COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILLIAMSPORT AREA SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-09-219-E
WILLIAMSPORT AREA SCHOOL DISTRICT	:	

FINAL ORDER

The Williamsport Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on February 18, 2010, challenging a January 29, 2010 Proposed Decision and Order. In the PDO, the Hearing Examiner concluded that the District violated Section 1201(a)(5) of the Public Employe Relations Act (PERA) by subcontracting the work of the bus drivers without having fulfilled its bargaining obligation with the Williamsport Area Support Personnel Association (Association). The Association submitted a response to the exceptions and a supporting brief, which were received by the Board on March 15, 2010. After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDING OF FACT

22. On June 10, 2009, the Association requested that the Board appoint a Fact Finder under Act 88. The Board appointed a Fact-Finder on June 16, 2009. The Fact-Finder issued a report on July 27, 2009. The Fact-Finder reviewed the financial data and recommended that the District's transportation services remain in-house. In doing so, the Fact-Finder reduced the Association's wage proposals, recommending zero percent in wage increases during the first two years of the contract, a 2% increase in the third year, and a 3% increase in the fourth year. The Fact-Finder found that with the revised employe wages, the total cost to the District of retaining the transportation services in-house versus outsourcing would be $42,500 over the life of the four-year agreement. The Fact-Finder also recommended adoption of the Association's proposal for additional cost savings in employe health benefits. The Association accepted the Fact-Finder's report. The District did not accept the report. (Case No. ACT 88-09-27-E; Association Exhibit 28).

DISCUSSION

The Association is the exclusive representative of a bargaining unit comprised of all full-time and regular part-time nonprofessional employes of the District, including its transportation employes. The Association and the District were parties to a five-year collective bargaining agreement effective July 1, 2003, through June 30, 2008. On January 3, 2008, the parties met to begin negotiations for a successor collective bargaining agreement. During the negotiations, the District indicated that it would be considering outsourcing "of certain areas".

In mid-July 2008, the District provided the Association with a proposal from STA of Pennsylvania, Inc. (STA), to provide transportation services for the District. The District also provided an analysis of the STA proposal that had been prepared by the Pennsylvania Association of School Business Officials (PASBO). At a bargaining session on August 18, 2008, the Association presented to the District 46 questions about outsourcing. The District answered most of the Association's questions by September 9, 2008, and the rest within ten days thereafter.

On September 9, 2008, the District presented to the Association a proposal for a four-year collective bargaining agreement with wage increases of $.85 in the first year and $.50 in each of the next three years. Paragraph six of the proposal included a provision that would allow the District to outsource transportation services effective January 1, 2009, and trash collection by June 30, 2009. On September 22, 2008, the Association presented to the District a proposal for a five-year collective bargaining agreement with

wage increases of $.85 in the first year, $.50 in each of the next three years and $.55 in the last year. The Association offered an additional proposal to withdraw a petition for unit clarification filed with the Board in exchange for the District agreeing to retain transportation services and trash collection in-house during the term of the agreement. In late fall of 2008, a mediator became involved in the negotiations.

On December 15, 2008, the District presented to the Association a proposal for a collective bargaining agreement under which the provision of transportation services would remain in-house and wages for members of the bargaining unit would be frozen for four years, with estimated savings to the District of approximately $1,000,000.00. On January 12, 2009, the Association presented to the District a chart estimating savings to the District of $514,193.00 over five years if the District agreed to a change in health care coverage proposed by the Association. Thereafter, on February 12, 2009, the Association presented to the District a proposal for a five-year collective bargaining agreement, under which wages would be frozen in the first year, with estimated savings to the District of approximately $220,000.00. This proposal provided that the District would not contract out the bargaining unit work of the transportation employes.

At a subsequent bargaining session on March 26, 2009, the Association's chief negotiator (Cary Kurtz) asked the District's chief negotiator (Benjamin Pratt) how much money the District needed to save over the next four or five years to keep the transportation services in-house. Mr. Pratt said, "Find me a million dollars." In follow up emails, Mr. Pratt wrote to Mr. Kurtz on April 22, 2009, asking, "Where do we stand on meeting again? If the Association is unable to meet the needs of the District then it would appear we are at impasse." Mr. Kurtz replied, "The Association's bargaining team is still working on adjusting its proposal in an attempt to meet the district's demands to come up with a savings of $1,000,000 in order [to] keep the jobs of the bus drivers, aides and mechanics in the bargaining unit." Mr. Pratt replied, "[T]he $1,000,000 is just the starting point, it is the out years as well with retirement costs, health care, wage increases, etc that is a driving factor as well." Mr. Kurtz replied, "If that is the case, then I must repeat my request for your client to provide me with a detailed cost analysis for the contract period on the savings that will be realized by outsourcing these jobs" and that "If you need more than a million dollars, then tell me exactly how much more is needed and provide me with the documentation to support that demand."

