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PSEA AND NEA
CASE NUMBER: PERA-M-14-366-E

Enclosed, please find a Proposed Order of Dismissal.

Sincerely,

A handwritten signature in black ink that reads "Jack E. Marino".

JACK E. MARINO, ESQUIRE
Hearing Examiner

JEM/kjo

cc: RICHARD E. BURRIDGE, ESQUIRE
CHARLES O. BECKLEY, II, ESQUIRE

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MARY TROMETTER :
 :
 :
 v. : Case No. PERA-M-14-366-E
 :
 PENNSYLVANIA STATE EDUCATION :
 ASSOCIATION and NATIONAL EDUCATION :
 ASSOCIATION :

PROPOSED ORDER OF DISMISSAL

On November 18, 2014, Mary Trometter (Complainant or Ms. Trometter) filed a report of illegal contributions under the Public Employe Relations Act (Act or PERA) with the Pennsylvania Labor Relations Board (Board) against the Pennsylvania State Education Association (PSEA) and the National Education Association (NEA) (collectively Respondents or Unions).¹ In the report, Ms. Trometter alleged that she is member of the PSEA and that she pays union membership dues to the PSEA, the NEA and the local union affiliate. Ms. Trometter further alleged that the PSEA and the NEA violated Section 1701 of the Act by using her membership dues to pay for a letter that NEA sent to her husband urging her husband to vote for, then candidate, Tom Wolf for Pennsylvania Governor. Ms. Trometter additionally alleged that the Unions violated Section 1701 of the Act by using PSEA's dues-funded magazine, the "PSEA Voice," to support Candidate Wolf for Governor.

On December 19, 2014, the Unions filed an answer to the report. On December 22, 2014, the Secretary of the Board issued a letter informing Ms. Trometter's counsel that he could file a response to the Union's answer within 30 days. On January 14, 2015, Ms. Trometter's counsel filed a rebuttal to the Unions' joint answer, as permitted by the Secretary of the Board. On January 21, 2015, the Unions jointly filed a sur-reply to Ms. Trometter's rebuttal. On July 21, 2015, the Board issued an Order Referring Report to Attorney General Pursuant to 34 Pa. Code § 95.112. On August 19, 2015, Ms. Trometter filed a Petition for Review with the Commonwealth Court of Pennsylvania seeking the reversal of the Board's decision to transfer the report to the Attorney General's Office for review and investigation. On May 23, 2016, the Attorney General's Office issued a letter providing that, after investigating the facts and reviewing the relevant statutes, it was declining to pursue criminal prosecution of the PSEA and the NEA under Section 1701 of the Act.

¹ Ms. Trometter used a charge format to initiate this administrative action. Charges filed with the Board, however, are limited to unfair practice claims under Article XII of PERA. The Board's regulations require the filing of a report with the Board to initiate an action under Section 1701 of PERA. Accordingly, I have redesignated Ms. Trometter's initial filing as a report and I have treated it as such for purposes of this litigation.

On September 8, 2016, the Commonwealth Court issued an order reversing the Board's order transferring the report to the Attorney General's Office and remanded the matter to the Board for investigation and review. On October 20, 2016, the Secretary of the Board issued an order and notice of hearing scheduling a hearing date for February 1, 2017. On January 23, 2017, Ms. Trometter filed an amended report of illegal contributions clarifying that the letter sent to Ms. Trometter's husband constituted two separate violations of Section 1701 of the Act. On January 25, 2017, the Secretary of the Board issued an amended notice of hearing. During the hearing on February 1, 2017, the parties submitted joint stipulations of fact, Joint Exhibits 1-10, and they were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.² On April 14, 2017, the Complainant filed a post-hearing brief. On June 13, 2017, the Respondents filed a joint post-hearing brief. On July 3, 2018, the Complainant filed a notice of supplemental authority. On August 24, 2018, the Respondents filed a joint notice of supplemental authority.

