COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| MIFFLIN COUNTY EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, ESPA/PSEA/NEA | : | |
| v. | : | Case No. PERA-C-05-551-E |
| MIFFLIN COUNTY SCHOOL DISTRICT | : | |

**FINAL ORDER**

On May 10, 2006, the Mifflin County School District (District) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated April 20, 2006. In the PDO, the Hearing Examiner concluded that the District engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by hiring George Giousios from outside the District at a starting wage rate that exceeded that which was provided in the collective bargaining agreement. On June 9, 2006, the Mifflin County Educational Support Personnel Association (Union) timely filed a response and a brief in opposition to the District's exceptions in compliance with the extension granted by the Board Secretary.

The facts as found by the Examiner are as follows. The District and the Union are parties to a collective bargaining agreement (CBA) that is effective from July 1, 2004 to June 30, 2007. On or about May 18, 2005, the District and parents of a hearing impaired student entered into an individualized education program (IEP) that required the District to provide a full-time sign language interpreter for all of the student's graded subjects. The student has been referred to as Jane Doe on this record. On June 22, 2005, the educational interpreter in the bargaining unit vacated that position and accepted another position with the District. On June 23, 2005, the District posted the newly vacated educational interpreter position with an application deadline of July 7, 2005. The District awarded the position to the only applicant at a rate which is not placed at issue in this proceeding. On August 4, 2005, the new educational interpreter accepted another position and informed the District that she was no longer interested in the educational interpreter position. On August 5, 2005, the educational interpreter position was posted for a second time, with a deadline of August 18, 2005 for applications. No members of the bargaining unit responded to this posting.

With eleven days remaining before the beginning of the 2005-2006 school year, the District placed advertisements for a full-time sign language interpreter in two local newspapers and in a publication of the Pennsylvania School Boards Association (PSBA) in order to comply with Jane Doe's IEP. The District made a total of twenty-nine (29) contacts to numerous individuals, institutions and organizations in an attempt to fill the position. On August 25, 2005, the District contacted an individual (George Giousios), a person known to the District, who had completed a four-year degree at Bloomsburg University. Another person contacted by the District regarding the job vacancy was a freelance sign language interpreter, who demanded $45 per hour. An individual who saw the District's advertisement for a full-time sign language interpreter scheduled an appointment with the District and then canceled it due to an unacceptable pay rate. On August 26, 2005, the District and Jane Doe's parents reconvened the IEP team to discuss options for the student's education if a full-time sign language interpreter could not be located. Jane Doe's parents would not agree to any other options.

The CBA contains a salary schedule, which sets forth the hourly rate of pay for the position of educational interpreter. The CBA provides that the hourly rate of pay for an existing educational interpreter in the 2005-2006 school year is $17.12. The CBA also provides that the starting rate for a newly hired educational interpreter is 65% of the hourly rate for existing educational interpreters. Accordingly, an educational interpreter new to the District would start at the hourly rate of $11.13. On August 26,

2005, the District offered the educational interpreter position to Mr. Giousios, a new hire, at a rate of $17.12 an hour, rather than $11.13. Mr. Giousios began his duties as educational interpreter on August 29, 2005. On September 23, 2005, the District's board of directors approved the hiring of Mr. Giousios effective August 29, 2005. On August 31, 2005, and again on September 12, 2005, the Union forwarded e-mails to the District requesting bargaining over the hiring of an educational interpreter at a rate of pay that was not set forth in the CBA. The District did not bargain the change in the contractual wage rate for new hires in the position of educational interpreter.

In its exceptions and supporting brief, the District claims that the Examiner erred in failing to recognize the exigencies created by the District's need to hire an educational interpreter who satisfied the recently imposed qualifications and requirements under Act 57, within the one-and one-half weeks before the school year began, to be available for the IEP of Jane Doe, after numerous attempts to contact and hire qualified individuals.

The Board has held that an employer may be excused from what would otherwise constitute a bargaining violation where the activity complained of was a reasonable means to fulfill the public employer's statutory duty to provide public services during an exigent circumstance not of its own creation. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 37 PPER 4 (Final Order, 2006)(concluding that public employer did not commit an unfair practice by assigning bargaining unit teaching/training work to a non-bargaining unit trainer where the public employer was unable to locate a qualified bargaining unit member in time to provide training for classes already scheduled due to the abrupt retirement of the trainer). However, the public employer is not in violation of its bargaining obligation only for as long as the emergency or exigent circumstances exist. A public employer must continue to fulfill its bargaining obligations to the union when the exigent circumstances abate or continued efforts consistent with the employer's bargaining obligation provide a qualified candidate.

The District was legally obligated to provide an educational interpreter to Jane Doe at the first day of school on August 29, 2005, pursuant to the IEP. The position for educational interpreter was posted twice during the summer of 2005 in compliance with the parties' CBA. In response to the first posting, a bargaining unit member successfully bid for the position, but she later accepted another position with the District, and the position of educational interpreter was posted a second time. As of August 18, 2005, no qualified bargaining unit member bid for the position of educational interpreter. At this time, in order to fulfill its legal obligation to comply with Jane Doe's IEP, the District placed advertisements for a full-time sign language interpreter in two local newspapers and in PSBA's publication. The District also contacted numerous individuals, institutions and organizations in an attempt to fill the position. One of the individuals contacted by the District regarding the job vacancy was a freelance sign language interpreter who demanded $45 per hour. An individual who saw the District's advertisement for a full-time sign language interpreter scheduled an appointment with the District and then canceled it due to the unacceptable pay rate offered. Jane Doe's parents refused to agree to any other options for their child other than the provision of an educational interpreter. As of August 26, 2005, the District's numerous recruitment efforts were unsuccessful and school was scheduled to start in a few days.

On these facts, the record supports the conclusion that due to circumstances beyond its control, the District was unable to hire an educational interpreter at the contractual rate in time to meet the obligations of the District or the needs of the student, for the impending 2005-2006 school year. The District responded to these exigent circumstances and secured the employment of Mr. Giousios by August 29, 2005 to provide educational support for Jane Doe, albeit at a wage rate higher than the contractual rate.

Generally, an alleged emergency unsupported by evidence of reasonable efforts to avert the circumstance will not excuse unilateral wage increases and/or direct dealing. PLRB v. Minersville School District, 14 PPER ¶ 14137 (Final Order, 1983), affd 475 A2d 962 (Pa. Cmwlth., 1984). In Minersville, the school district subcontracted cafeteria services to a private contractor alleging "urgent" need, in that the school year was

about to commence shortly. However, the record revealed that the parties had been engaged in negotiations for a new contract for months and the district initially broached the subcontracting matter at an advanced stage of negotiations, and then subcontracted within two weeks of introducing the subject alleging the need for urgency before the union even responded to the district's initial proposal. Similarly in Fraternal Order of Police v. City of Jeannette, 36 PPER 68 (Final Order, 2005), aff'd 890 A2d 1154 (Pa. Cmwlth., 2006) the Board rejected an exigent circumstance defense where the employer transferred overtime work from the bargaining unit and assigned it to a manager where the employer had adequate notice of the need for overtime assignment and had adequate time to follow the contract and past practice regarding bargaining unit overtime assignment.

Conversely in PSTA, supra, the Board credited the employer's defense to a similar charge of unilateral removal of bargaining unit work when the record showed that the incumbent in an instructor position abruptly retired approximately a month prior to the start of a course of scheduled instruction. The instructor was the only bargaining unit employee in that position. The replacement procedure required a fifteen day posting, written examination, subsequent interview and further review and approval by the state police deputy of administration. It was impossible to follow this process and select a candidate before the scheduled start of the instruction and the employer contracted the services of the now retired instructor to start the course. Because the circumstance which created the immediate need was beyond the employer's control and the applicable practice and procedure would not have provided the required instructor in time for the start of the course, the Board found no unfair practice. It is significant for our purposes that the Union limited its charge to the hiring of Mr. Giousios on September 23, 2005 at a rate in excess of the rate established in the CBA without bargaining. The Union did not allege any statutory violations for the District's conduct subsequent to the hiring of Mr. Giousios, and the record does not reveal what further efforts were made to locate an interpreter at the applicable contract rate of pay. Accordingly, the Board will not address whether or to what extent the District had an obligation to further address the conditions that gave rise to the emergency subsequent to the hiring of Mr. Giousios.

The above review of the Board's case law and the facts of record lead the Board to conclude that this circumstance is more like PSTA than cases such as Jeannette and Minersville, where the respective employers similarly claimed exigent or emergency circumstances justifying the failure of the employer to satisfy its bargaining obligation. In PSTA, the record showed that the employer sought compliance with the existing practice but that the abrupt retirement of the bargaining unit employe in the unique position[1] coupled with inadequate time to comply with the routine recruiting and employment procedures prior to the start of the scheduled course made it impossible for the employer to recruit and hire a replacement employe in the available time frame. In PSTA, the Board dismissed the charge of unfair practices because the exigent circumstance indicated that the employer did not repudiate its bargaining obligation. This circumstance is contrasted with Minersville where in the course of negotiating a successor collective bargaining agreement, the employer withheld proposals regarding the subcontracting of bargaining unit work until the parties were well into the bargaining process and broached the subject for the first time not in sufficient time relative to the beginning of the school year for the employer to satisfy its collective bargaining duty. The Board there found an unfair practice because the employer did not satisfy its obligation to raise subcontracting in a timely manner to facilitate completion of the bargaining process. More recently, in Morrisville School District v. PLRB, 687 A2d 5 (Pa. Cmwlth., 1996), the Board found an unfair practice, affirmed by Commonwealth Court, where the employer did not timely raise a subcontracting matter. Similarly in Jeannette, unlike the employer here, the employer (aware of the need to schedule bargaining unit overtime), did not act timely and then directed the performance of the work by a manager, claiming an exigent circumstance. Review of that record led the Board and the Court to conclude that the employer did not act timely to comply with the contract and practices regarding the assignment of overtime and the alleged exigent circumstance was caused by the

[1] The record here is devoid of evidence that the position could have been filled by another bargaining unit employe working out of class at an adjusted pay rate for the employe. We confine our analysis here to a unique position in a bargaining unit (e.g.: The Act 120 trainer in PSTA or the sign language interpreter here) where there are not bargaining unit employes qualified and able to perform the work.

employer's failure to act. Here, the findings of fact and the record as a whole demonstrate that the District twice attempted to comply in a bidding process to facilitate the opportunity for a bargaining unit member to bid and awarded the position consistent with this process only to find that the successful bidder withdrew shortly thereafter. The District then engaged in extensive efforts to recruit a non-bargaining unit person at the rate provided in the contract without success and it was only days before the beginning of the school year when the employer was able to retain a candidate at a rate higher than that in the agreement.

We do not find on this record that the employer repudiated the collective bargaining agreement having made substantial efforts to fill the position consistent with the agreement and existing practice only to find that due to circumstances beyond the District's control, it was unable to fill the position consistent with its obligations under the IEP of the affected student. The Union did not show that there was any candidate within or without the bargaining unit willing and available to accept the position. We reach this result based on the District's compliance with the contractual mechanism in its attempt to fill the unique position, its independent recruiting effort following the failure of the bidding process to produce a candidate coupled with the District's independent obligation to comply with the student's IEP.

We further note that we do not interpret the parties' collective bargaining agreement regarding the contractual rate for the position (although each party concedes that the rate was in excess of the contractual rate). Any issues concerning any alleged violation of the agreement are reserved to the grievance/arbitration process and the Board confines its role here to deciding whether under such circumstances the employer's conduct constitutes a repudiation of the collective bargaining agreement. This record simply does not support an argument that the employer repudiated the collective bargaining agreement or violated its collective bargaining duty.

The Union posits that the problem faced by the District should be remedied by the imposition of an ad hoc duty to bargain with the Union, speculating that the parties could expeditiously reach a mutually acceptable alternative.[2] We do not believe that this alternative is consistent with the case law or represents a practical resolution of the issue. First, the parties do have a collective bargaining agreement addressing the pay for this position and it is only the unique circumstances following the District's compliance with the contract, the withdrawal of a candidate and the extensive unsuccessful recruiting efforts, many of which were beyond the control of the employer mere days before the beginning of the new school year. As above noted, employer conduct during the life of the agreement alleged to be in violation of the agreement is remedied through the grievance/arbitration process and not the negotiation of new terms and conditions. Second, Board case law in this area demonstrates that the imposition of a mid-term bargaining obligation requires compliance with the statutory collective bargaining procedures. City of Philadelphia (First Responder) 28 PPER ¶ 28100 (Final Order, 1997); Salisbury Township v. PLRB, 672 A2d 385 (Pa. Cmwlth., 1996). In cases such as Philadelphia, the Board has stated that where there is a midterm bargaining right and duty, the obligation to bargain which the Union seeks to impose on the District here requires compliance with the statutory bargaining procedures. While the Union speculates that had the District approached the Union regarding this matter, a mutually acceptable resolution would have occurred, oftentimes the collective bargaining process does not result in early resolution and subsequently requires significant investments in time and process to satisfy the statutory bargaining duty. The record here shows that there was not sufficient time to comply with the statutory bargaining procedure. Further, Board case law also indicates that the employer is obliged to maintain the status quo until an agreement is reached to provide new terms and conditions. Philadelphia Housing Authority v. PLRB, 620 A2d 594 (Pa. Cmwlth, 1993). For these reasons, the Board does not find that the creation of a new bargaining obligation regarding a matter addressed by the existing agreement to be the proper resolution of this matter.

At the outset of our analysis above, we noted that the record does not show the circumstances beyond the District's decision in August/September to hire Mr. Giousios

[2] An alternative suggested by the Union was that all new hires be raised to the higher level necessitated by the unsuccessful recruiting efforts regarding this position.

into the interpreter position. In resolving this charge, we only decide that the Employer's conduct at that time was not an unfair practice in violation of the District's bargaining obligation, nor did it authorize a long term employment relationship at a rate inconsistent with the contract. The District is under a continuing obligation to recruit an interpreter at the contractually provided rate and subsequent recruiting efforts may under such circumstances produce a candidate at the contract rate consistent with the collective bargaining agreement.

Therefore, after review of the exceptions, briefs in support and opposition, and all matters of record, the Board shall dismiss the charge that the District's conduct constituted an unfair practice in violation of the District's bargaining obligation.

## CONCLUSIONS

The Board therefore after due consideration of the foregoing and the record as a whole, concludes and finds that conclusions 1 – 3 of the Proposed Decision and Order are sustained, that conclusion 4 is vacated, and further concludes:

5. The Mifflin County School District has not committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

## ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Board

## HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order be and the same are hereby sustained, in part, and dismissed, in part consistent with this decision; and that the Order on page 6 of the Proposed Decision and Order be, and the same hereby is, vacated and set aside. The Board further orders and directs that the charge of unfair practices is dismissed and the complaint issued thereon is rescinded.

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 twentieth day of March, 2007. 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.