

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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

**FINAL ORDER**

The Erie Education Association (Association) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on December 21, 2009. The Association challenges a Proposed Decision and Order issued on December 2, 2009, in which the Hearing Examiner concluded that the Erie City School District (District) did not violate Section 1201(a)(1), (2), (3) or (5) of the Public Employee Relations Act (PERA). Following an extension of time granted by the Secretary of the Board, the Association filed a brief in support of its exceptions on January 25, 2010. The District filed a brief in response to the exceptions on February 16, 2010. Upon review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

8. The Association, in writing, consented to the publication of the September 24, 2008 opinion and award of the grievance arbitrator. (Stipulation 10, Exhibit F).

DISCUSSION

The Hearing Examiner's Findings of Fact are supported by a joint stipulation of facts, and are not challenged in the exceptions. Those findings are summarized as follows.

On August 28, 2007, an arbitrator issued a decision and award denying a grievance the Association filed alleging that the District violated the collective bargaining agreement when it issued an unsatisfactory rating to Denice Manus for the 2005/2006 school year. On September 24, 2008, a different arbitrator issued an opinion and award denying a grievance the Association filed alleging that the District suspended and discharged Ms. Manus during the 2006-2007 school year without just cause. The Pennsylvania School Boards Association (PSBA) published the full text of both arbitration decisions as part of its Public Sector Arbitration Service that is available to the public by subscription.

Thereafter, in 2009, Ms. Manus became a candidate for election to the District's board of directors. 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." In response, the District provided Mr. Palattella with the full text of both arbitration decisions. On May 3, 2009, the Erie Times News published an article "which referenced, discussed and quoted" from the arbitrators' decisions.

Based on the stipulated facts, the Hearing Examiner determined that there was no basis to find that the District's release of the arbitrators' decisions to the Erie Times News would tend to coerce or interfere with a reasonable employee's decision to exercise the right to file a grievance, and therefore there can be no independent violation of Section 1201(a)(1) of PERA. The Hearing Examiner also noted that the Association did not allege or prove facts to support the conclusion that the District's release of the arbitrators' decisions resulted in the District taking unlawful control of the Association in violation of Section 1201(a)(2) of PERA. Further, the Hearing Examiner concluded that running for political office was not an activity protected under Article IV of PERA, and thus the claim of discrimination against Ms. Manus under Section 1201(a)(3) of PERA had to also be dismissed. Finally, the Hearing Examiner found, based on the stipulations and post-hearing briefs, that the District's release of the arbitration decisions to the Erie Times News was not a change to the procedure or practice of the parties with regard to the arbitration of grievances, and thus there was no violation of Section 1201(a)(5) of PERA. Accordingly, the Hearing Examiner dismissed the Association's Charge of Unfair Practices and rescinded the Board's Complaint.

In its exceptions, the Association essentially raises the same arguments that it presented to the Hearing Examiner. With respect to its claims of a violation of Section 1201(a) (5) of PERA, the Association argues that the District unlawfully changed a mandatory subject of bargaining when it released the arbitration decisions to the Erie Times News. Generally, the employer's unilateral change to a mandatory subject of bargaining is an unfair practice within the meaning of Section 1201(a) (5) of PERA. E.g., Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); Commonwealth of Pennsylvania v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983). The arguments raised in the Association's exceptions support its contention that releasing arbitrators' decisions for publication may be a mandatory subject of bargaining.<sup>1</sup> However, even assuming, as does the Association, that the release of the full text of an arbitrators' decision for publication would be a mandatory subject of bargaining, the *sine qua non* of the unfair practice alleged by the Association is that there must have been a unilaterally implemented change in the policy. Fraternal Order of Police Lodge No. 9 v. City of Reading, 29 PPER ¶29177 (Final Order, 1998). In the absence of a showing that the District has changed the policy or practice of publicizing opinions of arbitrators, no violation of Section 1201(a) (5) of PERA can be found.

As stipulated to, and found by the Hearing Examiner, prior to the release of the arbitration decisions to the Erie Times News, the full text of arbitration decisions had been released to PSBA for a publication available to the public by subscription. Indeed, the decisions at issue in this case were released to and published by the PSBA. Just like the PSBA publication, the Erie Times News is also a publication available to the public. Accordingly, on this record, where the District previously released arbitrators' decisions to publications that are available to the public, the Association has failed to establish an unlawful unilateral change in the policy of releasing arbitration decisions for publication within the purview of Section 1201(a) (5) of PERA.

The Association also contends that the District violated Section 1201(a) (5) of PERA by failing to provide notice to the Association of its intent to release the arbitration decisions to the Erie Times News in accordance with the District's obligation to provide information as part of its duty to bargain.<sup>2</sup> However, on this record, there is no indication that the Association requested information from the District concerning the release of the arbitration decisions to the Erie Times News. See AFSCME District Council 88 v. Berks County Intermediate Unit, 29 PPER ¶29098 (Proposed Decision and Order, 1998) (employer's duty to bargain includes the obligation to provide requested information that is relevant to the employe representative's processing of a grievance). Accordingly, no unfair practice can be found based upon the District's duty to provide information to the Association upon request.

Furthermore, while arguably an obligation to provide prior notice before release of arbitration decisions may be created through collective bargaining, there is no evidence that the parties agreed to such a restriction here. As discussed above, the pertinent inquiry for this charge, and the exceptions, is whether the District's conduct regarding any obligation to provide notice to the Association before releasing a grievance opinion is consistent with past practice or policy. On review of the record, there is no evidence that the District had provided the Association with notice before releasing the full text of arbitration decisions to the PSBA for publication.

Upon review of the record, we agree with the Hearing Examiner's assessment that the District's release of the arbitration decisions to the Erie Times News was not an unlawful change in the procedure or practice of the parties with regard to the release

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<sup>1</sup> By letter dated March 8, 2010, the Association brings to the attention of the Board the case of Michael Lutz Lodge #5, FOP v. City of Philadelphia, 41 PPER ¶1 (Court of Common Pleas, 2009), appeal pending, No. 1996 CD 2009 (Pa. Cmwlth.), which upon review may support an argument that releasing grievance arbitration decisions for publication may constitute a mandatory subject of bargaining. Similarly, the argument over whether the Right-to-Know Law, 65 P.S. §67.101 *et seq.*, allows for, or restricts, the release of arbitration decisions is relevant to the question of whether the issue is prohibited by Section 703 of PERA or is subject to bargaining. Pittston Area Federation of Teachers Local #1590 v. Pittston Area School District, 27 PPER ¶27085 (Final Order, 1996).

<sup>2</sup> To the extent the Association argues that the District is obligated under the Right-to-Know Law to provide notice before releasing arbitration decisions, the Board has no jurisdiction to enforce the Right-to-Know Law.

and publication of grievance arbitration decisions.<sup>3</sup> Accordingly, on the record presented, the Association failed to establish that the District violated Section 1201(a)(5) of PERA by taking unilateral action to change a mandatory subject of bargaining.

The Association requests that the Board remand the case to the Hearing Examiner so that it may introduce the collective bargaining agreement in effect between July 1, 2004 and June 30, 2009. In support thereof, the Association asserts that it can establish a violation of Section 1210(a)(5) arising from the District's repudiation of contract provisions that provide for confidentiality in the grievance procedure. As noted by the Hearing Examiner, the collective bargaining provisions were not alleged in the Stipulation of Facts that was filed of record in this case, and the collective bargaining agreement was not introduced as evidence before the Examiner. Further, a review of the Charge of Unfair Practices does not appear to allege an unfair practice for repudiation of agreed upon contract language. Accordingly, the claim that the Hearing Examiner should have made findings and conclusions based on language in the collective bargaining agreement has not been preserved. Erie School District, 14 PPER ¶14227 (Proposed Decision and Order, 1983); Independent State Store Union v. Liquor Control Board, 22 PPER ¶ 22009 (Final Order, 1990). Likewise, under the Board's Rules and Regulations, the claim has been waived for purposes of these exceptions. 34 Pa. Code §95.98(a)(2) (no reference may be made in the statement of exceptions to any matter not contained in the record of the case).

Nevertheless, the Board may grant a remand for introduction of after-acquired evidence where the evidence (1) is new; (2) could not have been obtained at the time of hearing despite due diligence; (3) is relevant and non-cumulative; (4) is not for the purposes of impeachment; and (5) is likely to compel a different result. Transport Workers Union, Local 234 v. Southeastern Pennsylvania Transportation Authority, 25 PPER ¶25038 (Final Order, 1994). However, for purposes here, it is beyond cavil that at the time of filing of the Association's charge and the Stipulation, the relevant portions of the collective bargaining agreement between the Association and District were not new or undiscoverable to the Association. Accordingly, the Association's request for a remand is denied.

