COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

PALMERTON AREA EDUCATION : ASSOCIATION PSEA/NEA :

:

v. : Case No. PERA-C-10-102-E

:

PALMERTON AREA SCHOOL DISTRICT

PROPOSED DECISION AND ORDER

On April 2, 2010, the Palmerton Area Education Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Palmerton Area School District (District) violated Section 1201(a)(5) of the Public Employe Relations Act (PERA), by allegedly refusing to process a grievance to arbitration.

On April 16, 2010, the Secretary of the Board issued a letter to Union Counsel informing him that the Board was unable to process the Union's charge in its present form and requested that the Union submit a copy of the parties' collective bargaining agreement (CBA). On April 21, 2010, the Union timely filed its amended charge including a copy of a collective bargaining agreement. On April 30, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on September 20, 2010 in Harrisburg, Pennsylvania. On August 30, 2010, I granted the District's request to change the hearing location. Accordingly, the hearing was held on September 20, 2010 in Allentown, Pennsylvania. During the hearing, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties presented oral arguments at the hearing in lieu of submitting post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

- 1. The District is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-398-C).
- 2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (PERA-R-398-C).
- 3. The parties' CBA contains a four-step grievance procedure culminating in arbitration. (Joint Exhibit 1, Appendix D).
- 4. Union President, Tom Smelas, filed Grievance No. 2009-01, dated May 26, 2009, with the Superintendent's office on May 28, 2009. (N.T. 7, 15, 20; Union Exhibits A & B).
- 5. On June 4, 2009, Superintendent Carol S. Boyce, responded to Grievance No. 2009-01. In her response, Ms. Boyce stated, in relevant part, as follows:

Tom, as to memorialize our conversation earlier today at the PAEA retirement luncheon, I am returning to you the above numbered grievance [No. 2009-01] with neither acceptance nor denial but only the following observations:

- 1. Regarding: Date & Nature of Alleged Grievance—No date of grievance or names of specific grievants are given.
- 2. The contract between the PAEA and the Palmerton Area School District specifies that a grievance be filed within 10 days of the action causing the grievance. Your grievance references employees who have resigned or retired as

At the hearing, the Union acknowledged that it mistakenly filed the wrong collective bargaining agreement. The correct CBA was admitted into evidence at the hearing as Joint Exhibit 1.

being those aggrieved. No one has retired or resigned within the 10 days preceding the date of receipt of the grievance.

3. In as much as the health and dental benefits have not been denied to those employees retiring or resigning effective at the end of the 2008-2009 school year, none of those employees have been aggrieved.

(Union Exhibit B).

- 6. The school board has not acted on Grievance No. 2009-01. (N.T. 13-14).
- 7. UniServ Representative, Tom Widitz, filed a Request for Grievance Arbitration Panel, with the Bureau of Mediation on November 20, 2009. The Request specifically references the May 26, 2009 grievance. (N.T. 32; Union Exhibit E).
- 8. On December 10, 2009, William D. Gross, Director of the Bureau of Mediation, responded to Mr. Widitz's request for an arbitration panel and sent a letter addressed to Superintendent Boyce and Mr. Widitz stating that "[a] panel of arbitrators is attached as requested. (N.T. 32-36; Union Exhibit C).
- 9. By letter dated January 11, 2010, District's Counsel refused to proceed to arbitration. In this letter, Counsel stated, in relevant part, the following:

[W]e believe that the PAEA has abandoned the grievance by refusing to respond to repeated and reasonable requests for factual information about the basis for the grievance and even the school year in which it is alleged to have occurred. The District has been unable to investigate the grievances, both Nos. 2009-01 and 2010-1, as the PAEA will not admit who, what or when the grievance is about. It is impossible to prepare for or conduct arbitration proceedings about unknown events and individuals. We will not do so.

(Union Exhibit D).

DISCUSSION

The District essentially argues that Grievance No. 2009-01 is not arbitrable because it was abandoned by the Union. The District contends that Mr. Smelas did not follow up or process the grievance to the next step which is the school board. The District specifically claims that Mr. Smelas did not make a phone call, write a letter or speak to Superintendent Boyce about the matter. Instead, argues the District, Mr. Smelas filed a second, identical grievance which is not relevant to this unfair practice charge.

The Board and the courts have been absolutely, unequivocally, unwaiveringly, unyieldingly, inflexibly, immutably, irrevocably, unalterably and inveterately consistent in repeatedly holding that

ARBITRABILITY IS FOR THE ARBITRATOR TO DECIDE!

Pennsylvania Labor Relations Board v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982); Chester Upland School District v. Pennsylvania Labor Relations Board, 655 A.2d 621 (Pa. Cmwlth. 1995); Danville Area School District v. Danville Area Education Association, 562 Pa. 238, 754 A.2d 1255 (2000); Pittsburgh Joint Collective Bargaining Comm. v. City of Pittsburgh, 481 Pa. 66, 391 A.2d 1318, 1320 (1978); York County Area Vo-Tech Educ. Ass'n v. York County Area Vo-Tech Sch., 570 A.2d 105 (Pa. Cmwlth. 1990); Indiana Area School District v. Indiana Area School District, 35 PPER 56 (Final Order, 2004); Avonworth Education Ass'n v. Avonworth School District, 35 PPER 44 (Final Order, 2004); International Brotherhood of Electrical Workers Local #385 v. Center Township Sewer Authority, 32 PPER ¶ 32038 (Final Order, 2001); Ringgold Education Association, v. Ringgold School District, 24 PPER ¶ 24064 (Final Order, 1993).

Indeed, even frivolous grievances must be submitted to the arbitrator. <u>City of</u> Pittsburgh, 481 Pa. 66, 391 A.2d 1318; Bald Eagle, supra (holding that, under the mandate

of PERA, arbitrability must be decided by an arbitrator even though PERA explicitly prohibits the relief requested in the grievance); York County Vo-Tech., supra (holding that an arbitrator properly determined arbitrability in favor of the grievant even though the agreement was silent on the grievance issue because an arbitrator may base his conclusions on the implications of the agreement). The employer simply does not have the authority to unilaterally determine which grievances are arbitrable in the first instance because that would empower the employer's interpretation to control and would permit employers to effectively deny any and all grievances. East Pennsboro Area School District v. PLRB, 467 A.2d at 1358, 1359. In Center Township Sewer Authority, the Board stated the following:

The Board cannot usurp the jurisdiction of arbitrators by encouraging employers to refuse to submit arbitrability to an arbitrator in the hopes of having the Board decide that an employe is outside a particular bargaining unit or outside the protection of PERA when the Union eventually files an unfair practice charge for refusing to arbitrate. Such a policy would empower the employer to choose another forum, i.e., the Board, to decide whether an issue is arbitrable and to delay the arbitration process; a process that is favored, in part, for its expediency and cost effectiveness.

<u>Center Township</u>, 32 PPER at 102 (emphasis added). The record in this case clearly establishes that the Union submitted class action Grievance No. 2009-01 to the District at the Superintendent level and it was essentially denied for lack of information. The Union subsequently requested and received a panel of arbitrators. Although the District received the list of arbitrators, it unequivocally refused to proceed to arbitration stating that "[i]t is impossible to prepare for or conduct arbitration proceedings about unknown events and individuals. We will not do so." (F.F. 9) (emphasis added). It does not matter whether the District's position regarding the arbitrability of this Grievance is correct. As veteran and experienced labor counsel for the District is very well aware, THE DISTRICT ABSOLUTELY MUST SUBMIT THE GRIEVANCE TO ARBITRATION AND ARGUE ARBITRABILITY TO THE ARBITRATOR.

Accordingly, the examiner may not decide the merits of the parties' dispute or relative positions regarding Grievance No. 2009-01, and the District engaged in unfair practices in violation of Section 1201(a)(5) of PERA and in derogation of its duty to bargain in good faith with the Union when it refused to strike the name of an arbitrator based on its unilateral determination regarding arbitrability.

CONCLUSIONS

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

- 1. The District is a public employer within the meaning of Section 301(1) of PERA.
- 2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
- 3. The Board has jurisdiction over the parties hereto.
- 4. The District has committed unfair practices in violation of Section 1201(a)(5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the District shall

1. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in an appropriate

unit, including but not limited to discussing of Grievances with the exclusive representative.

- 2. Cease and desist from refusing to strike names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation and from refusing to submit Grievance No. 2009-01 to arbitration;
 - 3. Take the following affirmative action:
 - (a) Submit to the Union in writing an offer to arbitrate Grievance No. 2009-01;
 - (b) Strike names of arbitrators from the list of arbitrators provided by the Pennsylvania Bureau of Mediation until an arbitrator is selected to hear Grievance No. 2009-01 and;
 - (c) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-second day of October, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

PALMERTON AREA EDUCATION ASSOCIATION PSEA/NEA

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v. : Case No. PERA-C-10-102-E

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PALMERTON AREA SCHOOL DISTRICT

AFFIDAVIT OF COMPLIANCE

The Palmerton Area School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(5) of the Public Employe Relations Act; that it has ceased and desisted from refusing to strike names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation and from refusing to submit Grievance No. 2009-01 to arbitration; that it has submitted to the Union in writing an offer to arbitrate Grievance No. 2009-01; that it has posted a copy of the proposed decision and order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

	Signature/Date	
	Title	
SWORN AND SUBSCRIBED TO before me the day and year first aforesaid.		
Signature of Notary Public		