

In the Commonwealth Court of Pennsylvania

1484 C.D. 2015

MARY TROMETTER,
Petitioner,

v.

PENNSYLVANIA LABOR RELATIONS BOARD,
Respondent,

NATIONAL EDUCATION ASSOCIATION; and
PENNSYLVANIA STATE EDUCATION ASSOCIATION,
Intervenors.

PETITIONER'S INITIAL BRIEF

Appeal from a Final Determination of the Pennsylvania Labor Relations Board
(Case No. PERA-M-14-366-E)

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INTRODUCTION

This is a case of first impression regarding the General Assembly’s 45-year-old prohibition preventing public-sector unions from contributing “either directly or indirectly to any political party or organization or in support of any political candidate for public office.” In November 2014, Petitioner Mary Trometter (“Ms. Trometter”) presented Respondent Pennsylvania Labor Relations Board (“PLRB”) with evidence that the National Education Association (“NEA”) and Pennsylvania State Education Association (“PSEA”)—Intervenors and the unions representing Ms. Trometter—violated that prohibition in an attempt to support then-candidate Tom Wolf. When given the opportunity to respond, the NEA and the PSEA only confirmed the truth of the underlying facts alleged by Ms. Trometter. However, instead of fulfilling its statutory responsibilities, the PLRB punted: in a final determination, it referred Ms. Trometter’s charge to the Attorney General’s Office “for investigation and application of prosecutorial discretion” without addressing the merits of Ms. Trometter’s filing. The PLRB’s determination was contrary to the statutory prohibition, located at section 1701 (“section 1701”) of the Public Employe Relations Act (“PERA”), 43 P.S. § 1101.1701, and must be reversed.

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over this matter pursuant to section 763(a) of the Judicial Code, 42 Pa.C.S. §§ 101-9913.

ORDER IN QUESTION

Ms. Trometter appeals from an order of the PLRB, which read:

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

That this matter is referred to the Attorney General of the Commonwealth of Pennsylvania for proceedings under applicable statutes.

A copy of the order is attached hereto as Appendix "A."

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Because this case "presents a matter of statutory interpretation, and '[a]s this is a purely legal question, [this Court's] standard of review is de novo and scope of review is plenary.' " Allstate Life Ins. Co. v. Commonwealth, 52 A.3d 1077, 1080 (Pa. 2012) (quoting In re Milton Hershey School, 911 A.2d 1258, 1261 (Pa. 2006)). "[W]hile deference may be given to an agency's interpretation of its statute, such deference is unwarranted where the meaning of the statute is a question of law and when the court is convinced that the agency's interpretation is unwise or

erroneous.” Cope v. Ins. Comm’r, 955 A.2d 1043, 1048 (Pa. Cmwlt. 2008) (internal quotation marks and citation omitted)).

STATEMENT OF THE QUESTIONS INVOLVED

- I. **WHETHER THE PLRB ERRED IN DETERMINING THAT IT WAS PRECLUDED FROM ENFORCING SECTION 1701 OR FINDING THAT THE NATIONAL EDUCATION ASSOCIATION AND PENNSYLVANIA STATE EDUCATION ASSOCIATION VIOLATED SECTION 1701, EVEN WHERE THE UNIONS ADMITTED TO THE UNDERLYING ALLEGATIONS**
- II. **WHETHER SECTION 95.112 OF THE PLRB’S RULES AND REGULATIONS IS VALID AND CONSISTENT WITH SECTION 1701**
- III. **WHETHER THE PLRB ERRED IN APPLYING SECTION 95.112 OF THE PLRB’S RULES AND REGULATIONS**

STATEMENT OF THE CASE

Background and Procedural History

This is an appeal from the PLRB’s “Order Referring Report to Attorney General Pursuant to 34 Pa. Code § 95.112” (“Order”) in Case No. PERA-M-14-366-E. See App’x A.

On November 18, 2014, Ms. Trometter filed a Charge of Illegal Contributions (“Charge”) pursuant to section 1701 of the PLRB and as directed by title 34, section 95.112, of the Pennsylvania Administrative Code (“PLRB’s Rule”). (R. 1a-51a). The petition alleged that the NEA and PSEA violated section 1701, which prohibits making “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. (R. 2a).

