IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Williamsport Area School District,	:	
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Petitioner	:	
	:	
v.	:	No. 932 C.D. 2010
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Pennsylvania Labor Relations Board,	:	Argued: December 7, 2010
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 3, 2011**

The Williamsport Area School District (District) petitions for review of the Final Order of the Pennsylvania Labor Relations Board (Board), which made absolute and final the Proposed Decision and Order (Proposed Decision) of a Hearing Examiner. In the Final Order, the Board denied the District's exceptions to the Proposed Decision and held that the District committed an unfair labor practice in violation of Section 1201(a)(5) of the Public Employe Relations Act (PERA), 43 P.S. § 1101.1201(a)(5),[1] by subcontracting bargaining unit work

[1] Act of July 23, 1970, P.L. 563, 43 P.S. § 1101.1201(a)(5). This Section provides, in relevant part:

(Continued…)

without having fulfilled its bargaining obligation with the Williamsport Area Support Personnel Association (Association), which has intervened in this appeal. On appeal, the District argues that the Board erred by: (1) finding that it refused to bargain in good faith over the subcontracting issue; (2) imposing a de facto mandatory requirement that parties engage in fact-finding before declaring a bona fide impasse; and (3) relying on the length of the contract with STA of Pennsylvania, Inc. (STA) as evidence that the District did not bargain to a bona fide impasse.

The Hearing Examiner found the following facts. The Association is the certified bargaining representative of the District's full-time and part-time non-professional employees, including its transportation employees. (Hearing Examiner's Findings of Fact (FOF) ¶ 1.) The Association and the District "entered into a five-year collective bargaining agreement" effective from July 1, 2003. (FOF ¶ 2.) On January 3, 2008, the parties met to begin negotiating a successor collective bargaining agreement. (FOF ¶ 3.) During this session, "[t]he District indicated that it would be considering the subcontracting 'of certain areas.'" (FOF ¶ 3.) "In mid-July 2008, the District provided the Association with a proposal from [a subcontractor, STA] to provide transportation services" to the District for five years (STA Proposal). (FOF ¶ 4.) The STA Proposal gave the cost to the

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> (a) Public employers, their agents or representatives are prohibited from:
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> . . . .
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> (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit.

Id.

District for providing daily bus runs for five years and indicated that STA would purchase the District's school buses for one million dollars. (FOF ¶ 4.) At an August 18, 2008, bargaining session, the Association gave the District forty-six questions regarding the subcontracting of its transportation services, to which the District provided answers between September 9, 2008, and September 19, 2008. (FOF ¶ 5.) The District presented a proposal to the Association on September 9, 2008, which would increase wages in each of the four years of the contract, but indicated that the District intended to subcontract the District's transportation and trash collection services. (FOF ¶ 6.) The Association issued a counter-proposal accepting the wage increase terms and agreeing to withdraw a petition for unit clarification in exchange for the District not subcontracting transportation services. (FOF ¶ 7.) "In the late Fall of 2008, a mediator became involved in the negotiations." (FOF ¶ 8.) On December 15, 2008, the District submitted a proposal that would keep transportation services in-house in exchange for a four year freeze on all bargaining unit wages, resulting in a savings to the District of approximately one million dollars. (FOF ¶ 9.) The Association presented a chart to the District on January 12, 2009, indicating that it would change the health care coverage to a lesser plan, which would save the District $514,193 over five years. (FOF ¶ 10.) The Association presented another proposal to the District on February 12, 2009, in which the bargaining unit's wages would be frozen for the first year, resulting in $220,000 in savings, and the transportation services would remain in-house. (FOF ¶ 11.)

"At a bargaining session on March 26, 2009, the Association's chief negotiator (Cary Kurtz) asked the District's chief negotiator (Benjamin Pratt) how

much money the District needed to save over the next four or five years to keep transportation services in-house." (FOF ¶ 12.) Mr. Pratt stated, "Find me a million dollars." (FOF ¶ 12.) On April 22, 2009, Mr. Pratt inquired of Mr. Kurtz where the parties stood on scheduling the next negotiation session and stated that, if the Association was unable to meet the needs of the District, the parties were at an impasse. (FOF ¶ 13.) Mr. Kurtz responded that the Association was "adjusting its proposal in an attempt to meet the [D]istrict's" demand that it provide one million dollars in savings. (FOF ¶ 13.) Mr. Pratt replied that the "$1,000,000 is just the starting point, it is the out years as well as with retirement costs, health care, wage increases, etc., that is a driving factor as well." (FOF ¶ 13 (quoting e-mail from Mr. Pratt to Mr. Kurtz (April 22, 2009), Association's Ex. 6, R.R. at 75a).) Mr. Kurtz indicated that, if this was the case, the Association was repeating its request for the District to provide it "with a detailed cost analysis for the contract period on the savings that w[ould] be realized by" subcontracting to support the District's increased demand. (FOF ¶ 13 (quoting e-mail from Mr. Kurtz to Mr. Pratt (April 22, 2009), Association's Ex. 8, R.R. at 78a).) "On April 27, 2009, Mr. Pratt sent to Mr. Kurtz a chart estimating the savings to the District" if it subcontracted its transportation services, indicating the amount of savings expected in each school year. (FOF ¶ 14.) Mr. Kurtz wrote Mr. Pratt on April 28, 2009, questioning the budget numbers used to calculate the savings figures; thereafter, Mr. Kurtz worked with the District's Business Manager, Jeffrey Richards, to resolve some of these issues. (FOF ¶¶ 15-17.)

