

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLENTOWN EDUCATION ASSOCIATION :
PSEA/NEA :
v. : CASE NO. PERA-C-16-167-E
ALLENTOWN CITY SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On June 10, 2016, the Allentown Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Allentown City School District (District) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that, on or about February 17, 2016, Union officials learned that the District partnered with Communities in Schools of the Lehigh Valley, Inc. (CIS) for the provision of professional instructional services to students who have dropped out of the District to earn credits towards a diploma or GED and that said work had been historically and exclusively performed by the bargaining unit. On August 4, 2016, the Union filed an amended charge further alleging that, although CIS began providing professional instructional services in October 2015, the Union did not learn of the subcontracting until February 17, 2016.

On July 28, 2016, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on October 24, 2016, in Harrisburg. On August 10, 2016, the Secretary of the Board issued an amended complaint and notice of hearing again directing that a hearing be held on October 24, 2016. At the hearing on that date and before testimony was taken, the District moved to dismissed the charge for being filed beyond the Act's four-month statute of limitations. Also during the hearing, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On February 3, 2017, the Union filed its post-hearing brief. The District filed its post-hearing brief on April 3, 2017.

The examiner, based upon all matters 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. 6)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. Teaching and instructing students enrolled in the District is work historically and exclusively performed by bargaining unit members. (N.T. 21)

4. The District utilizes a software program known as "Apex" for online computer courses, subjects, lessons and testing. This is the District's "Virtual Academy." Bargaining unit members teach Virtual Academy courses. (N.T. 22-23, 107)

5. The District operates a program called "GAIN." GAIN is located in the District's William Penn Building. GAIN is an acronym for Graduate Attainment Initiative Network. (N.T. 24-25, 37-38)

6. The GAIN program is designed to provide credit recovery for ENROLLED District students, between the ages of 17 and 21, who are credit deficient for graduation because they may have failed one or more classes; they may have become pregnant or homeless; they may be student-fathers and may have needed to financially support their child; or some students may have suffered certain forms of abuse and other emotional issues during their high school years. The District uses bargaining unit professional teachers to provide instruction through Virtual Academy in the GAIN program. (N.T. 22-23, 37-38, 42-43, 47)

7. David Gonzalez is a certified teacher in the GAIN program. (N.T. 35-36)

8. The Apex computer software allows students to work on an individual self-paced basis. Apex allows students to take tests on the computer, and Mr. Gonzalez provides support for students using and testing with Apex. (N.T. 44-46)

9. The District also operates the Re-Engagement Center (REC) which is also located at the William Penn Building across the hall from the GAIN program. (N.T. 25-26, 29)

10. In the Spring of 2015, the administration presented the idea of the REC at a school board meeting. The administrators indicated to the board members that bargaining unit professionals would staff the program. The REC began serving students in October 2015. Union President Debra Tretter initially believed that the REC would be staffed by bargaining unit professionals. (N.T. 18-19, 25-26, 104)

11. Approximately one month after the REC opened, in early October, Ms. Tretter heard from a bargaining unit teacher assigned to REC students that there were no students at the REC when she went there. Students enrolled in the REC are individuals who have DISENROLLED from the District due to life changing events such as child bearing and parenting, homelessness and transportation problems. Because of their life challenges and responsibilities, students at the REC are unable to attend or participate in Virtual Academy for large blocks of time. Two bargaining unit members were assigned to go to the REC in the morning not in the afternoon. These teachers work for the District's Virtual Academy. Students began appearing in the REC in October 2015. (N.T. 19, 65, 104, 106, 141-143, 168-171)

12. One of the Union's building representatives at the William Penn Building was one of the teachers assigned to the REC, and she is the bargaining unit member who informed Ms. Tretter that there were no students in the REC when she went there. (N.T. 30)

13. In late November or early December 2015, Mr. Gonzalez informed Union President Debra Tretter that CIS employees were in the REC program. "[T]hat was the beginning of [Ms. Tretter's] awareness that [the Union] may have a problem as far as who was actually teaching in there." At this time, Union President Tretter was aware that CIS

employees may have been performing work that the Union claims is bargaining unit work. Also at this time, Ms. Tretter "talked to different people about what was actually going on" in the REC. (N.T. 18-20, 30-32)

14. On February 17, 2016, Human Resources Director, Christina Mazzella, informed Ms. Tretter at a monthly meeting that CIS employees were in charge of the REC program and were working there. During conversations with Ms. Mazzella in late 2015 and early 2016, Ms. Mazzella conveyed her understanding that bargaining unit members were assigned to the REC. (N.T. 20-21, 32)

15. The only individuals who consistently work at the REC are Jon Fenner and Manny Gomez, who are employees of CIS, and two individuals from CareerLink and/or the Workforce Investment Board. (N.T. 62, 64, 133, 164)

