

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PORT AUTHORITY OF ALLEGHENY COUNTY :
 :
 v. : Case No. PERA-C-02-297-W
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 AMALGAMATED TRANSIT UNION :
 LOCAL #85 :

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 LOCAL #85 AFL-CIO :
 :
 v. : Case No. PERA-C-02-431-W
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 PORT AUTHORITY OF ALLEGHENY COUNTY :

FINAL ORDER

The Amalgamated Transit Union, Local # 85, AFL-CIO (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) from a March 27, 2003 Proposed Decision and Order (PDO). In the PDO, the hearing examiner concluded that the Union violated Section 1201(b)(3) of the Public Employee Relations Act (PERA), and that the Port Authority of Allegheny County (Authority) had not violated Section 1201(a)(1) and (5) of PERA. The Union filed its exceptions and supporting brief on April 15, 2003, and the Authority filed a timely response thereto on May 2, 2003. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

30. By letter dated July 5, 2002, the Authority advised the Union that the parties' agreement had provided that the contract for the supervisors would apply the wages reached for the rank-and-file employees, and thus because the May 8, 2002 award provided for a wage freeze, no COLA was owed the supervisors after that date. (Exhibit E-50).

DISCUSSION

On June 20, 2002, the Authority filed a Charge of Unfair Practices with the Board alleging that the Union violated Section 1201(b)(3) and (5) of PERA by reneging on an agreement for mediation and binding interest arbitration, and by refusing to reduce that agreement to writing.¹ On September 9, 2002, the Union filed a related charge alleging that since May 9, 2002 the Authority was in violation of Section 1201(a)(1) and (5) of PERA by refusing to pay a cost of living adjustment (COLA) following expiration of the parties' prior agreement, thus altering the status quo during contract negotiations

¹ Case No. PERA-C-02-297-W.

and prior to impasse.² The Secretary of the Board issued complaints on both charges, and the matters were consolidated for a hearing to be held October 16, 2002.

The hearing was held as scheduled, at which time both parties had the opportunity to question and cross-examine witnesses and present documentary evidence into the record. Based on the evidence presented the hearing examiner found that the Union represents two bargaining units, one consisting of operators and maintenance employees (rank-and-file unit) and a unit of first-level supervisors (supervisors unit).³ (Finding of Fact No. 3). The most recent contract for the rank-and-file unit expired November 30, 2001, and the supervisors' contract expired December 31, 2001. (Finding of Fact No. 4). For purposes of collective bargaining for successor contracts, on February 19, 2002, the Board appointed John Skonier as the fact-finder for both bargaining units. (Finding of Fact No. 10).

On February 26, 2002, Joseph Pass, Esquire, counsel for the Union, and Bruce Campbell, Esquire, counsel for the Authority, met with Mr. Skonier, and during that meeting discussed, in lieu of fact-finding, proceeding to final offer binding interest arbitration in order to reach collective bargaining agreements for both units, and further agreed that the fact-finder would serve as the mediator and arbitrator. (Finding of Fact No. 11). On March 1, 2002, Mr. Campbell sent a letter to Mr. Pass outlining the procedure discussed on February 26, 2002. (Finding of Fact No. 12). Thereafter, on March 5, 2002, both parties signed the written agreement to proceed with mediation/arbitration for the rank-and-file employees. (Exhibit E-19).⁴

During a telephone conference with the arbitrator on March 6, 2002, Mr. Campbell and Mr. Pass orally agreed to utilize the same procedure to reach a successor agreement for the supervisors unit. That day, Mr. Campbell prepared a written draft of the agreement to proceed to binding interest arbitration for the supervisor unit, and discussed

² Case No. PERA-C-02-431-W.

³ Section 13.2 of the Second Class County Port Authority Act grants collective bargaining rights to first level supervisors. 55 P.S. §563.2(d); Port Authority of Allegheny County v. Local 85, Amalgamated Transit Union, 533 Pa. 135, 620 A.2d 1099 (1993).

