COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PHILADELPHIA FEDERATION OF TEACHERS, LOCAL 3, AFL-CIO	:	
v.	:	Case No. PERA-C-07-407-E
SCHOOL DISTRICT OF PHILADELPHIA	:	

PROPOSED DECISION AND ORDER

On September 21, 2007, the Philadelphia Federation of Teachers (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the School District of Philadelphia (District) violated Section 1201(a)(5) of the Public Employe Relations Act (PERA). On October 11, 2007, the Secretary of the Board issued a complaint and notice of hearing wherein this case was scheduled for hearing on December 14, 2007, in Philadelphia, Pennsylvania. A series of granted continuance requests resulted in a hearing finally taking place on February 7, 2008, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer.

2. The Union is an employe organization.

3. The parties have a current collective bargaining agreement that was negotiated in 2004 and remains current through August of 2008. Bargaining unit members are predominantly ten-month employes, although their pay is spread out over twelve months. The parties stipulated that they have negotiated specific provisions covering terms and conditions of employment and pay rates for two types of summer programs. (N.T. 23-29; Joint Exhibit 1, Joint Exhibit 5).

4. In September of 2006, the parties met and one topic discussed was the possible implementation of an eleven-month, extended school year for either the whole District, or a portion thereof. The Union’s position was that, if the District wanted any kind of eleven-month program, bargaining unit members would need to be paid their regular-year salary with no reductions. At a meeting in February of 2007, the District and the Union again discussed an extended school year program. Discussions ended when the Union insisted that bargaining unit members be compensated for any eleven-month program at the regular-year salary. (N.T. 30-34; Joint Exhibit 2, 3, 70-74; Union Exhibit 7, 8).

5. In January of 2007, the Union electronically received a copy of the summer program job posting for the 2007 summer program. The undisputed practice between the parties was that these announcements were sent from the District’s Summer Program Office to the District’s Labor relations Office, which in turn sent them to the Union’s point person for these issues. It was not until a meeting in June of 2007, however, that the Union became aware that the District would be starting an eleven-month program in just two weeks. The District had not sent the Union a copy of the eleven-month program job posting in January, as it had with the regular summer program job posting. The stated salary for bargaining unit members participating in the eleven-month program was the summer program salary, an amount the Union refused to agree to when the eleven-month program was being discussed in November of 2006 and February of 2007. (N.T. 37, 38, 46, 47, 110, 111, 113, 114; Joint Exhibit 1, 5).

6. The job posting for what the District called the "Eleventh Month Extended Learning Opportunity(CEO Region)" was provided to the Union after it specifically requested it from the District after the June 2007, meeting. Unlike the summer job postings, this job posting was open only to bargaining unit members in a portion of the District called the CEO Region. Unlike the summer job postings, this posting had reductions in force based on District seniority, and not on summer program seniority, as bargained. Moreover, the eleven-month program was offered on dates coinciding with those dates proposed by the District in the February 2007 meeting. (N.T. 68-70; Joint Exhibit 4, 5, Union Exhibit 7, 8).

DISCUSSION

The Union charges the District with violating Section 1201(a)(5) of the PERA by "unilaterally extending the school year in the form of an 11th Month Program[1] in the CEO Region of the District. This Program was implemented without prior notification, bargaining, or agreement with the Union." The District parries this allegation by asserting that this is just another previously bargained summer program and any changes it made were "slight differences," and that the Union "focuses" on the "immaterial differences."

What the record shows, however, is just what the Union alleges; that the District implemented an eleven-month program under rules specifically rejected by the Union in previous bargaining, and different from any previously bargained-for summer offering.

A review of the parties' bargaining history for summer offerings is a helpful place to start. The parties have bargained for both "summer school" and "summer programs." These were bargained at a lower rate of pay than bargaining unit members' regular-year salary because of the District's fiscal constraints. As agreed between the parties, summer employment opportunities are open to bargaining unit members districtwide. And, reductions in force are decided, not on years of teaching-seniority with the District, but rather on summer seniority.

In contrast, the idea for an eleven-month program was first raised with the Union by the District in a September 2006, meeting. The discussions at that meeting included the possibility that the eleven-month program would be districtwide. The issue of salary for bargaining unit members was an initial, and continuing area of disagreement between the parties for the eleven-month program. The Union expected its members to be paid the regular-year salary and not the reduced summer program or summer school rates. The Union memorialized this position in correspondence to the District; the District wrote back that it was willing to continue discussions on this issue.

The next meeting between the parties to discuss the eleven-month program was in February of 2007. The District proposed an eleven-month program, but only in what the parties referred to as the "CEO Region." This was not a specific geographic area, but rather a group comprised of the entire District's worst performing schools, regardless of location. (N.T. 32). The Union's position on salary remained unchanged from the prior September meeting; the regular-year contractual rate. No agreement was reached at this meeting about any eleven-month program. Since the District had laid-off employes, because it was running a deficit, and no further meetings about the eleven-month program were scheduled, the Union assumed the District had abandoned the idea.

The Union was understandably somewhat taken aback when, at a meeting in the beginning of June 2007, the District first told the Union it was proceeding with implementation of the eleven-month program in the CEO Region, starting June 21, 2007. After the meeting, and after the Union specifically asked, the District provided a flyer

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[1] Throughout the Union's charge, the notes of testimony and the parties' briefs, this program is variously called the 11th Month Program, the extended school year, the eleven month school year, the Eleventh Month Extended Learning Opportunity (Joint Exhibit 4), the eleven month session, the CEO eleven month session (N.T. 49), the 11th Month Summer Program (Union Exhibit 6), the eleven month extended program, the eleven month extended school year program, and the eleventh month extended school year. In an attempt to put the rabbit in the hat, the District refers to the eleven-month program as the "CEO Region Summer Program," (District's brief at 3), and the "summer program in the CEO [R]egion" (N.T. 19). For the sake of simplicity I will call it the eleven-month program.

titled, “Eleventh Month Extended Learning Opportunity (CEO Region).” (Joint Exhibit 4). The parties refer to this type of flyer as a “job opportunity.” (N.T. 39).

The District’s job opportunity for the bargained-for summer program was published in January 2007, and sent to the Union, as always. The job opportunity for the Eleventh Month Extended Learning Opportunity (CEO Region) was never sent to the Union, until the Union asked for it.

Despite the District’s argument, that there are only “immaterial differences” between the regular Summer Program Job Opportunity and the Eleventh Month Extended Learning Job Opportunity, some differences involve well-established, mandatory subjects of bargaining. The overall differences between the two include, different starting and stopping dates; different sites; different seniority provisions for bargaining unit members; different selection criteria for bargaining unit members; different rules for reductions in force should too many bargaining unit members apply; different application procedures; different application deadlines, and a rate of pay for the eleven month program specifically rejected by the Union. The District did not *replace* the summer program with the eleven-month program, but *added* the eleven-month program in addition to offering the summer programs.

What program offerings the District makes available is a management prerogative. Nevertheless, the District must bargain manditorily negotiable items associated with those offerings. In this case items such as salary, the pool of bargaining unit members eligible to apply, and the criteria used to cull the applicant ranks should too few students actually attend, are manditorily negotiable subjects Philadelphia School District, 25 PPER ¶ 25090 (Final Order, 1994). Since it did not bargain to agreement with the Union over these items, the District has violated Section 1201(a)(5) of PERA. Jersey Shore Area School District, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987).

The District’s policy-makers do not appreciate the import of bargainable changes to their own programs. In a rather Joycean exchange, the District’s whilom director of after school and summer programs testified that the Teacher Requirements section in the Eleventh Month Extended Learning Opportunity (Joint Exhibit 4), was “exactly the same” (N.T. 124) as the Teacher Requirements section of the Summer Program opportunity (Joint Exhibit 5). But those sections are clearly not the same. One says that, “[p]ossible reductions will be based on *system* seniority,” while the other says that, “[p]ossible reductions will be based on *summer program* seniority.”[2] And, the District had **bolded-out** those sentences in each of its documents, calling the reader’s attention to the difference. Given that the prior hearing testimony focused on just this difference, the witness’s testimony is stunning, and is reminiscent of Garrison Keillor’s[3] assertion that he believes “in looking reality straight in the eye, and denying it.”

The remedy for this unfair practice is for the District to offer to bargain with the Union over those manditorily negotiable items associated with the eleven-month program, should the District decide to offer it again next year: namely, the rate of pay for bargaining unit members; the eligibility criteria for bargaining unit members; and the criteria used to cull the applicant ranks of bargaining unit members, if need be. These three items simply cannot be unilaterally determined by the District without violating the PERA. Moreover, the District violated the PERA by not following the contractually bargained system of informing the Union in January concerning the upcoming summer’s job opportunities.

CONCLUSIONS

The examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds that:

1. The District is an employer within the meaning of Section 301(1) of the PERA.

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[2] The parties have bargained for reductions in summer program employes based only upon summer program seniority. (N.T. 27-29; Joint Exhibit 1, pp 77, 137; Joint Exhibit 5).

[3] US humorist, radio broadcaster, host and writer of *A Prairie Home Companion* (1942-).

2. The Union is an employe organization within the meaning of Section 301(3) of the PERA.

3. The Board has jurisdiction over the parties hereto.

5. The District has committed unfair practices within the meaning of Section 1201(a)(5) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

3. Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days.

4. Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this twenty-eighth day of May, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

The School District of Philadelphia 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 posted the Proposed Decision and Order as directed therein; and that it has served a copy of this affidavit on the Philadelphia Federation of Teachers at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED to before me
The day and year first aforesaid

_____
Signature of Notary Public