Thereafter, on April 27, 2009, Mr. Pratt sent Mr. Kurtz a chart prepared by the District estimating savings if the District were to outsource its transportation services to STA. Based on its projected budget allocations for transportation services, the District estimated savings of $540,000.00 during the 2008-2009 school year, $1,640,013.00 during the 2009-2010 school year, $654,319.00 during the 2010-2011 school year, $669,120.00 during the 2011-2012 school year and $788,031.00 during the 2012-2013 school year.

In response, Mr. Kurtz wrote to Mr. Pratt on April 28, 2009, asking questions about the calculations underlying the estimated savings set forth in the chart. In addition, Mr. Kurtz questioned why the District was using a projected budget figure when the District has for several years come in under budget on transportation costs, and recommended using actual cost data. Mr. Pratt referred Mr. Kurtz to the District's business administrator (Jeffrey Richards) for answers.

On April 30, 2009, Mr. Richards answered Mr. Kurtz's questions regarding the District's alleged projected savings. During their discussion, Mr. Kurtz stated that "the numbers, they're showing a savings for the District," (N.T. 145), and together Mr. Richards and Mr. Kurtz agreed that the cost of replacing four buses each year was $380,000.00, not $440,000 as the District had stated. On May 14, 15 and 18, 2009, Mr. Richards provided Mr. Kurtz with information Mr. Kurtz needed to prepare a proposal for a bargaining session scheduled for May 21, 2009.

On May 21, 2009, the Association presented to the District a proposal for a five-year collective bargaining agreement, which included a cost analysis, based on actual and projected transportation costs, estimating savings to the District of $707,732.00 through the 2012-2013 school year. The contract proposal provided for a wage freeze for the 2008-2009 school year and a $.55 per hour wage increase in each of the next four school years.

With respect to the continuation of transportation services by the bargaining unit, the proposal provided as follows:

> **10. Transportation Employes**
>
> The District agrees to keep all bargaining unit positions in the transportation department in the unit and will not contract out this work for the duration of this Agreement. Please see attached cost analysis to support this position.
>
> Additionally, the Association proposes that a joint committee be created with equal members from the Administration and the Association to explore cost saving measures for student transportation such as consolidation of runs and other more efficient methods of operation.

Without asking any questions about the proposal, the District rejected it. Mr. Pratt testified that the District did not believe that the Association had met or would be able to meet the savings the District wanted in order to prevent outsourcing of the transportation services, but never indicated how much more in savings the District needed to keep the transportation services in-house. Upon rejecting the Association's proposal, Mr. Pratt unilaterally declared an impasse in the negotiations over subcontracting, and indicated that the District's board of directors would be voting on June 2, 2009, to outsource transportation services. Mr. Kurtz said that the parties could not be at impasse because they had not gone thorough fact-finding, and testified that the Association remained open to further negotiations on outsourcing.

On June 2, 2009, the District's board of directors voted to outsource transportation services, and the District entered into a seven-year contract with STA to provide daily bus runs for the District through the 2015-2016 school year. On June 10, 2009, the Association filed a request for Fact Finding with the Board under Act 88, and the Board appointed a Fact-Finder on June 16, 2009. The Fact-Finder issued a report on July 27, 2009, in which the Fact Finder recommended that the District's transportation services remain in-house. The Fact-Finder's recommendation reduced the Association's wage proposals to zero percent in wage increases during the first two years of the contract, a 2% increase in year three, and a 3% increase in year four. Upon review of the financial data, the Fact-Finder found that with the revised employe wages, the total cost to the District of retaining the transportation services in-house versus outsourcing would be $42,500 over the life of a four-year agreement. The Fact-Finder also recommended adoption of the Association's proposal for additional cost savings in employe health benefits. The Association accepted the Fact-Finder's report. Having already signed the contract with STA, the District did not accept the Fact-Finder's recommendation against subcontracting its transportation services.

Based on the testimony and documents introduced, the Hearing Examiner found that the Association and the District were not at a *bona fide* impasse in the negotiations over the subcontracting of transportation services. Accordingly, the Hearing Examiner determined that by outsourcing transportation services on June 2, 2009, the District violated Section 1201(a)(5) of PERA.

The District challenges several of the Hearing Examiner's Findings of Fact. With respect to the factual findings, the hearing examiner's findings must be supported by substantial and legally credible evidence. PLRB v. Kaufmann Department Stores, Inc., 345 Pa. 398, 99-400, 29 A.2d 90, 92 (1942). It is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and to weigh the probative value of the evidence presented. The Board will not disturb the examiner's credibility determinations absent the most compelling of circumstances. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004); Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). A hearing examiner need not summarize all of the evidence presented, but makes findings of fact that are relevant to the determination of the unfair practice charge before the Board. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). Upon review of the exceptions, the District's proposed facts are irrelevant to the outcome of this case and the finding of an unfair practice. Accordingly, the District's exceptions to the Hearing Examiner's findings of fact are dismissed.

The District also excepts to the Hearing Examiner's determination that the parties were not at a *bona fide* impasse in negotiations over subcontracting, and therefore the District violated PERA by subcontracting its transportation services on June 2, 2009. In this respect, we note that the issue of subcontracting bargaining unit work is a mandatory subject of bargaining. Upper Moreland Township School District v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997); Morrisville School District v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied,* 549 Pa. 708, 700 A.2d 445 (1997). In this regard, the Board, quoting our Supreme Court, has stated as follows:

> [A]n employer must bargain about such a decision because a "contrary conclusion would allow the public employer's economic concerns always to outweigh those of its employes, encouraging the very discord in the public sector Act 195 was designed to alleviate." [PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073, 1075 (1978)]. Thus an employer may not merely assert that subcontracting services would save money and thereby avoid its bargaining obligation. The appellate cases that interpret PERA have clearly established that the economic concerns of the employer [do] not override the duty of the employer to bargain collectively with its employes.

Lower Dauphin School Service Personnel Association v. Lower Dauphin School District, 19 PPER ¶19195 at 473 (Final Order, 1988). The good faith bargaining that is mandated by PERA requires the parties to make a serious effort to resolve their differences and reach a common ground. Morrisville School District, supra. With respect to assessing good faith bargaining, the Board stated in PLRB v. Homer-Center School District, 12 PPER ¶12169 at 262 (Final Order, 1981) as follows:

> Good faith bargaining cannot be discharged simply by counting the number of meetings between the parties or by weighing the amount of information exchanged during such negotiations. The totality of the circumstances of the bargaining procedure must be considered in determining whether good faith bargaining did in fact take place. If after examining all the circumstances one can reasonably conclude that one or the other party never intended to achieve an agreement, demonstrated unreasonableness, or displayed a single-minded purpose to thwart the public policy, then good faith bargaining did not occur.

See also, Lower Dauphin School District, 19 PPER at 474. When negotiating over the contracting out of bargaining unit work, the employer has the statutory obligation to bargain in good faith to a *bona fide* impasse before subcontracting the work of the bargaining unit. Morrisville School District, supra. A *bona fide* impasse in bargaining is the completion of all mandatory steps of the bargaining process set forth in the law, Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006), and the point in bargaining "at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless ... Perhaps all that can be said with confidence is that an impasse is a 'state of facts in which the parties, despite the best of faith, are simply deadlocked.'" Norwin School District v. Belan, 510 Pa. 255, 268 n.9, 507 A.2d 373, 380 n.9 (1986); Morrisville School District, 687 A.2d at 10; see also Philadelphia Housing Authority v. PLRB, 620 A.2d 594, 596 (Pa. Cmwlth. 1993) ("[a]s the term 'impasse' is used in public sector law under PERA, however, it can also mean the end of the statutory dispute resolution process, as well as deadlock").[1]

Upon review of the record, we agree with the Hearing Examiner's assessment that the facts of this case lead to the reasonable conclusion that the parties were not at a *bona fide* impasse in their negotiations, and therefore the District violated Section 1201(a)(5) of PERA by subcontracting its transportation services on June 2, 2009. As reflected in the evidence presented, although bargaining for a successor contract started in January 2008, and the District was contemplating subcontracting its transportation services, it was not until December of 2008 that the District made a proposal to the Association that would have retained those services in-house. On December 15, 2008, the District proposed to the Association a contract providing zero percent wage increases for

[1] Although a conjunctive requirement, the Board notes that in practicality, the completion of the final step of the statutory bargaining process will often either resolve the dispute or be the point "at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless."

four years, and in exchange the District would agree to retain the bargaining unit work of the transportation employes. The District's proposal estimated a savings of approximately $1,000,000.00 for the District over the life of the agreement.

