

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PLUM BOROUGH SCHOOL DISTRICT :  
EDUCATIONAL SECRETARIES, :  
ESPA/PSEA/NEA :  
 : PERA-C-11-330-W  
v. :  
 :  
PLUM BOROUGH SCHOOL DISTRICT :

**FINAL ORDER**

The Plum Borough School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on August 20, 2012 to a Proposed Decision and Order (PDO) issued on July 31, 2012. In the PDO, the Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by subcontracting support work incidental to the employment of substitutes without first offering to bargain with the Plum Borough School District Educational Secretaries, ESPA/PSEA/NEA (Association). The Hearing Examiner's Findings of Fact relevant to the exceptions are summarized as follows.

Prior to the 2011-2012 school year, bargaining unit members were responsible for calling and assigning day-to-day substitutes<sup>1</sup> for vacant positions, including substitute teachers, teacher aides,<sup>2</sup> nurses, secretaries, food service workers and custodians; maintaining substitute and extra service statements to submit to the District's payroll department for payment; recording and monitoring call-offs by District employees; and maintaining the District's payroll records for substitute employees. (FF 10). On July 12, 2011, the District entered into a contract with Kelly Services, Inc. to provide the District with day-to-day substitutes for teachers, nurses, paraprofessionals, custodial employees, cafeteria employees and secretarial employees. (FF 4). The contract stated Kelly's responsibilities generally as, "Kelly will recruit, interview, select, hire and assign employees to [District] to provide education-related services." (FF 5). The contract also stated as follows:

As the employer, Kelly will maintain all necessary personnel and payroll records for its employee; (ii) calculate their wages and withhold taxes and other government mandated charges, if any; (iii) remit such taxes and charges to the appropriate government entity; (iv) pay net wages and fringe benefits, if any, (i.e. vacation and holiday pay plus other(s) specified in Exhibit A) directly to its employees; (v) provide for liability and fidelity insurance as specified in Section 12 below, and (vi) provide workers' compensation insurance coverage in amounts as required by law.

At [District's] request, Kelly will remove any of its employees assigned to [District]; provided, that in its sole discretion as employer, to hire, assign, reassign, discipline and/or terminate its own employees.

(FF 6).

On August 15, 2011, Kelly started providing day-to-day substitute services with the start of the 2011-2012 school year. (FF 8). Furloughed paraprofessionals who chose to be day-to-day substitutes remain employees of the District, however the remainder of the day-to-day substitutes are now employees of Kelly and no longer work for the District. (FF 9). Several administrative secretaries testified that with respect to all day-to-day substitutes, Kelly is now performing the work of calling and assigning vacant positions; maintaining substitute and extra service statements to submit to payroll for payment;

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<sup>1</sup> The day-to-day substitutes are not members of the Association's bargaining unit. (FF 7).

<sup>2</sup> Aides are referred to as "paraprofessionals". (N.T. 68).

recording and monitoring call-offs by District employes; and maintaining payroll records for substitute employes. (FF 10).

There is no dispute that, because the day-to-day substitutes were not the Association's bargaining unit members, the Charge of Unfair Practices does not involve the District's decision to subcontract employment of the substitutes without first bargaining with the Association. However, the Hearing Examiner found that the work of calling and assigning vacant positions; maintaining substitute and extra service statements; recording and monitoring call-offs; and maintaining payroll records, was important support work incidental to the employment of substitutes, and therefore the District violated Section 1201(a)(1) and (5) of PERA by subcontracting this incidental support work to Kelly without first bargaining with the Association.

On exceptions, the District argues that the Hearing Examiner erred in finding a removal of bargaining unit work because the work of finding day-to-day substitutes to fill vacancies was not exclusively performed by bargaining unit members. The District asserts that since 2002/2003, the District used an automated system (AESOP) for call-offs and finding day-to-day substitutes. In addition, the District notes that custodians, who did not use AESOP, contacted the facilities manager, who was not a bargaining unit member, to find a substitute.

The fact that bargaining unit employes may have only needed to find day-to-day substitutes when AESOP failed to do so, or was not used, is not a barrier to the finding of an unfair practice for removal of bargaining unit work. The unilateral removal of any amount of bargaining unit work has been found to be an unfair practice. See e.g., **City of Jeannette v. Pennsylvania Labor Relations Board**, 890 A.2d 1154 (Pa. Cmwlth. 2006). Indeed, as the Board has noted, where the employer unilaterally entirely eliminates the bargaining unit's participation in shared work, the employer has substantially altered the extent to which the work is shared, and thus unlawfully removed bargaining unit work. **Woodland Hills Educational Support Personnel Association v. Woodland Hills School District**, 40 PPER 135 (Final Order, 2009); **Bradford County Vocational-Technical School Educational Support Personnel Association v. Northern Tier Career Center**, 28 PPER 28066 (Final Order, 1997); **Fraternal Order of Police Lodge No. 9 v. City of Reading**, 32 PPER ¶132158 (Proposed Decision and Order, 2001).

The District further argues that the Hearing Examiner erred in finding an unlawful removal of work because the bargaining unit employes never performed the support work of calling and assigning vacant positions; maintaining substitute and extra service statements; recording and monitoring call-offs; and maintaining payroll records, for non-District employes. The flaw in the District's argument is that the work of the furloughed paraprofessionals who are day-to-day substitutes was not subcontracted and they remain District employes. Thus, under the District's own argument, the support work at issue with respect to the use of the furloughed paraprofessionals as day-to-day substitutes is still bargaining unit work, despite the contract with Kelly.

However, several bargaining unit members testified that Kelly is now performing the support work of calling and assigning vacant positions; maintaining substitute and extra service statements; recording and monitoring call-offs; and maintaining payroll records, with respect to **all** day-to-day substitutes, which would include the furloughed paraprofessionals. The Hearing Examiner accepted this testimony as credible, and the witnesses' testimony is supported by the contract with Kelly. Accordingly, there are no extraordinary circumstances warranting review of the Hearing Examiner's credibility determination. **Mt. Lebanon Education Association v. Mt. Lebanon School District**, 35 PPER 98 (Final Order, 2004).

The Hearing Examiner did not err in finding that the District's decision to have Kelly perform the support duties of calling and assigning vacant positions; maintaining substitute and extra service statements; recording and monitoring call-offs; and maintaining payroll records, for District employes, such as the furloughed paraprofessionals working as day-to-day substitutes, without first bargaining with the Association is an unlawful removal of bargaining unit work. Thus, the Hearing Examiner

did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA with respect to the removal of the support work associated with the use of the District's furloughed paraprofessionals as day-to-day substitutes.

With respect to the remaining day-to-day substitutes, the Association does not challenge the employer's decision to subcontract these day-to-day substitute positions, or the Hearing Examiner's finding that those day-to-day substitutes are now employees of Kelly. In this regard, importantly, the Hearing Examiner found that the support work at issue was incidental to the employment of day-to-day substitutes. Thus, unlike the furloughed paraprofessionals where the bargaining unit's work is incidental to the District's employment of furloughed paraprofessionals, the remaining day-to-day substitutes are employees of Kelly, and thus the support work associated with their employment is now the responsibility of Kelly. The Hearing Examiner's findings, insofar as they involve the non-District-employed day-to-day substitutes is tantamount to a finding of an impact on the bargaining unit employees arising from the managerial decision to subcontract the employment of the day-to-day substitutes to Kelly.

Relevant to the disposition of its exceptions, the District raises a dispositive fact that the Association "has never raised the issue of what impact this potential contract with Kelly could have on employees." (District's Brief in Support of Exceptions at 10). With respect to issues of the impact of a managerial prerogative on bargaining unit members, the Commonwealth Court has held as follows:

When a managerial decision has an impact on the terms and conditions of employment, the parties are required to engage in impact bargaining. **City of Philadelphia v. Pennsylvania Labor Relations Board**, 138 Pa. Commw. 113, 588 A.2d 67 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 528 Pa. 632, 598 A.2d 285 (1991). This Court, in [**Lackawanna County Detectives' Association v. Pennsylvania Labor Relations Board**, 762 A.2d 792 (Pa. Cmwlth. 2000)] articulated four necessary elements to establish a public employer's refusal to impact bargain:

First, the employer must lawfully exercise its managerial prerogative. Second, there must be a demonstrable impact on wages, hours, or working conditions, matters that are severable from the managerial decision. Third, the union must demand to negotiate these matters following management's implementation of its prerogative. Finally, the public employer must refuse the union's demand.

**Lackawanna County**, 762 A.2d at 794.

The parties do not dispute that the Unions did not make an impact bargaining demand prior to the filing of their complaint that initiated this case.

\* \* \*

Absent such a demand, timely preceding the filing of a charge alleging the failure to bargain, we will not find an unfair practice for refusal to bargain.

**Teamsters Local 77 & 250 v. PLRB**, 786 A.2d 299, 307-308 (Pa. Cmwlth. 2001).

Here, the Association's President, Rebecca Gralewski, testified that during the public comment sessions at school board meetings she voiced the Association's objections to the District moving forward with the subcontract to Kelly, but never formally sat down with District representatives to discuss any potential impact of the subcontract on the bargaining unit members. (N.T. 73-74). Further, Ms. Gralewski did not recall raising the issue of the impact of subcontracting substitutes on the bargaining unit employees during the negotiations for a successor to the collective bargaining agreement expiring in June 2011. (N.T. 76). As in **Teamsters Local 77 & 250**, *supra*, there is no substantial evidence

to support a finding that the Association made a timely demand to bargain the impact of the District's subcontracting of the day-to-day substitutes after the start of the 2011-2012 school year.

After a thorough review of the exceptions and all matters of record, we find the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA by removing the bargaining unit's support work for District-employed paraprofessionals who work as day-to-day substitutes. However, with respect to the remaining day-to-day substitutes who are now employes of Kelly, in the absence of a timely demand by the Association to bargain the impact of the decision to have Kelly provide day-to-day substitutes, there is no basis upon which to find a violation of Section 1201(a)(1) and (5) of PERA. **Teamsters Local 77 & 250, supra; Lackawanna County, supra.** Accordingly, the District's exceptions to the Proposed Decision and Order of July 31, 2012 shall be sustained in part and denied in part.

**ORDER**

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

**HEREBY ORDERS AND DIRECTS**

that the exceptions filed by the Plum Borough School District are hereby sustained in part, and denied in part. The July 31, 2012 Proposed Decision and Order, be and hereby is modified consistent with this order.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this twenty-seventh day of November, 2012. 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**

The Plum Borough School District hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (5) of PERA; that it has ceased and desisted from transferring bargaining unit work, including but not limited to the work of calling and assigning District-employed day-to-day substitutes to vacant positions (as substitute teacher aides, nurse aide, swimming aide, or paraprofessional); maintaining substitute and extra service statements for District-employed substitutes to submit to payroll for payment; recording and monitoring call-offs by District employees; and maintaining payroll records for substitute District employees; that it has posted a copy of the Final Order and Proposed Decision and Order as directed and that it has served an executed copy of this affidavit on the Association.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Signature of Notary Public