
**BEFORE THE 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)

**COMPLAINANT'S POST-
HEARING BRIEF**

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INTRODUCTION

At this stage of these proceedings, the basic question before the Pennsylvania Labor Relations Board (“PLRB”) is whether it will take steps, as the Commonwealth Court put it, “to enforce and implement [section 1701] of [the Public Employee Relations Act (“PERA”)], thereby ensuring compliance and ‘preventing the circumvention or evasion of the provisions of this section.’” *Trometter v. Pennsylvania Labor Relations Bd.*, 147 A.3d 601, 609-10 (Pa. Cmwlth. 2016). The General Assembly added the prohibitions on public-sector union political activity to protect public employees and the public at large from government union officials who are willing to spend someone else’s money on their politics. *See* 43 P.S. §§ 1101.101, 1101.1701. Complainant Mary Trometter (“Ms. Trometter”), a public employee entitled to those protections, is merely asking the PLRB to enforce the plain language of the statute. After all, “by the plain language of the statute, all rights under PERA are not vested in the union, but rather, *it is the individual public employee* who possesses certain rights. . . .” *Commonwealth v. Pennsylvania Labor Relations Bd.*, 916 A.2d 541, 548 (Pa. 2007) (emphasis added).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On November 18, 2014, Ms. Trometter filed a Charge of Illegal Contributions (“Charge”) pursuant to section 1701 of PERA, 43 P.S. § 1101.1701 (“section 1701”).

Joint Stipulation of Facts (“Stips.”) ¶ 19; Ex. 1 at 1a-51a.¹ The Charge alleged that the Respondents, the National Education Association (“NEA”) and Pennsylvania State Education Association (“PSEA”), violated section 1701 by funding, respectively, a letter to Ms. Trometter’s husband and a magazine, both supporting then-gubernatorial candidate Tom Wolf. Ex. 1 at 2a.

On July 21, 2015, following written argument and further evidence from the parties, Ex. 1 at 53a-90a, the PLRB issued an order purporting to dispose of Ms. Trometter’s Charge. Stips. ¶ 20; Ex. 7. In its order, the PLRB expressly declined to resolve any factual or legal issues raised by the parties. Stips. ¶ 20; Ex. 7 at 2. Instead, it “referred” Ms. Trometter’s Charge to the Attorney General for the Commonwealth of Pennsylvania, reasoning that “the Office of Attorney General can make the constitutional and statutory determinations for which it is better suited than the Board,” Ex. 7 at 2.

Ms. Trometter timely appealed to the Commonwealth Court, Stips. ¶ 21; Ex. 8, which reversed and remanded the PLRB’s order. *Trometter*, 147 A.3d 601; Stips. ¶ 23; Ex. 10. The Commonwealth Court concluded:

[T]he Board erred in determining that it lacks the authority, and thus the jurisdiction, to enforce Section 1701 of PERA. To the contrary, the Board has the statutory duty and obligation to enforce and implement that section of PERA, thereby ensuring compliance and “preventing the

¹ The parties entered into stipulations of fact for purposes of this proceeding on February 1, 2017. Unless noted otherwise, the exhibits cited in this brief are stipulated exhibits attached to the agreement setting forth stipulated facts.

circumvention or evasion of the provisions of this section.”
Section 1701 of PERA. The Board’s Transfer Order is,
therefore, inconsistent with the will of the General
Assembly and must be reversed.

Trometter, 147 A.3d at 609-10. Following remand, the PLRB scheduled a February 1,
2017 “hearing to determine the issue raised in” Ms. Trometter’s Charge. Order and
Notice of Hearing, Oct. 20, 2016. The PLRB designated Jack E. Marino the Hearing
Examiner “for the purpose of taking testimony relative to [Ms. Trometter’s] matter.”
Id.

On January 23, 2017, with leave from the Hearing Examiner and without
objection from the NEA and PSEA, Ms. Trometter amended the Charge (“Amended
Charge,” incorporated herein and attached hereto as “Appendix A”). Ms. Trometter’s
Amended Charge clarified that, with respect to the letter sent to Ms. Trometter’s
husband, the NEA committed two separate violations of section 1701. The
Specification of Charges now reads:

1. On October 31, 2014, *my husband* received the attached
letter jointly signed by the [PSEA] and [NEA]. The
letter urges my husband “as the family member of an
educator” to vote for Tom Wolf for Governor.
[Amended Charge Ex. A]. In directly or indirectly
funding the letter to my husband, 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,” as prohibited by section
1701 of [PERA].
2. According to the NEA Advocacy Fund’s 2014 12-Day
Pre-Election FEC Form 3X [Amended Charge Ex. 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,” as prohibited by section 1701 of [PERA].

3. In November 2014, the PSEA’s dues-funded magazine, PSEA Voice, was used to support Tom Wolf for Governor. [Amended Charge Ex. C]. The PSEA takes \$4.25 from each member, state-wide, to pay for the PSEA Voice. [Amended Charge Ex. C, p. 2]. In funding the PSEA Voice—the November issue in particular—the PSEA has made a “contribution out of the funds of the employe organization either directly or indirectly . . . in support of any political candidate for public office,” and has “willfully violate[d]” section 1701 of [PERA].

