The COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL No. 8	:	
v.	:	Case No. PERA-C-18-303-E
PENNSYLVANIA STATE UNIVERSITY	:	

FINAL ORDER

On September 18, 2019, Pennsylvania State University (PSU or University) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued on August 29, 2019. On September 19, 2019, the International Brotherhood of Teamsters, Local No. 8 (Union) also filed timely exceptions to the PDO with a supporting brief. The Union filed a response to the University's exceptions and a supporting brief on October 7, 2019. The University filed a response to the Union's exceptions with a supporting brief on October 9, 2019.

This matter arose on November 15, 2018, when the Union filed a Charge of Unfair Practices pursuant to Section 1201 (a)(1), (5), and (8) of the Public Employe Relations Act (PERA). On December 12, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing scheduling a hearing for March 6, 2019. A hearing commenced on that date, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

For purposes of addressing the cross-exceptions to the PDO in this matter, the relevant facts, as found by the Hearing Examiner, may be summarized as follows. The Union represents a bargaining unit which existed prior to PERA but was then certified by the Board in 1978 at PERA-R-11,403-C to be the exclusive representative of "all regular technical service employes wherever employed by the University in the Commonwealth of Pennsylvania, guards and other security employes located at the University Park campus. . . ." (FF 3). The Union and the University are parties to a Collective Bargaining Agreement (CBA), effective July 1, 2017, through June 30, 2020. (FF 4). The CBA contains a provision, in Article 21.6, which permits the Union to seek review of certain jobs which the Union believes are misclassified for coverage within the bargaining unit.[1] (FF 4). Specifically, Article 21.6 provides, as follows:

> The Union may submit to the University the title of any position which the Union may believe properly should be classified as technical-service. The University shall study such position and respond to the Union indicating the University's findings with respect to the appropriate-ness of the classification. Disputes in regard to such

[1] This provision has appeared in every CBA between the parties dating back to at least the 1990's.

findings shall be settled in the manner provided in Section 8.3, Job Evaluation Grievance. . . .

(FF 4, N.T. 41, Joint Exhibit 1).

On September 21 and 25, 2018, the Union sent three letters (Joint Exhibits 5, 6 and 7) to Susan Rutan, Senior Director of Labor and Employee Relations for the University, listing various job classifications that the Union believed should be in the bargaining unit, totaling approximately 1,100 specific positions. The Union sought the University's review of those positions as part of the process set forth in Article 21.6 of the CBA. On September 21, 2018, the Union also sent a letter to Arbitrator Robert Creo (Joint Exhibit 4) delineating fifteen Article 21.6 grievances regarding alleged job misclassifications which had already been reviewed by the University and had been assigned to him for an arbitration hearing.

On October 16, 2018, Ms. Rutan responded to the Union's communications stating that, in reliance upon a Proposed Order of Dismissal issued by Hearing Examiner Jack Marino on August 27, 2018 at Case No. PERA-U-16-173-E (hereinafter "Marino decision")[2], the University "would not proceed with further consideration of the jobs listed in [the letters] unless the Union identifies for each individual employee's position the existing bargaining unit job the Union believes accurately describes the work the employee is currently performing." (FF 16, N.T. 117, Joint Exhibit 8). Thereafter, at a meeting held on October 22, 2018, Ms. Rutan reiterated the University's position, and advised the Union that the University would not process any grievances pursuant to Article 21.6 of the CBA unless the Union identified, for each misclassified individual employe's position, the existing bargaining unit job the Union believes accurately describes the work that the allegedly mistakenly classified individual employe is currently performing. (FF 18, N.T. 61-62). As a result, the Union filed the instant unfair practice charge with the Board.

The Hearing Examiner determined that the University did not commit unfair practices in violation of Sections 1201 (a)(1) and (5) of PERA by refusing to participate in the Union's attempt to accrete job classifications into an existing bargaining unit consisting of "all

[2] In the Marino decision, the Union filed a petition for unit clarification with the Board seeking to accrete 177 nonprofessional information technology support personnel (ITSS) into the existing bargaining unit of approximately 2,643 technical-service employes. Although the ITSS classification of employes was less than 10% of the existing bargaining unit, and shared an identifiable community of interest with it, the Hearing Examiner dismissed the petition because the record evidence established that the Union was engaged in a systematic campaign dedicated to accreting a large number of job classifications into the unit by filing serial, piecemeal petitions so as to avoid giving the targeted employes a say in their representation in a proper election held pursuant to the requirements of Westmoreland Intermediate Unit, 12 PPER ¶12347 (Order and Notice of Election, 1981). No exceptions were filed in the Marino decision, which became final on September 17, 2018. 34 Pa. Code §95.98(b).

regular technical-service employes wherever employed by the University in the Commonwealth of Pennsylvania" because that practice had been prohibited by the unappealed Marino decision. Importantly, however, the Hearing Examiner also determined that the University did commit unfair practices in violation of Section 1201 (a)(1) and (5) of PERA insofar as the University refused to arbitrate pending grievances regarding the alleged misclassification of specific jobs for which arbitration had been filed prior to the Marino decision.

