COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WYALUSING AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-19-153-E
WYALUSING AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On June 27, 2019, the Wyalusing Area Educational Support Personnel Association, PSEA/NEA (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Wyalusing Area School District (District or Employer), alleging that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by failing to bargain in good faith and to bona fide impasse before subcontracting its custodial, maintenance, and utility technician services on May 13, 2019.

On July 29, 2019, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on October 9, 2019, if necessary. The hearing was subsequently continued to January 17, 2020.

The hearing ensued on January 17, 2020, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief on March 4, 2020. The District filed a post-hearing brief on March 6, 2020.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)

2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)

3. The Association is the exclusive bargaining agent for a unit of nonprofessional employes at the District. (Exhibit D-3)

4. The Association and the District are parties to a collective bargaining agreement (CBA), effective July 1, 2014 through June 30, 2019. (Exhibit D-3)

5. The parties met for a "compliance" meeting on December 8, 2018 with the state-appointed mediator to begin negotiations for a successor agreement. At that meeting, the District informed the Association that it was considering subcontracting the maintenance, custodial, and utility work, which was currently being performed by bargaining unit employes. (N.T. 18-19)

6. The parties scheduled a bargaining session for January 23, 2019, which had to be cancelled due to inclement weather. (N.T. 20)

7. The Association and the District held a bargaining session on February 13, 2019, during which the Association presented an initial proposal for a successor CBA, which continued to cover the maintenance, custodial, and utility work. The District did not respond to the Association's proposal at that time, other than to state the District was intending to subcontract the maintenance, custodial, and utility positions. The District also provided the Association with the requests for proposals. (N.T. 20-23; Association Exhibit 1)

8. The District did not provide the Association with any figures during the February 13, 2019 bargaining session to address any cost savings it might achieve by subcontracting the bargaining unit work. (N.T. 12)

9. In late February 2019, the District issued the requests for proposals. (N.T. 12)

10. The Association and the District next met for a bargaining session on March 6, 2019, during which the District presented a counterproposal to the Association's initial proposal. The District's counterproposal removed the maintenance, custodial, and utility work from the bargaining unit. (N.T. 23-24; Association Exhibit 2)

11. The District's March 6, 2019 counterproposal also indicated the following in the relevant part:

> ...[t]he District has solicited proposals, which will be shared with the Association as soon as they are received. It is the intent of the [School] Board to discuss the most favorable proposal at the April 8, 2019 hearing which has been advertised. The services would begin on July 1, 2019. As such, the District requests that any final proposal to address the third party contract issues must be received by the District no later than April 5, 2019...

(Association Exhibit 2)

12. On March 25, 2019, the District opened the bids it had received following the request for proposals. The District did not accept any bids at that time. The lowest bidder was ATS Facility Services. (N.T. 25-26; Association Exhibit 4)

13. On April 3, 2019, the Association and the District met for another bargaining session. The Association presented its second proposal at that time, which was a counterproposal to the District's March 6, 2019 proposal. The Association's April 3, 2019 proposal continued to cover the maintenance, custodial, and utility work. (N.T. 26; Association Exhibit 3)

14. At the April 3, 2019 bargaining session, the District provided the Association with a summary of projected costs contained in the third-party bids for the maintenance, custodial, and utility work, which the District opened on March 25, 2019. (N.T. 27-28; Association Exhibit 5)

15. According to the District's summary, it would cost the District $711,884.82 to keep the maintenance, custodial, and utility work in the

bargaining unit for the 2019-2020 school year, whereas it would cost the District between $336,227.38 and $798,681.00 to use one of the third-party bidders to provide those services. (Association Exhibit 5)

16. The Association's chief negotiator, UniServ Representative Jim Maria, testified that the Association was not in a position to negotiate with the District with regard to the bids the District had received during the April 3, 2019 bargaining session. Maria explained that the District had still not accepted any bids at that time, and the Association did not have a target number yet. During the April 3, 2019 bargaining session, Maria stated that the Association would not be able to match the potential savings included in the bids and asked if the District would be willing to compromise. The District indicated that it would compromise and that it was not expecting the Association to match the savings dollar for dollar. (N.T. 28-29, 72)