The Examiner, on the basis of the stipulations of fact, the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The PSEA is a labor organization that is a non-profit state affiliate of the NEA and represents public education employees in Pennsylvania. The PSEA is incorporated and registered with the Pennsylvania Department of State as a non-profit domestic corporation. The PSEA is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 37-38; S.O.F. ¶ 1, 3)

2. The NEA is a labor organization that represents public-education employees in Pennsylvania and across the United States. NEA is a federally chartered corporation, incorporated in the District of Columbia by Congress. The NEA is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 14-15; S.O.F. ¶ 2, 3)

3. At all times relevant to this matter, Ms. Trometter was a member of both PSEA and NEA. Her PSEA and NEA membership dues payments were deducted from her salary and remitted to a local affiliate, the Penn College Education Association (PCEA), pursuant to Article II, Section 2.01 of the collective bargaining agreement (CBA) between her employer and the PCEA. (N.T. 37-38; S.O.F. ¶s 4, 5)

4. At all times relevant to this matter, PCEA remitted all or a portion of Ms. Trometter's dues payments to the PSEA, which in turn transmitted a portion of Ms. Trometter's dues to the NEA. (N.T. 15-16; S.O.F. ¶ 6)

² The Joint Stipulations of Fact are abbreviated "S.O.F." in citations contained in the findings of fact.

5. The PSEA issues a publication called "The Voice." This magazine publication serves as one of the primary means by which the PSEA communicates with its members on a variety of topics. (S.O.F. 7)

6. A print subscription to "The Voice" is included as part of each PSEA member's annual dues. At all times relevant to this matter, print subscriptions were also available to non-members for a fee. (S.O.F. ¶ 8)

7. On October 17, 2014, the PSEA mailed to subscribers the November 2014 edition of "The Voice." (S.O.F. ¶ 9)

8. In addition to mailing the November 2014 edition of "The Voice," PSEA posted an electronic copy of the November 2014 edition for members and families to access on the PSEA's website. That copy could be accessed by anyone but only through the "Membership Center" section of the PSEA website, and by clicking on a link that included a disclaimer stating, "Note: This content is intended for PSEA members and their immediate families." The January 2017 edition of "The Voice" was also available online for anyone who wanted to read it. Anyone who received a hard copy of the "The Voice" could show it to anyone else. (N.T. 41, 51-53, 58, 60-61, 63, 66; S.O.F. ¶ 10; Joint Exhibit 1 at 78a)

9. 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. The front cover of that edition stated: Tom Wolf needs your vote on Nov. 4." For one of the articles in the November 2014 edition, Tom Wolf was interviewed to ascertain his position on certain policy issues, and his answers to some of the interview questions were included in an article that urged members to vote for Wolf. None of the content of the November 2014 issue of "The Voice" was made in cooperation or in consultation with then-Candidate Wolf or any political committee authorized by him, or at the request or suggestion of Candidate Wolf or his campaign. (N.T. 39-42, 50; S.O.F. ¶ 11)

10. At the time of the November 2014 edition of "The Voice," the PSEA had fifteen paying subscribers, and "The Voice" was distributed to approximately 150,000 PSEA members. The PSEA no longer has any subscribers, and it has terminated the subscriber program, as of March 2015. (N.T. 49, 56)

11. The PSEA 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. Organizations, universities and companies pay the PSEA to advertise in "The Voice." Some advertisers are endorsed by the PSEA because they are vendors that provide discounted services and benefits to PSEA members. No individual or entity pays for any editorial content contained in "The Voice." (N.T. 38-39, 43-48, 51-52, 70; S.O.F. ¶ 12; Joint Exhibit 1 at 20a-51a, 55a-58a; Joint Exhibit 3)

12. Trometter's household received a copy of the November 2014 issue of "The Voice." (S.O.F. ¶ 13)

13. On October 28, 2014, the NEA sent a form letter exclusively to the household family members of PSEA members urging them to vote for

Tom Wolf. A disclaimer at the bottom of the October 28, 2014 letter states that it was "Paid for by the NEA Advocacy Fund. Not authorized by any candidate." The letter contains the independent speech of the NEA. (N.T. 29-30, 32-34; S.O.F. ¶ 14)

14. The NEA Advocacy Fund is an independent expenditure-only political action committee registered with the Federal Election Commission (FEC) as a political action committee (PAC). NEA and PSEA members include public employes, such as teachers, college professors and other public school employes who pay dues to the NEA. The NEA Advocacy Fund is primarily funded by transfers from NEA's general treasury and the NEA Fund for Children & Public Education, a political action committee affiliated with the NEA. (N.T. 14-15, 19, 21-22, 32, 37-38, 56; S.O.F. ¶ 15; Joint Exhibit 1 at 4a, 6a)

