COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CRESTWOOD SCHOOL DISTRICT	:	
	:	
v.	:	Case No. PERA-C-99-436-E
	:	
CRESTWOOD EDUCATION ASSOCIATION	:	

FINAL ORDER

On October 3, 2000, the Crestwood School District (District) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions and a supporting brief to a Proposed Decision and Order (PDO) issued September 13, 2000. In the PDO, the Hearing Examiner dismissed the District's Charge of Unfair Practices (Charge) which alleged that the Crestwood Education Association (Association) violated Section 1201(b)(1), (3), (5) and (9) of the Public Employe Relations Act (PERA) by refusing to bargain collectively in good faith regarding a trust agreement to enable the District to provide employe health benefits at a reduced cost during the term of an existing collective bargaining agreement. The Hearing Examiner concluded that the District had no standing to charge the Association with violating Section 1201(b)(1), citing PLRB v. McEntee, AFSCME, Council 13, 13 PPER ¶ 13134 (Proposed Decision and Order, 1982), adopted, 13 PPER ¶ 13148 (Memorandum Opinion, 1982); that the District did not state a cause of action under Section 1201(b)(9), citing State System of Higher Educ. v. APSCUF, 20 PPER ¶ 20125 (Final Order, 1989); and that the District's 1201(b)(3) charge failed on the merits.

The District did not except to the Hearing Examiner's dismissal of the allegations of the Section 1201(b)(1) and (9) violations of PERA, and those determinations of the Hearing Examiner are not before the Board. The District's exceptions concern the dismissal of its Section 1201(b)(3) allegation and are summarized as follows: the Hearing Examiner erred by: (1) concluding in finding of fact 7 that the Association President appointed David Minnier to attend the meetings of a consortium of public school entities and labor organizations within Luzerne County Intermediate Unit 18 (Consortium) to find out how it would be structured and how it would work, rather than finding that Minnier was the Chief Negotiator appointed at the request of the Pennsylvania State Education Association (PSEA) and that Minnier was a voting member of the Consortium; (2) concluding in finding of fact 22 that Minnier abstained from voting for the August 17, 1999 Agreement and Declaration of Trust (Trust), rather than relying on the testimony of School Board member Joseph Krivak and School Board President Edmund Sieminski and finding that Minnier voted for the Trust; (3) not allowing telephonic testimony of Dr. Sandra Vidlicka, recording secretary of the Consortium meetings; (4) finding that the Association was not obligated to collectively bargain or to sign the Trust; (5) not concluding that the Association waived the zipper clause in its collective bargaining agreement (CBA), entered into negotiations and voted for the Trust. The District seeks the reversal of the PDO, or in the alternative, a remand for the purpose of eliciting the testimony of Vidlicka.

This case arises out of the District's desire to form a consortium of the public school entities within the Luzerne County Intermediate Unit 18 to create a trust and to negotiate with Blue Cross/Blue Shield for the same or better health benefits at a lower cost than their employes currently enjoyed in the parties' CBA. The parties' eight-year CBA expires August 31, 2002 and the terms of its health benefits are set forth in the PDO, F.F. 3. In January 1999, the Consortium began holding meetings which representatives from the public school entities and labor organizations attended. Sieminski attended the Consortium meetings on behalf of the District and after appointment by the Association President, Minnier attended and participated in the meetings. Sieminski considered the meetings to be collective bargaining sessions, while Minnier considered them to be informational in nature. Pennsylvania State Education Association (PSEA) employe Walter Glogowski also attended many of the meetings that he too, considered to be informational in nature. After approximately five months of meetings, the Executive Council of the Association passed a motion to refrain from endorsing the Consortium. On June 14, 1999, the Association President sent a memorandum to the then President of the District's Board of Directors communicating the Association's decision and explaining that a majority of the Association's members were not in favor of the Consortium and that they desired to wait "until something more concrete is put forth showing us the structure and what the consortium will offer." (PDO, F.F. 14)

On July 1, 1999 the District began providing prescription benefits through an insurer other than Blue Cross/Blue Shield and on July 9, 1999 the Association filed a grievance alleging a violation of the major medical provisions of the CBA. The grievance was denied on July 22, 1999. Minnier was thereafter presented with the Trust for him to sign, the relevant portions of the text of the Trust are set forth in the PDO at F.F. 19-21. The Trust provides that the public school entities and labor organizations reached agreement and created the Trust through "the process of collective bargaining" and that the Trust does not authorize or permit any public school entity to violate its CBA or to unilaterally modify any aspect of the health benefits. Minnier did not sign the Trust, nor did he communicate to the District that the Association objected to any of its terms.

On August 17, 1999 the Consortium held a voice vote to approve the agreement and all of the votes cast were in favor of the approval. The Hearing Examiner found that Minnier abstained from voting, but that no abstentions were solicited by the secretary, Vidlicka. In September 1999, the Association President, Larry Westawski told Sieminski that the Association had no interest in the Trust's health plan and that the Association couldn't "open up the contract" in view of the zipper clause:

> The parties agree that all negotiable items have been discussed during the negotiations leading to this Agreement and that no additional negotiations on this agreement will be conducted on any item, whether contained herein or not, during the life of this Agreement.

(PDO, F.F. 21.) On October 18, 1999 Westawski informed the District's solicitor that the Association would be willing to vote on the Trust if the District would be willing to negotiate an extension of the CBA. The District then passed a resolution to amend the provisions of the CBA concerning health benefits and the Association rejected the Amendments. By letter dated November 3, 1999 the Association offered to settle two outstanding grievances relating to medical and dental benefits by agreeing to consider the Trust in exchange for a three-year extension of the CBA, an annual wage increase of 4% and medical benefits for the spouses of retiring employes. The District rejected the settlement and filed this Charge.

The Board rejects the District's first two exceptions to the Hearing Examiner's findings of fact. First, there is substantial evidence, as required by the Supreme Court in PLRB v. Kaufmann Dep't Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942), to support finding of fact 7, that Minnier was appointed to attend the Consortium meetings to find out how it would be structured and how it would work. Minnier testified that he was asked to "attend these meetings to hear about the possibility of forming a consortium" (N.T. I, at 118) and to "learn as much as I could about how his consortium would function . . . [a]nd to report back to . . . the executive council." (N.T. I, at 120.) The District's suggestion that the finding is in error because it does not reveal that Minnier had served as the District's "Chief Negotiator" is neither determinative nor relevant. That PSEA may have requested that the Association send its chief negotiator to the meetings is likewise irrelevant, especially in light of the fact that PSEA's Glogowski (also a "chief negotiator") testified that he believed the meetings were informational in nature, rather than collective bargaining sessions. (PDO, F.F. 5 and 11.) The fact that Minnier had acted as chief negotiator in past negotiations does not contradict finding of fact 7, nor does it preclude the Association from appointing him to attend meetings for informational purposes. Second, finding of fact 22, that all of the votes cast at the August 17, 1999 meeting were in favor of the Trust; that the secretary did not ask for abstentions; and that Minnier abstained from voting is fully supported by substantial evidence of record. Minnier testified that he abstained from voting. (N.T. I, at 127.) The District asserts that Hearing Examiner should have relied on the testimony of Krivak and Sieminski that Minnier did in fact vote for the trust, rather than on "Minnier's self-serving testimony that he abstained." (Dist., Br. at 5.) The Hearing Examiner found Minnier's testimony to be credible and the Board will not disturb the Hearing Examiner's credibility determinations absent compelling circumstances, and the Board's review of this record indicates no such compelling circumstances. AFSCME v. Commonwealth, 12 PPER ¶ 12246 (Final Order, 1981); AFSCME, Dist. Council 85 v. Commonwealth, 18 PPER ¶ 18029 (Final Order, 1986). Further, the Board gives deference to the Hearing Examiner's decision to credit all, some, or none of the testimony by a particular witness Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1996), because it is the hearing examiner that is able to observe the manner and demeanor of the witnesses at the hearing. York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). The mere fact that the hearing examiner chose to credit the Association's witness on this point, rather than the District's witnesses (who likely provided "self-serving" testimony as well) is not error. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 27 PPER ¶ 27159 (Final

Order, 1996). Thus, these exceptions are dismissed and the District cites no authority to support a different result.

The District next excepts to the Hearing Examiner's refusal to permit the telephonic testimony of Vidlicka over the Association's objection. The Board's Rules and Regulations do not contain provisions for telephonic testimony and the District cites no authority for allowing such testimony. A review of the record reveals that a subpoena was obtained and served on Vidlicka to secure her testimony for April 10, 2000, the first date of hearing and that a second subpoena was faxed to her to secure her testimony for April 27, 2000 the second date of hearing. Vidlicka did not appear to testify at either hearing. Counsel for the Association objected to the District's request to secure her testimony via telephone because of the importance of having the individual appear; concern over the documents she may have with her; and concern over who may be with her. The Hearing Examiner sustained the Association's objection and inquired as to whether the District desired to seek enforcement of the subpoena. Counsel for the District indicated that he did not desire to seek enforcement. (N.T. II, at 7.) Under the circumstances, the Hearing Examiner did not err by refusing to permit the telephonic testimony. The appropriate remedy under PERA is enforcement of a subpoena in a court of appropriate jurisdiction under Section 1604, where a party does not excuse noncompliance with its subpoena. The Hearing Examiner's decision, to decline telephonic testimony, is consistent with the Commonwealth Court's decision in a similar case, Knisley v. Unemployment Compensation Board of Review, 501 A.2d 1180 (Pa. Cmwlth. 1985), wherein the Court explained that

> [o]ne potential area of abuse inherent in telephonic hearings is the possibility of witnesses fraudulently misrepresenting their identities at such proceedings. A witness could also refer to records or notes which had not properly been admitted into evidence or disclosed to the opposing party . . . These areas of potential abuse are compounded where the agency has adopted no regulations concerning the conduct of telephonic hearings. As such, we can no longer allow the Board to conduct telephonic hearings, over the objections of one of the litigants . . . [E]vidence obtained via telephone, if properly objected to, will be stricken from the record.

The Board has not adopted formal regulations concerning the use of telephonic testimony. Indeed, the Board's rules provide that subpoenas shall be served and enforced consistent with the provisions of PERA. 34 Pa. Code § 95.95. Accordingly, the Board shall dismiss the District's exceptions regarding the proffered telephonic testimony of Vidlicka.

The District's request for a remand to elicit Vidlicka's testimony is denied. The Board will grant a request to reopen the record when the following five criteria are met. The evidence sought to be admitted must be evidence that: (1) is new; (2) could not have been obtained at the time of hearing through the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the

purpose of impeachment; and (5) is likely to compel a different result. 34 Pa. Code § 95.98(f)(2); Middletown Township Police Benevolent Ass'n v. Middletown Township, 24 PPER ¶ 24167 (Final Order, 1993)(citing Minersville Area Sch. Dist. v. Minersville School Service Personnel Assoc., 518 A.2d 874 (Pa. Cmwlth. 1986)). The District argues in its brief that the "sole and exclusive purpose for the testimony of Dr. Vidlicka was to conclusively establish that she was the drafter of [the minutes from the August 17, 1999 meeting], that David Minnier, the CEA's Chief Negotiator and representative was present, and that David Minnier did in fact vote for the final trust agreement." (Dist., Br. at 5.) The Board does not find that the testimony meets these criteria, and the District does not argue otherwise. First, because the alleged information is not new and has been available presumably since August 17, 1999, the Board's inquiry could end here. However, the testimony fails to meet the remaining criteria as well. Second, the record reveals that Vidlicka was subpoenaed, but did not attend either day of hearing, apparently upon the advice of her attorney. The Hearing Examiner's offer to enforce the subpoena was rejected by the District. Further, the District thereafter concluded its case on the record without the testimony of Vidlicka. (N.T. II, at 225-226.) Third, this testimony would be arguably cumulative of the testimony of Krivak and Sieminski, who were also in attendance at the August 17, 1999 meeting, observed the conduct of Minnier and testified at the hearing. Fourth, the Hearing Examiner did not find the similar testimony of Krivak and Sieminski to be credible, so Vidlicka's testimony is not likely to compel a different result. The District's request to remand the record to reopen the record and elicit Vidlicka's testimony is accordingly denied.

The District's remaining exceptions concern the zipper clause of the parties' CBA and the Association's alleged obligations to bargain with the District over, and to sign, the Trust. As the Hearing Examiner explained, an employe organization commits an unfair labor practice under Section 1201(b)(3) of PERA if it refuses to collectively bargain in good faith, Medical Rescue Team South Auth. v. Ass'n of Prof. Emergency Medical Technicians, 29 PPER ¶ 29168 (Proposed Decision and Order, 1998), exceptions dismissed as moot, 30 PPER ¶ 30063 (Final Order, 1999). The Board will find an employe organization in violation of Section 1201(b)(5) of PERA if it refuses to execute a collective bargaining agreement, Lehighton Area Educ. Support Personnel Ass'n v. Lehighton Area Sch. Dist., 23 PPER ¶ 23133 (Proposed Decision and Order, 1992).

Neither party disputes that the District and the Association are parties to a CBA that expires August 31, 2002. Neither party disputes that the current CBA contains provisions for health benefits. Neither party disputes the existence of the zipper clause in the CBA. The District asserts that the Association waived the protections of the zipper clause and that the meetings with respect to the Consortium and Trust were collective bargaining sessions, while the Association maintains that the zipper clause prevents them from reopening the contract and that the meetings were for informational purposes only. It is well-established that a zipper clauses may "only be used as a 'shield by either party to prevent incessant demands during contract term' but that use of this clause as a sword by one seeking to impose unilateral changes without first bargaining is not favored.'" PLRB v. Lieberth, Dep't of Labor and Industry, 14 PPER ¶ 13264 (Final Order,

1983)(citing Commonwealth v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983)). There is no indication that the Association used the zipper clause as anything but as a shield from the District's demands to (1) amend the CBA per its October 27, 1999 letter (PDO, F.F. 27); (2) join the Consortium; (PDO, F.F. 30); and to (3) sign the Trust. (PDO, F.F. 18.)

Further, there is no indication that the Association waived the protections of its zipper clause. In adopting the Board's position regarding alleged waiver of collective bargaining rights and duties, the Commonwealth Court explained that "express and unmistakable action must be taken by the waiving party in order for waiver to be found." City of Pittsburgh v. PLRB, 621 A.2d 1224 (Pa. Cmwlth. 1993) rev'd on other grounds, 539 Pa. 535, 653 A.2d 1210 (1995). See also Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993)(waiver of the right to bargain may only be found when the words show a clear and unmistakable waiver); PSSU v. Berks County, 22 PPER ¶ 22095 (Final Order, 1991)(waiver of the right to bargain over a mandatory subject must be clear, express and unmistakable). The District presents no evidence of a clear, express and unmistakable waiver by the Association of the protections of its zipper clause. The District's argument that such a waiver must be inferred by Minnier's actions is contrary to well-established caselaw. The District cites no authority to the contrary, and loses sight of the fact that in order to have violated its duty to bargain in good faith, the Association must necessarily have been obligated to bargain in the first place. The record does not support the conclusion that the Association was obligated to renegotiate the health benefits provisions of the existing CBA. In a similar case, the employer argued that by sending a union representative to participate on a parking committee that recommended the implementation of a parking fee, the union's action constituted a waiver of the right to bargain over that fee. Commonwealth of Pennsylvania v. PLRB, 467 A.2d 1187 (Pa. Cmwlth. 1983). The District presents a similar argument when it asserts that by sending Minnier to participate on the Consortium that recommended the Trust's health benefits, the Association waived its right to rely on its collectively-bargained for health benefits. The Commonwealth Court rejected the same argument that the District presents here. There is no clear, express, unmistakable waiver of the zipper clause and the inference of a waiver by conduct is insufficient under the caselaw.

The record does however, support the Hearing Examiner's findings of fact that the parties did not engage in collective bargaining in the development of the Trust Agreement. According to the testimony of Minnier and Glogowski credited by the Hearing Examiner, the meetings were voluntary and for informational purposes only; Minnier communicated that he did not have the authority to sign the Trust or to bind the Association; the meetings were not for the purpose of negotiating a collective bargaining agreement between the District and the Association, but rather for forming a Trust to include 14 public school entities and their labor organizations. It is the Board's policy to defer to credibility determinations of its hearing examiners. AFSCME v. Commonwealth, supra. The District has presented no basis for the Board to upset the Hearing Examiner's findings that the Association's participation in the Consortium effort was for any reason other than that found by the Hearing Examiner.

Section 701 of PERA explains that "[c]ollective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ." 43 P.S. § 1101.701 (emphasis added). The parties' CBA evidences that collective bargaining in satisfaction of PERA already took place. Section 701 further provides that "such obligation does not compel either party to agree to a proposal or require the making of a concession." 43 P.S. § 1101.701. The Association was neither obligated to engage in collective bargaining over the Trust, nor was it obligated to agree to its terms. The record supports the Hearing Examiner's conclusion that no such bargaining or agreement took place. The District offers absolutely no authority for its assertion that Minnier's actions bound the Association to the terms of the Trust Agreement and obligated him to sign it. Absent a collectively bargained agreement/meeting of the minds, the Association cannot be found to have violated its obligation to reduce said agreement to writing or to sign it under Section 1201(b)(5). PLRB v. Blair County Valley View Home, 13 PPER ¶ 13224 (Proposed Decision and Order, 1982). The District's apparent frustration and opinion that the Association "in its greed violated the basic tenets of collective bargaining in good faith" cannot be remedied through this unfair practice charge. (Dist. Br. at 7.)

The District's arguments fail for four basic reasons. First, it failed to prove that Minnier was sent to the Consortium meetings to engage in collective bargaining. To the contrary, the Hearing Examiner found as fact that Minnier attended for informational purposes only. Second, the District failed to prove that Minnier could bind the Association. To the contrary, the Hearing Examiner found as fact that Minnier did not have the authority to bind the Association without ratification by the Association. Third, the zipper clause protects the Association from having to engage in collective bargaining over the health benefits provisions that are covered by the existing CBA. Fourth, there is no clear, express and unmistakable waiver of the zipper clause on the record. Accordingly, the District's exceptions are dismissed.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed, and the Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle, Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this thirteenth day of February, 2001. 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.