17. Prior to the April 8, 2019 School Board hearing, the District notified the Association that it was postponing the vote to award the subcontract until May 2019. (N.T. 79)

18. On April 8, 2019, the District held a public School Board hearing, during which the District indicated that it had selected ATS Facility Services as the subcontractor for the maintenance, custodial, and utility work. The Association attended that hearing and learned alongside the rest of the public that the District intended to subcontract with ATS. (N.T. 30-33)

19. According to the District's summary that was provided to the Association at the April 3, 2019 bargaining session, subcontracting the maintenance, custodial, and utility services to ATS would result in cost savings of $375,657.44 or $234,369.05 in the 2019-2020 school year. (Association Exhibit 5)[1]

20. In response to learning that the District selected the subcontracting bid from ATS, the Association considered proposing various cost-saving measures, including lowering the bargaining unit's starting wages, limiting healthcare coverage to single-only coverage for new bargaining unit employes, and wage freezes to the salary schedule. The Association also accepted portions of the nonmonetary language proposed by the District, such as language permitting the use of part-time workers provided it did not reduce the number of full-time employes. (N.T. 38)

21. The parties met for another bargaining session on April 24, 2019, during which the Association presented these cost-saving measures in its third proposal for a successor agreement, even though the District had not yet responded to the Association's second proposal. (N.T. 38-39; Association Exhibit 7)

22. The Association's April 24, 2019 proposal continued to cover the maintenance, custodial, and utility work, and for the first time, included the following clause: "[t]here shall be no subcontracting of bargaining unit positions." (N.T. 44-45; Association Exhibit 7)

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[1] The separate figures represent projections based on two different complement options using either a predominantly full-time staff or mostly part-timers. (Association Exhibit 5).

23. Maria testified that the District was impressed and surprised the Association was able to generate some savings. He also explained that the discussion focused largely on how to actually calculate what the savings would be, as much of it would be achieved through attritional savings, which would accrue to the District, due to the retirement of bargaining unit members. (N.T. 39-42)

24. In an attempt to address these uncertainties, the parties agreed to assume a two percent wage increase over three years. The parties also agreed to share their calculation methods and to be transparent about how they were performed. The District's labor counsel and lead negotiator, David Conn, indicated that there would need to be a guaranteed number of bargaining unit retirements within a set number of years for the District to accept the Association's proposal. At that point, the parties adjourned so the District could run the numbers and consider the Association's proposal. (N.T. 43-44, 47-49, 117)

25. The parties met again for a bargaining session on May 6, 2019, at which time the District presented its second proposal for a successor agreement. The District's proposal expressly stated: "[t]his proposal is limited to the financial contract changes which the School Board would accept in lieu of the awarding a third party contract for custodial and maintenance services." (N.T. 46-47; Association Exhibit 8)

26. The District's May 6, 2019 proposal accepted the salary provisions of the Association's most recent proposal, which continued to cover the maintenance, custodial, and utility workers as District employes. The District also accepted the Association's proposals regarding the use of part-time employes and single coverage for new hires, but without the right to move to family coverage in the third year. (N.T. 50-51; Association Exhibit 7, 8)

27. The District's May 6, 2019 proposal also accepted the "no subcontracting" language of the Association's most recent proposal, contingent on the execution of a Memorandum of Agreement (MOA), which provided for various drastic cost-saving measures if ten bargaining unit members did not retire by June 1, 2022. (N.T. 50-51; Association Exhibit 7, 8)

28. The cost-saving measures of the proposed MOA, which were to become effective if ten bargaining unit employes did not retire by June 1, 2022, included the following: an automatic four-year extension of the CBA; a wage freeze for the entire bargaining unit during that four-year extension; a language change allowing the District to utilize part-time employes in its complete discretion in the future; an automatically escalating increase in employe healthcare premium contributions for bargaining unit members with family coverage from 20 percent of the premium cost difference between single and family coverage to 80 percent over the four-year extension; and elimination of the no subcontracting language. (N.T. 50-51; Association Exhibit 8)