Thereafter, on January 12, 2009, the Association presented the District with suggested changes to the health care benefits, which would result in a savings of $514,193.00 over five years. On February 12, 2009, the Association presented a bargaining proposal for a five-year agreement with wage concessions resulting in an additional savings of approximately $220,000.00.

Although the District's bargaining representative stated on March 26, 2009, that the Association needed to find a savings of a million dollars, on April 22, 2009 (when it appeared the Association may be getting close to that amount) the District upped the ante and stated that "the $1,000,000 is just the starting point." Nevertheless, the Association continued its efforts to find savings for the District to retain the bargaining unit work in-house, as opposed to subcontracting. In that vein, the Association requested information concerning the District's alleged projected savings were it to outsource the transportation services, which the District supplied on April 27, 2009. The District's cost savings chart reflected projected estimated savings of $540,000.00 during the 2008-2009 school year, $1,640,013.00 for 2009-2010, $654,319.00 during 2010-2011, and $669,120.00 in the 2011-2012 school year, which was based in part on the alleged cost of replacing busses at $440,000.00 per year, and the sale of its bus fleet for $1,000,000.00. The Association met with the District business manager to discuss the projected savings in the District's chart. Finally, given this pertinent information, the Association set off in earnest working on yet further modifications to its bargaining proposal.

On May 21, 2009, the parties met again, and the Association presented the District with a bargaining proposal for a five-year collective bargaining agreement, with concessions offering an estimated savings of $707,732.00 through the 2012-1013 school year. Following a caucus, and without asking any questions about the proposal, the District rejected the Association's offer, and declared an impasse in negotiations and advised that the District would subcontract its transportation services on June 2, 2009. The Association responded by noting its desire to pursue fact-finding under Act 88 in an effort to continue bargaining.

Given the Association's repeated attempts at making concessions to satisfy the District, despite the District's increasing demands for additional savings, it is apparent that the parties were not yet in a state of deadlock. Nor does the record show that further discussions would have been fruitless. Indeed, even if fact-finding was not mandated under Act 88, as astutely noted by the Hearing Examiner, the Association's willingness to continue to work toward an agreement with the District is evidenced by its desire to pursue fact-finding. Indeed, the Association's acceptance of the fact-finder's report is evidence of its continued willingness to make further concessions to retain the bargaining unit work in-house. Simply put, on this record, at the time the District unilaterally declared impasse and voted to subcontract transportation services, the Association was continuing its efforts in making further bargaining offers in an attempt to reach an amicable agreement with the District. Thus, clearly the parties were not at a point where they had exhausted all prospects of concluding an agreement. Morrisville School District, supra; Lower Dauphin School District, supra.

Accordingly, on the record presented, the Association and the District were not at a *bona fide* impasse in their negotiations when the District ceased bargaining on May 21, 2009. Therefore, on June 2, 2009, the District violated Section 1201(a)(5) and its statutory bargaining obligation under PERA by contracting out the transportation services performed by the bargaining unit employes.

The District makes several arguments to support its contention that bargaining with the Association had reached an impasse on May 21, 2009. The District asserts that by stating that negotiations over subcontracting commenced in earnest on April 27, 2009, the Hearing Examiner ignored months of meaningful negotiations between the parties. However, the focus of this case is not the nature of the parties' negotiations earlier in the process, but the state of negotiations when the District unilaterally declared an impasse.

Regardless of when bargaining started over subcontracting, as of June 2, 2009, it cannot be said that the parties had "exhausted the prospects of concluding an agreement." Norwin School District, supra. Therefore, the parties were not at an impasse in negotiations.