Am. Charge 2.

On February 1, 2017, the parties appeared at the scheduled hearing (“Hearing”) before the Hearing Examiner. Transcript of Hearing (“Tr.”) 1-2 (incorporated herein and attached hereto as “Appendix B”). After brief opening statements, Tr. 6-11, Ms. Trometter called three witnesses, who together confirmed the substance of her Amended Charge, Tr. 12-66, and the hearing concluded with closing remarks, legal argument, and establishment of a briefing schedule. Tr. 73-114.

This post-hearing brief summarizes the evidence provided to the PLRB at the February 1, 2017 hearing and supplements the legal argument before the Hearing Examiner. *See* Tr. 86.

II. STATEMENT OF FACTS

A. Section 1701

In 1970, the Pennsylvania General Assembly enacted PERA. Many states during this time period enacted similar legislation extending to public-sector unions the opportunity to represent state workers, subject to certain limitations.

Pennsylvania, for one, granted unions the privilege of representing public employees but only on the condition that unions would not contribute funds out of the organization in furtherance of political ends. Section 1701 of PERA reads:

No employe organization shall make any 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.

The board shall establish such rules and regulations as it may find necessary to prevent the circumvention or evasion of the provisions of this section.

If an employe organization has made contributions in violation of this section it shall file with the board a report or affidavit evidencing such contributions within ninety days of the end of its fiscal year. Such report or affidavit shall be signed by its president and treasurer or corresponding principals.

Any employe organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall be subject to a fine of not more than two thousand dollars (\$2,000).

Any person who wilfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than thirty days or both. Each individual required to sign affidavits, or reports under this section shall be personally responsible for filing such report or affidavit and

for any statement contained therein he knows to be false. Nothing herein shall be deemed to prohibit voluntary contributions by individuals to political parties or candidates.

43 P.S. § 1101.1701.

Other states, including Kansas in 1971² and Iowa in 1974,³ later passed substantively identical statutes. Still more states went on to restrict public-sector union

² Section 75-4333(d) of the Kansas Statutes provides:

(d)(1) It shall be a prohibited practice for a public employee organization to endorse candidates, spend any of its income, directly or indirectly, for partisan or political purposes or engage in any kind of activity advocating or opposing the election of candidates for any public office.

(2) For the purposes of this section, “partisan or political purposes” means an act done with the intent or in a way to influence or tend to influence, directly or indirectly, any person to refrain from voting or to vote for or against any candidate for public office at any caucus, political convention, primary or election.

³ Section 20.26 of the Iowa Code, which was amended in 2017, provides:

An employee organization shall not make any direct or indirect contribution out of the funds of the employee organization to any political party or organization or in support of any candidate for elective public office.

Any employee organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall, upon conviction, be subject to a fine of not more than two thousand dollars.

Any person who willfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall, upon conviction, be subject to a fine of not more than one thousand dollars or imprisoned for not more than thirty days or shall be subject to both such fine and imprisonment. Each individual required to sign affidavits

political activity whenever the union makes use of the state's payroll deduction system.⁴

B. Conduct Giving Rise to the Amended Charge

Ms. Trometter is employed by the Pennsylvania College of Technology, an affiliate of Pennsylvania State University.⁵ Tr. 15, 37. When she filed the original Charge, she had been a dues paying member of both the NEA and PSEA for 25 years.⁶ Stips. ¶ 4; Ex. 1 at 2a; Ex. 2 at 82-83.

The unions' dues collection process bears mentioning. First, Ms. Trometter's dues were subtracted from her wages via automatic payroll deduction and forwarded to the NEA's and PSEA's local affiliate, Penn College Education Association

or reports under this section shall be personally responsible for filing such report or affidavit and for any statement contained therein the individual knows to be false.

Nothing in this section shall be construed to prohibit voluntary contributions by individuals to political parties or candidates, provided that such contributions are not made through payroll deductions.

Nothing in this section shall be construed to limit or deny any civil remedy which may exist as a result of action which may violate this section.

⁴ See Ala. Code § 17-17-5; Idaho Code § 44-2004; Tenn. Code § 49-5-608(b)(6); Utah Code § 34-32-1.1(2).

⁵ See generally 24 P.S. §§ 2510-501–2510-512. As an affiliate of Pennsylvania State University, the Pennsylvania College of Technology is “granted the benefits and responsibilities of the status of The Pennsylvania State University as a State-related institution and as an instrumentality of the Commonwealth of Pennsylvania.” 24 P.S. § 2510-504.

⁶ The NEA and PSEA are incorporated in the District of Columbia and Pennsylvania, respectively, Stips. ¶ 1-2, and “employe organization[s]’ for purposes of [PERA].” Stips. ¶ 3.

(“PCEA”), pursuant to a collective bargaining agreement (“CBA”) with the Pennsylvania College of Technology.⁷ Stips. ¶ 5. The PCEA then remitted all or a portion of Ms. Trometter’s dues to the PSEA, which, in turn, transmitted a portion of her dues to the NEA. Stips. ¶ 6. The NEA and PSEA placed their respective portions of Ms. Trometter’s dues into their general treasuries. Stips. ¶¶ 12, 16.

