

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNCREST EDUCATION ASSOCIATION, :
PSEA/NEA :
 :
v. : Case No. PERA-C-12-385-W
 :
PENNCREST SCHOOL DISTRICT :

FINAL ORDER

Penncrest Education Association, PSEA/NEA (Association) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on July 3, 2014, challenging a Proposed Decision and Order (PDO) issued on June 16, 2014. In the PDO, the Board's Hearing Examiner concluded that the Penncrest School District (District) had a sound arguable basis in the parties' collective bargaining agreement (CBA) for contending that it did not violate Section 1201(a) (1) and (5) of the Public Employee Relations Act (PERA) when it eliminated the Dental Hygiene Program conducted by a dental hygienist and utilized local dentists to perform dental examinations required by the Public School Code of 1949.¹ The District timely filed a response to the exceptions on July 21, 2014. Pursuant to an extension of time granted by the Secretary of the Board, the Association timely filed a brief in support of its exceptions on August 6, 2014. The District also was granted an extension of time by the Secretary to file its response brief, which was timely filed on September 25, 2014.² After a thorough review of the record, the Board makes the following:

AMENDED FINDING OF FACT

8. In 2012, the District and the Association entered into mid-contract term negotiations to reduce expenses due to budget concerns. On June 7, 2012, the District and the Association entered into a tentative addendum to the CBA which modified several terms for the 2012-13 school year. The Association permitted the District to reduce step movement and tuition reimbursement and agreed to additional insurance contributions. The Association also agreed to the elimination of the Dental Hygiene Program in exchange for the District's agreement that there would be no other program cuts for the 2012-2013 school year. The tentative agreement provided as follows:

There will be no program cuts. Some positions may be eliminated in certain programs primarily through attrition. The exception is that the dental hygiene program will be eliminated at the start of the 2012-2013 school contract year. If any work done by the dental hygienist in the past is performed by other parties, the Association will take appropriate action.

(N.T. 24-25, 52, 153, Association Exhibit 9).

The facts of this case are summarized as follows. The Association is the exclusive representative for all full-time and regular part-time professional employees of the District. The District and the Association are parties to a CBA for the 2009-2010 through the 2012-2013 school years.

Through the end of the 2011-2012 school year, the District employed a registered, certified dental hygienist to be responsible for a program approved by the Pennsylvania

¹ Act of March 10, 1949, P.L. 30, art. I, as amended, 24 P.S. §§ 1-101- 27-2702.

² The Hearing Examiner also concluded that the District violated Section 1201(a) (1) and (5) of PERA when it transferred the supplemental fluoride program duties of the dental hygienist to non-bargaining unit, nonprofessional and management level employees. No exceptions were filed to the Hearing Examiner's decision regarding the transfer of the duties related to the supplemental fluoride program. The District filed an Affidavit with the Board on July 7, 2014, stating that it had complied with the relief directed in the Hearing Examiner's PDO.

Department of Health providing dental services to students as mandated by the Public School Code. The dental hygienist position has been included in the professional bargaining unit since 1973. Deanna Harrison has held the position of dental hygienist since 2003.

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On June 13, 2012, the District notified Ms. Harrison that it was intending to suspend her from employment effective August 26, 2012, "due to the curtailment of the Dental Hygiene Program..."

Ms. Harrison had four main areas of responsibility as the dental hygienist, which included performing dental screenings on individual students in Kindergarten, third and sixth grades who did not receive dental examinations by their family dentist; coordinating and implementing a supplemental fluoride program for students in the two elementary schools in municipalities without fluoridated water; providing supplemental dental health education to students and maintaining accurate dental records in students' files. In addition, Ms. Harrison performed various other duties as part of the Dental Hygiene Program including making referrals and arranging for follow-up treatment for students following their dental screenings, arranging for the mobile dentist program to come to the District to serve students in grades K-8 and facilitating the District's participation in the Children's Dental Health Month Poster Contest.

The overwhelming amount of Ms. Harrison's time was taken up by dental screenings, the supplemental fluoride program and the paperwork and follow-up associated with those duties. Seventy percent of Ms. Harrison's total work time was spent organizing, scheduling, performing and following up on student dental screenings. Ms. Harrison estimated that the supplemental fluoride program accounted for 15% of her time.

