

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NORTH SCHUYLKILL EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION ESPA/PSEA/NEA :
 :
v. : Case No. PERA-C-02-246-E
 :
NORTH SCHUYLKILL SCHOOL DISTRICT :

FINAL ORDER

On April 16, 2003, the North Schuylkill School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated March 27, 2003. In the PDO, the Hearing Examiner concluded that the District engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to implement the terms of a settlement agreement between the District and the North Schuylkill Educational Support Personnel Association (Union) that resolved a prior unfair practice claim assigned Case No. PERA-C-01-410-E. By letter dated April 24, 2003, the Union informed the Board that it would not file a response.¹ After a thorough review of the District's exceptions and all matters of record, the Board makes the following:

AMENDED FINDING OF FACT

15. As of April 11, 2002, the District had not told the subcontractors to cease providing the busing services that the District had been providing with its own bus drivers; it had neither offered to reinstate nor reinstated Andrews, Cantizone, Harner, Krapf and Smith as bus drivers; the District did not negotiate subcontracting or exchange proposals; and the Union had not provided the District with an accounting of any wages earned by Andrews, Cantizone, Harner, Krapf and Smith to replace those that they lost since June 4, 2001, as a result of the District's subcontract of the bus driver work they performed until then. (N.T. 17, 25, 28, 75, 80).

DISCUSSION

The facts, as found by the Examiner and amended herein, are as follows. The District provided bus services with its own bus drivers and three subcontractors, until the 2001-2002 school year, when it began providing bus services with only the three subcontractors. On September 14, 2001, the Union filed a charge alleging that the District committed

¹ Also in its April 24th letter, the Union claimed that the District's exceptions were not timely filed. The Board rejects that claim. The exceptions were due on April 16, 2003. The exceptions were accompanied by a United States Postal Form 3817 that was date stamped April 16, 2003. The Board's regulations provide that "[e]xceptions will be deemed received upon actual receipt or on the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions."

unfair practices within the meaning of Section 1201(a)(5) of the PERA by unilaterally subcontracting its busing services. (Case No. PERA-C-01-410-E). On February 12, 2002, the parties entered into a settlement agreement (Agreement) regarding that charge. The Agreement provided the following: (1) that the District will rescind the subcontracting of bus driver work and reinstate that work to the bargaining unit effective June 4, 2001; (2) that the District will make bus drivers Andrews, Cantizone, Harner, Krapf and Smith whole for any economic losses sustained by them as the result of the subcontract, however, any unemployment compensation they received will be deducted from the back pay due; (3) that the District will bargain with the Union over the subcontract of any bus driver work in the future; and (4) that the Union will withdraw the charge at Case No. PERA-C-01-410-W. Thereafter, Union representative Robert B. Whitehead and the attorney for the District, Mark Semanchik, exchanged information and letters concerning compliance with the Agreement.

On February 13, 2002, Mr. Whitehead requested information pertaining to the subcontracting of bus services to prepare a proposal to retain the bus driving work. On February 28, 2002, Mr. Whitehead requested a meeting to answer some questions before the Union could develop a proposal. Mr. Whitehead also wanted to know when the District would pay the past wages for the five drivers affected by the subcontract and subsequent settlement. In response, Mr. Semanchik wrote that he and the business manager would respond to questions presented in writing or in a conference call format. Mr. Semanchik also wrote that the District would pay back wages after the District receives from the Union the information regarding setoffs from unemployment compensation benefits and other wages. At a meeting held on March 14, 2002, Union members and representatives submitted specific questions regarding transportation cost information previously provided by the District. On March 19, 2002, Mr. Semanchik informed Mr. Whitehead that the District was awaiting the Union's proposal regarding the subcontracting of bus driving services and reminded him that the District was unable to calculate the back-pay owed the five affected drivers without information from the Union regarding the unemployment benefits and other wages received by them during the back-pay period.

