COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMALGAMATED TRANSIT UNION LOCAL 164	:	
	:	
	:	CASE NO. PERA-C-17-30-E
v.	:	
	:	
	:	
LUZERNE COUNTY TRANSPORTATION AUTHORITY	:	

PROPOSED DECISION AND ORDER

On February 10, 2017, Amalgamated Transit Union Local 165 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Luzerne County Transportation Authority (Authority or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

On March 1, 2017, the Secretary of the Board issued a complaint and notice of hearing designating June 5, 2017, in Harrisburg, as the time and place of hearing.

On May 5, 2017, the Union filed an amended charge of unfair practices with the Board alleging that the Authority violated Section 1201(a)(1) and (5) of PERA.

On May 12, 2017, the Secretary of the Board issued an amended complaint and notice of hearing designating June 5, 2017, in Harrisburg, as the time and place of hearing.

A hearing was held on the amended charge on June 5, 2017, in Harrisburg, before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief August 9, 2017. The Authority filed its post-hearing brief on September 11, 2017.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Authority is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6).

3. William MacLunny has been employed as an operator for the authority for approximately forty-five years. He is a bargaining unit member and has held various leadership positions within the union. From 1992 through 2000, he was the Business Agent and Financial Secretary. From 2009-2012, he was the President of the Union. (N.T. 28-29).

4. In 1998 or 1999, MacLunny discussed a light duty program with John Gruzinski, who was then the Operations Director for the Authority. Gruzinski was interested in a light duty program because the Authority would save money on its Workers' Compensation insurance by assigning employes who were available to light duty in the dispatch office or the drivers' room. As a result of the discussion between Gruzinski and MacLunny, MacLunny understood that bargaining unit members, when assigned to light duty, would be paid their regular wages, receive full benefits, and remain as members of the Union. Thus, in 1998 or 1999, the Authority started requiring bargaining unit members to work light duty assignments. (N.T. 30-32, 35).

5. After the light duty policy was implemented in 1998 or 1999 under Gruzinski, a bargaining unit member named Burkhart was assigned to light duty. It was MacLunny's understanding that Burkhart received full wages and benefits when assigned to light duty. (N.T. 31-33).

6. Jake Hassaj is a mechanic and member of the bargaining unit. He has been Vice President of the Union since approximately 1995. (N.T. 61-62).

7. In 2009 Hassaj injured his hand. The authority assigned him to light duty. While assigned to light duty in 2009, Hassaj received his full 40-hour-per-week regular rate of $22.34 per hour as a mechanic. Hassaj was issued a pay check for his full wages while on light duty on the following dates: March 19, 2009, April 2, 2009, April 16, 2009, April 30, 2009, May 14, 2009, May 28, 2009, June 11, 2009, June 25, 2009, July 9, 2009, and July 23, 2009. (N.T. 33-34, 62-66; Union Exhibit 3).

8. Norman Gavlick has been the Executive Director for the Luzerne County Transportation Authority since June of 2014. (N.T. 14).

9. When Gavlick became Executive Director in the summer of 2014, he made the decision to pay bargaining unit members assigned to light duty a wage of $12.00 per hour. His reasoning was that a wage of $12.00 per hour was appropriate because that was the amount paid to entry level clerical workers. Gavlick believed bargaining unit members assigned to light duty performed similar work to the Authority's entry level clerical workers. Gavlick knew that light duty had been used by the Authority in the past, but did not check to see what wages were paid to bargaining unit members assigned to light duty. (N.T. 19, 125-126, 147).

10. When, in the summer of 2014, Gavlick made the decision to pay bargaining unit members assigned to light duty a wage of $12.00 per hour, he did not provide any notice to the Union. Gavlick did not offer to bargain the establishment of the $12.00 per hour light duty wage with the Union. (N.T. 25, 57, 102).

11. Gavlick has over thirty-five years of experience in human resources including experience with collective bargaining with unions. (N.T. 126).

12. Paul Jason is an operator for the Authority and has been an employe since 2004. He was President/Business Agent for the Union from

2012 through 2014. Since 2016, he has been Financial Secretary/Treasurer of the Union. (N.T. 52).

