COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 764	:	
	:	
v.	:	Case No. PERA-C-02-622-E
	:	
MILTON BOROUGH	:	
MILTON REGIONAL SEWER AUTHORITY	:	

FINAL ORDER

Teamsters, Local 764 (Teamsters) and the Milton Regional Sewer Authority (Authority) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) of June 26, 2003. On July 11, 2003, the Authority filed exceptions to the hearing examiner's determination that it violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA), and the Teamsters filed exceptions on July 14, 2003, to the hearing examiner's determination that the Authority was not the "alter ego" of Milton Borough (Borough). Following the grant of an extension of time, the Teamsters timely filed a brief in support of its exceptions and in opposition to the Authority's exceptions on August 14, 2003. The Authority filed a brief in response to the Teamsters' brief in support of exceptions on September 5, 2003. After a thorough review of the record, the Board makes the following:

ADDITIONAL FINDING OF FACT

18. In December 2002, the Authority issued its employe handbook setting forth the initial terms and conditions of employment.

DISCUSSION

Based upon the stipulated facts submitted at the hearing on April 30, 2003, the hearing examiner dismissed the refusal to bargain charge filed against the Borough. However, the hearing examiner concluded that it was the Authority, as the successor employer of the Milton Waste Water Treatment Plant, that violated Section 1201(a)(1) and (5) of PERA by refusing to recognize and bargain with the Teamsters.[1] Initially, we

[1] The Authority raises in its exceptions that private sector federal labor policy of "alter ego" and "successor employer" status is inapplicable and inconsistent with the public labor laws under PERA and the Pennsylvania Labor Relations Act. However, it has been acknowledged by the Pennsylvania Supreme Court that where the policies are similar, the Board may look to the federal labor laws as guidance in determining labor policy in Pennsylvania. Pennsylvania Labor Relations Board v. Altoona Area School District, 480 Pa. 148, 389 A.2d 553 (1978). The Board and the courts have recognized that the policies underlying "alter ego" and "successor employer" status in the private sector are applicable for public labor relations in Pennsylvania. See, Lycoming County v. Pennsylvania Labor Relations Board, 480 A.2d 1310 (Pa. Cmwlth. 1984); District 1199P, Service Employees International Union,

will address the Teamsters' argument that the Authority is the "alter ego" of the Borough, then address the issue of any successor employer relationship between the Authority and the Borough, and lastly address the Teamsters' assertion of direct dealing in the context of a successor employer's ability to unilaterally implement initial terms and conditions of employment.

The Teamsters contend in their exceptions that not only was the Authority required to recognize the Teamsters as the representative of its employes, but it was also the alter ego of the Borough in operation of the Waste Water Treatment Plant and thus was bound by the terms of the collective bargaining agreement then in effect for the wall-to-wall unit of the Borough's non-professional employes. Generally, an alter ego status exists where there is a mere technical change to the employing entity, without any substantial change in ownership or control. As such, it is recognized that an alter ego is bound to the terms of the existing collective bargaining agreement, and not merely a duty to negotiate. Stardyne, Inc. v. NLRB, 41 F.3d 141 (3rd Cir. 1994).

The factors to consider in determining alter ago status are whether the two employers have "'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." Id. at 146 (quoting Crawford Door Sales Co., 226 NLRB 1144 (1976)). An additional factor to consider is whether the purpose of the creation of the alter ego was to evade application of the labor laws. Id. at 147. No one factor is dispositive, and the determination must be based on the totality of the circumstances. Id. at 146.

Because the determination of alter ego status is a totality of the circumstances analysis, establishing an actual common ownership over the two entities is not an absolute requirement. Nevertheless, to support an alter ego relationship, at a minimum, it must be shown that there is a continuation of control and management over the new entity. NLRB v. Omnitest Inspections Services, Inc., 937 F.2d 112 (3rd Cir. 1991). Although members of the governing board of the Authority are selected by the participating municipalities, and even though five of the eight members are appointed by the Borough, the board is a separate and independent body, governing the operation and management of a regional authority that transcends the Borough. See, Municipality Authorities Act, Act of June 19, 2001, P.L. 287, No. 22, as amended, 53 Pa. C.S.A. §5610. The Pennsylvania Supreme Court has recognized "the fundamental nature of an Authority as a corporate agency of the state, … not the child of a municipality…." Simon Appeal, 408 Pa. 464, 184 A.2d 695, 698 (1962). Given this pronouncement of the governance of a municipal authority, we cannot say that the Borough is continuing to exercise substantially identical management and control over the Authority.

Moreover, we recognize that the Borough entered into an agreement with neighboring municipalities to establish a sewage treatment regional authority servicing multiple municipalities, where previously the Borough operated a sewage treatment plant serving Borough residents. The agreement creating the Authority (entered into by four

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AFL-CIO, CLC v. Pennsylvania State University, 32 PPER ¶ 32162 (Final Order, 2001).

municipalities and two authorities) acknowledged the need for public sewage availability and treatment as the region around the Borough develops. This regional arrangement is not the equivalent of the Borough establishing its own sewer authority to continue to operate a wastewater treatment plant only for the Borough. Because the scope of the mission of the enterprise has changed to meet the needs of the region and not merely the Borough, there is sufficient change in the ownership and control of the enterprise so as not to constitute an alter ego relationship between the Borough and the Authority.

