COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMALGAMATED TRANSIT UNION	:	
LOCAL #85	:	
v.	:	Case No. PERA-C-02-401-W
	:	
PORT AUTHORITY OF ALLEGHENY COUNTY	:	

FINAL ORDER

On June 3, 2003, the Amalgamated Transit Union, Local No. 85 (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated May 14, 2003. In the PDO, the Hearing Examiner concluded that the Port Authority of Allegheny County (Authority) did not engage in unfair practices in violation of Section 1201(a)(1) or (5) of the Public Employe Relations Act (PERA) by revising a performance code for bargaining unit employes. On June 23, 2003, the Authority filed a reply to exceptions and a supporting brief.

In 1976, the Authority unilaterally implemented a performance code and the Union filed a grievance. The arbitration panel denied the grievance and concluded that the Authority did not violate the parties' collective bargaining agreement. The arbitration panel relied, in part, on Section 105 of that agreement and its bargaining history. Section 105 of the 1973 agreement provided the following:

> "DISCIPLINE
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> The Authority has the right to discipline employees covered by this agreement for sufficient cause under the theory of progressive discipline. Discipline, as used here, includes the making of written record entries as well as suspension or discharge."

(PDO, F.F. 3). Soon after the 1976 arbitration, the Union commenced an unfair practice proceeding challenging the unilateral implementation of the performance code. The Board dismissed the charge, which was affirmed by the Court of Common Pleas of Allegheny County and the Commonwealth Court. In 1979, 1982 and 1993, the Authority made unilateral revisions to the performance code. The Union did not challenge the 1979 or 1982 revisions, but did challenge the 1993 revisions in a grievance filed over an employe's discharge. The grievance proceeded to arbitration, and the arbitration panel concluded that "[t]he relevant language of Section 105 of the December, 1973 contract is identical to the language of the current Agreement." Based on this language, the arbitration panel held "that the Authority did not violate the collective bargaining agreement by unilaterally implementing a new performance code on February 1, 1993. On May 1, 2002, the Authority again implemented a revision to the performance code, which is the subject of this charge. Although there was some discussion concerning the revision of the code in labor-management meetings, the revised code that was implemented in May 2002 was not collectively bargained. When the Authority unilaterally implemented the revised performance code in May 2002, the parties were operating

under the terms of an expired collective bargaining agreement (CBA) that had taken effect on December 1, 1997. Section 105 of the CBA contains the identical language that it contained in the 1973 and subsequent contracts.

Initially, the Union has submitted a request for oral argument before the Board. In support of its request, the Union asserts that oral argument is necessary to urge the Board not to rely on the earlier unfair practice claim because there have been changes in the precedent and the parties' agreement in the intervening 25 years. The Union argues that the Board's view regarding mandatory bargaining subjects has evolved during that period of time and to rely on the earlier decision would permit the Authority to change mandatory subjects of bargaining on a continuous and unilateral basis. However, the issues presented here are routine bargaining issues and do not require further development by way of oral argument. Accordingly, the Union's request for oral argument is denied.

In its exceptions, the Union claims that "the Examiner erroneously concluded in Finding of Fact No. 6 that the collective bargaining agreement in effect in May 2002 is identical to the language found in the collective bargaining agreement in 1976, which originally determined that the Authority had the right to unilaterally implement a discipline code." (Union Exceptions ¶ 1). Findings of fact must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942); State System of Higher Education v. PLRB, 737 A.2d 313, 315, n.6 (Pa. Cmwlth. 1999); Teamsters Local 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997). Substantial evidence is "`relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Kaufman, supra (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)).

Contrary to the Union's assertion, Finding of Fact No. 6 does not state that the language from the two agreements is identical. Rather the finding provides that the language in Section 105 of the new agreement contains the same language as Section 105 of the old agreement. This Finding provides the following:

> When the Authority unilaterally implemented the revised performance code in May 2002, the parties were operating under the terms of an expired CBA that had taken effect on December 1, 1997. Section 105 of that CBA contained the same language that is quoted above in Finding of Fact No. 3. (N.T. 9-10, 46-48; Union Exhibit 6).

