

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ERIE EDUCATION ASSOCIATION :  
 :  
 v. : Case No. PERA-C-09-207-W  
 :  
ERIE CITY SCHOOL DISTRICT :

**PROPOSED DECISION AND ORDER**

On June 8, 2009, the Erie Education Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the School District of the City of Erie (District) violated sections 1201(a)(1), (2), (3) and (5) of the Public Employe Relations Act (PERA) by "improperly releas[ing] confidential information to the Erie Times News regarding facts and opinions contained in grievance arbitration decisions in an attempt to discredit the grievant, a former employee running for School Board."<sup>1</sup> On June 26, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October 27, 2009, if conciliation did not resolve the charge by then. The hearing examiner subsequently cancelled the hearing upon the representation of the parties that they would be submitting the case for decision on stipulated facts. On October 15, 2009, the parties submitted stipulated facts. On November 13, 2009, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the stipulated facts submitted by the parties and from all other matters of record, makes the following:

**FINDINGS OF FACT**

1. The Board has certified the Association as the exclusive representative of a bargaining unit that includes employes of the District. (Case No. PERA-R-10-W)
2. On August 28, 2007, the parties received from an arbitrator a decision and award denying a grievance the Association filed alleging that the District violated a collective bargaining agreement of the parties when it issued an unsatisfactory rating to Denice Manus for the 2005/2006 school year. (Stipulation 3)
3. On September 24, 2008, the parties received from an arbitrator an opinion and award denying a grievance the Association filed alleging that the District violated a collective bargaining agreement of the parties when it suspended and discharged Ms. Manus during the 2006-2007 school year. (Stipulation 3)
4. On April 28, 2009, the District received a request from a reporter with the Erie Times News (Edward Palattella) for "[t]he two labor arbitration decisions pertaining to the dismissal of Denice Manus as an employee at the Erie School District." The Erie Times News is the primary local newspaper of general circulation in Erie and Northwest Pennsylvania. Ms. Manus was a candidate for election to the District's board of directors at the time. (Stipulations 4-5, 8)
5. The District provided Mr. Palattella with the decision and award it received on August 26, 2007, and the opinion and award it received on September 24, 2008. (Stipulation 6)
6. On May 3, 2009, the Erie Times News published an article "which referenced, discussed and quoted" the decision and award and the opinion and award. (Stipulation 8)
7. The Pennsylvania School Boards Association has published the opinion and award and the decision and award as part of its Public Sector Arbitration Service that is available to the public by subscription. (Stipulation 12)

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<sup>1</sup> The Association also filed the charge under section 1201(a)(4) of the PERA, but in its brief at n. 1 it has withdrawn that portion of the charge. Accordingly, the charge as filed under section 1201(a)(4) will not be addressed.

## DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1), (2), (3) and (5) of the PERA by "improperly releas[ing] confidential information to the Erie Times News regarding facts and opinions contained in grievance arbitration decisions in an attempt to discredit the grievant, a former employee running for School Board." According to the Association, in releasing the information, the District (1) interfered with employes in the exercise of their right to engage in an activity protected by the PERA (filing a grievance), (2) interfered with the administration of the Association, (3) discriminated against an employe (the grievant, Denice Manus) for having engaged in an activity protected by the PERA (filing a grievance) and (4) unilaterally changed a mandatory subject of bargaining (the procedure for arbitrating grievances under section 903 of the PERA).

The District contends that the charge should be dismissed because running in a political election is not an activity protected by the PERA, because the information it released to the Erie Times News already was available to the public and because its release of the information to the Erie Times News was consistent with public policy as set forth in the Right-to-Know Law.

The charge under section 1201(a)(1)

In Commonwealth of Pennsylvania, Department of Corrections, 35 PPER 97 (Final Order 2004), the Board explained the law under section 1201(a)(1) as follows:

"An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employe, regardless of whether anyone was actually coerced. Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). The employer's motive for its actions is irrelevant. Northwestern Education Association v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)."

Id. at 303. In Commonwealth of Pennsylvania, Department of Public Welfare, Somerset State Hospital, 27 PPER ¶ 27086 (Final Order 1996), the Board found that the filing of a grievance is a protected activity.

The record shows that upon the request of a reporter the District released to the Erie Times News an arbitration decision and award denying a grievance the Association filed alleging that the District violated a collective bargaining agreement of the parties when it issued an unsatisfactory rating to Ms. Manus for the 2005-2006 school year and an arbitration opinion and award denying a grievance the Association filed alleging that the District violated a collective bargaining agreement of the parties when it suspended and discharged Ms. Manus during the 2006-2007 school year (findings of fact 2-5). The record also shows that the Pennsylvania School Boards Association has published the opinion and award and the decision and award as part of its Public Sector Arbitration Service that is available to the public by subscription (finding of fact 7).

