COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UPPER BUCKS COUNTY TECHNICAL SCHOOL EDUCATION ASSOCIATION, PSEA/NEA	:	
v.	:	CASE NO. PERA-C-19-203-E
UPPER BUCKS COUNTY TECHNICAL SCHOOL	:	

PROPOSED DECISION AND ORDER

On September 16, 2019, the Upper Bucks County Technical School Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board alleging that the Upper Bucks County Technical School (School) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that, during collective bargaining impasse, the School threatened Union members with discipline for wearing Union buttons and mandated that teachers complete computer-based lesson plans at least 15 days in advance of class covering the material in the plan.

On September 26, 2019, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on October 28, 2019, in Harrisburg. The hearing was continued, at the request of the complainant and without objection from the respondent, and it was rescheduled for February 26, 2020. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses.

Also during the hearing on that date, the Union withdrew several paragraphs from its specification of charges and withdrew its cause of action under Section 1201(a)(5). The withdrawals left only paragraphs 1-6 of the specification of charges remaining for consideration and its cause of action under Section 1201(a)(1), as related the dispute over the Union button. The parties also entered into factual stipulations, which formed the entire basis for the factual record. After the parties offered factual stipulations, I concluded that the misconduct alleged in the charge was rendered moot when the parties subsequently entered into a new collective bargaining agreement, as a matter of law, that the Board lacked jurisdiction over the claims, and that post-hearing briefs were unnecessary.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The School is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6-7)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (M.T 6-7)

3. The parties stipulated and agreed that, at the start of the 2019-2020 school year and during the status quo period of contract negotiations,

Union members wore badges to the School during an in-service work day. Students were not present at the School on that day. (N.T. 8-10)

4. The parties stipulated and agreed that the badge states as follows: the first line states; "Food Truck = $; the second line states; "Teachers ???" (N.T. 10; Association Exhibit 1)

5. The parties stipulated and agreed that a representative of the School questioned the Union about the meaning of the button. (N.T 11; Association Exhibit 2)

6. The parties stipulated and agreed that the Executive Director of the School sent an email to the Union which stated as follows: "the silent protesting with your buttons are not the type of atmosphere we want to portray to our new instructors for the public, period. The negotiations have nothing to do with the improvement of our teaching strategies." (N.T. 12; Association Exhibit 2)

7. The parties stipulated and agreed that the Union and the School disagreed over the meaning of the button. (N.T. 12-13)

8. The parties stipulated and agreed that on September 16, 2019, the Union filed an unfair practice charge based upon the exchange/disagreement between management and the Union regarding the buttons. (N.T. 18)

9. The parties stipulated and agreed that subsequent to the filing of the charge, in the fall 2019, the parties ratified a successor collective bargaining agreement resolving any and all contract negotiation disputes. (N.T. 13)

10. The parties stipulated and agreed that no employees were disciplined regarding the wearing of buttons and there have been no other button-related disputes between the parties. (N.T. 14)

11. The parties stipulated and agreed that the alleged dispute arising out of the wearing of buttons was a matter that arose out of an environment created by contentious negotiations which has been resolved by the ratification of the new collective bargaining agreement. (N.T. 16)

DISCUSSION

In APSCUF v. PASSHE, 8 A.3d 300, 607 Pa. 461 (2010), our Supreme Court reversed the Commonwealth Court and affirmed the Board's holding that unfair practice charges alleging misconduct, that arises out of collective bargaining negotiations with no lasting effect on wages, hours or working conditions, are rendered moot by the parties' ratification of a new collective bargaining agreement subsequent to the alleged misconduct. In PASSHE, the parties were in the midst of bargaining a new collective bargaining agreement when the State System of Higher Education threatened to cancel health insurance and other benefits for the faculty with summer school assignments, if the faculty went on strike during the summer. The State System also threatened that faculty, who failed to report for summer classes, would be considered to be on strike and would have their pay and benefits terminated. Relatedly, the State System also stated that pay for summer classes would be forfeited, including for classes already taught.

APSCUF filed a charge of unfair practices with the Board. Before the Board could issue a complaint, APSCUF and the State System entered into new collective bargaining agreement. In a letter to the Board, APSCUF informed the Board of the agreement. The Board dismissed the charge of unfair

practices as moot. The Board concluded that APSCUF failed to demonstrate that the matter involved an issue of great public importance or that the matter was capable of repetition and evading review. Saliently, the Board refused to speculate about whether the State System would make the same threats during future negotiations. The Board opined that "continued litigations over allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." PASSHE, 8 A.3d at 302, 607 Pa. at 465. (citations omitted)

In affirming the Board, the Supreme Court stated: "The Board, which is expert in this area, explained its approach to this particular class of moot cases where charges are rendered moot by the parties' later voluntary execution of a new collective bargaining agreement." PASSHE, 8 A.3d at 307, 607 Pa. at 472. The Supreme Court further held that the Board properly "concluded that the interests of the parties and the public are best served by avoiding continued litigation over conduct during negotiations that obviously did not prevent the parties from reaching a mutually agreeable contract." PASSHE, 8 A.3d at 307, 607 Pa. at 473.