On November 19, 2014, the PLRB acknowledged Ms. Trometter’s filing, assigned a case number, and notified the NEA and PSEA that they were parties to the case. (R. 52a). The NEA and PSEA were directed to file an answer within thirty days, with failure to specifically deny allegations constituting an admission. (R. 52a).

On December 19, 2014, the NEA and PSEA filed a joint “Response to Charge” with sworn affidavits from NEA and PSEA officials admitting to the conduct alleged by Ms. Trometter. (R. 53a-65a). The NEA and PSEA argued, however, that section 1701 should be construed so as to permit the charged conduct. (R. 55a-59a).

On January 14, 2015, Ms. Trometter replied to the NEA’s and PSEA’s response. (R. 66a-82a). And on January 21, 2015, the NEA and PSEA filed a joint “sur-reply” to Ms. Trometter’s reply. (R. 83a-90a).

On July 21, 2015, the PLRB issued its Order. App’x A. In its Order, the PLRB determined that it was precluded from finding that the NEA and PSEA had violated section 1701 and from enforcing the law. Id. at p. 2. The members of the PLRB are L. Dennis Martire, Chairman; Robert H. Shoop, Jr., Member; and Albert Mezzaroba, Member. Id. at p. 3.

On August 19, 2015, Ms. Trometter filed a timely petition for review with this Court.

Facts

Ms. Trometter has been a dues-paying member of the NEA and PSEA for 25 years. (R. 2a). In that time period—in fact, since 1970—the NEA and PSEA have never reported a single instance of their making “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. (R. 70a, 81a).

On October 31, 2014, Ms. Trometter’s husband received a letter jointly signed by the NEA and PSEA presidents reading:

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.
- 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.**

(R. 2a-3a) (Emphasis in original). The letter indicates, at the bottom, that it was “[p]aid for by the NEA Advocacy Fund.” (R. 3a). The NEA Advocacy Fund, as the NEA would later confirm, did in fact pay for the production and distribution of the letter. (R. 64a). The NEA Advocacy Fund is an Independent-Expenditure Only political action committee that “receives all of its funding from dues paid by NEA members.” (R. 63a).

In November 2014, Ms. Trometter also received the PSEA's dues-funded magazine, PSEA Voice, the cover of which included the plea "TOM WOLF NEEDS YOUR VOTE ON NOV. 4." (R. 20a). As the PSEA would later admit, the magazine "contains a number of articles urging members to vote in the then-upcoming election and, specifically, to vote for Tom Wolf for governor." (R. 62a). The inside cover of the magazine, and a PSEA affidavit filed with the PLRB, demonstrate that the PSEA uses general treasury funds—membership dues—to produce and mail the PSEA Voice. (R. 21a, 61a).

On November 18, 2014, Ms. Trometter filed her Charge with the PLRB, alleging that, in funding the letter sent to her husband and the PSEA's magazine, the NEA and PSEA violated section 1701, which prohibits "any 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. (R. 2a). In proceedings before the PLRB, the NEA and PSEA filed sworn affidavits admitting the conduct as alleged by Ms. Trometter; the thrust of their joint response was only that the PLRB should not enforce the law in this instance. (R. 53a-65a).

Specifically, the NEA admitted by sworn affidavit that the NEA Advocacy Fund paid for the production and distribution of the letter sent to Ms. Trometter's husband, as well as family members of other union members. (R. 63a-64a). The

NEA also admitted that the NEA Advocacy Fund is financed entirely by union dues money. (R. 63a). The NEA Advocacy Fund’s filing with the Federal Election Commission lists the transfer of funds from the NEA to the NEA Advocacy Fund as a “contribution.” (R. 6a, 9a). Additionally, the PSEA admitted by sworn affidavit that its magazine is funded through general treasury funds and that the November 2014 issue included “a number of articles urging members to vote in the then-upcoming elections and, specifically, to vote for Tom Wolf for governor.” (R. 61a-62a). The PSEA also admitted to making the magazine freely available to the public. (R. 88a-89a).

