

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TREDYFFRIN-EASTTOWN EDUCATION :
ASSOCIATION :
v. : Case No. PERA-C-09-508-E
TREDYFFRIN-EASTTOWN SCHOOL DISTRICT :

FINAL ORDER

The Tredyffrin-Easttown School District (District) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on March 21, 2011.¹ The District's exceptions challenge a February 28, 2011 Proposed Decision and Order (PDO), in which the Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).² The Tredyffrin-Easttown Education Association (Association) filed a response to the exceptions and a supporting brief on April 11, 2011. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

60. John Mull, an assistant principal, and the District's site coordinator for E-Learning, reviewed student progress reports, and met with students throughout the year to discuss their progress in the E-Learning Pilot Program. (N.T. 95-96).

DISCUSSION

In the 2006-2007 school year, the District began a strategic planning process. The District's Strategic Planning Committee consisted of 30 persons, including community members, school board members, Association representatives, parents, teachers, administrators and students, who worked to develop a new mission statement and strategies to address the District's needs in the 21st century. The plan's strategies included the leveraging of technology for the purpose of transforming learning and creating the position of Director of Electronic Learning. In June 2008, the School Board approved the District's new strategic plan, and appointed Dr. Delvin Dinkins to the position of Director of Electronic Learning.

In 2008, during bargaining of the current collective bargaining agreement, the concept of online learning was discussed at three different bargaining sessions. Association President Debra Ciamacca, who was a member of the Association's bargaining team and was also a member of the committee which drafted the District's strategic plan, testified that not one word was mentioned about non-bargaining unit members teaching online courses, and that the strategic plan did not indicate that non-bargaining unit members would instruct the online courses. During the negotiations, the parties never discussed specific details or implementation of an online learning program.

In September 2009, the District implemented a pilot program for students consisting of online learning (E-Learning Pilot Program). The courses in the E-Learning Pilot Program consisted of Latin I and II, German I, and Visual BASIC and were offered to the District's high school students. Twenty-three (23) students participated in the E-Learning Pilot Program during the 2009-2010 school year. The students' schedules permitted up to one (1) period per day for the students to participate in E-Learning Pilot Program courses. The students could also work on the online courses before school,

¹ The District's exceptions, filed Monday March 21, 2011, are timely because the last day to file exceptions fell on a Sunday, and is therefore omitted from the computation of the twenty-day time period for filing exceptions. 34 Pa. Code §95.100.

² In its exceptions, the District also requests oral argument before the Board. The issues raised on exceptions are thoroughly addressed in the parties' briefs and are not novel issues. Accordingly, the District's request for oral argument is denied.

after school, from home, or over weekends. The District paid the cost of the courses for participating students, which range from \$300 to \$800 per student depending upon the subject matter and the length of the course.

Prior to implementation of the E-Learning Pilot Program, Latin I and II, German I, and Visual BASIC were taught exclusively by bargaining unit members. The tests and quizzes for these courses were given and proctored by bargaining unit members, and grades reflecting student achievement were issued by bargaining unit members and appeared on students' report cards. However, under the E-Learning Pilot Program, these courses were only offered online, and were taught by instructors who were not members of the bargaining unit. The numeric grades reflecting students' achievement in the E-Learning Pilot Program courses were issued by the non-bargaining unit E-Learning teachers. Grades earned in online courses do not appear on report cards issued by the District and are not included in the student's grade point average. However, the grades are accepted toward the minimum credit requirements for graduation, and are included in honor roll calculations.

Additionally, no bargaining unit members were assigned to monitor the students' participation in the E-Learning Pilot Program. Instead, John Mull, an assistant principal and the site coordinator for E-Learning, reviewed student progress and met with students throughout the year to discuss their progress in the E-Learning Pilot Program.

On October 20, 2009, the Association demanded to bargain with the District concerning the E-Learning Pilot Program. The District denied the Association's demand to bargain by letter dated November 10, 2009.

