

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NESHANNOCK EDUCATION SUPPORT :
PROFESSIONALS PSEA/NEA :
v. : Case No. PERA-C-11-441-W
NESHANNOCK TOWNSHIP SCHOOL DISTRICT :

FINAL ORDER

The Neshannock Township School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on November 1, 2012, challenging a Proposed Decision and Order (PDO) issued on October 12, 2012. In the PDO, the Board's Hearing Examiner concluded that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally transferring the duties of the Science Lab Coordinator to non-bargaining unit teachers and parent volunteers. Pursuant to an extension of time granted by the Secretary of the Board, the District timely filed a brief in support of its exceptions on November 30, 2012. The Neshannock Education Support Professionals, PSEA/NEA (Association) timely filed a response to the exceptions and a supporting brief on December 21, 2012.

The facts of this case are summarized as follows. On January 2, 2008, the Board, pursuant to a joint request of the parties at Case No. PERA-R-07-523-W, accreted secretaries and paraprofessionals, including the Science Lab Coordinator position, into an existing unit of nonprofessional employes represented by the Association. The District and the Association are parties to a collective bargaining agreement effective July 1, 2011 through June 30, 2015.

From the fall of 1993 through the end of the 2010-2011 school year, Suzanne Lagnese was employed in the science lab at the District's elementary school. The position was initially classified as Science Lab Aide, but was later reclassified to Science Lab Coordinator. However, the duties and responsibilities associated with the position were not affected by the change in job title.

The science lab was a room in the elementary school that could be utilized by teachers in order to facilitate hands-on science instruction. The teaching staff was not required to use the lab, but consistently did so because of its convenience and amenability for the performance of science experiments. During Ms. Lagnese's tenure as Science Lab Coordinator, science experiments were generally conducted in the science lab. However, there was a time before the Science Lab Coordinator position was accreted into the bargaining unit when Ms. Lagnese used a cart to transport materials and perform experiments in individual classrooms because the lab was under construction.

Ms. Lagnese worked thirty-five hours per week in the Science Lab Coordinator position at a rate of pay for the 2010-2011 school year of \$11.74 per hour. Ms. Lagnese's job duties as Science Lab Coordinator included, *inter alia*, maintaining the science lab by organizing materials; procuring items needed in order to conduct science experiments; maintaining a schedule for lab usage by teachers; preparing for and setting up science experiments for elementary school teachers and students; assisting the teachers and students with those experiments as needed; tearing down science experiments after completion; cleaning up the lab as necessary; and putting materials away. Ms. Lagnese worked in conjunction with the teachers in order to select and plan science experiments to be performed by a specific teacher and class. Ms. Lagnese would often assist teachers in conducting science experiments with students.

Ms. Lagnese was exclusively responsible for purchasing supplies needed for science experiments, either by ordering those items through a science company or using a District-issued credit card to purchase consumable items at Wal-Mart. Ms. Lagnese exclusively prepared or set up the lab for specified experiments, except for a "handful

of times" when a teacher helped her set up an experiment. Ms. Lagnese was exclusively responsible for cleaning up or tearing down the experiments after completion, except for infrequent occasions when teachers would ask their students to assist in clearing off tables so that Ms. Lagnese could prepare for the next class coming in to use the lab. Ms. Lagnese was exclusively responsible for completing all laminating projects using the elementary school's laminator, which was stored in the science lab.

On May 24, 2011, the District's Board of Directors eliminated the Science Lab Coordinator position and furloughed Ms. Lagnese effective June 30, 2011. By letter dated June 10, 2011, PSEA UniServ Representative Leslie Kitsko expressed prospective concerns to Superintendent Mary Todora about the potential diversion of bargaining unit work previously performed by the Science Lab Coordinator and other eliminated positions. Dr. Todora responded by e-mail on June 13, 2011, stating that "[a]s far as the science lab coordinator goes, teachers are required to teach science and as doing such, they are going to need to take the kids in the lab for experiments."

Teachers are not members of the nonprofessional bargaining unit represented by the Association. The District did not bargain with the Association regarding the subject of assigning work previously performed by the Science Lab Coordinator to members of the teaching staff.

After the start of the 2011-2012 school year, the Association was advised that teachers and parent volunteers had performed duties which had previously been performed by Ms. Lagnese in her role as the Science Lab Coordinator. It was unclear at that point whether the District's administration had assigned teachers to perform the work of the Science Lab Coordinator. On October 4, 2011, Ms. Kitsko alerted Elementary School Principal Matt Heasley to this issue, and reiterated the Association's position that bargaining unit work could not be assigned outside the unit. Principal Heasley contacted Dr. Todora about the letter, but no negotiations took place regarding the removal of bargaining unit work from the unit.

For the 2011-2012 school year, the science lab was moved from its previous location to a vacant art room in the elementary school building. Around October 2011,¹ Principal Heasley asked Ms. Lagnese to assist in organizing the science lab so that teachers could more easily locate materials. Ms. Lagnese performed this work in increments of three to four hours for a total of forty hours of work. Ms. Lagnese was compensated at her hourly rate from the 2010-2011 school year for those forty hours.

On October 18, 2011,² Principal Heasley held a meeting with the Science Committee, which included one teacher from each grade at the elementary school level. Principal Heasley informed the committee members at this meeting that staff needed to continue on with the science curriculum. The staff members were encouraged to continue to conduct science experiments with their students. The committee discussed various ideas about filling the void left by the elimination of Ms. Lagnese's position. If materials were needed, the teachers were instructed to purchase the materials and to submit receipts for reimbursement. The committee also decided that staff would use packaged experiments provided through Science in Motion, a program administered by Westminster College, and through the Penn State Cooperative Extension Agency. The teachers were told that they may use parent volunteers to assist in preparing for and cleaning up after experiments. The conversation that occurred during this meeting was memorialized by Principal Heasley in an e-mail dated November 10, 2011.

¹ The Board notes that Finding of Fact 25 contains a typographical error mistakenly stating that Principal Heasley asked Ms. Lagnese to assist in organizing the science lab around October 2012. The testimony cited by the Hearing Examiner, and the record as a whole, clearly indicates that Ms. Lagnese was asked by Principal Heasley to organize the science lab around October 2011. Thus, Finding of Fact 25 is hereby amended to reflect that Principal Heasley asked Ms. Lagnese to assist in organizing the science lab around October 2011.

² The Board notes that Finding of Fact 28 contains a typographical error mistakenly stating that Principal Heasley held a meeting with the Science Committee on October 18, 2012. The Association's Exhibit E, relied upon by the Hearing Examiner, indicates that the Science Committee meeting was held on October 18, 2011. Therefore, Finding of Fact 28 is hereby amended to reflect that the Science Committee meeting was held on October 18, 2011.

The elementary teaching staff followed Principal Heasley's instructions and performed science experiments both in the relocated science lab and in their own classrooms. Rebecca Harlan, a first grade teacher, conducted experiments in the science lab for a total of three to five times in the 2011-2012 school year. Ms. Harlan and the other teachers used a sign-up calendar in order to notify each other that they intended to use the lab on a certain date at a specified time. The calendar shows that Ms. Harlan used the science lab on November 17, 2011, November 21, 2011 and February 1, 2012. In using the lab, Ms. Harlan was required to set up the lab and to clean up afterwards. Ms. Harlan also performed experiments in her classroom because it was often easier logistically. However, even in the classroom based experiments, Ms. Harlan was responsible for setting up the experiments, cleaning up afterwards and returning materials to the lab.

Sandra Giordano, a fourth grade teacher, performed roughly twelve to fourteen science experiments in the 2011-2012 school year. One experiment had been performed in the science lab, while the others were performed in her classroom. Ms. Giordano was required to set up and clean up after experiments in all instances. Parent volunteers also assisted teachers in the set-up and clean up of experiments in the 2011-2012 school year. Teachers purchased items for use in science experiments as needed.

In the 2011-2012 school year, the laminator for the elementary school was moved from the science lab to the elementary school office. Instructions for its use were posted nearby and members of the teaching staff were informed that they should use the laminator themselves.

The Association filed its Charge of Unfair Practices on December 22, 2011, alleging that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally transferring the duties of the Science Lab Coordinator to non-bargaining unit teachers and parent volunteers. A hearing was held before the Board's Hearing Examiner on May 30, 2012, 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.

The Hearing Examiner concluded in the PDO that the District's unilateral transfer of the duties of the Science Lab Coordinator to non-bargaining unit employees (teachers and parent volunteers) violated Section 1201(a)(1) and (5) of PERA. By way of remedy, the Hearing Examiner ordered the District to cease and desist from transferring bargaining unit work to non-unit employees and to offer Ms. Lagnese reinstatement with back pay.

In its exceptions, the District alleges that it had the managerial right to furlough Ms. Lagnese for budgetary reasons and that it only had a duty to meet and discuss with the Association over the impact of its decision. However, it is well settled 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); **Midland Borough School District v. PLRB**, 560 A.2d 303 (Pa. Cmwlth. 1989), **appeal denied**, 525 Pa. 651, 581 A.2d 576 (1990). As such, the Board and the courts have consistently held that the transfer of any bargaining unit work to non-members of the unit (non-bargaining unit employees, volunteers, employees of an outside contractor) without first bargaining with the employee representative to impasse is an unfair practice. **Mars Area School District, supra**; **Midland Borough School District, supra**; **Commonwealth of Pennsylvania v. PLRB**, 557 A.2d 1112 (Pa. Cmwlth. 1989), **appeal denied**, 525 Pa. 587, 575 A.2d 117 (1990); **City of Harrisburg v. PLRB**, 605 A.2d 440 (Pa. Cmwlth. 1992); **City of Jeanette v. PLRB**, 890 A.2d 1154 (Pa. Cmwlth. 2006). As the Commonwealth Court stated nearly a quarter of a century ago in **Midland Borough School District**:

The PLRB decision, as adopted, pointed out that the employer has not departed from the enterprise of junior and senior high school education but has transferred bargaining unit work without collective bargaining. Such a unilateral transfer is unlawful, even when the transfer is to unpaid volunteers. *Pennsylvania Labor Relations Board v. Mars Area School District*, 480 Pa. 295, 389 A.2d 1073 (1978). Continuing to provide a service, by paying

an independent contractor to perform it, is an unfair practice when pursued without previous bargaining. *Minersville Area School District v. Pennsylvania Labor Relations Board*, 82 Pa. Commonwealth Ct. 506, 475 A.2d 962 (1984) (cafeteria services).

...

There has been unflagging consistency in judicial approval of the PLRB's view that unilateral removal of work from a bargaining unit and transfer of that work to others for economic reasons, without collective bargaining, is an unfair labor practice.

560 A.2d at 305.

In **Commonwealth of Pennsylvania**, the Board concluded, and the Commonwealth Court agreed, that the employer was required to bargain with the employe representative over the transfer of bargaining unit work to non-bargaining unit employes because its decision to furlough the bargaining unit members was for economic reasons. Likewise, the District's economic reasons for furloughing Ms. Lagnese did not obviate its duty to bargain with the Association over the transfer of the duties of the Science Lab Coordinator position to non-bargaining unit employes. If the District had permanently ceased the performance of the science lab experiments, there would be no duty to bargain over its decision to eliminate the Science Lab Coordinator position and to furlough Ms. Lagnese. **See Youngwood Borough Police Department v. PLRB**, 539 A.2d 26 (Pa. Cmwlth. 1988), **appeal denied**, 522 Pa. 599, 562 A.2d 323 (1989); **see also PLRB v. Millcreek Township School District**, 7 PPER 91 (Nisi Decision and Order, 1976), **aff'd**, 7 PPER 215 (Final Order, 1976). However, that is not the case here, where the District continued to perform science lab experiments with non-bargaining unit teachers and parent volunteers performing the duties formerly performed by a member of the nonprofessional bargaining unit. As such, the District was required to bargain with the Association before it transferred the duties of the Science Lab Coordinator position to non-bargaining unit employes. **Mars Area School District, supra; Commonwealth of Pennsylvania, supra.**

Alternatively, the District alleges that the Hearing Examiner erred in concluding that the work of the Science Lab Coordinator was exclusively performed by bargaining unit members. This argument fails because the record establishes that certain duties of the Science Lab Coordinator position were exclusively performed by a bargaining unit member since January 2, 2008 when the Board accreted the position into the existing nonprofessional bargaining unit represented by the Association, and that other duties were exclusively performed by that same bargaining unit member except for a few infrequent occasions. Even where work is not exclusively performed by a bargaining unit, an employer commits an unfair practice by unilaterally changing the extent to which the unit performs the work. **American Federation of State, County and Municipal Employees, Council 13, AFL-CIO v. PLRB**, 616 A.2d 135 (Pa. Cmwlth. 1992); **City of Jeannette, supra.** Here, the District unilaterally changed the extent to which the bargaining unit performed the duties of the Science Lab Coordinator by completely removing the duties from the bargaining unit and transferring them to non-unit employes and volunteers. Therefore, the Hearing Examiner properly concluded that the District committed an unfair practice.³

The District further asserts that the Hearing Examiner erred in concluding that it failed to bargain with the Association over its decision to furlough Ms. Lagnese because the District announced its intentions to eliminate the Science Lab Coordinator position to the Association at a time while the parties were engaged in contract negotiations. However, to fulfill its duty to bargain to impasse over a proposed transfer of bargaining unit work, an employer must affirmatively raise the issue in bargaining and may not merely announce a **fait accompli** to the employe representative. **Teamsters Local #205 v. Peters Creek Sanitary Authority**, 34 PPER 27 (Final Order, 2003). Although the District informed the Association of its intent to eliminate the Science Lab Coordinator position

³ The District also challenges the Hearing Examiner's suggestion in the discussion portion of the PDO that the Science Lab Coordinator's performance of her duties allowed the teachers to focus on teaching science. However, this exception is dismissed because the challenged statement by the Hearing Examiner is merely dicta that does not affect the outcome of this case.

while the parties were engaged in contract negotiations, it failed to bargain with the Association over transferring the duties of that position to non-bargaining unit employees. Further, the District essentially ignored the June 10 and October 4, 2011 letters sent by PSEA Uniserv Representative Leslie Kitsko to Dr. Todora and Principal Heasley, respectively, which advised the District to refrain from transferring the work of the furloughed bargaining unit members to non-bargaining unit employees without first bargaining with the Association. (Association Exhibits I and J). Indeed, in response to Ms. Kitsko's June 10, 2011 letter, Dr. Todora informed the Association of the District's intent to transfer the bargaining unit work of the Science Lab Coordinator without bargaining with the Association by stating that "[a]s far as the science lab coordinator goes, teachers are required to teach science and as doing such, they are going to need to take the kids in the lab for experiments." (Association Exhibit K). Accordingly, the Hearing Examiner correctly found that the District failed to meet its duty to bargain with the Association over the transfer of the duties of the Science Lab Coordinator to non-bargaining unit employees.

The District additionally alleges that the Hearing Examiner erred in concluding that non-bargaining unit teachers and parent volunteers are substantially performing the duties of the Science Lab Coordinator position. However, the record establishes that teachers have purchased supplies needed for science experiments, maintain a schedule for lab usage by teachers, set up the lab for experiments, clean up the experiments after completion, and use the elementary school's laminator, duties that were performed by Ms. Lagnese as the Science Lab Coordinator. The record also shows that parent volunteers help teachers set up experiments and clean up the experiments afterwards. Further, Principal Heasley stated at the hearing that teachers are performing the duties that Ms. Lagnese had performed as the Science Lab Coordinator. (N.T. 92). Therefore, the Hearing Examiner properly concluded that non-bargaining unit employees and parent volunteers are substantially performing the duties of the Science Lab Coordinator.

The District also alleges that the Hearing Examiner erred in concluding that its actions were a violation of Section 1201(a)(1) of PERA because the Association stipulated that its Charge under that provision of PERA should be dismissed. A violation of Section 1201(a)(1) of PERA may be independent or derivative. **Mars Area School District, supra**. A derivative violation of Section 1201(a)(1) occurs when an employer commits any violation of sections 1201(a)(2) through (9), whereas an independent violation of Section 1201(a)(1) occurs when an employer engages in conduct that, in and of itself, tends to coerce reasonable employees in the exercise of their rights under PERA. **Fink v. Clarion County**, 32 PPER ¶ 32165 (Final Order, 2001). Review of the record indicates that the Association agreed that its allegation of an independent violation of Section 1201(a)(1) should be dismissed, but did not agree to the dismissal of any allegation of a derivative violation of Section 1201(a)(1). Because the District violated its duty to bargain under Section 1201(a)(5), the Hearing Examiner did not err in concluding that the District committed a derivative violation of Section 1201(a)(1) as well.

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 Neshannock Township School District are hereby dismissed, and the October 12, 2012 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, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this sixteenth day of April, 2013. 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
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v. : Case No. PERA-C-11-441-W
NESHANNOCK TOWNSHIP SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

Neshannock Township School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employee Relations Act; that it has offered to reinstate Suzanne Lagnese to the position of Science Lab Coordinator and to make her whole for all lost wages and benefits she would have earned had she not been furloughed; that it has posted the Proposed Decision and Order and Final Order as directed and that it has served a copy of this affidavit on the Neshannock Education Support Professionals, PSEA/NEA at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public