On May 14, 15, and 18, 2009, Mr. Richards provided the Association with the additional information requested so that the Association could prepare a

proposal for the bargaining session on May 21, 2009. (FOF ¶ 18.) At that bargaining session, the Association presented a proposal that included a wage freeze for the first year, a smaller wage increase over the next three years, indicated that the District would keep transportation services in-house, and that the parties would form a joint committee to explore additional cost savings measures. (FOF ¶ 19.) The Association's proposal included a "cost analysis estimating savings to the District of $707,732 through the 2012-2013 school year" and was based on the District's actual transportation costs with projected 4% budget increases through the 2012-2013 school year. (FOF ¶ 19.) "Without asking questions about the [Association's] proposal and following a caucus, the District rejected the proposal" and declared an impasse. (FOF ¶ 20.) "Mr. Pratt explained that the District did not" think that the Association had met or could "meet the savings the District needed" to prevent subcontracting its transportation services and that the District's Board of Directors would be voting on subcontracting on June 2, 2009. (FOF ¶ 20.) Mr. Kurtz indicated that they could not be at an impasse because the parties had not gone through fact-finding, to which Mr. Pratt responded that he was only declaring an impasse on the subcontracting issue and that the District was willing to negotiate over the other outstanding issues. (FOF ¶ 20.) Mr. Kurtz indicated that the Association was open for further negotiating on the subcontracting issue, but would wait until after the District's Board of Directors voted on the subcontracting issue to negotiate for the rest of the bargaining unit. (FOF ¶ 20.) The District's Board of Directors voted on June 2, 2009, to subcontract its transportation services and entered into a seven-year contract with STA to provide daily bus services through the 2015-2016 school year. (FOF ¶ 21.)

On June 16, 2009, the Association filed a charge of unfair labor practices with the Board, averring that the District did not bargain in good faith in violation of Section 1201(a)(5) of PERA when it subcontracted its transportation services, because the District: (1) solicited bids from potential subcontractors without notifying the Association of the solicitation; (2) did not provide the Association with a target or gave a moving target regarding what it would accept to refrain from subcontracting transportation services; (3) refused to accept a proposal from the Association under which the District would have saved more money than if it subcontracted; (4) prematurely declared an impasse in negotiations over subcontracting; and (5) entered into a subcontract prior to fact-finding. The Board issued a complaint and appointed a Hearing Examiner, who held a hearing on December 30, 2009, at which both parties presented evidence. Based on the evidence presented, the Hearing Examiner issued the Proposed Decision.

Based on the facts stated above, the Hearing Examiner concluded, *inter alia*, that the District violated Section 1201(a)(5) of PERA by not meeting its obligation to engage in the bargaining process to a bona fide impasse before it subcontracted its transportation services. The Hearing Examiner held that, notwithstanding the negotiations between the Association and the District prior to April 2009, the District did not put the Association in a position to make a serious proposal about subcontracting until April 27, 2009, which was when the District provided the Association with the information regarding the District's estimated savings. The record revealed that the parties had only one bargaining session after the District provided this information, at which the District summarily rejected the Association's proposal and declared an impasse. The Hearing Examiner rejected the District's explanation that it did not think that the Association could meet the

savings required to keep transportation services in-house, noting that the record did not support such an explanation where the parties only had one bargaining session after the District put the Association in a position to make a knowledgeable proposal. The Hearing Examiner concluded that the District prematurely declared an impasse over the subcontracting issue, particularly where the Association indicated that it wanted to continue negotiating over that issue and go to fact-finding on that issue.

The Hearing Examiner, likewise, rejected the District's contention that it bargained in good faith, noting that the District did not provide the Association with information regarding how much it would save over the life of the contract with STA until April 27, 2009, only one month before the District declared an impasse. The Hearing Examiner indicated that, without that information, the Association was in no position to intelligently formulate a proposal for the District's consideration, and no serious negotiations could have taken place. The Hearing Examiner further pointed out that the District did not provide the Association with the opportunity to meet the terms of the subcontract where the District entered into a contract with STA for seven years, not the four year contract that was the subject of the parties' negotiations. The Hearing Examiner rejected the District's evidence that Mr. Kurtz admitted that he did not feel that the Association could match the numbers, as the evidence was based on Mr. Richards' testimony regarding Mr. Kurtz's feelings, stating that Mr. Richards was not competent to testify as to what Mr. Kurtz felt. Concluding that the District committed an unfair labor practice under Section 1201(a)(5), the Hearing Examiner ordered the District to, *inter alia*, cease and desist from refusing to collectively bargain in good faith with the Association, rescind the contract with

STA,[2] offer unconditional reinstatement to employees who lost work as a result of the contract with STA, make whole any employee who sustained a loss as a result of the contract with STA by paying back pay with interest, and provide the Board with notice of compliance with the Proposed Decision.

The District filed exceptions to the Proposed Decision, to which the Association filed an answer. The Board agreed with the Hearing Examiner's conclusion that the parties were not at a bona fide impasse in negotiations over subcontracting and, therefore, the District violated Section 1201(a)(5) of PERA by subcontracting its transportation services on June 2, 2009.[3] The Board noted that, although the parties began negotiating in January 2008, it was not until December 2008 that the District made a proposal that would have retained the transportation services positions in-house and that it could not be said that the parties had reached an impasse as of June 2, 2009. In considering the totality of the circumstances with regard to whether the Board bargained in good faith to a bona fide impasse,

[2] The District's contract with STA includes a provision that states that if there is a legal determination that the District did not fulfill its obligation to bargain, the District may cancel the contract and not be subject to compensatory damages. (Contract for School Transportation Services, Article XIX at 17, R.R. at 403a.)

