

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :
COLLEGE AND UNIVERSITY FACULTIES :
 : CASE NO. PERA-C-16-373-E
v. :
 :
 :
PENNSYLVANIA STATE SYSTEM OF HIGHER :
EDUCATION, CALIFORNIA UNIVERSITY :

SECOND PROPOSED DECISION AND ORDER

On December 21, 2016, the Association of Pennsylvania State College and University Faculties (APSCUF or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Pennsylvania State System of Higher Education, California University (PASSHE, University or Employer) violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA).

By letter dated January 9, 2017, the Secretary declined to issue a complaint on the charge filed. The Association filed exceptions to the Secretary's decision on January 30, 2017. In its exceptions, the Association withdrew its charge based on Section 1201(a)(3) and requested a complaint be issued on its charge against the University for an alleged violation of Section 1201(a)(1). By Order dated February 21, 2017, the Board directed the Secretary to issue a complaint. On March 8, 2017, the Secretary of the Board issued a complaint and notice of hearing designating June 26, 2017, in Harrisburg, as the time and place of hearing.

A hearing was held on the charge on June 26, 2017 in Harrisburg, before the undersigned Hearing Examiner. A second day of hearing was held on July 26, 2017 in Harrisburg, also before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed its post-hearing brief on September 14, 2017. The University filed its post-hearing brief on November 1, 2017.

The Hearing Examiner issued the first Proposed Decision and Order on November 22, 2017, which found that the University had not committed unfair practices in violation of Section 1201(a)(1) of PERA and dismissed the Association's charge.

The Association filed timely exceptions. On July 17, 2018, the Board issued an Order Directing Remand to Hearing Examiner for Further Proceedings (Remand Order). The Board directed the Hearing Examiner on remand to determine if the University violated Section 1201(a)(1) of the Act.

The Hearing Examiner determined that an additional hearing was not necessary to resolve the matter on remand. The parties expressed to the Hearing Examiner that they did not wish to file new briefs and

requested that the Hearing Examiner rely on the parties post-hearing briefs and briefs on exception when determining the issue on remand.

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

ADDITIONAL FINDINGS OF FACT

24. The July 1, 2011 through June 30, 2015 CBA states in relevant part:

Article 3

FAIR PRACTICES

Neither party hereto nor any FACULTY MEMBER shall discriminate against any other FACULTY MEMBER or candidate for employment on the basis of. . . APSCUF membership or activity or lack thereof. . .

. . .

. . . .

Article 43

INVESTIGATIONS OF COMPLAINTS AGAINST FACULTY MEMBERS

The STATE SYSTEM and APSCUF recognize that it may be necessary to investigate complaints against FACULTY MEMBERS prior to making a disciplinary decision. When appropriate, attempts should be made to resolve complaints informally. In those cases in which complaints are not resolved informally, the principles below shall apply:

A. If the University determines to conduct an investigation of a complaint, either verbal or written, it shall be initiated and concluded within a reasonable amount of time. Absent unusual circumstances, the decision to conduct a formal investigation shall be made within twenty (20) days of receipt of the complaint.

. . . .

G. This Article shall supplement and by no means shall diminish the rights of any FACULTY MEMBER, APSCUF, or the STATE SYSTEM/UNIVERSITIES under any law, including the Pennsylvania Public Employee Relations Act.

(Joint Exhibit 1).

25. The July 1, 2015 through June 30, 2018 CBA was executed on December 20, 2016. It states in relevant part:

Article 3

FAIR PRACTICES

Neither party hereto nor any FACULTY MEMBER shall discriminate against any other FACULTY MEMBER or candidate for employment on the basis of . . . APSCUF membership or activity or lack thereof. . . .

Article 42

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. . . .

G. This Article shall supplement and by no means shall diminish the rights of any FACULTY MEMBER, APSCUF, or the STATE SYSTEM/UNIVERSITIES under any law, including the Pennsylvania Public Employee Relations Act.

(Joint Exhibit 2).

DISCUSSION

This issue comes to me on remand. The Board found that the posting of the strikebreaker poster was protected activity by the Association notwithstanding the use of the word "infamous". The Board held: "[u]pon review of [the strikebreaker poster], the Hearing Examiner's determination that the list was not protected under section 401 of PERA solely due to the use of the word "infamous" is not legally supported." Remand Order at page 6. In footnote three to the Remand Order, the Board held: "Our disposition on exceptions extends only to reversal of the Hearing Examiner's determination that [the Association's] use of the term "infamous", in and of itself, was dispositive." The Board held that because I did not address the Association's allegations that the University violated Section 1201(a) (1) of PERA, remand was necessary for a determination of whether

the University's actions violated Section 1201(a)(1) of PERA. Remand Order page 6.

