COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 1201	:	
V.	:	
	:	Case No. PERA-C-94-172-E
UPPER MORELAND TOWNSHIP SCHOOL DISTRICT	:	

FINAL ORDER

On March 20, 2000, the International Brotherhood of Firemen and Oilers, Local 1201 (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO) entered on March 1, 2000. The Board Secretary granted the Union's request for an extension of time to file a supporting brief, and the Union timely filed its supporting brief on April 10, 2000. This matter originated with the Union's charge of unfair practices, filed on April 7, 1994. In the original Proposed Decision and Order, dated December 2, 1994, the Hearing Examiner concluded that the Upper Moreland Township School District (District) committed unfair practices within the meaning of Sections 1201(a)(1) and 1201 (a)(5) of the Public Employe Relations Act (PERA) for failing to bargain in good faith regarding the subcontracting of bargaining unit work and for wrongfully discharging bargaining unit employes as a result. The 1994 Proposed Decision and Order required the District to (1) cease and desist from its refusal to bargain over subcontracting, (2) offer unconditional reinstatement of the discharged employes, (3) rescind the subcontract with the outside contractor, (4) make whole the wrongfully discharged employes with back pay, and (5) file an affidavit of compliance certifying that the employes were offered unconditional reinstatement and back pay from the date of their discharge to the date of their unconditional offer of reinstatement. By way of Final Order, dated September 12, 1995, the Board dismissed the District's exceptions to the PDO and affirmed the Hearing Examiner. By Opinion and Order, dated May 22, 1996, the Montgomery County Court of Common Pleas affirmed the Final Order of the Board in its entirety. Upper Moreland Township Sch. Dist. v. PLRB, 27 PPER ¶ 27138 (Court of Common Pleas of Montgomery County 1996). By Opinion and Order, dated May 23, 1997, the Commonwealth Court of Pennsylvania also affirmed. Upper Moreland Township Sch. Dist. v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997). By Order dated February 27, 1998, the Supreme Court of Pennsylvania denied the District's Petition for Allowance of Appeal. Upper Moreland Township Sch. Dist. v. PLRB, 552 Pa. 698, 716 A.2d 1250 (1998).

However, subsequent disagreements arose concerning the proper calculation for determining the back-pay amounts owed to the discharged employes. Consequently, on April 6, 1998, the Union requested that the Board conduct compliance proceedings. On June 24, 1998, the Board informed the District that it had not filed an Affidavit of Compliance. On July 6, 1998, the District filed an Affidavit of Compliance certifying that it offered to reinstate the affected employes unconditionally and that it was in the process of determining the amount of back pay due to each employe; the District

asserted that these employes would be made whole as soon as such determination was made. By January 11, 1999, the parties still disagreed about the manner in which to calculate the back pay owed to the affected employes and requested a compliance hearing. A compliance hearing was scheduled for February 26, 1999, but a related unfair practice charge was heard that day instead. [1] At the request of the parties, the Hearing Examiner granted several continuances, and the compliance hearing was finally held on August 11, 1999.

Based on the testimony and exhibits presented at the hearing and on all other matters of record, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

26.The discharged custodial and grounds employes are in the same bargaining unit as the transportation employes, as certified by the Board. (August 11, 1999 N.T. 74).

32. Mr. Mangin was working for the District on a part-time basis. At the time of his discharge from the District, he worked four hours per day, five days per week, for ten months per year. Mr. Mangin worked full-time for Acme since 1963. (August 11, 1999 N.T. 33-34, 41-42). Mr. Mangin received his health and medical benefits from his position at Acme. (August 11, 1999 N.T. 42).

42. During negotiation sessions prior to the layoff of the custodial and grounds employes, the District proposed a $2.00 per hour wage decrease for these employes which remained in effect until the time of layoff. At no time during these negotiations did the District ever propose or agree to any wage increase for the custodial and grounds employes. (August 11, 1999 N.T. 75, 87).

43. As a result of their reinstatement, the custodial and grounds employes are again included in the same bargaining unit as the mechanical and transportation employes. (August 11, 1999 N.T. 81).