Given the availability of the decision and award and the opinion and award by public subscription from the Pennsylvania School Boards Association, it stands to reason that a reasonable employe would not be any less likely to file a grievance because the District released the same information to the Erie Times News. Accordingly, there is no basis for finding that the District's release of the decision and award and the opinion and award to the Erie Times News would have a tendency to interfere with a reasonable employe in the exercise of their right to file a grievance. Thus, the charge under section 1201(a)(1) must be dismissed.

In arguing for a contrary result, the Association posits as follows:

"If potential grievants infer from the treatment of Ms. Manus that, if they contest a disciplinary action or a contract violation, the District will see to it that they are made the subject of an expose' on the front page of the Sunday newspaper

where contested allegations will be reported as fact, this obviously will have a chilling, coercive effect on members' willingness to exercise their rights under Pennsylvania Law."

Brief at 14.

The record does not show, however, that the District "saw to it" that Ms. Manus "was the subject of an expose' on the front page of the Sunday newspaper where contested allegations will be reported as fact." Rather, the record shows that the District released the decision and award and the opinion and award upon the request of a reporter for the Erie Times News (findings of fact 4-5) and that the Erie Times News thereafter published an article "which referenced, discussed and quoted" the decision and award and the opinion and award (finding of fact 6).

The Association also posits as follows:

"If this practice is allowed to stand, there will be nothing to prevent the District from continuing to use its ability to facilitate public disclosure to intimidate union members. For example, say a newly elected local president had successfully contested an effort by the District to impose discipline or even discharge. The news media may very well believe that the election of the local president makes an investigation of their background and history of grievances to be newsworthy. If the full text of the decision is released, undeserved attention would be refocused upon the allegations even though they had been successfully defended against and disproven. One can easily envision a situation like this generating public controversy and criticism of the union for defending 'bad' teachers that the District sought to discipline."

Brief at 15.

In Commonwealth of Pennsylvania, Department of Corrections, supra, however, the Board rejected the argument that the potential for adverse action by a third party in the future supports a charge under section 1201(a)(1). In that case, the charging party alleged that an employer interfered with employees in the exercise of their right to select a collective bargaining representative when it argued to an arbitrator that its back-pay liability for a grievance should be limited because its processing of the grievance had been delayed while the employees changed their exclusive representative. In dismissing the charge, the Board reasoned as follows:

"It cannot be said on this record that the arguments of the Commonwealth's advocate in the Shields' grievance would have a tendency to coerce employees from engaging in protected activity. It is common knowledge of labor relations, that arbitration proceedings are adversarial -- each party, the employer and the union, vying for the best possible outcome. There are no guarantees as to the results of arbitration as the ultimate decision is in the hands of a neutral arbitrator, thus, leading the Pennsylvania Supreme Court to recognize that an 'arbitrator might fashion an invalid award.' Commonwealth, Office of Administration v. PLRB, 528 Pa. 472, 479, 598 A.2d 1274, 1277 (1991). Merely because an arbitrator may accept an argument of one party and reach an adverse result for the employee, does not mean that employees should or would expect the same result from the same, or a different arbitrator, in a subsequent matter. What should be obvious to the employees, and to the union, is that just because the employer may attempt to assert the same position in a subsequent arbitration, is not a foregone conclusion that that argument will be accepted by another arbitrator, or that it would not be overturned on appeal. Accordingly, the potential for the Commonwealth to argue for a limitation of its back pay liability resulting from a 'decertification' and/or delays there from, would not have a tendency to coerce or interfere with the employees' right to designate their collective bargaining representative. As such, the hearing examiner did not err in dismissing PSCOA's independent Section 1201(a)(1) claims."

35 PPER at 303. It should be equally obvious to a reasonable employee that just because an employer releases to the media information involving a grievance that the employee

"successfully defended against" does not mean that the media will portray that information in a negative light. Thus, the same result as in Commonwealth of Pennsylvania, Department of Corrections, supra, obtains here.

The charge under section 1201(a)(2)

In SEPTA (Victory District), 40 PPER 87 (Final Order 2009), the Board explained the law under section 1201(a)(2) as follows:

"[I]t is well-settled that Section 1201(a)(2) prohibits 'company unions' and is directed at employer domination of, or assistance, to employe organizations. See IBPAT, Local 1968 v. Girard School District, 38 PPER ¶ 124 at 366 (Final Order, 2007) ('The Board has determined that Section 1201(a)(2) is intended to prevent an employe organization from becoming so controlled or assisted by the employer that the employe organization is indistinguishable from the employer')."

