COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MCKEESPORT EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-07-379-W
MCKEESPORT AREA SCHOOL DISTRICT	:	

FINAL ORDER

McKeesport Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on March 24, 2008, challenging a March 4, 2008 Proposed Decision and Order (PDO). In the PDO, the Board Hearing Examiner concluded that the District violated Section 1201(a)(1) and (8) of the Public Employe Relations Act (PERA) by failing to comply with a grievance arbitration award. On April 10, 2008, the McKeesport Educational Support Personnel Association, PSEA/NEA (Association) timely filed a response to exceptions and supporting brief. The Hearing Examiner's Findings of Fact, as amended and adopted herein,[1] are summarized as follows.

In January 2007, the District discharged Vincent Little from his position as a custodian on the first shift (6:00 a.m. to 2:30 p.m.) at George Washington Elementary School. The Association filed a grievance alleging that the District violated the parties' collective bargaining agreement by terminating Mr. Little without just cause. The grievance proceeded to arbitration and on July 2, 2007, an arbitrator issued an award sustaining the grievance:

> Inasmuch as the School District has not sustained it's (sic) burden of proving all of the allegations which it asserts cumulatively constituted just cause for termination I find that just cause does not exist for Grievant's termination. However, while I feel I am compelled to make such a ruling I am concerned at the same time that Grievant is still not fully accepting of the limited nature of his employment as a custodian and that he is to have absolutely no physical interaction with any of the students attending the school to which he is assigned. Grievant's testimony at the arbitration hearing did little to persuade me that he can distinguish between his role as a Minister and a resident of the community in which the Elementary School is located –- and his role as a custodian.
>
> Therefore I am returning Grievant to his employment on a 'last chance' basis. Any future incident in which it is established that Grievant had inappropriate physical contact with students such as were the subject of this Award shall subject him to immediate discharge.

Award

> The grievance is sustained in part. Grievant shall be immediately reinstated to his former position but without the payment of any lost wages or benefits. Said reinstatement shall be subject to the 'last chance' provisions indicated above.

By letter dated July 10, 2007, the District informed Mr. Little that "pursuant to the recent arbitration, you will be reinstated to your former position as custodian at Geo. Washington Elementary School." However, the District instead placed Mr. Little in a custodial position on the second shift (3:30 p.m. to midnight) at South Hall.

Based on the facts stipulated to by the parties, the Hearing Examiner determined that the District violated Section 1201(a)(1) and (8) of PERA. The Hearing Examiner concluded that by placing Mr. Little on the second shift at South Hall, the District did not reinstate him to his "former position" as first shift custodian at George Washington Elementary School, as was directed by the grievance arbitration award.

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[1] Finding of Fact 5 is amended as follows to correct a typographical error:

5. When the District reinstated Mr. Little, it placed him in a custodial position on the second shift from 3:30 p.m. to midnight at South Hall. (N.T. 6-8; Attachment C to the charge).

There is no dispute that the July 2, 2007 grievance arbitration award exists, or that the District did not appeal the award to the court of common pleas. Thus, the only issue is whether the District has complied with the provisions of that award. Teamsters, Local 401 v. Hazle Township, 38 PPER 157 (Final Order, 2007). In ascertaining whether there has been compliance with the award, the Board appropriately performs an interpretive role. East Hempfield Township Police Association v. East Hempfield Township, 38 PPER 138 (Final Order, 2007); AFSCME, Local 1971 v. City of Philadelphia, Officer of Housing and Community Development, 24 PPER ¶24052 (Final Order, 1993) (citing State System of Higher Education v. PLRB, 528 A.2d 278 (Pa. Cmwlth. 1987)); AFSCME, District Council 85 v. McKean County, 16 PPER ¶16139 (Proposed Decision and Order, 1985). In interpreting the award for compliance, the Board does not consider the merits of the grievance, but reviews the award to ascertain, if at all possible, the arbitrator's intended relief. North Hills Education Association v. North Hills School District, 38 PPER 78 (Final Order, 2007).

The District argues on exceptions that the Hearing Examiner erred in interpreting the arbitrator's use of the term "former position" to require that the District reinstate Mr. Little to the first shift at George Washington Elementary School. The District further contests the Hearing Examiner's reliance on the arbitrator's reinstatement of Mr. Little on a "last chance" basis, as evidence of intent to reinstate Mr. Little to the first shift at George Washington Elementary School.[2]

In determining the intended meaning of "former position", the Hearing Examiner looked to the common and approved usage of the word "former" as defined in the Oxford American Dictionary and Thesaurus and Webster's Encyclopedic Unabridged Dictionary. Based on the common, accepted definition of "former", the Hearing Examiner determined that the position in which Mr. Little "had been previously" was the position of first shift custodian at George Washington Elementary School. The Hearing Examiner found this definition alone to be sufficient support for interpreting "former position" in the arbitration award to mean the position of first shift custodian at George Washington Elementary School. However, the Hearing Examiner found further support for this interpretation by noting that the arbitrator expressly referenced the elementary school and Mr. Little's position there as custodian in reinstating Mr. Little to his former position on a "last chance basis".