On April 2, 2002, Mr. Whitehead requested copies of the subcontractors' contracts. On April 11, 2002, the District's board of directors passed a motion subcontracting a second time, authorizing the sale of unused district owned buses and dismissing the five bargaining unit drivers. As of that date, the District had not told the subcontractors to cease providing the busing services that the District had been providing with its own bus drivers and had not offered to reinstate Andrews, Cantizone, Harner, Krapf and Smith. Also at this time, the Union had not provided the requested accounting of the wages earned by the affected employes during the back-pay period.

In its exceptions, the District argues that Finding of Fact No. 15 is in error because the record indicates that the five affected employes were either not available or had refused alternate employment with the District. Finding No. 15 provides, in relevant part, that "[a]s of April 11, 2002, the District had not told the subcontractors to cease providing the busing services that the District had been providing with its own bus drivers and had not reinstated Andrews, Cantizone, Harner, Krapf and Smith as bus drivers." (F.F. 15) (emphasis added). 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)). After reviewing the record as a whole, and the Examiner's references to the notes of testimony, the Board concludes that Finding of Fact No. 15 is supported by substantial evidence. The District's claim that affected employees allegedly refused alternate employment does not refute, contradict or invalidate the finding that none of the affected employees were offered reinstatement as bus drivers in the bargaining unit. To the extent that the District is attempting to argue that it was unable to reinstate the affected employees because some were, in the District's view, either unavailable for employment as bus drivers or otherwise refused alternate employment in the District, the record clearly indicates that none of the five affected employees were offered reinstatement as bus drivers, which is a necessary step towards complying with the Agreement, and we have amended Finding of Fact No. 15 to reflect this fact. Accordingly, the District cannot defend its failure to reinstate the affected employees on the theory that it was somehow unable to do so or that the employees refused to accept reinstatement to other positions. The District's subjective, unilateral determination that the employees would not have accepted an offer of reinstatement to the position of bus driver employed by the District is not relevant to the determination of whether the District fulfilled its obligation under the Agreement to offer reinstatement to the affected bus drivers. The District simply cannot persuade the Board that none of the affected employees would or could accept an offer of reinstatement to the position of bus driver in the bargaining unit, as required by the Agreement, merely because they had other employment or refused alternative employment with the District. In any event, it was the District's obligation to extend the offer of reinstatement and it was the decision of the employees and not the employer to determine whether to accept the offer of reinstatement.

In exceptions 2 through 6, the District claims that the Examiner disregarded the following evidence: (1) that employee Krapf was offered and accepted a teaching position with the District effective August 27, 2001; (2) that employee Harner obtained employment as a bus driver with one of the District's subcontractors as of August 2001; (3) that employee Smith was retired during all relevant times of this proceeding; (4) that employees Andrews and Cantizone were offered alternate employment with the District at no loss of pay or benefits; (5) that 85% of the District's needs for transportation in the 2000-2001 school year, and ten years prior, were provided by independent contractors.

The Hearing 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). The District's proposed evidence does not support the Examiner's conclusions that "the District did not rescind the subcontract of bus driver work and reinstate that work to the bargaining unit effective June

4, 2001, as required by the settlement agreement," (PDO at 6), and that "the District did not 'bargain with the [Union] over the subcontract of any bus driver work in the future' as required by the settlement agreement." (PDO at 7)(quoting Exhibit A).

Moreover, the Agreement requires that the District "reinstate that [subcontracted] work to the bargaining unit." (Exhibit A, ¶ 1). Accordingly, it is of no consequence that employe Krapf is currently working as a teacher, employe Harner is a bus driver employed by a subcontractor and employe Smith retired. Whether the specific individuals furloughed as a result of the District's subcontracting would or could accept an offer of reinstatement does not in any way affect the District's obligation to restore the work to the bargaining unit as a whole under the terms of the Agreement.