1. The NEA contributed in support of then-Candidate Tom Wolf.

On October 31, 2014, Ms. Trometter learned that the NEA and PSEA sent her husband—who is not a member of the NEA or PSEA, Stips. ¶ 18—the following letter (“Letter”), dated October 28, 2014:

Dear Jeffrey,

As Governor, Tom Corbett has been a disaster for students, parents, and educators. It’s nearly inconceivable than [sic] any educator would support Corbett for re-election.

For everyone in public education who cares about students, who knows the value of a collective voice and a safe retirement, Tom Wolf is the only choice for Governor.

It’s just as important that every family member of an educator support Tom Wolf too.

When Tom Corbett damaged our schools, he hurt everyone in an educator’s family:

- Nearly \$1 billion in school funding cuts and 20,000 lost educator jobs meant lost income for educators’ families and larger classes for students.
- Larger class sizes meant more hours working, at school and at home, and less family time for devoted educators.

⁷ The collective bargaining agreement and extensions to the agreement governing Ms. Trometter’s employment with the Pennsylvania College of Technology are included within Exhibit 2 to the parties’ stipulations.

- And attacks on educators’ pensions endangered the retirement of entire families.

On the other hand, Tom Wolf is an ally of public education and educators:

- Wolf has pledged to restore the funding and invest in our schools.
- He’ll institute universal pre-K and hold charter schools to the same standards as other schools.
- And he’s opposed to changes in current employee pension plans.

As the family member of an educator, you know they are devoting their career to helping others and bettering the community. You see the difference they make every day. We’re asking you to join them and make an impact on November 4th.

**Please join Mary
in voting for Tom Wolf for Governor on
November 4th.**

Ex. 1 at 3a. The Letter was signed by the NEA’s and PSEA’s respective presidents and placed on PSEA and NEA letterhead. *Id.*; Tr. 28. It indicated, at the bottom, that the Letter was “[p]aid for by the NEA Advocacy Fund,” Ex. 1 at 3a, a statement that the parties would later discover was inaccurate. Stips. ¶ 16; Tr. 29-30.

As it turns out, the NEA *itself* funded the Letter using Ms. Trometter’s and other dues-paying members’ money. Stips. ¶ 16. Specifically, the NEA paid a direct mail firm, out of the NEA’s general treasury, for the production, design, and printing of the Letter received by Ms. Trometter’s husband. Stips. ¶ 16; Ex. 5; Ex. 6 at 183; Tr. 30, 34. The Letter was part of a larger, state-specific campaign that cost the NEA \$32,812.31. Ex. 5; Ex. 6 at 183; Tr. 30. At the Hearing, former NEA Campaigns and Elections Manager Amy Kurtz (“Manager Kurtz”) admitted that, in sending the letter,

the NEA and PSEA were supporting Tom Wolf, then a gubernatorial candidate. Tr. 28.

2. The NEA contributed to the NEA Advocacy Fund.

The NEA also contributed funds from its general treasury, including Ms. Trometter's dues, to a political organization called the NEA Advocacy Fund. Stips. ¶ 15; Ex. 1 at 72a-77a; Tr. 14, 21. The NEA Advocacy Fund is a "separate entity," distinct from the NEA. Tr. 14. It is classified as an "independent expenditure-only political action committee" or, colloquially, a "SuperPAC."⁸ Stips. ¶ 15; *see also* Ex. 1 at 63a, 72a-77a; Tr. 20. Ms. Kurtz admitted at the Hearing that, as an independent expenditure-only political action committee, the NEA Advocacy Fund necessarily spends its money for communications "expressly advocating the election or defeat of a clearly identified candidate." Tr. 20-21.

The NEA Advocacy Fund is funded primarily by direct contributions from the NEA. Stips. ¶ 15; Tr. 21. In fact, from January 1, 2014, to October 15, 2014, the NEA contributed \$12,514,151.58 in general treasury funds to the political organization. Ex.

⁸ The NEA also runs a traditional political action committee, called the NEA Fund for Children and Public Education ("NEA PAC"). Tr. 32. Unlike the NEA Advocacy Fund, the NEA PAC is funded by voluntary contributions *from members* and gives directly to candidates, parties, or political organizations, without general treasury commingling. Tr. 32. Because such contributions do not come out of the public-sector union's general treasury, the NEA PAC allows the NEA to contribute to candidates and parties without violating section 1701.

1 at 4a, 6a, 9a; Tr. 24. By November 24, 2014, the number for the year had grown to \$14,500,000. Ex. 4 at 6; Tr. 25-26.

According to Ms. Kurtz and as reflected on the NEA Advocacy Fund's federal filings,⁹ all \$14,500,000 sent by the NEA to the NEA Advocacy Fund are "contributions." Ex. 1 at 6a; Ex. 4 at 3; Tr. 6, 25-27.

3. The PSEA Contributed Support for Then-Candidate Tom Wolf.

The PSEA, which had also placed a portion of Ms. Trometter's dues in its general treasury, used her dues to fund the November 2014 issue of the PSEA's semi-monthly magazine, *The Voice*. Stips. ¶¶ 6-8, 12; Ex. 1 at 61a; Tr. 38-39. As the parties stipulated, that issue in particular "contained articles urging members to vote in the then-upcoming elections and, specifically, to vote for Tom Wolf for governor." Stips. ¶ 11; see Ex. 1 at 20a-51a. In fact, as PSEA Director of Communications David Broderic ("Mr. Broderic") admitted at the Hearing, twelve out of the magazine's thirty-two pages were devoted to supporting Tom Wolf for Governor. Tr. 41.

