing Examiner erred in failing to find that the September 21, 2004, grievance settlement agreement involved only Professor Kubachka, who was aware of the pending grievance. However, these proposed facts are irrelevant to the determination that there has not been an unfair practice in this case. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975) (a hearing examiner does not need to render findings on every alleged fact, but only those relevant for the decision). In accordance with Penn Hills, *supra* and Allegheny Intermediate Union #3, *supra*, the relevant and controlling fact here is the absence of any clear, express, and unequivocal waiver of the right to pursue the contractual grievance and arbitration process.

As found by the Hearing Examiner, the settlement agreement here is silent on any "waiver" of the contractual grievance and arbitration process. Thus, as correctly determined by the Hearing Examiner, APSCUF did not violate its statutory bargaining obligation under Section 1201(b)(3) of PERA by pursuing a contractual and statutory right that it did not clearly, expressly and unequivocally waive. Allegheny Intermediate Union #3, *supra*; AFSCME, District Council 47, *supra*. Accordingly, after a thorough review of the exceptions and all matters of record, the Board shall dismiss PASSHE's exceptions and make the PDO final.

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 Pennsylvania State System of Higher Education are hereby dismissed, and the May 2, 2008 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 July, 2008. 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.

¹ Allegheny Intermediate Union #3 is consistent with the holding in Penn Hills. The Board recognized in Allegheny Intermediate Union #3, that the first grievance settlement did not waive the contractual rights for the second set of grievants, and thus, the employer violated its statutory obligation to arbitrate the second grievance over the alleged same subject matter.