[3] The Board amended the Hearing Examiner's finding of fact number 22 to indicate that the Association requested fact-finding on June 10, 2009, and that the fact finder issued a report on July 27, 2009. (Final Order, Amended Finding of Fact (Amended FOF) ¶ 22.) "The [f]act-[f]inder reviewed the financial data and recommended that the District's transportation services remain in-house." (Amended FOF ¶ 22.) The fact finder reduced the wage proposals, freezing wages for the first two years, and suggesting 2% and 3% increases in years three and four. (Amended FOF ¶ 22.) The fact finder found that, with the revised wages, the total cost to the District of retaining transportation services in-house was $42,500 for the life of the four year agreement. (Amended FOF ¶ 22.) The Association accepted the report, but the District did not. (Amended FOF ¶ 22.)

the Board looked at the fact that the District kept moving the targeted savings amount, the District did not ask any questions or make a counter-proposal to the Association's May 21, 2009, proposal, and the fact that the STA contract was for seven years, not four years. The Board noted that the fact that the Association wanted to undergo fact-finding on this issue, regardless of whether fact-finding was a mandatory step in the bargaining process, evidenced the Association's desire to continue bargaining and make further concessions. The Board concluded that, regardless of whether the District believed it was possible that the Association would ever meet its demands, such belief was not justification for precluding the Association from attempting to meet those demands in order to save bargaining unit jobs, which the Association believed was possible. Accordingly, the Board dismissed the District's exceptions and made the Proposed Decision absolute and final. The District now petitions to this Court for review.

We are aware that, "a decision of the Board must be upheld if the Board's factual findings are supported by substantial evidence, and if conclusions of law drawn from those facts are reasonable, not capricious, arbitrary, or illegal." Borough of Ellwood City v. Pennsylvania Labor Relations Board, __ Pa. __, __, 998 A.2d 589, 594 (2010). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 275, 501 A.2d 1383, 1387 (1985). "[W]hen reviewing an administrative order, the prevailing party . . . is entitled to the benefit of every inference which can be logically and reasonably drawn from the evidence when viewed in a light most favorable to the prevailing party. Doerr v. Pennsylvania Liquor Control Board, 491 A.2d 299, 302 (Pa.

Cmwlth. 1985). Appellate courts "'will not lightly substitute [their] judgment for that of a body selected for its expertise whose experience and expertise make it better qualified than a court of law to weigh facts within its field.'" Borough of Ellwood City, __ Pa. at __, 998 A.2d at 594 (quoting Appeal of Cumberland Valley School District, 483 Pa. 134, 140, 394 A.2d 946, 949 (1978)).

I. The duty to bargain in good faith.

Bargaining in good faith "requires the parties to make a serious effort to resolve differences and to reach common ground." Morrisville School District v. Pennsylvania Labor Relations Board, 687 A.2d 5, 8 (Pa. Cmwlth. 1997). "The duty to bargain in good faith extends to the subject of subcontracting bargaining unit work." Id. Before an employer may subcontract bargaining unit work, it "has the obligation to bargain in good faith to a bona fide impasse." Id.

The District argues that the Board erred in holding that it failed to bargain in good faith over the issue of subcontracting the District's transportation services. According to the District, the Board ignored evidence of the District's good faith efforts, which included bargaining for over a year on the subcontracting issue and making a contract proposal to keep the work in-house, to which the Association did not even respond and did not take to its members. The District further points out that, despite the ongoing negotiations, the Association did not make any movement in its proposals between February 2009 and May 2009. Relying on Mars Area Association of School Service Personnel, PSSPA/PSEA v. Pennsylvania Labor Relations Board, 538 A.2d 585 (Pa. Cmwlth. 1987), the District contends that, in determining whether a party engages in good faith bargaining over the subcontracting of bargaining unit work, the totality of the

circumstances must be considered. The District argues that, pursuant to Mars Area, this Court must look at certain factors to determine whether good faith bargaining has occurred, including: (1) notice of the intent to investigate subcontracting; (2) whether the employer truly negotiated over the subcontracting issue; (3) whether the employer extended the deadline to accept the third party contract to allow more time to negotiate; and (4) whether a true impasse was reached. The District asserts that the evidence established that all of these factors weigh in its favor and against the Board's final conclusion that the District did not engage in good faith bargaining.

In Mars Area, this Court affirmed the Board's decision holding that the school district bargained in good faith before subcontracting its transportation services. Id. at 587. The district and union in Mars Area began bargaining over a successor contract on February 8, 1984, and, during that month, the district decided to investigate subcontracting its transportation services. Id. at 586. On February 28, 1984, the district informed the union that it was contemplating subcontracting its transportation services, agreed to give the union specifications and other details regarding the issue, and informed the union that it would receive and consider counter-proposals "designed to reduce operational costs and maintain the transportation services in-house." Id. To this end, the district provided the union with an accounting of its in-house transportation costs in May 1984. Id. The parties bargained for ten sessions over whether to subcontract or maintain in-house transportation services. Id. In particular, the district required any proposal submitted by the union to account, *inter alia*, for the proceeds of the sale of its buses and spare parts, as well as the rental income from the rental of the district's

bus garage. Id. During the negotiation process, the district made at least three counter-proposals under which transportation services would remain in-house. Id. In its last counter-proposal, the union was able to propose a contract that was $3,000 less than the third party's bid, but did not take into account the sale of the district's school buses and spare parts or the cost of overtime for the bus drivers. Id. The district rejected the counter-proposal and voted to subcontract its transportation services. Id. The union filed an unfair labor charge against the district, which the Board rejected. Id. We affirmed, noting and agreeing with the hearing examiner's statement that the district "kept the [union] fully apprised of all subcontracting developments, presented at least three counter[-]proposals under which transportation services would have remained in-house, modified its bargaining position on a number of points . . . and met with the [union] at reasonable times." Id. at 587.