On July 9, 2012, the District and the Association signed an addendum to the CBA which included, among other things, the elimination of the Dental Hygiene Program. The addendum stated, in relevant part, as follows:

There will be no program cuts for the 2012-2013 year. Some positions in particular programs may be eliminated primarily through attrition. The exception is that the dental hygiene program will be eliminated at the start of the 2012-2013 school contract year.

On October 11, 2012, the District's Board of Directors approved contracts with three local dentists to perform dental examinations in accordance with the Public School Code in the three elementary attendance areas of the District for students in Kindergarten, third and sixth grades.³ On November 29, 2012, the District also

³ The Board notes that Finding of Fact 17 contains a typographical error mistakenly stating that the local dentists were to perform dental examinations for students in Kindergarten, third and seventh grades. The testimony cited by the Hearing Examiner, and the record as a whole, indicates that the local dentists were to perform dental examinations for students in Kindergarten, third and sixth grades. Thus, Finding of Fact 17 is

reconstituted its supplemental fluoride program under the direction of Curriculum Director Andy Wheeling who then delegated responsibility for portions of the program to building principals, secretaries and aides. These positions are not in the Association's bargaining unit. The numerous recordkeeping responsibilities involved in connection with both the student dental screenings and the supplemental fluoride program were delegated to the building principals who directed the building aides and secretaries to perform much of this work.

The Association filed its Charge of Unfair Practices on December 24, 2012, alleging that the District violated Section 1201(a)(1) and (5) of PERA by transferring the duties of the dental hygienist outside of the bargaining unit. After a continuance, a hearing was held before the Board's Hearing Examiner on August 19, 2013, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the parties' addendum eliminating the Dental Hygiene Program, along with the requirement under the Public School Code that the District furnish dental examinations to its students where it does not conduct a dental hygiene program, 24 P.S. § 14-1403, provided a sound arguable basis for the District's elimination of the Dental Hygiene Program and reassignment of the dental screenings and related recordkeeping duties outside the bargaining unit. However, the Hearing Examiner further concluded that the District violated Section 1201(a)(1) and (5) of PERA when it transferred the supplemental fluoride program duties of the dental hygienist to nonprofessional and management level employees. No exceptions were filed to the Hearing Examiner's finding of a violation of Section 1201(a)(1) and (5) of PERA. Rather, the Association's exceptions solely concern the dismissal of the Charge regarding the District's transfer of the dental screening duties and related recordkeeping outside of the bargaining unit.

Initially, the Association does not challenge any of the Hearing Examiner's Findings of Fact (FF) in its exceptions and, therefore, the Hearing Examiner's findings are conclusive. **FOP Lodge #5 v. City of Philadelphia**, 34 PPER 22 n.3 (Final Order, 2003). However, the Board finds it necessary to amend FF 8 to more accurately reflect the evidence of record indicating that the Association agreed to the elimination of the Dental Hygiene Program in exchange for the District's agreement that there would be no other program cuts for the 2012-2013 school year. Accordingly, we have amended FF 8 as set forth above.

In its exceptions, the Association alleges that the Hearing Examiner erred in concluding that the District did not transfer the dental screening duties of the dental hygienist outside of the bargaining unit. However, the Hearing Examiner acknowledged that the District hired dentists to perform dental examinations, but concluded that the parties' addendum to the CBA provided the District with a sound arguable basis to eliminate the Dental Hygiene Program and to use local dentists to perform dental examinations required by the Public School Code. Therefore, this exception is dismissed.

The Association further alleges that the District is not contractually privileged to transfer dental screening duties to the local dentists when the District has not completely and permanently ceased providing dental services. A public employer commits an unfair practice when it transfers any bargaining unit work outside of the bargaining unit without first bargaining with the employee representative. **City of Harrisburg v. PLRB**, 605 A.2d 440 (Pa. Cmwlth. 1992). In establishing an unfair practice for the removal of bargaining unit work, an employee representative has the burden of proving that the employer unilaterally transferred or assigned work exclusively performed by the bargaining unit outside of the bargaining unit. **City of Allentown v. PLRB**, 851 A.2d 988 (Pa. Cmwlth. 2004). However, a refusal to bargain charge will be dismissed if the employer establishes that it had a sound arguable basis in claiming a contractual privilege for its action. **Fraternal Order of Transit Police v. SEPTA**, 35 PPER 73 (Final

hereby amended to reflect that the local dentists were to perform dental examinations for students in Kindergarten, third and sixth grades.

