COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

PENNS MANOR AREA SCHOOL DISTRICT

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v. : Case No. PERA-C-07-481-W

:

PENNS MANOR EDUCATIONAL SUPPORT PERSONNEL

ASSOCIATION¹

PROPOSED DECISION AND ORDER

On November 7, 2007, the Penns Manor Area School District (District) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Penns Manor Educational Support Personnel Association (Association)² violated section 1201(b)(3) of the Public Employe Relations Act (PERA) by "refus[ing] to take action" on a fact finder's recommendations under Act 88 of 1992 (Act 88).³ On December 5, 2007, the Secretary of the Board issued a complaint assigning the charge to conciliation. On January 8, 2008, the District asked the Secretary to schedule a hearing. The Board thereafter assigned the charge to the hearing examiner. On February 14, 2008, the hearing examiner scheduled a hearing for March 31, 2008. The hearing was held as scheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On April 23, 2008, each party filed a brief.

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 February 20, 1973, the Board certified the Association as the exclusive representative of a bargaining unit that includes employes of the District. (Case No. PERA-R-2901-W)
- 2. On April 26, 2007, the Board amended the certification of the Association to reflect that the Association has changed its name to the Penns Manor Education Support Professionals, PSEA/NEA. (Case No. PERA-U-07-174-W)
- 3. On August 21, 2007, the Board, upon notification from the Bureau of Mediation that the parties had not reached a collective bargaining agreement, issued an order appointing Christopher E. Miles as a fact finder under Act 88. The order included the following language:

"NOT MORE THAN TEN DAYS AFTER THE FINDINGS AND RECOMMENDATIONS OF THE FACT FINDER HAVE BEEN SENT, THE PARTIES SHALL NOTIFY THE BOARD AND EACH OTHER WHETHER OR NOT THEY ACCEPT THE RECOMMENDATIONS OF THE FACT FINDER."

(Association Exhibit 2)

¹ The caption appears as amended by the hearing examiner. The previous caption erroneously identified the named respondent as the Penns Manor Educational Support Personnel Association ESPA/PSEA/NEA.

² As set forth in finding of fact 2, <u>infra</u>, the Association has changed its name to the Penns Manor Education Support Professionals, PSEA/NEA. Although the Association has referred to itself by it new name, the District has not. The Association and the Penns Manor Education Support Professionals, PSEA/NEA, are, however, one and the same.

³ The District also alleged that the Association violated the PERA by not timely informing the Board and the District whether or not it accepted the recommendations of the fact finder, but the District withdrew that portion of the charge at the hearing (N.T. 11). That portion of the charge is, therefore, no longer before the Board. See Palmyra Area School District, 26 PPER ¶ 26087 (Final Order 1995)(where a portion of a charge has been withdrawn, the Board need only address the remaining portions of the charge).

- 4. When the Secretary served a copy of the order on the Association, she enclosed an explanation of the fact-finding process, which included the following: "Failure of a party to respond will be treated as a rejection." (N.T. 22; Association Exhibit 2)
- 5. On October 1, 2007, the fact finder sent a report with his recommendations to the parties. In his cover letter, he wrote that "[a]cceptance of the report must constitute approval of the report in its entirety and on an unqualified basis. The options are simply 'accept' or 'reject.'" (N.T. 25; District Exhibits 1-2)
- 6. On October 10, 2007, the Association met to review the recommendations with its membership. By votes of its membership, the Association decided not to take any action on the recommendations at that time, not to reconvene to reconsider them later and not to accept them even if the District did. (N.T. 34-36, 39-40, 45-47; Association Exhibit 13)
- 7. On October 12, 2007, the Association notified the Board and the District by facsimile as follows:

"Please be advised that the Penns Manor Education Support Professional Association met on October 10, 2007 to review Mr. Christopher E. Miles' fact-finding report. The Association took no action regarding the report."

(District Exhibit 4)

8. On October 12, 2007, the Secretary posted the fact finder's report on the Board's website as follows:

"Section 1122-A(c) of Act 88 Of 1992 provides for publication of the findings of fact and recommendations of appointed Fact Finders if one or both of the parties have rejected the report within ten (10) days of its issuance. This has not been construed as a requirement for legal advertising.

Fact Finder Christopher E. Miles, Esquire has issued a report in the matter of the employes of **Penns Manor Area School District**.

The Pennsylvania Labor Relations Board has received official notice that the report has been accepted by the **Penns Manor Area School District** and the **Penns Manor Educational Support Personnel Association** has acted to neither accept nor reject the report. Failure to accept or reject is deemed a rejection.

Section 1122-A(d) of Act 88 of 1992 provides that not less than five (5) days nor more than (10) days after the publication of the findings of fact and recommendations, the parties shall again inform the Board and each other whether they accept the findings of the Fact Finder.

