

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PITTSTON AREA EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION :
v. : Case No. PERA-C-14-283-E
PITTSTON AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On August 29, 2014, the Pittston Area Educational Support Personnel Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Pittston Area School District (District or Employer), alleging that the District violated Section 1201(a)(1), (2), and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally removing bargaining unit work.

On September 10, 2014, 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 March 15, 2015, in Harrisburg, as the time and place of hearing, if necessary. On September 25, 2014, the District filed an Answer, denying all material allegations contained in the specification of charges. The hearing was continued to September 23, 2015 at the District's request and without objection from the Association. On September 21, 2015, the District filed an objection to the issuance of any subpoenas relating to compensatory records of employes, which was treated as a Motion to Quash the subpoena. The Association filed a response thereto on September 21, 2015. I denied the Motion to Quash on September 21, 2015.

A hearing was necessary and was held before the undersigned Hearing Examiner of the Board on September 23, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief in support of its position on December 11, 2015. The District filed a post-hearing brief in support of its position on January 11, 2016. The Association filed a reply brief on February 1, 2016, while the District filed a response thereto on February 12, 2016.

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 District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 9)
3. The Association is the exclusive bargaining agent for a unit certified as "[a]ll full-time and regular part-time blue-collar nonprofessional employes including but not limited to maintenance employes, custodial employes, cafeteria employes and bus drivers; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act." (Exhibit A-1)
4. Maintenance employes have been performing the work of maintaining and repairing the District's equipment, machinery, and buildings/facilities; plowing and removing snow; cutting the grass and yard work on the District's premises, such as trimming shrubbery, removing weeds, fertilizing fields and grasses, raking leaves, maintaining and lining the athletic fields; and delivering the District's equipment/machinery to the various school buildings (Maintenance work) for the past 15 years. (N.T. 18-19, 23-26, 28-36, 132, 147)

5. James Serino has been the District's Maintenance Director for approximately ten years. The position of Maintenance Director is not in the Association's bargaining unit. (N.T. 20; Exhibit A-1)
6. Kenneth Bangs has been the District's Maintenance Supervisor, which is a position that is not in the bargaining unit, since July 2014. Before then, Bangs was a maintenance worker who was in the bargaining unit. The previous Maintenance Supervisors were James O'Brian, who held the position for 11.5 months, and Bobby Starina, who held the position for approximately 25 years. (N.T. 21-22, 217; Exhibit A-1)
7. There are four buildings in the District, including the Primary Center for kindergarten and first grade, the Intermediate Center for grades 2 through 6, the Middle School for grades 7 and 8, and the High School for grades 9 through 12. Until recently, there was also a Kindergarten Center which the District sold roughly one year ago. (N.T. 19-20)
8. Before July 2014, Serino performed Maintenance work at times by assisting bargaining unit members on repair projects, which required more than one person. This happened on average a couple times per year. Serino did not perform any repair projects or work by himself or without the assistance/cooperation of a bargaining unit maintenance employe. Serino assisted maintenance workers with two-man jobs and in a helping manner. (N.T. 25-27, 65-67, 91, 141, 258, 269)
9. Before July 2014, Serino transported the District's equipment between the buildings only once or twice. Serino did not do the work activity alone or without the assistance/cooperation of a bargaining unit employe. He merely assisted the maintenance workers. (N.T. 33-35, 183, 203-204, 269, 273)
10. Before July 2014, Serino performed yard work at times by assisting bargaining unit members with cutting grass, removing weeds, and working on the fields in preparation for graduation. Serino did not perform the yard work alone or without the assistance/cooperation of other bargaining unit employes. He merely assisted the maintenance workers in these tasks. (N.T. 257-261, 269-270)
11. Before July 2014, O'Brian and Starina performed Maintenance work at times by assisting bargaining unit members on repair projects, cutting the grass and yard work, and/or delivering the District's equipment between the various school buildings. O'Brian and Starina did not perform the Maintenance work alone or without the assistance/cooperation of other bargaining unit employes. O'Brian and Starina merely assisted the maintenance workers with these tasks. (N.T. 124, 127-128, 152, 175-178, 201, 216-219, 221, 223-224, 228-230, 239, 242-243, 250-251)
12. In 2010, the Association and District executed a Memorandum of Agreement (MOA), which resolved a prior charge of unfair practices docketed at PERA-C-10-241-E. The MOA provides in relevant part as follows:
 1. All eligible, qualified Association employees shall be offered the opportunity to (sic) overtime snow removal duties.
 2. Non-bargaining unit members shall be permitted to engage in snow removal if there is no bargaining unit member available for snow removal and/or in exigent circumstances.
 3. The use of non-bargaining unit employees in snow removal shall not serve to reduce, replace or displace bargaining unit positions or work, or (sic) shall it affect the exclusivity of bargaining unit work.

