COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SAYRE AREA EDUCATION ASSOCIATION, PSEA/NEA	:	
v.	:	Case No. PERA-C-17-317-E
	:	PERA-C-17-319-E
SAYRE AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On October 23, 2017, the Sayre Area Education Association, PSEA/NEA (Association) filed two charges of unfair practices with the Pennsylvania Labor Relations Board (Board), docketed at PERA-C-17-317-E and PERA-C-17-319-E, against the Sayre Area School District (District or Employer) alleging that the District violated Section 1201(a)(5) and (8) of the Public Employe Relations Act (PERA).

On November 14, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing in the charge docketed at PERA-C-17-317-E, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating February 5, 2018, in Harrisburg, as the time and place of hearing, if necessary.

On November 22, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing in the charge docketed at PERA-C-17-319-E, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating February 16, 2018, in Harrisburg, as the time and place of hearing, if necessary

Pursuant to agreement by the parties, a hearing on both charges was held on April 6, 2018, in Sayre, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Association submitted a post-hearing brief in support of its charges on June 13, 2018. The District submitted a post-hearing brief in support of its position on July 10, 2018.

The Hearing Examiner, based on 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. 5).

2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).

3. Sayre Online Learning Community (SOLA) is the District's online learning resource which was implemented in the beginning of the 2016-2017 school year. The District designates a classroom for SOLA activity. The

content and instruction of SOLA courses is provided by a third-party firm called eQuip. Samuel Hawkes is the District employe who administers the SOLA program within the school. Hawkes is a bargaining-unit member and is referred to as an auxiliary teacher. He does not provide instruction or teaching. (N.T. 14-15, 28-29, 44-45, 64).

4. The Association and District (the Parties) are subject to a collective bargaining agreement (CBA) with the effective dates of July 1, 2013 through June 30, 2019. (Joint Exhibit 1).

5. On August 9, 2016, the Parties executed a Memorandum of Understanding which states in relevant part:

> [The District] and [the Association] agree to the following in regards to the Cyber Schooling and/or Online Learning:
>
> The District desires to implement an Online Learning Program. The following conditions shall apply to any such program:
>
> 1. A District Teacher serving as Instructor or otherwise in an Online Learning Program shall be compensated in accordance with the salary schedule established in [the CBA].
>
> 2. The opportunity to participate as the Teacher/Instructor in an Online Learning Program shall be by assignment. All courses shall be monitored and/or taught by a member of the bargaining unit.
>
> . . . .
>
> 14. The District shall not reduce, replace, demote, supplant staff or divert any bargaining unit work as a result of the existence of an Online Learning Program.
>
> 15. Students enrolled in and attending regular school day courses in combination with Online Learning Program courses are not permitted to enroll in Online Learning Program courses that are offered/provided during the regular school year schedule. Such courses shall be available only to those students enrolled in an "off-campus" Online Learning Program. Exceptions may be considered due to special circumstances. Such circumstances will be reviewed by the District and Representatives of the Association selected by the Association. Exceptions shall be mutually agreed upon.
>
> 16. Students enrolled in and attending regular school day courses may take courses in addition to those being offered during the regular school day. However, any such courses shall not be taken in lieu of, or as a substitute for, required courses and/or credits taught/provided by bargaining unit members. For example, if graduation requirements call for 4 credits

> in English, such a student must meet these 4 credits via regular school classes; however, such a student may take additional English courses via Online Learning Program. Online Learning Program Courses shall not replace credits required for graduation for such students.
>
> 17. If at any time a course is offered through the on-line program and ten(10) or more students who physically attend school enroll in the course, the District shall ensure that such a course is made available to the students via a regular classroom setting as soon as possible, but no later than the start of any semester.

(Association Exhibit 2).

