COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE COLLEGE AND UNIVERSITY FACULTIES	:	
v.	:	Case No. PERA-C-11-79-E
STATE SYSTEM OF HIGHER EDUCATION KUTZTOWN UNIVERSITY	:	

FINAL ORDER

The Association of Pennsylvania State College and University Faculties (APSCUF) filed exceptions with the Pennsylvania Labor Relations Board (Board) on April 21, 2011.[1] APSCUF's exceptions challenge a March 29, 2011 decision of the Secretary of the Board declining to issue a complaint and dismissing APSCUF's Charge of Unfair Practices filed against the State System of Higher Education, Kutztown University (SSHE). Pursuant to an extension of time granted by the Secretary, APSCUF timely filed a brief in support of its exceptions on May 9, 2011.

In its Charge filed on March 23, 2011, APSCUF alleged that SSHE announced its intention to close its academic advising center, to lay off two bargaining unit members who advised undeclared students effective May 2011, and to reassign those duties to librarians who are members of the bargaining unit. APSCUF further alleged that SSHE denied its request to bargain over SSHE's decision and its impact upon the librarians' wages, hours and terms and conditions of employment. APSCUF asserted that SSHE's actions violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

The Secretary declined to issue a complaint, stating that SSHE's assignment of duties to other members of the bargaining unit is a managerial prerogative that is not subject to bargaining, citing Joint Bargaining Committee of the Pennsylvania Social Services Union v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983), Lincoln University Chapter of the American Association of University Professors v. Lincoln University, 38 PPER 137 (Final Order, 2007), Bangor Area Education Association v. Bangor Area School District, 33 PPER ¶ 33088 (Final Order, 2002) and APSCUF v. SSHE East Stroudsburg University, 32 PPER ¶ 32138 (Final Order, 2001). The Secretary further stated that APSCUF's request for impact bargaining was premature because SSHE had not yet assigned the academic advising duties to the librarians, citing Lackawanna County Detectives' Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000). The Secretary additionally indicated that even if SSHE had assigned the academic advising duties to the librarians, APSCUF failed to allege sufficient facts to establish a severable impact on the librarians' wages, hours or terms and conditions of employment. Because APSCUF failed to state causes of action under Section 1201(a)(1) and (5) of PERA, the Secretary dismissed the Charge.

In determining whether to issue a complaint, the Board assumes that all facts alleged are true. Issuance of a complaint on a charge of unfair practices is not a matter of right, but is within the sound discretion of the Board. Pennsylvania Social Services Union, Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978). A complaint will not be issued if the facts alleged in the charge could not support a cause of action for an unfair practice as defined by PERA. Homer Center Education Association v. Homer Center School District, 30 PPER ¶ 30024 (Final Order, 1998).

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[1] APSCUF's exceptions were due on or before April 18, 2011, but the Board did not receive the exceptions until April 21, 2011. However, the Board will consider APSCUF's hand delivery of its exceptions on April 21, 2011 as timely due to the emergency closure of the Capitol Complex on April 18, 19, and 20, 2011. The Board notes that in lieu of hand delivery, a party may mail its exceptions to the Board along with a United States Postal Form 3817 Certificate of Mailing. See 34 Pa. Code § 95.98(a)(1)(exceptions will be deemed received upon actual receipt or on the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions).

APSCUF alleges in its exceptions and supporting brief that Section 23(A)(2) of the parties' collective bargaining agreement (CBA) limits SSHE's managerial prerogative in assigning duties to the librarians to those duties that are related to library needs. Therefore, APSCUF asserts that SSHE was required to bargain before assigning the academic advising duties to the librarians.

A public employer's decision to eliminate positions and to reassign the duties of those positions to other bargaining unit members falls within the employer's managerial prerogative under Section 702 of PERA to select and direct personnel. North Pocono Educational Support Personnel Association v. North Pocono School District, 39 PPER 44 (Final Order, 2008); PLRB v. Cornell School District, 13 PPER ¶ 13267 (Final Order, 1982), aff'd, 14 PPER ¶ 14147 (Allegheny County Court of Common Pleas, 1983). Nevertheless, if a public employer chooses to negotiate and agree to terms in a collective bargaining agreement that are matters of managerial prerogative, the employer will be bound by those terms for the life of the agreement. Scranton School Board v. Scranton Federation of Teachers, Local 1147, AFT, 365 A.2d 1339 (Pa. Cmwlth. 1976); see also Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 32 (Final Order, 2010). However, the Board's role is to enforce the parties' statutory duty to bargain and not to interpret contracts. Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978). Thus, where a complainant files an unfair practice charge alleging a failure to bargain based on an alleged failure to comply with the provisions of a collective bargaining agreement, the Board will only find a violation of an employer's duty to bargain in good faith if the employer has clearly repudiated express provisions of the agreement. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), appeal denied, 537 Pa. 626, 641 A.2d 590 (1994). As the Commonwealth Court stated in Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005):

> With respect to the proper role of the Board in labor disputes, this Court has explained that the Board "exists to remedy violations of statute, *i.e.*, unfair labor practices, and not violations of contract." … Where a breach of contract is alleged, it should be resolved by an arbitrator using the grievance procedure set forth in the parties' collective bargaining agreement. … However, the Board is empowered to review an agreement to determine whether the employer clearly has repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance.