The District also contends that parties do not need to go through fact-finding under Act 88 for there to be an impasse. Depending on the facts of the case, the District may be correct because fact-finding under Section 1122-A of Act 88 is not mandatory. However, as noted above, on May 21, 2009 when the District declared impasse and ceased bargaining, the parties here were not at a *bona fide* impasse in the negotiations. The significance of the Association's raising the issue of fact-finding is not that fact-finding is mandatory under Act 88, but rather that the Association's stated desire to pursue fact-finding evidenced its willingness to continue bargaining and to make further concessions through that process.

The fact that the District rejected the Association's May 21, 2009 proposal out of hand, without asking questions or making a counter-proposal, is of course relevant to the Board's examination of the totality of the circumstances in assessing the status of the collective bargaining negotiations.[2] Furthermore, whether or not the District "believed" that the Association would ever be able to meet the District's moving target of alleged cost savings is no justification for precluding the Association from attempting to meet the District's demands in order to save bargaining unit jobs. As the record reflects, when the District summarily rejected the Association's May 21, 2009 proposal, the Association still believed that it was possible to meet the District's claimed cost savings and desired to further pursue bargaining in an attempt to reach an agreement.

The District contends that the Hearing Examiner ignored an admission by the Association's chief negotiator that he did not feel that the Association could come up with the savings, but negotiations still had to continue. Upon review of the record, the District mischaracterizes the testimony. While District Business Manager Richards quoted the Association's chief negotiator as admitting that "Yes, the numbers, they're showing a savings for the District[,]" Mr. Richards did not testify as to exactly what the Association's chief negotiator stated concerning the Association's willingness to try to meet the District's projected savings through subcontracting. Rather, Mr. Richards offered his opinion that Mr. Kurtz did not feel that the Association could come up with that type of savings. As recognized by the Hearing Examiner, in this testimony there is no statement by Mr. Kurtz amounting to an admission by the Association that it was unwilling to offer acceptable savings to the District. Indeed, the Association's actions in submitting proposals, and expressing a desire to pursue fact-finding, speak louder than its alleged words or Mr. Kurtz's opinion.

Finally, the District argues that the Hearing Examiner improperly excluded evidence of the Association's unclean hands in negotiations. Unlike Section 10.1 of the Pennsylvania Labor Relations Act,[3] PERA does not have a similar forfeiture provision. Accordingly, under PERA, the Board and the courts have recognized that to preserve its claims that the union is engaging in bad faith bargaining, the employer must file its own unfair practice charge. Snyder County Prison Board, supra. Moreover, where subcontracting is involved, the employer may simply "force the union's hand" by actively pursuing all available statutory bargaining procedures through to the end -- after which, despite the employer's best of faith, the parties would be simply deadlocked, having each made their best, and final, offers. See Footnote 1 infra. However, an employer cannot, as the District did here, declare impasse to put an end to the union's desire to continue bargaining, as a means to reach its desired goal of unilaterally contracting out the work of bargaining unit employes.

After a thorough review of the exceptions and all matters of record, we agree with the Hearing Examiner's determination that by declaring an impasse and thereby ceasing collective bargaining with the Association on May 21, 2009, and thereafter unilaterally subcontracting the transportation services performed by bargaining unit employes, the

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[2] Similarly, the fact that the District ultimately entered into a seven-year agreement with STA is relevant to the Board's examination of the totality of the circumstances. Prior to June 2, 2009, the District never advised the Association that its cost savings could be achieved over a seven-year period, thus constraining the Association's bargaining position and its options to reach acceptable cost savings.

[3] 43 P.S. §211.10.1.

District violated its statutory bargaining obligation under Section 1201(a)(5) of PERA. Accordingly, we shall dismiss the District's exceptions, and make the PDO final.

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 the Williamsport Area School District are hereby dismissed, and the January 29, 2010 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania 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 April, 2010. 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

WILLIAMSPORT AREA SUPPORT PERSONNEL ASSOCIATION	:	
v.	:	Case No. PERA-C-09-219-E
WILLIAMSPORT AREA SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violation of section 1201(a)(5) of the PERA, that it has rescinded its contract with STA and reinstated the work of providing transportation services to the bargaining unit, that it has offered in writing to any employe who lost work as the result of its contract with STA unconditional reinstatement to their former position without prejudice to any rights or privileges enjoyed by them, that it has made whole any employe who sustained a loss of pay and/or benefits as the result of its contract with STA, that it has paid any back pay due with interest as directed, that it has posted the proposed decision and order and final order as directed 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