In January 2010, the District distributed an Extended Learning Opportunities brochure to students for the purpose of course selection for the 2010-2011 school year. The brochure listed almost 40 online courses to be offered for the upcoming school year. Dr. Dinkins testified that these courses would not be offered at all by the District if they were not offered as E-Learning courses, and that the District has made approximately twenty-five (25) electronic courses available for students in the 2010-2011 school year.

Based on the evidence presented, the Hearing Examiner found that the District's unilateral implementation of the E-Learning Pilot Program and the E-Learning Program in the 2010-2011 school year, effectively transferred bargaining unit work of teaching and assessing students to a non-bargaining unit contractor. Accordingly, the Hearing Examiner concluded that the District's implementation of the E-Learning Program was an unlawful transfer of bargaining unit work in violation of Section 1201(a)(1) and (5) of PERA.

In its exceptions, the District challenges the Hearing Examiner's Findings of Fact, asserting that certain findings are not supported by substantial evidence in the record. Generally, the Hearing Examiner's findings of fact will be sustained by the Board where there is substantial evidence in the record to support the findings. Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942).

The District challenges Finding of Fact 42, which is a direct quote from Ms. Ciamacca's testimony. The District argues in its brief that Ms. Ciamacca's testimony that the "entire time during that period, not one word was mentioned about non-TE teachers teaching these courses" is not supported by substantial evidence. We have reviewed the notes of testimony cited by the Hearing Examiner, and indeed Ms. Ciamacca stated what is reflected in Finding of Fact 42. Moreover, upon review of the entire record, there is no evidence to support any notion that the District and the Association negotiated for the District's use of non-bargaining unit contractors to exclusively perform the work associated with the E-Learning Program. Accordingly, Finding of Fact 42 is supported by substantial evidence of record and will not be disturbed.

The District also challenges Finding of Fact 53, which states that "[s]tudents may not use online coursework to exceed eight Conestoga credits in an academic year." The District claims in its brief that the elective credit allotment for graduation is 4.4 credits, not 8. While the District asserts that the Hearing Examiner erroneously relied on his own interpretation of Association Exhibit 1, that exhibit is a District-prepared

document explaining Extended Learning Opportunities and does in fact state as quoted that “[s]tudents may not use online coursework to exceed eight Conestoga credits in an academic year.” Accordingly, Finding of Fact 53 is supported by substantial evidence and will be upheld.

With respect to the remainder of the District’s exceptions, it is undisputed that the transfer of bargaining unit work is a mandatory subject of bargaining. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). Indeed, the Board and the Commonwealth Court have repeatedly recognized that under the balancing test of PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), the interest of the bargaining unit members in retaining their work outweighs the employer’s interest in using a contractor or other non-bargaining unit persons to perform the work. Commonwealth v. PLRB, 568 A.2d 730 (Pa. Cmwlth. 1990). Because of the employees’ substantial interest in retaining their work, the fact that members of the bargaining unit are not furloughed or terminated does not relieve the employer of its statutory obligation to bargain the transfer of the employees’ duties to others who are not in the bargaining unit. Id.; Cocalico Area Education Association v. Cocalico Area School District, 35 PPER 118 (Proposed Decision and Order, 2004). Thus, the Board and the courts have held that the transfer of any bargaining unit work to non-members without first having bargained with the employee representative, is an unfair practice. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992); City of Jeanette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006); Lake Lehman Educational Support Personnel Association v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006).

A removal of bargaining unit work may take one of two forms. As the Board and the Commonwealth Court have recognized:

An unfair labor practice occurs when an employer unilaterally removes work that is exclusively performed by the bargaining unit without prior bargaining with the union ... An employer also commits an unfair labor practice when it alters a past practice related to assignment of bargaining unit work to non-unit members or varies the extent to which members and non-members of the unit have performed the same work.