Upon review of the record, we agree that the common and approved usage of the term "former" warrants interpreting the award to require reinstatement of Mr. Little to his former position as first shift custodian at George Washington Elementary School. Moreover, the Hearing Examiner's interpretation of "former position", based on the common and approved usage, is supported by an additional source specific to labor law. The National Labor Relations Board (NLRB) utilizes a Compliance Manual which defines the intended remedy for terms used in its orders. With regard to "reinstatement to former position", Section 10530.2 of the Compliance Manual provides that "[w]hen the former position is well defined and still exists at the time reinstatement is offered, the [employer] should offer the employee reinstatement to that position." The fact that another employe moved into that position and may need to be displaced does not obviate an employer's duty to comply with the NLRB order directing an employe's reinstatement to his or her "former position". The Compliance Manual further provides in Section 10530.3 that reinstatement to an equivalent position is only acceptable where the former position no longer exists. This definition of "former position", as used in the context of labor law, further supports the Hearing Examiner's interpretation of the arbitration award as requiring Mr. Little's reinstatement to the first shift at George Washington Elementary School.

In addition, we agree that the arbitrator's "last chance" arrangement further supports this meaning. The intended relief, as found by the Hearing Examiner, is supported by the arbitrator's reference to the "elementary school" in his "last chance" language, which evidences the arbitrator's assumption that Mr. Little would return to the elementary school from which he was terminated. Also, in its July 10, 2007 letter, the District itself recognized Mr. Little's "former position as custodian at Geo. Washington

[2] In response, the Association argues that by reinstating Mr. Little to his former position without the payment of any lost wages or benefits, the arbitrator did not intend for Mr. Little to lose his accrued seniority benefit of having successfully bid on a vacancy to obtain his position as first shift custodian at George Washington Elementary School.

Elementary School[,]" but thereafter failed to reinstate Mr. Little to that position. There is ample basis to find the arbitrator's intended meaning of "former position" and, accordingly, the Hearing Examiner did not err in finding that the arbitration award required the District to reinstate Mr. Little to his position as first shift custodian at George Washington Elementary School.

The District also argues that requiring the District to reinstate Mr. Little as the first shift custodian at George Washington Elementary School infringes on its contractual and inherent managerial right to assign and transfer employes. The District claims that, so long as it reinstated Mr. Little as a custodian, it has the management right to assign Mr. Little to the second shift at South Hall. The District argues that under City of Philadelphia v. PLRB, 759 A.2d 40 (Pa. Cmwlth. 2000) and Hockaday v. Civil Service Commission, 304 A.2d 708 (Pa. Cmwlth. 1973), a directive to reinstate an employe to his or her "former position", does not require that the employe receive the same assignment.

However, we agree with the Hearing Examiner that Hockaway is inapplicable. Hockaway is a Philadelphia Civil Service case that relied on the Philadelphia Civil Service Regulation that equated "position" to a "class" of jobs. The court found that under the applicable Civil Service Regulations, the City's reinstatement of Mr. Hockaway to the same "class" of job was in compliance with the Commission's directive to restore him to his former position as defined in the regulations. No such regulation similarly defining the term "position" was presented in this case, or is applicable to the grievance arbitration award here.

In City of Philadelphia, supra, the Board found that the arbitration award directing the employer to reinstate the police officers to their "former positions" did not require that they be returned to their prior assignments in highway patrol or a particular police district. In that case, the City offered unrefuted evidence of a binding past practice of reinstating police officers pursuant to grievance arbitration awards to different assignments based on operational needs at the time of their reinstatement. See FOP, Lodge No. 5 v. City of Philadelphia, 30 PPER ¶30105 (Proposed Decision and Order, 1999). The District here has presented no evidence to support a similar practice as a defense to Mr. Little's entitlement to reinstatement to his former position under the award.

In its brief in support of exceptions, the District contends that the Commonwealth Court's decision in City of Philadelphia stands for the proposition that an arbitration award requiring reinstatement to a "former position" does not require an employe to be reinstated to the same assignment. However, the District does not address the City of Philadelphia's past practice of reinstatement to different assignments that the Board relied upon in that case. While the Commonwealth Court apparently agreed with the Board's resolution of that issue, the question of whether the language of the award required the City to reinstate the police officers to their exact previous assignments was not before the Commonwealth Court. The union in that case did not appeal the Board's Final Order in which the Board ruled in the City's favor based upon the binding past practice that is unique to that case.

Moreover, in the Final Order in City of Philadelphia, the Board rejected the claim, repeated by the District here, that a contractual management rights clause giving the employer the right to transfer employes allows the employer to unilaterally determine the position to which the employe will be reinstated under an arbitrator's award. In City of Philadelphia, the Board expressly noted:

> The City also contends that the examiner erred in applying the transfer provision of the parties' collective bargaining agreement to this situation, which involves reinstatement after dismissal rather than a transfer from one unit to another during the course of employment. The hearing examiner referred to the transfer provision, however, in order to acknowledge the City's rights under the parties' agreement and to point out that the City could not rely on that provision to circumvent the mandate of the award.

City of Philadelphia, 30 PPER ¶30204 at 444 (Final Order 1999). Similarly here, in reinstating Mr. Little pursuant to the arbitration award, the District cannot rely on the contractual management rights clause to avoid compliance with the arbitrator's directive that Mr. Little be reinstated to his former position.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in determining that to comply with the arbitration award, the District was required to reinstate Mr. Little to his former position as the first shift custodian at George Washington Elementary School. The Hearing Examiner properly concluded that the District violated Section 1201(a)(1) and (8) of PERA by placing Mr. Little on the second shift at South Hall and not reinstating him to his former position, as directed by the arbitration award. Accordingly, the District's exceptions to the PDO shall be dismissed, and the PDO made absolute and final.

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 the exceptions filed by the McKeesport Area School District are hereby dismissed, and the March 4, 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 twentieth day of May, 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.

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AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (8) of the Act; that it has complied with the provisions of the award, by reinstating Mr. Little to his former position as first shift custodian at the George Washington Elementary School; 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.

_____
Signature of Notary Public