

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES,	:	
DISTRICT COUNCIL 83	:	
	:	
v.	:	Case No. PERA-C-17-102-W
	:	
CENTER TOWNSHIP	:	

FINAL ORDER

Center Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on April 2, 2018, challenging a Proposed Decision and Order (PDO) issued on March 14, 2018. The Township excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by unilaterally increasing the amount of labor operator duties performed by the Township Supervisors following the layoff of Greg Cusimano. The American Federation of State, County and Municipal Employees, District Council 83 (AFSCME) also filed timely exceptions and a supporting brief with the Board on April 2, 2018, regarding the remedy issued by the Hearing Examiner.

The facts of this case are summarized as follows. AFSCME is the exclusive representative for the labor operators and mechanics employed by the Township. The labor operators perform road maintenance, plow snow, perform drainage work, extricate drainage pipe, install catch basins, haul stone and carry out other related duties. The Township employed at least four labor operators for ten years prior to 2017. At the beginning of 2017, the Township employed five labor operators. The Township Supervisors, Dave Smyers, John Bertolino and Jim Gatskie, work as Roadmasters and plan road projects and direct the work of the bargaining unit labor operators.

Greg Cusimano served as an appointed Township Supervisor and Roadmaster from July 2015 to January 2016. Thereafter, from January 2016 to January 2017, Mr. Cusimano was a bargaining unit labor operator for the Township and served as the union steward. On January 20, 2017, the Township Supervisors furloughed Mr. Cusimano from his labor operator position.

On or about February 7, 2017, AFSCME filed a grievance concerning the furlough of Mr. Cusimano. A grievance meeting was held between the Township Supervisors, Mr. Cusimano and AFSCME representatives on February 10, 2017, in which the parties discussed Mr. Cusimano's furlough and the possibility of bringing him back to work. At the meeting, Township Supervisor Gatskie stated that the Supervisors were going to have to "pick up the slack" because there was one less labor operator. The Township denied the grievance and did not reinstate Mr. Cusimano.

After Mr. Cusimano's furlough, Tony Perolli, one of the four remaining labor operators, unexpectedly resigned. AFSCME representative Terry Skultety sent the Township Supervisors a letter dated March 7, 2017, which states, in relevant part:

As you know, on January 19, Center Township furloughed Greg Cusimano. Since that time, the extent to which supervisors outside the AFSCME bargaining unit are performing bargaining unit work has increased. The Township has not bargained with the Union over this transfer of bargaining unit work. Under [PERA], it is well-settled that any removal of bargaining unit work from the unit is a mandatory subject of bargaining. AFSCME thus demands that the Township rescind Mr. Cusimano's furlough immediately and make him whole and further, that the Township meet with the Union to bargain over the transfer of bargaining unit work.

Thereafter, Mr. Skultety and the Township Supervisors met to discuss the duties that the Supervisors were performing and AFSCME's request to reinstate Mr. Cusimano. The Township did not agree to reinstate Mr. Cusimano or to negotiate over the amount of bargaining unit work that the Township Supervisors were performing.

Prior to January 2017, the Township Supervisors performed some bargaining unit work of the labor operators such as trimming trees, cold patching and paving roads. After the layoff of Mr. Cusimano in January 2017, the Township Supervisors have been performing more bargaining unit work than they had prior to January 2017. The percentage of bargaining unit work performed by the Township Supervisors has increased from January through March 2016 to January through March 2017. A comparison of the Township's payroll records from January through March 2016 to the same period in 2017 shows an increase in the percentage of both straight time and overtime for bargaining unit work performed by the Township Supervisors. The time records from January through March 2016 show that the Township Supervisors performed 27.74% of the total straight time hours of bargaining unit work and 36.35% of the total overtime hours of bargaining unit work. From January through March 2017, the share of bargaining unit work performed by the Township Supervisors increased to 31.44% of the straight time and 41.75% of the overtime.

AFSCME filed its Charge of Unfair Practices on April 25, 2017, as amended on May 5, 2017, alleging that the Township violated Section 1201(a)(1) and (5) of PERA by unilaterally increasing the amount of bargaining unit work performed by the Township Supervisors.¹ A hearing was held before the Board's Hearing Examiner on October 16, 2017, 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.