The Association also argues that the District's release of the arbitration decisions to the Erie Times News violated Section 1210(a)(1) of PERA. An independent violation of Section 1201(a)(1) of PERA occurs where the employer's actions, viewed within the totality of the circumstances by a reasonable employe, would have a tendency to coerce employes in the exercise of protected rights. Northwestern Education Association v. Northwestern School District, 24 PPER ¶ 24,141 (Final Order, 1993). The employer's motive or intent is irrelevant, and even an inadvertent act may violate Section 1201(a)(1) of PERA if it would tend to coerce or interfere with employes' exercise of protected rights. Montgomery County Community College v. PLRB, 16 PPER ¶16156 (Court of Common Pleas, 1985); Northwestern School District, supra.

In this respect, the Association asserts that the release of the full text of arbitration opinions to newspaper reporters would tend to coerce employes in deciding whether or not to pursue a grievance over an adverse employment action. However, newspapers could obtain copies of the full text of arbitration decisions through a number of sources, such as the publication by the PSBA or other reporting services that publish decisions of arbitrators. Indeed, here the Association consented to the publication of the September 24, 2008 opinion and award over Ms. Manus' discharge. We believe given the availability of this information to newspapers from any number of sources does not, and would not, deter a reasonable employe from filing a grievance to challenge an adverse employment action. Upon review of the exceptions, we agree with the Hearing Examiner's assessment that on this record there is no basis for finding a violation of Section 1201(a)(1) of PERA.

The Association further contends that the District's release of the full text of the arbitration decisions to the Erie Times News was discriminatory in violation of Section 1201(a)(3) of PERA. To support a claim of discrimination, the charging party must establish that the employe engaged in an activity protected by PERA, that the employer was aware of that activity, and that the employer took adverse action against the employe because of anti-union reasons. St. Joseph's Hospital v. Pennsylvania Labor Relations

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<sup>3</sup> Moreover, with respect to the September 24, 2008 arbitration decision, the Association, in writing, consented to the arbitrator's publication of the opinion and award. (Stipulation 10, Exhibit F).

Board, 473 Pa. 101, 373 A.2d 1069 (1977); Lakeland Educational Support Professionals v. Lakeland School District (Margaret Billings-Jones), 40 PPER 120 (Final Order, 2009).

To support its claim of discrimination, the Association argues on exceptions that Ms. Manus engaged in a protected activity by filing the grievances which resulted in arbitration decisions. However, there is no contention or support in the record for finding that the District released the arbitration decisions to the Erie Times News because of Ms. Manus' grievance filings or any other activity protected under Article IV of PERA. Indeed, the Stipulations indicate that after Ms. Manus announced her candidacy for the District's board of directors, and because of a request from a reporter, the District therefore provided the arbitration decisions to the Erie Times News. As succinctly stated by the Hearing Examiner, "[r]unning for a political office is not an activity protected by the PERA..." (PDO at 6). Accordingly, the Hearing Examiner did not err in concluding that the Association failed to establish the necessary elements for a claim of discrimination under Section 1201(a)(3) of PERA.

The Association also argues on exceptions that the Hearing Examiner erred in failing to find a violation of Section 1201(a)(2) of PERA. In this regard, the Association asserts that because it is an equal owner of arbitration decisions, the District violated Section 1201(a)(2) of PERA by usurping the Association's ownership rights through its unilateral release of those decisions to the Erie Times News. However, Section 1201(a)(2) of PERA prohibits "company unions" and 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. SEPTA (Victory District), 40 PPER 87 (Final Order 2009); IBPAT, Local 1968 v. Girard School District, 38 PPER 124 (Final Order, 2007). Upon review of the record, the District's release of the arbitration decisions does not rise to the level of a cognizable claim under Section 1201(a)(2) of PERA.

After a thorough review of the exceptions and all matters of record, the Association has failed to establish that the District committed unfair practices under Section 1201(a)(1), (2), (3) or (5) of PERA by releasing the Manus arbitration decisions to the Erie Times News. Accordingly, the Association's exceptions to the PDO shall be dismissed, and the Hearing Examiner's dismissal of the charge of unfair practices shall be made 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 Erie Education Association are hereby dismissed, and the December 2, 2009 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania 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 twenty-first day of September, 2010. 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.