Initially, the University excepts to the Hearing Examiner's factual finding that, after the Marino decision, the University refused to proceed to arbitration regarding the many job classifications the Union sought to have included in the bargaining unit pursuant to Article 21.6. However, this finding has adequate support in the record. Indeed, Jonathan Light testified to the fact that Ms. Rutan, a representative of the University, stated in a meeting held between the Union and the University on October 28, 2018, that the University would not process any further grievances based on its understanding of the Marino decision. (FF 18, N.T. 61-62). The Hearing Examiner specifically credited this testimony in his decision.

It is well-settled that the Board defers to the hearing examiner's decision to credit some, all, or none of a witness' testimony because he is best able to observe the manner and demeanor of the witnesses at the hearing. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER ¶33011 (Final Order, 2001); Crestwood School District v. Crestwood Education Association, 32 PPER ¶32050 (Final Order, 2001). The Board will not disturb a hearing examiner's credibility determinations absent compelling circumstances. Id. Here, the University did not allege any such circumstances, and the factual findings of the Hearing Examiner are supported by substantial, credible evidence. As such, the University's exception to the Hearing Examiner's findings of fact must be denied.

Based on his review of the record and factual findings, the Hearing Examiner concluded that PSU committed an unfair practice by refusing to proceed to arbitration on the fifteen grievances delineated in Joint Exhibit 4 which had already been reviewed by PSU and referred to Arbitrator Creo pursuant to the Article 21.6 procedure contained in the CBA. On exceptions, the University now contends that the Hearing Examiner's conclusion in this regard was erroneous because the Marino decision is all-encompassing and essentially serves to eviscerate Article 21.6 of the CBA altogether. The University further contends that arbitration is not warranted here because the Union's grievance does not concern an interpretation of the parties' collective bargaining agreement.

Arbitration of grievances arising under the provisions of a collective bargaining agreement is mandatory. 43 P.S. §1101.903. As properly noted by the Hearing Examiner, all disputes concerning arbitrability of a grievance under a collective bargaining agreement must first be submitted to an arbitrator for determination. PLRB v. Bald Eagle Area School District, 499 Pa. 62 (1982); Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), aff'd *per curiam*, 544 Pa. 199 (1996). Moreover, even if a grievance is

alleged to be frivolous, it must be submitted to arbitration. Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 391 A.2d 1318 (Pa. 1978); Indiana Area Education Association, PSEA/NEA v. Indiana Area School District, 35 PPER 56 (Final Order, 2004). As such, for those grievances pending in arbitration, the University must make its jurisdictional argument to the arbitrator. Schuykill County v. PLRB, 197 A.3d 1256 (Pa. Cmwlth. 2018), appeal denied, 216 A.3d 219 (Pa. 2019). Accordingly, pursuant to binding precedent in Bald Eagle and Chester Upland, we affirm the Hearing Examiner's conclusion that the University violated Section 1201(a)(1) and (5) of PERA.[3]

In the Union's exceptions, it challenges the Hearing Examiner's conclusion that the University did not commit unfair practices in violation of Sections 1201 (a)(1) and (5) of PERA by refusing to process the grievances concerning the positions delineated in Joint Exhibits 5, 6 and 7. The University counters that the Union's grievances are an attempt to accrete **job classifications** into the unit, and not to grieve "misclassified positions."

It is well-established that once the Board has determined that a class of positions is within a bargaining unit, an arbitrator may lawfully determine if a particular employe falls within an included classification. Cumberland County, 10 PPER ¶ 10146 (Nisi Decision and Order, 1979). Here, the Union asserts that it should be permitted to continue to use the Article 21.6 process to place "misclassified" positions into the unit. However, as found by the Hearing Examiner, the Union is utilizing Article 21.6 to accrete hundreds of job classifications into the unit through the grievance process thereby bypassing the Board's jurisdiction to determine whether a class of employes share a community of interest and should be included in the unit. PLRB v. Conestoga Valley School District, 11 PPER ¶ 11303 (Proposed Decision and Order, 1980), 12 PPER ¶ 12127 (Final Order, 1981). As stated in the Marino decision and the PDO herein, the Union is required to accrete **classifications of jobs**, if at all, through the Board's unit clarification proceedings or, if necessary, a proper showing of interest and an election held pursuant to the requirements of Westmoreland Intermediate Unit, supra. As such, the Hearing Examiner in this case did not err by concluding that the University did not commit an unfair practice under PERA by insisting on the Union pursuing the Board's unit clarification process concerning the positions in Joint Exhibits 5, 6 and 7.