The Board has long been consistent in dismissing cases alleging misconduct arising from collective bargaining negotiations. In Hazleton Area School District, 29 PPER 29180 (Final Order, 1998), the Board stated its policy in the following manner: "In certain circumstances, the Board will exercise a policy of dismissing as moot unfair practice charges involving issues that are collateral to a collective bargaining impasse when that impasse is resolved via achievement of a collective bargaining agreement." Id. at 419.

In Medical Rescue Team South Authority v. Association of Professional Emergency Medical Technicians, 30 PPER 30063 (Final Order, 1999), the Board adopted the reasoning from the New Jersey Public Employment Relations Commission as follows:

> "We have often held that the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations. We have so held irrespective of whether the charging party is a majority representative or a public employer. Continued litigation over past misconduct which has no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future. Under all the circumstances, this case does not warrant an exception to our reluctance to resurrect pre-contract negotiations disputes."

Medical Rescue, 30 PPER 30063 (quoting Ramapo-Indian Hills Regional High School District, 16 NJPER 21225, at 117-118).

In Upper Moreland School District, 38 PPER 117 (Proposed Decision and Order, 2007), the union filed a charge of unfair practices alleging that the employer school district violated its statutory bargaining obligation to participate in fact finding. Hearing Examiner Wallace articulated his survey of Board law in this area as follows:

> In determining whether alleged past violations of bargaining violations occurring during negotiations should be heard, the Board considers as paramount whether its involvement after a successor agreement has been reached, is appropriate under the facts of any particular case. In this regard, the Board distinguishes between

> those charges where employes continue to suffer residual effects of an unlawful change to wages, hours and working conditions, which are typically not moot, as opposed to those involving bargaining tactics, which do not result in affirmative relief to employes, but rather cease and desist orders, which are generally mooted by the parties' entry into a collective bargaining agreement.

Upper Moreland, 38 PPER 117.

In Pennsylvania Social Services Union v. Commonwealth of Pennsylvania, Department of Public Welfare, 39 PPER 26 (Proposed Decision and Order, 2008), Hearing Examiner Wallace was again confronted with a dispute involving facts very similar to those presented in the instant case. In the Department of Public Welfare case, the union charged that, during contract negotiations, the employer prohibited union members from wearing two types of union buttons; one that stated: "More Staff Quality Services" and the other that stated: "Careful someone's listening." During the hearing in that case, the union withdrew its charge regarding the first button, and the Commonwealth moved to dismiss as moot the charge with respect to the second button because the parties had, since the filing of the charge, entered into a new collective bargaining agreement. Examiner Wallace consistent with Upper Moreland, supra, concluded that the dispute involved matters collateral to collective bargaining impasse as defined in Hazleton, supra, and granted the Commonwealth's motion to dismiss as moot. Examiner Wallace addressed the union's argument that the dispute falls within the exception to the mootness doctrine (i.e., that the matter, arising during collective bargaining, was capable of repetition and evading review). In so doing, Examiner Wallace relied on the Board's policy that the Board will not speculate as to whether the employer will prohibit wearing the same or similar buttons in the future during collective bargaining and, therefore, the matter was not capable of repetition or evading review, nor was it a matter of great public importance. Department of Public Welfare, supra.

As he did in Upper Moreland, supra, Examiner Wallace further noted that the Board distinguishes between two categories of charges when considering the mootness of alleged misconduct arising during collective bargaining: those that involve unilaterally altering wages, hours or working conditions in violation of the employer's collective bargaining obligation, as in Hazleton, supra; and those involving matters collateral to collective bargaining impasse, which are resolved by a new collective bargaining agreement, as in Temple University, 25 PPER 25121 (Final Order, 1994). Charges in the first category will not be dismissed as moot because they have lasting effects on wages, hours or working conditions and the conduct may hamstring the union's bargaining position. However, charges involving the second category will be dismissed as moot if the parties subsequently enter into a new collective bargaining agreement.

More recently, the Board again took the position that disputes alleging employer misconduct occurring during collective bargaining impasse that are, for tactical purposes, collateral to issues in bargaining, with no residual effect on wages, hours or working conditions, are mooted by the parties' ratification of a successor collective bargaining agreement after the filing of a charge. In Philadelphia Community College, 51 PPER 17 (Final Order, 2019), the union alleged that the college employer unlawfully required faculty members to attend professional development days and perform student learning outcomes because the parties were at impasse after contentious, protracted contract negotiations.

The employer prevailed at the hearing examiner level, and the union filed exceptions. While pending before the Board on exceptions, the parties ratified a successor collective bargaining agreement, and the union withdrew its charge. The Board issued an order vacating the proposed decision and order. The employer filed exceptions asserting that vacating the order was in error where the parties had not entered into an agreement settling the issues disposed of in the proposed order. Relying on Medical Rescue Team South Authority, supra, the Board, in Philadelphia Community College, stated as follows: "The Board has consistently and unequivocally recognized that where there is no ongoing loss of employe wages or benefits, charges of unfair practices alleging unlawful unilateral action during negotiations are rendered moot once the parties have reached a successor collective bargaining agreement." Philadelphia Community College, 51 PPER 17.

Indeed, the Board and its examiners have "consistently" and "unequivocally" dismissed claims of alleged employer misconduct during contract negotiations after ratification of a new agreement. Accordingly, the Board has also held that allegations that the employer knowingly provided false financial information during collective bargaining negotiations are mooted by the parties' subsequent ratification of a successor collective bargaining agreement, requiring dismissal of the charge. APSCUF v. PASSHE, 49 PPER 58 (Final Order, 2018)(charge also dismissed as untimely).

The Board also dismissed as moot a charge alleging that the employer violated its bargaining obligation by prematurely releasing a fact finding report after the parties' post-charge ratification of a collective bargaining agreement. Slippery Rock Area School District, 24 PPER 24175 (Proposed Decision and Order, 1993). *See also*, Hempfield School District, 34 PPER 75 (Proposed Decision and Order, 2003)(charge alleging unlawful direct dealing with employes during collective bargaining properly dismissed as moot after parties enter into a successor collective bargaining agreement); Temple Association of University Professionals, Local 4531 AFT v. Temple University, 23 PPER 23118 (Proposed Decision and Order, 1992)(charges alleging employer direct dealing, failure to provided requested information for bargaining, the unilateral declaration of impasse and the employer implementation of final, best offer were properly dismissed as moot after the parties' post-charge ratification of a successor collective bargaining agreement); TAUP v. Temple, 40 PPER 129 (Proposed Decision and Order, 2009)(charge alleging that the employer unlawfully engaged in direct dealing, misrepresenting negotiations to employes and denigrating the union to employes was properly dismissed when the parties entered into a post-charge collective bargaining agreement and where the union controlled mootness by choosing to agree or disagree to a contract during litigation); AFSCME District Council 33 v. City of Philadelphia, 36 PPER 158 (Final Order, 2005)(charge alleging the City's refusal to proceed to interest arbitration for its prison guards was properly dismissed as moot after the parties entered into a negotiated collective bargaining agreement covering those employes post charge).

In the case *sub judice*, there is no factual dispute. During contentious contract negotiations, a School representative challenged the meaning of buttons worn by bargaining unit members on an in-service work day when no students were present. No employes were disciplined for wearing buttons. Although the dispute over the buttons arose from the environment created by collective bargaining negotiations for a new contract, it was collateral to the wages, hours and working conditions being negotiated. If the charge were entertained and sustained, the only remedy available would be a possible

cease and desist order. Under consistent and longstanding Board policy and case-law, this matter is moot because "the Board distinguishes between those charges where employes continue to suffer residual effects of an unlawful change to wages, hours and working conditions, which are typically not moot, as opposed to those involving bargaining tactics, which do not result in affirmative relief to employes, but rather cease and desist orders, which are generally mooted by the parties' entry into a collective bargaining agreement." Upper Moreland, 38 PPER 117.

As the Board has repeatedly stated: "Continued litigation over past misconduct which has no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Moreover, as with the many past cases where the Board has dismissed disputes as moot once a post-charge collective bargaining agreement has been ratified, this matter too is not one of great public importance. Nor will the Board speculate as to whether the School in this case will engage in the complained of conduct in the future. The speculation is further compounded by uncertainty about whether the Union will engage in the same button-wearing conduct in the future. Consequently, the matter does not fall within the exception to the mootness doctrine. Also, the alleged misconduct at issue here did not hamstring the Union's position in bargaining a new contract. Accordingly, this matter is moot as a matter of law; the charge is dismissed for lack of case or controversy and, therefore, subject matter jurisdiction.

CONCLUSIONS

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

1. The School is a public employer under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Board lacks subject matter jurisdiction over the claims presented herein, and the charge is properly dismissed as moot.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner:

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifteenth day of May, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

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Jack E. Marino, Hearing Examiner