29. The Association countered at the table that day by proposing changes to the MOA, including the following: changing the number of bargaining unit retirements needed to avoid the cost-saving measures from ten to seven; changing the automatic CBA extension from four years to two years; allowing step movement up the salary schedule during the wage freeze based on years of service completed; and reversion to the Association's prior proposed

language regarding the use of part-time employes. The Association also proposed allowing single coverage to increase to family eligibility after several years and rejected the escalating healthcare premiums, as well as any elimination of the no subcontracting provision. (N.T. 52-53)

30. The District indicated that seven bargaining unit retirements over three years was not enough to satisfy its newly articulated $275,000 savings threshold and rejected the Association's proposal. (N.T. 53-56)

31. The Association and the District had previously scheduled a bargaining session for May 7, 2019. (N.T. 56)

32. Maria testified that, at the conclusion of the May 6, 2019 bargaining session, the District stated: "[w]e're at the finish line, we're done. We don't see any reason for us to meet tomorrow." (N.T. 56)

33. The Association indicated that it wanted to keep the bargaining session that was already scheduled for the following day. (N.T. 57)

34. Despite the District's refusal to meet on May 7, 2019, the Association sent a new proposal to the District by email on May 7, 2019. (N.T. 58; Association Exhibit 9, 10)

35. The Association's May 7, 2019 proposal included the following changes to the MOA: changing the number of bargaining unit retirements needed to avoid the cost-saving measures from ten to nine; agreeing to the automatic CBA extension and wage freeze for four years; agreeing to the automatic escalation in employe healthcare premiums from 20 percent to 80 percent over the four-year CBA extension; and a reversion to the Association's language regarding the District's use of part time employes, as well as the no subcontracting provision. The Association's May 7, 2019 proposal also accepted the District's language limiting health insurance coverage to single only for new hires. (N.T. 58-60; Association Exhibit 9, 10)

36. By email dated May 7, 2019, Maria sent the Association's proposal to Conn as an attachment. In the actual body of the email, Maria also explained the following, in relevant part:

> David,
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> Attached is our modified proposal as we discussed earlier. I have removed the language that allowed new hires to receive non-single medical coverage after 3 years. I include some our thoughts and justifications of our positions.
>
> We are not sure how to put an accurate value on the impact of single only health insurance for all new hires. There is no question that it has value. It removes a significant financial burden from the district, but it is a difficult number to pin down. The potential impact could be $10,000 to $14,000 per employee or it could be $0 if the new hire would only need single coverage. With 37 positions impacted, do we say $370,000 to $518,000 or is it 27 positions, due to the potential to subcontract out the 10 custodial, maintenance and utility positions, at $270,000 to $378,000? Is it only those positions that are replaced during the term of the new contract?

> If we say that it has no value if it happens outside of the 3 year window of our proposed contract, then our original proposal to allow new hires access to non-single coverage after 3 years would have been adequate for the district. Since it is not, there has to be some consideration and value assigned to the concession of single coverage only for new hires.
>
> We contend that the dollar value for replacing current staff with new hires, with single only coverage, is worth at least the value of 2 or 3 retirees when doing the savings comparisons. Logically then, we can agree to the conditions in your proposed MOA with a minimum of eight [bargaining unit] members leaving instead of ten. We understand that the district might hesitate to agree to eight.
>
> We offer that if, by June 30, 2022, fewer than nine (9) [bargaining unit] members separate from service with the district, then the following conditions of the MOA are implemented.
>
> In that the MOA addresses economic issues we can agree to the four year extension with no increase in wages and with the schedule of premium cost difference contributions. We cannot agree to amending Article VIII, Section 5 [Use of Part Time Employees] and with eliminating Article XIV, Section 16 [Subcontracting]. They are not economic issues related to the targeted cost savings. We believe that they are independent of the targeted number of [bargaining unit] members leaving service and cannot be conditional on that.
>
> We accept your proposal of May 6, 2019 and offer an amended MOA to govern that document. Our amended proposal is attached along with the revised MOA.