⁴ In summary, that process involved the exchange of initial drafts of final complete offers on all unresolved issues, and a meeting to discuss those proposals. If no agreement was reached, the parties would repeat the process, and then meet and bargain through the assistance of a mediator using the final package offers previously exchanged. In the event no agreement was reached through mediation, the parties would then proceed to a hearing before an arbitrator. After the hearing the parties would meet with the arbitrator in an attempt to mediate a collective bargaining contract. If no agreement is reached through this final effort at mediation, then the parties would simultaneously submit final package offers to the arbitrator, who would select one of the proposals, without changes, which would then become the successor collective bargaining agreement for the rank-and-file unit. (Finding of Fact No. 13).

the same with Mr. Pass, who had orally agreed to the process. (Finding of Fact No. 15). The procedures agreed to for the supervisors was essentially the same as that for the rank-and-file unit, and would end with the arbitrator selecting a contract for the supervisors on June 1, 2002. A final draft of the agreement for mediation/arbitration for the supervisors unit was prepared and faxed to Mr. Pass on March 8, 2002. (Finding of Fact No. 15). Per the request of Mr. Pass, Mr. Campbell forwarded another copy of the agreement to him on April 2, 2002. (Finding of Fact No. 16). The agreement, dated and delivered to Mr. Pass on April 2, 2002, was executed by the Union and returned to Mr. Campbell on or about April 8, 2002. (Finding of Fact No. 17).

Because as of April 8, 2002, some of the dates for the preliminary steps set forth in that agreement had since passed, Mr. Campbell sent a letter to Mr. Pass explaining that while the language of the agreement is acceptable to both parties, the dates would need to be changed, and that the parties' representatives would be meeting to discuss later dates for the agreed upon process. (Finding of Fact No. 18). Although the Union had executed the agreement, because the dates were no longer feasible, neither Mr. Campbell, nor the Authority's representative, ever signed the April 2, 2002 agreement.

While this exchange of correspondence was occurring, on March 19, 2002, Mr. Pass wrote Mr. Campbell to inquire why the supervisory employees received a \$.06 per hour COLA reduction in their wages. Because the Authority believed that that quarterly COLA was in accordance with the agreement to proceed to mediation/arbitration, on April 12, 2002, in response to the correspondence regarding the March 2002 COLA issue, Mr. Campbell questioned whether "the Union contends that the parties do not have an understanding to resolve the First Level Supervisors contract through binding arbitration, or does the Union agree that there is an agreement and the parties must reduce it to writing and sign it once the dates are adjusted?" (Finding of Fact No. 20). Mr. Pass responded that same day, stating that "there is no question that the parties have agreed to proceed to mediation/arbitration over the first level supervisors. All that needs to be done is sign that agreement." (Finding of Fact No. 21).

While the COLA debate was occurring among counsel, the parties' representatives met and discussed new dates for the mediation/arbitration process for the supervisor unit. The dates agreed to by the parties started with the exchange of bargaining proposals on May 13, 2002, and ended with the neutral arbitrator's projected acceptance of a final offer on August 1, 2002. At a meeting on May 14, 2002, the Authority and the Union exchanged proposals for the supervisor unit as they had agreed.⁵ Later that month, Mr. Campbell and Mr. Pass exchanged correspondence regarding amending the dates for the occurrence of the succeeding steps in the bargaining process set forth in the parties' agreement. On May 28, 2002, Mr. Campbell proposed revising the dates in the April 2, 2002 agreement to reflect the dates agreed upon by the parties' representative in April, 2002, and in addition proposed additional changes to the dates to conform to the

⁵ Mr. Campbell believed the representatives met on May 15, 2002, however the testimony revealed that the parties actually met May 14, 2002.

meeting that already took place and make performance of the remaining steps more feasible. (Finding of Fact No. 27).

Consistent with the dates agreed upon in April 2002, the parties' representatives met on June 4 and June 5, 2002 to bargain the proposals they exchanged on May 14, 2002. A subsequent exchange of offers was scheduled, however when the time arose the Union advised the Authority that it would not proceed with the mediation/arbitration process because it was appealing the award for the rank-and-file unit. (Finding of Fact No. 28).