Many of the remaining pages were sold, in whole or in part, to vendors as advertisements,¹⁰ Tr. 70, with each page of *The Voice* worth up to \$124.32 for the

⁹ The NEA Advocacy Fund is required to disclose any contributions it receives to the Federal Election Commission ("FEC") using forms labeled "FEC FORM 3X." Ex. 1 at 4a-19a; Ex. 4; Tr. 21.

¹⁰ The parties' stipulation concerning *The Voice* advertisements is reflected in the Hearing transcript as follows:

As part of the member—we do agreements with those vendors who are endorsed. We give them access to our members and they give certain benefits to members,

PSEA.¹¹ One such vendor, “Gannon University,” paid the PSEA \$11,935 in 2014, in part, to place their advertisement on the top half of page 22 of the November 2014 issue of *The Voice*. Ex. 1 at 41a; Ex. 3 at 56; Tr. 70. The PSEA’s “Form LM-2 Labor Organization Annual Report” confirms at least three other paying advertisers¹² in the November 2014 issue.

The PSEA mailed the November 2014 issue of *The Voice* to PSEA members and any PSEA nonmembers who chose to subscribe. Stips. ¶ 9; Tr. 49, 51-52, 54-55. In accordance with its “common practice at the time,” Tr. 60, the PSEA also made an electronic copy of the same issue available to anyone else who clicked a link on PSEA’s website, Tr. 41, 58, which contained a disclaimer “Note: This content is intended for PSEA members and their immediate families.” Stips. ¶ 10; Ex. 1 at 78a,

discounts, et cetera. Part of that agreement is they do provide funds which are identified in the LM[-2] that go for various promotional materials, sponsorships and advertisements, and that does include advertising in the “Voice” when there’s space, and those that were identified as member benefits were, in fact, ads that were at least part of that payment—those receipts that were identified on the LM[-2].

Tr. 70.

¹¹ This figure was calculated by conservatively assuming that Gannon University received half-page advertisements in all six 2014 issues of *The Voice*, then taking Gannon University’s reported payment to the PSEA in 2014 (\$11,935), dividing it across those six 2014 issues (\$1,989.17) and 32 pages per issue (\$62.16), and multiplying that number by two half-page spaces per page (\$124.32).

¹² AmeriServ Financial, Ex. 1 at 51a; Ex. 3 at 55; NEA’s Member Benefits Corporation, Ex. 1 at 33a, 41a, 45a; Ex. 3 at 58; and Select Partners d/b/a Home Rewards, Ex. 1 at 21a; Ex. 3 at 61.

88a-89a. Approximately 50 visitors read the electronic copy of *The Voice* in November 2014 alone, and, as PSEA Assistant Director of Communications Mandy Nace (“Ms. Nace”) testified, the PSEA did not attempt to track or restrict nonmember access. Tr. 59, 63.

Following Ms. Trometter’s original Charge, however, the PSEA stopped mailing *The Voice* to PSEA nonmembers and, at the advice of a PSEA attorney, removed the link to the November 2014 issue of *The Voice* from its website, Ex. 1 at 89a; Tr. 60. Then, beginning in 2016 and continuing to the date of the Hearing, the PSEA decided to allow electronic access to *The Voice* but instituted a members-only password protection for certain issues. Tr. 60-61. According to Ms. Nace, the PSEA’s decision as to whether to place password protections on a particular issue depends on the issue’s *content*; the PSEA places password protections on “[c]ontent that include[s] information about PSEA recommended candidates.” Tr. 65.¹³

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Letter, which was funded by the NEA and supported then-gubernatorial candidate Tom Wolf, violates section 1701.

¹³ Ms. Nace testified that the PSEA’s password protection practice was contrary to what she considered “best practices” but was put in place because, in her words, “our attorneys advised us to do so.” Tr. 60. Ms. Nace further testified that the password protection practice was maintained despite the fact that “it made it unreasonably difficult” to access the issue on which the protection was placed. Tr. 62.

2. Whether the NEA's contribution of general treasury funds to a political organization, the NEA Advocacy Fund, violates section 1701.

3. Whether the November 2014 issue of *The Voice* magazine, which was funded by the PSEA and supported then-gubernatorial candidate Tom Wolf, violates section 1701.

SUMMARY OF ARGUMENT

Section 1701 was enacted as a reasonable restriction on public-sector unions, including the NEA and PSEA, which choose to represent government employees in Pennsylvania. It was justifiably enacted to prevent *quid pro quo* corruption or the appearance of such corruption, to ensure that public-sector unions are not beholden to public employers, and to protect government employees.

The NEA and PSEA violated section 1701, in fact and in law, in at least three ways. Ms. Trometter submitted an Amended Charge reporting those violations to the PLRB and supplied evidence, before and during the Hearing, sufficient to prove them. The PLRB should conclude that the NEA's Letter to Ms. Trometter's husband, the NEA's provision of funds to the NEA Advocacy Fund, and the PSEA's use of its magazine to support a gubernatorial candidate were distinct violations of section 1701.

