

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 :

FINAL ORDER

Crestwood School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on June 3, 2014, to a May 14, 2014 Proposed Decision and Order (PDO) of the Hearing Examiner. In the PDO, the Hearing Examiner found that the District, without having filed a unit clarification with the Board and without bargaining with the Crestwood Education Support Personnel Association (Association), unilaterally declared that a secretarial position was no longer in the bargaining unit as the result of the District allegedly assigning confidential duties to the position. The Hearing Examiner concluded that the District's unilateral action violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA). In accordance with an extension of time granted by the Acting Secretary of the Board (Secretary), the Association filed a timely brief in response to the exceptions on July 11, 2014.¹ For purposes of the exceptions, the Hearing Examiner's Findings of Fact are summarized as follows:

The June 13, 2000 Board certification described the Association's bargaining unit as:

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

(FF 3). The recognition clause of the Collective Bargaining Agreement (CBA) between the Association and District incorporates the Board certification. (FF 5). Thus, secretaries employed by the District are in the bargaining unit represented by the Association and covered by the CBA. (FF 4).

Coreen Stec, a bargaining unit employee, 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. (FF 7). As a secretary, Ms. Stec reported to the Business Manager, Courtney Lomax, who is an employee of an outside accounting firm, the Al Melone Agency. (FF 10).² Ms. Stec's last day of work was October 26, 2012. (FF 11).³

On November 19, 2012, the District posted to fill a position described as a "Confidential Secretary." (FF 12 and 14). The District's posting listed the qualifications, duties, and responsibilities of the secretarial position, which included all duties and responsibilities that Ms. Stec performed when she was in the bargaining unit. (FF 13).

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

¹ The District filed a Reply Brief with the Board on August 4, 2014.

² The District does not employ its own in-house Business Manager. Instead, the District uses the services of 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 her assistant, Leslie Risko, work on the District's premises and perform the functions of a Business Manager and Business Department. (FF 9).

³ Ms. Stec 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. (FF 11).

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." (FF 17).

The District hired Gina Miale under the new posting and she began working for the District on January 18, 2013. (FF 19). Ms. Miale performs the same duties and responsibilities that Ms. Stec performed when she was a bargaining unit secretary. (FF 20). Ms. Miale works 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. (FF 22). Ms. Stec had worked in that same office. Indeed, Ms. Miale works at the same desk that Ms. Stec used when she was a bargaining unit secretary. (FF 22). Like Ms. Stec, Ms. Miale reports to the Al Melone Agency, which is the District's acting Business Manager. (FF 23). Ms. Miale has also performed duties of other members of the Association's bargaining unit, including secretaries Sarah Smigelski and Theresa Humenick. (FF 24).

Since hiring Ms. Miale, the District has treated her as not being a member of the bargaining unit. The District has paid her different compensation and benefits than is prescribed in the CBA for secretaries in the bargaining unit. (FF 25). The District never bargained or obtained the Association's consent to remove Ms. Stec's secretarial duties from the bargaining unit or to classify Ms. Miale's position as confidential. Nor has the Association consented to Ms. Miale's compensation and/or benefits, which differ from those set forth in the CBA. As of the date of the hearing, the District had not filed a Petition for Unit Clarification to have Ms. Miale's position deemed confidential by the Board. (FF 18).

Furthermore, the District never obtained the Association's consent to assign Ms. Stec's duties to the Al Melone Agency. 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, the Al Melone Agency performed certain aspects of Ms. Stec's secretarial duties, including work with payroll and accounts payable, invoices, bill preparation, and data entry. (FF 27).⁴