In June 2002, the Authority did not provide a COLA wage increase to the supervisor unit. (Finding of Fact No. 29). In a letter of July 5, 2002, the Authority advised the Union that pursuant to their agreement to apply the wages reached for the rank-and-file employees to the supervisors, no COLA increase was owed to the supervisors since the May 8, 2002 award for the rank-and-file unit provided for a wage and COLA freeze. (Finding of Fact 30).

The hearing examiner concluded that the Union had not violated Section 1201(b)(5) of PERA by refusing to sign the May 28, 2002 agreement to proceed to mediation/arbitration. In so finding, the hearing examiner noted that the dates affixed by Mr. Campbell in that agreement differed from those agreed to by the parties' representatives, and therefore the Union could not be compelled by the Board to execute that agreement. The Authority has not excepted to that determination.

The hearing examiner determined, however, that the Union had violated Section 1201(b)(3) of PERA. The hearing examiner noted that the Union had agreed to the process of mediation and binding final offer interest arbitration by signing the April 2, 2002 agreement to do so, and returning the executed agreement to Mr. Campbell. The hearing examiner further noted that the parties agreed to alter the dates in order to comply with that agreement, and had commenced to perform under the agreement. Accordingly, the hearing examiner concluded that the Union did not bargain in good faith when it ceased to operate under that agreement for the supervisors following the award for the rank-and-file unit.

With regard to the Union's charge against the Authority, the hearing examiner found no violation of Section 1201(a)(1) or (5) of PERA. The hearing examiner determined that the Authority had an agreement to proceed to arbitration for the supervisor unit and that the parties' agreement provided that the wages finalized for the rank-and-file unit were also applicable to the supervisors. Accordingly, the hearing examiner dismissed the Union's charge of unfair practices.

In its exceptions, the Union argues that the hearing examiner erred in finding that it had an agreement with the Authority to proceed to mediation and binding final offer arbitration for the supervisor unit. The Union argues that while it had agreed to the April 2, 2002 procedures for mediation and arbitration, the Authority refused to sign that agreement over a disagreement about the dates. The Union further contends that there was no agreement to proceed under the dates set forth in Mr. Campbell's letter of May 28, 2002, since the parties had

not settled on new dates for a revised schedule, and further that Mr. Campbell's May 28, 2002 draft was a mere proposal.

It is well recognized that the Board will not compel a party, under pains of a violation of Section 1201(a)(6) or 1201(b)(5), to sign a collective bargaining agreement that does not fully recognize the entire agreement of the parties. Pennsylvania Labor Relations Board v. William E. Lickert, Drivers and Dairy Employees, Local Union No. 205, 4 PPER 52 (Nisi Decision and Order, 1974). These clauses, however are inapplicable here where the parties' agreement in question was not a complete collective bargaining agreement resolving a bargaining impasse, but rather was an agreement to utilize certain procedures to ultimately arrive at a complete collective bargaining agreement.

Even if Section 1201(b)(5) were applicable to the parties' agreement here, we would agree with the hearing examiner's conclusion that there was not a complete agreement to proceed under the terms as set forth in Mr. Campbell's proposal on May 28, 2002. The hearing examiner found that

The Authority's charge under Section 1201(b)(5) of PERA apparently concerns the Union's failure to execute the written agreement which Attorney Campbell enclosed with his May 28, 2002 letter to Attorney Pass (FF 27). However, this document was not entirely consistent with the amended time-table that was agreed to by the parties' representatives (FF 22). Thus, the Union did not have a duty to execute the agreement which Attorney Campbell forwarded on May 28 and the Authority's charge under Section 1201(b)(5) of PERA must be dismissed.

(PDO pg. 15). As such, the hearing examiner did not err in finding no violation of Section 1201(b)(5) and refusing to bind the Union to the terms of the May 28, 2002 draft agreement.⁶

Although there is no violation of Section 1201(b)(5), what the hearing examiner did find was that the Union violated Section 1201(b)(3) by failing to bargain in good faith, when it refused to follow through on the agreement to proceed with mediation/arbitration that it had executed on April 2, 2002, and as revised by the parties' agreed upon schedule in April 2002. The Union attempts to argue that there was never an agreement to proceed with arbitration for the supervisor unit because the date of June 1, 2002, when the arbitration would be finalized was a material term, and that there was no agreement of the parties to revise that date.

