COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MT. LEBANON EDUCATION ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-03-387-W
	:	
MT. LEBANON SCHOOL DISTRICT	:	

FINAL ORDER

The Mt. Lebanon Education Association (Association) and the Mt. Lebanon School District (District) each filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO) of April 16, 2004. In the PDO, the Hearing Examiner dismissed the Association's Charge of Unfair Practices alleging that the District refused impact bargaining in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA). On May 5, 2004, the parties filed their respective exceptions together with supporting briefs. Responsive briefs were simultaneously filed May 25, 2004.

The Association's charge arises from an alleged refusal of the District to bargain the affects of the implementation of a software program known as "Dashboard". The Dashboard program allows teachers to post assignments and information on an internet site for access by students and parents. (Finding of Fact 2). Based on teachers' experiences while voluntarily using Dashboard during a pilot launching at the end of the 2002-2003 school year, the Association claimed that the required use of Dashboard, for the 2003-2004 school year, has an adverse effect on teachers' hours and workday.

The hearing examiner determined that although the District had advised the Association in September 2003, that the use of Dashboard would be mandatory for that school year, (Finding of Fact 9), Dashboard was not implemented until October 17, 2003. (Finding of Fact 12). The hearing examiner found that the Association's latest request for impact bargaining occurred September 19, 2003 (Finding of Fact 10), prior to implementation of the Dashboard. The hearing examiner therefore dismissed the charge, as the Association's request for impact bargaining was premature. The hearing examiner also found however that the use of Dashboard lengthened the teachers workweek by up to an hour. (Finding of Fact 13).

Association's Exceptions

The central issue in this case is raised by the Association, which excepts to the hearing examiner's finding that the Dashboard was implemented on October 17, 2003. The Association contends that Dashboard was actually implemented in the Spring of 2003 as a pilot program. The Association recognized that because participation in the pilot launching in the Spring of 2003 was voluntary, no impact occurred until use of the Dashboard became mandatory. The Association contends that because it was advised that Dashboard would be made mandatory for the 2003-2004 school year, mandatory implementation occurred no later

than the start of the school year, even though teachers were unable to access the program. The Association asserts therefore that the impact of Dashboard on the teachers' hours and working conditions was already known from its use during the pilot launching in the Spring of 2003, and that its requests for impact bargaining in September 2003 came after implementation at the start of the school year.

Implementation occurs on "the date when the [employer] directive becomes operational and serves to guide the conduct of employes…" Upper Gwynedd Township Police Department v. Upper Gwynedd Township, 32 PPER ¶ 32101 (Final Order, 2001). The preliminary steps taken by the employer to formulate a program that is to be utilized in the future is not an implementation for purposes of impact bargaining. Pennsylvania State Troopers Association v. Pennsylvania Labor Relations Board, 804 A.2d 1291 (Pa. Cmwlth. 2002).

The pilot launching of the Dashboard in the Spring of 2003 was on a voluntary basis, and teachers could choose not to utilize the Dashboard, and would face no consequences for their decision. The voluntary pilot launching in the Spring of 2003 did not guide the conduct of the teachers, and was only a preliminary step in the subsequent decision to implement the Dashboard. The record further shows that the Dashboard was not implemented with the start of the 2003-2004 school year. Although the District may have declared that use of the Dashboard would be mandatory for the 2003-2004 school year, the hearing examiner found that Dashboard was not operational, and thus did not guide the conduct of the employes, until October 17, 2003. Accordingly, there was no implementation prior to October 17, 2003.

The hearing examiner's finding that the Dashboard was not mandatory until October 17, 2003, is supported by the testimony in the record. Substantial evidence in the record exists to support a hearing examiner's finding, such that it will not be disturbed by the Board, where there is such "`relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Pennsylvania Labor Relations Board v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Mark McCloskey, President of the Association, testified that Dashboard did not start at the beginning of the year but was up and running, and required for all teachers, October 17, 2003. (N.T. 36-37). Because there exists this substantial evidence in the record, the hearing examiner did not err in finding that the Dashboard was implemented October 17, 2003.

Four elements must be met to establish that the employer unlawfully refused to bargain the impact of a managerial decision.

> [F]irst, the employer must lawfully exercise its managerial prerogative. Second, there must be a demonstrable impact on wages, hours, or working conditions, matters that are severable from the managerial decision. Third, the union must demand to negotiate these matters following management's implementation of its prerogative. Finally, the public employer must refuse the union's demand.

Lackawanna County Detectives' Association v. Pennsylvania Labor Relations Board, 762 A.2d 792, 794-5 (Pa. Cmwlth. 2000). Failing any

one element defeats a claim of unlawful refusal to engage in impact bargaining.

The Association argues however, the purpose of requiring that the demand occur only after implementation is to ensure that there has been an identifiable impact on the employes, not mere speculation. It asserts that during the pilot period in the Spring of 2003, the Association was able to identify a demonstrable impact on the teachers' hours and working conditions. However, the Association confuses the meet and discuss obligations prior to implementation with the duty of the employer to bargain the impact of its managerial decision post implementation.

Union demands made prior to implementation are in furtherance of the employer's meet and discuss requirement to afford the employes' the opportunity to voice their concerns regarding a proposed directive, without hindering the right of the employer to implement. The fulfillment of the meet and discuss obligations prior to implementation may effect changes to the employer policy or program that in turn affect the potential impact on the employes' working condition. It is pure speculation that any impact that exists during the meet and discuss period, prior to implementation, will have the same effects or impact on the employes upon final implementation. Only post implementation will the union be fully aware of the impact that the managerial decision has on the negotiable subjects of wages, hours and working conditions. Therefore, because any legally demonstrable impact must be identifiable only after implementation of the managerial prerogative, any demand to bargain that impact made prior to implementation is ineffectual.[1]

The Association last made a demand on the District to bargain the impact of the Dashboard on September 19, 2003 (Finding of Fact 10). Since the demand for bargaining predated implementation of the Dashboard on October 17, 2003, the District did not unlawfully refuse to bargain in response to the Association's premature demand. Accordingly, the hearing examiner did not err in dismissing the Association's charge.[2]

District's Exceptions

In its exceptions, the District takes issue with the hearing examiner's Finding of Fact 13, that "some teachers had to extend their work day by up to 60 minutes a week to enter information into the dashboard." The District claims that this finding is superfluous and could influence a subsequent charge filed by the Association. Although the hearing examiner dismissed the charge on the basis that the Association's demand for impact bargaining was premature, we do not

[1] There is no contention here that the District failed in its meet and discuss obligations prior to implementation.

[2] The Association takes issue with the hearing examiner's characterization of its initial meeting with the District over the Dashboard in the Spring of 2003 as a "request" for impact bargaining. As the only request for bargaining we are concerned with here, is one coming after implementation, this exception is dismissed.

believe that the hearing examiner erred in considering each of the Lackawanna County Detectives' Association factors in his decision.

The criteria for impact bargaining require that there must be a demonstrable impact on wages, hours and working conditions when the demand for bargaining is made. Lackawanna County Detectives' Association, supra. Thus, to support a claim for bargaining the severable impact of a managerial prerogative, the charging party must establish the impact as it exists at the time of its demand for impact bargaining. As such, the hearing examiner's determination in this case is charge specific, and any severable impact on hours and working conditions which may have existed as of September 19, 2003 (the date of the Associations' last bargaining demand), would be irrelevant to a subsequent claim that the District is refusing to bargain over the impact as it exists at the time of a later demand. See Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 29 PPER ¶ 29142 (Final Order, 1998).[3]

The District also claims that Finding of Fact 13 is not supported by credible evidence in the record. We disagree. Mr. McCloskey testified that entering a weeks worth of assignments into the Dashboard took him thirty to sixty minutes. (N.T. 49). Margaret Grasso testified that inputting information into Dashboard took her fifty minutes (N.T. 76), and it took Jeff Holliday thirty minutes. (N.T. 121). This testimony constitutes substantial evidence supporting the hearing examiner's Finding of Fact 13.

The District asserts however that the hearing examiner's finding should be stricken because it accepts the Association's subjective testimony over the objective evidence presented by the District showing how data is inputted into Dashboard. The Board, however, will not disturb the hearing examiner's credibility determinations absent compelling circumstances. Crestwood School District v. Crestwood Education Association, 32 PPER ¶32050 (Final Order, 2001). Merely because the District presented demonstrative evidence in addition to testimonial evidence, is not a basis for reversing the hearing examiner's acceptance of the testimony of the Association's witness. City of Reading v. Pennsylvania Labor Relations Board, 568 A.2d 715, 721 (Pa. Cmwlth. 1989).

The District also takes exception to the hearing examiner's conclusion that PERA requires, as a matter of law, that a public employer engage in impact bargaining. This argument runs counter to Section 701 of PERA that directly creates a bargaining obligation on the employer to negotiate changes in wages, hours and terms and conditions of employment. It is now beyond dispute by well-established authority of the Board and the courts, that the severable wage, hour, and working conditions impacted by a managerial decision are negotiable

[3] The Association also notes in its exceptions, as does the District, that the hearing examiner's discussion referring to a "non severable" impact is internally inconsistent with Finding of Fact 13. Since the issue of whether there is or is not a severable impact does not affect the outcome of this case, which is controlled by the timing of the Association's bargaining demand, and as the discussion has no bearing on any subsequent claims, the exception requesting clarification of the hearing examiner's analysis is dismissed.

upon request. Teamsters Local 77 & 250 v. Pennsylvania Labor Relations Board, 786 A.2d 299 (Pa. Cmwlth. 2001); see also, City of Philadelphia v. Pennsylvania Labor Relations Board, 588 A.2d 67 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, 528 Pa. 632, 598 A.2d 285 (1991); Lackawanna County Detectives' Association, supra.[4]

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 of April 16, 2004 are dismissed, and the PDO is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this seventeenth day of August, 2004. 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.

[4] Impact bargaining is required over those matters which are severable from the managerial prerogative, such that they involve elements of discretion not controlled by the underlying managerial decision. See Harrisburg International Airport Police Officers Association v. Susquehanna Area Regional Airport Authority, 33 PPER ¶33066 (Order Directing Remand, 2002) (recognizing that the affects of an employe failing a statutorily mandated re-screening process may be discretionary with the employer); cf. Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 29 PPER ¶29240 (Final Order, 1998) (loss of overtime occasioned by management's direction of workforce is not negotiable).