15. The NEA Advocacy Fund has electoral programs and develops communications to effectuate those programs. The communications involve media and digital communications with the public regarding candidates and public education. Funds transferred from the NEA to the NEA Advocacy Fund serve to fund advocacy for the election or defeat of political candidates. These transfers are reported on FEC form 3X. (N.T. 13-14, 27; Joint Exhibits 1 & 4)

16. The NEA spends money for political activities beyond core collective bargaining, and it paid for the production and distribution of the letter from its general treasury funds (which included Ms. Trometter's membership dues) and not from the NEA Advocacy Fund. (N.T. 17; S.O.F. ¶ 16)

17. The NEA gave a year-to-date amount of approximately \$12,500,000 to the NEA Advocacy Fund for the 2014 election cycle, prior to the election. The NEA gave a post-election amount of \$14,500,000 to the NEA PAC. (N.T. 24-26; Joint Exhibit 1 at 6a, 9a; Joint Exhibit 4 at 1, 3)

18. The October 28, 2014 letter was conceived, drafted, published, and sent without coordinating or consulting with Candidate Wolf or his campaign. The NEA received nothing from Candidate or Governor Wolf or any other political candidate for sending money to the NEA Advocacy Fund PAC. (N.T. 26, 33; S.O.F. ¶ 17)

19. Jeffrey Trometter, Ms. Trometter's husband, received a copy of the October 28, 2014 letter, which was addressed only to him. Jeffrey Trometter is not a member of the NEA or PSEA. The letter asked Mr. Trometter to vote for Candidate Wolf for Governor. In the letter, the NEA and the PSEA are supporting Candidate Wolf for Governor. The NEA paid approximately, \$32,800 for the printing, design, production of and postage for the letter. (N.T. 27-28, 34; S.O.F. ¶ 18; Joint Exhibit 1 at 3a, 64a; Joint Exhibit 5)

DISCUSSION

Ms. Trometter argues that Section 1701 was enacted to place a reasonable restriction on public-sector unions, which choose to represent public employes, to prevent quid pro quo corruption, or the appearance of such, and to ensure that government officials are not

beholden to unions when bargaining over government employes. (Complainant's Post-hearing Brief at 14, 19). Ms. Trometter contends that the NEA and the PSEA violated Section 1701 in three ways. She posits that the Board "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 [S]ection 1701." (Complainant's Post-hearing Brief at 14).

Ms. Trometter further contends that other states have similar prohibitions on the political contributions of unions representing employes in those states, (Complainant's Post-hearing Brief at 18-19), and that the federal courts have upheld restrictions on federal contractors making political contributions to steer government contracts in their direction as a result of such contributions. (Complainant's Post-hearing Brief at 19). Ms. Trometter asserts that, by funding the letter to her husband, supporting Candidate Wolf, out of its general treasury, the NEA made a contribution to a political candidate in violation of the plain meaning of Section 1701. (Complainant's Post-hearing Brief at 21-23). The transfer of funds from the NEA general fund to the NEA Advocacy Fund, which the NEA admits expressly advocates for the election or defeat of clearly identified candidates, constitutes a contribution to a political candidate in violation of Section 1701. (Complainant's Post-hearing Brief at 25).

The plain language of Section 1701, argues Ms. Trometter, is clear and contains no ambiguity that any direct or indirect contribution in support of a candidate is unlawful and "prohibits payments uncoordinated with a particular candidate or committee ('indirect')." (Complainant's Post-hearing Brief at 22-23). Ms. Trometter cites Black's Law Dictionary, 10th edition, 2014, as authority for the definition of the term "contribution," which, as quoted from the brief, defines the term as follows: "Something that one gives or does in order to help an endeavor be successful." Also, Ms. Trometter quotes from Webster's Seventh New Collegiate Dictionary, 1965, to give a dictionary definition arguably contemporaneous with the enactment of PERA, as follows: "to give or supply in common with others."