The District also claims that the record demonstrates the following: (1) that the Union intentionally delayed resolution of the their differences and failed to make any effort to reach a common ground; (2) that time was of the essence to both parties and the Union did not present a proposal or explain its failure to do so even though the District promptly provided requested information; (3) the Union did not bargain in good faith; and (4) that the District was relieved of its duty to bargain because the parties reached impasse when the District subcontracted a second time. Again, none of these claims have any relevance to the disposition of the underlying charge filed by the Union and the conclusions of the Examiner. Also, these claims do not constitute a defense to the charge that the District reneged on the Agreement by subcontracting a second time with independent bus contractors to provide 100% of busing services after the Agreement was reached without first reinstating the work to the bargaining unit by offering reinstatement to all of the five affected employes.

The District's attempt to defend against a charge and the Examiner's conclusion that the District reneged on the Agreement in failing to bargain the subcontracting issue and offer reinstatement to the affected employes, by focusing on the Union's alleged behavior is without merit. As demonstrated by the Examiner's findings, the District did not establish on this record that the Union intentionally delayed negotiations, proposals or wage information; that time was of the essence to both parties; that the Union bargained in bad faith or that the parties reached impasse, especially since the first bargaining proposal had not yet been made. Moreover, assuming arguendo that these claims were supported by substantial evidence, the Examiner was not obligated to make findings recognizing or establishing these claims because they are unnecessary to support his decision. Page's Department Store, supra.

The District contends that the Examiner's Conclusion No. 4 is capricious, arbitrary and constitutes error. The Board finds that Conclusion No. 4 is supported by the findings of fact and also by the substantial evidence of record. The District argues that the transfer of bargaining unit work will constitute a bargaining violation only if that work was exclusively performed by the bargaining unit. This argument, however, should have been made under the prior unfair practice charge at Case No. PERA-C-01-410-E when the issue of unilateral subcontracting was

before the Board.² The issue in this case is not whether the District committed a bargaining violation for unilateral subcontracting, rather the issue is whether the District committed a bargaining violation for reneging on an Agreement that concedes the issue of subcontracting, binds the District to offer reinstatement to five employees as bus drivers in the bargaining unit, makes those employees whole for lost wages and requires negotiation with the Union "in the future" before again transferring the bargaining unit work. An employer bargains in bad faith and engages in unlawful interference by failing to comply with the express terms of an unfair practice settlement agreement. New Castle Township Police Employees v. New Castle Township, 25 PPER ¶ 25101 (Final Order, 1994). The Examiner concluded, based on substantial evidence, that the District did not offer reinstatement as bus drivers and did not negotiate before subcontracting a second time. A vote to subcontract prior to restoration of the status quo ante as agreed and while compliance with the Agreement has not occurred constitutes a failure to bargain in good faith. See e.g., Elizabeth Forward Sch. Dist. v. PLRB, 624 A.2d 215 (Pa. Cmwlth. 1992) (an employer is obliged to reinstate the status quo ante prior to any further consideration of subcontracting following a finding of an unfair practice for unlawful subcontracting). Accordingly, the District's alleged defenses to subcontracting, and specifically its claims that the work was not exclusively performed by the unit, are without merit because whether the District's actions constitute a bargaining violation is governed by the terms of the Agreement and not by the law governing the rights and obligations of the parties regarding initial subcontracting.

The District also argues that its decision to proceed to subcontract the bus driving service performed directly by the District was promoted by information it received that one bus driver planned to retire and another requested a position as a teacher. Also, the District claims that the remaining three drivers either accepted a position with one of the subcontractors or refused alternative positions at no loss of wages or benefits. This argument is also without merit. The District's motive for initially subcontracting the work is not relevant to the issues before the Board and its Examiner. The Agreement, into which the District voluntarily entered, gave rise to new rights and obligations. Again, to comply with the Agreement, the District was obligated to offer the five affected employees reinstatement into the original bargaining unit as bus drivers, make those employees whole and bargain with the Union over subcontracting those positions. Accordingly, the District possessed a duty to bargain