The District argues on exceptions that the Hearing Examiner erred in failing to address its claim that certain duties performed by Ms. Miale are confidential within the meaning of Section 301(13) of PERA. However, as properly recognized by the Hearing Examiner, the present proceeding involves an adversarial unfair practice charge and not an investigatory unit clarification petition requiring the Board to assess the alleged confidential duties of Ms. Maile's position in the context of determining the appropriateness of the bargaining unit. *E.g.* **Community College of Beaver County Clerical-Secretarial-Technical-Janitorial-Maintenance School Service Personnel Association v. Beaver County Community College**, 23 PPER ¶23070 (Final Order, 1992), *affirmed*, 24 PPER ¶24110 (Court of Common Pleas, Beaver County, 1993). The District's attempts to interject the alleged confidential duties of Ms. Miale's position improperly conflates two separate and distinct proceedings: one adversarial, concerning the employer's obligation to negotiate reassignment of bargaining unit work outside the bargaining unit (initiated here through the Association's unfair practice charge), and the other type of proceeding involving the Board's statutory role to investigate and define appropriate bargaining units through filing of a unit clarification petition addressing new or reassigned duties in the workforce. **State College and University Professional Association v. State System of Higher Education (Clarion University)**, 37 PPER 87 (Final Order, 2006); **School District of the City of Erie v. PLRB**, 832 A.2d 562 (Pa. Cmwlth. 2003); **Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre**, 32 PPER ¶32161 (Final Order, 2001) (recognizing that Board determinations about appropriate units are separate and apart from an employer's obligation to bargain over the removal of work).

Generally, the performance of any bargaining unit work by employees who are not members of the bargaining unit constitutes an unfair practice. *E.g.* **City of Harrisburg v.**

⁴ The District does not except to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (5) of PERA by assigning bargaining unit secretarial duties to the Al Melone Agency between October 26, 2012 and January 18, 2013.

PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). Thus, black-letter law and the Board's long-standing policy require that when the District creates a new position alleged to be outside the bargaining unit as confidential, that "new" employe may not continue to perform any bargaining unit work without the District having filed a unit clarification petition with the Board seeking to have the position deemed confidential within the meaning of Section 301(13) of PERA. *E.g.* **Philadelphia Community College**, 24 PPER ¶24172 (Final Order, 1993). As the Board has stated time and again, "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 at 159.

The District also makes a similarly untenable argument that the Hearing Examiner erred in dismissing its sound arguable basis defense to the charge of unfair practices. In **Jersey Shore School District**, 18 PPER ¶18117 (Final Order, 1987), the Board held that "[w]here an employer has a sound arguable basis for ascribing a particular meaning to [the] contract and [its] action is in accordance with the terms of the contract ..., the [Board] will not enter the dispute to serve the function of [an] arbitrator in determining which party's interpretation is correct." **Jersey Shore School District**, 18 PPER at 341 (quoting **NCR Corporation**, 271 NLRB 12121, 117 LRRM 1062 (1984)). The contractual language relied upon by the employer must indicate that the **actions** of the employer were agreed to by the employe representative. *E.g.* **Capitol Police Lodge No. 85 v. PLRB**, 10 A.3d 407 (Pa. Cmwlth. 2010); **Temple University Hospital Nurses Association v. Temple University Health System**, 41 PPER 3 (Final Order, 2010); **Rochester Area Education Association v. Rochester Area School District**, 42 PPER ¶15 (Final Order, 2011); see **Commonwealth of Pennsylvania v. PLRB**, 459 A.2d 452 (1983) (a waiver of a right to bargain must be clear and unmistakable).

The District contends that the language in the recognition clause of the CBA adopting the Board certification that excludes confidential employes from the bargaining unit affords it a sound arguable basis defense to the Association's charge. The District's reliance on the contractual recognition clause for its unilateral action is misplaced. The fact that the contract may indicate that confidential employes are not within the Board-defined bargaining unit is insufficient to establish a contractual privilege that even arguably suggests that the Association agreed to allow the District to unilaterally create a new, non-bargaining unit confidential position and have that new employe perform bargaining unit work. Accordingly, the Hearing Examiner did not err in rejecting the District's sound arguable basis defense to the charge.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally creating an alleged confidential position, and assigning that position duties previously performed by a bargaining unit employe. Accordingly, the District's exceptions shall be dismissed, and the PDO made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Crestwood School District are hereby dismissed, and the May 14, 2014 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this nineteenth day of August, 2014. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

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Pennsylvania Labor Relations Board

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PERSONNEL ASSOCIATION, PSEA/NEA

v.

CRESTWOOD SCHOOL DISTRICT

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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 and Final Order in the manner prescribed therein; and that it has served a copy of this affidavit on the Crestwood Educational Support Personnel Association 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