

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CRESTWOOD EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION, PSEA/NEA :
v. : Case No. PERA-C-13-62-E
CRESTWOOD SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On March 25, 2013, the Crestwood Educational Support Personnel Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Crestwood School District (District or Employer) alleging that the District violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA or Act).

On April 26, 2013, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating November 13, 2013, in Harrisburg as the time and place of hearing, if necessary. Initially, the matter was scheduled to be heard by Thomas P. Leonard, Esquire, a duly designated Hearing Examiner of the Board. However, the case was subsequently reassigned to the undersigned Hearing Examiner by the Chief Counsel on or about September 11, 2013.

A hearing was necessary and was held as scheduled on November 13, 2013, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed timely post-hearing briefs in support of their respective positions. The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Crestwood School District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)
3. On June 13, 2000, the Board certified the Association as the exclusive representative for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment for the unit described as:

All full-time and regular part-time nonprofessional employes including but not limited to cafeteria employes, custodial employes, aides, secretaries, copy room employes, computer aides and athletic director; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act. (Joint Exhibit 3)

4. Secretaries have been in the Association's bargaining unit since 2000. (N.T. 62-63)
5. The Association and District are parties to a Collective Bargaining Agreement (CBA) that dictates the pay and compensation for all bargaining unit members, including secretaries. Like the Association's Unit Certification, the CBA's recognition clause requires the District to recognize the Association as the

- exclusive bargaining agent for all bargaining unit employes, including secretaries. (Joint Exhibit 1)
6. The CBA contains specific provisions addressing the pay and benefits for secretaries. (N.T. 63-64; Joint Exhibit 1, at 6 & 18, Exhibit C)
 7. Before October 26, 2012, Coreen Stec worked for the District as a full-time, twelve month secretary. Ms. Stec handled accounts payable and receivable, purchase acquisitions, purchase orders, and payment of bills. (N.T. 24-27, 36)
 8. During her employment, Ms. Stec was a bargaining unit member and received wages and benefits consistent with the parties' CBA. (N.T. 8)
 9. The District does not employ its own in-house Business Manager. Instead, the District uses the services of an outside accounting firm, known as the Al Melone Agency, which is not affiliated in any way with the District. Employees of the Al Melone Agency, such as Courtney Lomax and Leslie Risko, work on the District's premises and perform the functions of a Business Manager and Business Department. (N.T. 23-24, 54-55, 86-87)
 10. As a secretary, Ms. Stec reported to the Business Manager, Courtney Lomax, who is an employe of the outside accounting firm, Al Melone Agency. (N.T. 25)
 11. Ms. Stec's last day of work was October 26, 2012. However, she was still employed by the District and a member of the bargaining unit until her official retirement on December 7, 2012. She used her accrued leave between October 26, 2012 and her retirement on December 7, 2012. (N.T. 9, 25, 43, 113)
 12. On November 19, 2012, the District posted for the secretary position. (N.T. 9, 30; Joint Exhibit 2)
 13. The District's posting listed the qualifications, duties, and responsibilities of the secretarial position. These were all duties and responsibilities that Ms. Stec performed when she was in the bargaining unit. (N.T. 31-35; Joint Exhibit 2)
 14. However, the District's posting described the secretarial position as a "Confidential Secretary." (Joint Exhibit 2)
 15. The posting listed the pay and benefits for the position, which were inconsistent with the express provisions in the CBA for secretarial pay and benefits. Under the CBA, the maximum hourly rate for a secretary is \$12.73. The posting, however, paid an annual compensation of \$24,000, which amounted to the greater rate of \$13.52 an hour. In addition, there would be no insurance coverage for dependents until the secretary had worked three years, while the CBA required dependent insurance coverage immediately upon hire. (N.T. 64-66, 73, 153; Joint Exhibits 1-2)
 16. Secretaries in the bargaining unit enjoy a longstanding past practice of summer hours, which was upheld by an arbitration award. Specifically, during the summer months of June through August, bargaining unit secretaries receive full pay for the day, but leave work two hours early. The District's posting made no mention of summer hours and instead required the secretary to work Monday through Friday, 8am-4pm, with a one hour unpaid lunch. Although the District's confidential secretaries also have different work hours during the summer, they do not have the same summer hour arrangement as the bargaining unit secretaries. (N.T. 66, 77, 80, 132; Joint Exhibit 2)
 17. When the Association learned of the posting and saw that the District wished to treat the secretarial position as confidential, the Association raised the issue with the District's Superintendent, David McLaughlin-Smith. Superintendent McLaughlin-Smith responded that the secretarial position was not an Association position and the District would be "eliminating (Coreen Stec's)

position, to be filled by a confidential secretary who will be intimately involved with sensitive information." (N.T. 67-69; Association Exhibit 1)