Id. at 982 (citations omitted). See also Capitol Police Lodge No. 85, Fraternal Order of Police v. PLRB, 10 A.3d 407 (Pa. Cmwlth. 2010).

SSHE's decision to eliminate the two academic advising positions and to reassign the academic advising duties within the bargaining unit to other members of the unit (the librarians) falls within its managerial prerogative to select and direct personnel pursuant to Section 702 of PERA. North Pocono School District, supra; Cornell School District, supra. However, APSCUF alleges that SSHE may not unilaterally assign duties to the librarians that are unrelated to library needs because Section 23(A)(2)(c) of the parties' CBA states that "[a] Library FACULTY MEMBER'S schedule shall be based on library needs as determined by the President or his/her designee in consultation with members of the Library FACULTY." This provision in the CBA concerns the schedule of a Library Faculty member, and does not address the duties of such an employe. Therefore, this provision would not support a claim of a clear repudiation of express provisions of a collective bargaining agreement. Indeed, the preceding provision of the CBA (Section 23(A)(2)(b)) states, in relevant part, that "Library FACULTY also shall be expected, as are other FACULTY MEMBERS, to assume committee assignments and other campus responsibilities." Thus, APSCUF's interpretation of the CBA to prohibit assignment of duties to librarians that are unrelated to library needs is arguably inconsistent with Section 23(A)(2)(b) of the CBA. Moreover, regardless of whether APSCUF is correct or incorrect in its claim that SSHE has violated the CBA, its claim requires contract interpretation, and consequently is a matter reserved for an arbitrator, not the Board. Parents Union, supra; Capitol Police Lodge No. 85, supra; Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). Because APSCUF has failed to

adequately allege a clear repudiation of express provisions of a collective bargaining agreement, the Secretary properly dismissed its charge of a refusal to bargain over reassignment of the academic advising duties.

APSCUF further alleges that its request for impact bargaining was not premature because SSHE implemented its decision to assign the academic advising duties to the librarians when it required them to attend training in February 2011. APSCUF additionally asserts that SSHE's decision has a severable impact on the librarians' wages, hours and terms and conditions of employment because the librarians will be required to work their full schedule in addition to advising 40 to 60 undeclared students.

Where a public employer is charged with violating its duty to bargain over the impact of implementation of a managerial prerogative, the employe representative must demonstrate that (1) the employer lawfully exercised its managerial prerogative; (2) there is a demonstrable impact on wages, hours or working condition matters that are severable from the managerial decision; (3) the employe representative made a demand to bargain over these matters following management's implementation of its prerogative; and (4) the employer refused the employe representative's demand to bargain. Lackawanna County Detectives' Association, supra. Here, APSCUF has failed to allege that it made a demand to impact bargain after implementation of SSHE's managerial decision to assign academic advising duties to the librarians. Indeed, the facts as alleged in the Charge indicate that SSHE has not yet implemented its decision to assign the academic advising duties to the librarians. The Charge alleges that the two bargaining unit members who were performing the academic advising duties were not to be laid-off until May 2011, and does not allege that the librarians have actually begun performance of advising duties. Further, in its February 15, 2011 letter to SSHE, APSCUF cites the anticipated additional counseling duties and notes that the increase in duties "will undoubtedly affect [the librarians'] wages, hours and terms and conditions of employment." (emphasis added). APSCUF's own pleading reveals the future nature of the impact of SSHE's decision on the librarians. Therefore, APSCUF's request for impact bargaining was premature as it preceded implementation of SSHE's managerial prerogative and actual realization of any demonstrable impact on the working conditions of the librarians. See APSCUF v. PLRB, 661 A.2d 898 (Pa. Cmwlth. 1995), appeal denied, 542 Pa. 649, 666 A.2d 1058 (1995) (determination of impact on bargaining unit employes premature where employer had not implemented its decision to assign bargaining unit work to non-bargaining unit employes); see also APSCUF v. SSHE, California University, 40 PPER 2 (Final Order, 2009), aff'd, APSCUF v. PLRB, 263 C.D. 2009 (Cmwlth. Ct. 2009)(unreported opinion)(charge was premature where employer had not imposed parking fees on employes and actual impact of parking fees could not be determined). Accordingly, we agree with the Secretary that APSCUF's Charge fails to state a cause of action under Section 1201(a)(5) of PERA.

APSCUF also asserts that it has alleged sufficient facts to support a finding of an independent violation of Section 1201(a)(1) of PERA. The Board will find that an independent violation of Section 1201(a)(1) of PERA has occurred where, in light of the totality of the circumstances, "the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). APSCUF's Charge only alleges that SSHE's actions constitute a refusal to bargain in violation of Section 1201(a)(5) of PERA, and a derivative violation of Section 1201(a)(1). There is no allegation in the Charge that SSHE's action would tend to interfere, coerce or restrain employes in the exercise of protected rights under PERA, as is required to allege an independent violation of Section 1201(a)(1). Accordingly, the Secretary did not err in declining to issue a complaint and dismissing the Charge.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and affirm the Secretary's decision declining to issue a complaint.

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 Association of Pennsylvania State College and University Faculties are dismissed and the Secretary's March 29, 2011 decision not to issue a complaint be and the same is hereby 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 and James M. Darby, Member, this twentieth day of September, 2011. 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.