

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LABOR RELATIONS BOARD

AFSCME DISTRICT COUNCIL 88 :
LOCAL NO. 790 :
 :
v. : CASE NO. PERA-C-03-60-E
 :
READING SCHOOL DISTRICT :

FINAL ORDER

The Reading School District (District) filed timely exceptions and a supporting brief on June 12, 2004, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued May 26, 2004. In the PDO, the Hearing Examiner concluded that the District had committed unfair labor practices within the meaning of Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) when 1) it unilaterally changed the procedure for submission of employee sealed job bids; 2) it unilaterally allowed non-bargaining unit members to perform work traditionally performed by bargaining unit employees represented by AFSCME District Council 88, Local No. 790 (Union); and 3) the high school principal spoke to bargaining unit members in a manner that would tend to coerce employees in the exercise of protected rights. On June 24, 2004, the Union filed its Answer in Opposition to Exceptions. After the Secretary granted an extension, the Union filed a brief in opposition on July 22, 2004.

The District excepted only to the Hearing Examiner's findings and conclusion concerning the changes to the job bidding procedure. Specifically, the District asserts that the Hearing Examiner erred by 1) finding that the parties bargained over the 1998 changes in the bidding procedure; 2) finding that procedures for posting and bidding positions under PERA are mandatory subjects of bargaining; 3) finding that a change by the employer to a past practice violates PERA; 4) finding that the District violated Section 1201(a)(1) and (5) by unilaterally changing the procedure for submitting sealed bids; 5) ordering the District to rescind the policy of having sealed bids sent to the director of human resource office and to reinstate the *status quo ante* of allowing the Union to receive, store and open bids; and 6) by failing to find that the Union contractually waived its right to challenge the unilateral change to the past practice.

Since November 1998, the Union has received, accumulated and opened all job bids submitted by employees. Union members interested in bidding to another posted job either mailed or hand delivered their bid form to the Union president. At the conclusion of the bidding period, the Union president opened all bids and telephonically identified to the District's personnel office the most senior applicant. The Union then mailed all bid material to the District's personnel office for the employer's review of the applicants and selection of a candidate. The District then formally notified the successful bidder in writing. By letter dated November 4, 2002, Elton Butler, Jr., the District's director of human resources, notified the Union that all subsequent bids for posted positions would be sent directly to the District's human resources office; the Union would no longer have a role in the bidding process.

After a thorough review of the District's exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

8. The parties' collective bargaining agreement in effect from April 6, 1998, through June 30, 2000, states in Article 33.1:

33.1 Past Practice

Nothing in this agreement nor the agreement itself shall be considered as requiring the school district to continue any past practices unless they are specifically set forth in this agreement.

(District's Exhibit 1).

9. The parties bargained over the 1998 change to the bidding procedure. (N.T. 11-12, 13).

DISCUSSION

First, the District excepts to the Hearing Examiner's statement in the PDO's Discussion that the parties bargained over the 1998 change to the bidding procedure. A Hearing Examiner's findings must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942)(quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)). The testimony of Michele L. Kondraski, president of the Union in 1998, adequately supports the disputed finding. See Finding of Fact 9. Therefore, this exception is dismissed.

Second, the District challenges the Hearing Examiner's finding that procedures for posting and bidding positions under PERA are mandatory subjects of bargaining. The law is well settled that bidding and posting procedures are mandatory subjects of bargaining. AFSCME v. Berks County, 29 PPER ¶ 29044 (Final Order, 1998), *aff'd sub nom*, Troutman v. PLRB, 735 A.2d 192 (Pa. Cmwlth. 1999); International Association of Fire Fighters, Local No. 10 v. City of McKeesport, 34 PPER 28 (Final Order, 2003); Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania State Police, 33 PPER ¶ 33056 (Final Order, 2002); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). Therefore, this exception is dismissed.

Third, the District asserts that the Hearing Examiner erred in finding that a unilateral change by the employer to a past practice violates PERA. A past practice may create or establish a separate enforceable condition of employment that cannot be derived from the express language of the collective bargaining agreement. County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977). Furthermore, an employer commits an unfair practice within the meaning of PERA when the employer unilaterally changes a mandatory subject of bargaining, including one established by past practice. In re Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); Bonnell-Tredegar Industries, Inc. v.

NLRB, 46 F.3d 339 (4th Cir. 1995). Therefore, this exception is dismissed.

Fourth, the District asserts that the Hearing Examiner erred in finding that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally changing the procedure for submitting sealed bids. As previously stated, the Hearing Examiner's finding that the 1998 bargained-for change to the bidding procedure established a past practice is supported by substantial evidence. It is unchallenged that the District unilaterally changed this practice. Since a unilateral change to a past practice constitutes an unfair practice under Section 1201(a)(1) and (5) of PERA, this exception is dismissed.

Fifth, the District challenges the Hearing Examiner's order instructing the District to rescind the policy of having sealed bids sent to the director of human resource office and to reinstate the *status quo ante* of allowing the Union to receive, store and open the bids. Pursuant to PERA, the Board is empowered to prevent any person from engaging in any unfair practice listed in Article XII of PERA. 43 P.S. § 1101.1301. More specifically, PERA grants the Board the power to "issue...an order requiring such person to cease and desist from such unfair practice, and to take such reasonable affirmative action...as will effectuate the policies of this act." 43 P.S. § 1101.1303. When an employer has unlawfully effected a change in terms and conditions of employment without first satisfying its bargaining obligation, the usual remedy ordered by the PLRB is an order directing the employer to cease and desist from refusing to bargain; rescinding the changed term; restoring the status quo; and, if appropriate, making affected employees whole for any wage or benefit losses sustained as a result of the unfair labor practice. See Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). Therefore, the Hearing Examiner's remedial orders to restore the *status quo ante* are standard and appropriate, and this exception is dismissed.

Finally, the District asserts for the first time that the collective bargaining agreement permits the District to unilaterally alter a past practice, and thus serves as a defense to the Union's charge of unfair practices with regard to the unilateral change to the bidding procedure. By way of background, the contract was admitted into evidence by the District on cross-examination of Union witness Michele Kondraski. (PDO p.4). While cross-examining the Union's recording secretary Michele Kondraski, the District's counsel questioned Kondraski only about Article 18 of the agreement, concerning seniority rights. [N.T. pp.17-20]. However, at no point during this cross-examination does the District's attorney question the witness about Article 33.1.¹ In addition, the District never raised Article 33.1

¹ In support of this argument, the District relies on Article 33.1 of the parties' collective bargaining agreement, which states:

Nothing in this agreement nor the agreement itself shall be considered as requiring the school district to continue any past practices unless they are specifically set forth in this agreement.

See Finding of Fact 8. The District now argues that the Union contractually waived its statutory right to challenge the

during his direct examination of the District's director of human resources, Elton Butler, despite questioning Butler about the agreement. Butler testified that he reviewed the collective bargaining agreement to determine how the bidding procedure operated. [N.T. 81]. However, he never testified that he interpreted Article 33.1 as granting him the ability to unilaterally change the past practice regarding the bidding procedure. Finally, the District never asserted before, during or after the hearing and prior to the issuance of the PDO, that Article 33.1 authorized it to alter the job bidding procedure.

The record reveals that the District first raised this defense in its exceptions to the PDO. In its Answer to Charge of Unfair Practice, the District asserted the following with regard to the charge that it unilaterally changed a past practice:

It is denied that the previously negotiated and agreed upon job bidding method was being discontinued, to the contrary, the job method bidding [sic] was to be performed in accordance with the collective bargaining agreement. [sic] i.e. performed by the employer. The [District] is unaware of a meeting in mid-November when the Union demanded to reinstate a prior practice not in accordance with the language of the collective bargaining agreement.

(Answer of Reading School District to Charge of Unfair Practices, filed March 19, 2003). Clearly, this is not an assertion that the Union has contractually waived its right to challenge an altered past practice.

Additionally, the Notes of Testimony indicate that the District never asserted this defense at the hearing. The District referred to the parties' collective bargaining agreement several times during witnesses' testimony, but never elicited testimony regarding Article 33.1 of the agreement.

The law is well established that an issue is waived when it is raised for the first time in exceptions. AFSCME v. PLRB, 514 A.2d 255 (Cmwlth. Ct. 1986); Bucks County Schools, Intermediate Unit No. 22 v. PLRB, 466 A.2d 262, 266 (Cmwlth Ct. 1983); In the Matter of the Employes of Norwin School District, 31 PPER ¶ 31104 (Final Order, 2000); AFSCME Council 13 v. State System of Higher Education, 32 PPER ¶ 32118 (Final Order, 2001). In AFSCME v. PLRB, *supra*, the Board declined to consider the employer's argument that the reorganization of job duties was a managerial prerogative under Section 702 of PERA, because by not raising that argument before the hearing examiner, the employer waived it for purposes of exceptions. The purpose of the hearing is to facilitate a full factual inquiry into all factual claims in support of and defense to the charge. Had the District timely raised this issue before the record was closed, it would have afforded the Union an opportunity to rebut the District's reliance on Article 33.1. By discovering and raising the argument for the first time on appeal from the Hearing Examiner's decision, the District foreclosed the Union's

District's unilateral change to a past practice not contemplated by the collective bargaining agreement.

opportunity to fully develop the record on this basis.² Similarly, by not raising the argument that the Union is contractually precluded from challenging the District's unilateral change to a past practice before the Hearing Examiner, the District waived it for purposes of exceptions.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order as amended herein 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 in the above-captioned matter be and the same are hereby dismissed consistent with this order and the Proposed Decision and Order as amended herein is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this twenty-first day of September, 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.

² For example, the record reveals that the parties entered into the past practice regarding the job bidding procedure after the collective bargaining agreement became effective. The District's failure to timely raise this argument at the hearing prohibited exploration into whether Article 33.1 contemplates only past practices that existed at the time the contract became effective or whether it also contemplates past practices entered into during the life of the agreement. However, the District's failure to act in a timely manner foreclosed adequate argument and analysis into this and any other relevant inquiry.