4. This Agreement shall not set a precedent, serve as a past practice or a waiver of any Association rights in regards to the exclusivity of any bargaining unit work or positions.
5. The Association and the District reserve their respective rights under the provisions of their Collective Bargaining Agreement. This Agreement contains the entire agreement among the parties and there are no other terms, conditions, promises or understandings, oral or written, relating to the subject matter of this Agreement and unfair labor charge filed before the Board to No. PERA-C-10-241-E which the Association shall dismiss (sic) with prejudice upon execution hereof.
6. The parties have received all necessary approvals and authorizations necessary to enter this Agreement.

(N.T. 50-53; Joint Exhibit 1)

13. Since July 2014, Serino and Bangs have been performing yard work by cutting the grass on the football field at the high school by themselves and without assisting or working in conjunction with any bargaining unit employes. (N.T. 38, 41-42, 75, 97, 109-110, 126-127, 130-134, 142-143, 146-147, 178-179, 239-240, 246-247, 251-252)
14. Since July 2014, Serino and Bangs have been performing Maintenance work on several occasions by delivering equipment to the various District buildings. (N.T. 42-43, 48, 114-115, 133-134, 142, 149)
15. Since July 2014, Serino and Bangs have been performing Maintenance work by repairing and maintaining District vehicles and machinery, such as the dump truck, lawn mowers, and tractors without the assistance or cooperation of any bargaining unit employes. (N.T. 106-108, 117-118, 145-146, 151, 191-192; Exhibit A-2)
16. In the fall and winter of 2014 to 2015, Serino and Bangs regularly performed the work of snow plowing and snow removal at the high school. Serino and Bangs performed this work each time it snowed and there was any kind of accumulation on the ground. (N.T. 112-113, 149-150, 156-157, 205-208, 240, 247, 274-276; Exhibits A-2, A-3, A-4)
17. The Association has 43 or more part-time employes in the bargaining unit. In 2014 to 2015, the District did not regularly call any part-time bargaining unit employes to work on days when there was accumulated snow. The District typically called only the full-time employes. (N.T. 160-161, 163-165, 190, 262, 270-273)
18. The Association did not consent to the District assigning bargaining unit work to either Serino or Bangs. The District never attempted to bargain the issue with the Association, nor did the District inform the Association that it was assigning Maintenance work to Serino and Bangs. (N.T. 43-44)

DISCUSSION

In its charge, the Association alleged that the District violated Section 1201(a)(1), (2), and (5) of the Act¹ by unilaterally removing bargaining unit Maintenance work without bargaining with the Association. The District contends that it did not violate the Act because the Maintenance Director and Supervisor had always shared the

¹ Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act. (2) Dominating or interfering with the formation, existence or administration of any employe organization... (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

Maintenance work at issue with the bargaining unit employees. The District also submits that it had a contractual privilege to assign the snow removal duties to employees outside the bargaining unit.

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 removal of *any* bargaining unit work is a per se unfair labor practice. **City of Harrisburg v. PLRB**, 605 A.2d 440, 442 (Pa. Cmwlth. 1992) (emphasis in original). There is no threshold amount of bargaining unit work that needs to be diverted; even a de minimis amount is actionable under PERA. **Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman School District**, 37 PPER 56 (Final Order, 2006). Nor does it matter whether the removal of bargaining unit work resulted in the termination or layoff of bargaining unit employees, or whether the unit members lost pay; instead, the analysis is whether the unit lost work. **Tredyffrin-Easttown School District**, 43 PPER 11 (Final Order, 2011). 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. **Tredyffrin-Easttown School District**, 43 PPER 11 (Final Order, 2011). 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).

