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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 413 CD 2016

DR. MARY ANN DAILEY,
Petitioner

v.

PENNSYLVANIA LABOR RELATIONS BOARD,
Respondent

BRIEF OF RESPONDENT PENNSYLVANIA LABOR RELATIONS BOARD

Petition for Review of a Final Order of the Pennsylvania Labor Relations Board
entered February 16, 2016 at Case No. PERA-C-15-131-E.

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* * *

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COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The Petitioner misstates the scope and standard of review of a decision of the Pennsylvania Labor Relations Board (PLRB or Board) declining to issue a complaint, which has been well-established for nearly 40 years. As stated by our Supreme Court in Association of Pennsylvania State College and University Faculties (APSCUF) v. Pennsylvania Labor Relations Board, 607 Pa. 461, 469, 8 A.3d 300, 304 (2010), “[t]his Court has repeatedly held that the decision of whether or not to issue a complaint regarding alleged violations of PERA is within the sound discretion of the Board, and is reviewable only for an abuse of that discretion.” See also Pennsylvania Social Services Union, Local 668 v. Pennsylvania Labor Relations Board, 481 Pa. 81, 392 A.2d 256 (1978).

COUNTERSTATEMENT OF THE QUESTION INVOLVED

Whether the Board abused its discretion by declining to issue a complaint, where the facts alleged in the Charge do not constitute an unfair practice under PERA?

Not answered below. Suggested answer in the negative.

COUNTERSTATEMENT OF THE CASE

On May 18, 2015, the Petitioner, Dr. Mary Ann Dailey, filed a Charge of Unfair Practices with the Board alleging that the Association of Pennsylvania State College and University Faculties (APSCUF) violated Section 1201(b)(1) of the Public Employe Relations Act (PERA)¹ by conducting its annual dues rebate campaign in which union members are provided with the option of receiving a rebate of \$25, allowing the \$25 to remain in APSCUF's dues fund, or donating the \$25 to APSCUF's political action committee. (Reproduced Record (R.) 1a-4a). On June 16, 2015, the Secretary of the Board declined to issue a complaint and dismissed the Charge of Unfair Practices, stating that the allegations in the Charge do not rise to the level of an unfair practice under Section 1201(b)(1) of PERA. (R. 247a-248a). The Secretary further stated that the allegations involve internal union matters and not unfair practices under the Board's jurisdiction.

On July 6, 2015, Dr. Dailey filed exceptions with the Board challenging the Secretary's decision not to issue a complaint. (R. 249a-252a). Upon review of the Secretary's decision and the exceptions concerning Dr. Dailey's allegation that she could not take advantage of the dues rebate for 2015 due to APSCUF's failure to

¹ Act of July 23, 1970, P.L. 563, No. 195, as amended, 43 P.S. §§ 1101.101–1101.2301. Section 1201(b)(1) of PERA provides that an employe organization is prohibited from “[r]estraining or coercing employes in the exercise of the rights guaranteed in Article IV of [PERA].” 43 P.S. § 1101.1201(b)(1).

provide her with the dues rebate form prior to the April 1, 2015 deadline,² the Board noted that since at least 2012, an employees' rebate election made by April 1 of any given year was effective during the current fiscal year and on any subsequent occasion. Notably, Dr. Dailey's allegations in her Charge also indicated that she was in possession of the dues rebate designation card in 2014, but took no action for 2015 until after April 1, 2015.³ (R. 3a). On February 16, 2016, the Board issued a Final Order concluding that Dr. Dailey's claims did not allege an unfair practice cognizable under Section 1201(b)(1) of PERA and dismissing the exceptions.⁴ On March 17, 2016, Dr. Dailey filed a Petition for Review of the Board's Final Order with this Court.

² Dr. Dailey acknowledges that her allegations concerning the 2014 dues rebate campaign were not raised within the four month statute of limitations under Section 1505 of PERA. 43 P.S. § 1101.1505.

³ The Board has been made aware that APSCUF issued a check to Dr. Dailey on May 10, 2015, before the filing of the Charge in this matter, in the amount of \$25 as payment of the 2015 dues rebate.

⁴ The Board's Final Order is attached to Dr. Dailey's Brief.

