

In the Commonwealth Court of Pennsylvania

413 CD 2016

DR. MARY ANN DAILEY,
Petitioner,

v.

PENNSYLVANIA LABOR RELATIONS BOARD,
Respondents.

PETITIONER'S REPLY BRIEF

Appeal from a Final Determination of the Pennsylvania Labor Relations Board
(Case No. PERA-C-15-131-E)

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Submitted July 22, 2016

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REPLY TO COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Respondent Pennsylvania Labor Relations Board (“PLRB”), in its answer brief (“PLRB’s Brief”), claims entitlement to the “abuse of discretion” standard governing agency action. PLRB’s Brief, at 1. However, the PLRB’s determination below turned on its interpretation of the Public Employe Relations Act (“PERA”) and may be reversed if merely “unwise or erroneous.” Cope v. Ins. Comm’r, 955 A.2d 1043, 1048 (Pa. Cmwlth. 2008); see also 36 Standard Pennsylvania Practice 2d § 166:87 (“Where an administrative interpretation of a statute is inconsistent with the statute itself, such an interpretation carries little or no weight with the court.”); see, e.g., Borough v. Pennsylvania Labor Relations Bd., 106 A.3d 212 (Pa.Cmwlth. 2014), appeal dismissed as improvidently granted sub nom., Chambersburg Borough v. Pennsylvania Labor Relations Bd., No. 37 MAP 2015, --- A.3d ---, 2016 WL 3388463 (Pa. June 20, 2016).

REPLY TO COUNTERSTATEMENT OF THE CASE

The PLRB materially misstates the facts leading to Petitioner Dr. Mary Ann Dailey’s (“Dr. Dailey’s”) filing of an unfair labor practice charge (“Charge”). First, the PLRB tells this Court—without record citation—that the PLRB “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.” PLRB’s Brief, at 4 n.3. That is false. A letter and signed check from the Association of Pennsylvania State College and University Faculties (“APSCUF”) to Dr. Dailey and dated May 19, 2015—after the Charge was filed—is attached as “Exhibit A.” Dr. Dailey donated the check to charity and informed APSCUF by letter that she would continue to pursue the Charge based on the impact of APSCUF’s conduct on all members. Her letter to APSCUF is attached as “Exhibit B.” At no point did APSCUF indicate that it would discontinue its practice or provide the “rebate” to other public employee.

Second, the PLRB suggests that Dr. Dailey had notice of APSCUF’s “Dues Rebate Campaign” (“Campaign”) in 2015 because she had received a “Dues Rebate Designation” card (“Card”) in 2014. PLRB’s Brief, at 4. Although Dr. Dailey did receive a Card in 2014—she received one too late to respond (R. 3a)—Dr. Dailey had no way of knowing whether APSCUF would again offer the rebate in 2015. It is undisputed that, in 2015, APSCUF provided no notice or Card to Dr. Dailey until after the deadline had passed. (R. 4a).

REPLY TO ARGUMENT

I. THE PLRB ABUSED ITS DISCRETION

The PLRB’s Brief—and the Order it defends—depend upon findings not supported by substantial evidence, rendering the PLRB’s determination erroneous

even under the PLRB's preferred abuse of discretion standard. This Court should therefore reverse the PLRB's determination below.

First, the PLRB, both in its brief and Order, assume that Dr. Dailey received notice of the Campaign in 2015 and an actual opportunity to respond. PLRB's Brief, at 7; Order, at 2. But as Dr. Dailey clearly alleged—and APSCUF has not challenged—in 2015, she was neither notified of the Campaign nor presented with an opportunity to request a refund. (R. 3a-4a). By the time she received the form (which constituted her “notice” in 2015), APSCUF's arbitrary April 1 deadline had already passed. (R. 3a-4a).¹

Next, the PLRB argues that APSCUF's conduct is actually Dr. Dailey's fault. According to the PLRB, Dr. Dailey could have simply mailed APSCUF the Card that she received in 2014—just in case there was another Campaign in 2015—and avoided APSCUF's retention of her funds. PLRB's Brief, at 8-9. But this argument is plainly contradicted by the record evidence, which demonstrates that APSCUF

1. Neither does knowledge of the Campaign in 2014 constitute constructive notice of the Campaign in 2015, as the PLRB suggests. APSCUF bills the Campaign as a “rebate” of “dues,” which suggests that it would not happen if the “dues” were needed for actual union activities. Dr. Dailey's allegations and supporting materials demonstrating that the Campaign has reliably repeated itself annually since at least 1997 were the product of time-intensive research.

would not have permitted Dr. Dailey to object early.² In 2015, APSCUF disseminated a new Card, different from those provided in prior years, see (R. 212a), and made clear that “APSCUF will accept no designation for payment of a dues rebate except on this form,” (R. 178a).

Additionally, the PLRB is incorrect to imply that, as long as an exaction is labeled “membership dues,” the PLRB has no power to address it. PLRB’s Brief, at 10. Indeed, in Pennsylvania Labor Relation Board v. Eastern Lancaster Education Ass’n, 427 A.2d 305, 310 (Pa. Cmwlth. 1981), this Court held that a legitimate dues increase was an “internal union affair.”³ But this Court also cited to federal case law that would, at the very least, require the union to provide to members “sufficient information about all proposals” to ensure a “reasoned and informed vote,” prior to the increase. Blanchard v. Johnson, 532 F.2d 1074, 1079 (6th Cir. 1976), cert. denied sub nom., Maritime Engineers Beneficial Ass’n v. Johnson, 429 U.S. 834 (1976)). Here, even if this Court were to accept the PLRB’s “dues”

2. More to the point, a rule requiring public employees to object in advance of illegal union conduct would be patently unreasonable, not to mention contrary to PERA. See 43 P.S. § 1101.1201(b).