The Union's argument turns on the hearing examiner's credibility determination, which the Board will not disturb absent compelling circumstances. E.g. Waynesboro Education Association v. Waynesboro Area School District, 25 PPER ¶25118 (Final Order, 1994). In rendering his

⁶ We note that in remedying the Union's unfair practice under Section 1201(b)(3) of PERA, the hearing examiner did not bind the Union to any set schedule, but directed the Union to propose a schedule to effectuate the agreed upon mediation/arbitration process.

findings on whether the parties agreed to revise the dates in the April 2, 2002 agreement, the hearing examiner noted that

[although the Union claims that the parties never reached agreement on new dates for the contract resolution process for the first level supervisors, I have found that representatives of the parties did agree on new dates, consistent with the testimony of Larry Lutheran, who is the Authority's director of employe relations (FF 22). In the testimony that is cited in support of Finding of Fact 22, Lutheran testified that he discussed new dates with Union President Joseph Hutzler, that he reached agreement with Hutzler on new dates subject to Hutzler's review of those dates with Union Attorney Pass, and that Hutzler subsequently informed him that the dates were acceptable to the Union. In making this finding, I have credited Lutheran's testimony over that of Hutzler, who was less certain in his testimony and candidly admitted that he did not recall many of the details of the relevant events.

(PDO at 14).

The Union claims that the hearing examiner's finding that the parties agreed to the revised dates is in error because Mr. Hutzler testified that he did not recall telling Mr. Luther that those dates were acceptable. However, contradictory testimony in the record is not compelling circumstances warranting the reversal of credibility findings. York City Employees Union v. City of York, 20 PPER ¶29235 (Final Order, 1998). Here there is ample credible testimony from Mr. Lutheran to support the hearing examiner's finding that the parties had agreed to revised dates to proceed with the mediation/interest arbitration, including altering the date for final contract selection by the arbitrator from June 1, 2002 to August 1, 2002.

Furthermore, the Union argues that nonetheless, there is no binding contractual agreement to proceed to mediation and interest arbitration because the April 2, 2002 agreement was never signed and agreed to by the Authority. We note that the Union's argument misses the point of the unfair practice charged. The question for purposes of the alleged Section 1201(b)(3) unfair practice is not whether there was a legally enforceable written contract, but whether the Union failed to bargain in good faith with the employer. As noted by the Commonwealth Court in Athens Area School District v. Pennsylvania Labor Relations Board, 760 A.2d 917, 920 (Pa. Cmwlth. 2000)

We do not disagree with the trial court that applying principles of contract law to this matter yields the conclusion that no *binding contract* came into being as a result of this sequence of events. However, this does not necessarily mean that since there was no contract enforceable at law, no violation of Section 1201(a)(6) could occur. It must be remembered that this is not a civil contract action, but a charge of unfair labor practice. In this regard we believe both the School District and the trial court read Section 1201(a)(6) too narrowly. If Section 1201(a)(6) proscribed no more than refusal to formalize a CBA which was already binding and enforceable

as a matter of law, it would be of little significance. We believe, rather, that the provision was intended to prevent precisely what occurred here--an act of bad faith which derails an agreement in the finalization stage, just as Section 1201(a)(5) proscribes an act of bad faith in the bargaining stage. It is of no consequence to the bad faith issue whether the agreement has at the time become a binding contract. Indeed, we believe this is the teaching of [St. Clair Area School District v. Pennsylvania Labor Relations Board, 552 A.2d 1133 (Pa. Cmwlth. 1988)](holding that district was not exercising good faith in its negotiations where a majority of the school board approved the agreement and subsequently changed their vote at a public meeting)].