Ultimately, the PLRB referred Ms. Trometter’s Charge “to the Attorney General of the Commonwealth of Pennsylvania for investigation and application of prosecutorial discretion. . . . without consideration of the underlying merits of the [Charge].” App’x A, at p. 2. The PLRB’s Order did not actually determine—nor provide findings in support of its conclusion—that an “investigation” was necessary to conclude that the NEA and PSEA had violated section 1701. Instead, the PLRB’s Order stated that the questions necessary to reach such a conclusion hinged on “constitutional and statutory determinations.” Id. Yet the PLRB opined—also without reference to any supporting facts or binding law—that “[the Office of

Attorney General] is better suited than the Board” to make such legal determinations. Id.

This appeal followed.

SUMMARY OF ARGUMENT

This Court should reverse the PLRB’s Order for at least three reasons. First, the PLRB erred in interpreting section 1701, which does not prevent the PLRB from enforcing the statutory prohibition on union contributions “directly or indirectly to any political party or organization or in support of any political candidate for public office.” 43 P.S. § 1101.1701. In fact, PERA charges the PLRB with enforcement responsibilities, and the PLRB’s determination otherwise is contrary to the statutory mandate that it “shall exercise those powers and perform those duties which are specifically provided for in [PERA].” 43 P.S. § 1101.501.

Second, in determining that it was precluded from enforcing section 1701, the PLRB relied on an agency rule inconsistent with PERA and section 1701 itself. The Rule, contrary to PERA, shifts responsibility for enforcement of section 1701 to the Attorney General and utterly fails “to prevent the circumvention or evasion of the provisions of this section.” 43 P.S. § 1101.1701. Additionally, the language in the Rule is vague and lends itself to arbitrary agency action.

Finally, even if the PLRB's Rule is valid, the PLRB failed to follow it. No investigation was necessary to determine that the NEA and PSEA violated section 1701, the prerequisite for referral to the Attorney General's Office.

Accordingly, this Court should reverse the PLRB's determination and remand for further proceedings.

ARGUMENT

I. THE PLRB WAS NOT PRECLUDED FROM ENFORCING SECTION 1701 OR FINDING THAT THE NEA AND PSEA VIOLATED SECTION 1701, PARTICULARLY WHERE THE NEA AND PSEA ADMITTED TO THE ALLEGATIONS CHARGED

The PLRB erred in determining that it was precluded from enforcing section 1701. Contrary to the PLRB's determination, it can and must enforce the statutory ban on use of union membership funds "directly or indirectly to any political party or organization or in support of any political candidate for public office." 43 P.S. § 1101.1701. This Court should reverse the PLRB's determination.

Statutory construction begins with a statute's plain language. 1 Pa.C.S. § 1921(b); see Bd. of Governors of State Sys. of Higher Educ. v. Commonwealth, 514 A.2d 223, 225 (Pa. Cmwlth. 1986) ("When the words of a statute are clear and free from all ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit."). "[O]nly when the words of a statute are ambiguous[] should a reviewing court seek to ascertain the intent of the General

Assembly through considerations of the various factors found in Section 1921(c).”
Lancaster Cnty. v. Pennsylvania Labor Relations Bd., 94 A.3d 979, 987 (Pa. 2014).

The Public Employe Relations Act (“PERA”) was enacted in 1970,¹ with the stated “purpose of . . . promot[ing] orderly and constructive relationships between all public employers and their employes subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare.” 43 P.S. § 1101.101. The General Assembly determined that this purpose could be effected, in part, by “establishing procedures to provide for the protection of the rights of the public employe, the public employer and the public at large.” Id. (emphasis added).

PERA requires that the PLRB² “shall exercise those powers and perform those duties which are specifically provided for in this act.” 43 P.S. § 1101.501. Among other duties, the PLRB is tasked with determining the appropriateness of a bargaining unit, 43 P.S. § 1101.604, conducting, overseeing, and certifying representation elections, 43 P.S. § 1101.605, and preventing unfair labor practices, 43 P.S. § 1101.1301. The PLRB is granted authority to bring charges against

1. 1970, July 23, P.L. 563, No. 195.

2. “The PLRB was created by the legislature in the Pennsylvania Labor Relations Act (PLRA) under its police powers.” West Shore Sch. Dist. v. Pennsylvania Labor Relations Bd., 626 A.2d 1131, 1133 (Pa. 1993).

employee organizations and public employers in a complaint heard before the PLRB, 43 P.S. § 1101.1302, take testimony and engage in fact-finding, 43 P.S. § 1101.1303, and to craft and order remedies for unfair practices, 43 P.S. § 1101.1303.

The PLRB is also given investigatory powers “for the purpose of investigating and considering disputes, other than a question concerning the representation of employes.” 43 P.S. § 1101.1601. Those investigatory powers include the power to issue subpoenas, compel production of evidence, examine witnesses, and receive evidence. 43 P.S. § 1101.1602.

As a part of the general statutory scheme in which public employees were given authorization to organize and negotiate with the state, the General Assembly prohibited employee organizations from using membership dues, directly or indirectly, to support a political candidate and tasked the PLRB with enforcement of the 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.

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 [PLRB] 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.

Section 1701's prohibition is, on its own terms, broad in scope. It prohibits "any" contribution of funds from an employee organization from being used "in support of any political candidate for public office." Id. The statute makes no distinction between contributions that are "direct or indirect." Id. Instead, it looks to whether the intended use of the contribution is to further the aims of aspiring political candidates through either contributions to a "political party or

organization,” or generally “in support of any political candidate for public office.”

Id.

Here, both the NEA and PSEA have admitted to using “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.” Id. Specifically, the NEA filed with the PLRB a sworn affidavit admitting that the NEA sends money from its general fund to the NEA Advocacy Fund, a political action committee, which in turn paid for the production and distribution of the letter sent to Ms. Trometter’s husband. (R. 63a-64a). There can be no question that the letter urging individuals to vote for Tom Wolf for Governor was “in support of a candidate for political office.” (R. 3a).

The PSEA also admitted to using “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. It admitted, specifically, to using “general treasury funds to pay the expenses for production and mailing of PSEA Voice,” its bi-monthly magazine. (R. 61a). It also agreed with Ms. Trometter that the November 2014 issue of the PSEA Voice “contains a number of articles urging members to vote in the then-upcoming elections and, specifically, to vote for Tom Wolf for governor.” (R. 62a).

Given the breadth and clarity of section 1701—and the admissions to the alleged conduct—the PLRB had no choice but to find that there was a violation of section 1701 and to impose concomitant enforcement measures. The PLRB’s Order identifies no factual issues preventing such a determination and makes no factual findings to support its conclusion that the Attorney General’s Office would be “better suited” to address Ms. Trometter’s Charge. App’x A, at p. 2. The questions that remain are questions of law³ that could have been resolved by the PLRB.⁴

3. For example, the NEA and the PSEA contended below that the activities in question were not “contributions” under section 1701, a question of law that could have been resolved based on the undisputed facts. (R. 55a). The NEA Advocacy Fund’s filing with the Federal Election Commission labels the receipt of funds from the NEA a “contribution.” (R. 6a, 9a). And the Pennsylvania Election Code would appear to do the same. See 25 P.S. § 3241(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.”). As for the PSEA’s provision of substantial promotional space—the sort of which Wolf’s campaign would have otherwise paid to receive—section 1701 captures “direct or indirect” contributions to a candidate.

4. Even if an investigation were necessary to confirm the undisputed facts in this case, PERA provides the PLRB investigatory powers “for the purpose of investigating and considering disputes, other than a question concerning the representation of employes.” 43 P.S. § 1101.1601. Those investigatory powers include the power to issue subpoenas, compel production of evidence, examine witnesses, and receive evidence. 43 P.S. § 1101.1602. There was no need to send this matter to the Attorney General’s Office.

In fact, the PLRB's determination that it was precluded from enforcing section 1701 is contrary to the statutory mandate that it "shall exercise those powers and perform those duties which are specifically provided for in [PERA]." 43 P.S. § 1101.501. Section 1701 appears within PERA, just below the comprehensive description of the PLRB's investigatory powers. 43 P.S. § 1101.1701. In requiring the PLRB to "establish such rules and regulations as it may find necessary to prevent the circumvention or evasion of the provisions of this section," the General Assembly clearly put the PLRB in the position of applying and enforcing its language. Id.