Pursuant to section 1701, therefore, the NEA and PSEA should be ordered to report their violations to the PLRB and pay a fine. Should the PLRB find more

evidence is necessary to prove a violation of section 1701, it must further investigate Ms. Trometter's Amended Charge and ensure compliance with PERA.

ARGUMENT

In the past, the PLRB would have simply referred the NEA's and PSEA's clear violations of section 1701 to the Attorney General for enforcement. *See, e.g., Pittsburgh Fed'n of Teachers*, 7 PPER ¶ 07158 (Pa. Labor Relations Bd. May 27, 1976). However, given the Commonwealth Court's recent mandate in this case that the PLRB "has the statutory duty and obligation to enforce and implement [section 1701] of PERA," the PLRB must change its approach. *Trometter*, 147 A.3d at 609-10. The PLRB must carry out the express intent of the General Assembly: public-sector unions are prohibited from using general treasury dollars to support political organizations or candidates for political office.

Ms. Trometter presented evidence to the PLRB sufficient to find that the NEA and PSEA violated section 1701. Accordingly, the PLRB should order the NEA and PSEA to file reports concerning the violations and pay a fine, the amount of which is at the discretion of the PLRB. 43 P.S. § 1101.1701. If, however, more evidence is needed to discern whether the NEA or PSEA violated section 1701, the PLRB has the responsibility of gathering that evidence and ultimately enforcing the law. *See Trometter*, 147 A.3d at 609-10.

I. PENNSYLVANIA’S LIMITATIONS ON PUBLIC-SECTOR UNION POLITICAL ACTIVITY HAVE HISTORICAL AND LEGAL PRECEDENT

Federal law “leaves States free to regulate their labor relationships with their public employees.” *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 181 (2007). Thus, every state in the union has chosen to regulate public-sector collective bargaining in some form or fashion.¹⁴ On the extreme ends of the spectrum, many states,¹⁵ including Pennsylvania, 43 P.S. § 1101.701, require public employers to collectively bargain with public-sector unions, while at least six¹⁶ states make collective bargaining *illegal* for some or all public-sector unions.

Even those states that require public employers to bargain can and do place conditions on unions vying for the privilege of representing public employees. Pennsylvania, for one, placed heavy restrictions on its public-sector unions when it opened its workforce to unionism. For example, our General Assembly prohibited certain public-sector union strikes, *see* 43 P.S. §§ 213.14, 215.2, 1101.1001–1101.1010, and union members can be made to cross union picket lines, *see* 43 P.S. § 1101.1101.

¹⁴ *See generally* Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States* (2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf>.

¹⁵ Priya Abraham, *Transforming Labor: A Comprehensive, Nationwide Comparison and Grading of Public Sector Labor Laws* 3 (2016), https://www.commonwealthfoundation.org/docLib/20161027_TransformingLaborPolicyReport.pdf; Data from National Council on Teacher Quality’s research on state influence over district policy (last updated May 2015), http://www.nctq.org/admin/ExcelOutput?type=SCOPE_OF_BARGAINING.

¹⁶ Georgia, North Carolina, South Carolina, Tennessee, Texas, Virginia. *See supra* note 13 at 5.

Unions are not allowed to speak to employees in a manner “restraining or coercing” them to join a union or engage in concerted activities and cannot even “induc[e] or encourag[e]” others to engage in secondary boycotts. 43 P.S. § 1101.1201(b)(1), (7). The PLRB is tasked with, among other restrictions, predetermining a public-sector unions’ bargaining unit, 43 P.S. § 1101.604, and unions are prohibited entirely from representing certain employees, *see* 43 P.S. § 1101.301(2). Perhaps most striking in terms of due process, public-sector unions may be forced into arbitration as a means of settling labor disputes. 43 P.S. §§ 217.4, 1101.903.

And of course, the government can and does limit public-sector unions’ ability to speak at the negotiating table. *See Smith v. Arkansas State Highway Emps., Local 1315*, 441 U.S. 463, 464-65 (1979) (“[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.”). Pennsylvania allows government employers to effectively *shut down* discussions when public-sector union officials bring up “the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure[, or] selection and direction of personnel.” 43 P.S. § 1101.702; *see also* 24 P.S. § 11-1112-A; 43 P.S. § 217.1. Other states are far more restrictive; Wisconsin, for example, limits general public-sector unions to collective bargaining on just one topic: “total base wages.” Wis. Stat. §§ 111.70(4)(mb), 111.91(3).

It should come as no surprise, then, that states also condition unions' representational privileges by limiting union political activity. Again, Pennsylvania is not alone in this respect; Iowa's and Kansas' laws mirror Pennsylvania's in broadly prohibiting public-sector union-funded political activity. Iowa Code § 20.26;¹⁷ K.S.A. § 75-4333(d).¹⁸ Meanwhile, Alabama, Idaho, Tennessee, and Utah have targeted similar political activity but have made their restrictions dependent on unions' use of the state's automatic payroll deduction system. Ala. Code § 17-17-5; Idaho Code § 44-2004; Tenn. Code Ann. § 49-5-608(b)(6); Utah Code Ann. § 34-32-1.1(2). Of course, that is precisely the means by which the NEA and the PSEA have been collecting Ms. Trometers' dues. Stips. ¶ 5.