18. The District did not file a Petition for Unit Clarification with the Board in 2012 or 2013 as of the date of the hearing. (N.T. 9-10)
19. The District hired secretary Gina Miale under the new posting on January 18, 2013, at which time she also began working. (N.T. 9, 27)
20. Ms. Miale performs the same duties and responsibilities that Ms. Stec had when she was a bargaining unit secretary. (N.T. 31-35, 103)
21. Both Ms. Stec and Ms. Miale worked in the District's Business Office, which houses the District's Superintendent McLaughlin-Smith, the District's Assistant Superintendent, Brian Waite, and two employees from the Al Melone Agency, Ms. Lomax and Ms. Risko. (N.T. 23-24, 86)
22. Ms. Miale works at the same desk that Ms. Stec used when she was a bargaining unit secretary. (N.T. 28)
23. Like Ms. Stec, new secretary Ms. Miale reports to the Al Melone Agency, who is the acting Business Manager. Ms. Miale also received her on-the-job training from the Al Melone Agency. (N.T. 28-29, 55-56, 154; Joint Exhibit 2)
24. Ms. Miale has also performed work for other secretaries in the Association's bargaining unit, including Sarah Smigelski and Theresa Humenick. (N.T. 36-38)
25. Since hiring Ms. Miale, the District has treated her as a confidential secretary and not as a bargaining unit member. The District has paid her the different compensation and provided her with the different benefit arrangement stated in the posting. (N.T. 114-115)
26. The District never obtained the Association's consent to remove Ms. Miale's secretarial position from the bargaining unit or classify the position as a confidential secretary. Nor has the Association consented to Ms. Miale's compensation and/or benefits, which differ from the CBA. The District never bargained these issues with the Association. (N.T. 69, 79)
27. During the time between Ms. Stec's last actual day of work on October 26, 2012 and Ms. Miale's first day of work on January 18, 2013, when there was no secretary in the position, the District used the Al Melone Agency to perform certain aspects of Ms. Stec's secretarial duties, including work with payroll and accounts payable, invoices, bill preparation, and data entry. (N.T. 18, 39-42, 113-114)
28. The District never obtained the Association's consent to assign Ms. Stec's duties to the Al Melone Agency and never bargained the issue with the Association. (N.T. 69-70)

DISCUSSION

In its charge, the Association alleged that the District violated Section 1201(a)(1) and (5) of the Act by unilaterally designating the secretarial position as confidential and removing it from the bargaining unit. The Association contends that the District's actions in doing so were unlawful because the District never filed a Petition for Unit Clarification or obtained an Order from the Board removing the secretarial position from the bargaining unit. Further, the Association asserts that the District diverted bargaining unit work to the Al Melone Agency without bargaining, which is a clear violation of the Act.

The District, on the other hand, argues that the charge cannot be sustained because the District relied on a provision in the CBA when it created the confidential secretary position, thereby availing itself of a contractual privilege defense. Similarly, the

District submits that it did not transfer bargaining unit work to a non-bargaining unit employee because the previous position occupied by Ms. Stec was dissolved, and a new position was subsequently created that is outside of the bargaining unit. In addition, the District claims that the charge should be dismissed because Ms. Miale's duties are confidential, as defined by the Act. Therefore, she is necessarily excluded from the bargaining unit, and the District was under no obligation to bargain with the Association before hiring Ms. Miale.