SUMMARY OF ARGUMENT

The unfair practice set forth in Section 1201(b)(1) of PERA requires restraint or coercion of the exercise of employe rights. Here, nothing in the facts alleged by Dr. Dailey demonstrates any restraint or coercion by APSCUF of its members through utilization of the dues rebate campaign. Indeed, the dues rebate campaign provides the union members with the option of receiving a \$25 rebate, allowing the \$25 to remain in APSCUF's dues fund, or donating the \$25 to APSCUF's political action committee. Further, it is an unreasonable contention that APSCUF is somehow coercing Dr. Dailey when she has been a member of APSCUF since 2006, thereby voluntarily consenting to assist the union through the payment of membership dues, and has declined to take the necessary steps to receive a rebate. Because APSCUF's dues rebate campaign does not affect membership rights and provides the union members with options regarding disposition of the rebate, the Charge does not state a cause of action under Section 1201(b)(1) of PERA. Accordingly, the Board's dismissal of Dr. Dailey's Charge was not a manifest or flagrant abuse of discretion, or a purely arbitrary execution of the Board's duties or functions and this Court should affirm the Board's Final Order.

ARGUMENT

The Board did not abuse its discretion by declining to issue a complaint, where the facts alleged in the Charge do not constitute an unfair practice under PERA.

Pursuant to Section 1302 of PERA,⁵ 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. APSCUF, supra; Pennsylvania Social Services Union, supra. As the Pennsylvania Supreme Court explained in Pennsylvania Social Services Union:

The decision of whether or not to issue a complaint does lie within the discretion of the Labor Board. Section [1302] gives the Labor Board “authority to issue ... a complaint”; it does not command that it must do so in all cases. Further [S]ection [1302] expressly contemplates that, in some cases, complaints will not be issued by the Labor Board.

392 A.2d at 258; see also APSCUF, supra. Further, the Board “cannot be found to have abused its discretion by relying upon its own established precedent.”

Pennsylvania State Park Officers Association v. Pennsylvania Labor Relations Board, 854 A.2d 674, 688 (Pa. Cmwlth. 2004), appeal denied, 582 Pa. 704, 871 A.2d 194 (2005).

⁵ Section 1302 states in relevant part that “[w]henver it is charged by any interested party that any person has engaged in or is engaging in any such unfair practice, the board ... shall have authority to issue and cause to be served upon such person a complaint ... and ... notice of hearing....” 43 P.S. § 1101.1302.

A. The Charge fails to state a cause of action under Section 1201(b)(1) of PERA.

Pursuant to Section 401 of PERA, public employes have the following rights:

[T]o organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.

43 P.S. § 1101.401. Section 1201(b)(1) of PERA provides that an employe organization is prohibited from “[r]estraining or coercing employes in the exercise of the rights guaranteed in Article IV of [PERA].” 43 P.S. § 1101.1201(b)(1).

The facts alleged by Dr. Dailey do not demonstrate any restraint or coercion by APSCUF through allowing her to select a refund under the dues rebate campaign. Indeed, the dues rebate campaign provides the union members with the option of receiving a \$25 rebate, allowing the \$25 to remain in APSCUF’s dues fund, or donating the \$25 to APSCUF’s political action committee. (R. 178a). Further, Dr. Dailey alleged in her Charge that she obtained a dues rebate designation card in 2014. The rebate card states that a member’s designation is

effective “during the current fiscal year and on any subsequent occasion.” (R. 178a). Dr. Dailey’s allegation that APSCUF is coercing her is inconsistent with the facts alleged that (1) she has been a member of APSCUF since 2006, thereby voluntarily consenting to assist the union through the payment of membership dues, (R. 6a) and (2) she had the necessary form to obtain a 2015 rebate as early as 2014.