¹⁷ Iowa's Public Employment Relations Board has had several opportunities to interpret the law since its passage, never questioning its validity. *See, e.g., Iowa Dep't of Admin. Servs.*, No. 8604, 2013 WL 1950631, at *3 (Iowa Pub. Emp't Relations Bd. Feb. 8, 2013), *upheld AFSCME Iowa Council 61 v. Iowa Pub. Emp't Relations Bd.*, No. CVCV 9631, 2013 WL 3733522, at *2 (Iowa Pub. Emp't Relations Bd. July 12, 2013); *Pub. Prof'l & Maint. Emps., IUPAT Local 2003*, No. 6678, 2003 WL 25771130, at *1 (Iowa Pub. Emp't Relations Bd. July 28, 2003).

¹⁸ Despite ample testimony in committee from union officials, not a single proponent or opponent of the recent amendment prohibiting use of payroll deduction systems for *employee* contributions, Act of Apr. 1, 2013, ch. 6, 2013 Kan. Sess. Laws (H.B. 2022), questioned the constitutionality of the then- and now-existing provisions prohibiting the political spending and activity of unions. To the contrary, American Federation of Teachers-Kansas President Lisa Ochs criticized the amendment but stated that the broad prohibition on government union political activity already in place "protects employees." *Hearing on H.B. 2023 Before the H. Comm. on Commerce, Labor and Econ. Dev.*, 2013 Legislative Session (2013), http://www.kslegislature.org/li_2014/b2013_14/committees/misc/ctte_h_cmrce_lb_r_1_20130123_16_other.pdf (H.B. 2023 was the original vehicle for the amendment until the Kansas Senate imported language from H.B. 2023 and substituted it into H.B. 2022).

Pennsylvania has, like Kansas, Iowa, Alabama, Idaho, Tennessee, and Utah, justifiable reasons for enacting a prohibition on public-sector union political activity. First, Pennsylvania has an interest in avoiding *quid pro quo* corruption or the appearance of corruption, just as it does with government contractors. *See* 53 P.S. § 895.704-A(a). After all, government contractors, like government unions, seek the privilege of doing business with the Commonwealth and enter willingly into that market. *See Wagner v. Fed. Election Comm’n*, 793 F.3d 1, 21 (D.C. Cir. 2015), *cert. denied sub nom. Miller v. Fed. Election Comm’n*, 136 S. Ct. 895 (2016) (upholding, in a unanimous *en banc* decision authored by Chief Judge Merrick Garland, federal restrictions on political activity of government contractors, observing that such contractors “choose to do work for the federal government” and that “[t]here is nothing novel or implausible about the notion that contractors may make political contributions as a *quid pro quo* for government contracts, that officials may steer government contracts in return for such contributions, and that the making of contributions and the awarding of contracts to contributors fosters the appearance of such *quid pro quo* corruption”). Indeed, seventeen states,¹⁹ including Pennsylvania, limit or prohibit campaign contributions from some or all state contractors or licensees.

¹⁹ Cal. Gov’t Code § 84308(d); Conn. Gen. Stat. § 9-612(f)(1)-(2); Haw. Rev. Stat. § 11-355; 30 Ill. Comp. Stat. 500/50-37; Ind. Code. §§ 4-30-3-19.5–4-30-3-19.7; Ky. Rev. Stat. Ann. § 121.330; La. Stat. Ann. §§ 18:1505.2(L), 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat. Ann. §§ 1944A-20.13–1944A-20.14; N.M. Stat. Ann. § 13-1-191.1(E)-(F); Ohio Rev. Code Ann. § 3517.13(I)-(Z), *invalidated in part on procedural grounds by United Auto Workers, Local Union*

Conversely, Pennsylvania has an interest in ensuring that public-sector unions like the NEA and PSEA are not beholden to public employers, the leadership of which is largely determined by popular election and may demand political support for concessions at the bargaining table. *See Wagner*, 793 F.3d at 21 (“Nor is there anything novel or implausible about the idea that contractors may be coerced to make contributions to play in that game, or that more qualified contractors may decline to play at all if the game is rigged.”). In other words, if unions are forced to play expensive political games just to secure deals with public employers, public-sector unionism will become a tool to extort, not protect, government employees.

Finally, and perhaps most important to Ms. Trometter, Pennsylvania has an obligation to protect individual public employees and safeguard *their* rights from politically charged unions. *See Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 528-29 (1991) (“[Unions’] public speech in support of the teaching profession generally is not sufficiently related to the union’s collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.”). This is, perhaps, precisely what the General Assembly had in view when it enacted section 1701 and

1112 v. Brunner, 911 N.E.2d 327 (Ct. App. Ohio 2009); S.C. Code Ann. § 8-13-1342; Vt. Stat. Ann. tit. 32, § 109(b); Va. Code Ann. § 2.2-3104.01; W. Va. Code § 3-8-12(d).

expressly stated its intent in PERA “to provide for the protection of the rights of the public employe, the public employer and the public at large.” 43 P.S. § 1101.101; *see also Pennsylvania Labor Relations Bd.*, 916 A.2d at 548 (“[B]y the plain language of the statute, all rights under PERA are not vested in the union, but rather, it is the individual public employee who possesses certain rights. . . .”).