Restating the allegations, the Association charges that the University committed independent violations of Section 1201(a)(1) of PERA when the University: (1) on December 9, 2016 issued a direct order to remove the strikebreaker poster from the Association's bulletin board; (2) began an investigation on December 12, 2016 of Hess regarding the posting of the strikebreaker poster; and (3) sent an email on December 13, 2016 notifying faculty members they had been listed on the poster and solicited information from the listed faculty members.

Restating the relevant law, Section 1201(a)(1) prohibits an employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." 43 P.S. §1101.1201(a)(1). An employer commits an independent violation of section 1201(a)(1) "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 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employes have in fact been coerced. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985); Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER ¶ 97 (Final Order, 2004). If the employer's conduct was not coercive, then no violation of Section 1201(a)(1) may be found. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, *supra*.

Nor may a violation of Section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order, 1992), *affirmed on another ground*, 25 PPER ¶ 25121 (Final Order 1994); Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989). However, if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a)(1) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order, 1995).

Returning to this case with the Board's decision in mind, the Board found in its Remand Order that the use of the word "infamous" was not, by itself, sufficient to make the strikebreaker poster "so offensive, defamatory, opprobrious or obnoxious as to lose the protection of PERA." Pennsylvania State Troopers Association, 41 PPER 33 (Final Order, 2010), *aff'd sub nom.*, Pennsylvania State Police v. PLRB, 2011 WL 10843672 (Pa. Cmwlth. 2011) (unreported opinion); Remand Order page 6. However, as I interpret the Board's Remand Order, the Board left space for the strikebreaker poster to still be found to be not protected under PERA on a different combination of factors other than solely relying on its use of the word "infamous". Reviewing the record in this matter, and considering all the facts about the strikebreaker poster, I find that it must be considered protected activity and that it does not lose protection for being offensive and defamatory under Pennsylvania State Troopers Association, *supra*. In so finding, I also rely on the Board's citations to National Labor Relations Board cases which hold that conduct similar to that engaged

in by the Association in this matter, the posting of names of strikebreakers, is protected concerted activity. Remand Order at page 5.

Therefore, I find that Barnhart's email directive to Hess to take the strikebreaker poster down from the Association's bulletin board was an independent violation of Section 1201(a)(1). Barnhart's email states in relevant part:

Subject: Directive for you

Professor Hess and ABSCUF Officers:

With this email, I am issuing you a directive to immediately take down the poster entitled, "Strikebreakers 2016: The Infamous 43", that you have displayed near the local APSCUF office. It is my expectation that you will comply with this directive by the close of business today, Friday, December 9, 2016.

Sincerely,

Bruce Barnhart

(Finding of Fact 15; Association Exhibit 5). The email's coercive power is found in the language used by Barnhart. The subject of the letter includes the word "directive". The first sentence also states "I am issuing you a directive" and the second sentence states "[i]t is my expectation that you will comply". There can be no doubt that a reasonable employe would perceive this letter to be a strongly coercive communication with a peril of discipline. The coercive effect of the directive is plainly evident on this record as Hess, who is the Association president, removed the poster as soon as possible. I find that a reasonable employe would be incontrovertibly impelled by Barnhart's directive to stop participating in protected activity.

Moving to any legitimate basis to support Barnhart's email, I note that the email contains absolutely no basis or justification for the take-down order. While, as discussed below, the University did present at the hearing some basis to justify its actions with respect to the strikebreaker poster, none of those reasons are present in Barnhart's email. The fact that Barnhart did not intratextually justify his take-down email to Hess increases the coercive effect of the email and decreases the weight of any legitimate basis identified by the University.