It is well settled that the removal of bargaining unit work is a mandatory subject of bargaining and an employer commits an unfair practice when it fails to bargain with the exclusive representative before transferring bargaining unit work to an employee outside the unit. **Hazleton Area Education Support Personnel Ass'n v. Hazleton Area School District**, 37 PPER ¶ 30 (Proposed Decision and Order, 2006) citing **Midland Borough School District v. PLRB**, 560 A.2d 303 (Pa. Cmwlth. 1989); **PLRB v. Mars Area School District**, 389 A.2d 1073 (Pa. 1978). The complainant in an unfair practices proceeding has the burden of proving the charges alleged. **St. Joseph's Hospital v. PLRB**, 373 A.2d 1069 (Pa. 1977).

The Association has sustained its burden of proving that the District has committed unfair practices in violation of Section 1201(a)(1) and (5) of the Act. Indeed, the record clearly shows that the Association represents the secretaries who work for the District, and the parties' CBA dictates the pay and benefits for the secretaries. The record also shows that secretary Coreen Stec was a bargaining unit member at all times during her employment and paid compensation and benefits pursuant to the CBA. The record further shows that the overwhelming majority of Ms. Stec's secretarial duties are now performed by new secretary Gina Miale. What is more, as the Association points out, the District did not file a Petition for Unit Clarification and obtain an Order from the Board designating Ms. Miale as a confidential secretary or removing her position from the bargaining unit. Likewise, the District did not obtain the Association's consent to remove the position from the bargaining unit or provide the secretary with pay and benefits different from the CBA. As a result, the District clearly violated the Act.

During the hearing, the District attempted to establish that Ms. Miale performs duties as a confidential secretary, which necessarily excludes her position from the bargaining unit, to which the Association objected on the basis of relevance. The objection is sustained. The Board has long held that where an employer creates a position that is clearly within the broad description of the bargaining unit as certified by the Board, the employer commits an unfair labor practice by unilaterally declaring the position excluded from the bargaining unit as confidential. **Beaver County Community College**, 23 PPER ¶ 23070 (Final Order, 1992), *aff'd*, 24 PPER ¶ 24110 (Court of Common Pleas of Beaver County, 1992).

Here, the new secretarial position is clearly within the broad description of the bargaining unit, as certified by the Board. To be sure, the certification includes all full-time and regular part-time secretaries. (Joint Exhibit 3). As such, the District cannot unilaterally determine whether Ms. Miale is a confidential secretary excluded from the unit and then refuse to bargain. **Teamsters Local 430 v. Manchester Ambulance Club**, 32 PPER ¶ 32039 (Final Order, 2001). As the party seeking to exclude Ms. Miale from the bargaining unit, the District had the burden of filing a petition for unit clarification before refusing to bargain. *Id.*

Nor is it a defense for the District to argue that the previous position occupied by Ms. Stec was dissolved, and a new position was subsequently created that is outside of the bargaining unit. First of all, such a contention is unsupported by the record, which unequivocally shows that Ms. Miale is performing the same duties that Ms. Stec performed. In fact, the District's Superintendent effectively conceded that the District replaced Ms. Stec with Ms. Miale. (N.T. 113). In any event, as the Hearing Examiner noted in **Hazleton Area School District**, which is a case directly on point, "[e]ven if we set aside this evidence and agree with the District that the position is a newly created one, a public employer has a duty to seek unit clarification before it designates a position as confidential and thus outside the bargaining unit." *Id.* citing **Beaver County Community College**, *supra*. The District had no right to declare the secretarial position outside of the bargaining unit, but rather the District was required to treat the position as being

part of the bargaining unit and must continue to do so unless its petition for unit clarification to remove the position from the bargaining unit on confidential employe grounds is granted. **Penns Manor Education Ass'n v. Penns Manor Area School District**, 29 PPER ¶ 29203 (Proposed Decision and Order/Proposed Order of Dismissal, 1998). Because the District did not file a Petition for Unit Clarification until February 6, 2014 and treated Ms. Miale as outside the bargaining unit, the District has committed an unfair practice.

The District further contends that the charge cannot be sustained because the District relied on a provision in the CBA when it created the secretarial position at issue here. The District avers that the Article I recognition clause incorporating the Board's certification expressly excludes confidential employes from the unit, and the District reasonably understood this CBA provision as granting it permission to unilaterally hire a confidential secretary. However, this argument is without merit.

The Article I recognition clause provides as follows:

The (School) Board hereby recognizes the Association as the sole and exclusive bargaining agent in all matters within the scope of bargaining as set forth in Act 195, July 23, 1970, known as "*The Public Employee (sic) Relations Act*" for all employees, including but not limited to, maintenance, maintenance specialist, custodians, cafeteria, secretaries and aides (paraprofessionals and/or personal care assistants) and monitors included in the bargaining unit as certified and determined by the Pennsylvania Labor Relations Board at case number PERA-R-3263-C and as subsequently amended. The parties recognize that aides and monitors are paraprofessionals...

(Joint Exhibit 1) (emphasis in original).

On June 13, 2000, the Board certified the Association as the exclusive representative for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment for the unit described as:

All full-time and regular part-time nonprofessional employes including but not limited to cafeteria employes, custodial employes, aides, secretaries, copy room employes, computer aides and athletic director; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act.

(Joint Exhibit 3)

(Joint Exhibit 3).

The Board has required that a waiver of right such as the right to have the Board determine the appropriate bargaining unit must be clear, express and unequivocal. **In the Matter of Employes of Chambersburg Area School District**, 20 PPER ¶ 20149 (Final Order, 1989) citing **Commonwealth (Venango County Board of Assistance) v. PLRB**, 459 A.2d 452 (Pa. Cmwlth. 1983). I find absolutely no language in the above-cited CBA provision, which could even purport to be a waiver by the Association of its right to have the Board process a petition for unit clarification or authorize the District to unilaterally alter the bargaining unit or exclude positions, much less a clear, express and unequivocal waiver. The recognition clause in the CBA contains nothing more than a general description of the bargaining unit, as does the Board's certification. Significantly, the Board has held that the execution of an agreement that includes a description of a bargaining unit does not amount to a clear, express and unequivocal waiver on the part of the union of its right to have the Board process a unit clarification petition. **Chambersburg Area School District**. Further, as the Association points out, there is no evidence in the record to support the District's claim that it relied on the CBA's recognition clause when it removed Ms. Miale from the bargaining unit. To the contrary, the Superintendent actually testified that he wanted to create a confidential secretary position because the District had lost a director of transportation who was also responsible for human resources duties. (N.T. 98-99). Accordingly, the District's contractual privilege argument is rejected.

Finally, the Association has also sustained its burden of proving the District violated the Act by using non-bargaining unit personnel to perform secretarial work, which is exclusive bargaining unit work. The record shows that the District used the Al Melone Agency to perform the duties of Ms. Stec's position from October 26, 2012 to January 18, 2013 when that work was previously performed exclusively by the bargaining unit. In fact, the District's Superintendent readily conceded this point during his testimony. (N.T. 112-114). The District never obtained the Association's consent for diverting this bargaining unit work, nor did the District bargain the issue with the Association. Therefore, the District has clearly committed an unfair practice in this regard.

CONCLUSIONS

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

1. The Crestwood School District is a public employer within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Crestwood School District has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

That the District shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.
3. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:
 - (a) Return the secretarial work to the bargaining unit and provide Ms. Miale the pay (on a prospective basis only), benefits, and working conditions stated in the Collective Bargaining Agreement;
 - (b) Rescind any contract or work appointment by the District that grants Ms. Miale different pay, benefits, and/or working conditions;
 - (c) Reimburse and make whole Ms. Miale for any lost pay or out-of-pocket expenses she has suffered;
 - (d) 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;

- (e) 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; and
- (f) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this fourteenth day of May, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CRESTWOOD EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION, PSEA/NEA :
v. : Case No. PERA-C-13-62-E
CRESTWOOD SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

Crestwood School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has returned the secretarial work to the bargaining unit and provided Ms. Miale the pay (on a prospective basis only), benefits, and working conditions stated in the Collective Bargaining Agreement; that it has rescinded any contract or work appointment by the District that grants Ms. Miale different pay, benefits, and/or working conditions; that it has reimbursed and made whole Ms. Miale for any lost pay or out-of-pocket expenses she has suffered; that it has posted a copy of the Proposed Decision and Order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union 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