II. THE LETTER, WHICH WAS FUNDED BY THE NEA AND SUPPORTED THEN-GUBERNATORIAL CANDIDATE TOM WOLF, VIOLATES SECTION 1701

In funding the Letter sent to Ms. Trometter’s husband out of the NEA’s general treasury, the NEA violated section 1701’s prohibition against supporting political candidates. As a result, the PLRB should require the NEA to report the violation and pay a fine.

Statutory construction starts with a statute’s plain language. 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). Where the language of the statute is unambiguous, the enforcement agency is not entitled to interpretive deference. *See Seeton v. Pennsylvania Game Comm’n*, 937 A.2d 1028, 1037 (Pa. 2007) (“While an agency’s interpretation of an ambiguous statute it is charged with enforcing is entitled to deference, courts’ deference never comes into play when the statute is clear.”). Even then, deference to an agency’s interpretation is “unwarranted where the meaning of the statute is a question of law” and “unwise or erroneous.” *Cope v. Ins. Comm’r*, 955 A.2d 1043, 1048 (Pa. Cmwlth. 2008).

Again, section 1701 contains the following prohibition:

No employe organization shall make any 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.

43 P.S. § 1101.1701.

Here, with respect to the NEA's funding of the Letter, Ms. Trometter has presented the PLRB with a violation of section 1701. First, the NEA is, as stipulated, an "employe organization." Stips. ¶ 3. Second, the NEA admits that it paid for the Letter "out of the funds of the employe organization," 43 P.S. § 1101.1701; the parties stipulated that the "NEA paid for the production and distribution of the [L]etter from its general treasury funds." Stips. ¶ 16. And third, as Ms. Kurtz admitted at the Hearing,²⁰ the Letter was clearly "in support of any political candidate for public office." 43 P.S. § 1101.1701. The only aspect of this charge left is whether, in funding the Letter, the NEA has made a "contribution" in support of then-candidate Tom Wolf.

²⁰ From the Hearing transcript:

[Counsel for Ms. Trometter:]

Q. Is it fair to say that in sending this letter, the NEA and the PSEA are supporting Tom Wolf for Governor?

[Ms. Kurtz:]

A. That is correct.

Tr. 28.

But a plain reading of section 1701 quickly resolves the question. Section 1701 concerns itself broadly with “any” contribution, whether “direct or indirect,” and even those generally “in support of” a candidate for office. 43 P.S. § 1101.1701. These qualifiers clarify the General Assembly’s intent not just to stop payments to a candidate, committee, or political organization (“direct”) but to prohibit payments uncoordinated with a particular candidate or committee (“indirect”). Additionally, prohibited contributions include those generally “in support of” (as opposed to those only “to”) candidates. *Id.*

Dictionaries provide further guidance. *See St. Ignatius Nursing Home v. Dep’t of Pub. Welfare*, 918 A.2d 838, 845 (Pa. Cmwlth. 2007) (“[I]n ascertaining the common and approved usage or meaning of a word, we may resort to the dictionary.”). Black’s Law Dictionary, for instance, defines “contribution” primarily as “[s]omething that one gives or does in order to help an endeavor be successful.” (10th ed. 2014). Likewise “[a] dictionary entry at the approximate time of the enactment of PERA,” *Lancaster Cty. v. Pennsylvania Labor Relations Bd.*, 94 A.3d 979, 987 (Pa. 2014), defines “contribution” largely in reference to the verb “contribute,” defined primarily as “to give or supply in common with others,” *Webster’s Seventh New Collegiate Dictionary* 182 (G. & C. Merriam Co. 1965).

Therefore, the NEA made “any contribution” when it used NEA general treasury dollars to pay for the Letter supporting Tom Wolf. The NEA did not, of course, transfer money directly to the then-candidate’s campaign, but it did pay

handsomely to support Tom Wolf—or “to help [his] endeavor be successful.”

Contribution, Black’s Law Dictionary (10th ed. 2014). In fact, Ms. Kurtz already admitted that the Letter represented NEA support for Wolf’s gubernatorial candidacy. Tr. 28. Given the General Assembly’s express intent to broadly prohibit such political activity for public-sector unions, the statute should be enforced as written.

Accordingly, in funding the Letter and sending it to Ms. Trometter’s husband, the NEA violated section 1701. The NEA must file a report with the PLRB evidencing its contribution and pay a fine, the amount of which is at the discretion of the PLRB.

III. THE NEA’S CONTRIBUTION OF GENERAL TREASURY FUNDS TO A POLITICAL ORGANIZATION, THE NEA ADVOCACY FUND, VIOLATES SECTION 1701

Quite apart from the prohibition on supporting candidates, section 1701 prohibits public-sector unions from “mak[ing] any contribution out of the funds of the employe organization either directly or indirectly to any political . . . organization.” 43 P.S. § 1101.1701. Because it is undisputed that the NEA transferred funds from its general treasury to the NEA Advocacy Fund, the PLRB should determine that the NEA violated section 1701, require the NEA to file a report, and impose a fine.