Furthermore, upon review of the record, there is no substantial evidence to support a reasonable inference that the purpose behind the Borough in joining the Authority was to avoid its collective bargaining obligations. See Fugazy Continental Corporation, 265 NLRB 1301 (1983). Accordingly, based on the record before us, there is not substantial evidence to support a conclusion that, under the totality of the circumstances, the Authority is merely an alter ego of the Borough, and therefore, the Teamsters' exceptions must be dismissed.

Turning to the Authority's exceptions, we find that the Authority is clearly a successor to the Borough's operation of the Milton Waste Water Treatment Plant. As correctly noted by the hearing examiner, the United States Supreme Court stated in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), that the focus in finding a successor relationship is on whether the new employer has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operation." (quoting Golden State Bottling Company v. NLRB, 414 U.S. 168, 184 (1973)). The factors to consider are (1) whether the business of both employers is essentially the same; (2) whether the employes of the new employer are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new employer utilizes the same processes, produces the same products or services, and basically has the same body of customers. Fall River Dyeing & Finishing Corp., 482 U.S. at 43. The stipulated facts support that the business of the Authority is the same as that of the Borough's Waste Water Treatment Plant, that the same employes are doing the same waste water treatment work, using the same equipment and facilities under the same supervision, and that the Authority serves essentially the same customers. Accordingly, the Authority is a successor employer to the Borough.

Attendant to its status as a successor employer, upon hiring a substantial and representative complement of its employes from the ranks of the predecessor's bargaining unit, a successor employer is obligated to bargain with the union that represented a majority of the employes of the predecessor. Fall River Dyeing & Finishing Corp., 482 U.S. at 52. The Authority argues, however, that it should not be compelled, as a successor employer, to bargain with the representative of the Borough's employes, since it had hired a minority of the employes from a wall-to-wall bargaining unit consisting of all non-professional Borough employes. In addition, since the Milton Waste Water Treatment Plant employes comprised only a minority of the wall-to-wall unit certified in 1979, the Authority contends that it cannot now be assured that a majority of its employes desire to continue to be represented by the Teamsters.

However, the National Labor Relations Board has held that

> It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union represented operation is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation.

The Bronx Health Plan, 326 NLRB 810, 812 (1998), affirmed, 203 F.3d 51 (D.C. Cir. 1999). Thus, there is a recognized presumption that the desire for continued union representation remains unchanged with the transfer to a successor employer. That presumption however may be defeated by a showing that it is reasonable to assume that, as a result of transitional changes, the employes' desires concerning unionization have changed. Id. In determining whether the employes' desires may have been affected, consideration must be given to any effects of a long hiatus in the resumption of operations, a change in product line or market, a change in location, or an extreme change in the scale of operations. Id.[2]

Here, the Authority has failed to establish any factor which would defeat the presumption that the employes of the Borough's Waste Water Treatment Plant desire to continue to be represented by the Teamsters. The unit as transferred to the Authority is appropriate and the transferred employes are virtually all of the employes of the Authority.[3] There was no hiatus in operations in the transfer from the Borough's Waste Water Treatment Plant to the Authority. The services provided by the Authority are the same as those provided by the Waste Water Treatment Plant, and the Authority is even using the same facilities as the Borough had used. Further, there has been no substantial change to the scale of the operation. In addition, the public policies and purposes behind establishing a regional sewer authority would not have a material effect on terms and conditions of employment for employes previously working in The Borough's Waste Water Treatment Plant. Finally, there is no evidence of a petition filed by the employes challenging the Teamsters' representation. Accordingly, the Authority was obligated to bargain with the Teamsters as the

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[2] The Board notes, however, that for purposes of public sector labor laws these factors are not all-inclusive, and we recognize that under PERA, the "employes' desires" can and should normally be gauged by actions of the employes in the bargaining unit through the filing of a rival union petition or a petition to decertify, and not through the self-serving actions of the employer by refusing to bargain.

[3] The Authority notes that in 1979 when the Teamsters were certified the Borough's Waste Water Treatment Plant employes represented a minority of the employes, and thus it is not reasonable to presume that the Waste Water Treatment Plant employes continue a desire to be represented. We note however from the record on In the Matter of the Employes of Milton Borough, Case No. PERA-R-12,979-C, that of the valid ballots cast, twenty-four votes were for representation by the Teamsters, and only six votes were cast for no representative. Thus, of the valid votes cast in the election, the Teamsters enjoyed eighty percent support of the bargaining unit.

representative of the employes, and as such we shall dismiss the Authority's exceptions to the hearing examiner's finding of a violation of Section 1201(a)(1) and (5) of PERA.

The Teamsters' further argue that the hearing examiner erred in failing to conclude that the Authority violated Section 1201(a)(5) by "dealing directly" with the employes by unilaterally issuing an employe handbook concerning terms and conditions of employment under which it would hire the Borough's Waste Water Treatment Plant employes. Generally, under federal private sector labor law a successor employer is free to set the initial terms of hire. Eg. Fall River Dyeing & Finishing Corp., 482 U.S. at 40. There is an exception found in the private sector that where the successor employer expresses intent to retain the incumbent workforce and leads those employes to believe that they are being retained under identical terms and conditions of employment. See NLRB v. World Evangelism, Inc., 656 F.2d 1349 (9th Cir. 1981); Spruce Up Corp, 209 NLRB 194 (1974). We agree that such an exception would be equally applicable under PERA.

In addition, however, we believe that under public labor laws the circumstances may warrant that a successor employer maintain the *status quo* of the terms and conditions of employment in order to effectuate the policies of PERA. The Board and the courts have recognized that the stated policy underlying PERA is to promote orderly and constructive employment relations, minimize unresolved disputes and promote the public health, safety and welfare. Thus, the Commonwealth Court in Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 620 A.2d 594 (Pa. Cmwlth. 1993) held that the *status quo* of an expired contract must be maintained during negotiations for a successor agreement so long as the employes are not on strike. Similarly, the Board has recognized that an employer must maintain the *status quo* as to mandatory bargaining terms during negotiations of an initial contract with a newly certified union. Teamsters Local 429 v. Lebanon County, 30 PPER ¶30002 (Final Order, 1998).

In this regard, we note that where there is merely a transfer of the workforce from one PERA covered employer to a successor PERA covered employer, the policies of PERA would favor the maintenance of the *status quo* until new terms of employment are negotiated. By requiring an entire workforce to undergo unilateral changes to wages, hours and working conditions, simply because they are providing the same public services under a different PERA covered employer, would have a tendency to bring about labor unrest, which is contrary to the policies of our public sector labor laws.

Where there is merely a continuation of services through a transfer in ownership from one public employer to another, maintaining the *status quo* would avoid the potential for unnecessary disruption of the public service. We note however that a successor employer may, on the other hand, be reviving a defunct public service that has been disrupted because the predecessor public employer lawfully ceased performing that service. In such situations, where the predecessor had previously ceased operation of the service, to hinder the new successor employer with employment terms that had become nonexistent by operations of the predecessor "closing its doors", would unduly burden the recommencement of the public services, and would be counter to the policy of encouraging collective bargaining.

Applying these policy concerns, we believe that the facts and circumstances involved in the creation of the Authority is just such a situation where PERA requires the maintenance of the *status quo*. The Authority here employed, without interruption, its entire workforce from the ranks of the employes previously working in the Borough's wastewater treatment facility. Thus, the Authority was aware of its employment needs, and the present "costs" of its chosen labor force. Furthermore, there is no indication in the record that the Borough's alternative to joining the Authority was to cease providing public sewage treatment for its residents. Instead, it was the desire of the agreeing municipalities in creating the Authority to provide and maintain public sewage treatment for existing and developing areas in the region. Moreover, we note that the agreement creating the Authority, as well as the Municipal Authorities Act, provides funding and revenue generating abilities for the start-up and ongoing financial stability of the Authority. As such, the stipulated facts of this case do not support a situation where the Authority is a wholly separate and disinterested entity which is attempting to restart a previously ceased and defunct public service of the Borough.

Under these circumstances, we hold that PERA required the Authority to maintain the *status quo* as to the existing terms and conditions of the employes' employment as they had existed with the Borough.[4] Thus, the Authority was statutorily obligated to bargain with the Teamsters before altering any mandatory terms and conditions of employment, and thus violated Section 1201(a)(1) and (5) by unilaterally issuing the December 2002 employe handbook.

After a thorough review of the exceptions and all matters of record, the Board will dismiss the Authority's exceptions, and sustain in part, and dismiss in part, the exceptions filed by the Teamsters. The relief granted by the hearing examiner on page 9 of the PDO will be amended accordingly.

ORDER

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

HEREBY ORDERS AND DIRECTS

that in addition to the affirmative action necessary to effectuate the policies of PERA set forth in Paragraph 3 of the Proposed Order, the Authority shall

(d) rescind the December 2002 employe handbook, and restore the *status quo ante*.

[4] We recognize that as this area of public sector labor law develops, additional factors may arise for consideration to determine whether the *status quo* should be maintained under the circumstances presented. Suffice it to say, however, where the above factors are present as in this case, a successor employer will be bound to maintain the *status quo* with regard to the terms and conditions of employment as they had existed with the predecessor.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the exceptions filed by the Authority are hereby dismissed, and the exceptions filed by the Teamsters are hereby dismissed in part, and sustained in part. The Proposed Decision and Order of June 26, 2003 be and hereby is made absolute and final as modified herein.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member, and Anne E. Covey, Member, this sixteenth day of December, 2003. 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.

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AFFIDAVIT OF COMPLIANCE

The Milton Regional Sewer Authority 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 rescinded the December 2002 employe handbook and restored the status quo; that it has made a written offer to bargain with the Union; that it has posted a copy of the proposed decision and order as directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me

This _____ day of _____, 200___.

_____
Signature of Notary Public