Similarly, Ms. Trometter maintains that the PSEA violated Section 1701 in paying for its November 2014 issue of "The Voice" with general treasury funds. She argues that, "[l]ike the funding of the [NEA] letter, the PSEA used Ms. Trometter's money to support then-candidate Tom Wolf for political office." (Complainant's Post-hearing Brief at 26). All the elements of Section 1701 are satisfied, contends Ms. Trometter, because the PSEA is an employe organization, it paid for the production and distribution of the November 2014 edition of "The Voice" with general treasury funds, which included Ms. Trometter's dues and "The Voice" contained articles urging members to vote in support of Candidate Wolf. (Complainant's Post-hearing Brief at 26).

Section 1701 of the Act provides as follows:

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 [B]oard 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 [B]oard 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 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 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.

43 P.S. § 1101.1701.

The Unions argue that there is a long-standing and well-understood distinction between a political contribution, which is prohibited by Section 1701, and expenditures on free political speech. They maintain that the NEA's expenditure on the letter and PSEA's expenditure on "The Voice" constituted permissible free speech of the Respondents in support of a political candidate and not a contribution from the Respondents to a political candidate, within the meaning of Section 1701.

Article XVI of the Election Code for the Commonwealth of Pennsylvania is titled "PRIMARY AND ELECTION EXPENSES." In the definition section of that Article, the General Assembly defines the term "contribution." The term "contribution" is not defined anywhere in PERA. Accordingly, an examination of other statutory and case-law authority must provide an understanding of what exactly is prohibited by Section 1701 of PERA. The problem with dictionary definitions became evident in the post-hearing closing arguments and briefing stages where both parties selected different, favorable definitions from different dictionary sources. Clearly, the prohibition in Section 1701 of PERA has everything to do with contributions to political candidates and their campaigns in seeking their election or re-election. The Election Code, therefore, is the most appropriate authority for the definition of the term "contribution" with respect to elections, campaigns and

candidate support and shall herein be read in pari materia with Section 1701 of PERA.³ Section 3241 of the Election Code provides as follows:

(b) The word "**contribution**" shall mean any payment, gift, subscription, assessment, contract, payment for services, dues, loan, forbearance, advance or deposit of money or any valuable thing, to a candidate or political committee made for the purpose of influencing any election in this Commonwealth or for paying debts incurred by or for a candidate or committee before or after any election. "Contribution" shall also include the purchase of tickets for events such as dinners, luncheons, rallies and all other fund-raising events; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office; and any payments provided for the benefit of any candidate, including any payments for the services of any person serving as an agent of a candidate or committee by a person other than the candidate or committee or a person whose expenditures the candidate or committee must report under this act. The word "contribution" includes any receipt or use of anything of value received by a political committee from another political committee and also includes any return on investments by a political committee.

25 P.S. § 3241(b) (emphasis original).

Section 3241 of the Election Code also defines the term "independent expenditure" and provides as follows:

The words "**independent expenditure**" shall mean an expenditure by a person made for the purpose of influencing an election without cooperation or consultation with any candidate or any political committee authorized by that candidate and which is not made in concert with or at the request or suggestion of any candidate or political committee or agent thereof.

25 P.S. § 3241(e) (emphasis original).

In General Majority PAC v. Aichele, 2014 WL 3955079 (M.D. PA 2014), the District Court for Middle District of Pennsylvania issued a memorandum decision striking a Pennsylvania Election Code provision prohibiting banks, corporations, unions and unincorporated associations from making either contributions or independent expenditures in connection with any candidate or political purpose. In striking the law as unconstitutional, the District Court relied on the distinction between a "contribution" and an "expenditure." Citing Citizens United v. FEC, 558 U.S. 310, 130 S.Ct. 876 (2010), the District Court noted that the Supreme Court has held that the only legitimate governmental interest in limiting political spending, and thereby restricting protected First Amendment activities, is the avoidance of corruption or

³ Section 1932 of the Statutory Construction Act provides: "(a) Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things." 1 Pa. C.S. § 1932(a).

the appearance of corruption. The District Court held that a "prohibition on political spending that is neither prearranged nor coordinated with a candidate amounts to an impermissible restriction of protected First Amendment activity."

In Citizens United, supra, the United States Supreme Court reversed recent precedent and determined that a federal law prohibiting corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate for federal office, through any form of media, known as electioneering communication, within 60 days of a primary and within 30 days of a general election, was unconstitutional.