3. Even this much appears to be an extreme rendering of PERA. To the extent that membership dues violate public employees’ rights, the PLRB should have the power to address their imposition on captive employees.

characterization, reasonable information about the “increase” was never provided to Dr. Dailey or any other public employee.

II. THIS CASE IS NOT MOOT

Finally, based on its incorrect understanding about when Dr. Dailey received a \$25 check from APSCUF, the PLRB argues that this case is moot. This Court should decline the invitation.

Again, contrary to the PLRB’s allegation, APSCUF sent Dr. Dailey a check for \$25 only after the Charge was filed. Exh. A. Dr. Dailey informed APSCUF that she would follow through with the Charge, based on the harm to other professors and coaches. Exh. B. At no point did APSCUF suggest that it would discontinue the Campaign in the future or send a similar check to other employees.⁴

A case is not moot “merely because alleged illegal conduct has been stopped voluntarily.” Allen v. Colautti, 417 A.2d 1303, 1306 (Pa. Cmwlth. 1980). Instead, the alleged wrongdoer “bears the heavy burden of proving that there is no reasonable expectation that the past conduct will be repeated.” Id. APSCUF, which declined to intervene in this proceeding, cannot bear that burden at this stage in the proceedings. Cf. Ass’n of Pennsylvania State College and University Faculties v.

4. In fact, if this Court intends to consider the PLRB’s non-record allegations concerning APSCUF, Dr. Dailey can present evidence that the Campaign continues.

Pennsylvania Labor Relations Bd., 8 A.3d 300 (Pa. 2010). Notably, the PLRB has informed this Court that it would allow the Campaign to continue.⁵

In any event, firsthand injury is not a prerequisite to filing an unfair labor practice. In fact, PERA allows anyone with knowledge of an unfair practice and an interest in enforcement to file an unfair labor practice. See 43 P.S. § 1101.1302 (“Whenever it is charged by any interested party that any person has engaged in or is engaging in any such unfair practice”); see also 34 Pa. Code §§ 95.1, 95.31. It should go without saying that an unfair labor practice charge is about the practice, not the party filing it, and the PLRB should be pursuing enforcement to that end.

CONCLUSION

In sum, this Court should reject the PLRB’s arguments, reverse the PLRB’s Order, and remand for further proceedings. The PLRB’s Order was not only incorrect as a matter of law; it was an abuse of discretion stemming from false

5. Likewise, even if Dr. Dailey’s Charge is technically moot, it is “capable of repetition but likely to evade review.” Philipsburg-Osceola Educ. Ass’n ex rel. Porter v. Philipsburg-Osceola Area Sch. Dist., 633 A.2d 220, 222 n.5 (Pa. Cmwlth. 1993). Again, APSCUF has given no indication that it will stop the Campaign. And its strategy with respect to Dr. Dailey’s Charge—namely, providing a belated rebate only after an unfair labor practice charge has been filed—demonstrates that such challenges would evade review.

information contradicted by the undisputed facts of the case. Dr. Dailey is entitled to the protections afforded to public employees in PERA.

Respectfully submitted,

THE FAIRNESS CENTER

July 22, 2016

A handwritten signature in black ink, appearing to read 'D. Osborne', written over a horizontal line.

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EXHIBIT A



BLUMSBURG CALHOUN COUNTY CLARK COUNTY EAST PENNSYLVANIA
EDINBURG HERRICK HUNTSVILLE LEHIGH COUNTY MARYLENE
MILLERSVILLE SHIPPAHANSBURG SLIPPERY ROCK WEST CHESTER

May 19, 2015

Dr. Mary Ann Dailey
397 Nester Drive
Pottstown, PA 19464

Dear Dr. Dailey,

It was recently brought to APSCUF's attention that you would like to receive your annual dues rebate in the amount of \$25. Enclosed, please find a rebate check in this amount.

Sincerely,

Dr. Kenneth M. Mash, PhD
President
APSCUF

Enclosure

APSCUF
319 NORTH FRONT STREET
HARRISBURG PENNSYLVANIA 17101

Wells Fargo
3-50310

027953

DATE	AMOUNT
05/19/2015	*****25.00**

*TWENTY-FIVE AND XX / 100

PAY TO
THE
ORDER
OF
Mary Ann Dailey

AUTHORIZED SIGNATURE

⑈0000 27953⑈

⑆03 ⑆000 503⑆ 20000 ⑆30669 ⑆0⑆

EXHIBIT B

May 27, 2015

Kenneth M. Mash, PhD
President
APSCUF
319 North Front Street
Harrisburg, PA 17101

Dear Dr. Mash,

Please be advised that I received your letter dated 19 May 2015, in which you returned \$25 of my APSCUF membership dues.

Most probably, this issue was brought to your attention through the unfair labor practice charge that I filed with the Pennsylvania Labor Relations Board on 18 May 2015. The filing of this charge was based upon APSCUF's annual "Dues Rebate Campaign," through which APSCUF retained my overcharged membership dues for 2014 and 2015.

I appreciate your letter and will donate the \$25 to The Salvation Army, a charity close to my heart. However, as stated in the charge, the unfair labor practice is the campaign itself, which impacts all APSCUF members from the overcharging of dues to the retention of funds. Moreover, there is no indication from your letter that the campaign would be discontinued. Therefore, I will not be withdrawing my charge.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Mary Ann Dailey". The signature is written in a cursive style with a large initial 'M' and 'D'.

Mary Ann Dailey, PhD, RN
397 Nester Drive
Pottstown, PA 19464

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief has on this date been served on Respondents, addressed as follows:

Peter Lassi, Esq.
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Counsel for Pennsylvania Labor Relations Board

Date: July 22, 2016



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