6. On July 6, 2017, Arbitrator Diane Mulligan issued an Award which states in relevant part:

> BACKGROUND
>
> [The District] and [the Association] entered into a MOU on August 9, 2016 which provided at Section 15, that exceptions would be considered for special circumstances and that such exceptions would be mutually agreed upon. On December 16, 2016, the Association filed a grievance . . . alleging, inter alia, that the District ". . . failed to properly work with the Association by granting exceptions due to special circumstances without mutual agreement . . . ." The grievance proceeded through three (3) contractual steps without a resolution and the Association then invoked arbitration. The parties selected Diana S. Mulligan to act as Arbitrator and a hearing was scheduled for June 23, 2017 in Sayre, Pennsylvania. Before the hearing could begin, the parties discussed the issue and directed the Arbitrator to make the following
>
> AWARD
>
> The parties will strictly comply with all terms and conditions of the MOU dated August 9, 2016.
>
> With regard to special circumstances referenced in paragraph 15 of the MOU, the Association will be provided the student's grade level, anticipated year of graduation, current credit status, current schedule and proposed changes to his/her schedule. The Administration will also provide a summary of the special circumstances as set forth in paragraph 15. The above information will be provided for review by the Association. The hard copy may be reviewed by the parties but will be retained only by the Administration. The Association will agree or disagree

> with the proposed assignment within two (2) business days of being provided with the information set forth herein. Time is of the essence and, if the Association does not object within said two (2) business day period, the Administration may make the assignment which it deems educationally appropriate.
>
> In implementing this Award, the parties will act reasonably. All Sayre Online Learning Academy (SOLA) related grievances filed by the Association prior to the issuance of this Award will be withdrawn.

(Association Exhibit 1).

7. Keystone remediation is a District program whereby students who fail any part of the Keystone Exam are required to attend remediation classes in order to prepare to take the Keystone exams again. There are Keystone exams in Algebra, Biology and Literature. Keystone remediation had been offered by the District for several years and the classes had always been taught by bargaining-unit members prior to the 2017-2018 school year. (N.T. 17, 29, 55-57, 62).

8. Prior to the 2017-2018 school year, remediation classes where built into bargaining-unit teachers' schedules during the regular school year. Teachers were assigned remediation classes based on their certification. (N.T. 18, 58-59).

9. Soon before the start of the 2017-2018 school year, at a meeting on or about August 25, 2017, the District informed the Association that all Keystone remediation students would no longer by scheduled into teachers' classrooms but instead would be put into SOLA. The Association responded that plan would be in violation of the MOU because, according to the Association, remediation was teachers' work and SOLA was not supposed to supplant or replace any teachers. At this meeting, the Association also learned that approximately 60 students had been assigned for SOLA in the upcoming year. The breakdown was approximately 22 students for math remediation, 22 for science remediation, and 16 for English and language arts remediation. District records indicate that, in the 2017-2018 school year and through SOLA, 21 students took Algebra 1 remediation, 16 took Biology remediation, and 17 took Literature remediation. (N.T. 19-21, 46-48; District Exhibit 2).

10. At this same meeting on or about August 25, 2017, the Association also learned from the District that the District had assigned a student to SOLA over the summer of 2017. The student was assigned to the District's credit recovery program. The credit recovery program through SOLA allowed the student who had failed a class during the school year to earn credits in the summer to stay on pace for graduation. The credits earned in the summer SOLA classes counted towards graduation. (N.T. 21-22, 65-70, 74).

11. Summer school courses are not regular school day courses. (N.T. 28, 52).

DISCUSSION

This matter arises out of two charges filed by the Association in October 2017. Both charges allege that the District violated Section 1201(a)(5) and (8) of PERA. Specifically, the charge in PERA-C-17-317-E states:

> 8. On August 22, 2017, the Association informed the District that it believed four courses being offered through SOLA were being done so in violation of the MOU and Arbitrator Mulligan's Award.
>
> . . .
>
> 10. The District continues to offer classes through SOLA in violation of the MOU and Arbitrator Mulligan's Award, such conduct constitution an unfair labor practice.

(Specification of Charges, PERA-C-17-317-E). This charge stems from the Association learning of the District's enrollment of students in SOLA Keystone remediation courses for the 2017-2018 school year. The Association believes that these assignments violate the MOU and the Arbitration Award because the courses divert bargaining unit work and because there were more than ten students in a SOLA class.

