COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EASTON AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-05-320-E
EASTON AREA SCHOOL DISTRICT	:	

FINAL ORDER

The Easton Area School District (District) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on February 27, 2006, challenging a Proposed Decision and Order (PDO) issued February 7, 2006, wherein the hearing examiner concluded that the District violated Section 1201(a)(5) of the Public Employe Relations Act (PERA) by unilaterally subcontracting food service work performed by the bargaining unit represented by the Easton Area Educational Support Personnel Association (Association).[1]

The facts, as found by the hearing examiner, are set forth at length in the PDO, but for purposes of these exceptions may be summarized briefly as follows. Starting in 2004, the District and the Association were negotiating a successor collective bargaining agreement, and signed a new contract in May, 2005. (Finding of Fact 4). Also beginning in 2004, and during the negotiations for the successor contract, the District was exploring the possibility of subcontracting the food services for the District. (Finding of Fact 5). The District held several public meetings where the topic of subcontracting the food service work was discussed, (Finding of Fact 5-7, 10), and on April 21, 2005, sent the Association's president, Suzanne Greenleaf, a copy of the Request for Proposal (RFP) that was being given to interested subcontractors. (Finding of Fact 8). On June 27, the District's Board of Directors voted to enter into a contract with Sodhexo for the District's food service work. (Finding of Fact 11). However, at no time did the District discuss Sodhexo's proposal with the Association or ever offer to negotiate or bargain with the Association over the decision to subcontract the food services to Sodhexo. (Finding of Fact 15 and 16).

The District argues that the hearing examiner's Finding of Fact 17 is not supported in the record. The District first challenges the hearing examiner's finding "[t]hat at the same time the District was deciding to subcontract the food services work, it was negotiating a new collective bargaining agreement with the Association." The District contends that this finding is in error because it only *decided* to subcontract on June 27, 2005. The hearing examiner's Finding of Fact 17, read in conjunction with Finding of Fact 5, "[t]hat beginning in 2004, the District began studying the possibility of subcontracting the food services[,]" does not necessitate any amendment. Clearly the hearing examiner's use of the words "was deciding" is a reference back to the deliberation process discussed in Finding of Fact 5.

In addition, the District argues that the hearing examiner's Finding of Fact 17, that "[t]he District representative told the Association bargaining team that the District did not want to transfer all the work to a private firm. It only wanted to transfer the management of the food services but that it was accepting proposals to transfer the work and the management[,]" is likewise unsupported in the record. However, the hearing examiner refers to the Notes of Testimony from the January 6, 2006 hearing wherein at page 66, Ms. Greenleaf testified that although the District was accepting proposals for both management and the entire food service operation, during the bargaining sessions '[i]t was pointed out very clear by the [negotiating] team that they were not looking to privatize the workers[,] [t]hey were only looking for management." Accordingly, upon review of Finding of Fact 17, and the record evidence, no amendment to Finding of Fact 17 is warranted and the District's exception thereto is dismissed.

[1] The Association has not filed a brief in response to the exceptions.

The District also argues that the hearing examiner erred in failing to make several findings regarding the extent to which subcontracting was allegedly discussed during the negotiations for a successor collective bargaining agreement, and at duly noticed public meetings. Generally, the hearing examiner must set forth those findings that are necessary to support the conclusion reached, and need not render all possible findings on all the facts presented. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). Upon review of the exceptions, the District's proffered findings would not alter the conclusion that it had committed an unfair practice.

Where the issue is one of subcontracting, an employer must initiate negotiations with regard to subcontracting and engage in the bargaining process in good faith to a *bona fide* impasse on that issue before exercising its managerial right to subcontract any bargaining unit work. Morrisville School District v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996); Teamsters Local #205 v. Peters Creek Sanitary Authority, 34 PPER 27 (Final Order, 2003). As the Board has repeatedly held, an employer desiring to make changes to wages, hours or working conditions through subcontracting of bargaining unit work, must affirmatively seek out its bargaining counterpart and actively engage in good faith negotiations over the issue of subcontracting without prompting or prodding from the union. Peters Creek Sanitary Authority, supra.