¹ On June 7, 2017, AFSCME filed a second Amended Charge of Unfair Practices, to also allege that the Township violated Section 1201(a)(1) and (3) of PERA by refusing to recall Mr. Cusimano to his labor operator position in retaliation for filing a grievance contesting his furlough. The Hearing Examiner concluded that the Township did not violate Section 1201(a)(1) or (3) of PERA when it refused to reinstate Mr. Cusimano to his labor operator position. No exceptions were filed by AFSCME to the Hearing Examiner's decision dismissing its independent Section 1201(a)(1) and 1201(a)(3) claims. 34 Pa. Code § 95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

In the PDO, the Hearing Examiner concluded that the Township violated its duty to bargain under Section 1201(a)(1) and (5) of PERA by unilaterally increasing the percentage of straight and overtime hours in which the Township Supervisors performed labor operator work in 2017. By way of remedy, the Hearing Examiner ordered the Township to cease and desist from its violation of Section 1201(a)(1) and (5) of PERA, and to restore the *status quo ante* and return the work to the bargaining unit.

In its exceptions, the Township alleges that the Hearing Examiner erred in finding that it violated Section 1201(a)(1) and (5) of PERA because AFSCME failed to prove that the Township Supervisors performed more bargaining unit work in 2017. An employee representative bears the burden of proving that an employer unilaterally transferred or removed work from the bargaining unit. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). The transfer of any bargaining unit work outside the unit without first bargaining with the employee representative is an unfair practice. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). A removal of bargaining unit work may occur (1) when an employer unilaterally removes work that is exclusively performed by the bargaining unit or (2) when an employer alters a past practice regarding the extent to which bargaining unit employees and non-bargaining unit employees perform the same work. City of Jeannette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006) (citing AFSCME, Council 13, AFL-CIO v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992)).

It is undisputed that the Township Supervisors performed some labor operator duties prior to Mr. Cusimano's furlough in January 2017. Therefore, the issue presented here is whether the Township changed the extent to which its Supervisors perform such work. In this regard, the Hearing Examiner found that the Township violated its duty to bargain under Section 1201(a)(1) and (5) of PERA, stating, in relevant part, as follows:

[AFSCME's] charge is supported by the following four specific facts from the record. First, time records from January through March 2016 show that [Township Supervisors] performed 27.74% of the total straight time hours of bargaining unit work and 36.35% of the total overtime hours of bargaining unit work. In January through March 2017, which includes time subsequent to two bargaining unit members leaving employment due to furlough and resignation, the share of bargaining unit work performed by the [Township Supervisors] increased to 31.44% of straight time hours of bargaining unit work and 41.75% of overtime hours of bargaining unit work. Second, the fact that the [Township Supervisors] were performing more bargaining unit work in 2017 than before is supported by the testimony of [Greg] Cusimano and [Paul] Colgan, who both testified that they personally witnessed [Township Supervisors] performing more bargaining unit work than they had prior to the furlough of Cusimano. Third, Cusimano credibly testified that, during the meeting in January, 2017, to discuss the furlough of Cusimano, [Supervisor Jim] Gatskie said that the [Township Supervisors] were going to have to "pick up the slack" because there would be one less bargaining unit member.... I infer from this record that "picking up the slack" means

that the [Township Supervisors] would have to do more bargaining unit work in 2017 than they had done previously. Fourth, 2017 is the first year in at least the past 10 years that the Township only employed three labor operators, though the budget for 2017 had included five labor operators.

(PDO at 5).

The Township argues that the hours of both the Township Supervisors and labor operators decreased in 2017. Nevertheless, there is substantial evidence of record to support the Hearing Examiner's findings that the percentage of bargaining unit work performed by the Township Supervisors increased from 2016 to 2017. Indeed, even with the decrease in hours worked performing labor operator duties in 2017, the percentage of bargaining unit work performed by the Supervisors increased from 2016. As such, the Hearing Examiner did not err in concluding that the Township altered the past practice regarding the extent to which the work was shared between the Township Supervisors and labor operators. See Palmerton Area Educational Support Personnel Association PSEA/NEA v. Palmerton Area School District, 41 PPER 96 (Proposed Decision and Order, 2010) (employer violated Section 1201(a)(1) and (5) by changing extent to which non-bargaining unit supervisor and bargaining unit members conducted an inventory of the contents of the freezer and refrigerator when it decreased the number of unit members performing the work).

The Township further asserts that the Hearing Examiner erred in crediting the testimony of Mr. Cusimano and labor operator Paul Colgan that they witnessed the Township Supervisors performing more bargaining unit work in 2017 than in the previous year. 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 at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. Id. Upon review of the record, the Township has failed to present any compelling reasons to warrant reversal of the Hearing Examiner's credibility determinations. Accordingly, the Township's exceptions to the finding of a violation of Section 1201(a)(1) and (5) of PERA must be dismissed.

With regard to the remedy ordered by the Hearing Examiner, AFSCME contends in its exceptions that the Township is required to reinstate Mr. Cusimano to his labor operator position with back pay. The Township asserts that it is only required to reinstate Mr. Cusimano to his former position. In order to effectuate the policies of PERA, the Board is authorized under Section 1303 to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action ... as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, and not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000). Generally, whether to grant remedial relief such as back pay for the commission of an unfair practice is a matter of Board discretion. PLRB v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948).

Here, the amount of overall bargaining unit work performed by the Township Supervisors increased by approximately 3.7% of straight time and 5.4% of overtime hours from 2016 to 2017, supporting the finding of an unfair practice and an order directing the Township to restore that amount of work to the bargaining unit. To remedy the unfair practice, the Hearing Examiner ordered the Township to "[r]estore the *status quo ante* which existed prior to the diversion of bargaining unit work" and "return the work to the bargaining unit." However, although AFSCME requested the awarding of back pay in its post-hearing brief, the Examiner did not order any make-whole relief concerning back pay.

Notably, the overall hours and work performed by all labor operators decreased in 2017 from 2016, and the record does not indicate that the increase in work of the Township Supervisors would have been performed by Mr. Cusimano, or by any other members of the bargaining unit. Accordingly, based on the record in this proceeding, it was not an abuse of discretion for the Hearing Examiner to order restoration of the work to the bargaining unit without directing back pay. See Martha Company, supra; AFSCME District Council 47, Local No. 2187 v. City of Philadelphia, 30 PPER ¶ 30003 (Final Order, 1998) (Hearing Examiner was not required to award back pay and did not abuse discretion in declining to award such relief); York City Employees' Union v. City of York, 37 PPER 122 (Final Order, 2006) (Hearing Examiner did not abuse discretion in declining to order make-whole relief where evidence did not establish specific employee lost bargaining unit work); Northampton County Deputy Sheriffs Association v. Northampton County, 40 PPER 86 (Final Order, 2009) (cease and desist order proper where no evidence of any specific deputy sheriff losing bargaining unit work).²

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the Township violated Section 1201(a)(1) and (5) of PERA by unilaterally changing the extent to which non-bargaining unit Township Supervisors perform the bargaining unit work of the labor operator position. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 Center Township and the American Federation of State, County and Municipal Employees, District Council 83 are hereby dismissed, and the March 14, 2018 Proposed Decision and Order be and the same is hereby made absolute and final.

² In conjunction with the filing of its exceptions on April 2, 2018, the Township filed a Motion for Clarification, requesting that the Hearing Examiner resolve the parties dispute regarding back pay. Due to the Board's disposition of this issue in this matter, the Township's Motion for Clarification need not be addressed. Disputes concerning the implementation of the remedy ordered by the Hearing Examiner are generally addressed through subsequent compliance proceedings. Teamsters Local Union No. 205 v. Munhall Borough, 40 PPER 102 (Final Order, 2009).

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this twenty-first day of August, 2018. 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.

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AFFIDAVIT OF COMPLIANCE

The Township hereby certifies that it has ceased and desisted from its violations of Sections 1201(a)(1) and (5) of the Public Employee Relations Act; that it has restored the status quo and returned the work to the bargaining unit; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on AFSCME, District Council 83 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