COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PALMERTON AREA EDUCATION SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-00-333-E
PALMERTON AREA SCHOOL DISTRICT	:	

FINAL ORDER

On May 28, 2002, the Palmerton Area School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated May 8, 2002. In the PDO, the Hearing Examiner found that the District engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by failing to grant the relief requested in two grievances where the District failed to respond to the grievances within the time frame specified in the parties' collective bargaining agreement (CBA) and where the CBA expressly provided that such a failure to timely respond requires the District to provide the requested relief. The District timely filed its supporting brief on July 26, 2002 in compliance with the extensions granted by the Board Secretary. After a thorough review of the District's exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

11. Appendix D, Section I of the CBA provides the following for Step I of the grievance procedure:

> Person or persons initiating the alleged grievance shall present grievance, in writing, on forms prepared by the employer and attached to the contract, to the First Level Supervisor within ten (10) work days after its occurrence. The First Level Supervisor shall reply in writing to the grievant within ten (10) workdays after initial presentation of the grievance.

(Association Exhibit 7, Appendix D, Section I, Step I).[1]

12. Appendix D, Section I of the CBA provides the following for Step II of the grievance procedure:

> If the action in Step I fails to resolve the grievance to the satisfaction of the affected parties, the grievance shall be

[1] After exceptions were filed the Board informed the parties that the collective bargaining agreement accepted into evidence as Association Exhibit 7 applied to a different bargaining unit within the District. However, the parties agreed that the contract language relied upon by the Examiner was identical to the applicable CBA, and accordingly the parties agreed to replace the inapplicable contract with the CBA as Association Exhibit 7, which was forwarded to the Board on June 7, 2002.

> referred to the Superintendent in writing within five (5) workdays. The Superintendent shall reply in writing to the grievant within five (5) workdays.

(Association Exhibit 7, Appendix D, Section I, Step II).

DISCUSSION

The facts of this case are as follows.[2] On May 22, 2000, the Palmerton Area Education Support Personnel Association (Union) filed two grievances. Dr. Robert M. Foster, District Superintendent, then contacted Kimberly Ottinger, Union President, to confirm if Denise Strohl, who signed the grievances, was the proper representative of the Union and whether the grievances were brought through the proper channels of the grievance procedure. Ms. Ottinger confirmed with Mr. Robert Whitehead, the PSEA representative, that the grievances should proceed. Ms. Strohl, the grievance chairperson and negotiator for the Union, had a conversation with Dr. Foster regarding the two grievances filed by the Association. On June 8, 2000, Dr. Foster delivered the District's response denying the two grievances.

Step I of the grievance procedure requires a grievance to be filed with the first level supervisor within 10 working days of the occurrence and answered within 10 working days of the presentation of the grievance. Step II requires that, if the grievance is denied at Step I, the grievance shall be referred to the Superintendent within 5 days of the denial and that the Superintendent shall reply within 5 work days from the presentation of the grievance to him. Appendix D, Section III of the CBA provides that "[i]f the Employer at any step fails to render its decision within the time periods established, the grievant shall be granted the action requested, without prejudice to the [b]oard's future position." (F.F. 9; Appendix D, Section III, Association's Exhibit 7). The District's response through Dr. Foster was untimely under either the 10-day period of Step I or the 5-day period of Step II of the CBA.

In its exceptions, the District contends that the Hearing Examiner erred in concluding that it committed an unfair practice in refusing to grant the relief requested in two grievances, where the Superintendent failed to timely respond, for the following reasons: (1) the resolution of the dispute in this case requires contract interpretation within the jurisdiction of an arbitrator and not this Board; and (2) the Examiner erred by failing to find that the parties entered into an agreement to extend or waive the deadline for responding to the two grievances.

