

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CRONIN,

Petitioner,

v.

PENNSYLVANIA LABOR RELATIONS BOARD,

Respondent.

Appeal from a Collateral Order of the
Pennsylvania Labor Relations Board
(Case No. PERA-R-17-40-E)

_____ **CD 2018**

NOTICE TO PARTICIPATE

**TO: THE PENNSYLVANIA STATE UNIVERSITY; and
COALITION OF GRADUATE EMPLOYEES, PSEA/NEA**

If you intend to participate in this proceeding in the Commonwealth Court, you must serve and file a notice of intervention under Pa.R.A.P. 1531 of the Pennsylvania Rules of Appellate Procedure within 30 days.

Dated: April 17, 2018



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PETITION FOR REVIEW

Petitioner Michael Cronin (“Mr. Cronin”), by and through undersigned counsel, having been denied the ability to intervene or participate pursuant to the General Rules of Administrative Practice and Procedure (“GRAPP”)¹ and Respondent Pennsylvania Labor Relations Board’s (“PLRB’s”) Rules and Regulations (“PLRB’s Rules”),² files this petition pursuant to Pennsylvania Rules of Appellate Procedure 313 and 1511:

STATEMENT OF JURISDICTION

1. Mr. Cronin appeals as of right from a collateral order of the PLRB. *See* Pa. R. App. P. 313; *Markham v. Wolf*, 136 A.3d 134, 138 n.4 (Pa. 2016) (“We have

¹ 1 Pa. Code §§ 31.1–35.251.

² 34 Pa. Code §§ 91.1–95.112.

jurisdiction over Appellants' appeal from the Commonwealth[Court]'s order [denying intervention] pursuant to Pa.R.A.P. 313.”).

2. Specifically, Mr. Cronin seeks reversal of the PLRB's one-page order (“Order”), dated March 28, 2018, denying Mr. Cronin's request to intervene or participate³ in ongoing representation proceedings before the PLRB. A true and correct copy of the Order is attached hereto as “Exhibit A” and incorporated herein by reference.

3. The denial of Mr. Cronin's request to intervene or participate involves, for the reasons outlined below, rights too important to be denied review, and the nature of intervention or participation is such that, if review is postponed until final judgment in the case, his claims will be irreparably lost.

PERSON SEEKING REVIEW

4. Mr. Cronin is a doctoral student of Energy and Mineral Engineering at the Pennsylvania State University (“Penn State”), where he is also furthering his education by serving as a graduate assistant. He has both teaching and research assignments.

³ The PLRB's Rules provide for intervention, 34 Pa. Code § 95.44(a), but also “permit public employers, public employes and employe organizations to participate as parties without formal intervention, upon a showing of good cause which reasonably prevented them from having filed a timely motion to intervene,” 34 Pa. Code § 95.44(b).

5. Mr. Cronin has been deemed a “public employe” despite longstanding Pennsylvania Supreme Court precedent establishing that individuals paid to perform work primarily for educational or training purposes are not “public employes” under the Public Employe Relations Act, 43 P.S. §§ 1101.101–1101.2301 (“PERA”). *See Phila. Ass’n of Interns & Residents v. Albert Einstein Med. Ctr., Temple Univ.*, 369 A.2d 711 (Pa. 1977) (“*PAIR*”). A true and correct copy of the PLRB’s “Order and Notice of Election” and materials attached thereto are attached hereto as “Exhibit B” and incorporated herein by reference.⁴ The PLRB has also deemed Mr. Cronin an eligible voter for purposes of a representation election at Penn State. Ex. B, at Pennsylvania State Univ., Univ. Park Campus Eligibility List 7.

6. As a result, Mr. Cronin is potentially subject to the exclusive representation of the “Coalition of Graduate Students, NEA/PSEA” (“Coalition”) or any other organization seeking to impose exclusive representation on him in the future.

7. In the last PLRB proceeding involving exclusive representation of graduate assistants,⁵ the putative “public employer” initially opposed legal

⁴ The Order and Notice of Election “affirmed and incorporated by reference,” Ex. B, at 2, substantial portions of Hearing Examiner Stephen A. Helmerich’s proposed decision and order concluding, *inter alia*, that certain graduate students are “public employes” for purposes of section 301 of the Public Employe Relations Act. A true and correct copy of the Hearing Examiner’s proposed decision and order is attached hereto as “Exhibit C” and incorporated herein by reference.

⁵ *In re Emps. of Temple Univ. of the Commonwealth Sys. of Higher Educ.*, No. PERA-R-99-58-E, 32 PPER ¶ 32164 (PLRB Aug. 21, 2001).

characterization of graduate assistants as “public employes” under PERA and filed an appeal when the PLRB ruled in the employe organization’s favor. Ex. C, at 20.

However, the public employer subsequently withdrew its appeal, leaving the PLRB’s ruling without court review and certain graduate assistants subject to exclusive representation. *See id.*

**NAME OF THE GOVERNMENT UNIT THAT MADE THE ORDER
SOUGHT TO BE REVIEWED**

8. Respondent PLRB is an administrative agency of Pennsylvania charged with enforcement of PERA, among other statutes. *See* 43 P.S. § 1101.501.

REFERENCE TO THE ORDER SOUGHT TO BE REVIEWED

9. Mr. Cronin seeks review of the attached Order, dated March 28, 2018, in case number PERA-R-17-40-E. Ex. A.⁶

10. In the Order, the PLRB denied Mr. Cronin’s request to intervene or participate in an ongoing representation proceeding in which graduate assistants, including Mr. Cronin, have been deemed by nonfinal order “public employes” for

⁶ The Order was signed by the Board Representative, which was “designated by the Board at a regular meeting of the Board” for representation proceeding purposes. 34 Pa. Code § 95.91(k)(2)(i). Under the PLRB’s Rules, “[n]o exceptions may be filed to orders directing elections issued by the Board Representative under § 95.91(k)(2) (relating to hearings), orders directing the canvassing of challenged ballots, *final orders or procedural orders of the Board or its designated agents.*” 34 Pa. Code § 95.96(a) (emphasis added). The PLRB’s Rules provide only for filing of exceptions “to a hearing examiner decision.” 34 Pa. Code § 95.98(a).

purposes of PERA, Exs. A & C, at 22, and therefore subject to potential exclusive representation by an “employe organization.”

11. As grounds for denying Mr. Cronin’s request to intervene or participate, the PLRB employed a blanket prohibition on individuals’ intervening or participating in representation elections. Ex. A (“However, individual employes lack standing to intervene in representation election proceedings before the Board.”).

STATEMENT OF OBJECTIONS

12. The PLRB erred in denying Mr. Cronin’s Motion to Intervene or Participate and Advance Request for Review and Stay (“Motion to Intervene”). A true and correct copy of Mr. Cronin’s Motion to Intervene is attached hereto as “Exhibit D” and incorporated herein by reference.

13. Among other errors, the PLRB’s blanket prohibition on individuals intervening or participating in representation proceedings is contrary to section 35.28(a) of GRAPP and section 95.44 of the PLRB’s Rules and deprives individuals, including Mr. Cronin, of due process of law.

14. The PLRB erred by failing to apply section 35.28(a) of GRAPP, which permits individuals to intervene by right or by virtue of “an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought.” GRAPP further specifies that “*employes of the applicant or respondent*” are among such individuals which may have a cognizable interest sufficient to justify intervention. 1 Pa. Code § 35.28(a)(2) (emphasis added).

15. The PLRB ostensibly and erroneously determined that section 95.14 of the PLRB's Rules—which sets forth required contents of election requests—supersedes section 35.28(a) of GRAPP, even though section 95.14 lacks specific language indicating as much. *See* 1 Pa. Code § 13.38(a); *Ciavarra v. Commonwealth*, 970 A.2d 500, 503 n.5 (Pa. Cmwlth. 2009) (“If an agency intends that its own regulation supersede the GRAPP, the superseded provision must be expressly cited, along with a statement that the cited provision is not applicable to proceedings before the agency.”).

16. In at least one instance, GRAPP's standard for intervention has been expressly applied in the context of a PLRB proceeding without apparent conflict with the PLRB's Rules. *See In re City of Allentown*, No. PF-C-93-179-E, 26 PPER ¶ 26209 n.1 (PLRB Hr'g Exam'r Sept. 21, 1995). In fact, the PLRB has previously adopted the position that GRAPP is entirely consistent with, if not complementary to, the PLRB's Rules concerning intervention. Br. of Resp't PLRB at 8, *Commonwealth v. PLRB*, No. 359 CD 2000, 2000 WL 35603498, at *8–9 (Pa. Cmwlth. June 1, 2000) (“Although the Board's regulations are silent regarding intervention at times other than pre-hearing, the General Rules of Administrative Practice and Procedure apply by default. Under those rules, intervention may be granted by an agency at any time following the filing of an application and further permit intervention upon good cause shown.”).

17. Meanwhile, the PLRB erred in applying its own rule governing intervention. *See* 34 Pa. Code § 95.44. Section 95.44(a) of the PLRB's Rules sets forth

the procedure and format for motions to intervene in PLRB proceedings without apparent limitation on individuals' intervention. But neighboring subsection (b), in addition to permitting "participation" by nonparties, also affirms that individual "public employes" can intervene:

In representation proceedings, the hearing examiner may, subject to § 95.11 (relating to request for certification) permit public employers, *public employes* and employe organizations to participate as parties without formal intervention, upon a showing of good cause *which reasonably prevented them from having filed a timely motion to intervene.*

34 Pa. Code § 95.44(b) (emphases added).

18. Furthermore, the PLRB erroneously denied Mr. Cronin's request to participate pursuant to section 95.44(b) of the PLRB's Rules. By its own terms, section 95.44(b) clearly anticipates that individuals, including "public employes,"⁷ should have the ability to participate in PLRB proceedings. Yet the PLRB determined that Mr. Cronin was unable to participate solely because he was an individual.

19. Even if the PLRB correctly applied GRAPP and the PLRB's Rules concerning intervention and participation, its application of a blanket rule prohibiting individuals from intervening or participating in representation proceedings violates Mr. Cronin's state and federal constitutional rights to due process of law. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is

⁷ Graduate assistants have recently been deemed "public employes" by the Hearing Examiner in the underlying proceeding. Ex. C, at 22. However, Mr. Cronin intends to challenge such characterization.

the opportunity to be heard at a meaningful time and in a meaningful manner.”) (emphasis added); *R. v. Dep’t of Pub. Welfare*, 636 A.2d 142, 153 (Pa. 1994) (adopting *Mathews’* methodology to assess due process claims brought under Section 1 of Article I of the Pennsylvania Constitution).

STATEMENT OF RELIEF

WHEREFORE, Mr. Cronin requests that this Court reverse the PLRB’s denial of his request to intervene or participate and remand to the PLRB with instructions to permit intervention in the underlying administrative proceeding.

Respectfully submitted,

Dated: April 17, 2018



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Petition for Review, referenced exhibits, and Notice to Participate were served this day as follows:

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