In this case, the Association has sustained its burden of proving that the District violated the Act by unilaterally altering a past practice concerning the extent to which bargaining unit employees and non-bargaining unit personnel had previously shared work. Indeed, the record shows that, before July 2014, the District's Maintenance Director and previous Maintenance Supervisors performed various Maintenance work at times, including repair projects and yard work, but only by assisting or working in cooperation with bargaining unit employees, who were also engaged in the same tasks at the same time. The record shows that the Maintenance Director and the previous Maintenance Supervisors did not perform the Maintenance work alone or without the assistance and/or cooperation of the bargaining unit employees. However, the record shows that after July 2014, the Maintenance Director and the current Maintenance Supervisor have been performing repair projects and yard work by themselves and without assisting or working in conjunction with any bargaining unit members. The Association did not consent to the District assigning bargaining unit work in this fashion to either the Maintenance Director or the Maintenance Supervisor. In fact, the District never attempted to bargain the issue with the Association. As a result, the District has clearly committed unfair practices in violation of Section 1201(a)(1) and (5) of the Act.²

Turning to the dispute over snow removal duties, the Association argues that the District committed unfair practices by violating the 2010 MOA, which mandates that all eligible, qualified Association employees be offered the opportunity to perform overtime snow removal duties. The District counters that it was contractually privileged to assign the work to non-bargaining unit personnel since the MOA provides for an exception in exigent circumstances.

In **Ambridge Area Education Ass'n, PSEA/NEA v. Ambridge Area School District**, 28 PPER ¶ 28020 (Proposed Decision and Order, 1996), the Hearing Examiner succinctly explained the law as follows:

The Board will find an employer in violation of Sections 1201(a)(1) and 1201(a)(5) of the Act if the employer repudiates a provision of a collective

² The Association has not sustained its burden of proving that the District unilaterally altered the past practice concerning the extent to which bargaining unit employees and non-bargaining unit personnel had previously shared the work of delivering equipment between the various District buildings. The record shows that the Maintenance Director and/or the previous Maintenance Supervisors performed this work prior to July 2014 only by assisting bargaining unit employees, who were also present at the time. The record also shows that the Maintenance Director and the new Maintenance Supervisor have been performing this work since July 2014. However, I am unable to discern from the record whether the Maintenance Director and the current Maintenance Supervisor have been performing this work alone and without the assistance of any bargaining unit employees since July 2014.

bargaining agreement. **Millcreek Township School District v. PLRB**, 631 A.2d 734 (Pa. Cmwlth. 1994); **Palmyra Area School District**, 26 PPER ¶ 26087 (Final Order, 1995). The Board does so on the theory that the employer acts unilaterally in derogation of its statutory obligation to bargain in good faith when it reneges on an agreement reached during collective bargaining. If, however, a review of the collective bargaining agreement reveals a sound arguable basis for the employer to contend that it acted in conformity with the provision, then the Board will not find the employer in violation of Sections 1201(a) (1) and 1201(a) (5) of the Act. **Altoona Metro Transit**, 26 PPER ¶ 26085 (Final Order, 1995); **Bristol Township School District**, 25 PPER ¶ 25031 (Final Order, 1994). The Board's theory in such a case is that the employer met its statutory obligation to bargain in good faith when it negotiated the provision so long as there is a legitimate basis for doing so. The Board leaves the parties' dispute over exactly what they agreed to for an arbitrator to decide. The Board also will dismiss a charge filed under Sections 1201(a) (1) and 1201(a) (5) of the Act if the employer takes action consistent with past practice. **Clinton County**, 24 PPER ¶ 24144 (Final Order, 1993). The Board's theory in a case of that nature is that the employer has not acted unilaterally in that nothing has been changed by its action.

The Board has adopted the sound arguable basis or contractual privilege defense to a claimed refusal to bargain, which calls for the dismissal of a charge when the employer establishes a sound arguable basis in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible, i.e. contractually privileged under the terms of that agreement. **Temple University Hospital Nurses Ass'n et. al. v. Temple University Health System**, 41 PPER ¶ 3 (Final Order, 2010). Where the employer asserts a contractual right to change a mandatory subject of bargaining, it must point to specific, agreed-upon contract language which arguably indicates the union expressly and intentionally authorized the employer to take the precise unilateral action at issue. *Id.* citing **Port Authority Transit Police Ass'n v. Port Authority of Allegheny County**, 39 PPER 147 (Final Order, 2008).

In the present case, the Association has established that the District violated the Act by repudiating the 2010 MOA with regard to snow removal work. The 2010 MOA expressly states that "[a]ll eligible, qualified Association employees shall be offered the opportunity to (sic) overtime snow removal duties."³ The MOA further provides that "[n]on-bargaining unit members shall be permitted to engage in snow removal if there is no bargaining unit member available for snow removal and/or in exigent circumstances." The record shows that, in the fall and winter of 2014 to 2015, the Maintenance Director and Maintenance Supervisor regularly performed the work of snow plowing and snow removal at the high school. In fact, the Maintenance Director and Maintenance Supervisor performed this work each time it snowed and there was any kind of accumulation on the ground. The record also shows that the Association has 43 or more part-time employees in the bargaining unit and that the District did not regularly call any part-time bargaining unit employees to work on days when there was accumulated snow in 2014 to 2015. Instead, the District typically called only the full-time employees. This was a clear repudiation of the MOA, which requires the District to offer overtime snow removal duties to all eligible, qualified Association employees, and which permits non-bargaining unit members to perform this work only if there is no bargaining unit member available or in exigent circumstances.

The District relies on the exigent circumstances provision of the MOA for its contractual privilege defense. According to the District, any accumulation of snow or ice that endangers the safety of the District students, employees, or visitors is an exigent circumstance because the District can be charged with negligence for failing to remove accumulation of snow and ice on its sidewalks. (See District's brief at p. 7). However, this argument is without merit. As the Association points out, there is absolutely no

³ The record shows that maintenance employees in the bargaining unit work a 7:00 am to 3:00 pm shift. On snow days, they may be called in early to perform snow removal duties, during which time they earn overtime pay. They earn their regular pay between 7:00 am and 3:00 pm, but are frequently sent home early on snow days, for which they still receive a full day's pay, plus any overtime they earned prior to their normal starting hours. (N.T. 197-200, 209-211).

language in the MOA which could even arguably support the notion that the Association expressly and intentionally authorized the District to take the precise unilateral action at issue, i.e. permit the District to utilize two non-bargaining unit employees to perform snow removal duties each and every time it snowed and there was any accumulation on the ground. Indeed, such a reading of the provision would allow the exception in the second paragraph of the MOA to swallow the rule that appears in the first paragraph of the MOA. To be sure, the first provision of the MOA, which requires the District to offer overtime snow removal duties to all eligible and qualified Association employees, would be rendered meaningless if the District was permitted to utilize multiple non-bargaining unit employees for the same snow removal duties instead of bargaining unit members anytime it snowed and there was any accumulation on the ground. In any event, the record is devoid of any evidence that the District considered any accumulation of snow or ice to be an exigent circumstance, or how it was an exigent circumstance, justifying its use of non-bargaining unit personnel to perform the snow removal duties. The District offered no explanation whatsoever during the testimony of its witnesses regarding how the accumulation of any snow or ice was such an emergency that it was prevented or precluded from offering the work to the part-time employees in the bargaining unit. As such, the District's contractual privilege defense must fail.⁴

Finally, the Association has alleged a violation of Section 1201(a)(2) of the Act. The Board will find a violation of Section 1201(a)(2) where an employer creates a company union whose independence is subject to question because of managerial assistance to or involvement in it. **AFSCME District Council 88 v. Berks County Intermediate Unit**, 29 PPER ¶ 29098 (Proposed Decision and Order, 1998) citing **Montgomery County Intermediate Unit**, 17 PPER ¶ 17124 (Final Order, 1986). There is absolutely no evidence in the record to support a finding that the District created a company union whose independence is subject to question because of managerial assistance to or involvement in it. Accordingly, the charge under this Section must be dismissed.

CONCLUSIONS

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

1. The 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 District has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.
5. The District has not committed unfair practices in violation of Section 1201(a)(2) of PERA.

ORDER

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

⁴ The District also defends the charge of unfair practices with regard to snow removal duties on the basis that the parties had a past practice of allowing the non-bargaining unit employees to perform this work. However, the MOA expressly provides that "[t]he use of non-bargaining unit employees in snow removal shall not serve to reduce, replace or displace bargaining unit positions or work, or (sic) shall it affect the exclusivity of bargaining unit work." The MOA also states that "[t]his Agreement shall not set a precedent, serve as a past practice or a waiver of any Association rights in regards to the exclusivity of any bargaining unit work or positions." Thus, the parties expressly agreed that the use of non-bargaining unit personnel to perform the snow removal duties could not become a past practice under the terms of the MOA. Therefore, the District's argument is rejected in this regard.

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) Immediately return the Maintenance work to the bargaining unit, restore the status quo ante, and make whole any bargaining unit employes who have been adversely affected due to the District's unfair practices;
 - (b) 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;
 - (c) 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
 - (d) 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 17th day of February, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PITTSTON AREA EDUCATIONAL SUPPORT :
PERSONNEL ASSOCIATION :
v. : Case No. PERA-C-14-283-E
PITTSTON AREA SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

Pittston Area 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 complied with the Proposed Decision and Order as directed therein by immediately returning the Maintenance work to the bargaining unit, restoring the status quo ante, and making whole any bargaining unit employees who have been adversely affected due to the District's unfair practices; 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