

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CLARION LIMESTONE EDUCATIONAL :
SUPPORT PERSONNEL ASSOCIATION, :
ESPA/PSEA/NEA :
 :
v. : Case No. PERA-C-03-134-W
 :
CLARION LIMESTONE SCHOOL DISTRICT :

FINAL ORDER

Clarion Limestone School District (District) filed timely exceptions and a supporting brief on May 17, 2004, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued April 27, 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 it required members of the Clarion Limestone Educational Support Personnel Association (Union) sign job descriptions for child specific aides that limited their seniority, layoff and bumping rights, constituting direct dealing prohibited by PERA. The Union filed a response to exceptions and brief in support on June 7, 2004.

The District's exceptions may be summarized as follows: the Hearing Examiner erred by (1) finding that the District failed to negotiate with the Union in developing the job description for child specific aides; (2) finding that the Union never approved the job description; (3) failing to determine whether or not the Union established a *prima facie* case; (4) failing to dismiss the charge because of the District's past practice defense; (5) interpreting the District's "first defense" as one of contract privilege; and (6) finding that the District committed an unfair labor practice under PERA.

The Hearing Examiner's salient findings of fact are as follows. For purposes of PERA, the District and the Union are parties to a collective bargaining agreement that provides the wage schedule for teacher aides, but no job description for child specific aides. The District employs eight (8) aides; six (6) are child specific aides who are assigned to a particular student with medical or educational deficiencies. In 1998, the District developed a job description for child specific aides that states:

TERMS OF EMPLOYMENT: The child specific aide is scheduled to work whenever the child is in attendance at school. The position is terminated when the child is no longer in school.

The District developed the description with the help of individual teachers. The Union secretary was present at the meetings, but the Union never approved the description or authorized the secretary to bargain this issue on its behalf. The applicable collective bargaining agreement contains provisions granting seniority, bumping and layoff rights to members of the bargaining unit that are contrary to the job description.

Between March 2, 1998, and August 9, 2003, five (5) child specific aides were presented with and signed the job description. On August 21, 2003, Superintendent Richard Slack wrote to Peggy Flickinger, a child specific aide, requesting that she sign the description, noting that failure to sign could lead to her dismissal. Flickinger initially stated that she should not sign the description, but eventually signed it.

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

ADDITIONAL FINDING OF FACT

12. Article VIII of the parties' collective bargaining agreement effective from July 1, 2001 through June 30, 2006 provides:

1. In the event that it becomes necessary to lay off employees for any reason, employees shall be laid off in inverse order of seniority...
2. Employees shall be recalled from layoff according to their seniority within the category being recalled. However, no new employee shall be hired until all employees on layoff, who are qualified, have been recalled.
3. When employees are laid off because of a reduction in the work force, they shall be provided the right to bump, replacing any employee with less seniority first within the laid off employee's job category and in the event the laid off employee lacks sufficient seniority, then with a job category in which the employee possesses the necessary skills to perform the work.

(Association Exhibit 1, N.T. 11-12).

DISCUSSION

The District asserts in its first two exceptions that the Hearing Examiner's findings of fact number 6 and 7, finding that the District developed the child specific job description in conjunction with individual teachers, but without the participation or approval of the Union, are not supported by substantial evidence. 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); 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." 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)). After reviewing the testimony and exhibits cited by the Hearing Examiner, the Board finds that there is substantial evidence to support these findings. Therefore, these exceptions are dismissed.

The District next asserts that the Hearing Examiner failed to determine whether the Union established a *prima facie* case, before analyzing and dismissing the District's defenses. The Hearing Examiner properly identified the definition and requirements for establishing impermissible direct dealing. The PDO states:

An employer may not engage in direct dealing with the employees who are represented by an exclusive representative when it comes to wages, hours and terms and conditions of employment. In Pike County Educ. Ass'n, PSEA/NEA v. Delaware Valley School District, 17 PPER ¶ 17156 (Final Order, 1986), the Board established that the duty to bargain in good faith under Section 1201(a)(5) of the Act includes the "employer's obligation to avoid unilateral action inconsistent with its bargaining obligation and collective bargaining agreement with regard to wages, hours or working conditions." (citations omitted). Pike County held an employer committed an unfair practice by making an individual contract with a math teacher at a higher pay and that the employer was not justified in claiming an emergency removed the duty to bargain.

(PDO pp.2-3). Subsequently in the PDO, the Hearing Examiner found:

Given the evidence presented at the hearing, the District's requirement that employees sign the job description for child specific aides at issue in this case constitutes direct dealing that is prohibited by the Act.

(PDO p.4). The Board finds that the Hearing Examiner properly and adequately found that the Union established a *prima facie* case of direct dealing in violation of PERA. Therefore, this exception is dismissed.

In its next exception, the District claims that he Hearing Examiner erred by dismissing its past practice defense. Our Supreme Court has stated the following regarding past practices:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.
(citation omitted)(emphasis in original.)

County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), n. 12. The District failed to negotiate with the Union over the job description, and the Union never approved of the description following its formation. Consequently, the Hearing Examiner was correct in concluding that the parties never knowingly entered into a course of conduct constituting a past practice. Therefore, this exception is dismissed.¹

Finally, the District excepts to the Hearing Examiner's finding that it violated Section 1201(a)(1) and (5) of PERA. As stated above, by requiring the child specific aides to sign a job description that nullifies provisions of the collective bargaining agreement, the District improperly dealt directly with members of the Union, rather than negotiating with their designated and sole bargaining representative. Therefore, this exception is dismissed.

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 Employee 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, Member, and Anne E. Covey, Member, this twenty-second day of June, 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.

¹ In its next exception, the District asserts that their first defense was not one of contract privilege, but rather, further support that the District and the Union agreed on the terms contained in the job description for child specific aide. As previously stated, the Board finds that there is substantial evidence supporting the Hearing Examiner's finding that the parties did not negotiate or agree upon the job description. Therefore, this exception is dismissed. In addition, as the District effectively withdraws its contractual privilege defense in its exceptions, the Board will not review the PDO with regard to this issue.