<u>Click here for the complete text of the Fact Finder's report.</u> If you are unable to access the report on-line, you may call (717) 783-6018 to have a copy faxed or mailed to you.

Any questions relating to the fact finding procedure may be directed to the Secretary of the Pennsylvania Labor relations Board, 418 Labor and Industry Building, Seventh and Forster Streets, Harrisburg, Pennsylvania 17120, Telephone: (717) 783-6018."

(District Exhibit 5)

- 9. The Association did not reconsider the recommendations or submit them to its membership for a vote. $(N.T.\ 39)$
- 10. On October 22, 2007, the Association notified the Board and the District by facsimile as follows:

"Please be advised that the Penns Manor Education Support Professional Association has not changed its position concerning Mr. Christopher E. Miles' fact-finding report." (N.T. 38; District Exhibit 7)

DISCUSSION

The District has charged that the Association committed unfair practices under section 1201(b)(3) by "refus[ing] to take action" on a fact finder's recommendations under Act 88. The District first contends that the Association committed an unfair practice because it did not meet its obligation under section 1122-A(c) of Act 88 to notify the Board and the District whether or not it accepted the recommendations, having indicated instead that it "took no action regarding the report." The District next contends that the Association committed an unfair practice because it did not submit the recommendations to its membership for a vote, having decided to take no action instead, and thus did not meet its obligation to bargain in good faith. The District lastly contends that the Association committed an unfair practice because it did not reconsider the recommendations after they were publicized by the Secretary, having decided beforehand not to reconsider them, again without submitting them to its membership for a vote, and thus did not meet its obligation to bargain in good faith. By way of remedy, the District would have the Board direct the Association to submit the recommendations to its membership for a vote.

The Association would have the Board dismiss the charge for lack of proof. In the Association's view, under Board case law and the Secretary's explanation of the factfinding process, taking no action on a fact finder's recommendations is the same as not accepting them, so it met its obligation to notify the Board and the District whether or not it accepted the recommendations when it indicated that it "took no action regarding the report." Reiterating its view that taking no action on a fact finder's recommendations is the same as not accepting them, the Association contends that it was under no obligation to take action on the recommendations. The Association further contends that it was under no obligation to submit the recommendations to its membership for a vote. According to the Association, its obligation after the Secretary publicized the recommendations was not to meet to reconsider them or to submit them to its membership for a vote but to notify the Board and the District again whether or not it accepted them, which it did by indicating that it "has not changed its position concerning Mr. Christopher E. Miles' fact-finding report." Reiterating its contention that it was under no obligation to submit the recommendations to its membership for a vote, the Association posits that an order directing it to submit them to its membership for a vote would be inappropriate to remedy any unfair practice it may have committed.

The obligations of a party following the issuance of a fact finder's recommendations are set forth in section 1122-A of Act 88 as follows:

- "(c) Not more than ten (10) days after the findings and recommendations shall have been sent, the parties shall notify the board and each other whether or not they accept the recommendations of the fact-finding panel, and, if they do not, the panel shall publicize its findings of fact and recommendations.
- (d) Not less than five (5) days nor more than ten (10) days after the publication of the findings of fact and recommendations, the parties shall again inform the board and each other whether or not they will accept the recommendations of the fact-finding panel."

As set forth in findings of fact 5-6, the record shows that after the fact finder sent a report with his recommendations to the parties the Association by votes of its membership decided not to take any action on the recommendations at that time, not to reconvene to reconsider them later and not to accept them even if the District did. As set forth in finding of fact 7, the record shows that the Association subsequently notified the Board and the District that it "took no action regarding the report." As set forth in findings of fact 8-10, the record shows that after the recommendations were publicized by the Secretary the Association did not reconsider them or submit them to its membership for a vote but notified the Board and the District that it "has not changed its position concerning Mr. Christopher E. Miles' fact-finding report."

On that record, there is no basis for finding that the Association committed an unfair practice by not meeting its obligation under section 1122-A(c) of Act 88 to notify

the Board and the District whether or not it accepted the recommendations, having indicated instead that it "took no action on the report." According to the District, although the Secretary explained that under the fact-finding process the "[f]ailure of a party to respond will be treated as a rejection" (Association Exhibit 2), taking no action on a fact finder's recommendation is not an option under the express terms of section 1122-A(c) of Act 88. As the District points out, the fact finder himself wrote that "[a]cceptance of the report must constitute approval of the report in its entirety and on an unqualified basis. The options are simply 'accept' or 'reject'" (District Exhibit 1). In West Shore Education Association, 20 PPER ¶ 20073 (Proposed Decision and Order 1989), 20 PPER ¶ 20113 (Final Order 1989), however, the Board itself opined that under the fact-finding process as set forth in Act 88 anything less than an unconditional acceptance of a fact finder's recommendations is to be construed as a rejection of them. Thus, by indicating that it "took no action regarding the report," the Association met its obligation under section 1122-A(c) of Act 88 to notify the Board and the District whether or not it accepted the recommendations.

