AIN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JERSEY SHORE AREA SCHOOL DISTRICT, Plaintiff,	: :	CV- 15-2774
vs.	: :	CIVIL ACTION-EQUITY
FRANK GIRARDI, JR., and JERSEY SHORE AREA EDUCATION ASSOCIATION, Defendants.	: : :	INJUNCTION

O P I N I O N AND O R D E R

This matter comes before the court on the Jersey Shore Area School District (District)'s motion for preliminary injunction pursuant to Pa. R.C.P. No. 1531.[1] Upon careful review and consideration of the briefs, arguments and stipulated facts, it is hereby ORDERED and DIRECTED that the District's motion for preliminary injunction is DENIED. This Court concludes that it lacks jurisdiction to determine whether or not a tenured public school teacher waived his right to grieve and arbitrate his termination from employment under the circumstances of this case.

I. Factual and Procedural Background

A summary of the facts as stated in the parties' briefs follows.[2] On November 19, 2015 the Jersey Shore Area School District ("District") filed a complaint and a petition for a preliminary injunction to enjoin Mr. Frank Girardi, Jr. and the Jersey Shore Are Education Association (Association) from grieving Girardi's termination and submitting it to arbitration pursuant to the grievance or disciplinary procedure of the applicable collective bargaining agreement. The District contends that the parties executed a last chance agreement on January 16, 2015 waiving those procedures.

[1] A hearing on the motion for preliminary injunction was held December 3, 2015. The parties submitted briefs on December 2 and supplemental briefs on December 11, 2015.
[2] Dr. Dorothy Chappel, the Superintendent for the District, testified that the factual averments of the complaint are true and correct. Defendants did not contest the facts set forth in the complaint for purposes of this determination.

Mr. Girardi is a tenured professional employee of the District. The District has employed Girardi as a teacher since 1993, most recently as a 5th grade teacher at Salladasburg Elementary School. Mr. Girardi is a member of the Association and represented by them through collective bargaining with the District. The Pennsylvania Labor Relations Board (PLRB) designated the Association as the exclusive bargaining agent for wages, hours, and terms and conditions of employment for full-time teachers and professional employees of the District. The Association and the District entered a collective bargaining agreement ("CBA") for the period from July 1, 2011 through June 30, 2015, which is the applicable CBA related to the instant lawsuit and is attached as exhibit "A" to the Complaint.

In May of 2014, the District initiated termination proceedings against Girardi, citing poor performance and violations of Section 1122 of the School Code. Girardi filed a grievance and requested arbitration under the CBA. An arbitration hearing was scheduled in January 2015. On January 16, 2015, the parties resolved the dispute by entering into a Last Chance Agreement (LCA). The LCA provided the following.

> (f) Girardi agrees that any other conduct in the future that violates the provisions of Section 1122 of the School Code will be grounds for immediate termination, without recourse under the grievance or disciplinary procedure of the collective bargaining agreement. LCA ¶ 5(f).

The LCA further provided that "[a]ny recourse not specifically preserved by this Agreement is waived." LCA ¶10. The LCA does not expressly state who determines the threshold question as to whether any other conduct in the future by Girardi violates the provisions of Section 1122 of the School Code.

Pursuant to the LCA, Girardi resumed teaching for the 2015-2016 school year. On October 26, 2015, the District issued a notice of pre-termination hearing to Girardi, placing Girardi on administrative leave with pay commencing October 23, 2015. The District cited

conduct that violated provisions of Section 1122 of the School Code and cited incidents allegedly occurring on August 28, September 1, 9, 10, 14, 15, 28, 29, 30, October 9, 13, 15, 16, 20, 21, 22, 23, and 26 of 2015 and additional matters of concern. On October 30, 2015, the District issued a notice of Pre-termination Hearing – Addendum, providing additional documentation that had been discussed at the pre-termination hearing held on October 29, 2015.[3] The additional documentation included additional incidents dated October 27, 28, and 29, 2015. The District, Girardi and the Association attended the hearing.

On November 2, 2015, the District issued a statement of charges and notice of hearing pursuant to 24 P.S. § 11-1122. Girardi and the Association demanded that the termination be submitted to arbitration and attempted to file a grievance with the District. The District contends that Girardi and the Association waived the right to arbitration and to grieve the termination by the clear terms of the LCA. Girardi and the Association contend that the Court of Common Pleas has no jurisdiction or power to determine whether or not this matter is subject to arbitration or to enjoin the arbitration.