Writing for the Court in Citizens United, Justice Kennedy stated as follows:

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United, 558 U.S. at 340-341. The Court further emphasized that First Amendment protections for political speech applied to corporations and unincorporated entities. Id. at 342-343. The Citizens United Court cited to its prior decision in Buckley, 424 U.S. 1 (1976), which holding the Court reinstated, wherein the Court explained that "the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures." Citizens United, 558 U.S. at 344-346 (citing Buckley v. Valeo, 424 U.S. 1, 47-48). The Buckley Court emphasized that "'the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,' . . . because '[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" Citizens United, 558 U.S. at 344-346 (quoting Buckley, 424 U.S. at 29). "Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" Citizens United, 558 U.S. at 33 (quoting Belotti v. U.S., 435 U.S. 765, 777).

In this regard, the distinction between a contribution to a political candidate, committee or campaign on the one hand and an independent expenditure on the other is not only significant, but also determinative. Contributions can be prohibited and regulated by the government, but independent expenditures to voice support for candidates constitute protected First Amendment speech. With this understanding, the prohibited contribution language in Section 1701 constitutes permissible government regulation, and it is consistent with First Amendment law.

As argued by the Unions, in this matter, an agency, such as this Board, must interpret the statutes that it enforces in a manner that does not violate and is consistent with the United States Constitution or the Pennsylvania Constitution. An agency must leave an unconstitutional determination of a statute or statutory provision to the judiciary. 1 Pa. C.S. § 1922(3)⁴ (Union's Post-hearing Brief at 19 (citing Brown v. Montgomery County, 918 A.2d 802, 807 n.7 (Pa. Cmwlth. 2007))). In Brown, the Commonwealth Court dismissed the appellants tax appeal, under 42 U.S.C § 1983 challenging the constitutionality of taxes on a trust property, because he did not pursue the state provided remedies and statutory processes which were adequate to challenge his property tax relief claims. In this context, the Commonwealth Court opined that state and local agencies are not competent to decide the validity or constitutionality of the statutes that they enforce but a litigant must raise the issue before the agency to preserve it for court review. Brown, 918 A.2d at 807-808.

Although Section 1701 was enacted in 1970, it must be interpreted in light of the Supreme Court's holding in Citizens United issued in 2010. Since Citizens United, federal and state courts have recognized that unions have the First Amendment right to take partisan political positions and express those views without government interference. (Brief at 4). The Unions poignantly noted that if one interpretation of a statute would raise constitutional problems for a litigant in the case or others, the other interpretation should prevail. (Union's Post-hearing Brief at 19) (citing Clark v. Martinez, 543 U.S. 371, 380-381 (2005)).

Ms. Trometter's proposed interpretation of Section 1701 of PERA certainly raises constitutional problems by placing limitations on protected First Amendment free speech, with which a reviewing court would likely disagree under Citizens United, supra. 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. The Unions did not make a prohibited contribution directly or indirectly to him or his campaign.

The facts overwhelmingly establish that neither the NEA or the PSEA gave anything of any kind to Candidate Wolf or his campaign. They did not cooperate with Candidate Wolf or his campaign in disseminating their speech in the form of the NEA letter to Mr. Trometter or in the form of the November 2014 edition of "The Voice" from the PSEA. The letter was the uncoordinated, unprearranged speech of the NEA. The November 2014 edition of "The Voice" was the uncoordinated, unprearranged speech of the PSEA. The Constitution of the United States, as interpreted by the United States Supreme Court in Citizens United, protects this form of free speech from government restriction

⁴ This Section provides for certain assumptions in ascertaining legislative intent and specifically provides, inter alia: "(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa. C.S. § 1922(3).

or regulation and therefore, Section 1701 cannot be read to restrict such speech.