The District asserts that its actions here were similar to the district's actions in Mars Area and, therefore, it did not commit an unfair labor practice. The District contends that it notified the Association at the first collective bargaining session in January 2008 that it was investigating subcontracting its transportation services. According to the District, Mars Area supports its position because it: met with the Association on numerous occasions between January 2008 and May 2009 to discuss the subcontracting issue and communicated with the Association on the issue outside the formal negotiation meetings; presented the Association with a proposal in December 2008 that would have kept transportation services within the bargaining unit, which the Association rejected; asked STA to extend the deadline to accept the STA Proposal, which STA granted; and negotiated with

the Association until a bona fide impasse occurred following its May 21, 2009, negotiation session.

However, based on the Board's findings and given our constrained standard of review in these matters, we must conclude that the facts here are not the same as in Mars Area. "[I]n a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the fact[]finder, rather, the pertinent inquiry is whether there is any evidence which supports the fact[]finder's factual finding." Mulberry Market, Inc. v. City of Philadelphia, Board of License and Inspection Review, 735 A.2d 761, 767 (Pa. Cmwlth. 1999). Contrary to the District's assertions, the Board did not find that the District notified the Association in January 2008 of its intent to investigate subcontracting its transportation services; rather the Board found that the District advised the Association that it was investigating subcontracting "**certain areas**." (FOF ¶ 3 (emphasis added).) This finding is supported by Mr. Kurtz's testimony that the District did not specifically mention subcontracting transportation services at the first bargaining session in January 2008. (Hr'g Tr. at 16, R.R. at 473a.) The Board also found that the District did not provide the Association with the STA Proposal until mid-July 2008. (FOF ¶ 4; Hr'g Tr. at 19, R.R. at 476a.) Mr. Kurtz testified that the Association did not learn of the proposed subcontracting of transportation services until it saw the Request for Proposal (RFP) in the local newspaper, (Hr'g Tr. at 16, R.R. at 473a), and Mr. Pratt, the District's chief negotiator, acknowledged that he did not know when the Association was made aware of the RFP and could not remember whether it was the District or the Association that

brought up the RFP. (Hr'g Tr. at 112, R.R. at 569a.) Thus, contrary to the District's assertion that they had been negotiating on subcontracting since January 2008, this evidence raises questions regarding whether the negotiations between January 2008 and mid-July 2008 truly could have addressed the issue of subcontracting the District's transportation services.

Additionally, unlike the district's multiple proposals in Mars Area, the District here offered one proposal, in December 2008, that would have kept transportation services in-house. (FOF ¶ 9; Hr'g Tr. at 26-27, 116-18, R.R. at 443a-44a, 573a-75a.) The Board also found that the District did not provide the Association with the pertinent financial information required to fully understand the cost savings the District would receive from subcontracting its transportation services and how it could structure its offer until April 27, 2009, with other relevant financial information received on May 14, 15, and 18, 2009, (FOF ¶¶ 14-18, Final Decision at 5; Hr'g Tr. at 36-53, R.R. at 493a-510a), a period of more than eight months after the Association received the STA Proposal and the parties began to negotiate about subcontracting transportation services. There is substantial evidence in the record to support this finding, which contrasts with Mars Area, where the district was found to have provided an accounting of its in-house transportation costs within two months of the beginning of negotiations on the subcontracting issue, after which the parties engaged in **ten** negotiation sessions before coming to an impasse. Mars Area, 538 A.2d at 586. The Board found that, in this case, the Association and the District had only **one** bargaining session, on May 21, 2009, to discuss a proposal based on the newly received financial information before the District declared an impasse.

Relevant to this last point, the District asserts that the Association did have all of the necessary information to negotiate in September 2008, because the District provided the Association with the STA Proposal, the Pennsylvania Association of School Business Officials (PASBO) review of the STA Proposal, and the District's answers to the questions posed by the Association in August 2008. The District, thus, challenges the factual findings of the Board. We have reviewed these documents and the District's answers and note that: the STA Proposal does not contain information about how the budgetary figures were determined; the PASBO review only addressed the 2008-2009 school year; and the District's answers to the Association's questions did not contain any detailed analysis. We also note that, Mr. Richards, the District's Business Manager, implicitly acknowledged that the PASBO review did not include all the savings numbers for the term of the STA Proposal because he stated that he used "what PASBO had set up as a sample, and then, projecting it over, we were looking at, possibly, a four-year agreement." (Hr'g Tr. at 143, R.R. at 600a.) These documents and the District's answers to the Association's questions did not contain a total, or actual, cost savings number that the Association could use as a base point. The District did provide the Association with a chart of estimated savings, but that occurred on April 27, 2009. After reviewing the record, it does not appear that the District provided this cost savings information in that form to the Association until April 27, 2009.[4] Therefore, the findings of the Board are

[4] It was of particular importance to the Association to know how the District was calculating its estimated cost savings since it appears, from the record, that certain costs may not have been included in the STA Proposal. For example, in the District's response to the Association's question, the District indicated that the STA Proposal was only for "daily runs" and did not include the costs of bus runs for extracurricular or athletic activities. (District Responses at 4-5, R.R. at 366a-67a.) Indeed, at the time the District provided its responses, it

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supported by substantial evidence in the record. Based on these findings, which are significantly different than in Mars Area, Mars Area does not support the District's position that it bargained in good faith.

The Board and the Association contend that this matter is controlled by the principles set forth in Upper Moreland Township District v. Pennsylvania Labor Relations Board, 695 A.2d 904 (Pa. Cmwlth. 1997). In Upper Moreland, this Court held that good faith bargaining 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 agreement." Id. at 908. We further stated 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.
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> . . . .
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> It is not a fair practice to refuse to define the terms the [e]mployer will accept in a settlement before contracting away the bargaining unit's work.