II. **Discussion**

The Court concludes that this Court lacks jurisdiction to determine a dispute as to whether this matter is subject to arbitration and therefore lacks jurisdiction to enjoin Girardi from seeking to grieve or arbitrate the termination of his employment unless and until an arbitrator or the Pennsylvania Labor Relations Board (PLRB) determines that the matter is not subject to arbitration.

The Pennsylvania Public Employe Relations Act (PERA), Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §1101.903 ("Section 903 of PERA") mandates "[a]rbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining

---

[3] This is a hearing in accordance with Cleveland Board of Education v. Laudermill, 470 U.S. 532 (1985).

agreement." "[T]he arbitrator has sole and exclusive jurisdiction to hear disputes related to collective bargaining agreements, including disputes of whether a matter is arbitrable." Chester Upland School District v. McLaughlin, 544 Pa. 199, 675 A.2d 1211, 629 (Pa. 1996), *aff'd without opinion*, 544 Pa. 199, 675 A.2d 1211 (Pa. 1996)(overruling cases to the contrary). The Pennsylvania Supreme Court has "consistently held that 'the question of the *scope* of the grievance arbitration procedure is for the arbitrator, at least in the first instance.'" Davis v. Chester Upland Sch. Dist., 567 Pa. 157, 161 (Pa. 2001)(emphasis in original)(quotation citations omitted). "[A]ll questions of whether a matter is arbitrable must be decided in the first instance by an arbitrator, not a trial court." Davis, supra, *citing* 43 P.S. §1101.903, supra, and Chester Upland School District v. McLaughlin, supra, *see also*, Abington Heights School District v. PLRB, 709 A.2d 993 (Pa.Cmwlth. 1998); Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 391 A.2d 1318 (Pa. 1978) and Montgomery Area School District v. Montgomery Area Education Association, No. 14-00185 (Lyco. Co. April 7, 2014)(J. Anderson).

When an employee is covered by a collective bargaining agreement, arbitration is mandatory under section 903 of PERA unless the employer can establish an express waiver of the right to arbitration under the circumstances. Mun. Emples. Org. of Penn Hills v. Municipality of Penn Hills, 876 A.2d 494, 499 (Pa. Cmwlth. 2005), *appeal denied*, 586 Pa. 731, 890 A.2d 1062 (Pa. 2005) ("Penn Hills").[4] There is a presumption in favor of arbitration. Id. It must be established by strong and forceful evidence that an agreement expressly excludes the dispute from arbitration. Id. In Penn Hills, the PLRB concluded that "under the express language of" the last chance agreement, the union and employee "had clearly and unequivocally waived" the right to challenge the dismissal. The Commonwealth Court held that the PLRB did not err in

[4] Thus, Penn Hills debunks the District's argument that a last chance agreement removes the applicability of the mandatory arbitration under Section 903 of PERA because the Court is interpreting the LCA instead of the CBA.

exercising its jurisdiction to determine whether unfair practices had occurred. Penn Hills, 876 A.2d at 499. It further held that the PLRB did not err in concluded that - based upon the language of the last clear chance agreement - the employer's actions did not constitute an unfair practice. Id.

Significantly, the Commonwealth Court noted that the last chance agreement clearly spelled out that threshold question of whether a violation occurred was at the sole discretion of the employer and that such determination by the employer could not be challenged by filing a grievance.[5] The Court contrasted the matter with United Steelworkers of America, AFL-CIO-CLC v. Lukens Steel Company, Division of Lukens, Inc., ("Lukens") 969 F.2d 1468 (3rd Cir. 1992) where the Third Circuit declined to infer who was to determine whether a violation occurred. Lukens, 969 F.2d at 1478.

In addition to the protections provided under PERA, the Public School Code provides the right of a professional employee to elect whether to file a grievance under the collective bargaining agreement ***or*** request a hearing, but not both. 24 P.S. § 11-1133 (emphasis added). The School Code requires all collective bargaining agreements to be subject to the provisions of the School Code and to provide that none of the provisions of the School Code "may be waived either orally or in writing[.]" 24 P.S. § 11-1121.