44. Prior to their discharge, wages and other terms and conditions of employment for the custodial and grounds employes were governed by the 1991-1994 collective bargaining agreement. (District Exhibit 1, Union Exhibit 7).

45. The District and the Union entered into a collective bargaining agreement effective from July 1, 1994 through June 30, 1997. The 1994-1997 agreement does not treat the entire bargaining unit uniformly with respect to wages. Article III of the 1994-1997 agreement contains a wage schedule, which classifies the different positions included within the bargaining unit and assigns each classification with a grade number. Wage rates and wage increases are assigned according to job grade number and each job grade is treated differently regarding wage rates and wage increases. Due to the discharge of the custodial and grounds employes, the wage schedule does not classify or in any way address these employes. (Union Exhibit 7).

[1] The related unfair practice charge is docketed at Case No. PERA-C-98-519-E. In this related charge, the Union alleged that the District engaged in direct dealing with reinstated Union members by seeking their approval of the District's back pay calculations.

46. The parties did not have an agreement between July 1, 1997 and June 30, 1998 for the remaining bargaining unit employes who were covered by the 1994-1997 agreement. (District Exhibit 2, Union Exhibit 7, August 11, 1999 N.T. 76).

47. Since the reinstatement of the custodial and grounds employes in April 1998, the parties have negotiated a tentative agreement to be effective from July 1, 1998 through June 30, 2002. (August 11, 1999 N.T. 74-79).

48. The tentative agreement provides a wage reduction for the reinstated custodial and grounds employes in comparison to the wages they received prior to discharge. Additionally, the Union bargained away the longevity provision in the 1991-1994 contract, which gave additional wage differentials to employes depending on their years of service with the District. (August 11, 1999 N.T. 72, 81).

DISCUSSION

The Union and the District disagree about the specific manner in which to effectuate the terms of this Board's Final Order of September 12, 1995 and the concomitant Affidavit of Compliance, which required the District to make whole the affected employes "for the loss of pay or benefits sustained by them from the date of their discharge to the date of the unconditional offer of reinstatement." The parties did resolve many of the compliance issues including the following: outstanding medical expenses and losses incurred during layoff; night differentials; and reimbursement for vacation, holidays and personal days. The Union, however, asserted that the back pay owed to the reinstated employes had to be calculated to include the wage increases given to the transportation workers during the layoff period. Additionally, the District refused to give back pay to the following three employes: Catherine Beattie, Raymond John Mangin, Sr. and William L. Wrye. According to the District, these employes failed to exercise due diligence in pursuing other employment and in mitigating their damages as a result of the layoff.

The Hearing Examiner concluded that the District was not obligated to calculate the back-pay award for the custodial and grounds employes consistent with the wage increases that it negotiated with the Union for the transportation workers who remained in the bargaining unit after the custodial and grounds employes were discharged. The Hearing Examiner also concluded that Ms. Beattie and Mr. Mangin were not entitled to any back pay because the record revealed that they failed to exercise due diligence to mitigate the damages created by their layoff. The Hearing Examiner concluded that Mr. Wrye did mitigate his damages to the extent that he was seasonally employed from June 8, 1995 through December 17, 1995; June 8, 1996 through December 1, 1996; and April 13, 1997, through November 16, 1997. Mr. Wrye, therefore, was entitled to a back pay calculation based on the period of seasonal employment only. He would not be entitled to any back pay for the year prior to this employment or for any part of any year that he was seasonally unemployed. No exceptions were filed regarding this conclusion.