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had yet to begin negotiating on the contract with STA. (District's Responses at 4, R.R. at 366a.) Such information was important to the Association because the Association did provide those additional bus runs. If those costs were not included in the STA Proposal, then the District would be required to pay amounts in addition to the bid price to provide those services, thereby reducing the actual savings realized by the District by subcontracting its transportation services. The Association raises this issue in its May 21, 2009, proposal in which the Association "assert[s] that these costs [(the net costs for contracting transportation services with STA)] will significantly increase due to payment for canceled runs and extra runs." (Attachment to the Association's May 21, 2009, Proposal, R.R. at 104a.)

Id. at 909. This Court upheld the Board's finding of a violation of Section 1201(a)(5) of PERA where the district initially demanded that the union's offer be competitive with the subcontractor and save the district $102,300. Id. However, before the union could obtain enough information to respond to the district's invitation for proposals, the district increased its demand to $297,863 before it would ask the district's school board to consider the union's offer as acceptable. Id. Moreover, the district did not offer the union any firm proposal for keeping its bargaining unit work in-house, either initially or before subcontracting the work. Id. In rejecting the district's arguments that it did not negotiate in bad faith, we stated "[s]uch weaving and dodging during negotiations . . . cannot be sanctioned because it puts the [u]nion's negotiators in the unconscionable position of demanding that they go before the [u]nion membership with terms for which they cannot vouch will result in at least a tentative agreement." Id. at 910.

Based on the Board's findings, which are supported by substantial evidence in the record, Upper Moreland is applicable. The Board found that the District changed positions on the amount of savings required to retain its transportation services; in other words, the District failed to set forth a position on which the Association could rely. The Board found that the District advised the Association on March 26, 2009, that if the Association could "find [the District] a million dollars" over the next four or five years, it would keep the transportation services in-house, but that, on April 22, 2009, less than a month later, the District told the Association that the million dollars was just a starting point. (FOF ¶¶ 12-13.) These findings are supported by the testimony of Mr. Pratt and Mr. Kurtz, as well as the e-mail correspondence between Mr. Pratt and Mr. Kurtz. (Hr'g Tr. at 35-44,

124-25, 135, R.R. at 492a-501a, 581a-82a, 592a; E-mail Correspondence, R.R. at 74a-92a.) Mr. Kurtz testified that:

> [u]p [until the March 26, 2009, negotiation], the Association had been just shooting in the dark in terms of trying to get a proposal that would meet the District[']s needs to keep those jobs in-house because we really didn't know.
>
> Although we had asked the question several times, ["h]ow much more money do you need?" we could never get a definite answer from the District.

(Hr'g Tr. at 37, R.R. at 494a.) The Board held that this constituted a moving target in terms of the amount that the Association needed to save the District to maintain in-house transportation services and left the Association unable to prepare an effective proposal.

The Board found that the shift in the District's position regarding the amount of savings needed, and the District not providing the detailed savings figures the Association requested until **after** the District changed its position regarding the amount of money it needed to save, resulted in the Association being unable to bargain with full knowledge of the District's economic needs such that it could make a serious effort to come to common ground with the District. The Board also found that the Association did not have all of the financial information necessary to submit an informed proposal until the proposal submitted at the May 21, 2009, negotiation session; however, at that negotiation session the District declared an impasse, without asking any questions regarding the Association's proposal. (FOF ¶ 20.) As we have described, there is substantial evidence in the record to support these findings. Thus, we conclude that the District did not provide the Association with "an identifiable target for the adversary to shoot at which will result in at least

a tentative agreement, if reached," as described in Upper Moreland, 695 A.2d at 909. Because the District did not provide the Association with "an identifiable target," as in Upper Moreland, we must conclude that the Board's holding that the District did not bargain in good faith was reasonable and not capricious, arbitrary, or illegal and, therefore, the Board did not err in holding that the District violated Section 1201(a)(5) of PERA in this matter.

II. The duty to bargain to a bona fide impasse.

The District next asserts that the Board improperly imposed a mandatory obligation for the parties to engage in fact-finding under the act commonly known as Act 88,[5] 24 P.S. §§ 11-1101-A – 11-1172-A, before the declaration of a bona fide impasse can occur. The District contends that this requirement is not expressly required by either Act 88 or this Court's decision in Central Dauphin School District v. Central Dauphin Bus Drivers' Association, 996 A.2d 47 (Pa. Cmwlth. 2010). Moreover, the District maintains that, notwithstanding Act 88's requirements, the parties had reached a bona fide impasse and, therefore, it could act unilaterally without violating PERA. In response, the Board argues that, before a bona fide impasse can be declared, the party seeking to declare an impasse must establish that the parties: (1) completed all of the mandatory statutory steps in the bargaining process which, pursuant to Central Dauphin and Section 1122-A of Act 88, 24 P.S. § 11-1122-A,[6] include going through the fact-finding process; and (2)

[5] Act of March 10, 1949, P.L. 30, added by the Act of July 9, 1992, P.L. 403.

[6] Section 1122-A provides, in relevant part:

> (a)(1) Once mediation has commenced, it shall continue for so long as the parties have not reached an agreement. If, however, an agreement has not been

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are at a point in the bargaining at which the parties have "exhausted the prospects of concluding an agreement and further discussions would be fruitless," i.e., are deadlocked, Norwin School District v. Belan, 510 Pa. 255, 267 n.9, 507 A.2d 373, 380 n.9 (1986). According to the Board, the District did not establish either of these requirements where the District did not engage in the fact-finding process after the Association requested fact-finding and did not bargain to actual deadlock

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> reached within forty-five (45) days after mediation has commenced or in no event later than eighty-one (81) days prior to June 30 or December 31, whichever is the end of the school entity's fiscal year, the Bureau of Mediation shall notify the board of the parties' failure to reach an agreement and of whether either party has requested the appointment of a fact-finding panel.
>
> (2) **No later than eighty-one (81) days prior to June 30 or December 31**, whichever is the end of the school entity's fiscal year, **either party may request the board to appoint a fact-finding panel. Upon receiving such request, the board shall appoint a fact-finding panel which may consist of either one (1) or three (3) members.** The panel so designated or selected shall hold hearings and take oral or written testimony and shall have subpoena power. If, during this time, the parties have not reached an independent agreement, the panel shall make findings of fact and recommendations. The panel shall not find or recommend that the parties accept or adopt an impasse procedure.
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> (3) **The parties may mutually agree to fact-finding**, and the board shall appoint a fact-finding panel as provided for in clause (2) **at any time except** that the parties may not mutually agree to fact-finding **during mandated final best-offer arbitration**.
>
> (4) **The board may implement fact-finding and appoint a panel** as provided for in clause (2) **at a time other than that mandated in this section**, **except** that fact-finding may not be implemented **between the period of notice to strike and the conclusion of a strike or during final best-offer arbitration**. If the board chooses not to implement fact-finding prior to a strike, the board shall issue a report to the parties listing the reasons for not implementing fact-finding if either party requests one.

24 P.S. § 11-1122-A (emphasis added).

before declaring an impasse and unilaterally subcontracting its transportation services in violation of Section 1201(a)(5) of PERA.

An employer has the "obligation to bargain in good faith to a bona fide impasse before" it may subcontract bargaining unit work. Morrisville, 687 A.2d at 8. Our Supreme Court has defined "impasse" as

> that 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.'
>
> > An employer may, after bargaining with the union to a deadlock or impasse on an issue, make unilateral changes that are reasonably comprehended within his pre-impasse proposals. . . .

Norwin School District, 510 Pa. at 267 n.9, 507 A.2d at 380 n.9 (quoting R.A. Gorman, Basic Text in Labor Law, Unionization and Collective Bargaining at 445-47 (1976) (citations omitted)). In Snyder County Prison Board v. Pennsylvania Labor Relations Board, 912 A.2d 356, 364-67 (Pa. Cmwlth. 2006), a PERA case involving an unfair labor charge pertaining to bargaining over subcontracting, this Court held that good faith bargaining included the obligation to exhaust the statutory impasse procedures set forth in PERA, which requires mandatory mediation and interest arbitration, Sections 801 and 805 of PERA, 43 P.S. §§ 1101.801, 1101.805, before taking unilateral action.[7] In public sector labor law,

[7] In Snyder County, we referred to PERA as Act 195. In that case, the public employer attempted to execute an agreement subcontracting bargaining unit work during the term of an already-existing collective bargaining agreement. Snyder County, 912 A.2d at 359. The parties did not go through mediation or interest arbitration before the public employer unilaterally *(Continued…)*

the term "impasse" can mean both deadlock and the end of the statutory dispute resolution process. Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 620 A.2d 594, 596 (Pa. Cmwlth. 1993).

In Central Dauphin, this Court was asked to determine whether the impasse procedures of Act 88 or PERA[8] applied to a mid-contract dispute about subcontracting its transportation services during the life of the existing contract. Central Dauphin, 996 A.2d at 48. We concluded that Act 88's impasse procedures applied and, pursuant to Snyder County, those impasse procedures were required to be exhausted before the district could unilaterally subcontract its transportation services.[9] Id. at 54. In reaching this conclusion, we discussed the statutory impasse procedures of Act 88, including Section 1122-A, relating to the appointment of a fact-finding panel. Id. at 55. We stated that Act 88 describes the procedures for resolving an impasse in a step-by-step manner, wherein each step is interrelated. Id. One of these steps can include the appointment of a fact-finding panel under Section 1122-A. Id. The Board indicates that our statements in

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entered into the subcontract. Id. at 360. We held that requiring public employers and employees, particularly prison guards, to exhaust the statutory requirements of PERA advances sound public policy because it ensures a balance between the public employers and the prison guards, who are not permitted to strike pursuant to Section 1001 of PERA, 43 P.S. § 1101.1001. Snyder County, 912 A.2d at 366-67.

[8] We referred to PERA as Act 195 in Central Dauphin.

[9] In order to reach this conclusion, our Court compared the statutory impasse requirements of Act 88 and PERA and the requirement that Act 88 and PERA be read *in pari materia* unless PERA's terms are inconsistent with Act 88's provisions, per Carroll v. Ringgold Education Association, 545 Pa. 192, 201-02, 680 A.2d 1137, 1141-42 (1996). Because the impasse procedures were more stringent under Act 88 than under PERA, we concluded that the impasse procedures of Act 88 and PERA were inconsistent and that Act 88's provisions prevailed. Central Dauphin, 996 A.2d at 55.

Central Dauphin clearly indicate that **all** public school employers and public school employee associations, which are the only parties governed by Act 88, must go through fact-finding **before** attempting to declare an impasse. (Board's Br. at 17.) We do not agree with this interpretation of Central Dauphin and Section 1122-A of Act 88.