Id. at \_\_\_\_.

The Association has neither alleged nor shown that the District's release of the decision and award and the opinion and award to the Erie Times News has resulted in the Association becoming so controlled or assisted by the District that it is indistinguishable from the District. Thus, the charge under section 1201(a)(2) must be dismissed.

In arguing for a contrary result, the Association posits as follows:

"Given the exclusion of arbitration opinions and decisions from the definition of public record in the Right to Know Law, the contractual provision guaranteeing confidentiality of grievance materials and the long time practice of the parties whereby arbitration decisions and opinions were not disclosed to the news media along with its ownership stake in the arbitration as directed by statute, the Association had the reasonable and clear expectation that neither party would disrupt the zone of privacy regarding the arbitration decisions that had been the status quo. The District's unilateral disclosure of the arbitration decisions and opinions was completely and unexpectedly contrary to the long-time practice of the parties.

Given the Association's partial ownership of the awards, derived from its financial contribution to the proceedings, the opinions and decisions are property of the Association as much as they are property of the District. The District's unilateral disclosure of the decisions and opinions obliterated the Association's right to control the disclosure of awards or, at a minimum, the forums in which such disclosure would take place."

Brief at 20.

Be that all as it may, the fact remains that the Association has neither alleged nor shown that the District's release of the decision and award and the opinion and award to the Erie Times News has resulted in the Association becoming so controlled or assisted by the District that it is indistinguishable from the District.

The charge under section 1201(a)(3)

An employer violates section 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by the PERA. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). As noted above, the filing of a grievance is a protected activity. Commonwealth of Pennsylvania, Department of Public Welfare, Somerset State Hospital, supra. "The motive creates the offense" under section 1201(a)(3). PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). Close timing between the employe's protected activity and the employer's action coupled with the employer's disparate treatment of similarly situated employes will support a finding that the employer was discriminatorily

motivated. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). Close timing between the employee's protected activity and the employer's action coupled with an inadequate explanation for the employer's action will, too. Lehigh Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005). Remote timing between the protected activity and the employer's action also will not. Cameron County School District, 37 PPER 45 (Final Order 2006).

The Association has neither alleged nor shown that the District's release of the decision and award and the opinion and award to the Erie Times News was motivated by an employee having engaged in a protected activity. Rather, the Association has specifically alleged and shown at best that the District's release of the decision and award and the opinion and award to the Erie Times News was "to discredit the grievant, a former employee running for School Board." Running for a political office is not an activity protected by the PERA, however. Thus, the charge under section 1201(a)(3) must be dismissed.

In arguing for a contrary result, the Association posits that the timing of events supports a finding that the District released the decision and award and the opinion and award to the Erie Times News because the grievant (Ms. Manus) filed a grievance over her rating for the 2005-2006 school year and a grievance over her suspension and discharge during the 2006-2007 school year. According to the Association, the District took various actions against Ms. Manus from before it rated her for the 2005-2006 school year up to when it suspended and discharged her during the 2006-2007 school year that were "suspicious" (Brief at 17). By way of example, the Association submits that "her first unsatisfactory rating was issued three months after she went on sabbatical leave and was based on criticisms never presented to her prior to the rating." Id. "Furthermore," according to the Association,

"the District's timing in releasing the arbitration decisions without undertaking a sufficient legal review and without providing notice to the Association and Ms. Manus of the newspaper's request was clearly predicated to facilitate the release of the arbitration awards prior to the primary election. These awards contain information that the District considered damaging, and that prove to be damaging, to Ms. Manus' quest to be elected to the School Board."

Brief at 18.

The record does not show, however, that the District took various actions against Ms. Manus that were "suspicious." Even if it did, by the Association's own admission, the District's actions began before it rated her for the 2006-2007 school year, so they obviously predated the filing of her grievance over that rating and the subsequent filing of her grievance over her suspension and discharge. Where the genesis of an employer's course of conduct predates the employee's protected activity, the timing of events militates against a finding that the employer was discriminatorily motivated. Delaware County, 28 PPER ¶ 28005 (Final Order 1996). Thus, to the extent that the various actions taken by the District against Ms. Manus may be found to be "suspicious," they do not compel a finding that the District was discriminatorily motivated. Furthermore, to the extent that the record shows that the District's release of the decision and award and the opinion and award to the Erie Times News was timed to influence the primary election, it undercuts any basis for finding that the District was discriminating against Ms. Manus because she filed the two grievances.