The charge in PERA-C-17-319-E specifically alleges:

> 8. On July 28, 2017, the Association learned that the District had violated the MOU and Arbitrator Mulligan's Award by unilaterally implementing SOLA for credit recovery during summer weeks without mutually agreement with the Association. This action is in a direct violation of the MOU and Arbitrator Mulligan's Award.

(Specification of Charges, PERA-C-17-319-E). This charge stems from the Association learning in August 2017 that the District had arranged for one student to use SOLA to earn credit towards graduation in the summer of 2017. The Association argues this was a violation of the MOU because classes which award credits must be taught by bargaining unit members and not through SOLA unless the Association agrees.

Turning first to the Association's charge in PERA-C-17-317-E that the District violated the MOU and Section 1201(a)(5) of PERA, it is well settled that the Board exists to remedy violations of statute, i.e., unfair labor practices, and not violations of contract. Pennsylvania State Troopers Ass'n v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). Where a breach of contract is alleged, interpretation of collective bargaining agreements typically is for the arbitrator under the grievance procedure set forth in the parties' collective bargaining agreement. Id. at 649. However, the Board will review an agreement to determine whether the employer has clearly repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance. Id. If the Board determines that there is no clear repudiation, but instead that the party charged presented a sound arguable basis for its conduct, the Board will dismiss the charges of unfair

labor practices and the issue then becomes one of contractual interpretation to be addressed in arbitration. Id.

The Association alleges that the number of students assigned to SOLA Keystone remediation classes for the 2017-2018 school year violates the MOU since enrollment exceeded 10 students per class. The MOU states:

> 17. If at any time a course is offered through the on-line program and ten(10) or more students who physically attend school enroll in the course, the District shall ensure that such a course is made available to the students via a regular classroom setting as soon as possible, but no later than the start of any semester.

(Association Exhibit 2). The Association claims it learned at the August 2017 meeting that of the approximately 60 students had been assigned for SOLA: 22 students were assigned for math remediation, 22 were assigned for science remediation, and 16 were assigned for English and language arts remediation. District records produced at hearing showed that, in the 2017-2018 school year, ultimately 21 students took Algebra 1 remediation, 16 took Biology remediation, and 17 took Literature remediation through SOLA.

It is clear from this record that the District did in fact offer three Keystone remediation courses through SOLA during the 2017-2018 school year. It is also clear that more than ten students were enrolled in and completed Algebra 1 remediation, Biology remediation, and Literature remediation. Thus, there is a clear repudiation of Paragraph 17 of the MOU by the District.

The Association also alleges that the District violated Paragraph 14 of the MOU and Section 1201(a)(5) of PERA because the District diverted Association work by placing Keystone remediation courses in SOLA. Paragraph 14 of the MOU states:

> 14. The District shall not reduce, replace, demote, supplant staff or divert any bargaining unit work as a result of the existence of an Online Learning Program.

(Association Exhibit 2). The record in this matter is clear that the teaching of Keystone remediation courses was exclusively bargaining unit work prior to the 2017-2018 school year. Prior to the 2017-2018 school year, Keystone remediation classes where built into bargaining unit teachers' schedules and teachers were assigned Keystone remediation classes based on their certification. In 2017-2018, the District changed its Keystone remediation program by placing all Keystone remediation in its SOLA program. Crucially, though the SOLA program is administered by a bargaining unit member, the classes are not taught by a bargaining unit member as they had been before the 2017-2018 school year. The facts in this matter are similar to Tredyffrin-Easttown Education Association v. Tredyffrin-Easttown School District, 43 PPER 11 (Final Order, 2011). In Tredyffrin-Easttown, the Board held that a school district violated Section 1201(a)(5) when it diverted exclusive bargaining unit work of teaching and assessing students to non-unit employes of an operator of an online learning program called E-Learning. Id. The Board held:

> Here, the introduction of E-Learning online courses did not eliminate the essential function of the District's bargaining unit professional employes, which is teaching and assessing students. The duties of teaching the students and assessing their progress is now done by a non-bargaining unit instructor and site coordinator, who perform those teaching functions via computers and online resources. As in City of Reading[1] and City of Philadelphia[2], the bargaining unit duties of teaching and assessing students have not been eliminated by automation. Therefore, the District is not excused from its statutory obligation to bargain over the removal of the bargaining unit work.

Id. It is clear the District diverted the bargaining unit work of teaching Keystone remediation courses when it started SOLA Keystone remediation courses in 2017-2018. Thus, there is on this record a clear repudiation of the language of Paragraph 14 of the MOU.

In defense of these charges, the District argues in its post-hearing brief that "the MOU only applies to SOLA courses taught for credit during the school year" and cites Paragraphs 15 and 16 of the MOU. (District's Brief at 2). The District further argues "[s]imply put and relevant to these proceedings, the MOU only places restrictions on SOLA courses taught for credit during the regular school year" and again cites paragraphs 15 and 16 of the MOU. (District's Brief at 10). The District continues:

> The MOU states that District students enrolled in and attending regular school day courses may not enroll in SOLA courses during the regular school year schedule barring "special circumstances." [Association's Exhibit 2 at Paragraph 15]. However, the MOU also provides that District students enrolled in and attending regular school day courses may also take SOLA courses as long as these courses "[do] not replace credits required for graduation[.]" [Association's Exhibit 2 at Paragraph 16]. Therefore, the three (3) Keystone Exam remediation courses offered through SOLA during the 2017-2018 school year are compliant with the MOU and Arbitrator Mulligan's Award.
>
> [The Association's] assertion that the SOLA remediation courses reduce bargaining unit work is conclusory and unfounded. No remediation courses were offered during the regular school day during the 2017-2018 school year, and remediation courses were only previously offered during the 2016-2017 school year. [N.T. 57, 59]. Furthermore, [Hawkes], a bargaining unit member . . . administers SOLA. . . .

(District's Brief at 11). However, Paragraph 17 of the MOU clearly states that if a course is offered through SOLA and more than 10 students enroll,

---

[1] Reading Lodge No. 9 v. City of Reading, 41 PPER 4 (Final Order, 2010).
[2] Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 41 PPER 163 (Final Order, 2010)

the course shall be made available to the students via a regular classroom setting as soon as possible. Nothing in the MOU and the record in this matter indicates that Paragraph 17 of the MOU refers only to courses offered for credit. Indeed, it is the clear expectation of Paragraph 16 that SOLA courses shall not replace credits required for graduation for such students. Thus, the clear language of Paragraph 17 is referring to SOLA classes which, according to the language of the MOU, are not to be offered for credit. Therefore, the District clearly repudiated Paragraph 17 of the MOU when it enrolled more than 10 students in three different non-credit SOLA Keystone remediation courses in the 2017-2018 school year and has offered no sound arguable basis from the MOU to explain its actions.

Paragraph 14 of the MOU clearly states that the District shall not reduce, replace, demote, supplant staff or divert any bargaining unit work as a result of the existence of SOLA. The language cited by the District in Paragraph 16 of the MOU does not support its arguments. Paragraph 16 states:

> Students enrolled in and attending regular school day courses may take courses in addition to those being offered during the regular school day. **However, any such courses shall not be taken in lieu of, or as a substitute for, required courses and/or credits taught/provided by bargaining unit members.**

(Association Exhibit 2)(emphasis added). Prior to the 2016-2017 school year, Keystone remediation courses were required and taught by bargaining unit member teachers. Thus, the District expressly repudiated the language of Paragraph 16 when it offered the required Keystone remediation courses through SOLA because Keystone remediation had been required and previously taught by bargaining unit members. Furthermore, its argument in its Brief with respect to Keystone remediation courses misstates the record: Keystone remediation courses were offered in 2017-2018. Additionally, the District's arguments that Hawkes administers SOLA are not relevant to a determination that the District diverted bargaining unit work. The work the District diverted was not the administration of the Keystone remediation courses; it was the instruction and teaching of Keystone remediation courses.