Nor is there a basis for finding that the Association committed an unfair practice by not meeting its obligation to bargain in good faith because it did not submit the recommendations to its membership for a vote, having decided to take no action instead. Citing Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978);

Morrisville School District v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 549 Pa. 708, 700 A.2d 445 (1997); and Homer-Center School District, 12 PPER ¶ 12169 (Final Order 1981), for the proposition that a party must make a serious effort to resolve differences and reach a common ground in order to satisfy its obligation to bargain in good faith, the District posits that the Association thereby subverted the fact-finding process and thus did not act in good faith. The District finds further support for its position in West Shore Education Association, supra, where the hearing examiner wrote that "there can be no dispute that the effectiveness of the fact-finding process depends upon the good faith of the parties involved," 20 PPER at 205, and in Commonwealth of Pennsylvania v. Commonwealth of Pennsylvania, PLRB, 438 A.2d 1061 (Pa. Cmwlth. 1982), where the court held that the Board properly directed an employer to submit an interest arbitration award to its legislative body for a vote.

In <u>International Brotherhood of Painters and Allied Trades</u>, <u>Local 1968</u>, 38 PPER 128 (Final Order 2007), however, the Board found that an employe organization is under no obligation to submit a contract proposal to its membership for a vote. As the Board explained:

"The fact that the Union has not agreed to the Employer's proposal to subcontract bargaining unit work and has declined to submit the Employer's final offer containing that proposal to a vote of its members does not rise to the level of bargaining in bad faith. Indeed, Section 701 of PERA provides that the duty to bargain in good faith 'does not compel either party to agree to a proposal or require the making of a concession.' 43 P.S. § 1101.701.

Additionally, as the Commonwealth Court held in <u>PLRB v. Eastern Lancaster</u> County Education Association, 427 A.2d 305 (Pa. Cmwlth. 1981), employe organizations have the right to govern their internal affairs without interference, and such internal union matters include the necessity and the procedures for ratification of a collective bargaining agreement. As stated by the court, the union membership could 'either give to or withhold from the membership the right to ratify collective agreements by popular vote' by adopting provisions in the union's constitution or by-laws. <u>Id.</u> at 308 (citing <u>Houchens Market of Elizabethtown, Inc. v. NLRB</u>, 375 F.2d 208 (6th Cir. 1967)). Moreover, an employe organization does not have the obligation to submit proposed agreements to which it has not assented to its membership for ratification or rejection. <u>Cleveland Orchestra Committee v. Cleveland Federation of Musicians</u>, 303 F.2d 229 (6th Cir. 1962); <u>Branch v. Vickers, Inc.</u>, 209 F. Supp. 518 (E.D. Mich. 1962). Therefore, the Union was not required to submit the Employer's contract proposal to a ratification vote of its members, and the Secretary did not err in dismissing the Employer's Charge under Section 1201(b)(3) of PERA."

38 PPER at 374. The recommendations were in the nature of a contract proposal, so the Association was under no obligation to submit them to its membership for a vote.

Moreover, under the fact-finding process as set forth in Act 88, anything less than an unconditional acceptance of a fact finder's recommendations is to be construed as a rejection of them. West Shore Education Association, supra. In the event that one party, as here, does not accept the recommendations unconditionally, the parties are to move on to the next step in the process. Id. Furthermore, as set forth in finding of fact 6, the record shows that the Association met to review the recommendations and submitted them to its membership for a vote in any event.

There also is no basis for finding that the Association committed an unfair practice by not reconsidering the recommendations after the Secretary publicized them. According to the District, the Association thereby avoided the glare of public scrutiny that otherwise would have been brought to bear on it and thus subverted the fact-finding process and did not act in good faith. The District also posits that the Association thereby prevented its membership from voting to accept the fact finder's recommendations in the light of public scrutiny and thus subverted the fact-finding process and did not act in good faith for that reason as well. The Association was, however, subject to the glare of public scrutiny once the Secretary publicized the recommendations. Moreover, as noted above, the Association was under no obligation to submit the recommendations to its membership for a vote. Under the circumstances, the Association hardly subverted the fact-finding process or acted in bad faith by not reconsidering the recommendations after the Secretary publicized them.

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 PERA.
- 2. The Association is an employe organization under section 301(3) of the PERA.
- 3. The Board has jurisdiction over the parties.
- 4. The Association 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 fifteenth day of May 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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May 15, 2008

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PENNS MANOR AREA SCHOOL DISTRICT Case No. PERA-C-07-481-W

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE Hearing Examiner

Enclosure

cc: PENNS MANOR ESPA