(N.T. 61-62; Association Exhibit 10)

37. Conn responded to the May 7, 2019 email by stating that he would take the Association’s May 7, 2019 proposal to the entire School Board for consideration. (N.T. 63)

38. The District did not provide a formal response to the Association’s May 7, 2019 proposal. (N.T. 63)

39. The District never formally declared impasse to the Association. (N.T. 64)

40. On May 13, 2019, the District’s School Board voted to approve the subcontract with ATS to be effective July 1, 2019. (N.T. 13, 15, 64-65, 78)

41. The Association and the District next held a bargaining session on June 5, 2019. (N.T. 63)

42. At the June 5, 2019 bargaining session, in response to the Association’s remarks that the District never formally responded to its May 7, 2019 proposal, Conn indicated that the proposal was rejected. (N.T. 63-65)

43. At the June 5, 2019 bargaining session, the Association presented a proposal that still included the maintenance, custodial, and utility work. The District indicated that it would not entertain any proposals with those members in it. Conn stated that "there is no version of the conversation that will change the [School] Board's decision on this." (N.T. 65-66)

44. The Association asked the District for more dates to meet in June, to which the District responded that it had no available dates in June. The parties next met on July 2, 2019, at which time the Association still tried to discuss the maintenance, custodial, and utility workers. The District refused to discuss those individuals. (N.T. 66)

DISCUSSION

The Association has alleged that the District violated Section 1201(a)(1) and (5) of the Act[2] by failing to bargain in good faith and to bona fide impasse before subcontracting its custodial, maintenance, and utility technician services on May 13, 2019. The District, on the other hand, contends that the charge should be dismissed because the District did fulfill its good faith bargaining obligation, and the parties were deadlocked when it subcontracted those services.

In Amalgamated Transit Union, Local 1552 v. Penn Hills School District, 45 PPER 104 (Proposed Decision and Order, 2014), Hearing Examiner Jack Marino described the law governing subcontracting as follows:

> The scope and procedures for bargaining between a public school district and its employes are governed by both PERA and the Act 88 amendments to the Public School Code of 1949. Central Dauphin School District v. Central Dauphin Bus Drivers Association, 966 A.2d 47 (Pa. Cmwlth. 2010). Where the two statutes are in conflict, Act 88 prevails. Central Dauphin, 966 A.2d at 51. Act 88 applies during the term of an existing contract. Id. Both PERA and Act 88 require the parties to bargain in good faith. In Morrisville School District v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996), the Court opined as follows:
>
> Good faith bargaining requires the parties to make a serious effort to resolve differences and to reach common ground. ***The duty to bargain in good faith extends to the subject of subcontracting bargaining unit work***. An employer has the obligation to bargain in good faith to a bona fide impasse before subcontracting any bargaining unit work.
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> Morrisville, 687 A.2d at 8 (citations omitted)(emphasis added). "Good faith requires at a minimum that the parties negotiate with authority and define for their adversary an initial position which, if accepted, will bind the parties to at least a tentative

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[2] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(5) 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. 43 P.S. § 1101.1201.

agreement. Although Section 701 of PERA does not require a party to make any agreement or concession, it does require each party to bargain in good faith." Upper Moreland Township School District v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997). An employer's failure to make a counterproposal after it makes clear to the union that it has exceeded its bottom line is not, by itself, a violation of PERA or the employer's duty to bargain in good faith, but it may be a factor if there is an overall failure to bargain in good faith. Morrisville, 687 A.2d at 9. In Upper Moreland, the Court held that "[t]he parties must set forth a position upon which the adversary may rely that the acceptance of which would result in a tentative agreement. At a minimum, each party must present an identifiable **target** for the adversary to shoot at which will result in at least a tentative agreement, if reached." Upper Moreland, 695 A.2d at 909. When determining whether an employer bargained in good faith, the Board examines the totality of the circumstances. PSSU, Local 668 v. Lancaster County, 45 PPER 94 (Final Order, 2014).