In its Exceptions and supporting brief, the Union argues that the Hearing Examiner erred in failing to make the following conclusions: (1) that the discharged custodial and grounds employes were entitled to the same wage increases obtained by the transportation employes during the period of time between their discharge and offer of reinstatement; and (2) that Catherine Beattie and Raymond John Mangin, Sr., were entitled to back pay because they

exercised due diligence in seeking new employment following their discharge from the District.[2]

This Board has not heretofore addressed the specific issue of whether the back pay of employes, who were unlawfully discharged and replaced with independent contractors for economic reasons only, without any evidence or claim of discrimination or anti-union animus, can be calculated with reference to the negotiated wage increases given to the remaining employes who are in the same bargaining unit, but have different job classifications and duties. In fashioning the back-pay remedy in the instant matter, the Board must distinguish between cases where the employes' discharge was motivated by discrimination or anti-union animus and cases where the unlawful discharge was motivated solely by an expected economic savings, as in the instant case.

Upon finding that a charged party has engaged in an unfair practice, Section 1303 of PERA empowers the Board to issue an "order requiring such person to cease and desist from such unfair practice, and to take such reasonable affirmative action, including reinstatement of employes discharged in violation of Article XII of this act, with or without back pay, as will effectuate the policies of this act." 43 P.S. §1101.1303. The Board, therefore, has the express statutory authority to order the reinstatement of unlawfully discharged employes with back pay or to decline to issue such an order. West Shore Area School District, 23 PPER ¶ 23031 (Final Order, 1992). This section also confers upon the Board broad discretion in choosing or fashioning a remedy to fulfill its statutory function, under Section 1303, by effectuating the policies of PERA. 43 P.S. 1101.1302; Fraternal Order of Police, Lodge No. 19 v. City of Chester, 20 PPER ¶ 20099 (Final Order, 1989). In this regard, our Supreme Court has held that a make-whole remedy fashioned by the Board is within the scope of the Board's powers and discretion as set forth in PERA. In re Cumberland Valley Sch. Dist., 483 Pa. 134, 394 A.2d 946 (1978).

However, the Board's authority to order back pay to unlawfully discharged employes is remedial in nature; a back pay order cannot be punitive. Id., 394 A.2d 946. Accordingly, "the purpose of the award of back pay is to make the employee whole, not give the employee a windfall." Commonwealth v. Stairways, Inc., 425 A.2d 1172, 1176 (Pa. Cmwlth. 1981). Consistent with this limitation, the Board must minimize the amount of speculation about the endless income possibilities to which an affected employee may have obtained. Raymond McMahon v. Springfield Township, 28 PPER ¶ 28185 (Final Order, 1997)(emphasizing the well-established rule that the Board's conclusions and decisions in unfair labor practice matters must not be based on speculation only); City of Chester, supra (concluding that the hearing examiner properly refused to order back pay where the work of bargaining unit police officers was displaced by part-time officers who were paid from grant money and the record failed to disclose whether the same grant money could have been used for the bargaining unit officers rendering entitlement to payment for the lost work too speculative). In light of these guiding principles, both this Board and the National Labor Relations Board (NLRB) have fashioned various formulas for calculating

[2] In its Exceptions, the Union did not challenge any of the Hearing Examiner's findings of fact or argue that any of those findings were unsupported by substantial evidence. Therefore, the Hearing Examiner's findings of fact are conclusive and those findings will not be revisited.

appropriate, equitable back-pay remedies for different situations[3]. Accordingly, these formulations are designed to make the affected employes as nearly whole as possible, without providing them with a windfall, while recognizing that absolute precision in calculating back pay is virtually unattainable. NLRB v. Kartarik, 227 F.2d 190, 192-93 (8th Cir. 1955), enf'g, 111 NLRB 630 (1955) (stating that the NLRB is not held to an unattainable standard of precision in back-pay computations and the NLRB has the power of choosing the appropriate back-pay calculation based on the facts or reasonable inferences, provided that a rational basis for its conclusion is provided).

The Board's goal in remedying unfair labor practices is to attain the status quo ante and, where reasonably possible, place the complainant in the same or substantially similar position in which he would have been but for the unfair labor practice.[4] Cumberland Valley, 483 Pa. 134, 394 A.2d at 953. The status quo ante has been defined as the "last actual peaceable and lawful noncontested status which preceded the controversy." Fairview Sch. Dist. v. Commonwealth, 494 Pa. 539, 454 A.2d 517 (1982). Under this approach, there is inherently some level of estimating or speculating involved in determining the relative positions in which wrongfully discharged employes would have been if the unfair labor practice had not occurred because the Board has to project the manner in and the degree to which conditions would have changed or remained the same had the employer's wrongful conduct not occurred. In this regard, the Board looks to the record for reliable indicia of the affected employes' wages, hours and other terms and conditions of employment such as benefits, vacation time, sick leave, shift differentials and wage increases.

The Union argues that the affected employes are entitled to the same wage increases received by the transportation workers in the same bargaining unit who remained employed. These wage increases were negotiated after the affected employes were discharged. In dismissing this argument, the Hearing Examiner concluded that such a calculation would be too speculative to have a reasonable basis in law or fact. The Board concludes that the Hearing Examiner in this case properly exercised his discretion in refusing to apply the negotiated wage increase obtained by the transportation workers to the discharged custodial and grounds personnel as part of their back pay remedy.

In discrimination cases, where economic factors are not the source or the motive of a discharge, there is often reliable indicia of the affected employes' economic position but for the discharge. There are many permutations of back-pay calculations to address the specific facts and

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[3] In Cumberland Valley, the Supreme Court of Pennsylvania restated its position that the Board and the courts may follow federal law where the state matter "does not present a situation where there exists a meaningful difference in policy between the NLRA and Act 195 [PERA]." Cumberland Valley, 483 Pa. 134, 394 A.2d at 950. The Cumberland Valley Court expressly adopted federal authority in interpreting Section 10(c) of the NLRA, the federal counterpart to Section 1303 of PERA. Likewise, this Board finds the federal caselaw regarding back-pay calculations persuasive.

[4] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194-95, 61 S.Ct 845, 852 (1941). In Franks v. Bowman Transportation Co., 424 U.S. 747 (1975), the United States Supreme Court stated that the NLRB's "task in applying Section 10(c) is to take measures designed to recreate the relationships that would have been had there been no unfair labor practice." Id. at 769.

circumstances of each case. A complex case may not lend itself to a basic formula. Operating Engineers, 151 N.L.R.B. 972, 58 L.R.R.M. 1532 (1965). Where a basic formula or derivative therefrom is unworkable, a new custom-tailored formulation must be devised, and it must be defensible as reasonable. Id. The test is whether the formula is fair and reasonable. Id. Accordingly, the repertoire of formulations for calculating back pay of reinstated employes who were discharged for discriminatory reasons reflects the ability of this Board and the NLRB to reasonably project the affected employes' status during the back-pay period. Because economic factors do not contribute to the dismissal in a discrimination case, the Board can reasonably evaluate the affected employes' financial status during the layoff period by looking to the status of similarly situated employes who remained employed. If the remaining or replacement employe(s) receive increases in wages or perquisites during the back-pay period, it is reasonable to conclude that the discharged discriminatee would have received the same increases, but for his union affiliation, because there were no economic or performance deficits in the decision to discharge the discriminatees. Therefore, a discrimination case lends itself more readily to an economic comparison between the discharged employes and non-discharged employes during the back-pay period, as urged by the Union. In this regard, there is an abundance of NLRB and Board decisions that incorporate wage increases into a back-pay calculation because the evidence of record reasonably supports the conclusion that the discriminatee would have received a similar increase.

In the instant matter, the District committed an unfair practice because it failed to bargain in good faith with the Union over the District's decision to subcontract the work performed by the custodial and grounds personnel, which proximately caused a layoff of those employes. Unlike the non-economic motive in discrimination cases, the custodial and grounds personnel in the instant matter were specifically targeted for economic layoff. The evidence of record demonstrates that the District's pre-discharge position was for a two-dollar-per-hour wage decrease for the custodial and grounds personnel. The transportation workers, although in the same bargaining unit, were not targeted, at any time, for a layoff or a wage decrease. Accordingly, the record clearly demonstrates that the District perceived and treated the dischargees differently in terms of economic value, regardless of its subsequent failure to fully satisfy its collective bargaining duty prior to subcontracting.

In reaching its remedial goal of returning the dischargees to the status quo, the Board must first determine the nature of the status quo. Where, as here, a particular group of employes are targeted for layoff for economic reasons only, and therefore patently treated differently then their co-workers economically, there is an insufficient basis to compare the wages of the reinstated dischargees to those of their co-workers for purposes of including in the back-pay calculation a negotiated wage increase obtained by the co-workers during the back-pay period. The evidence in this record does not reasonably yield the inference that the dischargees in this case would have received a wage increase at all, let alone one similar to the transportation workers. It must be remembered that the District's bargaining position was to retain the performance of transportation service in-house and subcontract custodial and grounds services. Consequently, for bargaining purposes, it must be noted that the economic relationship to the subcontracting proposal was at least as significant as the relationship of the grounds/custodial wages and benefits to other bargaining unit employes who were to be retained. Therefore, just as it would be too speculative to assume that the dischargees

would have received a wage decrease during the back-pay period, it is equally speculative, and therefore unreasonable, for this Board to assume that the dischargees, who were specifically targeted for differential treatment, would have received a wage increase during the back-pay period.

Moreover, the wage increases obtained by the transportation workers were negotiated contractual wage increases agreed upon by the District and the Union. Because the custodial and grounds personnel were specifically carved out of the bargaining unit for different economic treatment, as opposed to union activity, and it cannot therefore be said that the dischargees would have enjoyed the same increase as part of the bargaining unit, applying the negotiated wage increase to the dischargees in this case would effectively impose a contractual term upon the employer when there is no evidence that the District would have agreed to it. The District committed an unfair practice under 1201(a)(5) because it breached the duty to bargain in good faith imposed by Section 701 of PERA. This section, however, also provides, in relevant part, that the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." 43 P.S. §1101.701. Accordingly, returning the parties to the status quo ante following a bargaining violation may require ordering the respondent to bargain, but it cannot require an agreement on specific terms set by the Board. The parties voluntarily agreed that the transportation workers would receive a wage increase. It is not only unreasonable for this Board to speculate about a wage increase for the dischargees, but also this Board is powerless to bind the District to the same agreement, under Section 701, when the District bargained separately with the Union regarding the transportation workers' increases.

Additionally, the record demonstrates that the dischargees would not have benefited from the Union's bargain on behalf of the transportation workers under a third-party beneficiary theory. In Scarpitti v. Webong, 530 Pa. 366, 609 A.2d 147 (1992), the Pennsylvania Supreme Court restated the rule for designating an individual or entity as a third-party beneficiary. Accordingly, the Scarpitti Court stated the following:

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Id., 609 A.2d at 150-52 (citations omitted). The 1994-1997 agreement between the District and the Union on behalf of the transportation workers demonstrates that neither the Union nor the District intended that agreement to apply to or in any way serve the discharged custodial and grounds employes. The dischargees are expressly and intentionally omitted from the wage schedule whereas the 1991-1994 agreement expressly includes the dischargees in the wage schedule and classified them for purposes of determining wages and wage increases during the 1991-1994 term. Moreover, the circumstances are not so compelling that effectuating the parties' intent requires giving the dischargees the same increase.

Based on the foregoing reasons, the Board hereby dismisses the Union's exceptions to the Hearing Examiner's determination that the appropriate back-pay for the dischargees in this matter is based on their pre-discharge wages with no adjustment for the wage increases obtained by the transportation workers.

The Union next challenges the Hearing Examiner's conclusions that custodial employes, Raymond John Mangin, Sr. and Catherine Beattie were not entitled to any back pay because they failed to exercised due diligence in securing alternative employment to mitigate their damages following their layoff from the District.

A wrongfully discharged employee has a duty to mitigate the damages engendered by the loss of employment by using reasonable efforts to find comparable replacement work. PLRB v. Sands Restaurant Corp., 429 Pa. 479, 240 A.2d 801 (1968); Valley Township Police Benevolent Association v. Valley Township, 23 PPER ¶ 23137 (Final Order, 1992). Also, an employe is not entitled to any back pay for any period during which that employe failed to exercise due diligence. Sands Restaurant, 429 Pa. 479, 240 A.2d at 806. In W.T. Grant Co., Inc. v. United Retail Employees of America, Local No. 134, 347 Pa. 224, 31 A.2d 900 (1943), our Supreme Court stated that "it was not the intention of the legislature that one who is deprived unlawfully of his employment should be maintained in idleness when he has an opportunity to do work for which he is fitted." Id., 31 A.2d at 901. Also, an employe may not willfully incur the loss of earnings or abandon a search for interim employment. Phelps Dodge, 313 U.S 177, 61 S.Ct. at 198-200. The employer has the burden to prove that an employe failed to exercise due diligence. Appeal of H. Theresa Edge, 606 A.2d 1243 (Pa. Cmwlth. 1992); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1321 (DC Cir. 1972); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5th Cir. 1966). Determining whether an employe exercised due diligence is within the Board's broad discretion to fashion a remedy that will effectuate the policies of PERA.[5]

As noted in the PDO, this Board and the NLRB have previously examined the job-seeking efforts of reinstated employes to determine whether they exercised due diligence. Although unique facts of each case will determine existence or non-existence of due diligence, these precedents provide a framework of guiding principles for determining whether a given reinstated employe has exercised due diligience in seeking comparable replacement employment during a given time period. In PLRB v. North Hills School District, 12 PPER ¶ 12262 (Final Order, 1981), the Board affirmed both the factual and legal conclusions of the hearing examiner, PLRB v. North Hills School District, 12 PPER ¶ 12111 (Proposed Decision and Order, 1981), who concluded that an employe who applied for four jobs within a fifteen-month period failed to exercise due diligence in offsetting her unemployment. Id. The following cases are also instructive: W.T. Grant, supra, (holding that a dischargee was not due any back pay for the first seventeen weeks of unemployment during which time she made no effort to find employment);

[5] In Phelps Dodge, 313 U.S. 177, 61 S.Ct. at 852, the Supreme Court stated that "[b]ecause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." Id. at 194, 61 S.Ct. at 852.

Valley Township, supra, (concluding that a dischargee did not exercise due diligence by contacting one other employer during a sixteen-month period).

Mr. Mangin worked for the District ten months per year, four hours per day, five days per week. Mr. Mangin simultaneously held a full-time position at Acme Markets. Mr. Mangin retired from his job at Acme in June 1997, prior to the District's offer of reinstatement. Between Mr. Mangin's discharge from the District in June of 1994 and his retirement in June of 1997, he applied for five jobs. This translates into an application rate of 1.67 job applications per year. The Union argues that "Mr. Mangin consistently looked for work throughout the period of his layoff," (Union's Exception No. 2), and that the Hearing Examiner held an "arbitrary, ill-defined standard regarding the number of job applications required to establish due diligence." (Union's Brief in Support of Exceptions at 3). Contrary to the Union's assertions, in exercising his discretion, the Hearing Examiner's standards were neither "arbitrary" nor "ill-defined". The cases cited above demonstrate that due diligence is not determined by the number of job applications alone without regard to the relevant time frame. Rather, the Board's determination of whether an individual is making a reasonable effort in pursing another job is, in large part, a function of the concentration or rate of job applications within a given time frame. Although there is no litmus test to determine whether a dischargee has made a reasonable effort to find another job, the above cited cases clearly indicate that applying for jobs at the rate of 1.67 per year is clearly insufficient to establish that Mr. Mangin actively made a reasonable effort to substitute any of his lost income.

In June of 1997, Mr. Mangin retired from his full-time position at Acme, which he held for thirty-three years. Subsequent to his retirement from Acme, Mr. Mangin sought and obtained part-time employment at a car dealership. He worked at the dealership for approximately three-to-four months, when he left to accept a full-time job at the Middle Bucks County Institute of Technology. He worked at the Institute until he was called back by the District. Based on his findings of fact, which remain unchallenged, the Hearing Examiner concluded that the "employment he obtained was to replace his full time job with Acme rather than his part time job with the District." (March 1, 2000 PDO at 5). Based upon a review of the record and the Examiner's findings, this Board concludes that this determination is reasonable.