The term "contribution" requires that something of value be given to a candidate or his/her campaign or committee. Ms. Trometter argues that the speech in support of Governor Wolf's candidacy constitutes a valuable, indirect contribution to his campaign in violation of Section 1701, even though it was not coordinated or prearranged with Candidate Wolf or anyone from his staff, campaign or election committee. However, such a broad reading of the term "contribution" would directly conflict with the definition of "independent expenditure" and the Unions' First Amendment right to express their political views and support for candidates, in contravention with Citizens United, supra. This record clearly demonstrates that the NEA spent dues money on the letter and the PSEA spent dues money on "The Voice." These financial outlays fit squarely within the definition of "independent expenditure" permissible under the First Amendment and Section 1701 of PERA. The Unions' expenditures in this case were admittedly made "for the purpose of influencing an election without cooperation or consultation with any candidate or any political committee authorized by that candidate and which [were] not made in concert with or at the request or suggestion of any candidate or political committee or agent thereof." In this context, there is no risk of a quid pro quo or the appearance of corruption or impropriety in the payment for the Unions' expressions of their political views in favor of public education.

The Supreme Court of Pennsylvania has held that "public-sector unions are free to take public positions on partisan political matters," and that an elected union official on leave of absence from his civil service position is exempt from the civil service prohibition on political activity. Pinto v. State Civil Service Commission, 912 A.2d 787, 796 (Pa. 2006). Indeed, Section 3253 of the Election Code authorizes the Unions' speech in this case and provides, in relevant part, as follows: "(c) No provision of the laws of this Commonwealth [which includes Section 1701 of PERA] shall be deemed to prohibit direct private communications by a corporation to its stockholders and their families or by an unincorporated association to its members and their families on any subject." 25 P.S. § 3253(c) (emphasis added). Consequently, the NEA and the PSEA are both authorized to spend their members' dues money to pay for political communications with their members and their families. To interpret Section 1701 otherwise would create a direct conflict between the Election Code and PERA. Although Ms. Trometter points out that "The Voice" was accessible to the public, the United States Supreme Court decision in Citizens United, unequivocally held that government may not restrict a union's right to make expenditures for political advocacy addressed to the general public as long as such speech is not coordinated with any candidate, which was the case here with respect to the letter and "The Voice."

The Unions agree with Ms. Trometter that unambiguous statutory provisions must be given their plain meaning. The Statutory Construction Act requires that the words used in statutes must be given their plain meaning unless specifically given a technical meaning in the statute. 1 Pa. C.S. § 1903. The plain meaning of the term contribution, as defined by the Election Code and case law, requires the actual giving of money or something of value to another, in this

context to a political candidate, either directly or indirectly, and not the expenditure on speech.

By way of illustration, the Unions argue some examples to make the point. The Tax Code provides tax deductions for charitable contributions. The deduction is only available for the actual gift of property or money to the charity. (Union's Post-hearing Brief at 13). The taxpayer cannot claim the deduction for spending money on broadcasts or editorial ads that support the charity. Similarly, the Unions argue that an employer does not satisfy its obligation to make unemployment compensation contributions by paying for editorial advertisements extolling the importance of unemployment benefits. (Unions Post-hearing Brief at 13-14). The use of the Unions' funds in this case for editorial political support for Candidate Wolf in the letter and "The Voice" is not within the plain, ordinary or common understanding of the term "contribution," or as that term is defined by law.

The expenditures on the speech at issue here were never coordinated with Candidate Wolf and, therefore, there can be no contribution or reporting requirement under Section 1701 of PERA. As emphasized by the Unions, "The Voice" did not provide the Wolf campaign with free advertising, which they concede would constitute a contribution. The language in the letter and "the Voice" is the Unions' own editorial speech, and those words were published without coordinating with the Wolf campaign. (Unions' Post-hearing Brief at 14-15). Therefore, the dues money that paid for the speech complained of by Ms. Trometter regarding both the NEA letter and PSEA's "The Voice" qualify as independent expenditures protected by the First Amendment, and they were not contributions prohibited by Section 1701. Any other interpretation of Section 1701 would be contrary to Citizens United, supra, and Aichele, supra, and would require this Board to conclude, either expressly or implicitly, that Section 1701 is unconstitutional, which is well beyond the Board's agency authority and jurisdiction.

In a supplemental filing, Ms. Trometter relies on the United States Supreme Court decision in Janus v. AFSCME, Council 31, 585 U.S. ___, 138 S.Ct. 2448, 2018 WL 3129785 (2018) and argues thereunder that "public-sector union employees are constitutionally entitled to the assumption that they did not consent to fund union activity. . . . Ms. Trometter's general consent to membership within Respondent employee organizations could not have included, as a matter of law, consent to fund activity that is specifically prohibited by the Commonwealth," under Section 1701 of PERA. (Complainant's Notice of Supplemental Authority at 1).

