COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ROCHESTER AREA EDUCATION ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-09-448-W
ROCHESTER AREA SCHOOL DISTRICT	:	

FINAL ORDER

Rochester Area Education Association, PSEA/NEA (Association) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on September 21, 2010, challenging a Proposed Decision and Order (PDO) issued on September 1, 2010. In the PDO, the Board's Hearing Examiner concluded that the Rochester Area School District (District) did not violate Section 1201(a)(1) or (5) of the Public Employe Relations Act (PERA) when it eliminated the supplemental position of induction coordinator and assigned duties of that position to non-bargaining unit administrators. On October 8, 2010, the District timely filed a response to the exceptions and a supporting brief.

The Hearing Examiner's findings of fact are summarized as follows. Kim Inman is a bargaining unit member and had been the induction coordinator since late in the 2004-2005 school year. The induction coordinator was a supplemental position for which Ms. Inman received a stipend of $662. The District eliminated the induction coordinator position at the beginning of the 2009-2010 school year. The parties' collective bargaining agreement (CBA) provides, in relevant part, as follows:

> L. Supplementals
>
> The official list of compensated supplemental(s) is incorporated for illustrative and record purposes only, documenting the compensation to be applied to the current approved list.
>
> 1. Effective August 16, 2007 all listed supplementals shall be increased by 3.5% over current compensation.
>
> 2. The district reserves the right in its sole discretion to add, delete or modify any named and recognized supplemental activity or program at any time. There is no restriction as to who the district may recruit, offer or select to carry out the function(s) for any supplemental. However, if the district maintains any supplemental(s) as listed, the compensation for same shall be in accordance with the above. This provision is not grievable under the terms of this agreement except as to proper compensation.

The Association filed a Charge of Unfair Practices on November 12, 2009, alleging that the District violated Section 1201(a)(1) and (5) of PERA by assigning the bargaining unit work of induction coordinator to a building principal, a non-bargaining unit employe. A hearing was held before the Board's Hearing Examiner on March 31, 2010, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that Section L of the parties' CBA constituted a clear, unambiguous, unmistakable and unequivocal waiver of the Association's right to bargain any changes to the induction coordinator position or the reassignment of the work performed by the induction coordinator, citing Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993). The Hearing Examiner also concluded that, at a minimum, Section L of the CBA provided a sound arguable basis for the District's elimination of the induction coordinator position and its reassignment of those duties,

citing Fraternal Order of Transit Police v. SEPTA, 35 PPER 73 (Final Order, 2004). Therefore, the Hearing Examiner dismissed the Charge and rescinded the Complaint.

The Association alleges in its exceptions that the Hearing Examiner erred by failing to make various findings of fact. The Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached, but need not make findings summarizing all of the evidence presented. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). The Board finds that the Hearing Examiner made the findings that are necessary to support the proposed decision, and that the Association's suggested findings of fact are not necessary or relevant. As such, the Hearing Examiner did not err in failing to make the additional findings offered by the Association.

The Association further alleges that the Hearing Examiner erred in raising the sound arguable basis defense sua sponte, citing AFSCME District Council 88 Local No. 790 v. Reading School District, 35 PPER 111 (Final Order, 2004). However, Reading School District is inapplicable because the public employer in that case failed to raise the sound arguable basis defense before the hearing examiner and instead raised it for the first time in exceptions to the Hearing Examiner's decision filed with the Board. As stated in Reading School District, "[t]he law is well established that an issue is waived when it is raised for the first time in exceptions." 35 PPER at 348. See also AFSCME v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986); Bucks County Schools, Intermediate Unit No. 22 v. PLRB, 466 A.2d 262 (Pa. Cmwlth. 1983).

Here, the District effectively raised the sound arguable basis or contractual privilege defense in its post-hearing brief to the Hearing Examiner by asserting that pursuant to Section L of the CBA "… the District reserved the right in its sole discretion to add, delete or modify any named and recognized supplemental activity or program at any time and there is no restriction as to who the District may recruit, offer or select to carry out the functions for any supplemental." (District's post-hearing brief, p. 3). Thus, the Hearing Examiner did not sua sponte raise the issue of whether the parties' CBA provided the District with a defense to the unfair practice charge.

The Association additionally asserts that the Hearing Examiner erred in determining that the District had a sound arguable basis for its actions because the District failed to present any evidence during the hearing that it relied on Section L of the CBA when it eliminated the induction coordinator position.[1] A public employer commits an unfair practice when it transfers any bargaining unit work to non-bargaining unit employes without first bargaining with the employe representative. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). In establishing an unfair practice for the removal of bargaining unit work, an employe representative has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit to a non-bargaining unit employe. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). However, a refusal to bargain charge will be dismissed if the employer establishes that it had a sound arguable basis in claiming a contractual privilege for its action. SEPTA, supra. Thus, if the complainant establishes action by the employer and the employer claims a contractual right to take such action, the evidence required to establish a contractual privilege defense is the contract itself and no further evidence is required.

The issue the Board must determine is whether the parties bargained over the matter in dispute. Section L of the CBA, set forth in full above, evidences that the parties bargained concerning elimination of supplemental positions and the subsequent assignment of supplemental duties. Therefore, the District established a sound arguable basis for eliminating the induction coordinator position and reassigning those duties. Accordingly,

[1] The Association further asserts that the District had an obligation to pay the stipend to a bargaining unit member performing the supplemental position and that the District required Ms. Inman to continue to perform certain aspects of the induction coordinator position without compensation. The District's alleged conduct in this regard occurred months after the filing of the Charge and the Association did not amend its Charge to allege that such conduct was an unfair practice. Therefore, such post-charge conduct may not be considered as the basis for a finding of an unfair practice. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 37 PPER 4 (Final Order, 2006).

the Hearing Examiner properly concluded that the District did not violate Section 1201(a)(1) or (5) of PERA.[2]

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Rochester Area Education Association, PSEA/NEA are hereby dismissed, and the September 1, 2010 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member and James M. Darby, Member, this fifteenth day of February, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

[2] Based upon the Board's disposition of this case, it need not consider the Association's remaining exceptions regarding the issue of waiver.