Our Supreme Court has defined the meaning of "impasse" in the following manner:

[T]hat point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless... [P]erhaps 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, 208 n.9, 507 A.2d 373, 380 n.9 (1986). The Norwin Court further held that "[a]n employer may, after bargaining with the union to a deadlock or impasse on an issue, make unilateral changes that are reasonably comprehended within his impasse proposal." Id. The definition of impasse is not met when progress is perceptible, the Union has indicated by its conduct that substantial movement is forthcoming or the District has demonstrated that it is not interested in further movement or proposals. Morrisville, 687 A.2d at 9-11.

Moreover, a determination of whether a school district bargained in good faith to impasse under the totality of the circumstances must necessarily include consideration of whether the parties complied with the mediation and fact-finding mandates of Act 88. In Williamsport Area School District v. PLRB, 43 PPER 17 (Pa. Cmwlth. 2010), the Commonwealth Court reversed this Board's conclusion that all public school employers and employe associations must participate in fact-finding before reaching or declaring bona-fide impasse.

In this case, the Association has sustained its burden of proving that the District violated Section 1201(a)(5) of the Act. On these facts, the record clearly shows that the District failed to bargain in good faith and to a bona fide impasse before voting to subcontract the maintenance, custodial, and utility work to ATS on May 13, 2019. Therefore, the District must be ordered to rescind the subcontract with ATS and reinstate the maintenance, custodial, and utility work to the bargaining unit and to make whole those

employes who have been adversely affected as a result of the District's unfair practices.

The District argues in its post-hearing brief that the parties were at impasse because they met for six bargaining sessions, in addition to the December compliance meeting with the state-appointed mediator, before the District finally voted to award the subcontract to ATS. However, the record shows that the Association did not have any figures regarding the potential cost savings for the District during the December 8, 2018, February 13, 2019, and March 6, 2019 bargaining sessions. Indeed, the District did not provide the Association with a summary of the projected costs contained in the third party bids until the April 3, 2019 bargaining session, at which the Association made its second proposal. In fact, the Association did not learn which bid the District accepted until the actual April 8, 2019 School Board hearing when it learned alongside the rest of the public the District planned to subcontract with ATS. Thus, the Association was not in a position to even begin serious bargaining on the issue of subcontracting until the April 24, 2019 bargaining session when the Association made its third proposal for a successor CBA, even though the District had not yet responded to the Association's second proposal. It was during the April 24, 2019 bargaining session that the Association included significant cost savings in its proposal for the District, and the parties agreed on a method to calculate the savings for cost comparison purposes. What is more, although the District agreed to compromise and was not expecting the Association to match the potential savings dollar for dollar during the April 3, 2019 session, the District did not provide the Association with the $275,000 target until the May 6, 2019 bargaining session when the District made its first and only proposal to keep the maintenance, custodial, and utility work in-house.

In addition, the parties appeared to be close to actually reaching a tentative agreement during the May 6, 2019 bargaining session. At that session, the District accepted the salary provisions of the Association's April 24, 2019 proposal, which continued to cover the maintenance, custodial, and utility workers. Similarly, the District accepted the no-subcontracting language contingent on the execution of the MOA, which provided for various cost saving measures if ten bargaining unit employes did not retire by June 1, 2022 including the following: an automatic four-year extension of the CBA; a wage freeze for the entire bargaining unit during that four-year extension; a language change allowing the District to utilize part-time employes in its complete discretion in the future; an automatically escalating increase in employe healthcare premium contributions for bargaining unit members with family coverage from 20 percent of the premium cost difference between single and family coverage to 80 percent over the four-year extension; and elimination of the no-subcontracting language. Maria testified that the Association was not able to review the District's numbers and calculations that day. (N.T. 54-55). However, the Association countered at the table proposing changes to the MOA, including the following: changing the number of bargaining unit retirements needed to avoid the cost-saving measures from ten to seven; changing the automatic CBA extension from four years to two years; allowing step movement up the salary schedule during the wage freeze based on years of service completed; and reversion to the Association's prior proposed language regarding the use of part-time employes. The Association also proposed allowing single coverage to increase to family eligibility after several years and rejected the escalating healthcare premiums, as well as any elimination of the no-subcontracting provision.