² Even if the issue of exclusively performed work were before the Board in this matter, the District's argument is without merit. In AFSCME Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992), the Commonwealth Court recognized that a union has the burden of establishing that work was exclusively performed by the bargaining unit, but adopted the position of this Board and the National Labor Relations Board in opining that, although employees outside the bargaining unit historically performed the same work, the union can establish exclusivity by quantifying the proportion of the work exclusively performed by the bargaining unit. In the instant case, the Union clearly established that the District historically and consistently maintained 5 bus drivers in-house, which represented 15% of the busing services provided for the District. Accordingly, the bargaining unit exclusively performed 15% of the District's transportation services, and it would be unlawful to unilaterally subcontract that portion of the busing work.

with the Union the issue of subcontracting. The matter of whether the District lawfully subcontracted in the first instance and the alleged reasons for doing so were withdrawn and are no longer before the Board.

Additionally, the circumstances in which furloughed employes are transferred to the payroll of the subcontractor or some other position, either with the District or with another employer, in order to mitigate their damages as required by law, International Bhd. of Firemen and Oilers, Local 1201 v. Upper Moreland Township Sch. Dist., 31 PPER ¶ 31106 (Final Order, 2000), rev'd on other grounds, sub nom., 33 PPER ¶ 33065 (Montgomery County Court of Common Pleas, 2002), do not justify the District's failure to reinstate the work to the bargaining unit. The affected employes' terms and conditions of employment, as defined by the collective bargaining agreement, were unlawfully changed by the subcontracting. Those terms and conditions of employment, i.e., the status quo ante, will be restored when the employes and the work are reinstated as required by the Agreement. As long as the work remains outside the bargaining unit, affected employes will not receive the benefit of their bargained for terms and conditions of employment. Also, to permit the District to rely on the fact that furloughed employes either work for the subcontractor or in other positions within the District would also permit the District to circumvent an unfair practice for unlawful subcontracting. The District could, as it attempted to do here, subcontract the work out of the unit, place the affected employes in other positions with the District and claim that the subcontracting violation should be excused because the employes have alternative employment. An employer could thereby avoid liability for unlawfully subcontracting as long as it placed or employed the affected employes in some capacity subjectively determined to be comparable. Additionally, the Union is not in any position to bargain with the District in an effort to prevent subcontracting and keep the work in-house if the District does not rescind the subcontracts and restore the work. If the District is not obligated to bring the work in house before bargaining with the Union over subcontracting, the Union would be forced to bargain the work back into the unit, which is contrary to the express terms of the Agreement. It has been the Board's long held position in remedying bargaining violations of this sort that an employer may not unilaterally accomplish its obligation in violation of its bargaining duty and then claim satisfaction of that duty by forcing the employes' bargaining representative to negotiate out from under a fait accompli. International Ass'n of Firefighters, Local 713 v. City of Easton, 20 PPER ¶ 20098 (Final Order, 1989); Palmyra Area Sch. Dist. v. PLRB, 27 PPER ¶ 27032 (Court of Common Pleas of Lebanon County, 1995), aff'g, 26 PPER ¶ 26087 (Final Order, 1995). Accordingly, reinstatement is independent of and precedent to all other considerations.

The District also contends that the Examiner erred by relying on Upper Moreland Township Sch. Dist. v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997) and Morrisville Sch. Dist. v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996) instead of Girard Federation of Teachers v. Girard Sch. Dist., 33 PPER ¶ 33193 (Final Order, 2002). In the District's view, it bargained in good faith by providing requested information and meeting with Union representatives and employes to answer specific questions regarding transportation costs. We disagree and conclude that the Examiner properly relied on Upper Moreland and Morrisville. In Upper Moreland, the school district repeatedly informed the union of certain cost savings it could obtain by subcontracting. The district not only changed those cost saving figures, but also omitted informing the union whether it would accept a proposal