In Central Dauphin, our Court included language pertaining to mandatory fact-finding, but this was in reference to the Board's mandatory obligation to appoint a fact-finding panel once timely requested to do so by a party pursuant to Section 1122-A(a)(2). See Central Dauphin, 996 A.2d at 51 n.7 (discussing the impasse procedures under Act 88, including "the mandatory appointment of a fact-finding panel at the request of one party"). In this case, however, the Association requested fact-finding, but not until after the District declared an impasse on the subcontracting issue, scheduled a meeting to review the proposed subcontract with STA, held the meeting, voted to subcontract its transportation services to STA, and executed the subcontract. The timeframe for an **individual** party to request fact-finding under Section 1122-A(a)(2) is very specific; that section states fact-finding must be requested "no later than eighty-one (81) days prior to June 30 or December 31, whichever is the end of the school entity's fiscal year," 24 P.S. § 11-1122-A(a)(2). Under these circumstances, we conclude that the Association's failure to **timely** request fact-finding under Act 88 is fatal to the Association's and the Board's reliance on that factor to establish that the District did not negotiate to a bona fide impasse. By the time the Association requested the appointment of a fact-finding panel on June 10, 2009, the District had already significantly changed its position by declaring an impasse, voting to enter into, and actually entering into the contract with STA. Despite Mr. Kurtz's statement at the May 21, 2009,

bargaining session that the parties could not be at an impasse because they had not gone through fact-finding, (FOF ¶ 20; Hr'g Tr. at 80, R.R. at 537a), the Association did not request fact-finding until eight days after the District had entered into the contract with STA. Further, to hold, as the Board proposes, that it may consider the refusal of a party to assent to an **untimely** request for the appointment of a fact-finding panel as evidence of that party's unwillingness to bargain in good faith converts a non-mandatory provision of Act 88 into a de facto mandatory provision. Such result is not supported by the plain language of Act 88. Accordingly, we conclude that, in this matter, the District was not required to engage in fact-finding and the Board should not have considered this factor when determining whether the parties were at a bona fide impasse.

However, even though we conclude that the District was not obligated to engage in fact-finding under Act 88, we must next determine whether the parties were deadlocked such that there was a bona fide impasse. Norwin School District, 510 Pa. at 267 n.9, 507 A.2d at 380 n.9. The District argues that it had reached a bona fide impasse before unilaterally subcontracting its transportation services because, by the May 21, 2009, negotiation session, the Association had done nothing more to move the negotiations toward common ground, despite the fact that the District provided the Association with all of the necessary information on the STA Proposal by September 2008. The District asserts that, after negotiating for nearly eight months on this issue, the Association had not offered a proposal that could come close to the proposed savings under the STA Proposal, was simply restating its earlier proposals and attacking the District's projected future costs, and was attempting to delay the process. According to the District, it had no obligation to discuss the same proposal and the Board's finding that the Association made

repeated attempts to make concessions is not supported by the evidence, but was based on the Association's "hollow words." (District's Br. at 35.)

In finding that the parties were not at bona fide impasse in this matter, the Board held, *inter alia*, that the Association made repeated attempts to make concessions to satisfy the District, despite the District's increasing demands, such that it was apparent that the parties were neither at impasse nor that further discussions would have been fruitless. (Final Order at 5.) The Board found that, when the District declared an impasse on May 21, 2009, the Association was open to further negotiations on the subcontracting issue. (FOF ¶ 20.) According to the Board, the Association was continuing to make efforts to further bargain in an attempt to reach an amicable agreement and that, regardless of when negotiations started on this issue, it could not be said that the parties had reached an impasse as of the date the District voted to subcontract. (Final Order at 5-6.) The Board noted the history of negotiations in this matter, pointing out that: the Association had made multiple proposals before May 21, 2009, with each proposal showing increasing savings; the District made only one counter-proposal in December 2008 that retained transportation services in-house; when the District stated it needed to save more than one million dollars, the Association continued its efforts to find savings by requesting information regarding the District's alleged projected savings, which were supplied beginning April 27, 2009, and meeting with the District's Business Manager; and the District rejected the Association's May 21, 2009, proposal without asking any questions or making a counter-proposal. (Final Order at 4-6; see also FOF ¶¶ 5, 7, 9-21.) The Board found this last point relevant to the totality of the circumstances in assessing the status of the collective

bargaining negotiations. (Final Order at 6.) Additionally, the Board held that "whether or not the District 'believed' the Association would ever be able to meet the District's moving target of alleged cost savings is no justification for precluding the Association from attempting to meet the District's demands in order to save bargaining unit jobs," where "the Association still believed that it was possible to meet the District's claimed cost savings and desired to further pursue bargaining in an attempt to reach an agreement." (Final Order at 6.) The Board did consider the Association's request for fact-finding in its determination; however, this was not the main factor considered by the Board. (Final Order at 5-6.)

There is substantial evidence in the record to support the Board's findings and its determination that the District and the Association were not at a bona fide impasse when the District unilaterally subcontracted its transportation services. The Board's finding that the Association was still open to negotiations on subcontracting, Finding of Fact 20, is supported by Mr. Kurtz's testimony that the Association was open to further discussions to modify the May 21, 2009, proposal, that the Association was "hoping that if the District rejected that proposal, that [the District] would come back and say, 'You need to save us' X number of more dollars, and we would have gone back and tried to adjust our proposal to try to meet those savings," and remained willing to negotiate regarding the subcontracting of transportation services. (Hr'g Tr. at 73-74, R.R. at 530a-31a.) The record contains each of the Association's proposals, and those proposals support the Board's determination that the Association continued to make concessions to satisfy the District's savings demands. (Compare the Association's

Proposals from September 22, 2008, January 12, 2009, February 12, 2009, and May 21, 2009, R.R. at 64a-68a, 70a-73a, 102a-05a.) Although the District asserts that the May 21, 2009, proposal was merely a reiteration of the Association's February 2009 proposal, a review of those proposals indicates that: (1) the Association proposed a change in the amount of health insurance premiums its members paid, from a flat $15.00 per pay to 2% of the employee's base salary; (2) the proposal no longer referred to part-time wage increases; (3) the elimination of the availability of the "traditional" insurance plan; and (4) the creation of a joint committee between the Association and the District to explore further cost savings measures for transportation services. (Compare February 21, 2009, Association Proposal with the May 21, 2009, Association Proposal, R.R. at 71a-72a, 102a-03a.) Thus, there is substantial evidence to support the Board's finding that the Association was continuing to work towards an agreement with the District and was willing to continue to negotiate over the issue of subcontracting when the District declared an impasse. (FOF ¶ 20; Final Order at 5.)