The District indicated that seven bargaining unit retirements over three years was not enough to satisfy its newly articulated $275,000 savings threshold and rejected the Association's proposal. Then, the District stated "[w]e're at the finish line, we're done. We don't see any reason for us to meet tomorrow," and refused to show up for a previously scheduled bargaining session the following day on May 7, 2019. The Association expressed its desire to continue bargaining by stating that it wanted to keep the previously scheduled session, and despite the District's refusal, the Association emailed Conn another proposal on May 7, 2019 accepting nearly all of the District's proposed terms in the MOA. Indeed, the only aspects of the Association's May 7, 2019 proposal, which did not accept the District's May 6, 2019 proposal, were that the Association proposed changing the number of bargaining unit retirements in the MOA from ten to nine and a reversion to the Association's prior language regarding part-time employes. Nevertheless, the District simply voted to subcontract the maintenance, custodial, and utility work on May 13, 2019 without even responding to the Association's proposal until June 2019. This does not satisfy the Pennsylvania Supreme Court's definition of impasse.

As the Association argues in its brief, the parties only had two bargaining sessions where the actual subcontracting numbers were on the table. Likewise, the District only made one proposal which kept the maintenance, custodial, and utility workers in-house. Further, the parties were getting very close to reaching an agreement. And, the Association indicated that it wanted to continue bargaining at the previously scheduled May 7, 2019 session, which the District refused to attend. The obvious implication being that the Association was going to make another proposal, which it did by email on May 7, 2019, despite the District's refusal to attend. Moreover, Maria explained why he thought the Association's proposal on May 7, 2019 at least arguably met the District's target goal for cost savings in the body of his email to Conn. While the District was certainly entitled to draw a line and refuse to make concessions beyond a certain point, it cannot be said on these facts that the parties had exhausted all prospects of concluding an agreement and that further discussions would have been fruitless. To the contrary, the record shows that, by refusing to meet with the Association for their previously scheduled bargaining session on May 7, 2019, the District was not interested in further movement or proposals, which precludes any determination the parties were at impasse here, especially where the method of calculations was so uncertain. As the Association contends, the parties had only just begun serious negotiations on the issue of subcontracting and were making significant progress when the District voted to award the contract to ATS on May 13, 2019.[3]

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[3] The District also posits that the Association's failure to accept its May 6, 2019 proposal during the bargaining sessions in June and July 2019 reflects that the parties were at impasse. This argument, however, is unavailing. The record shows that the District voted to award the subcontract on May 13, 2019 without even responding to the Association's May 7, 2019 email proposal and that the subcontract began on July 1, 2019. Thus, the District had already executed the subcontract and outsourced the work at issue at least by the July 2019 bargaining session. Moreover, the Association's failure to accept the District's May 6, 2019 proposal in June 2019 is hardly evidence that the parties were at impasse. As set forth above, the District cannot unilaterally and prematurely cease bargaining, remove the work from the bargaining unit, and then cite the Association's subsequent lack of agreement following the District's actions as evidence of impasse, especially in light of the District already proceeding with the subcontract.