Janus is inapplicable to the disposition of the issues presented in the investigation of the Complainant's report and the determination of whether the Respondent's complained of activities constitute violations of Section 1701. Whether the Respondents provided contributions prohibited under Section 1701 of PERA has nothing to do with whether Ms. Trometter, under state law, can be required to pay fair share dues in support of a union when she does not support the union or its collective bargaining or political activities. To agree with Ms. Trometter that Janus has any controlling weight in this matter would also require the conclusion that Janus is inconsistent with

Citizens United, *supra*. The issues are completely different. A union's right to use union dues that it receives for political speech to its members uncoordinated with any political candidate or campaign representative has nothing to do with Ms. Trometter's constitutional right under Janus to withhold her financial support for the Unions here for any reason, including their political positions and speech.

Also, as emphasized by the Respondents in their Notice of Supplemental Authority, in response, the Janus Court held that public sector unions may no longer collect fair share fees from nonmembers absent affirmative consent and that mandatory fair share fees are an unconstitutional infringement on the First Amendment rights of **NONMEMBERS**. However, throughout this entire investigation, Ms. Trometter has admitted, maintained and stipulated that "[a]t all times relevant to this matter, Complainant Mary Trometter ("Trometter") was a member of both PSEA and NEA." (Stipulation of Fact 4). By virtue of being a full voluntary member of the Unions she has given her support and waived her constitutional challenges to the Unions' political positions or speech. Ms. Trometter's remedy is to become a nonmember and withhold her affirmative consent to pay dues to the Unions. Janus simply does not give Ms. Trometter, as a full member, the constitutional right to challenge the Unions' political speech to its members, which is permitted under Citizens United and the Election Code, nor does it change the conclusion that the Unions' speech in this case was not a prohibited contribution in violation of Section 1701 of PERA. Additionally, to the extent that Janus could possibly have any applicability to the facts of this case, it was not the law at the time of the activities of which Ms. Trometter complains. Indeed, the Court reversed itself and prior precedent in Janus.⁵

Accordingly, after a full investigation of the circumstances, facts and events relating to the report of illegal contribution, the report must be dismissed as unsubstantiated for lack of illegal contribution either directly or indirectly.⁶ Based on the analysis above, there are three reasons for this conclusion: (1) The statutory definitions of the terms "contribution" and "independent expenditure" as applied to the facts here yield the conclusion that the NEA and the PSEA did not provide illegal contributions to Candidate Wolf or any representative from his committee or campaign and did not violate Section 1701 of PERA; (2) The Election Code expressly authorizes the

⁵ Subscribing to Ms. Trometter's argument in her supplemental filing while simultaneously following Citizens United would result in an impossible administrative and accounting endeavor for the Respondents. Permitted to spend dues money on uncoordinated political speech, Ms. Trometter would have the Respondents determine from each Union member which of the Unions' various positions the individual member supports and maintain a multitude of segregated accounts each designated for certain speech. There could be as many different political opinions as there are members. The Respondents would have to place Ms. Trometter's dues in an account that would not have been used to support Candidate Wolf. Ms. Trometter's position would force an absurd result; it is impractical, if not impossible, to determine and continuously track individual members' political positions, especially where the membership is as large as it is for the NEA and the PSEA.

⁶ The Unions make several other arguments which I need not address given the disposition of the case.

type of speech and communications with members and families that occurred in this case, and subscribing to Ms. Trometter's reading of Section 1701 would conflict with that express statutory authority; and (3) Concluding that Section 1701 prohibited the expenditures on speech in this case, which were uncoordinated or prearranged with Candidate Wolf or his campaign, would contravene the Constitution as interpreted by the United States Supreme Court in Citizens United, supra.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record, concludes and finds as follows:

1. The NEA is an employe organization under PERA.
2. The PSEA is an employe organization under PERA.
3. Ms. Trometter is a dues-paying member of the NEA and the PSEA.
4. The Board has jurisdiction over the parties hereto.
5. The NEA and the PSEA have not engaged in illegal contributions either directly or indirectly within the meaning of Section 1701 of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the report is dismissed and the investigation is closed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fourth day of October, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD



Jack E. Marino, Hearing