The facts of this case, as well as the arguments raised by the District, are quite analogous to Peters Creek Sanitary Authority, supra. In Peters Creek, the employer claimed that during bargaining sessions for a successor collective bargaining agreement, the union had waived the right to negotiate subcontracting. However, there was no evidence that the union by its express agreement or action waived its right to negotiate subcontracting, and therefore the Board recognized that the employer's bargaining obligation had not been satisfied. The employer in Peters Creek went on to claim that it had satisfied its bargaining obligation under PERA where its written bargaining proposal presented to the union mentioned subcontracting of its billing services. Recognizing that "good faith" bargaining is measured on the totality of circumstances, the Board held that the employer's conduct did not evidence any sincere desire to negotiate over subcontracting, holding that the party seeking to change the *status quo* with regard to subcontracting "must affirmatively introduce its proposed changes into the bargaining process." Peters Creek Sanitary Authority, 34 PPER at 84 (*quoting* Ferndale Area Education Association v. Ferndale Area School District, 30 PPER ¶ 30033 (Final Order, 1999). The Board concluded that because the employer in Peters Creek failed to expressly raise subcontracting during mediation, and bargain that issue to impasse in good faith with the union, the employer committed an unfair practice by unilaterally subcontracting bargaining unit work. It was inadequate for the employer there, like the employer here, to merely reference its consideration of the issue and thereby shift the burden to the union to ensure compliance with the bargaining process.

The District here claims that in the final bargaining session, Ms. Greenleaf asked her own representative whether the existing collective bargaining would permit subcontracting, and the response from the Association's Uniserve Representative, was that nothing in the current agreement precluded subcontracting. The District argues that it reasonably took this to mean that it was permitted to subcontract, and had satisfied its bargaining obligations. Contrary to the District's argument in its brief in support of exceptions, neither Ms. Greenleaf's question regarding the ability to subcontract, nor the Uniserve Representative's statement of what was covered in the contract, amounted to a clear express and unequivocal waiver of the right to negotiate the issue of subcontracting. Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983). At best this evidence merely shows that subcontracting is an issue that had not previously been bargained, and, under PERA, would need to be negotiated before the District could subcontract. The Board and the courts have consistently held that even a zipper or integration clause in a contract indicating that the existing agreement was the entire agreement and that the parties waived further negotiation for the life of the agreement was not a contractual waiver of a bargainable matter and the employer was precluded from acting unilaterally regarding a matter not addressed in the contract. Venango County Board of Assistance, supra; Commonwealth of Pennsylvania v. PLRB, 557 A.2d 1112 (Pa. Cmwlth. 1988). Here the District can point to no contractual provision which would support any claim of satisfaction of its bargaining duty.

The District points to its proposal for a unit-wide seniority list to include the food service workers, made during the final session with the mediator, to suggest that it adequately raised the issue of subcontracting at the bargaining table. However, per Peters Creek, the Authority had the obligation to expressly raise its proposed changes into the bargaining process, which is much more than the District did here through its tangential proposal about seniority. Further, as above noted, it was the District's duty to satisfy the statutory impasse resolution procedures regarding subcontracting prior to any removal of bargaining unit work to another provider. Moreover, the fact that the District's research into subcontracting of the food service work was widely known and discussed during public meetings which were not bargaining sessions, of which the Association was aware, did not relieve the District of its statutory bargaining duty to affirmatively, and directly, introduce its subcontracting proposals into the bargaining process.

As noted above, subcontracting, as a mandatory subject of bargaining, must be negotiated to a *bona fide* impasse. Morrisville School District, supra. Nothing stated in the District's proposed findings would support that a *bona fide* impasse had been reached on the issue of subcontracting. The lack of an impasse is clearly evident from the testimony of record, where throughout, the District offers the self-serving claim that it was the Association's obligation to bring the issue of subcontracting to the table. *See* Dormont Borough v. PLRB, 794 A.2d 402 (Pa. Cmwlth. 2002). To the contrary, it was the District's bargaining obligation, as the party seeking to change the *status quo*, to ensure that the issue of subcontracting was thoroughly explored with the Association and bargained to impasse. The evidence of record clearly shows that subcontracting of the bargaining unit food service work was not sufficiently discussed at the bargaining table for the District to lawfully subcontract in the absence of an agreement with the Association.

After a thorough review of the exceptions and all matters of record, the hearing examiner did not err in concluding that the District violated Section 1201(a)(5) 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 Easton Area School District are hereby dismissed, and the February 7, 2006 Proposed Decision and Order, 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 sixteenth day of May, 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EASTON AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-05-320-E
EASTON AREA SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

Easton Area School District (District) hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(5) of the Public Employe Relations Act; that it has rescinded the June 27, 2005, food services contract with Sodhexo; that it has offered unconditional reinstatement to the former food services employes of the District without any prejudice to their rights and privileges; that it has made whole the former employes for all lost wages and benefits; that it has posted the Final Order and Proposed Decision and Order; and that it has served a copy of this affidavit on the Association.

_____

Signature/Date

_____

Title

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

_____

Signature of Notary Public