In the present case, there is a legitimate dispute as to whether this matter is subject to arbitration which must initially be determined by an arbitrator. See, Chester Upland School District v. McLaughlin, supra. There is a dispute as to whether the purported waiver is void as a violation of the Public School Code. Therefore the Defendants have raised a legitimate issue as

---

[5]The Commonwealth Court noted that the "*determination* of what is 'chronic or excessive' shall be at the *sole discretion* of the employer." (emphasis by the Commonwealth Court) Penn Hills, 876 A.2d. at 499. And the Court noted that the parties "expressly waived their right to challenge to arbitrate the penalty imposed as well as the threshold question." Penn Hills, 876 A.2d. at 500.

to whether this matter is subject to arbitration. Questions as to whether a matter is subject to arbitration must be decided in the first instance by an arbitrator. Davis, supra.

To the extent Plaintiffs rely on Penn Hills for the proposition that the trial court has jurisdiction to determine whether this matter is subject to arbitration, this Court disagrees. First, Penn Hills did not hold that the trial court had jurisdiction to determine whether a matter is subject to arbitration or to enjoin the arbitration process. Instead, the trial court was reversed for vacating the PLRB's finding and directing the parties to proceed to arbitration.[6] The Commonwealth Court reversed and held that the PLRB correctly exercised its jurisdiction when it determined that no unfair labor practice occurred. In the present case, the matter comes before the court on a request for injunctive relief to enjoin arbitration where neither the PLRB nor an arbitrator has ruled on the matter.Second, this instant dispute implicates a question as to whether the purported waiver is void as violating the Public School Code. While Penn Hills involved the question of waiving the statutory mandate for arbitration under section 903 of PERA, it did not involve the purportedly non-waivable statutory job security protections afforded by the Public School Code to elect to grieve and arbitrate the dispute.

Lastly, the last chance agreement in Penn Hills is significantly distinguishable from the LCA in the present case. The LCA in the present case does not state who should determine the threshold issue of whether conduct in violation of Section 1122 of the School Code occurred. That distinction presents an additional issue as to whether the matter is subject to arbitration, which must be determined in the first instance by an arbitrator. *See*, Davis, supra. Absent a case on all fours with the present one, this Court concludes it lacks jurisdiction to provide the relief requested.

---

[6] The trial court referenced the requirement that an arbitrator must decide in the first instance whether a matter is subject to arbitration when reversing the PLRB's finding that an unfair labor practice occurred absent an initial determination by an arbitrator as to whether the matter was subject to arbitration.

Since the Court has concluded that it lacks jurisdiction to determine whether this matter is subject to arbitration, the Court need not reach the question of whether the Plaintiff has met the six essential prerequisites to injunctive relief outlined in Warehime v. Warehime, 860 A.2d 41, 46 (Pa. 2004).[7] Assuming the Court had jurisdiction, the Plaintiff failed to establish it lacked an adequate remedy at law such as money damages. See, e.g., Masure v. Massa, 692 A.2d 1119, 1122 (Pa. Super. 1997). In the present case, Girardi was placed on administrative leave with pay commencing October 23, 2015. If an arbitrator determines that this matter is not subject to arbitration, absent a showing to the contrary, the loss of the benefit of the bargain of the LCA should be compensable by money damages for breach of contract.

Accordingly, the Court enters the following Order.

O R D E R

AND NOW, this 3rd day of **February, 2016**, pursuant to this Opinion, it is hereby ORDERED and DIRECTED that Plaintiff's Petition for a Preliminary Injunction is DENIED.

BY THE COURT,

February 3, 2016
Date

____
Richard A. Gray, J.

cc: J. David Smith, Esq, & Austin White, Esq. for Plaintiff
William A. Hebe, Esq. for Defendants
SPENCER, GLEASON, HEBE & RAGUE, P.C.,
17 Central Avenue, Wellsboro, PA 16901

[7] The requesting party must establish:

> (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail in the merits; (5) the injunction is reasonably situated to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted. *Brayman Constr. Corp.*, 13 A.3d at 935. *See also Warehime,* 860 A.2d at 46-47; *Summit Towne Centre, Inc..*, 828 A.2d at 1002.