

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 :

PROPOSED DECISION AND ORDER

On October 3, 2011, the Plum Borough School District Educational Secretaries, ESPA/PSEA/NEA (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Plum Borough School District (District) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally transferring to an outside agency the work of the bargaining unit that previously had been done exclusively by the bargaining unit.

On October 24, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 24, 2012, in Pittsburgh. The hearing was held as scheduled at which time the parties were afforded a full opportunity to present evidence and to cross-examine witnesses.

The Association filed a brief on April 30, 2012 and the District filed a brief on June 1, 2012.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing, makes the following:

FINDINGS OF FACT

1. Plum Borough School District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)
2. Plum Borough School District Educational Secretaries, ESPA/PSEA/NEA is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)
3. The parties stipulated that the District and the Association are parties to a collective bargaining agreement effective from July 1, 2006 through June 30, 2011. (N.T. 11, 90, Joint Exhibit 1)
4. On July 12, 2011, the District entered into a contract with Kelly Services, Inc. for purposes of having Kelly provide the District with day-to-day substitutes for teachers, school nurses, paraprofessionals, and for custodial, cafeteria and secretarial employes. (N.T. 14-15, Joint Exhibit 2)
5. The contract stated Kelly's responsibilities generally as, "Kelly will recruit, interview, select, hire and assign employees to Customer to provide education-related services." (N.T. 11, 90, Joint Exhibit 2)
6. The contract also stated,

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

(N.T. 11, 90, Joint Exhibit 2)

7. Day to day substitutes are not members of any bargaining unit. (N.T. 16)

8. On August 15, 2011, Kelly started providing services, with the start of the 2011-2012 school year. (N.T. 96-97)

9. All day-to-day substitutes, except for paraprofessionals and bus drivers, are now employees of Kelly and no longer work directly for the District. (N.T. 101-102, 107)

10. Several administrative secretaries testified that the following work now performed by Kelly was performed by the bargaining unit prior to the 2011-2012 school year: calling and assigning vacant positions, including substitute teachers, teacher aides, nurses, secretaries, food service workers and custodians; maintaining substitute and extra service statements to submit to payroll for payment; recording and monitoring call-offs by District employees; and maintaining payroll records for substitute employees. Job descriptions for the positions held by these administrative secretaries corroborate their testimony. (N.T. 11-14, 21-24, 40-44, 46-48, 49-51, 67-68, 90, Joint Exhibits 3A, 3B, 3C, 3D, 3E, 3F, 3G, 3H, 3I, 3J and 3K)

11. The District did not approach the Association leaders to negotiate or discuss the transfer of those duties with the Association prior to making the change. (N.T. 71-76)

12. Several years ago, the District began using an Automated Substitute Placement and Absences Management System (AESOP) whereby the majority of its employees called off and their substitutes were found using this automated system. Kelly also uses the AESOP system. (N.T. 93)

DISCUSSION

The Association's specification of charges alleges that "on or about August 15, 2011, and continuing thereafter, the District committed unfair practices under sections 1201(a)(1) and (5) of PERA by unilaterally, and without bargaining with the Association, subcontracted work which had previously been performed exclusively by bargaining unit employees to an outside agency. Specifically, the District contracted with Kelly Services, Inc. to provide recordkeeping and calling services in connection with substitute employees utilized by the District. The duties now performed by an outside contractor previously performed exclusively by bargaining unit members include, but are not limited to: calling and assigning vacant positions, including substitute teachers, teacher aides, nurses, secretaries, food service workers and custodians; maintaining substitute and extra service statements to submit to payroll for payment; recording and monitoring call-offs by District employees and maintaining payroll records for substitute employees."

A public employer commits an unfair practice in violation of Section 1201(a)(1) and (5) when it unilaterally transfers work exclusively performed by bargaining unit members to non-members of the bargaining unit. PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978).

A party asserting an unfair practice must prove the elements of the alleged violation by substantial and legally credible evidence. St. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

For the sake of this discussion, in simple terms the District's contract with Kelly reflects two District decisions that are significant to this case. First, the District decided that Kelly would develop and maintain a roster of substitutes for the various positions. In the language of the contract, Kelly would "recruit, interview, select, hire" the employees. These substitutes would be Kelly's employees. The Association does not challenge this component of the contract. Day to day substitutes have never been in the bargaining unit represented by the Association, so any transfer of the work of the day to day employees themselves is outside the coverage of the Association's CBA

Second, the District decided that it would also give Kelly the important support work incidental to the employment of substitutes. It is important because it places District employees in the role of directly watching over the District's personnel expenditures, rather than contracting out those duties. This support work includes the assigning of substitutes, of paying them properly, of verifying their attendance and of monitoring call-offs by District employees. It is this second decision that has caused the Association to file the present charge of unfair practices.

This second component of the District's contract with Kelly has always been the Association's work. The Association has proven that fact. (Finding of Fact 10, supra.) The District's decision to subcontract to Kelly the support work incidental to the employment of substitutes is an unlawful transfer of bargaining unit work in violation of sections 1201(a)(1) and (5) of PERA because it was done unilaterally without bargaining with the Association.

In its defense, the District argues that the Association had knowledge of the transfer of these duties to Kelly when Association representatives heard about the proposed changes while attending a school board meeting but remained silent and did not request the District to bargain. Before a transfer of bargaining unit work may occur, the employer has an "affirmative duty to seek out the representatives of its employees, announce its intentions and provide the employee representative with relevant information necessary for it to fulfill its bargaining obligation." Faculty Fed. Of Comm. College of Philadelphia, Local 2026, AFT, AFL-CIO v. Philadelphia Comm. College, 25 PPER ¶ 25072 (1994), citing AFSCME, District Council 89 v. Lancaster County, 24 PPER ¶ 24054 at 132 (Final Order, 1993)

In the present case, the District did not formally approach the Association to notify the Association that it was taking such action. To successfully defend this charge, the District cannot rely on the fact that Association members may have heard about the impending contract with Kelly to perform bargaining unit work. These facts cannot constitute a waiver or an implied acceptance by the Association of the District's transfer of bargaining unit work. Accordingly, this defense is dismissed.

The District next argues that the work at issue has never been exclusively that of the bargaining unit. The District points to instances where teachers in the professional employee bargaining unit would independently arrange for substitutes by logging into the AESOP system and have the substitute immediately take the open position. The District also pointed to other instances. However, in none of these did the District demonstrate that the Association knowingly and willingly agreed to this as an accepted practice of the work being done by a non-bargaining unit employee. It should also be pointed out that the professional employees are not in the same different bargaining that the Association represents in the present case. Accordingly, this defense is dismissed.

Finally, the District argues that the Kelly is merely using the same automated call system, AESOP, that the Association employees have long used to call substitutes. The automation of the work means that the Association has given up the right to claim this work as its exclusive work. However, the use of technology by either the District employees or a new private subcontractor is not relevant to the question of whether the

actual support work incidental to the calling of substitutes has been unlawfully transferred. Accordingly, this defense is dismissed.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Plum Borough School District is a public employer under section 301(1) of PERA.
2. The Plum Borough School District Educational Secretaries , ESPA/PSEA/NEF is an employe organization under section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has committed unfair practices in violation of Sections 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA the Examiner

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in PERA. 111.
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Cease and desist from transferring bargaining unit work, including but not limited to the work of calling and assigning vacant positions, including substitute teachers, teacher aides, nurses, secretaries, food service workers and custodians; maintaining substitute and extra service statements to submit to payroll for payment; recording and monitoring call-offs by District employes; and maintaining payroll records for substitute employes.
4. Take the following affirmative action:
 - (a) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirty-first day of
July, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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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 vacant positions, including substitute teachers, teacher aides, nurses, secretaries, food service workers and custodians; maintaining substitute and extra service statements to submit to payroll for payment; recording and monitoring call-offs by District employes; and maintaining payroll records for substitute employes; that it has posted a copy of the 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