Similarly, the Association has also demonstrated that the District failed to bargain in good faith on the issue of subcontracting. First of all, the District insisted on subcontracting its custodial, maintenance, and utility work by July 1, 2019 from the very beginning of bargaining and remained immovable from that deadline. The District points to its decision in early April 2019 to postpone the School Board vote to award any subcontract to May 2019 as evidence of its good faith. However, such a notion is hardly compelling evidence of the District's good faith. Indeed, the record shows that the District did not provide the Association with a summary of the projected costs contained in the third-party bids until the April 3, 2019 bargaining session. In fact, the parties did not even begin to seriously bargain with the actual subcontracting numbers on the table until the April 24, 2019 session. Thus, the District knew it had to postpone the School Board vote originally scheduled for April 8, 2019 to maintain at least a hint of arguable good faith. Nevertheless, the District continually reminded the Association at each bargaining session in December 2018, February 2019, and March 2019 that it planned to subcontract the custodial, maintenance, and utility work on July 1, 2019 before it even received any of the third party bids. How the District knew it wanted to accept any of the third party bids before receiving them is unclear. What is more, the District expected the Association to compete with the third-party bid selected on April 8, 2019 in slightly more than a 30-day window, as the School Board voted to award the subcontract on May 13, 2019. To make matters worse, the District further compounded this problem by refusing to attend the May 7, 2019 bargaining session, claiming not that the parties were at impasse, but simply that the District was "done." The testimony of the District's witnesses that they thought the Association made their best offer on May 6, 2019 is not dispositive and of no consequence. The District was not entitled to make such a determination for the Association. In fact, Maria testified credibly that he never told the District that the Association's proposal in May 2019 was the best the Association could do. (N.T. 80-81).[4]

[4] The testimony of Maria has been accepted as more credible and persuasive than the testimony of the District's witnesses. Maria was direct, non-evasive, and forthcoming. The District, on the other hand, presented testimony from Conn and School Board Vice President Matthew Muench, who both offered testimony which was belied by the District's own proposals. For example, both Conn and Muench claimed that the District would never accept a no-subcontracting provision. (N.T. 112, 115, 119). Nevertheless, the District's very own May 6, 2019 proposal expressly accepted the Association's proposed language precluding subcontracting, contingent upon the execution of the MOA. (Association Exhibit 8). Conn tried to explain this away by stating that the District had simply made a mistake in this regard. (N.T. 119). However, this testimony is rejected as not credible and not persuasive. Furthermore, Conn did not even remember that the parties had a previously scheduled bargaining session on May 7, 2019 until Maria testified to the same. (N.T. 120). Moreover, if Muench's testimony is accurate, it would be clear evidence of bad faith bargaining for him to make a proposal to the Association as a member of the District's negotiating team, which accepted the no-subcontracting provision, and then vote against the potential tentative agreement had it been put to the District's governing body. St. Clair School District v. PLRB, 552 A.2d 1133 (Pa. Cmwlth. 1988). In this regard, Muench essentially conceded that he bargained in bad faith here given that he made a proposal on May 6, 2019, which conditionally accepted the Association's no-subcontracting language, and then rejected the Association's

The District argues that its persistent adherence to the July 1, 2019 start date for the subcontracting services was justified by recent amendments to the School Code. According to the District, these amendments require the District's request for proposals to include a minimum three-year cost projection, which must be specific to the years at issue, or in other words, the projections must be for actual school years. In this case, they were for 2019-2020, 2020-2021, and 2021-2022. The District asserts that if the parties bargained past July 1, 2019, and the District had to postpone an award of the third-party contract, the result would be that the information in the proposal would no longer be compliant with the statutory mandate for a three-year projection, and thus, be rendered moot. (*See District's Brief at 17).* The District's argument is untenable.

Section 5-528(a) of the School Code, which is entitled "Third-party services," provides in relevant part as follows:

> In addition to the requirements of any other law or regulation, a school employer shall not enter into a contract with a third party for non-instructional services unless the following conditions are met: (1) The school employer shall solicit applications from third parties. (2) The school employer's solicitation shall require each third party to provide in the application: (i) A minimum three-year cost projection to the school employer, using generally accepted accounting principles...

24 P.S. § 5-528.

The District's reliance on this amendment to the School Code is misplaced. First of all, this section can hardly be read to amend or alter the District's obligation under PERA to bargain in good faith. To the contrary, Section 528(c) actually reaffirms the District's good faith bargaining obligation, specifically stating that "[n]othing in this section shall be construed to...(2) Supersede or preempt the rights, remedies and procedures afforded to school employes or labor organizations under Federal or State law, including [PERA], or any provision of a collective bargaining agreement negotiated between a school employer and an exclusive representative of the employes in accordance with that act." 24 P.S. § 5-528(c). As the Association notes, the expiration of the July 1, 2014 to June 30, 2019 CBA would simply result in the parties being required to maintain the status quo, pending further negotiations. To satisfy its good faith bargaining obligation, the District could have easily postponed the award and obtained the cost projections for the next three-year period, beginning after 2019-2020. Indeed, the courts have expressly approved such a practice, even during the middle of a contract, holding that the Act 88 timelines repeat on a yearly basis. Central Dauphin School District v. Central Dauphin Bus

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counterproposal on May 6, 2019 simply because it contained the same provision, stating "we will never accept" the no-subcontracting provision. (N.T. 112). In any case, as the Association points out, the parties had essentially resolved the issue of subcontracting the maintenance, custodial, and utility work through the Association's cost savings proposal on April 24, 2019, which the District accepted in its May 6, 2019 proposal, and the only true remaining issue was the status of the no-subcontracting proposal in future years from the Association, which was contingent upon the terms of the MOA.

Drivers Association, 966 A.2d 47 (Pa. Cmwlth. 2010). The District essentially imposed an artificial six-month deadline on bargaining, despite its efforts to disclaim such a notion in its brief, which was exacerbated by its failure to engage in any serious bargaining with the subcontracting numbers on the table until the end of April 2019. As such, the District's argument must be rejected.

Finally, the District maintains that it bargained in good faith because it set a target amount of $275,000 over three years, which was substantially less than the actual savings the District could obtain from the third-party contractor. The District claims that the $275,000 target was calculated in error and that its proposal on May 6, 2019 would not have resulted in that actual amount of savings. The District emphasizes that it stood by this $275,000 target as evidence of its good faith because it believed that it would have been bad faith to retract it. However, while the District's willingness to compromise on the target savings amount is certainly commendable, even after it uncovered this alleged mistake in its calculations, that factor is not dispositive on this record. Indeed, as previously set forth above, the District did not provide the Association with the specific $275,000 figure until the May 6, 2019 bargaining session when it made its only proposal to keep the custodial, maintenance, and utility work in-house, then refused to attend the previously scheduled session on May 7, 2019, and voted to award the subcontract on May 13, 2019 without even responding to the Association's May 7, 2019 email proposal. As a result, it must be concluded that the District never intended to achieve an agreement and demonstrated unreasonableness in violation of the Act. Accordingly, the District has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

CONCLUSIONS

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

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

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

3. The Board has jurisdiction over the parties hereto.

4. The District 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 the Act, the Examiner

HEREBY ORDERS AND DIRECTS

That the District 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 the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.

3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of PERA:

(a) Immediately rescind the contract with ATS; restore the status quo ante and return the custodial, maintenance, and utility work to the bargaining unit; offer in writing to any employe who lost work as a result of the District's contract with ATS unconditional reinstatement to his or her former position; and make whole any bargaining unit employes who have been adversely affected due to the District's unfair practices, together with six (6%) percent per annum interest;

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place, readily accessible to its employes, and have the same remain so posted for a period of ten (10) consecutive days;

(c) 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

(d) 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 from Harrisburg, Pennsylvania this 23rd day of July, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WYALUSING AREA EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION PSEA/NEA :
:
v. : Case No. PERA-C-19-153-E
:
WYALUSING AREA SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

Wyalusing Area School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed and immediately rescinded the contract with ATS, restored the status quo ante and returned the custodial, maintenance, and utility work to the bargaining unit, offered in writing to any employe who lost work as a result of the District's contract with ATS unconditional reinstatement to his or her former position, and made whole any bargaining unit employes who have been adversely affected due to the District's unfair practices, together with six (6%) percent per annum interest; that it has posted a copy of the Proposed Decision and Order in the manner prescribed therein; and that it has served a 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