As regards the first claim, the Board agrees with the Hearing Examiner that Ambridge Area Educ. Ass'n v. Ambridge Area Sch. Dist., 28 PPER ¶ 28020 (Proposed Decision and Order, 1996), aff'd, 28 PPER ¶ 28092 (Final Order, 1997) (Markle, Chairman, dissenting), controls the

[2] The District has not challenged any specific findings of fact as being unsupported by substantial evidence. Accordingly, the Examiner's findings are the facts for purposes of reviewing the District's exceptions. 34 Pa. Code § 95.98(a)(3); Fraternal Order of Police, Lodge No. 5 v. PLRB, 727 A.2d 1187, 1190 (Pa. Cmwlth. 1999).

outcome here. The CBA in this case clearly provides that the District must respond to a grievance within 10 work days at step I and within 5 work days at Step II of the grievance procedure.[3] However, the District responded twelve working days after the initial presentation of the grievance, which is clearly beyond the deadlines mandated in either Step I or Step II. Moreover, Section III of Appendix D in the CBA expressly and unambiguously provides that "[i]f the employer at any step fails to render its decision within the time periods established, the grievant shall be granted the action requested, without prejudice to the Board's future position." (Exhibit A-7, Appendix D, Section III). There is no dispute that the District refused to grant the relief requested in the two grievances filed by the Union on May 22, 2000. Accordingly, as we held in Ambridge, supra, the District has engaged in unfair practices.

The District also maintains that the Board lacks jurisdiction to entertain this matter because the dispute involves a disagreement over the interpretation of the terms of the CBA and the District has a sound arguable basis for its interpretation that the CBA does not require it to grant the relief requested in the two grievances, citing Amalgamated Transit Union Local No. 801 v. Altoona Metro Transit, 26 PPER ¶ 26085 (Final Order, 1995). In Altoona Metro Transit, the union alleged unilateral action by the employer for implementing tardiness/absence work rules where the contract provided the employer with authority to promulgate rules, to "discuss" certain rule changes prior to promulgation and a right of the union to arbitrate the "reasonableness" of rule changes by the employer. However, Altoona Transit is distinguishable because the applicable provisions of the CBA in this case are neither subject to multiple or inconsistent interpretations nor do they clearly support the District's view. Rather those provisions at issue here clearly and unambiguously provide that the District's failure to reply to grievances within the time frames specified requires the requested relief to be granted by the District.

Here, the CBA provides no support for the District's admitted twelve-day timeframe to reply to the grievances. In order to sustain a claim of contractual privilege, the District must show by language in the agreement that its actions at issue have a sound arguable basis from the agreement, not mere recitation that the parties disagree. In North Cornwall Township Police Ass'n v. North Cornwall Township, 33 PPER ¶ 33054 (Final Order, 2002), the Board explained that "the contractual privilege defense is viable when `an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it.'" North Cornwall, 33 PPER at 114 (quoting Vickers, Inc., 153 N.L.R.B. 561 (1965)). Review of the District's claim of contractual privilege (beyond recitation of the legal standard) however

[3] It is unclear whether the timeline provisions of Step I or Step II govern the two grievances. Although the grievances were presented to and accepted by the Superintendent, thereby seemingly governed by the terms of Step II, the record indicates that the filing of those grievances with the Superintendent was the first presentation to the employer suggesting that the grievances could be governed by the terms of Step I and the more liberal time frames therein. However, such a determination is unnecessary to the resolution of the issues presented because the District's response was untimely under either time frame.

reveals no reliance on the provisions of the agreement but rather a claim that the Union waived the contractual provisions regarding the two grievances at issue. The District accordingly offers no contractual support for its reply to the grievances 12 working days after presentation of the grievances. Therefore, the District's claim of contractual privilege must be rejected.

The courts and the Board have previously rejected the District's argument that the Union's refusal to bargain charge under Section 1201(a)(5) is solely a matter of contract interpretation and the Board accordingly lacks jurisdiction to entertain the charge. Millcreek Township Sch. Dist. v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1994); Ambridge, supra. "The fact that the same act may give rise to both a violation of the collective bargaining agreement and an unfair labor practice, or that determination of whether an unfair labor practice has occurred may depend on interpretation of the collective bargaining agreement, does not oust the Board of jurisdiction." Id. at 737. Although some contract interpretation matters are indeed within the exclusive jurisdiction of an arbitrator, an "employer acts unilaterally in derogation of its statutory obligation to bargain in good faith when it reneges on an agreement reached during collective bargaining." Ambridge, 28 PPER at 50. Indeed the Commonwealth Court has expressly held that the Board has jurisdiction to determine whether an employer has engaged in unfair labor practices where, as here, the employer allegedly failed to comply with a contractually defined grievance process. Pottstown Police Officers' Ass'n v. PLRB, 634 A.2d 711 (Pa. Cmwlth. 1993).

The District next argues that the Examiner erred by failing to find that the Union agreed to waive or extend the deadline for the District's response. Although a finding that such an agreement existed would be favorable to the District, the Examiner is required to set forth only those facts that were necessary to support his decision. He was not required to summarize all the evidence presented, make findings that are unnecessary or make findings that would support another decision, even if there is substantial evidence to support such findings. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975); Ford City Borough, 19 PPER ¶ 19117 (Final Order, 1988); AFSCME v. Dep't Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). The Examiner's function is to resolve conflicts in evidence, set forth findings of fact from the resolution of those conflicts and draw inferences from those findings. AFSCME, District Council 88 v. Warminster Township, 31 PPER ¶ 31156 (Final Order, 2000). Often, the record contains substantial evidence to support two conflicting findings, however, the law only requires that substantial evidence exists to support the findings set forth by the Examiner or the Board. Id. The argument that there is substantial evidence to support a contrary finding has been repeatedly dismissed. Id. Sugarloaf Township Police Dep't v. Sugarloaf Township, 33 PPER ¶ 33023 (Final Order, 2001). Moreover, the Board will not disturb the credibility determinations of its hearing examiners absent the most compelling of circumstances. Sugarloaf, supra; AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986); Clarion-Limestone Area Educ. Ass'n v. Clarion-Limestone Area Sch. Dist., 25 PPER ¶ 25033 (Final Order, 1994).

In the PDO, the Examiner addressed the conflict in testimony regarding the alleged agreement to waive or extend the contractual deadlines for responding to grievances and stated the following:

> The Association put on two witnesses; the negotiator and grievance chairperson, and the Association's president. Both denied ever giving the Superintendent an extension of time to file the District's answers to the Association's grievances, which were filed on May 22, 2000. The Superintendent, when questioned about his request for an extension of time to answer the Association's grievances, stated "Perhaps I wasn't as clear in my request." (N.T. 15). The testimony of the Association's witnesses is more persuasive than is that of the Superintendent. That conclusion is based on the demeanor, clearness of statements and certainty of the witnesses.

(PDO at 2-3). The above statement clearly demonstrates that the Examiner credited the testimony of the Union's witnesses over that of the Superintendent. The record supports the Examiner's assessment that the two Union witnesses gave firm clear, accurate testimony regarding the lack of an agreement to waive the contractual time deadlines for responding to the grievances. The District has not argued that compelling circumstances exist warranting an interference with the Examiner's credibility determinations here. Accordingly, the Examiner properly resolved the conflicts in the record through credibility determinations and concluded that the District failed to prove that it made an agreement with the Union or otherwise received permission from the Union to respond to the May 22, 2000 grievances beyond the contractual deadlines. After reviewing the record and the PDO, the Board concludes that the Hearing Examiner properly made findings that were necessary to support his conclusions, that he did not omit any necessary findings regarding an alleged agreement to waive or extend the contractual time deadlines for responding to grievances and that none of the County's proposed alternative findings are necessary to support the Hearing Examiner's conclusions.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order, as modified herein, of the Hearing Examiner.

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 that the Proposed Decision and Order, as modified herein, is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John R. Markle Jr., Chairman,

L. Dennis Martire, Member, and Edward G. Feehan, Member, this seventeenth day of September, 2002. 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

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AFFIDAVIT OF COMPLIANCE

The Palmerton Area School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has sustained the two grievances filed on May 22, 2000 and has granted the relief requested therein; that it has posted the Proposed Decision and Order as directed therein; that it has posted the Final Order in the same manner; and that it has served a copy of this affidavit on the Association at its principal place of business.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public