Thus, the question for the alleged Section 1201(b)(3) violation before the hearing examiner was whether under the totality of the circumstances it was reasonable to conclude that the Union never intended to achieve an agreement, demonstrated unreasonableness, or displayed a single-minded purpose to thwart the public policy. See Pennsylvania Labor Relations Board v. Homer-Center School District, 12 PPER ¶12169 (Final Order, 1981). In this regard, the hearing examiner noted that

Although both parties never executed a written document which memorialized their agreement to resolve the supervisors' contract, the absence of such a written agreement did not relieve the Union of its duty to comply with the terms to which it had agreed with its collective bargaining counterpart. Donora Borough, 29 PPER ¶ 29069 (Proposed Decision and Order, 1998) (agreement between employer and employe bargaining representative was binding even though it was not reduced to writing). By reneging on its agreement for the supervisory unit due to its dissatisfaction with the arbitrator's award for the rank-and-file unit (FF 28), the Union violated its duty to bargain in good faith. Id. See also Edwardsville Borough, 27 PPER ¶ 27014 (Proposed Decision and Order, 1995)(employer engaged in bad faith bargaining by attempting to renege on agreement due to change of mind regarding terms agreed to).

(PDO at 15).

We agree with the hearing examiner's finding that under the totality of the circumstances the Union did not exercise good faith in its negotiations with the Authority for a successor collective bargaining agreement for the supervisors unit. The record is replete with references from the Union that it had, in fact, agreed with the Authority to a bargaining process for the supervisors unit including mediation and culminating in the binding final offer arbitration.

The Union executed an agreement for mediation/arbitration for the supervisors unit on April 2, 2002, forwarded that agreement to Mr. Campbell on April 8, 2002, and subsequently reiterated its intent to proceed with that process in discussions and letters from Mr. Pass to

Mr. Campbell. Specifically, by letter dated April 12, 2002, Mr. Pass stated "there is no question that the parties have agreed to proceed to mediation/arbitration over the first level supervisors." (Finding of Fact No. 21). In addition, on May 14, 2003 the parties exchanged proposals and on June 4 and 5, 2003 the representative met to discuss those proposals in accordance with their agreement to proceed with the mediation/arbitration for the supervisor unit. We believe this is substantial evidence supporting the hearing examiner's determination that the Union in fact agreed to a collective bargaining process of mediation/arbitration for the supervisors unit.

The Union's subsequent refusal to follow through with that agreement, because it was dissatisfied with the outcome for the rank-and-file unit under that same process, is unreasonable and lacking in good faith. Accordingly, the hearing examiner did not err in concluding that the Union did not bargain with the Authority in good faith and violated Section 1201(b)(3) of PERA when it refused to proceed with the mediation/arbitration process for the supervisor unit.

The Union next argues that the hearing examiner erred in finding that it could agree to an interest arbitration process that violated the Second Class County Port Authority Act.⁷ Section 13.2 of the Second Class County Port Authority Act provides, in relevant part, that

In the case of any labor dispute where collective bargaining does not result in an agreement, the dispute, with the written consent of both parties, shall be submitted to final and binding interest arbitration. The board of arbitration shall be composed of three persons, one appointed by the authority, one appointed by the labor organization representing the employes and a third member to be agreed upon by the labor organization and the authority.

55 P.S. §563.2(f). The Union argues that under Section 13.2 of that act it could not have agreed to binding final offer interest arbitration before a single arbitrator.

Specifically, Section 13.2(f) provides that where collective bargaining does not result in an agreement the parties may agree to tripartite interest arbitration. There is nothing in the Second Class County Port Authority Act that would preclude a union and employer from entering into an alternative arrangement, such as accomplished here, governing the manner and process in which the parties desired to collectively bargain. Only if that agreed upon process failed to result

⁷ The Authority argues that this issue has been waived. An issue is waived when it is raised for the first time in exceptions. Bucks County Schools, Intermediate Unit No. 22 v. Pennsylvania Labor Relations Board, 466 A.2d 262 (Pa. Cmwlth. 1983). Here, albeit belatedly, the issue of the legality of the agreement was raised in post-hearing submissions to the hearing examiner and adequately addressed in the PDO. Accordingly, the issue has been preserved for review on exceptions.

in a collective bargaining agreement, the parties may consent in writing to the procedures outlined in Section 13.2(f).⁸

As noted above, the parties agreed to a collective bargaining process that involved the exchange of proposals, bargaining, mediation then binding final offer arbitration. The agreed upon process was ultimately designed to reach a final collective bargaining agreement, and therefore, Section 13.2(f) of the Second Class County Port Authority Act, which authorizes an elective form of consensual arbitration, would not have been applicable.

Even if there is an agreement for mediation/arbitration, as found above, the Union contends that the hearing examiner erred in finding that the Authority had a sound arguable basis in that agreement for believing that the wage freeze imposed on the rank-and-file unit was also applicable to the supervisor unit.⁹ The Authority argued before the hearing examiner that the agreement to proceed to binding final offer arbitration for the supervisor unit provided that the supervisors would receive the same wage benefits that were received by the rank-and-file unit. Thus, because the May 8, 2002 award for the rank-and-file unit provided for a wage freeze, no COLA was owed to the supervisors in June 2002.

Upon review of the April 2, 2002 agreement to proceed to mediation/arbitration for the supervisor unit, there was, in fact, an agreement that the wages imposed on the rank-and-file unit were effective for the supervisors unit. Specifically, Paragraph 5 of the agreement states, in relevant part:

The term of the new agreement shall be from 12:01 a.m. January 1, 2002 to midnight July 31, 2005. The agreements on health insurance, wages and pensions reached through bargaining or an arbitration award for the unit of Operators, Mechanics, Secretaries and Others shall be adopted by the parties and incorporated into the parties' agreement reached through the process outlined in this Agreement.

(Finding of Fact No. 15).

⁸ We note that the Second Class County Port Authority Act does not make interest arbitration mandatory. Only, where the employer seeks court intervention to enjoin a strike, must a court impose interest arbitration as a condition of enjoining the strike. 55 P.S. §563.2(k). Otherwise arbitration under the statute is discretionary, requiring written approval of both parties.

⁹ "Sound arguable basis" is usually a defense to a charge of refusing to bargain a change to an existing collective bargaining agreement. Here, however it has been applied by the hearing examiner to support dismissal of a charge based not on an existing collective bargaining agreement but rather an agreement to resolve an impasse. Because we find that the impasse resolution agreement definitively resolved the COLA issue by freezing wages consistent with the rank-and-file award, we need not reach the issue of whether a sound arguable basis defense applies to agreements short of a full collective bargaining agreement.

The arbitrator's award for the rank-and-file unit issued May 8, 2002 provided for a prospective wage freeze. By its terms, Paragraph 5 incorporates that freeze into the supervisors' successor contract by providing that the rank-and-file wages shall be adopted by the parties. Although no successor collective bargaining agreement has been finalized with regard to the supervisor unit, the terms of the new collective bargaining agreement with regard to wages had already been established by the agreement to proceed with the arbitration/mediation process for the remaining unresolved issues. Regardless of when the successor agreement for the supervisors' unit comes into being, pursuant to Paragraph 5, its terms must provide for the agreed upon wage freeze effective May 8, 2002. Because, as noted above, the parties had mutually agreed to this provision, no unilateral change occurred when the Authority applied the wage freeze and did not apply the COLA of the then expired, and superseded, agreement to the supervisors' wages after May 8, 2002.

Finally, the Union argues that the hearing examiner erred in determining that the Authority was not refusing to proceed to fact-finding as required by law. On February 19, 2002, the Board had appointed Mr. Skonier as the fact-finder for the supervisors unit. However, the parties met with Mr. Skonier, and reached an agreement to terminate fact-finding and proceed with mediation/arbitration pursuant to their arrangement. As such, there is no basis for finding that the Authority had refused to proceed with statutory fact-finding, and therefore the hearing examiner did not err in dismissing this charge.

After a thorough review of the exceptions, and all matters of record, we sustain the hearing examiner's conclusion that the Union violated Section 1201(b)(3) and that the Authority did not violate Section 1201(a)(1) or (5) of PERA. Accordingly, the Union's exceptions are dismissed, and the PDO of March 27, 2003, as amended herein, is made 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 by the Amalgamated Transit Union, Local #85 are hereby dismissed, and the Proposed Decision and Order of March 27, 2003, as amended herein, 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, L. Dennis Martire, Member, and Anne E. Covey, Member, this nineteenth day of August, 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.