The Association also posits that disparate treatment of Ms. Manus by the District supports a finding that the District released the decision and award and the opinion and award to the Erie Times News because Ms. Manus filed the two grievances. According to the Association, the District's release of such information "is unprecedented" (Brief at 18). The record does not show, however, that the District ever received a request for information involving another employee's grievance. Thus, there is no basis for finding that the District treated Ms. Manus differently from a similarly situated employee, which is a prerequisite for inferring anti-union animus based on disparate treatment. See Erie City School District, 40 PPER 12 (Final Order 2009)(no disparate treatment where employees were not similarly situated).

The Association also posits that an inadequate explanation for the District's release of the decision and award and the opinion and award to the Erie Times News supports a finding that it released that information because Ms. Manus filed the two grievances. According to the Association, under the Right-to-Know Law, the District was only obligated to release the awards themselves. The record does not show, however, that the District explained that it released the decision and award and the opinion and award to the Erie Times News because it was compelled to do so by the Right-to-Know Law. To the contrary, the record shows that the District released the decision and award and the opinion and award to the Erie Times News because one of its reporters requested them (findings of fact 4-5). No inadequate explanation for the District's release of the decision and award and the opinion and award to the Erie Times News is apparent on that record.

The charge under section 1201(a)(5)

An employer violates section 1201(a)(5) if it unilaterally changes a mandatory subject of bargaining. PLRB v. Williamsport Area School District, 486 Pa. 375, 406 A.2d 329 (1979). Under section 903 of the PERA, a procedure for arbitrating a grievance is a mandatory subject of bargaining. The record does not show, however, that the District's release of the decision and award and the opinion and award to the Erie Times News changed a procedure for arbitrating a grievance. Thus, the charge as filed under section 1201(a)(5) must be dismissed. See Clarks Summit Borough, 29 PPER ¶ 29216 (Final Order 1998)(no violation of section 1201(a)(5) may be found where the record does not show that a prior practice was changed).

In arguing for a contrary result, the Association points out that an employer violates section 1201(a)(5) if it repudiates a provision in a collective bargaining agreement. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993). The Association also has attached to its brief a purported collective bargaining agreement of the parties with a grievance procedure providing that "[b]oth parties agree that these proceedings shall be kept as confidential as may be appropriate at each level of the procedure." According to the Association, the District repudiated that provision when it released the decision and award and the opinion and award to the Erie Times News. The Association also submits that the District was under no obligation to release the decision and opinion portions of the arbitration awards under the Right-to-Know Law and violated the Right-to-Know Law by not notifying Ms. Manus of the request by the Erie Times News for the decision and award and the opinion and award.

The collective bargaining agreement attached to the Association's brief is not referenced in the stipulated facts presented by the parties, however. A document attached to a brief but not introduced into evidence may not be relied upon to support the finding of an unfair practice. Erie School District, 14 PPER ¶ 14227 (Proposed Decision and Order 1983), citing PLRB v. Commonwealth of Pennsylvania, State Liquor Control Board, 367 A.2d 805 (Pa. Cmwlth. 1977); Greater Johnstown Area Vocational-Technical School, 14 PPER 14208 (Proposed Decision and Order 1983). Moreover, the collective bargaining agreement purports to be effective July 1, 2009, yet the record shows that the decision and award and the opinion and award were referenced by the Erie Times News in an article it published on May 3, 2009 (finding of fact 6). Thus, the collective bargaining agreement obviously post-dates the District's release of the decision and award and the opinion and award to the Erie Times News and therefore is inapplicable in any event. Furthermore, even if the collective bargaining agreement is applicable, given the request by the Erie Times News for the decision and award and the opinion and award and Ms. Manus's candidacy for elected office, the District has a sound basis for interpreting the agreement to mean that keeping the arbitration proceedings confidential was not appropriate under the circumstances. Whether or not the District's interpretation of the provision is violative of the collective bargaining agreement is, therefore, for an arbitrator to decide. See Port Authority of Allegheny County, 39 PPER 147 (Final Order 2008), citing Pennsylvania State Troopers Association v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2000). Finally, the Board has no jurisdiction to enforce the Right-to-Know Law, so whether or not the District violated the Right-to-Know Law by not notifying Ms. Manus of the request by the Erie Times News for the decision and award and the opinion and award is not for the Board to decide.

**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 District has not committed unfair practices under sections 1201(a)(1), (2), (3) or (5) 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 December 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner