

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LABOR RELATIONS BOARD**

MARY TROMETTER,

Complainant,

v.

PENNSYLVANIA STATE EDUCATION
ASSOCIATION and NATIONAL
EDUCATION ASSOCIATION,

Respondents.

Case No. PERA-M-14-366-E

(Hearing Examiner Jack E. Marino)

**EXCEPTIONS OF PUBLIC EMPLOYEE MARY TROMETTER TO THE
PROPOSED ORDER OF THE HEARING EXAMINER DISMISSING HER
AMENDED CHARGE OF ILLEGAL CONTRIBUTIONS**

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INTRODUCTION

Complainant and Public Employee Mary Trometter (“Ms. Trometter”), by and through undersigned counsel, files the following exceptions to Hearing Officer Jack E. Marino’s (“Hearing Officer’s”) Proposed Order, dated October 4, 2018,¹ dismissing Ms. Trometter’s Amended Charges of Illegal Contributions (“Amended Charges”). The Amended Charges are attached hereto as “Exhibit A” and incorporated herein by reference, and the Proposed Order is attached hereto as “Exhibit B.”

STATEMENT OF EXCEPTIONS

1. The process afforded to Ms. Trometter was deficient as a matter of constitutional due process and the Pennsylvania Labor Relations Board’s (“Board’s”) statutory mandate section 1701 of the Public Employee Relations Act (“PERA”). Under section 1701, “the Board has the statutory duty and obligation to enforce and implement that section of PERA, thereby ensuring compliance and preventing the circumvention or evasions of this section.” *Trometter v. Pennsylvania Labor Relations Bd.*, 147 A.3d 601, 610 (Pa. Cmwlth. 2016) (quoting 43 P.S. § 1101.1701). However, the Hearing Examiner stated that “the investigation is closed,” Proposed Order, at 13,

¹ Counsel for Ms. Trometter did not receive a copy of the Hearing Officer’s exceptions until October 24, 2018, twenty days after its issuance.

without conducting or recommending any independent investigation into the Amended Charges. The Board—not Ms. Trometter—should bear the burden of satisfying the Board’s statutory mandate.

2. Additionally, section 1701 requires the Board to “establish such rules and regulations as it may find necessary to prevent the circumvention or evasion of the provisions of this section.” 43 P.S. § 1101.1701. To date, no rules or regulations have been established. In fact, the Board has not taken administrative action to rescind or replace the rule that was invalidated nearly two years ago, 34 Pa. Code § 95.112(c), and continues to include it on the Board’s official website.² As a result, Ms. Trometter was subject to an *ad hoc* administrative proceeding in which her counsel lodged objections to the Board’s apparent refusal to conduct its own independent investigation or otherwise enforce section 1701. *See, e.g.*, Transcript of Proceedings (“Tr.”) 6–7, 75–76.

3. The Hearing Examiner erred in dismissing the Amended Charges, which contained three independent charges of violations of section 1701 by Respondents National Education Association (“NEA”) and the Pennsylvania State Education Association (“PSEA”) (collectively, “Respondents”). Proposed Order, at 12–13. His conclusion that “[t]he NEA and the PSEA have not engaged in illegal contributions

² Dep’t of Labor & Indus., “Rules and Regulations of the Pennsylvania Labor Relations Board, <https://www.dli.pa.gov/laws-regs/regulations/Pages/Regulations-of-the-Pennsylvania-Labor-Relations-Board.aspx> (last visited Oct. 24, 2018).

either directly or indirectly within the meaning of Section 1701 of PERA,” Proposed Order, at 13, is unsupported by the record, arbitrary, capricious, and contrary to law.

4. In dismissing the Amended Charges, the Hearing Examiner purported to apply principles of constitutional law, *see* Proposed Order, at 7–9, to render a judgment on constitutional matters not within the scope of his duties pursuant to section 1701. *See, e.g.*, Proposed Order, at 9 (“The record in this case clearly demonstrates that the NEA and the PSEA permissibly exercised their First Amendment free speech rights by making independent expenditures, that were neither prearranged or coordinated with Candidate Wolf or his campaign, to fund their support for Candidate Wolf.”). Such conclusions of law reached on constitutional matters are therefore outside the scope of his and/or the Board’s authority, unsupported by the record, arbitrary, capricious, and contrary to law.

5. In applying those principles of constitutional law in this setting so as to contort the text of section 1701 and it unenforceable as written, the Hearing Examiner effectively declared section 1701 unconstitutional. *Cf. Manor v. Dep’t of Pub. Welfare*, 796 A.2d 1020, 1025 (Pa. Cmwlth. 2002) (“[A]n administrative agency is not competent to pass upon questions of the validity or constitutionality of [its] enabling legislation.”). Accordingly, the Hearing Examiner’s dismissal of the Amended Charges was outside the scope of his and/or the Board’s authority, unsupported by the record, arbitrary, capricious, and contrary to law.

6. The Hearing Officer wholly failed to render a conclusion as to the legality of contributions that formed the basis for Ms. Trometter's second charge of a violation of section 1701, which read as follows:

According to the NEA Advocacy Fund's 2014 12-Day Pre-Election FEC Form 3X (Exh. B), the NEA contributed \$12,514,151.58, including union dues money, to the NEA Advocacy Fund, an independent expenditure-only political action committee. In doing so, the NEA has made a "contribution out of the funds of the employe organization either directly or indirectly to any political party or organization or in support of any political candidate for public office."

Amended Charges 2 (quoting 43 P.S. § 1101.1701). The Hearing Examiner's dismissal of the Amended Charges without any reasoned analysis whatsoever is unsupported by the record, arbitrary, capricious, and contrary to law.

7. To the extent that the Hearing Examiner's analysis with respect to Ms. Trometter's first and third charges of violations of section 1701 was intended to apply to her second charge, the Hearing Examiner's dismissal remains unsupported by the record and arbitrary, capricious, and contrary to law. With respect to the second charged violation, Ms. Trometter provided prima facie evidence that the NEA violated section 1701 in two distinct ways. First,

- (a) The NEA Advocacy Fund is a "political action committee" and therefore a "political organization" for purposes of section 1701, *see* Proposed Order ¶¶ 14–15; 11 C.F.R. § 100.16(a);

- (b) The NEA is an “employe organization,” Proposed Order ¶ 2; Joint Stipulation of Fact (“Stips.”) ¶ 3; and
- (c) The NEA made a “contribution” out of its funds to the NEA Advocacy Fund. Stips. Ex. 1 at 6a, 9a; Stips. Ex. 4 at 3, 6; Tr. 25–27.

Second, in addition to the evidence described above:

- (d) The NEA Advocacy Fund directly or indirectly supports candidates for public office, Proposed Order ¶ 15; Tr. 20–21; see 11 C.F.R. § 100.16(a); and
- (e) As a result of its funding and direction of the NEA Advocacy Fund, the NEA directly or indirectly supports candidates for public office, *see supra*.

8. The Hearing Examiner’s conclusion, Proposed Order, at 8–10, 12, that the NEA did not make a “contribution out of the funds of the employe organization either directly or indirectly . . . in support of any political candidate for public office,” 43 P.S. § 1101.1701, when it sent a letter supporting then-candidate Tom Wolf is also unsupported by the record and arbitrary, capricious, and contrary to law.

9. Likewise, the Hearing Examiner’s conclusion, Proposed Order, at 8–10, 12, that the PSEA did not make a “contribution out of the funds of the employe organization either directly or indirectly . . . in support of any political candidate for public office,” 43 P.S. § 1101.1701, when it published a magazine supporting then-

candidate Tom Wolf is also unsupported by the record and arbitrary, capricious, and contrary to law.

10. The Hearing Examiner’s reliance, Proposed Order, at 10, on section 3253(c) of the Election Code, which purportedly permits “communications . . . by an unincorporated association to its members and their families on any subject” was unsupported by the record and arbitrary, capricious, and contrary to law. As the parties have stipulated—and the Hearing Examiner recognized—neither the NEA nor the PSEA is an “unincorporated association.” Stips. ¶¶ 1–2; Proposed Order ¶¶ 1–2. The NEA is a federally chartered corporation, and the PSEA is a nonprofit domestic corporation. *Id.* There is no conflict between section 1701 and section 3253(c) of the Election Code.


11. The Hearing Examiner erred in importing definitions of “contribution” not found in PERA, other Pennsylvania statutes, other federal statutes, or existing case law at the time section 1701 was passed. *See* Proposed Order, at 7–11; *cf. Lancaster Cty. v. Pennsylvania Labor Relations Bd.*, 94 A.3d 979, 987 (Pa. 2014) (utilizing “[a] dictionary entry at the approximate time of the enactment of PERA” to appropriately ascertain the meaning of a term used within PERA). The Hearing Examiner’s findings that the Amended Charges did not establish as a matter of law that the NEA and PSEA made “contributions” for purposes of section 1701 are therefore unsupported by the record and arbitrary, capricious, and contrary to law.

12. Section 1701 is perfectly constitutional as written. The Hearing Examiner's efforts to avoid a supposedly unconstitutional reading of section 1701, Proposed Order, at 7-9, were entirely misguided. In so holding, the Proposed Order was unsupported by the record and arbitrary, capricious, and contrary to law

CONCLUSION

For the foregoing reasons, and for those that are anticipated in the brief to accompany these exceptions, Ms. Trometter respectfully requests that the Board reject the Hearing Examiner's Proposed Order and determine that the NEA and PSEA violated the plain language of section 1701.

RESPECTFULLY SUBMITTED this 24th day of October, 2018.



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