The Union also asserts that the Hearing Examiner erred in failing to find that it has a contractual right to process its claims concerning misclassified jobs through grievance and arbitration, citing the parties' "long history" of employing Article 21.6 and the Article 21.6 Agreement for that purpose. (Union's Brief, p 8-10). To sustain its burden, however, the Union must establish a repudiation of the contract terms. Pennsylvania State Troopers Association v. PLRB, 761

[3] The University alternatively requests that the PDO in this matter be vacated for the taking of additional evidence. However, the University has not specified any particular evidence which was lacking from the hearing in this matter. Indeed, no basis to reopen the record has been advanced by the University, and thus, this request is denied. See Exeter Township, PERA-U-16-56-E (Final Order, February 21, 2017), aff'd, Exeter Township v. PLRB, 211 A.3d 752 (Pa. 2019).

A.2d 645 (Pa. Cmwlth. 2000). A clear repudiation of the contract does not arise where an employer has a "sound arguable basis" in the language of the parties' collective bargaining agreement supporting its interpretation of the contract terms. Where the employer's actions were reasonably permissible under the negotiated provisions of an agreement, the statutory obligation to bargain in good faith has been satisfied. Here, for purposes of the alleged unfair practice, the express terms of the parties' CBA and the Article 21.6 Agreement provide the contractual right to pursue review of specific instances of alleged individual job misclassification. Accordingly, the University did not clearly repudiate its contractual obligations and a charge under Section 1201 (a)(5) must be dismissed.

Here, the Hearing Examiner reviewed the parties' CBA and Article 21.6 Agreement and properly concluded in the PDO that the University did not clearly repudiate its contractual obligations. In so doing, the Hearing Examiner reasoned that while Article 21.6 of the current CBA may provide the contractual right to pursue review of specific instances of alleged individual job misclassification, it did not extend to the accretion of entire job classifications into the bargaining unit.

Finally, the Union asserts that the Hearing Examiner erred by dismissing its allegation that the University violated Section 1201 (a)(8) in failing to comply with the arbitration award issued by Arbitrator Shyam Das (hereinafter "Das award"). The Das Award, issued on July 17, 2018, denied the University's request to nullify Article 21.6 or the Agreement executed by the Union and the University setting forth procedures concerning alleged misclassified employes.

In refusing to nullify the Article 21.6 Agreement, Arbitrator Das reasoned that the University entered into that Agreement regarding the procedures for reviewing alleged job misclassifications in 2014 and that there was no viable reason for nullification of the Agreement. However, the Das award did not dismiss or reject the University's interpretation of Article 21.6 itself, which is that the provision was meant only for situations where jobs are misclassified. The Hearing Examiner concluded that the Das award does not obviate the Board's exclusive jurisdiction to determine an appropriate bargaining unit and job classifications which should be in the unit. Here, there has been no evidence or argument presented by the Union which would support a charge for failing to abide by the Das award under Section 1201(a)(8). Thus, the Union's exceptions in this regard are dismissed.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err by concluding that the University did not commit unfair practices pursuant to PERA by refusing to participate in the Union's attempt to accrete **job classifications** into the bargaining unit. Further, the Hearing Examiner properly concluded that the University did commit an unfair practice in failing to proceed to arbitration on grievances pending before Arbitrator Creo concerning alleged **misclassification of specific employes.** Accordingly, the exceptions filed by the University and the Union shall be dismissed, and the PDO made absolute and 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 Pennsylvania State University and the International Brotherhood of Teamsters, Local No. 8, are hereby dismissed, and the Proposed Decision and Order dated August 29, 2019, shall 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, James M. Darby, Chairman, and Albert Mezzaroba, Member, this twenty-first day of January, 2020. 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.

The COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

Pennsylvania State University hereby certifies that it has ceased and desisted from its violation of Section 1201 (a)(1) and (5) of the Public Employe Relations Act; that it has immediately proceeded to arbitration over the alleged misclassified jobs mentioned in the Union's September 21, 2018, letter to Arbitrator Creo; that it has posted a copy of the Proposed Decision and Order and Final 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 aforesaid.

_____
Signature of Notary Public