The Board also found that the District's belief that the Association could not match the numbers of the STA Proposal did not justify precluding the Association from an opportunity to meet those numbers where the Association had not had an opportunity to do so. We note the Board's finding, which is supported by substantial evidence as discussed above, that the Association received the pertinent financial information regarding the District's proposed savings between April 27 and May 18, which was less than one month before the final bargaining session. (FOF ¶¶ 17-19; Final Order at 6.) Therefore, the May 21, 2009, bargaining session was the first session at which the Association had all of the financial information,

and the District rejected the Association's proposal based on the newly-received financial information without asking any questions regarding the new concessions. (Final Order at 5.)

The facts of this matter, as found by the Board, are similar to those in Morrisville. In Morrisville, this Court held that a school district did not bargain to a bona fide impasse where only two meaningful meetings on subcontracting were held before the district declared an impasse. Morrisville, 687 A.2d at 10. We noted that the district in Morrisville declared its first impasse after only five bargaining sessions in six months, one of which was the first time the district presented the union with the subcontract estimates and before the issue of subcontracting had been seriously discussed and negotiated further. Id. at 10-11. Moreover, there were only two negotiation sessions in Morrisville during which the "subcontracting numbers were on the table" and the district made only one counter-proposal after it received bids from potential subcontractors. Id. at 10. In that counter-proposal, the district rolled back its previous offer of a 3% total wage increase over four years to a 5% wage decrease over five years, "thus widening the gap rather than making a serious effort to resolve differences and reach common ground." Id. at 10. In concluding that the parties were not at an impasse, we stated that "[t]he definition of an impasse is not met when [the d]istrict has indicated by its conduct that it is not interested in a proposal forthcoming from its adversary who insists it is not deadlocked." Id. at 11. Here, based on the findings, although subcontracting had been discussed at previous negotiation sessions, the May 21, 2009, meeting was the first meeting at which the Association had "the subcontracting numbers . . . on the table." Id. at 10. Similarly, the District here

made one counter-proposal that would have kept transportation services in-house. Finally, the Board could find that the District, by rejecting the proposal without asking any questions on May 21, 2009, "indicated . . . that it is not interested in a proposal forthcoming from its adversary who insists it is not deadlocked" and that this does not meet the definition of a bona fide impasse. Id. at 11. Therefore, this Court must conclude that the Board did not err in holding that the Association and the District were not at a bona fide impasse when the District subcontracted its transportation services to STA on June 2, 2009, thereby violating Section 1201(a)(5) of PERA.[10]

III. The consideration of the length of the District's contract with STA.

The District also argues that the Board improperly relied upon the length of the STA contract—seven years as compared to the four or five year term of the proposed contract with the Association—to conclude that the District did not bargain to an impasse. The District contends that the Association did not raise this fact as part of its argument, which prevented the District from submitting evidence at the hearing about the negotiation of the STA contract. The District also contends that the STA contract was entered into by the parties after the District declared an impasse. The Association did not raise this factor in its Specification of Charges, (Charge of Unfair Practice(s) Under the Public Employe Relations Act,

[10] The District asserts that the Association's actions in submitting the same proposals over and over again were an attempt to delay the process. The Board addressed this assertion by noting that, to preserve its claims that the Association engaged in bad faith bargaining, the District "must file its own unfair labor practice charge." (Final Order at 6 (citing Snyder County Prison Board, 912 A.2d at 367 (stating that the union's conduct was not at issue because the employer did not file an unfair labor charge against the union)).) The District filed no such charge in this case.

Specification of Charges, June 16, 2009, R.R. at 4a-7a), and it is unclear from the record whether the Association raised this particular factor in its arguments to the Board or the Hearing Examiner; thus, we agree with the District that any argument by the Association based on this factor was waived. Township of Upper Saucon v. Pennsylvania Labor Relations Board, 620 A.2d 71, 73 (Pa. Cmwlth. 1993). We note, however, that the Board's reliance on this factor was minimal because it was mentioned only in a footnote. (Final Order at 6 n.2.) Thus, we conclude that any error in considering this factor was harmless and does not require this Court to reverse the Board's determination or to remand this matter to the Board for reconsideration.

We understand and commend the District's goal of seeking ways to reduce costs and save taxpayer dollars; however, this goal cannot be achieved without careful adherence to the procedures required by law. Because we conclude that the Board's findings of fact pertaining to the District's failure to bargain in good faith to a bona fide impasse are supported by substantial evidence and the Board's determination that the District's conduct in this matter violated Section 1201(a)(5) of PERA is, therefore, not unreasonable, arbitrary, capricious, or illegal, we must affirm the Board's Final Order.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Williamsport Area School District,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 932 C.D. 2010
	:	
Pennsylvania Labor Relations Board,	:	
	:	
Respondent	:	

O R D E R

NOW, May 3, 2011, the Order of the Pennsylvania Labor Relations Board in the above-captioned matter is **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge