COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 384	:	
	:	
v.	:	Case No. PERA-C-05-560-E
	:	
KENNETT CONSOLIDATED SCHOOL DISTRICT	:	

FINAL ORDER

Teamsters Local Union No. 384 (Union) filed exceptions with the Pennsylvania Labor Relations Board (Board) on April 5, 2006, challenging the Proposed Decision and Order (PDO) of March 24, 2006, in which it was found that the Kennett Consolidated School District (District) did not retaliate against the employes for initiating organizational activity when it subcontracted its student transportation services and therefore did not violate Section 1201(a)(1), (2), (3) and (4) of the Public Employe Relations Act (PERA). Under separate cover, the Union filed a supplemental brief on April 24, 2006, pursuant to an extension granted by the Secretary of the Board. The District filed a timely response to the exceptions on May 15, 2006. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

10. On June 30, 2005, Sandy Hamby, the Director of Transportation and an employe of the District for many years, retired. (N.T. 143, 170.)

11. Effective July 1, 2005, Mr. Tracy hired Edward L. McCusker, who had not previously been employed by the District, as the weekly interim Director of Transportation based on Mr. Tracy's ongoing negotiations with Krapf and his desire to eventually subcontract the District's student transportation services to Krapf. (N.T. 171).

12. Effective July 1, 2005, Mr. Tracy promoted Thomas Jenkins, a bus driver/safety coordinator for the District, to the position of interim Assistant Director of Transportation. (N.T. 171-172).

13. A memorandum to District personnel describes the hiring of Mr. McCusker and Mr. Jenkins as "interim personnel appointments in the Transportation Department to help us in this period of transition." (Exhibit No. 16; N.T. 172-173).

DISCUSSION

The factual background is briefly stated as follows: In the mid-1990's, the District hired George Krapf, Jr. & Sons, Inc. (Krapf) to provide bus transportation for some of its students. By 2003, Krapf was making nine bus runs a day for the District. (Finding of Fact 3). Beginning in April or May of 2005, the District's director of business administration, Mark Tracy, began exploring the possibility of having Krapf provide transportation services for all of its students. (Findings of Fact 4, 5, 6). Krapf submitted a proposal in May of 2005 which was rejected by the District because it would have increased the District's transportation costs. A second proposal in June of 2005 which would have saved the District $57,000 was also rejected. In September of 2005, Krapf submitted a third proposal which would save the District $158,000 if entered into in September and $94,000 if entered into in January of 2006 when compared to the District's cost of in-house bus transportation. (Findings of Fact 6 and 7). Mr. Tracy presented this proposal to the District's finance committee on October 3, 2005 and to the School Board on November 7, 2005. On November 14, 2005, the School Board voted to accept this third proposal. The rationale for this decision included the cost savings, the fact that the head bus mechanic was out on leave and the end of a purchase/buy back agreement on twenty-two buses. (Finding of Fact 8).

In October of 2005, the transportation employes initiated organizational activity. Specifically, the Union held organizational meetings in October, November and December of 2005 and January of 2006. Also, on November 9, 2005, the Union filed a petition for representation with this Board. (Finding of Fact 9).

The Union filed a Charge of Unfair Practices on November 30, 2005 alleging that the District subcontracted its student transportation services solely in retaliation for its organizing drive, thereby violating Section 1201(a)(1), (2), (3) and (4) of PERA. A complaint was issued and a hearing was held on January 13, 2006. By decision dated March 24, 2006, the Hearing Examiner determined that the Union did not prove that the District's decision to subcontract was motivated by anti-union animus. Accordingly, the Hearing Examiner dismissed the Charge of Unfair Practices.

In its exceptions, the Union argues that the Hearing Examiner erred in finding that the District did not retaliate against the employes for engaging in organizational activities when it subcontracted its student transportation services and that the Hearing Examiner erred by failing to find an independent violation of Section 1201(a)(1).