Indeed, the facts alleged in the Charge do not reveal coercion, but voluntary action by Dr. Dailey. Dr. Dailey alleges in her Charge that she did not receive notice or the option of receiving her 2015 rebate prior to the April 1, 2015 deadline to select a refund of her dues. However, according to her Charge, Dr. Dailey received a dues rebate designation card in 2014. It is noted that the rebate designation card states that an employe’s designation is effective “during the current fiscal year and on any subsequent occasion,” which obviates the need for an employe to fill out a card every year unless they wish to change their designation. (R. 178a). Dr. Dailey had notice of her ability to obtain a rebate for 2015 when she had the opportunity to submit a dues rebate designation card in 2014 to indicate that she wished to receive a rebate for 2015 and thereafter. Accordingly, the facts alleged reveal that it was Dr. Dailey’s conduct, and not any alleged coercion by APSCUF, that caused her failure to elect a rebate prior to

April 1, 2015. Therefore, the Board did not abuse its discretion in declining to issue a complaint.⁶

Further, the amount of dues charged union members is an internal union matter over which the Board does not have jurisdiction. See Rudnick v. AFSCME District Council 47, 29 PPER ¶ 29144, 1998 WL 35395985 (Final Order, 1998)(employee's claim involving union's denial of access to names and addresses of members who overpaid dues was an internal union matter not within the Board's jurisdiction); see also Pennsylvania Labor Relations Board v. Local 1816, American Federation of State, County and Municipal Employes, 3 PPER 330 (Nisi Order of Dismissal, 1973)(assignment of union member to inconvenient local is an internal union matter not within the Board's jurisdiction). The Board's case law is consistent with this Court's decision in Pennsylvania Labor Relations Board v. Eastern Lancaster County Education Association, 427 A.2d 305 (Pa. Cmwlth. 1981), certiorari denied, Schreffler v. Pennsylvania Labor Relations Board, 459 U.S. 838, 103 S.Ct. 84 (1982), where the Court recognized the right of unions "to govern their internal affairs without judicial interference...." 427 A.2d at 308.

⁶ Dr. Dailey's allegations concerning the 2015 dues rebate would be untimely because she knew or should have known and had the opportunity in 2014 to elect to receive the dues rebate for 2015. 43 P.S. § 1101.1505.

Indeed, Dr. Dailey fails to cite any statutory authority or case law supporting the notion that the Board is empowered to determine the proper calculation of membership dues that a union may charge its members. Additionally, the National Labor Relations Board (NLRB) has determined that the calculation of membership dues is an internal union matter not subject to mandatory bargaining because it does not “vitaly affect” the wages, hours and working conditions of employes. See Social Services Union, Local 535 (North Bay Development Disabilities Services, Inc.), 287 NLRB 1223, 1988 WL 213668 (Decision and Order, 1988), petition for review denied, 905 F.2d 476 (D.C. Cir. 1990), certiorari denied, 498 U.S. 1082, 111 S. Ct. 952 (1991); International Union of Bricklayers and Allied Craftsmen, AFL-CIO, 306 NLRB 229, 1992 WL 19914 (Decision and Order, 1992). Moreover, Section 8(b)(5) of the National Labor Relations Act (NLRA)⁷ only provides the NLRB with limited jurisdiction to determine whether union initiation fees, and not membership dues, are excessive or discriminatory. Social Services Union, Local 535 (North Bay Development Disabilities Services, Inc.), supra. Therefore, even looking to the NLRA for guidance, Dr. Dailey’s allegations would fail to state an unfair labor practice under the NLRA as well. Thus, the Board did not abuse its discretion because APSCUF’s dues rebate campaign

⁷ 29 U.S.C. §§ 151-169. Section 8(b)(5) of the NLRA states that labor organizations are prohibited from requiring of “employees covered by an agreement authorized under [8(a)(3) of the NLRA] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances.” 29 U.S.C. § 158(b)(5).

provides the union members with options regarding disposition of the rebate, including a refund, and does not restrain or coerce membership rights or employment.

Despite Dr. Dailey's repeated accusations, the Board does not, and did not, contend that it has no jurisdiction over charges where there is actual coercion or restraint on the exercise of employe rights to form, join or assist labor organizations.⁸ However, in cases such as this one where the alleged facts fail to indicate that Dr. Dailey was threatened or coerced in her decision not to use the rebate card in her possession to request a rebate for 2015, no unfair practice is stated or can be found.⁹

⁸ Consistent with the maintenance of membership proviso in Section 401, the Board has held that a union's refusal to honor an employe's timely resignation of membership and revocation of dues deduction authorization restrains and coerces an employe in asserting their rights under PERA in violation of Section 1201(b)(1) of PERA. Pennsylvania Labor Relations Board v. Philadelphia Housing Authority, 12 PPER ¶ 12327, 1981 WL 683896 (Nisi Decision and Order, 1981). Similarly, contrary to Dr. Dailey's reference to Chambersburg Borough v. Pennsylvania Labor Relations Board, 106 A.3d 212 (Pa. Cmwlth. 2014), appeal dismissed, 2016 WL 3388463 (Pa. 2016), the Board recognized in that case that employe organizations could not engage in threats and coercion to effectuate a secondary boycott in violation of Section 6(2)(d) of the Pennsylvania Labor Relations Act (PLRA), Act of June 1, 1937, P.L. 1168, No. 294, as amended, 43 P.S. §§ 211.1-211.13.