16. The REC program utilizes the same Apex system that the GAIN program utilizes. (N.T. 50)

17. Keith Falko was the Director of Instructional Initiatives responsible for the REC for a period of time. Mr. Gomez and Mr. Fenner do some of the same work in the REC that Mr. Gonzalez does in the GAIN program across the hall, such as analyzing student transcripts to determine the credits to be recovered or taken. Mr. Falko informed Mr. Gonzalez of this in September 2015. (N.T. 63, 66, 101-102)

18. Mr. Fenner and Mr. Gomez also help students in the REC with questions about the APEX program and have offered instruction to students in response to their questions regarding course subject matter and material. These are duties performed by Mr. Gonzales, a bargaining unit member, in the GAIN program. (N.T. 67-72; Association Exhibits 1 & 2)

DISCUSSION

The District defends the charge on the grounds that it was not timely filed, i.e. within the four-month limitations period set forth in Section 1505 of PERA, 43 P.S. §1101.1505. The initial charge was filed on June 10, 2016. The District argues that the Union President and Mr. Gonzalez had knowledge that CIS employees were allegedly performing bargaining unit work in November-December 2015, which is more than four months before the June 10, 2016 filing date of the initial charge. (District Brief at 6-7).

Section 1505 of PERA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements that were made more than four months prior to the filing of the charge." 43 P.S. § 1101.1505. A charge will be considered timely if it is filed within four months of when the charging party knew or should have known that an unfair practice was committed. Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College, 35 PPER 24 (Final Order, 2004).

Ms. Tretter testified that she became aware that the Union had a problem with the CIS employees working in the REC by December 2015, which is more than four months prior to the filing of the charge. Even

though Ms. Mazzella, the Human Resources Director indicated that professional bargaining unit members were also assigned, Ms. Tretter knew that CIS employees were also assigned to the REC and Ms. Mazzella never assured Ms. Tretter that CIS employees were not assigned. The statement of the William Penn Building Union representative, that she saw no students in the REC in October or November when she went there, may be accurate but it conflicts with other record evidence showing that students were in fact in attendance, but not at the times that that the unit teachers were there. The fact that Ms. Tretter may have believed that students were not being instructed, because she was told that no students were seen there, did not relieve the Union of its duty to investigate after receiving sufficient notice that work was allegedly being diverted, instead of waiting for Ms. Mazzella's, i.e. the employer's, investigation to be completed three months later.

A necessary component of determining when a union "should have known" of the unfair practice is the responsibility of a union to investigate upon receiving notice of a removal of bargaining unit work. West Side Career and Technology Center Education Association v. West Side Career and Technology Center, 46 PPER 102 (Proposed Decision and Order, 2015). Union officials in this case, who were aware that CIS employees were allegedly performing unit work, were in contact with Mr. Gonzalez, other bargaining unit members and seemingly with CIS employees, about the alleged activities in the REC.

Indeed, Mr. Gonzales provided extensive testimony at the hearing of his observations of the instructing of students in the REC by CIS employees as well as his own conversations with CIS employees who explained their duties to him, which included duties performed by him as a bargaining unit member. Also, Ms. Tretter testified that during late November and early December 2015, she "talked to different people about what was ACTUALLY going on" in the REC. (F.F. 13) (emphasis added). Pursuant to her own investigation, therefore, she knew or should have known in late 2015 that CIS employees were breaking down transcripts and instructing students to help them with their Apex lessons and testing.

To rely solely on and wait for the completion of the employer's investigation, as here, would empower the employer to delay, and thereby control, the viability and actionability of claims under their "investigation," which would divest unions of their rights to pursue meritorious claims.¹ Therefore, a union is not excused from an untimely filed charge when it was on notice of a diversion of work independent of the employer's investigation or timetable for confirming the same. Timeliness is not a mere technicality. It vests this Board with subject matter jurisdiction. Although the Union's attempts to engage the employer in a good-faith exchange of information and bargaining are laudable, the Union is legally obligated to preserve its rights by timely filing a charge while working with the employer rather than waiting for employer confirmation or to see if the employer will resolve the dispute with the Union. Accordingly, the charge was untimely filed, the Board lacks subject matter jurisdiction over the charge, which is hereby dismissed, and the complaint is rescinded.

¹ I am not suggesting that the District deliberately engaged in delay tactics here. This is merely a policy statement.

CONCLUSIONS

The Hearing 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 under Section 301(1) of PERA.
2. The Association is an employe organization under Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The charge was not timely filed within the four-month limitations period prescribed in Section 1505 of PERA, and the Board lacks subject matter jurisdiction over the claims alleged in the charge.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint is rescinded.

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 nineteenth day of January, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner