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	:	

PROPOSED DECISION AND ORDER

On September 4, 2007, the McKeesport Educational Support Personnel Association, PSEA/NEA (Association), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the McKeesport Area School District (District) violated sections 1201(a)(1) and 1201(a)(8) of the Public Employe Relations Act (Act) by refusing to comply with the provisions of a grievance arbitration award directing the reinstatement of Vincent Little "to his former position." On September 26, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 7, 2007, if conciliation did not resolve the charge by then. The hearing examiner thereafter continued the hearing to afford the parties additional time to settle the charge. On November 16, 2007, the Association requested that the hearing be rescheduled. On November 20, 2007, the hearing examiner rescheduled the hearing to January 22, 2008. The hearing was held as rescheduled. The parties presented stipulations in lieu of testimony. On February 21, 2008, each party filed a brief by deposit in the U.S. Mail.

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

FINDINGS OF FACT

1. On November 20, 1991, the Board certified the Association as the exclusive representative of a bargaining unit that includes custodians employed by the District. (Case No. PERA-U-91-371-W)

2. In January 2007, the District terminated Mr. Little. He had been working as a custodian at the George Washington Elementary School on the first shift from 6:00 a.m. to 2:30 p.m. at the time. (N.T. 6-8)

3. On July 2, 2007, an arbitrator issued an award disposing of a grievance alleging that the District violated the parties' collective bargaining agreement by terminating Mr. Little without just cause. The arbitrator wrote as follows:

> "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."

(N.T. 6-8; Attachment A to the charge)

4. By letter dated July 10, 2007, the District's director of administrative services (James G. Humanic) informed Mr. Little that "pursuant to the recent arbitration, you will be reinstated to your former position as custodian at Geo. Washington Elementary School." (N.T. 7-8; Attachment B to the charge)

5. When the District reinstated Mr. Williams, 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)

DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1) and 1201(a)(8) by refusing to comply with the provisions of a grievance arbitration award directing the reinstatement of Mr. Little "to his former position." According to the Association, Mr. Little's "former position" was as a custodian on the first shift at the George Washington Elementary School. The Association contends that the District did not reinstate Mr. Little "to his former position" as directed in the award because it reinstated him as a custodian on the second shift at South Hall instead.

The District contends that the charge should be dismissed for lack of proof because its only obligation under the award was to reinstate Mr. Little to a custodial position, which it did.

In Hazle Township, 38 PPER 157 (Final Order 2007), the Board recently restated the applicable law in a case of this nature as follows:

> "When the complainant alleges a refusal to comply with a grievance arbitration award, the Board must determine whether (1) an award exists; (2) the appeal period available to the aggrieved party has been exhausted; and (3) the respondent failed to comply with the provisions of the arbitration award. AFSCME, District Council 88 v. Upper Dublin Township, 27 PPER ¶ 27262 (Proposed Decision and Order, 1996)(citing PLRB v. Commonwealth of Pennsylvania, 478 Pa. 582, 387 A.2d 475 (1978)). The complainant bears the burden of establishing that the respondent has failed to comply with the arbitration award. McCandless Police Officers Association v. Town of McCandless, 30 PPER ¶ 30141 (Final Order, 1999). The Board's review is limited to ascertaining the arbitrator's intent from the four corners of the award, and it may not review the merits of the award. AFSCME, Local 1971 v. City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶ 24052 (Final Order, 1993); Upper Dublin Township, supra. A collateral attack on the validity of an arbitration award is not an affirmative defense to a Section 1201(a)(8) charge. Id."

38 PPER at 462.

There is no dispute that an award directing the District to reinstate Mr. Little "to his former position" exists and that the award has not been appealed. The dispositive question, then, is whether or not the District has complied with the provisions of the award.

As set forth in the findings of fact, the record shows that Mr. Little had been working as a custodian on the first shift at the George Washington Elementary School when the District terminated him (finding of fact 2); that in directing the District to reinstate Mr. Little "to his former position" the arbitrator wrote that he was doing so "on a last chance basis" because he was concerned that Mr. Little could not "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" (finding of fact 3); and that the District subsequently reinstated Mr. Little as a custodian on the second shift at South Hall (finding of fact 5).

On that record, it seems apparent that the arbitrator in directing that Mr. Little be reinstated "to his former position" intended that he be reinstated as a custodian on the first shift at the George Washington Elementary School. Notably, the Oxford American

Dictionary and Thesaurus (2003) defines the word "former" as "having been previously." Webster's Encyclopedic Unabridged Dictionary (1996) similarly defines the word "former" as "having once, or previously, been." The position Mr. Little previously or once had was as a custodian on the first shift at the George Washington Elementary School. Thus, that was his "former position." Moreover, in explaining that he was directing the reinstatement of Mr. Little "to his former position" the arbitrator wrote that he did so "on a last chance basis" because he was concerned that Mr. Little could not "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" (finding of fact 3). The arbitrator's reference to "the Elementary School" is further evidence that he intended that Mr. Little be reinstated as a custodian on the first shift at the George Washington Elementary School. Accordingly, by reinstating Mr. Little as a custodian on the second shift at South Hall instead, the District failed to comply with the provisions of the award. See McKean County, 16 PPER ¶ 16139 (Proposed Decision and Order 1985)(where a grievance arbitration award provided that a terminated employe was "to be reinstated to employment," the employer violated section 1201(a)(8) by not reinstating the employe to the same shift he had been working when it terminated him).

In support of its contention that it was only under an obligation to reinstate Mr. Little to a custodial position, the District points out that there are no classifications within the custodial job description, that the duties, opportunities for career enhancement, equipment and uniforms for custodians are the same on the first as on the second shift and that wages are greater on the second shift than on the first (N.T. 9). The District also cites 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), for the proposition that an employer need not reinstate an employe to the exact position from which he or she was terminated so long as it reinstates the employe to a comparable position. As the District points out, in City of Philadelphia the court opined that no distinction could be drawn between a "position" and an "assignment" in a case involving a grievance arbitration award directing the reinstatement "to their former positions" of police officers who had been terminated, while in Hockaday the court held that a civil service commission order reinstating a suspended laborer to his "former position" did not mean that he had to be reinstated as a laborer at the work location from which he had been suspended.

The District's contention is without merit. If the arbitrator had simply directed the District to reinstate Mr. Little to "a" custodial position, the District's contention would be well taken, but the arbitrator did no such thing. Thus, the District's contention finds no support in the record. Moreover, the District's reliance on City of Philadelphia and Hockaday is misplaced. In City of Philadelphia, there was no dispute that the arbitrator only intended that the police officers be reinstated to assignments comparable to those they had when they were terminated. No such arbitral intent is apparent here, so City of Philadelphia is distinguishable on the facts. In Hockaday, the court interpreted applicable civil service regulations defining the term "position." No such regulations are applicable here, so Hockaday also is distinguishable on the facts.

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.

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) Comply with the provisions of the award;

(b) 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

(c) 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 fourth day of March 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

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AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and 1201(a)(8) of the Act, that it has complied with the provisions of the award, that it has posted the 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