Therefore, by repudiating Paragraphs 14 and 17 of the MOU, the District violated Section 1201(a)(5) of PERA.

Turning to the Association's charge in PERA-C-17-317-E that the District violated the Arbitration Award, the Board has held that a public employer violates Section 1201(a)(8) of PERA when the complainant proves that the public employer refused to comply with a binding arbitration award. The Board has held that when the complainant in an unfair labor practice action charges a refusal to comply with the provisions of a binding arbitration award, the Board must determine first if an award exists, second, if the award has been stayed by an appeal, and third, if the respondent has failed to comply with the provisions of the arbitrator's decision. FOP Lodge 5 v. Philadelphia, 32 PPER ¶ 32102 (Order Directing Remand, 2001). Where the Board has determined that an award exists, and an appeal of the award does not stay the enforcement, and the charged party has failed to comply with the provisions of the award, then the Board will find that the charged party committed an unfair practice under Section 1201(a)(1) and (8) of PERA.

In this matter, it is not controverted that the Arbitration Award exists and that there is no relevant appeal. The relevant language of the award to this charge is "[t]he parties will strictly comply with all terms and conditions of the MOU dated August 9, 2016." As I have found above that the District repudiated Paragraphs 14 and 17 of the MOU, the District therefore has also not strictly complied with the MOU. Since it has not strictly complied with the MOU, it necessarily follows that the District has violated the Arbitration Award and has violated Section 1201(a)(8) of PERA.

Moving to the Association's charge in PERA-C-17-317-E that the District violated the MOU by using SOLA in the summer of 2017 for credit recovery courses, the record is clear in this matter that summer school is not considered by the parties to be "regular school day courses" by the parties. The District argues that the MOU only applies to SOLA course work "during the regular school day and regular school year" and cites Paragraphs 15 and 16 of the MOU. I agree with District that it has presented a sound arguable basis to assert the MOU only concerns SOLA classes offered during the regular school year and thus the District has not clearly repudiated the MOU by offering a credit recovery course through SOLA in the summer of 2017. Therefore, the Association's charge under Section 1201(a)(5) of PERA is dismissed.

Moving to the Association's charge in PERA-C-17-317-E that the District violated the MOU by using SOLA in the summer of 2017 for credit recovery courses, and applying FOP Lodge 5 v. Philadelphia, supra, the Association did not establish that the District failed to strictly comply with the MOU when it offered a credit recovery course through SOLA in the summer of 2017. I agree with the District's argument that the record in this matter supports that the MOU applies to SOLA courses offered in the regular school year, only. The Association's charge under Section 1201(a)(8) of PERA is dismissed.

CONCLUSIONS

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

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)(5) and (8) of PERA in PERA-C-17-317-E.

5. The District has not committed unfair practices in violation of Section 1201(a)(5) and (8) of PERA in PERA-C-17-319-E.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from 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.

2. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under Section 903 of Section IX of the Act.

3. Take the following affirmative action:

(a) Restore the *status quo ante* which existed prior to the repudiation of Paragraphs 14 and 17 of the MOU and violation of the Arbitration Award, return the Keystone remediation work to the bargaining unit, and make whole all affected bargaining unit members;

(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 the bargaining unit 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 Association.

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 at Harrisburg, Pennsylvania, this twenty-ninth day of August, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SAYRE AREA EDUCATION ASSOCIATION, PSEA/NEA	:	
v.	:	Case No. PERA-C-17-317-E PERA-C-17-319-E
SAYRE AREA SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The Sayre Area School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(5) and (8) of the Public Employe Relations Act; that it complied with the Proposed Decision and Order as directed therein; that it restored the *status quo ante* which existed prior to the repudiation of Paragraphs 14 and 17 of the MOU and violation of the Arbitration Award, returned the Keystone remediation work to the bargaining unit, and made whole all affected bargaining unit members; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed 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