

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

HAZLETON AREA EDUCATION SUPPORT :  
PROFESSIONALS :  
 :  
v. : Case No. PERA-C-13-27-E  
 :  
HAZLETON AREA SCHOOL DISTRICT :

**FINAL ORDER**

The Hazleton Area Education Support Professionals (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on March 7, 2013. The Union's exceptions challenge a February 15, 2013 decision of the Secretary of the Board declining to issue a complaint and dismissing the Union's Charge of Unfair Practices filed against Hazleton Area School District (District). Pursuant to an extension of time granted by the Secretary, the Union timely filed a brief in support of its exceptions.

In its Charge filed on February 6, 2013, the Union alleged that the District violated its duty to bargain under Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by unilaterally transferring the duties of the Warehouse Courier and Warehouse Assistant to non-bargaining unit employees without bargaining with the Union. The Union further alleged that it became aware of the District's use of non-bargaining unit employees to perform the work at issue on or about October 1, 2012.

The Secretary declined to issue a complaint stating that the Union's Charge was untimely under Section 1505 of PERA because the Union did not file its Charge within four months of when it became aware of the District's use of non-bargaining unit employees to perform the duties of the Warehouse Courier and Warehouse Assistant, i.e. October 1, 2012. Citing to **Kasel v. Harrisburg Area Community College**, 16 PPER ¶ 16183 (Final Order, 1985), the Secretary noted that the Union's utilization of a United States Postal Form 3817 dated January 30, 2013 to show the date of mailing of the Charge, would not be considered to determine timeliness because the Board looks to the actual date of receipt of the Charge and not the date of deposit in the mail. Therefore, the Secretary dismissed the Charge as untimely.

In its exceptions, the Union alleges that its Charge was timely because it was deposited in the mail on January 30, 2013, as evidenced on the United States Postal Form 3817 included with the Charge. The Union further alleges that the Board should reconsider its holding in **Kasel** and use the date a charge of unfair practices is deposited in the mail instead of the date it is received by the Board to determine whether the charge was timely filed. Although the Union notes that Section 95.42(a) of the Board's Rules and Regulations provides that documents are filed with the Board upon receipt by the Board, the Union further notes that Section 95.42(a) provides that "[e]xceptions to this requirement will be at the discretion of the Board," and it requests that the Board make an exception in this case.

Section 1505 of PERA provides that no charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the charge. 43 P.S. § 1101.1505. A charge will be considered timely if it is filed within four months of when the charging party knew or should have known that an unfair practice was committed. **Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College**, 35 PPER ¶ 24 (Final Order, 2004). The complainant has the burden to show that the charge was filed within four months of the occurrence of the alleged unfair practice. **PLRB v. Commonwealth of Pennsylvania (Bureau of Employment Security)**, 9 PPER ¶ 9171 (Nisi Decision and Order, 1978); **PLRB v. Allegheny County Prison Employees Independent Union**, 11 PPER ¶ 11282 (Proposed Decision and Order, 1980).

The Union alleged in its Charge that it became aware of the District's unilateral transfer of the duties of the Warehouse Courier and Warehouse Assistant to non-bargaining

unit employes on October 1, 2012. As such, the Union's Charge needed to be filed with the Board no later than February 1, 2013. The Union's Charge was not filed until February 6, 2013, which is beyond the four month statute of limitations under Section 1505 of PERA. The Union asserts that the date the Charge was deposited in the mail (January 30, 2013) should be the filing date for purposes of determining the timeliness of the Charge. However, the Board has consistently held pursuant to Section 95.42(a) of the Board's duly promulgated and published Rules and Regulations that charges of unfair practices are deemed filed on the actual date of receipt in the offices of the Board, rather than the date of deposit in the mail. 34 Pa. Code § 95.42(a); **PLRB v. SEPTA**, 13 PPER ¶ 13268 (Final Order, 1982); **Kasel, supra**; **Groves v. City of Philadelphia**, 32 PPER ¶ 32128 (Final Order, 2001).<sup>1</sup> Further, the Union's utilization of a United States Postal Form 3817 is ineffectual because the Board's Rules and Regulations only provide for utilization of a United States Postal service postmark to determine the date of filing of exceptions, and not to determine the date of filing of a charge of unfair practices. **Kasel, supra**; 34 Pa. Code § 95.98(a)(1). Therefore, the Union's Charge was filed upon actual receipt by the Board on February 6, 2013, and not on January 30, 2013. Thus, the Board lacks jurisdiction to address the Charge and issue a complaint. **SEPTA, supra**; **City of Philadelphia, supra**.

The Union further alleges that its Charge is timely even if it was filed on February 6, 2013, because the District has continued to use non-bargaining unit employes to perform the duties of the Warehouse Courier and Warehouse Assistant and the District did not make its position known to the Union over the work at issue until after October 1, 2012, when it denied the Union's request to bargain. Relying on **Teamsters Local Union 771 v. Lancaster County**, 30 PPER ¶ 30221 (Final Order, 1999), **aff'd sub nom., Lancaster County v. PLRB**, 761 A.2d 1250 (Pa. Cmwlth. 2000), the Union additionally alleges that the District's subsequent refusal to bargain over the work at issue is an independent unfair practice.

It is well settled that the transfer of bargaining unit work is a mandatory subject of bargaining. **PLRB v. Mars Area School District**, 480 Pa. 295, 389 A.2d 1073 (1978); **Midland Borough School District v. PLRB**, 560 A.2d 303 (Pa. Cmwlth. 1989), **appeal denied**, 525 Pa. 651, 581 A.2d 576 (1990). As such, the Board and the courts have consistently held that the unilateral transfer of bargaining unit work to non-members of the unit without first bargaining with the employe representative to impasse is an unfair practice. **Mars Area School District, supra**; **Midland Borough School District, supra**; **Commonwealth of Pennsylvania v. PLRB**, 557 A.2d 1112 (Pa. Cmwlth. 1989), **appeal denied**, 525 Pa. 587, 575 A.2d 117 (1990); **City of Harrisburg v. PLRB**, 605 A.2d 440 (Pa. Cmwlth. 1992); **City of Jeanette v. PLRB**, 890 A.2d 1154 (Pa. Cmwlth. 2006).

The District's continued use of non-bargaining unit employes to perform the duties of the Warehouse Courier and Warehouse Assistant is not a continuing violation of PERA because it is inescapably grounded in the District's initial decision to utilize non-bargaining unit employes to perform the work at issue. See **PLRB v. Borough of Frackville**, 14 PPER ¶ 14139 (Final Order, 1983) (no continuing violation where alleged violation is inescapably grounded upon a prior occurrence); **Uhring v. Springdale Borough**, 26 PPER ¶ 26215 (Final Order, 1995) (same); **Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia**, 39 PPER 100 (Final Order, 2008) (same). The fact that the District continues to use non-bargaining unit employes to perform the work at issue does not constitute a separate and distinct unfair practice. If that were the case, the statute of limitations would never begin to run. **Id.**

The Union alleges that it was not aware of the District's intentions until after October 1, 2012, when the District refused the Union's request to bargain over the transfer of the work at issue. However, the Union alleged in its Charge that it became aware of the District's unilateral transfer of the duties of the Warehouse Courier and Warehouse Assistant to non-bargaining unit employes without prior bargaining with the Union on October 1, 2012. Further, the District's subsequent failure to bargain over the

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<sup>1</sup> As the Board noted in **Kasel**, this regulation is consistent with Section 31.11 of the General Rules of Administrative Practice and Procedure which provides that "[t]he date of receipt at the office of the agency and not the date of deposit in the mails is determinative" of whether a document has been timely filed. 1 Pa. Code § 31.11.

work at issue is not an independent unfair practice because the District was obligated to bargain with the Union **before** it transferred the duties of the Warehouse Courier and Warehouse Assistant to non-bargaining unit employees on October 1, 2012. **Mars Area School District, supra; Midland Borough School District, supra; Commonwealth of Pennsylvania, supra; City of Harrisburg, supra; City of Jeanette, supra.** Therefore, any subsequent failure to bargain by the District is inescapably grounded upon the District's initial failure to bargain over the transfer of the duties of the Warehouse Courier and Warehouse Assistant to non-bargaining unit employees, which the Union became aware of on October 1, 2012. **Borough of Frackville, supra; Springdale Borough, supra; City of Philadelphia, supra.** As such, the Union's reliance on **Lancaster County** is misplaced because the charge of unfair practices in that case concerned an unfair practice (refusal to strike an arbitrator) that was separate and distinct from the alleged refusal of the employer to bargain with the union that occurred eight months prior to the filing of the charge. Therefore, the Board found that the charge had been timely filed within four months of when the employer refused to strike an arbitrator. That simply is not the case here, where the District's initial unilateral transfer of the work at issue without bargaining and its subsequent failure to bargain over the transfer of work is the same unfair practice under PERA. Thus, the Union failed to demonstrate that its Charge was timely filed. Accordingly, the Secretary did not err in declining to issue a complaint and dismissing the Charge as untimely.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Secretary's decision declining to issue a complaint.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

#### **HEREBY ORDERS AND DIRECTS**

that the exceptions filed by the Hazleton Area Education Support Professionals are dismissed and the Secretary's February 15, 2013 decision not to issue a complaint be and the same is hereby 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, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this sixteenth day of July, 2013. 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.