(PDO at 2). The language quoted in Finding of Fact No. 3 is the language from Section 105 of the 1973 agreement in effect in 1976. A comparison of Section 105 from the old agreement with Section 105 of the CBA indeed reveals that "Section 105 of [the 1973 agreement] contained the same language." Section 105 in the CBA not only contains additional provisions that address disciplinary hearings and drug and alcohol programs and contemplate the negotiation of future drug testing procedures, but also contains, as the Examiner stated in Finding No. 6, the identical language from Section 105 of the 1973 agreement.

Accordingly, the portions of the record cited by the Examiner in support of Finding of Fact No. 6 provide substantial evidence to support the finding, which we will not disturb.

The Union next argues that "the Examiner erroneously concluded in Findings of Fact Nos. 4 and 6 that Section 105, standing alone, authorized the employer to unilaterally implement a performance code." A review of Finding Nos. 4 and 6, however, reveals that those findings, either individually or collectively, do not conclude or state that Section 105 standing alone authorized the employer to unilaterally implement a performance code. Finding of Fact No. 4 provides, in relevant part, the following

> 4. In 1979, 1982 and 1993, the Authority made unilateral revisions to the performance code. The Union did not challenge the 1979 or 1982 revisions, but did challenge the 1993 revisions in a grievance filed over an employe's discharge. The grievance proceeded to arbitration and the arbitration panel found that "[t]he relevant language of Section 105 of the December, 1973 contract is identical to the language of the current Agreement." Based on this language, the arbitration panel held "that the Authority did not violate the Collective Bargaining Agreement by unilaterally implementing the new Performance Code on February 1, 1993. This finding does not constrain the Union from raising objections through the grievance procedure concerning the reasonableness of specific provisions of the Code, or from asserting that the application of the Code in individual instances is unreasonable or in violation of the Collective Bargaining Agreement." (N.T. 30-32; Employer Exhibit 3)

(PDO at 1-2). Nowhere in finding of Fact 4 or 6 does it state that Section 105 "standing alone authorized" the employer's action. What Finding of Fact No. 4 provides is that, for the arbitration of the grievance based on the 1993 revision, not the 1976 implementation, the arbitrator concluded that, based on the inclusion of Section 105 to the then governing contract, the arbitrator concluded that the authority did not violate the collective bargaining agreement. The Examiner's reference to the arbitration of the 1993 revision to the disciplinary code does not constitute his determination that Section 105 "authorized" the Authority's code revision here. Furthermore, a review of the cited record references reveals that the 1995 arbitration award referred to in Finding of Fact No. 4 does indeed rely solely on Section 105 and the fact that its language is identical between the 1973 contract and the contract being interpreted for the conclusion that the Authority did not violate the collective bargaining agreement in revising the performance code in 1993.[1] Accordingly, Finding of Fact No. 4 is also supported by substantial evidence of record.

The Union also contends that the Examiner erred in failing to find that the parties' collective bargaining agreement had changed since the 1973 agreement thereby eliminating the support for the prior

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[1] The arbitration panel also concluded that the Union's claim, that the Authority violated the contract by revising the performance code, was untimely because it was not grieved within the 30-day limitations period established in the contract.

arbitration award and the sanctioning of that award by this Board and the Commonwealth Court in PLRB v. Port Authority of Allegheny County, 8 PPER ¶ 172 (Final Order, 1977), aff'd sub nom., 10 PPER ¶ 10250 (Court of Common Pleas of Allegheny County, 1979), aff'd, 433 A.2d 578 (Pa. Cmwlth. 1981), which was relied upon by the Examiner in his PDO. Therefore, argues the Union, the Port Authority decision should not control this case.

First, the Examiner was 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). Whether the contract as a whole changed during the past 25 years of bargaining is not relevant to the fact that Section 105, the language relied upon, remained the same during that time period. Whatever happened to other contractual provisions is not necessary to support the examiner's conclusion that, because Section 105 of the contract contained the same dispositive language as it did in the 1973 contract, the Authority did not engage in unfair practices by unilaterally revising the performance code under the Board's and the Commonwealth Court's decision in Port Authority, which relied on the identical language from that Section.

Also, the Union incorrectly argues that the Board and the Court's prior decision relied on or deferred to an arbitration award. From this premise, the Union claims that the Board has separate jurisdiction to address the unfair practice nature of the Union's claim and that this case is distinguishable from Port Authority, supra, because there is no arbitration award here to which the Board may defer. Contrary to the Union's argument, the Board indeed has exercised its statutory jurisdiction here and did so in Port Authority. The Union has overlooked the explicit pronouncement by the Commonwealth Court in Port Authority previously dismissing this very same argument. The Port Authority Court stated following:

> We must, at the outset, disagree with the Union's characterization of the Board's decision as a "deferral" to the arbitration award. . . . the final order makes it clear that the Board specifically adjudicated the unfair labor practice charge by determining that the negotiated contractual provision authorized the Authority's implementation of a disciplinary code. The Board merely declined to relitigate the contract interpretation issues raised before the arbitrator, and it is only in this narrow sense that the Board "deferred" to the award.

Port Authority, 433 A.2d at 580 (emphasis original). Accordingly, the Commonwealth Court determined that the Board did not base its decision, that the contract provisions demonstrated that the parties negotiated the Authority's right to develop a discipline code, on the arbitration award. Rather the Board refused to engage in contract interpretation, which it recognized was properly before the arbitrator. This refusal did not constitute an adoption of or "deferral" to the arbitration award. The Commonwealth Court has already dismissed the Union's argument that the Board deferred to the arbitrator and neglected to

decide the statutory cause of action. Port Authority, supra. Accordingly, having resolved the statutory unfair practice claim in Port Authority, that case is not distinguishable from the Examiner's disposition of the Union's statutory unfair practice claim here.

Also, the Union contends that the original 1976 award relied on both Section 105 and Section 305 LL, the latter of which was removed from the contract. However, this argument again misses the point. As stated above, in Port Authority, neither the Board nor the Court relied on any of the arbitration awards referenced by the Union. The Port Authority Board did not expressly rely upon Section 305LL and stated rather that "[t]he record reveals that the issue of discipline has been negotiated and incorporated in the contract and the negotiated contractual provision authorized the Respondent's draft of a discipline code." Port Authority, 8 PPER at 173. It was the Union's position in Port Authority, supra, that the Board interpret Sections 105 and 305LL, which position was rejected by the Board and affirmed by the Commonwealth and Common Pleas courts. Moreover, the hearing examiner in that case expressly discounted the applicability of Section 305LL, for purposes of resolving the unfair practice charge. Section 305LL was limited to recording charges involving accident reports without mentioning discipline, whereas Section 105 applied to all employes in the unit and expressly pertained to the imposition of progressive discipline. Port Authority, 8 PPER at 60. Accordingly, the basis for the arbitration awards mentioned and contained in the record in this case were not the basis for the Port Authority case nor were they the basis for the Examiner's decision in this case. The fate of Section 305LL is not a relevant factor because that Section was expressly discounted in Port Authority.

The Union correctly notes in its exceptions and brief that it is the Board's role to determine if the employer has satisfied its statutory collective bargaining duty and not to interpret the parties' agreement. To that end and routinely in cases of this nature, the Board looks to evidence of bargaining regarding the subject[2] (here, negotiation of a disciplinary code), which may satisfy the employer's bargaining duty. Here, the parties have negotiated the matter and reached agreement as evidenced by Section 105, which the Board and the courts have already determined satisfies the Authority's statutory bargaining obligation. Port Authority, supra. The Commonwealth Court, in affirming the Board's order, aptly noted that the arbitrator found that the revised code was a "mere implementation of Section 105." Having previously determined that the relevant contract language was the parties' agreement for the Authority's prior revision to the code, the Board must reject the Union's same argument to the contrary advanced here.

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[2] The Union argues that the law regarding the negotiability of disciplinary codes has evolved over the years since Port Authority and that disciplinary codes may be negotiable under certain circumstances. While we may not disagree that certain disciplinary matters are negotiable, the crux of our holding here is that the parties have negotiated and agreed and we therefore need not reach the Union's scope of negotiation argument.

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 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 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.