13. When Jason was President of the Union in 2014, he was not aware of the decision made by Gavlick to pay employes on light duty assignment a wage of $12 per hour. He first learned of the policy to pay employes on light duty assignment a wage of $12.00 in the beginning of 2017. (N.T. 57-59).

14. In January of 2017, Hassaj again hurt his hand at work. He was assigned to light duty from the end of January 2017 until the end of April 2017. The Authority paid Hassaj a wage of $12.00 per hour while he was assigned to light duty in 2017. (N.T. 67).

15. Prior to 2017, Haasaj assumed that bargaining unit members assigned to light duty received their full wages. (N.T. 68, 79).

16. Kevin McGee is a bus operator and has been an employe since 2011. He has been President/Business Agent of the Union since January, 2015. (N.T. 81-82).

17. McGee found out that bargaining unit members assigned to light duty were being paid a wage of $12.00 an hour on January 21, 2017. He went to see Janine Hennigan about the policy on January 23, 2017. She informed McGee that it was Authority policy to pay employes assigned to light duty a wage of $12.00 per hour. The next day McGee spoke with Gavlick and told Gavlick that the Authority could not change rules regarding wages whenever it wanted. McGee had understood that an employee got their regular wages when assigned to light duty as this was a way for the Authority to save money since, instead of having open claims, the Authority was just paying employes their regular rate. (N.T. 83-86)

18. Of all the bargaining unit members assigned to light duty since 2014, only Hassaj was a Union officer. Hassaj was assigned to light duty at the end of January, 2017. (N.T. 88; Union Exhibit 2).

19. Since 2014, when Gavlick became executive director, ten bargaining unit members have been placed on light duty. They earned a wage of $12.00 per hour while assigned to light duty. (N.T. 16-17; Union Exhibit 2)

20. On May 12, 2017, the Board issued a subpoena *duces tecum* to the Authority's custodian of record. The subpoena requested that the Authority produce payroll records reflecting the rate of pay for any employee assigned to work light duty for the period of time during which a bargaining unit employee was assigned to work light duty between January 1, 2000 and December 31, 2013, among other documents. (Union Exhibit 1).

DISCUSSION

In its amended charge, filed May 5, 2017, the Union alleges that the Authority violated Section 1201(a)(1) and (5) of PERA when it "unilaterally changed its long standing past practice regarding the rate of pay for bargaining unit employees working light duty."

As an initial matter, the Authority, in its Answer and New Matter and during the hearing (N.T. 12), raises as a defense that the amended charge is time barred by Section 1505 of PERA which states 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 petition or charge." 43 P.S. §1101.1505. The four-month limitations period for the filing of an unfair practice charge under Section 1505 of the PERA is triggered when the complainant has reason to believe that the unfair practice has occurred. Lancaster Cty. v. Pennsylvania Labor Relations Bd., 62 A.3d 469, 473 (Pa. Commw. Ct. 2013); Commonwealth v. Pennsylvania Labor Relations Board, 438 A.2d 1061, 1063 (1982). The complainant has the burden to show that the charge was filed within four months of the occurrence of the alleged unfair practice. Hazleton Area Education Support Professionals v. Hazleton Area School District, 45 PPER ¶ 20 (Final Order, 2013).

As a general matter, the nature of the unfair practice alleged frames the limitations period for that cause of action. Bensalem Township Police Benevolent Association v. Bensalem Township, 47 PPER ¶ 109 (Proposed Decision and Order, 2016); Upper Gwynedd Township Police Dept. v. Upper Gwynedd Township, 32 PPER § 32101 (Final Order, 2001). In this matter, the Union has alleged that the Authority refused to bargain and violated Section 1201 (a)(1) and (5) of PERA by unilaterally implementing a wage of $12.00 per hour for bargaining unit members assigned to light duty. For a refusal to bargain a change in terms and conditions of employment, notice to the union of the implementation of the challenged policy or directive triggers the statute of limitations. Bensalem Township, supra, citing Harmar Township Police Wage and Policy Committee v. Harmar Township, 33 PPER § 33025 (Final Order, 2001).

In this matter, the record is clear that the Union became aware of the implementation of the policy of paying bargaining unit members a wage of $12.00 while assigned to light duty in the latter part of January, 2017. Hassaj, the Union's Vice President, was assigned to light duty at the end of January, 2017, and became aware of the policy at that time. Additionally, McGee, the Union President, became aware of the policy on January 21, 2017. The amended charge was filed on May 5, 2017, which is well within the statutory filing period of four months.

The Authority argues that since many bargaining unit members had been assigned to light duty since 2014, the Union should have been on notice as to the change in policy. Notice to employes is not considered notice to the union unless it is shown that the employes are the union's agents. Teamsters Local 77 v. Delaware County, 29 PPER ¶ 29087 (Final Order, 1998), aff' d sub nom., County of Delaware v. PLRB, 735 A.2d 131 (Pa. Cmwlth. 1999), appeal denied, 561 Pa. 679, 749 A.2d 473 (2000); AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Department of Military Affairs, 22 PPER ¶ 22205 (Final Order, 1991). In this matter, the record does not show that any of the bargaining unit members assigned to light duty since 2014 was a Union official, except Hassaj, as discussed above. The Union's amended charge is therefore timely.

Moving to the merits of the Union's amended charge, when determining whether an employer has committed a bargaining violation by contravening an established past practice, the Board must initially decide whether the change involves a mandatory subject of bargaining. South Park Township Police Ass'n v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002); City of Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002). An employer may not act unilaterally regarding a mandatory subject of bargaining without satisfying its statutory bargaining obligations with its employes' union representative. Teamsters Local Union 764 v. Lycoming County, 41 PPER 8 (Proposed Decision and Order, 2010). In this matter, the Union alleges that the Authority unilaterally changed established past practice with regard to wages paid to bargaining unit members assigned to light duty. Wages are plainly a mandatory subject of bargaining per the express language of the Act. 43 P.S. § 1101.701.

The Authority argues that the Union's amended charge cannot proceed under an established past practice analysis because the creation of a light duty program is a managerial prerogative. The Authority cites Plains Township Police Officers Association v. Plains Township, 40 PPER 103 (Final Order, 2009). However, the issue in this case is not the creation of a light duty program, or the assignment of bargaining unit employes to a light duty program. The issue in this case is the wages paid to bargaining unit members, which is a mandatory subject of bargaining.

The analysis moves to determining whether a past practice of paying full wages and benefits to bargaining unit members assigned to light duty existed. In Wilkes-Barre, 33 PPER ¶ 33087, the Board noted that it has consistently applied the definition of past practice adopted by the Pennsylvania Supreme Court in County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1978), and stated as follows:

> [A] custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to underlying circumstances presented. Id. quoting County of Allegheny, at 852, n. 12. In Ellwood City Police Wage and Policy Unit v. Ellwood City, 29 PPER ¶ 29214 (Final Order, 1998), aff'd, 731 A.2d 670 (Pa. Cmwlth. 1999), the Board stated that '[t]he definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances.' Id. at 507.

Wilkes-Barre, 33 PPER ¶ 33087.

The record in this matter shows that there was an established past practice that bargaining unit members were paid full wages and benefits when assigned to light duty. The record is clear that approximately twenty years ago, the Employer implemented a light duty program in consultation with the Union whereby it was understood by the parties that bargaining unit members would receive their full wages and benefits when assigned to light duty. Importantly, nothing in this record contradicts that this meeting between the Employer and the Union happened. The record is also clear that after this implementation of the light duty program, Hassaj, a bargaining unit member, was placed on light duty and received his full wages and benefits while on light duty for approximately six months. He received twenty bi-weekly pay checks for his full wages while assigned to light duty. Further, MacLunny, Hassaj, and McGee all credibly testified that it was their understanding that bargaining unit members received full wages and benefits while assigned to light duty prior to 2014.

The Employer's defense in this matter is undermined by the lack of credibility of their main witness, Gavlick. Gavlick testified that in 2014 he wasn't aware what the pay rates were for bargaining unit members assigned to light duty and that his lack of awareness was due to the fact that he admittedly made no effort to find out what bargaining unit members had been paid while assigned to light duty, even though he knew a light duty program was already in place. Given Gavlick's long history of working in human resource positions, including working with unions in the context of collective bargaining agreements, I find that Gavlick's lack of diligence, in discerning what bargaining unit members were paid when assigned to light duty, undermines his credibility.

Gavlick's credibility is further undermined by his responses to questions regarding his actions taken to respond to the Union's document subpoena. The Union, in its document subpoena, requested "[p]ayroll records reflecting the rate of pay for any employee assigned to work light duty for the period of time during which a bargaining unit employee was assigned to work light duty between January 1, 2000 and December 31, 2013". Such documents, if produced, would likely have been dispositive to the issue of past practice in this matter. They were not presented at the hearing. Relating to this document request, Gavlick was asked the following question on cross examination:

> Q. Other than Ms. White- well, let me step back a second. So in seeking to respond to the document subpoena, did you look for payroll records for employees who were on light duty prior to 2014?
>
> A. No, we didn't.
>
> Q. And I mean, you didn't provide any except for Ms. White, so what did you find?
>
> A. Well, there was no pay records – well, let me rephrase that. The way we understood this, there wasn't anything that applied prior to that as far as light-duty payments.

HEARING EXAMINER: I'm not sure I understood your response. Could you say that again, and rephrase that?

THE WITNESS: The way that we understood the subpoena to read we didn't have any payroll records pertaining to light duty prior to 2014.

HEARING EXAMINER: Okay.

BY ATTORNEY ROSENBERGER:

Q. So let me understand where you're coming from. The – did you understand the subpoena to be seeking information – records that would show what rate of pay people were paid prior to 2014 when they worked light duty?

A. That is not what the subpoena said, no.

(N.T. 22-23). I have read the subpoena and I find that it properly and directly requested records that would show what rate of pay bargaining unit members were paid prior to 2014 when they were assigned to light duty. Gavlick's above dissembling response on cross examination undermines his credibility.

Further, Gavlick's own testimony strongly indicates that prior to 2014, bargaining unit members assigned to light duty did in fact receive their full wages and benefits. Continuing with the cross examination above:

Q. What did you understand it to be seeking?

A. That you were looking for anyone that was on light duty and if there was any compensation paid to them, which we did have a list, I believe, that we got from Worker's Comp insurance. I don't know if Attorney Blazosek has forwarded that or not. **And the list that we got from there showed people who are on comp but there were none, according to them, that they did any supplement payments for, which meant that they just got – I guess got regular pay.**

(N.T. 23)(emphasis added). From this testimony from Gavlick, I infer a strong probability that any bargaining unit members who were assigned to light duty prior 2014 received their full wages and benefits because, as Gavlick testified, no employes received supplemental payments from Workers' Compensation. From this record, I infer that the implication of no supplemental payments means that no employe on light duty suffered any wage loss since they were receiving their full, regular pay.

For the above reasons, I find that prior to 2014 there was an established past practice that bargaining unit members were paid full wages and benefits when assigned to light duty. The record is also clear that in 2014, the Authority unilaterally changed the past practice when it implemented a policy to pay bargaining unit members $12.00 an hour when assigned to light duty. Therefore, the Authority has violated Section 1201(a)(1) and (5) of PERA.

As a remedy I will order the Authority to rescind its policy of paying bargaining unit members assigned to light duty $12.00 per hour, return to the *status quo ante* prior to Gavlick's decision in 2014 to pay bargaining unit members assigned to light duty $12.00 per hour, and make all affected bargaining unit members whole for wages lost as a result of the Authority's unilateral change in 2014, with statutory interest of six percent *per annum*.

CONCLUSIONS

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

1. The Authority is a public employer within the meaning of Section 301(1) of PERA.

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

3. The Board has jurisdiction over the parties hereto.

4. The Authority has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the Authority shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. 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. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of PERA:

(a) Immediately rescind its policy to pay bargaining unit members assigned to light duty a wage of $12.00 per hour and restore the *status quo ante*;

(b) Immediately make all affected employes whole for wages and benefits lost as a result of the policy to pay bargaining unit members assigned to light duty a wage of $12.00 per hour with statutory interest of 6 percent *per annum*;

(c) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to

the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(d) 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; and

(e) Serve a copy of the attached Affidavit of Compliance upon the Union.

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 third day of October, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

The Authority hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it complied with the Proposed Decision and Order as directed therein; that it rescinded its policy to pay bargaining unit members assigned to light duty a wage of $12.00 per hour and restored the *status quo ante*; that it made all affected employes whole for wages and benefits lost as a result of the policy to pay bargaining unit members assigned to light duty a wage of $12.00 per hour with statutory interest of 6 percent *per annum*; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union 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