⁹ Dr. Dailey asserts that she has no recourse to remedy the alleged coercive conduct of APSCUF due to the maintenance of membership provision in the collective bargaining agreement. However, Dr. Dailey fails to allege that she at any time attempted to resign her membership in APSCUF. See McCahon v. Pennsylvania Turnpike Commission, 491 F.Supp. 2d 522 (M.D. Pa. 2007).

The allegations in Dr. Dailey's Charge of Unfair Practices reveal no coercion or restraint by APSCUF with regard to employe Article IV rights actionable under Section 1201(b)(1) of PERA. As discussed above, the Board's conclusion that it lacks jurisdiction over such internal union matters is consistent with the Board's own decisions and those of this Court. See Pennsylvania State Park Officers Association, supra. Additionally, Dr. Dailey's failure to receive a rebate for 2015 was due to her decision not to request a refund for that year. Finally, the facts alleged in the Charge concern non-threatening, non-coercive internal union matters not within the Board's jurisdiction and do not support a cause of action or warrant the issuance of a complaint under Section 1201(b)(1) of PERA. Accordingly, the Board's dismissal of Dr. Dailey's Charge was not an abuse of discretion.¹⁰

¹⁰ In her Brief to this Court, Dr. Dailey makes unsupported allegations that APSCUF is utilizing membership dues for an unauthorized purpose. However, it is clear from the alleged facts in the Charge that only voluntary contributions are forwarded to APSCUF's political action committee. (R. 172a, 176a, 180a, 188a, 214a, 221a, 238a, 242a, 245a). Further, any allegation that a union is contributing membership dues for political purposes does not fall within the scope of unfair practices set forth in Article XII of PERA. See Borough of Ambridge v. Local Union 1051, AFSCME, 17 PPER ¶ 17075, 1986 WL 1235501 (Final Order, 1986)(Board has authority to remedy only those acts that constitute a violation of Article XII); see also Local 1816, American Federation of State County and Municipal Employes, supra (same); Trometter v. Pennsylvania State Education Association, PERA-M-14-366-E (Order Referring Report to Attorney General Pursuant to 34 Pa. Code § 95.112, July 21, 2015)(Board referred report to Attorney General's Office based upon the allegations presented).

B. The Charge is moot.

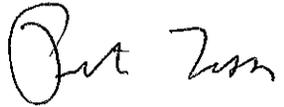
Dr. Dailey alleged to the Board under oath and asserts as fact to this Court that APSCUF retained her rebate in 2015 (R. 4a, Dr. Dailey's Brief at 6).

However, the Board has been advised that APSCUF issued a \$25 rebate to Dr. Dailey for 2015 prior to the filing of the Charge of Unfair Practices. Because Dr. Dailey is the only complainant named in the Charge and has received the 2015 dues rebate, the Charge of Unfair Practices and this appeal are moot. See APSCUF, supra. Nor is Dr. Dailey's claim capable of repetition. The Board's understanding is that she also received her \$25 dues rebate for 2016 and per the rebate procedure will continue to receive her rebate annually until she chooses otherwise.

CONCLUSION

WHEREFORE, the Pennsylvania Labor Relations Board respectfully requests this Court to dismiss the Petition for Review filed by Dr. Mary Ann Dailey and affirm the Final Order of the Board entered on February 16, 2016 at Case No. PERA-C-15-131-E.

Respectfully submitted,



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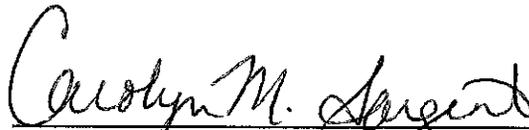
Date: July 8, 2016

PROOF OF SERVICE

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