In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must prove 1) that the employes engaged in protected activity; 2) the employer was aware of that protected activity; and 3) but for the protected activity, the adverse action would not have been taken against the employes. St Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

It is well-settled that the timing of an employer's action is a key factor in making a determination as to motivation behind that action. St. Joseph's. In Lower Dauphin School District Service Personnel Association v. Lower Dauphin School District, 19 PPER ¶ 19195 (Final Order, 1988), the union similarly argued that the school district's decision to subcontract transportation services was motivated by anti-union animus. The Board disagreed and stated that:

> The record reveals that the District began investigating the possibility of subcontracting in June 1986. The employes did not begin their organizing activities until July 1986. Timing of an employer's action has been determined to be a key factor in establishing the motivation behind the action. PLRB v. Fabrication Specialists, 477 Pa. 23, 383 A.2d 802 (1978); St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The timing of the District's action in this matter indicates that its motivation was economic and not anti-union because it began the process of investigating subcontracting before the employes began their organizational activity. The Hearing Examiner, therefore, correctly concluded that the Association failed to prove that the District was motivated by anti-union animus in its decision to investigate subcontracting.

Id. at 475.

In this case, the District had an established relationship with Krapf because it already used Krapf for some of its transportation needs. Because of this established relationship, the District began exploring the possibility of using Krapf for all of its transportation needs in April or May of 2005. However, the Union did not begin the process of organizing until October of 2005, which is five months after the District began negotiating with Krapf. Further, the District decided to accept Krapf's proposal only after it was apparent that it would save a significant amount of money by doing so. The timing of the District's action in this matter, in addition to the significant cost savings on which the District placed importance prior to the initiation of protected activity, indicate that the District's decision to subcontract the student transportation services to Krapf was economic and not anti-union.

With regard to the timing issue, the Union further excepts to the Hearing Examiner's Finding of Fact No. 8, wherein he found that Mr. Tracy recommended the

subcontracting proposal to the District's finance committee on October 3, 2005. The Union contends that there is "no evidence" to support this finding. However, although the Union's attorney did elicit testimony from Mr. Tracy that the subcontracting proposal was not on the written agenda of the October 3, 2005 meeting, Mr. Tracy did testify on direct examination and redirect examination that the subcontracting proposal was discussed at the October 3, 2005 meeting. (N.T. 1/13/3006, pp 180 and 228). In making relevant findings of fact, the hearing examiner may choose to credit or discredit any testimony or evidence, in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth, Department of Corrections Pittsburgh SCI, 34 PPER ¶ 134 (Final Order, 2003). In addition, absent compelling reasons in the record, the Board will not disturb the hearing examiner's credibility determination. Fraternal Order of Police, Lodge No. 85 v. Commonwealth of Pennsylvania, 18 PPER ¶ 18093 (Final Order, 1987). The Hearing Examiner, based on substantial and legally credible evidence, chose to believe Mr. Tracy that the subcontracting proposal was discussed at the October 3, 2005 meeting, which is several weeks before the employes held their first organization meeting. Because there is no compelling reason to disturb this credibility determination, the Board must conclude that Finding of Fact No. 8 is supported by the record.

The Union also argues that the Hearing Examiner erred by failing to make certain findings of fact regarding the subcontracting issue. However, as we stated in Colonial Intermediate Unit 20 Education Association v. Colonial Intermediate Unit, 36 PPER 36113 (Final Order, 2005), a hearing examiner is only required to set forth those facts that are necessary to support his decision and is 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. See Page's Department Store v. Velardi, 464 Pa. 276, 287, 346 A.2d 556, 561 (1975)("When the fact finder in an administrative proceeding is required to set forth his findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence and which are relevant to a decision."); Ford City Borough, 19 PPER ¶ 19117 (Final Order, 1988). In this case, after reviewing the record and the Hearing Examiner's PDO, the Board concludes that the Examiner did make those findings that were necessary to support his conclusions and that he did not omit any necessary findings with regard to the subcontracting issue.

The Union next argues that the Hearing Examiner erred by concluding that statements allegedly made by Ed McCusker, the District's interim manager of transportation, and Tom Jenkins, the District's interim assistant manager, regarding the District's intent to subcontract the transportation services were merely expressions of their personal opinion and not evidence of the District's motives.

Union witnesses testified that Mr. Jenkins and/or Mr. McCusker told them that the District would contract out the transportation services rather than allow the bus drivers to unionize. Mr. McCusker and Mr. Jenkins did not testify before the Hearing Examiner and, as noted by the Hearing Examiner, the District did not present any testimony to rebut the testimony of the Union witnesses in this regard. The Hearing Examiner did not find, based on this record, that these alleged comments should be attributed to the District because he found the alleged comments at issue to be their personal opinion. The record shows that the District had been engaged in negotiations with Krapf well before any organizing campaign started and that it decided to subcontract transportation services to Krapf when it was apparent that the District would realize significant cost savings by doing so. Further, Mr. Tracy testified that Mr. McCusker and Mr. Jenkins were hired on July 1, 2005 in interim capacities after the Director of Transportation retired on June 30, 2005 and that he did not want to hire people permanently in these positions because of the ongoing negotiations with Krapf. Because of the interim status of Mr. McCusker and Mr. Jenkins as evidenced by this record, the Board agrees with the Hearing Examiner that their alleged comments did not speak for the District when they allegedly made comments regarding the union organization efforts of the employees. In addition, the fact that the record shows that the decision to move forward with subcontracting was made before the District knew about any organizing activity supports the Hearing Examiner's conclusion that the alleged statements made my Mr. McCusker and Mr. Jenkins were their personal opinions of what they believed the District would do and not reflective of anti-

union motivation on the part of the District. Therefore, the Hearing Examiner did not err in failing to find a violation of Section 1201(a)(3).

The Union's Exception No. 4 states:

> Exception is taken to the Hearing Examiner's failure to find the District engaged in unlawful surveillance, interrogation and intimidation of bus drivers during the union organizing campaign ...

There exists a clear distinction between a claim of unfair practices for discriminatorily subcontracting to avoid a union organizing campaign and a claim of unlawful surveillance and interrogation of employes. The Union alleges the former but not the latter in the Charge. The Board only has jurisdiction to find the unfair practices alleged in a charge. As a matter of due process, a charging party may not allege one charge and then prosecute another. Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974). As such, at the hearing and in its Exceptions, the Union was limited to its claim that the District's subcontracting of the transportation services was discriminatory. The Board therefore must dismiss the Exception No. 4 claim of error for failure to find an unfair practice over alleged surveillance, interrogation and intimidation.

Further, although the Charge alleges a violation of Section 1201(a)(1), including other clauses of Section 1201(a) which are clearly not applicable, the Specification of Charges does not allege an independent violation of Section 1201(a)(1) or allege that the District engaged in any coercive or surveillance activity. Rather, the Charge is limited to the contention that the District retaliated against the employes for engaging in protected activity by subcontracting the transportation services. Further, a review of the transcript reveals that the Union did not seek to amend the Charge to include these allegations. Rather, the record only indicates that, prior to filing exceptions, the Union was only alleging a derivative violation of Section 1201(a)(1). See Teamsters Local Union No. 32 v. Washington Township Municipal Authority, 20 PPER ¶ 20128 (Final Order, 1989). Because issues may not be raised for the first time in exceptions to the hearing examiner's proposed decision and order, the Union waived the issue of whether the District committed an independent violation of Section 1201(a)(1). See 34 Pa. Code § 95.98(a)(2) ("No reference may be made in the statement of exceptions to any matter not contained in the record or the case.") See also Bucks County Intermediate Unit v. PLRB, 466 A.2d 262 (Pa. Cmwlth. 1983) (in a certification of election case, employer waived issue when it raised that issue for first time in exceptions to a PLRB *nisi* certification order.)

Finally, the Union argues that the Hearing Examiner erred by failing to find a violation of Section 1201(a)(2) and (4). However, it is well-settled that Section 1201(a)(2) prohibits so-called company unions and is directed at employer domination of or assistance to unions. Because the Union makes no such allegation, the Hearing Examiner did not err by failing to find a violation of Section 1201(a)(2). Section 1201(a)(4) of PERA provides that public employers are prohibited from "[d]ischarging or otherwise discriminating against an employe because he has signed an affidavit, petition or complaint or given any information or testimony under this Act." The Board has held that Section 1201(a)(4) is violated where an employe is discriminated against for filing petitions or charges or providing information or testimony in a Board proceeding. See PLRB v. Beaver County, 7 PPER ¶ 307 (Nisi Order, 1976). However, having found that the District was not unlawfully motivated when it entered into the subcontract with Krapf, the District cannot be found to have discriminated against the employees specifically for filing the petition for representation. Therefore, the Hearing Examiner did not err by failing to find a violation of Section 1201(a)(4).

After a thorough review of the exceptions, the briefs in support and opposition and all matters of record, the Board shall dismiss the Union's exceptions and affirm the Hearing Examiner's conclusion that the District did not engage in unfair practices in violation of Section 1201(a)(1), (2), (3) and (4) of PERA.

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 exceptions filed by the Teamsters Local Union No. 384 are hereby dismissed, and the March 24, 2006 Proposed Decision and Order as amended herein, be and hereby is made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this eighteenth day of July, 2006. 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.