The record shows that Barnhart sent the take-down email after a University management meeting to discuss the issue where a plan of action was agreed upon and justifications for that plan were expressed. (Finding of Fact 14). For the reader's convenience, Finding of Fact 14 stated:

14. On Friday December 9, 2016, there was a conference call with Guiser, Barnhart, the University Labor Relations representatives, and University counsel, to address the concerns brought forth by Pagen and Hoover about the

strikebreaker poster. As a result of the discussion in the conference call, the participants agreed to move forward with an investigation of Hess and for Barnhart to direct the Association to remove the strikebreaker poster on the Association bulletin board. Regarding the directive to the Association to remove the strikebreaker poster from the bulletin board, Barnhart believed that the only reason the strikebreaker poster had been posted by the Association was to retaliate against faculty members who crossed the picket line. Barnhart believed it was his duty to protect faculty members who crossed the picket line during the strike. The participants of the conference call felt the University must investigate the circumstances surrounding the posting of the strikebreaker poster since two faculty members came forward with concerns. (N.T. 225-226, 265-268).

I find that University interests discussed at this meeting were not legitimate bases to justify a take-down order which nullified the Association's protected activity. Importantly, the take-down letter issued to Hess was prior to any investigation by the University based on complaints by faculty members and Article 43/42¹ of the CBA. Therefore, I find that the University cannot rely on its assumed investigatory role under Article 43/42 to justify Barnhart's takedown email to Hess. Further, I do not find the University's mission to protect faculty members from discrimination by the Association under Article 3(a) of the CBA to be a legitimate basis to interfere with protected activity. The language in Article 3(a) is broad and aspirational and does not put forth any concrete mechanisms of enforcement or similar which would serve as a legitimate basis for Barnhart's take-down letter or for his belief that he had a duty to protect faculty members from the Association. Section 3(a) can at most be read, in the context of this matter, as a mutual pledge by the parties to not discriminate and not as a mandate for the University to interfere with protected activity.

I also find that the University committed an unfair practice when, on December 12, 2016, it began an investigation of Hess regarding the posting of the strikebreaker poster. This investigation was announced to Hess in a December 12, 2016 letter from Guiser which states in relevant part:

¹ The record shows that the parties were in status quo under the CBA which expired on June 30, 2015 during much of the events that form the basis of this matter. Under that CBA, the relevant section was Article 43. The parties then executed the July 1, 2015 to June 30, 2018 CBA on December 20, 2016, which was in the middle of the events of this matter. At the hearing the parties referred to the relevant section as Article 43 or Article 42 or Article 43/42 or similar. I will here use Article 43/42 to refer to the relevant section (which did not change between the two CBAs).

Dear Professor Hess:

Pursuant to Article 43 of [the 2011-2015 CBA], this letter is to notify you that an investigation is being conducted into the allegations that you threatened and intimidated faculty by displaying or causing to be displayed, a poster in Keystone Hall titled "Strikebreakers 2016: The Infamous 43".

You will be notified under a separate letter as to the time and place of an investigatory interview in order to allow you to respond to these allegations. You may have an APSCUF representative present at the investigatory interview if you desire.

As provided by Article 43, you are prohibited from taking any retaliatory action against anyone associated with this investigation, and such action may result in a separate disciplinary action.

Sincerely,

Eric Guiser

(Finding of Fact 18; Association Exhibit 6).

I find that the investigation into Hess would coerce a reasonable employe against performing similar protected activities. The investigation is manifestly about the Association's protected activity and is an adverse employment action. Even if, ultimately, the University decided not to discipline Hess, the fact that she was investigated at all has a coercive effect.

On this record, the University had no legitimate basis to investigate Hess. Guiser testified that the reasons the University investigated Hess are because the University believed it had a duty to respond to the two complaints (put forth fully below) from employes under Article 43/42 of the CBA and that the University has a duty under Article 3(a) of the CBA to protect faculty members from discrimination. (Finding of Fact 14).

As discussed above, I am not persuaded that Article 3(a) is a legitimate basis to interfere with protected activity.

The University's reliance on Article 43/42 is also not a legitimate basis in this context. As mentioned above, the University's use of Article 43/42 was based on two complaints it received about the strikebreaker poster. One complaint was from Professor Pagen which stated in relevant part:

Sent: Thursday, December 08, 2016 3:52 PM

. . .

Subject: Actions of a colleague

Hello, all-

I think, by now, you are all well aware of the actions taken by Barb Hess as APSCUF President. Allow me to voice my concern that this action was taken for the sole purpose [of] ensuring that "The Infamous 45 [sic]" (which is inaccurate, but I digress) are subjected to further intimidation and attempted public shaming. I would like to think that the faculty across campus would not commit acts of violence or physical retribution in some manner, but I no longer believe that to be so.

It is my hope that the administration will make public their support and protection of those who are named on the list. It is my hope that the administration will make public their condemnation of the actions taken by Dr. Hess, Ken Smelko, and union leadership.

When I crossed the line to meet with administration regarding students, I found myself faced with cyber-bullying from both current and former colleagues. At the time, I was fearful when I knew that I would have to be among groups of faculty. I was referred to as a scab (inaccurately, ironically), on-line and on campus.

. . .

Sincerely,

Michele

(Finding of Fact 12; Employer Exhibit 8) (emphasis added). The other complaint received by the University was from Professor Hoover which states in relevant part:

Sent: Thursday, December 08, 2016 12:08 PM

. . .

Subject: Work concern

Kevin,

I am writing to express my concern related to the recent union posting of strike breakers information.

I feel personally threatened and intimidated by this on a variety of levels. First the sign is directly outside my office making me an easy target.

Secondly, I have applied for promotion and the President's Merit Award in Teaching both of which require a peer review process.

I view the posting of the names as encouragement from the union to retaliate against those of us who did not participate in the strike even though numerous people on the list were off for medical reasons.

I have already contacted Eric Guiser and John Burnett on this matter but following appropriate protocol must also make you aware that **I feel this action by the union is a direct threat and it is creating a hostile work environment for me.**

Thank you for your time
Marcia

(Finding of Fact 13; Employer Exhibit 11) (emphasis added).

Article 43/42 relates to complaints against faculty members. The complaints made by Pagen and Hoover, which motivated the University's actions, were specifically against Hess's protected activity as an Association official, not as a faculty member.

Pagen's letter explicitly complains about the "actions taken by Barb Hess as APSCUF President", and not about any action Hess took as a faculty member. Pagen writes: "It is my hope that the administration will make public their support and protection of those who are named on the list." Pagen then calls for the University to condemn the "actions taken by Dr. Hess, Ken Smelko, and union leadership."² Pagen's complaint is, on its face, about labor issues. She is concerned with Hess's participation in protected activity and, generally, the activities of the Union.

Hoover's complaint letter does not even explicitly refer to Hess but states: "I am writing to express my concern related to the recent union posting of strike breakers information." Hoover further states: "I view the posting of the names as encouragement from the union to retaliate against those of us who did not participate in the strike. . . ." Hoover then writes: "I feel this action by the union is a direct threat and it is creating a hostile work environment for me." Hoover is solely concerned about the Association and the Association's protected activity, and not Hess specifically. The fact that the University understood Hoover's complaint to be a complaint about Hess in particular shows that the University was not focused on Hess's status as a faculty member but was singularly focused on Hess's status as Association president and person responsible for the strikebreaker poster.

On these facts, the University cannot credibly rely on Article 43/42 to thereafter launch an investigation of Hess based on her status as a faculty member. The University may not override the protections

² Ken Smelko is an Association official.

of PERA under the guise of investigation faculty member complaints especially since Article 43/42 expressly states that PERA rights are maintained. Article 43/42 cannot be used to undermine PERA rights. Any such reliance on Article 43/42 to justify the investigation of Hess is clearly pretext.

Finally, I turn to Guiser's December 13, 2016 email to faculty listed on the strikebreaker poster which states in relevant part:

Your name was included on a list that was posted on the APSCUF bulletin board in Keystone Hall. This list included the names of faculty that crossed the picket line during the strike and chose to work, as determined by APSCUF. The list was entitled "Strikebreakers 2016: The Infamous 43". The University directed APSCUF to take this list down, which they have as of December 12th. Please contact me at [Guiser's University email address] if you wish to share any information related to this posting. Please feel free to contact me at [Guiser's work telephone number] if you wish to do so.

Regards,

Eric Guiser

(Finding of Fact 20; Association Exhibit 7). This email would tend to have a coercive effect as a reasonable employe would understand that this email was an investigation about the Union's protected activity. The email specifically references the strikebreaker poster. As above, the University has not shown a legitimate basis for this investigation. Therefore, this email is also a violation of Section 1201(a)(1).

CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

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

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that PASSHE shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Take the following affirmative action:

(a) 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;

(b) 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; and

(c) Serve a copy of the attached Affidavit of Compliance upon the Association.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixteenth day of July, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

PASSHE hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of the Public Employe Relations Act; that it complied with the Proposed Decision and Order as directed therein; 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 Association at its principal place of business.

Signature

Title

Date

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public