City of Jeannette, 890 A.2d at 1159 (citing, AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992)). Not only does an employer commit an unfair practice by transferring work that had previously been performed exclusively by bargaining unit employees, but even where the service has previously been jointly performed by both bargaining unit and non-bargaining unit employees, the employer cannot unilaterally decide to continue to perform the service exclusively with non-bargaining unit employees, without first fulfilling its collective bargaining obligation. AFSCME, Council 13, supra; Wyoming Valley West Educational Support Personnel Association v. Wyoming Valley West School District, 32 PPER ¶32008 (Final Order, 2000); Woodland Hills Educational Support Personnel Association v. Woodland Hills School District, 40 PPER 135 (Final Order, 2009).

The Board has consistently held that an employer is not excused from its obligation to bargain the assignment of the work out of the unit merely by changing the manner in which the work is to be performed. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 41 PPER 163 (Final Order, 2010). This is so even when the change involves the introduction of new technology, or would require additional training. Pennsylvania State Police v. PLRB, 912 A.2d 909 (Pa. Cmwlth. 2006); City of Philadelphia, supra; Fraternal Order of Police, Reading Lodge No. 9 v. City of Reading, 41 PPER 4 (Final Order, 2010); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 27 PPER ¶27161 (Final Order, 1996).

The District argues on exceptions that under Board law, Findings of Fact 40 and 48 are irrelevant. Those findings are that Ms. Ciamacca, in discussing the E-Learning Program with the District, did not intend that non-bargaining unit personnel would perform the work, and that she was concerned about the number of online courses being offered by the District. The District also excepts to the Hearing Examiner’s characterization of the E-Learning Program as subcontracting in Finding of Fact 35, on the ground that it is a conclusion of law. However, consistent with the above-cited case

law, these findings bear directly on the relevant issues of whether the Association negotiated with the District over the removal of bargaining unit work, whether there has been a transfer of work, and whether the District altered the extent to which the work is shared by members and non-members of the bargaining unit. Accordingly, the District's exceptions to these findings are dismissed.

The District also excepts to Findings of Fact 55, 56, 57 and 59. As reflected in these findings, Ms. Ciamacca testified that she reviewed the E-Learning courses and the teaching certifications of the current bargaining unit members, and she determined that both were of similar subject matter. The District's challenge to these Findings of Fact misses the mark because, as the Hearing Examiner noted, for professional employes of a public school district, instruction of students is bargaining unit work. Midland Borough School District v. PLRB, 560 A.2d 303 (Pa. Cmwlth. 1989).

Contrary to the District's contention, the bargaining unit work is not the specific course taught, but the teaching and assessment of students in whatever courses are offered by the District. A change in subject matter or introduction of different courses does not justify a unilateral removal of that work from the bargaining unit. Even if the District's current professional employes were not certified in a newly-offered subject matter, the fact that a new bargaining unit employe may need to be hired or a current employe may need to be trained to teach the course, does not justify the District's removal of the work of teaching the students from the bargaining unit. Pennsylvania State Police, *supra*. Similarly, the claim that the District would not otherwise offer the courses provided through the E-Learning Program does not eliminate its obligation to bargain over use of non-bargaining unit personnel to teach the students if those courses are offered. Indeed, under the District's theory, the District could unilaterally eliminate the entire bargaining unit by using these claims to systematically transfer work out of the unit. See, Commonwealth, 568 A.2d at 733.

It is clearly a managerial prerogative of a school district to decide what courses to offer, but it is equally clear that the District must bargain with its teachers before assigning the work of teaching students in those classes to personnel outside of the bargaining unit. Accordingly, even assuming that the E-Learning Program courses may be different from those currently taught in the classroom, or would not be offered for classroom instruction, these alleged facts would not change the outcome because the District has a statutory obligation to bargain the removal of the work of teaching the District's students from the bargaining unit.

The District also argues on exceptions that the teaching of online courses was never bargaining unit work. In a similar argument, the District asserts that it has the managerial prerogative to introduce the new technology of online courses and assign corresponding duties to bargaining unit and non-bargaining unit personnel. The Board has previously addressed the competing interests between the introduction of technology and the removal of bargaining unit work raised by the District's exceptions. Specifically, in City of Philadelphia, the Board stated as follows:

The Board readily agrees that the introduction of new technology is generally a matter of managerial prerogative. The issue is obviously not whether the Employer can introduce advanced technology in the workplace, but who will perform the duties associated with the essential function and goals, which have not changed. As noted by the hearing examiner ... the Employer's decision to enhance security did not necessitate the removal of the work from the police bargaining unit. Thus, even if the introduction of more advanced technology did concern a managerial prerogative it was not this decision which produced the impact of the loss of work on the bargaining unit. The bargaining unit was affected when the Employer made the additional decision to remove the work from the bargaining unit.

City of Philadelphia, 27 PPER at 369. Indeed, where the essential function of a bargaining unit job has not been eliminated through automation, the assignment of non-bargaining unit personnel to perform work through the use of new technology that is substantially equivalent to work previously performed by the bargaining unit member is a

mandatory subject of bargaining. Fraternal Order of Police Lodge #5 v. City of Philadelphia, 31 PPER ¶31022 (Final Order, 1999).

With respect to the contention that the work at issue is teaching online courses, the District confuses the essential functions of the bargaining unit work, which is to teach and assess students, with the manner of performing that job, whether it is done online or in the classroom. Indeed, this case is very similar to a municipality's introduction of video surveillance cameras to monitor for criminal activity. In City of Reading, supra and City of Philadelphia, supra, the employer, as the District here, argued that the introduction of new technology (video surveillance cameras) was a managerial prerogative, and that the police officer bargaining unit employees had not previously performed the work of monitoring the video cameras. The Board recognized in those cases that the work at issue was not monitoring the cameras, but rather monitoring public areas for criminal activity, which had been the work of the police officers. The introduction of the video surveillance cameras enhanced, but did not eliminate, this essential function of the police officers. The Board therefore held that the employer unlawfully assigned the work of monitoring for criminal activity, via video surveillance, to non-bargaining unit employees without bargaining with the police officers' representative.

Here, the introduction of E-Learning online courses did not eliminate the essential function of the District's bargaining unit professional employees, which is teaching and assessing students. The duties of teaching the students and assessing their progress is now done by a non-bargaining unit instructor and site coordinator, who perform those teaching functions via computers and online resources. As in City of Reading and City of Philadelphia, the bargaining unit duties of teaching and assessing students have not been eliminated by automation. Therefore, the District is not excused from its statutory obligation to bargain over the removal of the bargaining unit work.

As for the District's argument that it has the managerial right to introduce new technology and assign duties to bargaining unit and non-bargaining unit personnel, the District fails to appreciate that in doing so it cannot effectuate a transfer of bargaining unit work to non-bargaining unit personnel without first fulfilling its bargaining obligation under PERA. An example of this type of introduction of technology and assignment of duties was presented in Rochester Area Education Association v. Rochester Area School District, 41 PPER 111 (Proposed Decision and Order, 2010). In Rochester School District the employer instituted an online health course for students, which was its managerial right. However, because teaching of the students, including the subject of health, was previously performed by bargaining unit members, the district did not have the right to unilaterally remove bargaining unit employees entirely from teaching the students in health. There was no unfair practice in Rochester School District because while the manner of teaching health had changed due to the introduction of the online course, the facts of record revealed that a bargaining unit teacher was assigned to assist the students and monitor their progress in the online health class, and thus the work of teaching the students in health, although performed in a different manner, was not removed from the bargaining unit. Rochester School District, supra.³

In this case, the District clearly had the right to introduce the E-Learning online courses, which obviously would have altered the manner of how the bargaining unit work of teaching of students was performed. This case is distinguishable from Rochester School District, in that in Rochester the district retained bargaining unit employees to teach the students by monitoring their progress in the online health class. Because here the District, without bargaining, entirely excluded the bargaining unit's involvement in the teaching of students in courses offered through the online E-Learning Program, the District, unlike in Rochester School District, violated its bargaining obligation under PERA.

In the alternative, the District asserts that the Hearing Examiner erred in failing to find that the District's use of non-bargaining unit personnel for online courses was

³ The exceptions filed in Rochester School District were withdrawn by the employe representative, and thus the Board did not review the Hearing Examiner's determination in that case. The Board is not bound by proposed decisions and orders, Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency v. Pennsylvania Labor Relations Board, 768 A.2d 1201 (Pa. Cmwlth. 2001), and expresses no opinion on the hearing examiner's decision in Rochester School District to the extent it may differ from the discussion herein.

consistent with past practice. As the Hearing Examiner correctly noted, an employer also commits an unfair practice by altering a past practice concerning the extent to which bargaining unit employees and non-bargaining unit personnel had previously shared work. E.g., AFSCME, Council 13, supra; Woodland Hills School District, supra. To support its argument the District cites to examples of where non-bargaining unit members were used to teach students, including independent physical education, homebound instruction due to illness or medical needs, online special education, itinerant math instruction, dual college enrollment courses, and social entrepreneurship and community leadership classes.

Upon review of the record, we agree with the Hearing Examiner's disposition of these examples. The Hearing Examiner correctly noted that the twenty-five courses being offered through the E-Learning Program was a significant expansion from the non-bargaining unit personnel used for independent physical education in Tredyffrin-Easttown Education Association v. Tredyffrin-Easttown School District, 29 PPER ¶29215 (Final Order, 1998). Second, unlike here, the wages and working conditions for home-bound instruction were negotiated by the Association. Third, the Association was unaware that non-bargaining unit personnel were teaching online special education or itinerant math, and therefore there could be no past practice. See County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 34 n.12, 381 A.2d 849, 852 n.12 (1978) (a past practice requires a knowing response to given circumstances). Fourth, dual enrollment classes, which are college courses, are distinguishable in that by statute those courses are taught by employes of the college or university, see Palisades Education Association v. Palisades School District, 37 PPER 168 (Final Order, 2006), and tuition for those courses is paid by the student. (N.T. 88). Finally, as for the social entrepreneurship and community leadership class, the practice is that bargaining unit teachers are assigned to be a liaison to the students in the class and assist with grading. Thus, the exclusion of the bargaining unit from the E-Learning Program would be a significant alteration to that practice. See Fraternal Order of Police Lodge No. 9 v. City of Reading, 32 PPER ¶32158 (Proposed Decision and Order, 2001). Moreover, even if the Association would have previously acquiesced in the District's use of non-bargaining unit personnel for these duties, as a matter of law, that acquiescence could not constitute a waiver of the Association's right to bargain the present removal of bargaining unit work occasioned by the E-Learning Program. Crawford County v. PLRB and AFSCME, D.C. 85, AFL-CIO, 659 A.2d 1078 (Pa. Cmwlth. 1995). Accordingly, on this record, the Hearing Examiner did not err in finding that the District altered a past practice with respect to the extent to which bargaining unit teachers and non-bargaining unit personnel had previously shared the work of teaching students. See Woodland Hills School District, supra.

After a thorough review of the exceptions and all matters of record, we find that the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA by excluding bargaining unit teachers from the online E-Learning Program, which uses non-bargaining unit personnel to perform the bargaining unit work of teaching and assessing students. Accordingly, the District's exceptions shall be dismissed, and the PDO made final.

ORDER

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 the Tredyffrin-Easttown School District are hereby dismissed, and the February 28, 2011 Proposed Decision and Order, be and hereby is 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, and James M. Darby, Member, this twenty-first day of June, 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

Tredyffrin-Easttown School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has rescinded the E-Learning Pilot Program and the 2010-2011 expansion of that program; that it has posted a copy of the Final Order and Proposed Decision and Order as directed; and that it has served a copy of this affidavit on the Tredyffrin-Easttown Education Association.

Signature / Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid

Signature of Notary Public