

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 85, :  
LOCAL 2184, AFL-CIO :  
 :  
v. : Case No. PERA-C-05-259-W  
 :  
MCKEAN COUNTY :

**FINAL ORDER**

McKean County (County) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on October 12, 2007, challenging a Proposed Decision and Order (PDO) issued on September 25, 2007. In the PDO, the Board's Hearing Examiner concluded that the County violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by failing to bargain in good faith with AFSCME District Council 85, Local 2184, AFL-CIO (Union) regarding accumulated sick leave. The Secretary of the Board granted the Union an extension of time to file a brief in opposition to the exceptions, which the Union timely filed on December 8, 2007. After a thorough review of the record, the Board makes the following:

**AMENDED FINDINGS OF FACT**

25. That County Commissioner Thomas Causer, in answering a citizen's question at the January 14 public meeting, said that the first resolution to enter into a management services agreement with CHR does not change the status of the bargaining unit employees as County employees. Commissioner Causer further explained that once the County and CHR negotiated and entered into an operating lease, which was the subject of the second resolution, the County would maintain ownership of the facility and the property, but the employees of Sena-Kean Manor would become employees of CHR. (N.T. 33, Union Exhibit 5).

39. That upon receiving this document, Ms. Hoak spoke to Mr. Smith, who indicated that the County's position on accumulated sick leave was as stated in the April 22, 2005 memo. (N.T. 46-47).

40. Interpreting the April 22, 2005 memo to be a proposal to cancel any accumulated sick leave of the bargaining unit employees, with the exception of those employees 60 years or older that intended to retire, Ms. Hoak indicated to Mr. Smith that the Union did not want to agree to such a proposal. Ms. Hoak also indicated that because no one had offered a proposal to change the contract language on accumulated sick leave, she assumed that it would remain the same. (N.T. 47-49).

41. That on April 25, 2005, the Union and CHR met for a negotiation session. Ms. Hoak appeared on behalf of the Union. The attendees on behalf of CHR included Mr. Smith, Mr. Chris Bailey and Ms. Theresa Hessler. Ms. Kim Baker, who was a County managerial employee before CHR took over the operation of Sena-Kean Manor, also attended. Ms. Baker is now the CHR personnel director at Sena-Kean Manor and is no longer a County employee. (N.T. 49, 73, 98-99).

43. That at the April 25, 2005 negotiation session, Mr. Smith, on behalf of a division of CHR, McKean Care Services, L.P., d/b/a Sena-Kean Manor, proposed that employees would receive eight (8) days of sick leave a year, with a maximum accumulation of sixteen (16) sick days. The proposal also included short-term and long-term disability insurance. (N.T. 68, 73-74).

45. That the Union accepted these terms in part because it was concerned about what would happen to the bargaining unit if no agreement was in place before May 1, 2005. Specifically, the Union believed that if a successor collective bargaining agreement was not completed by the current contract's extended expiration date of April 30, 2005, the employees might lose retroactivity of any financial benefits. Another reason the Union

accepted these terms was that CHR was proposing short-term and long-term disability, which would provide employees with some monetary relief if they had to be off work. (N.T. 43, 50-51, 53).

#### DISCUSSION

The facts of this case are summarized as follows. The County and the Union were parties to a collective bargaining agreement (County CBA) covering all nonprofessional employees working at Sena-Kean Manor, which was a nursing home operated by the County. The County CBA was effective from January 1, 2002 through December 31, 2004. The County CBA included a sick leave provision under Article XI that allowed the bargaining unit employees to accrue 15 days of sick leave a year, with a maximum accumulation of 115 days. Article XI also provided that any employee who retired from County employment at age 60 or older or took disability retirement would be compensated for unused sick leave up to a maximum of 115 days.

On or about September 2, 2004, the Union and the County began negotiations for a successor collective bargaining agreement. At that meeting, the County proposed a change to Article XI, Section 4, which would permit bargaining unit employees to choose between using three days of sick leave or three days of vacation time when sickness of an immediate family member required the employee to be absent from work. The Union agreed to this proposal.

On December 14, 2004, the County informed the Union that it was seeking resumes from companies interested in managing Sena-Kean Manor. Thereafter, the County and the Union held a negotiation session on January 12, 2005, during which Richard Casey, the County Administrator, introduced Michael Smith, the Vice President of Human Resources of Complete HealthCare Resources (CHR), as the new negotiator for the County. The County also advised the Union that it intended to enter into a management services agreement with CHR.

On January 14, 2005, the County Commissioners held a meeting to discuss and pass two resolutions concerning Sena-Kean Manor. The first resolution authorized the County to enter into a management services agreement with CHR. The second resolution authorized the County to negotiate and execute a letter of intent with CHR, outlining the basic terms for a future operating lease for Sena-Kean Manor. In answering a citizen's question at the meeting, County Commissioner Thomas Causer explained that the first resolution did not change the status of the bargaining unit employees as County employees. Commissioner Causer further explained that once the County and CHR entered into an operating lease, which was the subject of the second resolution, the County would maintain ownership of the facility and the property, but the employees of Sena-Kean Manor would become employees of CHR.

At the January 18, 2005 negotiation session, Smith indicated that CHR was negotiating a lease agreement with the County regarding Sena-Kean Manor. During February and March 2005, the Union and the County held three meetings in which the subject of sick time as it related to overtime was discussed. Additionally, Smith stated that the County and CHR were continuing to negotiate a lease agreement to be effective May 1, 2005. Smith further stated that if the parties reached an agreement before CHR took over Sena-Kean Manor, the County would sign the agreement, but that once the lease agreement was in place, CHR would sign the agreement. During negotiations, the County granted the Union three extensions of the terms and conditions of the County CBA. The County's third extension expired on April 30, 2005.

On March 29, 2005, the County and CHR finalized a lease agreement for Sena-Kean Manor, effective May 1, 2005. At a bargaining session on March 30, 2005, Smith informed Union Staff Representative Margaret Hoak of the lease agreement and that CHR would be the employer of the employees. On April 6, 2005, Smith sent Hoak an e-mail in which he provided a list of items that would need to be addressed with the change in ownership. The provisions concerning accumulated sick leave were not listed.

On April 22, 2005, Hoak and Smith received a facsimile from Kim Baker, a County management employe, which included a memo entitled "County position on the benefit issues associated with the Sena-Kean Manor employes and the Commencement of the Operating Lease with CHR". The memo stated regarding accumulated sick leave:

Accumulated sick days earned will be dealt with as required in the labor agreement. Any employe eligible to retire, age 60 or older, will be paid for his or her accumulated sick days as per the language in the labor agreement. Other employes will not be paid for accumulated sick days.

After receiving the memo, Hoak spoke to Smith, who indicated that the County's position on accumulated sick leave was as stated in the April 22, 2005 memo.

On April 25, 2005, the Union and CHR met for a negotiation session. Smith, on behalf of a division of CHR, McKean Care Services, L.P., d/b/a Sena-Kean Manor, and Hoak, on behalf of the Union, reached a tentative agreement that the bargaining unit employes who had accumulated sick leave with the County beyond forty hours would be credited with a maximum of forty hours of sick leave. Both parties signed this agreement on April 27, 2005. Additionally, the new operator, CHR, proposed that the employes would accrue eight days of sick leave a year with a maximum accumulation of sixteen sick days. The proposal also included short-term and long-term disability insurance. The Union made a counterproposal of ten sick days a year with a maximum accumulation of twenty days, as well as short-term and long-term disability. CHR agreed to the Union's counterproposal. The Union finalized a successor agreement with CHR, effective May 1, 2005 to December 31, 2008. The agreement included a sick leave policy that limited accumulated sick leave to 20 days. The bargaining unit employes subsequently ratified the agreement.

The Union filed its Charge of Unfair Practices on June 15, 2005, alleging that the County violated Section 1201(a)(1) and (5) of PERA by repudiating an alleged promise to ensure that CHR would take over employment of the bargaining unit employes with no loss of sick leave benefits. The Union further alleged that the County failed to bargain in good faith because it did not propose any changes concerning the accumulation of sick leave until a few days before CHR was to become the employer of the employes at Sena-Kean Manor.

The Hearing Examiner determined that the County, through its bargaining conduct, had made an implied promise to the Union that the bargaining unit employes would not lose their accumulated sick leave because the County did not propose any change in the relevant contract language before April 22, 2005. The Hearing Examiner stated that this case has unique facts, which require piercing the veil of the County-CHR lease agreement to permit the finding of an unfair practice by the County. The alleged unique facts relied on by the Hearing Examiner include (1) the County's placing CHR in an advantaged position that allowed it to engage in coercive bargaining; (2) the amount of time that the County and CHR waited until raising the accumulated sick leave issue; (3) the County's allowing CHR to wait until April 22, 2005, to inform the Union of the sick leave issue; and (4) the employment setting of a nursing home. Based on these alleged facts, the Hearing Examiner concluded that the County demonstrated unreasonableness in its bargaining conduct. Therefore, the Hearing Examiner held that the County violated Section 1201(a)(1) and (5) of PERA. By way of remedy, the Hearing Examiner ordered the County to make the bargaining unit employes whole for their loss of accumulated sick leave.

In its exceptions, the County initially argues that the Hearing Examiner erred in making certain findings of fact and in failing to make other findings. Upon review of the record, we find that several of the Hearing Examiner's findings do not accurately reflect the evidence of record. Accordingly, we have amended those findings as set forth above. With regard to the other findings proposed by the County, the Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached, but need not make findings summarizing all the evidence presented. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). The Board has declined to make the

other findings suggested by the County because they are not necessary or relevant to the conclusion reached in this order.

The County also argues in its exceptions that it had the right to make the managerial decision to completely cease operating the nursing home, citing Philadelphia Federation of Teachers, Local #3, AFL-CIO v. Philadelphia School District, 28 PPER ¶ 28202 (Final Order, 1997) and AFSCME, District Council 89 v. City of York, 28 PPER ¶ 28051 (Proposed Decision and Order, 1997). Further, the County asserts that its April 22, 2005 memo was not a proposal to cancel accumulated sick leave in the successor agreement. Rather, the County argues that its April 22, 2005 memo demonstrated its intent to comply with the accumulated sick leave provisions found in the County CBA.

In determining whether a respondent has complied with its obligation to bargain in good faith, the Board examines the totality of the circumstances surrounding the parties' negotiations. Commonwealth Bar Association v. Commonwealth of Pennsylvania Public Utility Commission, 35 PPER ¶ 113 (Final Order, 2004). The Board will determine that good faith bargaining did not occur if it can be reasonably concluded that one of the parties never intended to achieve an agreement, demonstrated unreasonableness, or displayed a single-minded purpose to thwart the public policy. Id.

The Hearing Examiner concluded that the County demonstrated unreasonableness in its bargaining conduct, relying in part on the County's April 22, 2005 memo. The Hearing Examiner interpreted the April 22, 2005 memo to be the County's proposal to change the provisions concerning the accumulation of sick leave. However, it is apparent from a review of the April 22, 2005 memo that the County was not proposing a change to the sick leave provision. (Union Exhibit 7). Rather, the County was stating in its memo that accumulated sick leave would be compensated under the existing terms in the County CBA. Id. The County CBA, by its express terms, only required that employees be compensated for accumulated sick leave where they retired at age 60 or above or took disability retirement. There was no requirement in the County CBA that employees be compensated for accumulated sick leave where, as here, the employees did not retire but continued working for a new non-County employer.<sup>1</sup>

Furthermore, the County's April 22, 2005 memo was not a proposal made in negotiations between the County and the Union. Indeed, the Union had previously been informed at the March 30, 2005 bargaining session with CHR that CHR had finalized a lease agreement with the County for Sena-Kean Manor, and that CHR would be the employer of the bargaining unit employees. (Finding of Fact 33). The next bargaining session between CHR and the Union did not take place until April 25, 2005, at which time the Union and CHR negotiated the agreement on accumulated sick leave for employees of CHR (Findings of Fact 41-44). Accordingly, the Hearing Examiner erred in concluding that the County's April 22, 2005 memo constituted bad faith bargaining on its part in violation of Section 1201(a)(1) and (5) of PERA. Indeed, at that time, the County was no longer engaged in bargaining with the Union due to its successful negotiation of the lease agreement with CHR.

Further, as indicated by our amendment above of Findings of Fact 41 and 43, the Hearing Examiner erred in stating in those findings that the "County" negotiating team met with the Union on April 25, 2005, and proposed changes to the provisions concerning accumulated sick leave. Those findings conflict with Finding of Fact 42, in which the Hearing Examiner found that Michael Smith, on behalf of CHR, reached a tentative agreement with the Union that the bargaining unit employees would be credited with up to 40 hours of sick leave. Union Staff Representative Margaret Hoak similarly acknowledged in her testimony that on April 25, 2005, the Union was negotiating a contract with CHR and that Smith had indicated that the things he was negotiating for were things that CHR could live with. (N.T. 73). Hoak further testified that the proposal concerning accumulated sick leave was put on the table by CHR. Id. Therefore, the new operator, CHR, proposed a change to the provision concerning accumulated sick leave, not the County. Moreover, the Union offered a counterproposal on that issue that was accepted by CHR and was memorialized in a collective bargaining agreement with the Union (after ratification

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<sup>1</sup> Nevertheless, the County offered un rebutted testimony that it elected to compensate individuals who were eligible to retire for their unused sick leave, regardless of whether they actually retired. (N.T. 95-96).

of the agreement by the Union membership). Thus, it would be incongruous to hold the County responsible for a bargaining proposal that it did not make. Further, the Union responded to CHR's proposal with its own counterproposal that was accepted and ratified by the Union's membership.

With regard to the "unique facts" relied on by the Hearing Examiner, we find upon review of the record that the Hearing Examiner's discussion in this regard is largely speculative. For example, the Hearing Examiner states that the County put CHR into an advantaged position that allowed it to later engage in coercive bargaining after it entered into the lease agreement to operate the nursing home. However, there is no evidence that the County and CHR did anything but engage in bona fide negotiations for the lease agreement or that this process was a subterfuge to give CHR an advantage in negotiations with the Union. To the contrary, the County made it clear at the public meeting on January 14, 2005 that it was entering into a management services agreement with CHR concerning the nursing home and proceeding to attempt to negotiate an operating lease whereby CHR would become the employer of the bargaining unit employees. (Findings of Fact 24, 25). At the very next bargaining session on January 18, 2005, the County informed the Union that CHR was negotiating a lease agreement with the County regarding operation of the nursing home. (Findings of Fact 26, 27). Moreover, after the County and CHR finalized the lease agreement on March 29, 2005, the Union was informed at a bargaining session on the very next day (March 30, 2005) of the lease agreement and that CHR would be the employer of the employees with respect to bargaining a successor agreement. (Finding of Fact 33). Thus, the Union was provided with ample notice and information regarding CHR's impending takeover of the nursing home.

Although the Board has no authority to rule on the alleged coercive bargaining by CHR in that CHR is not a public employer over which the Board has jurisdiction, we find no basis in this record for the Hearing Examiner's suggestion that the Union was coerced into agreeing to a change in the accumulated sick leave policy. The Union claimed that it was concerned that if an agreement was not reached promptly with CHR, the bargaining unit employees would become employees at will. There is no evidence that CHR made such a statement. Also, while the Union expressed concern that without an agreement the employees would be subject to loss of benefits, both public and private sector case law require a successor employer that maintains substantially the same workforce at the same location performing the same duties to bargain with the current representative of the employees and to maintain the status quo during such negotiations. Lycoming County v. PLRB, 480 A.2d 1310 (Pa. Cmwlth. 1984); Teamsters Local 764 v. Milton Borough, 34 PPER ¶ 159 (Final Order, 2003); NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972). Indeed, the record reflects that CHR complied with its obligations under this authority by bargaining with the Union and maintaining the status quo while the new collective bargaining agreement was being negotiated.

The Hearing Examiner further stated that the County and CHR strung the Union along in bargaining and then "blindsided" the Union with the accumulated sick leave issue just before CHR took over operation of the nursing home. As already discussed, the sick leave proposal was made by CHR and not by the County. Further, we find no evidence of a nefarious motive on the part of the County or CHR regarding the sick leave proposal. Indeed, the suggestion that the Union accepted the sick leave proposal under duress is belied by the fact that the Union voluntarily made a counterproposal that was accepted by CHR and ratified by the Union membership.

Finally, the Hearing Examiner stated that the particular employment setting in this case (a nursing home) is "significant." We agree with the Hearing Examiner that given the services at issue, i.e., care of an elderly population, it would be preferable to minimize labor strife during negotiations. However, if anything, these circumstances gave the Union great leverage in its negotiations with CHR, rather than, as found by the Hearing Examiner, putting additional pressure on the Union to accept terms proposed by CHR. Upon review of the totality of the circumstances, we find that the record does not support the conclusion that the County bargained in bad faith. Accordingly, we must vacate the conclusion in the PDO that the County violated Section 1201(a)(1) and (5) of PERA.

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Board shall sustain the County's exceptions and set aside the Proposed Decision and Order consistent with the above discussion.

#### CONCLUSIONS

CONCLUSIONS 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside and the following additional conclusion is made:

5. The County has not committed unfair practices within the meaning of Section 1201(a)(1) and (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 the exceptions filed by McKean County are hereby sustained, and the Order on pages 10-11 of the PDO is vacated. It is further Ordered that the Charge of Unfair Practices be and hereby 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 nineteenth day of February, 2008. 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.

BOARD MEMBER JAMES M. DARBY DISSENTS.

I would not disturb the Hearing Examiner's determination that the County's actions herein violated Section 1201(a)(1) and (5) of the Public Employe Relations Act.