The Pennsylvania Supreme Court has stated that "it is the function of the board not only to appraise conflicting evidence, to determine the credibility of witnesses, and to resolve primary issues of fact, but also to draw inferences from the established facts and circumstances." PLRB v. Kaufmann Department Stores, Inc., 345 Pa. 398, 29 A.2d 90, 92 (1942). (emphasis added). The record reveals, and the Examiner found, that Mr. Mangin applied for only five jobs during the first three years of his layoff from the District and failed to secure replacement employment during this time. During this period of time, Mr. Mangin was still a full-time employe of Acme. The record also reveals that immediately following his retirement from Acme in June 1997, Mr. Mangin vigorously increased his job-hunting efforts and applied for 4 jobs within a few months after his retirement. Additionally, Mr. Mangin not only secured employment after his retirement from Acme, but also received two job offers. Mr. Mangin worked at a car dealership for three-to-four months on a part-time basis, and he worked at the Bucks County Institute of Technology full-time thereafter. These positions were daytime positions that Mr. Mangin worked during the hours that he would have been at Acme but for his retirement. On this record, the Hearing Examiner found that Mr. Mangin failed to make a reasonable effort to replace his employment with the District while

he remained employed at Acme and that following his retirement, when he was idle and completely without employment or his full income from Acme, he substantially increased his job search and in fact found employment. Based on the evidence of record, the Board concludes that the Examiner's determination was reasonable and Mr. Mangin's post-retirement employment replaced his full-time position at Acme rather than his part-time position at the District.

The Hearing Examiner's conclusion that Mr. Mangin's post-retirement employment replaced his full-time position at Acme rather than his part-time employment with the District is based on the record evidence, and particularly the testimony of Mr. Mangin and his daughter. It is this Board's usual policy to defer credibility determinations to its hearing examiners, and it will not disturb those determinations on exceptions absent "compelling circumstances." Chester County Deputy Sheriffs Association v. Chester County, 28 PPER ¶ 28045, 96 (Final Order, 1997). In determining that Mr. Mangin's supplementary employment replaced his full-time employment at Acme, we do not find, as a matter of law, that a secondary or part-time employment dischargee who retires from a primary, full-time job must replace his full-time employment from which he retired and obtain secondary employment to be deemed to have exercised due diligence to find replacement work. Under appropriate circumstances a pension or other financial considerations may constitute the functional equivalent of the full-time employment from which the employe retired. We find here only that the evidence of record supports the Hearing Examiner's determination that the employment sought by Mr. Mangin replaced his full-time employment and not his part-time position with the District.

The record also establishes that Ms. Beattie failed to exercise due diligence to mitigate her damages as a result of her discharge from the District. During the eight months between her discharge from the district in August of 1994 and her knee operation in April 1995, Ms. Beattie applied for four jobs and collected unemployment compensation. Pursuant to the principals set forth in North Hills, supra, the Board concludes that applying for one job every two months does not constitute due diligence or reflect a reasonable effort to replace lost employment. Ms. Beattie underwent knee surgery in April 1995. She was unable to work during her convalescence, which endured through June or July of 1995. In September 1995, Ms. Beattie retired and began receiving pension income. Therefore, from April 1995 through June 1995, Ms. Beattie was removed from the labor market due to her knee surgery. An individual whose state of infirmity removes him or her from the labor market is not entitled to back pay for the period of time that she is so removed. Winn-Dixie Stores, Inc., 170 NLRB 1734, 69 LRRM 1219 (1968). Ms. Beattie also failed to seek any employment for the period of time between June of 1995 and September 1995 when she retired. Therefore, she failed to exercise due diligence for that time, within the meaning of W.T. Grant, supra. Finally, Ms. Beattie again voluntarily removed herself form the labor market when she retired in September 1995 and began receiving pension income. Ms. Beattie remained retired until she was called back to work at the District on April 13, 1998. She worked for one week and she voluntarily retired again. The Board concludes that there is substantial evidence of record to conclude that the District met its burden of proving that Ms. Beattie was not entitled to any back pay for the layoff period because she failed to exercise due diligence and she voluntarily removed herself from the work force.

The Union also argues that the District failed to meet its burden of proof because it failed to adduce its own evidence in rebuttal to the Union's employe witnesses regarding their job search activities. The Board finds this contention to be wholly without merit. The District was

represented at the August 11, 1999 hearing on the matter. At the hearing, the District subjected the Union's witnesses to cross-examination and elicited favorable testimony. The Board can find no authority for the proposition that the District cannot, as a matter of law, meet its burden with favorable evidence adduced by the Union as well as evidence elicited by the District on cross-examination.

Additionally, the Union argues that the Examiner erred in finding a lack of due diligence because the District failed to offer evidence showing the availability of vacant positions for the affected dischargees. This contention also is wholly without merit. There is no binding authority to support the Union's position, and the Board, as previously stated herein, has broad discretion in deciding remedial issues. Under federal law, job availability in the relevant labor market is merely a factor to be considered in determining whether a private sector employer has met its burden of proving a dischargee's lack of due diligence in mitigating his damages. Aircraft and Helicopter Leasing and Sales, Inc. v. Crowe, 227 N.L.R.B 644, 94 L.R.R.M 1556 (1976). Accordingly, although the private employer may generally have the burden of producing evidence showing the availability of employment, in a given case the evidence itself or the nonexistence of such evidence may not be dispositive regarding either the employer's burden or the employe's due diligence. For example, when a private sector employe fails to make an effort to seek alternative employment, the job availability in the area is irrelevant to determining whether that employe exercised due diligence, and the private sector employer is not required to proffer evidence of job availability. Arlington Hotel Co., Inc. v. International Ladies' Garment Workers' Union, 287 N.L.R.B. 851, 127 L.R.R.M. 1271 (1987). Although this Board is aware that job availability is a consideration for determining reasonable diligence in the federal scheme, there is no Pennsylvania authority that requires public sector employers within the Commonwealth to produce evidence demonstrating job availability to meet its burden of proving that a dischargee failed to exercise due diligence. Therefore, absent such a burden, the District was not required to proffer evidence of job availability or engage in any other type of labor market analysis at the compliance hearing in this case.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions. The back-pay calculation for the reinstated employes, in this matter, does not include the negotiated wage increases obtained by non-discharged bargaining unit members, and said calculation is limited to the dischargees' pre-discharge wages and hours. Also, Mr. Mangin failed to properly and reasonably mitigate his damages by exercising due diligence in seeking alternative employment following his discharge in April 1994. Although Mr. Mangin eventually secured employment, said employment does not mitigate his damages because it replaced his employment with Acme and not the District. Finally, Ms. Beattie failed to properly and reasonably mitigate her damages by exercising due diligence in seeking alternative employment following her discharge from the District during the entire back-pay period.

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; that the Order on pages 6 and 7 of the Proposed Decision and Order be affirmed; and,

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the District shall:

4. Calculate back pay for the reinstated employes based on their pre-discharge compensation only without inclusion of the negotiated increases received by other bargaining unit employes who were unaffected by the subcontracting.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this twentieth day of June, 2000. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 1201	:	
V.	:	
	:	Case No. PERA-C-94-172-E
UPPER MORELAND TOWNSHIP SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

Upper Moreland Township School District hereby certifies that it has made Mr. Wrye whole for any wages he lost while seasonally employed during the period of his discharge, that it has calculated and distributed back pay to the reinstated employes based on their pre-discharge compensation only without inclusion of the negotiated increases received by the other bargaining unit employes who were unaffected by the subcontracting; that it has posted the March 1, 2000 Proposed Decision and Order and the June 20, 2000 Final Order as directed therein; and that it has served a copy of this affidavit on Local 1201.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
The day and year first aforesaid.

_____
Signature of Notary Public