

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 :

PROPOSED DECISION AND ORDER

On August 29, 2005, the Pennsylvania State System of Higher Education (PASSHE) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Association of Pennsylvania State College and University Faculties (APSCUF) had violated section 1201(b)(3) of the Public Employe Relations Act (PERA) by "refus[ing] to comply with the terms of a local agreement entered into by representatives of West Chester University management and West Chester APSCUF" regarding "the eligibility of regular part-time faculty members for tuition waiver." On October 6, 2005, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on December 12, 2005. After a series of continuances, the hearing was held on January 24, 2008. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On April 11, 2008, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On November 12, 1971, the Board certified APSCUF as the exclusive representative of a bargaining unit that includes part-time teaching faculty employed by PASSHE at West Chester University. (Case No. PERA-R-775-C)

2. On September 21, 2004, a representative of APSCUF (Linda Myrsiades) entered into an agreement with a representative of PASSHE (Madeleine Wing Adler) 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."

3. On September 27, 2004, a representative of APSCUF (Clifford Johnston) submitted a grievance (local # 04-015WC, state # 2004-009WC) alleging as follows:

"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."

(Exhibits 1 and 11)

4. By letter dated May 6, 2005, a representative of APSCUF (C. J. Elder, Esquire) wrote to a representative of PASSHE (Dr. Michael K. Becker) as follows:

"Re: Professor Edward Kubachka - Tuition Waiver
APSCUF #2004-009WC
PASSHE # 2004-WC203-F

Dear Dr. Becker:

This is to advise you that APSCUF wishes to arbitrate the above-referenced grievance in accordance with the Collective Bargaining Agreement between the State System/Universities and APSCUF."

(Exhibit 1)

DISCUSSION

PASSHE has charged that APSCUF committed an unfair practice under section 1201(b)(3) by "refus[ing] to comply with the terms of a local agreement entered into by representatives of West Chester University management and West Chester APSCUF" regarding "the eligibility of regular part-time faculty members for tuition waiver." According to PASSHE, APSCUF breached the agreement when it sought to arbitrate a grievance alleging that a part-time faculty member (Professor Kubachka) was eligible for tuition waiver.

APSCUF contends that the charge should be dismissed because it had the statutory right to seek arbitration of the grievance no matter what the parties agreed to in the settlement. In APSCUF's view, only an arbitrator may find that the settlement precluded it from seeking arbitration of the grievance. APSCUF alternatively contends that the charge should be dismissed because the settlement did not resolve a grievance and was in violation of the parties' collective bargaining agreement. According to APSCUF, the settlement was not binding under the circumstances and therefore did not preclude it from seeking arbitration of the grievance.

PASSHE cites City of Scranton, 27 PPER ¶ 27034 (Proposed Decision and Order 1995), for the proposition that "[a] refusal to implement a grievance settlement constitutes an unfair practice under the [PERA]" (brief at 6). In that case, a hearing examiner, citing Moshannon Valley School District v. PLRB, 597 A.2d 229 (Pa. Cmwlth. 1991), for the proposition that an employer is bound by the actions of its representatives in settling grievances, found that an employer violated the PERA by reneging on a grievance settlement reached by one of its representatives.

City of Scranton and Moshannon Valley School District are, however, inapposite. As set forth in AFSCME, District Council 47, 13 PPER ¶ 13248 (Final Order 1982), a different analysis applies when an employe organization's statutory right to file a grievance is implicated as here.

In AFSCME, District Council 47, the Board, citing City of Duquesne v. Duquesne Education Association, 475 Pa. 279, 380 A.2d 353 (1977), for the proposition that an arbitrator is to resolve procedural matters involving the arbitrability of a grievance, dismissed a charge alleging that an employe organization committed an unfair practice under section 1201(b)(3) of the PERA by refusing to implement a grievance settlement when it sought to arbitrate a grievance in apparent violation of the settlement agreement. As the Board explained,

"[w]hether the settlement agreement is binding despite [the employe organization's] attempted repudiation appears to the Board to be reserved for an arbitrator's resolution after examination of the underlying facts and relevant contractual provisions."

13 PPER at 473 (footnote omitted). See also Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), aff'd without opinion, 544 Pa. 199, 675 A.2d 1211 (1996) (only an arbitrator may determine the arbitrability of a grievance); PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982) (same).

PASSHE's charge is substantially similar to the charge the Board dismissed in AFSCME, District Council 47. It follows, then, that PASSHE's charge also must be dismissed if AFSCME, District Council 47, is still good law. Although, as noted below, it appears that the Board sub silentio reversed AFSCME, District Council 47, in part in Allegheny Intermediate Unit #3, 36 PPER 17 (Final Order 2005), the analysis set forth in AFSCME, District Council 47, still applies on the facts of record here. Accordingly, PASSHE's charge also must be dismissed.

In Allegheny Intermediate Unit #3, the Board, in deciding whether or not an employe organization had the statutory right to arbitrate a grievance, found that it had jurisdiction to review the terms of a settlement agreement for a limited purpose -- to determine if the employe organization had waived its statutory right to arbitrate the grievance when it entered into the settlement agreement. See also 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), where the Board similarly reviewed the terms of a last chance agreement in deciding whether or not an employe organization had waived its statutory right to arbitrate a grievance when it entered into the last chance agreement. Thus, to the extent that AFSCME, District Council 47, provides that only an arbitrator may review a settlement agreement to determine if an employe organization had waived its statutory right to arbitrate a grievance when it entered into the settlement agreement, it no longer is good law.

Notably, however, a close review of the settlement does not show that APSCUF waived its statutory right to arbitrate the grievance when it entered into the settlement. Indeed, the settlement is silent in that regard. Thus, as in Allegheny Intermediate Unit #3, supra, where the Board found that the employe organization had the statutory right to arbitrate the grievance because the settlement agreement did not contain a waiver of its right in that regard, APSCUF had the statutory right to seek arbitration of the instant grievance as well. Compare Penn Hills Municipality, supra, where the Board found that the employe organization had no statutory right to arbitrate the grievance because the last chance agreement contained a waiver of its right in that regard. Under the circumstances, the same analysis as in AFSCME, District Council 47, applies. PASSHE's charge must be dismissed accordingly.

Given that under Allegheny Intermediate Unit #3 the Board has jurisdiction to review the settlement to determine if APSCUF waived its statutory right to arbitrate the grievance when it entered into the settlement, APSCUF's contention that the charge should be dismissed because it had the statutory right to arbitrate the grievance no matter what the parties agreed to in the settlement is without merit. APSCUF's contention that the charge also should be dismissed because the settlement was not binding in that it did not resolve a grievance and was in violation of the parties' collective bargaining agreement is without merit as well. Under both Allegheny Intermediate Unit #3 and AFSCME, District Council 47, the Board has no jurisdiction to decide if the settlement was not binding because it did not resolve a grievance and was in violation of the parties' collective bargaining agreement. PASSHE's charge nevertheless must be dismissed under the analysis set forth above.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. PASSHE is a public employer under section 301(1) of the PERA.
2. APSCUF is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. APSCUF has not committed an unfair practice under section 1201(b)(3) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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 second day of May 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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May 2, 2008

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ASSOCIATION OF PENNSYLVANIA STATE COLLEGE AND UNIVERSITY FACULTIES
Case No. PERA-C-05-377-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Thomas M. Krapsho
Jeffrey Cooper, Esquire
APSCUF