Conversely, in refusing to enforce section 1701, the PLRB ignores one of the General Assembly's "procedures 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. Many of the procedures within PERA are put in place to protect unions and public employers, but few actually operate to protect the employee and the general public from the abuses of unions. Section 1701 appears to aim specifically at ensuring against corruption within public-sector unions and preventing candidate influence over union priorities. Without such controls, public-sector unions would be beholden to political candidates, many of which are elected to positions within public employers. This problem is particularly vexing for individual employees in

Pennsylvania—where union membership is presumed and public employees must “opt out” in order to avoid payment of union dues—as they have a right to ensure that their union dues are used properly.

Ultimately, the PLRB is attempting to shirk its responsibility to enforce section 1701. Ms. Trometter’s Charge stated a violation of section 1701, and the NEA and the PSEA only verified the truth of the facts she alleged. The PLRB’s Order should have applied section 1701 to the undisputed facts and determined that the NEA and PSEA violated the prohibition on using union funds to directly or indirectly support Tom Wolf for Governor. It then should have instituted an enforcement action to carry out the General Assembly’s goal of protecting public employees and the general public from the NEA’s and PSEA’s misuse of membership dues.

In sum, this Court should reverse the PLRB’s Order and remand to the PLRB for enforcement of the law over which it has been assigned responsibility.

II. SECTION 95.112 OF THE PLRB’S RULES AND REGULATIONS IS INVALID AND INCONSISTENT WITH PERA

Relatedly, the PLRB’s Rule, which it relied on in referring Ms. Trometter’s Charge to the Attorney General, is inconsistent with section 1701. As a result, this Court should find that the Rule is invalid and reverse the PLRB’s determination.

The PLRB’s Rule guiding their handling of reports of illegal contributions—title 34, section 95.112(c) of the Pennsylvania Code—provides:⁵

Upon receipt of the report, if it appears to the Board that an investigation in respect to the charge should be instituted, the Board shall refer the report to the Attorney General of the Commonwealth for proceedings under applicable statutes.

Strangely, in interpreting section 95.112(c), the PLRB has determined that the Rule actually prevents it from determining whether a violation occurred at all. See In re Pittsburgh Federation of Teachers (No. PERA-C-7716-W), 7 PPER ¶ 07158, 1976 WL 389540 (Pa. Pub. Emp. Reporter May 27, 1976) (“Board’s function pursuant to 34 Pa. Code. Ch. 95.102 [sic] is to establish rules and regulations for procedure and refer matter to Attorney General of Commonwealth of Pennsylvania for proceedings under applicable statutes, not to judge whether charge is violation under Act.”).

Before describing several deficiencies obvious from the text and operation of the PLRB’s Rule in this case, it is worth noting how far afield the PLRB’s interpretation of its own Rule strayed from the actual text of section 1701. Again, the General Assembly placed the PLRB in position to enforce section 1701, 43 P.S.

5. Neighboring subsections (a) and (b) contain requirements for the preparation and filing of a charge of illegal contributions, requirements with which Ms. Trometter indisputably complied.

§ 1101.501, determined that “[n]o 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,” and specifically required that the PLRB “shall establish such rules and regulations as it may find necessary to prevent the circumvention or evasion of the provisions of [section 1701],” 43 P.S. § 1101.1701. Yet in a span of just a few years, the PLRB was already under the impression that its own role in preventing illegal contributions was little more than a delivery service, simply collecting and shuttling complaints to someone else.

The PLRB’s Rule suffers from at least three deficiencies, any of which render the rule invalid. First—and most fundamentally—the PLRB’s Rule attempts to unlawfully shift responsibility for enforcement of section 1701 elsewhere, contrary to the express intent of the General Assembly. See 36 Standard Pennsylvania Practice 2d § 166:16 (“An agency has no discretion as to the recognition of or obedience to a statute or as to the performance of a statutorily mandated function or act.”). PERA requires that the PLRB “shall exercise those powers and perform those duties which are specifically provided for in this act,” 43 P.S. § 1101.501, then, in section 1701, requires that the PLRB establish rules and regulations “to prevent the circumvention or evasion of the provisions of this section,” 43 P.S. §

1101.1701. But in “referring” Ms. Trometter’s Charge to the Attorney General without even passing judgment on whether the undisputed facts establish a violation, the PLRB leans entirely on the Attorney General’s Office to do the work with which it is charged.⁶

Second, the PLRB’s Rule fails in language and operation to actually “prevent the circumvention or evasion” of the prohibition on union support of political candidates. 43 P.S. § 1101.1701. The text of the Rule is devoid of any reference to the PLRB’s mandate and is far too cursory to seriously indicate a good-faith intent to fulfill it. But perhaps the proof is in the results: in the 45 years since section 1701 was enacted, there are no published decisions to indicate a single instance of enforcement. In fact, in Ms. Trometter’s experience, the PLRB actively discouraged any enforcement of section 1701; it took the PLRB over seven months from the date of filing to simply “refer” her Charge to the Attorney General, and only then urged the Attorney General to apply “prosecutorial discretion.” App’x A, at p. 2. If the PLRB takes its mandate seriously, it is difficult to tell from the PLRB’s Order.

6. Again, even if an investigation were necessary to confirm the undisputed facts in this case, PERA provides the PLRB investigatory powers “for the purpose of investigating and considering disputes, other than a question concerning the representation of employes.” 43 P.S. § 1101.1601. Those investigatory powers include the power to issue subpoenas, compel production of evidence, examine witnesses, and receive evidence. 43 P.S. § 1101.1602. There was no need to send this matter to the Attorney General’s Office.

Finally, the PLRB's Rule allows for standardless, arbitrary agency action. It provides that charges of illegal contributions will be referred to the Attorney General "if it appears to the Board that an investigation in respect to the charge should be instituted" yet contains no guidance as to how the PLRB is to decide that an investigation "should be instituted" in a particular case or, as discussed further infra, at III, what to do if investigation is unnecessary to determine whether the subject of the charge has violated section 1701. 34 Pa. Code § 95.112(c). Yet, to be valid, "[a] substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" Northwestern Youth Servs., Inc. v. Commonwealth, Dep't of Public Welfare, 66 A.3d 301, 316 (Pa. 2013) (quoting Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997)).

Ultimately, given the language and intent behind section 1701, the PLRB's Rule cannot stand. The PLRB's reliance on it was error, and the PLRB's Order should be reversed.

III. THE PLRB ERRED IN APPLYING SECTION 95.112 BECAUSE NO INVESTIGATION WAS NECESSARY TO DETERMINE THAT THE NEA AND PSEA VIOLATED SECTION 1701

In the event that this Court finds the PLRB's Rule to be valid as a general matter, this Court should nevertheless reverse the PLRB's Order on the ground that it improperly applied the Rule in this instance. Instead, the PLRB should have determined that the NEA and PSEA violated section 1701 based on the undisputed facts.

Whatever the standard of review, an agency's failure to follow its own rules constitutes reversible error. See Peoples Natural Gas Co. v. Pennsylvania Public Utility Comm'n, 542 A.2d 606, 608 (Pa. Cmwlt. 1988) ("An administrative agency also abuses its discretion when it fails to follow its own regulations and procedures."); see also Boswell Pharmacy Servs., LLC v. Dep't of Corrs., No. 1532 C.D. 2008, 2009 WL 9097148, at *3 n.6 (Pa. Cmwlt. Apr. 30, 2009) ("An error of law occurs where an agency fails to interpret its own statutes, regulations or orders consistent with their clear and plain meaning or fails to follow its own regulations and procedures."). "It is axiomatic that an agency must adhere to its own regulations." Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536 (D.C. Cir. 1986) (emphasis added).

Again, the PLRB's Rule reads:

Upon receipt of the report, if it appears to the Board that an investigation in respect to the charge should be instituted, the Board shall refer the report to the Attorney General of the Commonwealth for proceedings under applicable statutes.

Black's Law Dictionary (10th ed. 2014) defines "investigation" as

[t]he activity of trying to find out the truth about something, such as a crime, accident, or historical issue; esp., either an authoritative inquiry into certain facts, as by a legislative committee, or a systematic examination of some intellectual problem or empirical question, as by mathematical treatment or use of the scientific method.

Any administrative investigation must be warranted by an "authentic factual basis."

2 Am. Jur. 2d Administrative Law § 104.

On the other hand, an investigation is not always necessary; an agency may reach conclusions of law based on undisputed facts, and its decision based on undisputed facts is fully reviewable. Horsley v. Philadelphia Bd. of Pensions and Ret., 546 A.2d 1115, 1119 (Pa. 1988); see, e.g., Clark v. Natali Ins. Agency, LLC v. Pennsylvania Ins. Dep't, No. 1775 C.D. 2007, 2008 WL 9399069, at *3 (Pa. Cmwlth. Apr. 10, 2008).

Here, after the parties submitted evidence and argument before the PLRB, it was clear that the dispute was not factual, but legal, in nature.⁷ Specifically, the

7. The PLRB appeared to share the parties' view that the only outstanding questions were purely legal in nature. In referring Ms. Trometter's Charge to the

NEA and PSEA admitted to funding certain activities using membership dues and agreed that those activities supported political candidates for public office. The NEA and PSEA objected only to enforcement of the law in this instance, raising three questions of law: (1) Whether the unions' methods of funding constituted "contributions" for purposes of section 1701; (2) Whether other provisions of state law nevertheless protected the activities in question; and (3) Whether Citizens United v. FEC, 558 U.S. 310 (2010), and United States v. CIO, 335 U.S. 106 (1948), rendered section 1701 unconstitutional in part.

In that context, there was no authentic basis to conduct an "investigation" on the facts to determine that the NEA and PSEA violated section 1701.⁸ The truth of the matters alleged were already firmly established upon the NEA's and PSEA's own admission after a full opportunity to address the allegations. The PLRB's Order failed to determine that an investigation "should be instituted" in the first place or to make findings to support such a conclusion.

Attorney General's Office, the PLRB merely reasoned that "the Office of Attorney General can make the constitutional and statutory determinations for which it is better suited than the [PLRB]." App'x A, at p. 2.

8. As discussed infra, at n.5, were an "investigation" necessary, PERA provides the PLRB with investigatory powers "for the purpose of investigating and considering disputes, other than a question concerning the representation of employees." 43 P.S. § 1101.1601. Those investigatory powers include the power to issue subpoenas, compel production of evidence, examine witnesses, and receive evidence. 43 P.S. § 1101.1602.

In sum, the PLRB failed to follow even its own flawed Rule. As a result, if this Court upholds the PLRB's Rule as valid, it should nevertheless reverse the PLRB's Order in this instance.

CONCLUSION

For the reasons articulated above, this Court should hold that the PLRB erred, conclude that the PLRB was presented with evidence sufficient to determine that the NEA and PSEA violated section 1701, hold that the PLRB's Rule is invalid, and remand for further proceedings.

Respectfully submitted,

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January 4, 2016

APPENDIX A



COMMONWEALTH OF PENNSYLVANIA

July 21, 2015

Mary Trometter
C/O David R. Osborne, General Counsel
225 State Street, Suite 303
Harrisburg, PA 17101

Pennsylvania State Education Association
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National Education Association
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Washington, DC 20005

PENNSYLVANIA STATE EDUCATION ASSOCIATION AND
NATIONAL EDUCATION ASSOCIATION
Case No. PERA-M-14-366-E

Enclosed is a copy of the Order issued by the Board in the above-captioned matter. A copy of this Order is being forwarded to the Pennsylvania Office of Attorney General, along with a copy of the original filing in this case.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry D. Cheskawich".

Larry D. Cheskawich
Board Secretary

cl

Enclosures

cc: PA Office of Attorney General

Pennsylvania Labor Relations Board
651 Boas Street, Room 418 | Harrisburg, PA 17121-0750 | 717.787.1091 | F 717.783.2974 | www.dli.state.pa.us

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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 :

ORDER REFERRING REPORT TO ATTORNEY GENERAL PURSUANT TO 34 PA. CODE §95.112

On November 18, 2014, Mary Trometter (Complainant) filed a report with the Pennsylvania Labor Relations Board (Board), as permitted by Section 95.112 of the Board's Rules and Regulations, 34 Pa. Code §95.112,¹ alleging that the Pennsylvania State Education Association (PSEA) and the National Education Association (NEA) made contributions to then-candidate Tom Wolf's 2014 campaign for governor in violation of Section 1701 of the Public Employee Relations Act (PERA). Section 1701 provides in part 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.

43 P.S. §1101.1701. On December 19, 2014, PSEA and NEA filed an Answer denying the Complainant's allegations that they violated Section 1701. Thereafter, on January 14, 2015, the Complainant filed a response to the Answer of PSEA and NEA, and on January 21, 2015, PSEA and NEA filed a reply to the response of the Complainant.

In her report filed with the Board, the Complainant alleges that she is a dues-paying member of PSEA and NEA, and that union members' dues were used to fund (1) an October 31, 2014 letter from PSEA and NEA urging family members of educators to vote for Tom Wolf for governor, and (2) the November 2014 Edition of the PSEA Voice magazine, which also expressed support for the Wolf campaign. The Complainant alleges that such purported use of union dues constitutes a direct or indirect contribution in support of a political candidate in violation of Section 1701 of PERA. The Complainant asserts that under PERA, the Board is charged with enforcement of Section 1701 and

¹Section 95.112 of the Board's Rules and Regulations states that "[a]n individual who has knowledge of a political contribution or other activity by an employe organization thought to be in violation of section 1701 of the act . . . may file a report with the Board . . . Upon receipt of such report, if it appears to the Board that an investigation in respect to the charge should be instituted, the Board shall refer the report to the Attorney General of the Commonwealth for proceedings under applicable statutes. 34 Pa. Code §95.112(a) and (c).

requests that the Board impose the statutory penalties for violations of Section 1701, including fines, imprisonment or both.

In response to the Complainant's allegations, PSEA and NEA argue that the term "contribution" is undefined in PERA and should be accorded its common and approved usage, which is a gift of money or some other thing of value to another person or entity for a specified purpose. PSEA and NEA assert that they did not contribute money or any other thing of value to the Wolf campaign, and did not violate Section 1701 of PERA by issuing the aforementioned communications to union members and their families. PSEA and NEA further argue that the Complainant's construction of Section 1701 should be rejected to avoid conflict with the Pennsylvania Election Code, which indicates that no provision of the laws of the Commonwealth shall be deemed to prohibit direct private communications between a labor organization and its members and their families, 25 P.S. §3253(c), and so as not to raise serious concerns about Section 1701's constitutionality under the First Amendment to the United States Constitution, citing, *inter alia*, the United States Supreme Court's decision in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). Indeed, as noted by PSEA and NEA, constitutional concerns were raised by the Supreme Court in holding in United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948) that a federal statute prohibiting labor organizations from making contributions or expenditures in connection with elections did not bar use of union funds to publish a weekly periodical expressing views on candidates or political proposals.

The Complainant misconstrues the Board's role in the application of Section 1701 of PERA by requesting that the Board impose the statutory penalties of fines, imprisonment or both. See Borough of Ambridge v. Local Union 1051, AFSCME, 17 PPER ¶17075 (Final Order, 1986) (Board has authority to remedy only those acts that constitute a violation of Article XII of PERA). In PLRB v. Pittsburgh Federation of Teachers, Local 400, AFT, AFL-CIO, 7 PPER 198, the Board held that its function under Section 1701 is not to decide whether there has been a violation of that provision, which is not one of the specified unfair practices set forth in Article XII of PERA. Rather, the Board held that its role with regard to Section 1701 is to establish rules and regulations concerning disposition of reports of alleged violations. Section 95.112 of the Board's Rules and Regulations provides for referral of reports of alleged illegal political contributions under Section 1701 of PERA to the Attorney General of the Commonwealth of Pennsylvania for investigation and application of prosecutorial discretion. In doing so, the Office of Attorney General can make the constitutional and statutory determinations for which it is better suited than the Board.² Thus, in accordance with its Rules and Regulations, the Board shall refer the Complainant's report to the Attorney General without consideration of the underlying merits of the report.

²As an administrative agency, the Board must presume the constitutionality of legislative enactments unless and until the statute is found to be unconstitutional by a court. Haverford Township Education Association v. Haverford Township School District, 16 PPER ¶16115 (Final Order, 1985), aff'd, 16 PPER ¶16205 (Court of Common Pleas of Delaware County, 1985).

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that this matter is referred to the Attorney General of the Commonwealth of Pennsylvania for proceedings under applicable statutes.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this twenty-first day of July, 2015. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Initial Brief, has
on this date been served on the following:

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January 4, 2016



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