Again, the NEA is an “employe organization.” Stips. ¶ 3. From January 1, 2014, to November 24, 2014, the NEA sent \$14,500,000 from its general treasury to the NEA Advocacy Fund, an “independent expenditure-only political action committee.” Stips. ¶ 15; Ex. 4 at 6; Tr. 25-26. Such organizations are, no doubt, “political

organizations” as used in section 1701. Not only are they a type of “*political* action committee;” they “expressly advocat[e] the election or defeat of a clearly identified candidate.”²¹ 11 C.F.R. § 100.16(a). Ms. Kurtz confirmed that, indeed, the NEA Advocacy Fund does just that. Tr. 20-21.²²

The transfer of funds from the NEA to the NEA Advocacy Fund is, by all accounts, a “contribution.” In addition to meeting the dictionary definition of “contribution,” all \$14,500,000 are explicitly classified as “contributions” *on the NEA Advocacy Fund’s own federal filings*. Ex. 1 at 6a, 9a; Ex. 4 at 3, 6; Tr. 25-27. As Ms. Kurtz concisely testified at the hearing:

[Counsel for Ms. Trometter:]

Q. So let’s recap. This Form 3X, both of them, tell us that the NEA made [what is] *listed as contribution* of its funds to the NEA Advocacy Fund which is an independent expenditure-only political action committee.

[Ms. Kurtz:]

²¹ Accordingly, in contributing to the NEA Advocacy Fund, the NEA violates section 1701 in two ways: it both contributes to a political organization and indirectly supports candidates for political office.

²² From the Hearing transcript:

[Counsel for Ms. Trometter:]

Q. The FEC defines an independent expenditure as an expenditure for a communication, quote, “expressly advocating the election or defeat of a clearly identified candidate.” And it goes on to say that the only distinction here is it’s not made in coordination with the candidate.

Is that what you do with the NEA Advocacy Fund?

[Ms. Kurtz:]

A. Yes.

Q. Is that what the NEA Advocacy Fund does?

A. Yes.

Tr. 20-21.

A. That is correct.

Q. And by definition, independent expenditures expressly advocate for the election or defeat of a political candidate.

A. That is correct.

Tr. 27 (emphasis added).

There can be no serious objection, then, that the NEA contributed general treasury funds to a political organization. Accordingly, the PLRB should find that the NEA violated section 1701 in sending Ms. Trometter's dues to the NEA Advocacy Fund.

IV. THE NOVEMBER 2014 ISSUE OF *THE VOICE* MAGAZINE, WHICH WAS FUNDED BY THE PSEA AND SUPPORTED THEN-GUBERNATORIAL CANDIDATE TOM WOLF, VIOLATES SECTION 1701

Finally, in paying for its November 2014 issue with general treasury funds, the PSEA violated section 1701. Like the NEA's funding of the Letter, the PSEA used Ms. Trometter's money to support then-candidate Tom Wolf for political office.

Again, all elements of section 1701's prohibition are present. The PSEA is an "employe organization." Stips. ¶ 3. The PSEA admitted that it "pays for the publication and distribution of *The Voice* with general treasury funds, which at all times relevant to this matter included [Ms.] Trometter's membership dues." Stips. ¶ 12. And of course, as stipulated, "the November 2014 edition of *The Voice* contained articles urging members to vote in the then-upcoming elections and, specifically, to vote for Tom Wolf for Governor." Stips. ¶ 11. As Mr. Broderic admitted at the Hearing, such content was "supporting" Tom Wolf for Governor. Tr. 41-42.

In devoting over a third of the November 2014 issue of *The Voice* to promotion of Tom Wolf, the PSEA made “any contribution . . . in support of any political candidate for public office.” 43 P.S. § 1101.1701. Each page of *The Voice* has tangible, monetary value, and advertisers willingly pay for inclusion—up to \$124.32 per page. Tr. 70. It follows that the PSEA made a “contribution”—“[s]omething that one gives or does in order to help an endeavor be successful”—in support of then-candidate Tom Wolf. *Black’s Law Dictionary* (10th ed. 2014).

Therefore, the PLRB should find that provision of space to a political candidate in the PSEA’s magazine directing PSEA members, family, and friends to support and vote for then-candidate Tom Wolf also violated section 1701. The PSEA, too, should be made to file evidence of its contribution pursuant to section 1701 and pay a fine.

CONCLUSION

This is an important case to Ms. Trometter, but it is also important for the PLRB. The PLRB has, as the Commonwealth Court made clear, “the statutory duty and obligation to enforce and implement [section 1701] of PERA” and must apply the law in a principled way to these facts so as to guide its future determinations. *Trometter*, 147 A.3d at 609-10. If that takes more evidence, the PLRB should identify and seek out that evidence from the NEA and PSEA. Ms. Trometter submits that sufficient evidence is before the PLRB now; all three instances alleged in the Amended Charge are clear violations of PERA.

Date: April 14, 2017



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Complainant's Post-Hearing Brief* and corresponding appendices was served on this date via first class mail on the following counsel of record:

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