from the union matching those cost savings or providing the union any target toward which the union could aim in obtaining a tentative agreement. The Upper Moreland court opined that "[g]ood faith . . . requires at a minimum that the parties negotiate with authority and define for their adversary an initial position which, if accepted, will bind the parties to a least a tentative agreement." Upper Moreland, 695 A.2d at 908. The court further stated that "[t]he parties must set forth a position upon which the adversary may rely that the acceptance of which would result in a tentative agreement. At a minimum, each party must present an identifiable target for the adversary to shoot at which will result in at least a tentative agreement." Id. at 909. Here, the District did not at any time define a position or target for the Union. Indeed no proposals were exchanged by either party because the Union was still attempting to collect and understand as much information as possible relative to the subcontracting issue in the six weeks since the Agreement was signed.

In Morrisville, the Commonwealth Court held that an employer bargains in bad faith when it subcontracts pursuant to its unilaterally established and unnecessarily short time line or when it subcontracts before the union is finished negotiating and merely needs more time to formulate further proposals and meet with its membership. Morrisville, 687 A.2d at 9. Here, the District unnecessarily and arbitrarily established a deadline of April 11, 2002, without explanation for the haste, while the Union was still digesting the transportation cost information; the District re-subcontracted before a single proposal was submitted. Such tactics constitute bad-faith bargaining within the meaning of Morrisville and Upper Moreland.

The District also argues that the parties were at "bona fide impasse" which justified its subcontracting a second time before offering reinstatement. Notwithstanding whether the parties were at impasse, the Agreement required the District to reinstate the work to the bargaining unit before doing anything else. Impasse, bona fide or not, is no defense to the District's failure to immediately reinstate the work before any bargaining occurred. The District's conclusory assertion that the parties were at impasse does not justify the District's failure to reinstate the work.

Moreover, the Supreme Court of Pennsylvania has defined impasse as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." Norwin Sch. Dist. v. Belan, 510 Pa. 255, 268 n.9, 507 A.2d 373, 380 n.9 (1986). Recognizing the myriad factual permutations and court rulings that could determine whether parties are at impasse in a particular case, the Court added that "perhaps all that can be said with confidence is that an impasse is a 'state of facts in which the parties, despite the best of faith, are simply deadlocked.'" Id. (citations omitted). In this case, however, the parties were clearly not deadlocked or at impasse. Only six weeks passed since the Agreement and the parties were still gathering information when the District subcontracted a second time with the independent bus contractors. The parties were not deadlocked over any issue(s) because none were presented and discussed. The District has not identified, and is unable to identify, any issue over which the parties could be at impasse. The District's bald assertion that the parties were at impasse, when negotiations had not been exhausted, does not relieve the District of its bargaining obligation.

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 amended 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 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 twentieth day of May, 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NORTH SCHUYLKILL EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION ESPA/PSEA/NEA :
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NORTH SCHUYLKILL SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of PERA; that it has complied with the agreement settling the unfair practice charge at Case No. PERA-C-01-410-E; that it has rescinded its April 11, 2002 motion; that it has offered to Andrews, Cantizone, Harner, Krapf and Smith in writing unconditional reinstatement to their former positions as bus drivers without prejudice to any rights or privileges enjoyed by them; that it has made Andrews, Cantizone, Harner, Krapf and Smith whole for any losses in pay and benefits sustained by them as the result of its April 11, 2002 motion; that it has paid interest at the simple rate of six percent per annum on any backpay due Andrews, Cantizone, Harner, Krapf and Smith from April 11, 2002 up to the date they were offered unconditional reinstatement to their former positions as bus drivers; that it has posted a copy of the Final Order and the Proposed Decision and Order within five (5) days from the effective date of the Final Order in a conspicuous place readily accessible to the District's employes and has had the same remain so posted for a period of ten (10) consecutive days; and that it has served a copy of this affidavit on the Union.

Signature/Date

Title

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

Signature of Notary Public