Order, 2004). Thus, if the complainant establishes action by the employer and the employer claims a contractual right to take such action, the evidence required to establish a contractual privilege defense is the contract or other bargained for agreement and no further evidence is required.

The issue the Board must determine is whether the parties bargained over the matter in dispute. The July 9, 2012 addendum to the CBA evidences that the Association agreed to the elimination of the Dental Hygiene Program in exchange for the District's agreement that no other program cuts would occur for the 2012-2013 school year. The Association asserts that the District was required to bargain with the Association over the diversion of the dental hygienist's duties, not merely the elimination of the Dental Hygiene Program. However, the Association was aware that the elimination of the Dental Hygiene Program did not nullify the requirement under Section 14-1403 of the Public School Code that the District provide dental examinations to its students. Section 14-1403 states as follows:

(a) All children of school age, in the Commonwealth (i) upon original entry into the school, (ii) while in the third grade, and (iii) while in the seventh grade, **shall** be given a dental examination by a school dentist: Provided, however, That this requirement shall not apply to those school districts or joint school boards which have instituted a program of dental hygiene services as provided in subsection (b) of this section.

(b) Any school district or joint school board **may** institute a program of dental hygiene services for children of school age, which program shall be approved by the Secretary of Health, and for that purpose may employ dental hygienists.

(Emphasis added). Further, the performance of the recordkeeping duties by nonprofessional employees does not violate the District's duty to bargain under Section 1201(a)(1) and (5) of PERA because those duties are incidental to the District's responsibility to provide dental services under the Public School Code. **See Shaler Area Education Association, PSEA/NEA v. Shaler Area School District**, 45 PPER 83 (Proposed Decision and Order, 2014), **aff'd**, ___ PPER ___ (Final Order, 2014). Because the District is required by the Public School Code to provide dental services through either a dentist or an approved dental hygiene program, the Hearing Examiner properly concluded that the parties' addendum agreeing to the elimination of the Dental Hygiene Program provided the District with a sound arguable basis for its actions.

The Association alleges that it reserved the right to challenge any transfer of the dental hygienist's duties to non-bargaining unit employees in the tentative agreement. However, that language is not present in the addendum to the parties' CBA. Further, it is contradictory for the Association to agree to the elimination of the Dental Hygiene Program and also assert a right to contest the District's use of dentists to perform examinations where Section 14-1403 of the Public School Code requires the District to provide such examinations in lieu of a dental hygiene program.⁴

The Association asserts that the Hearing Examiner should have reviewed the duties of the dental hygienist position as a whole instead of artificially dividing the dental hygienist position into component parts (dental screenings versus supplemental fluoride program). Because Section 14-1403 of the Public School Code requires the District to provide dental services, whereas the District is not statutorily required to have a supplemental fluoride program, it was necessary for the Hearing Examiner to review the duties of the dental hygienist individually. Accordingly, the Hearing Examiner properly concluded that the District did not violate Section 1201(a)(1) and (5) of PERA.

⁴ The Association also alleges that the District is failing to comply with the provisions in the Public School Code concerning the manner in which dental examinations are to be performed by dentists. The Board does not have jurisdiction to remedy alleged violations of the Public School Code. Rather, the Pennsylvania Department of Education would have jurisdiction to remedy any failure by the District to comply with those provisions.

The Association additionally asserts that the remedy ordered by the Hearing Examiner is insufficient because it fails to reinstate Ms. Harrison to her previous position with full back pay and benefits, citing **Neshannock Education Support Professionals, PSEA/NEA v. Neshannock Township School District**, 44 PPER 50 (Proposed Decision and Order, 2012), **aff'd**, ___ PPER ___ (Final Order, 2013). It is within the Board's discretion to determine the appropriate remedy in an unfair practice case. **Mid Valley Education Association v. Mid Valley School District**, 25 PPER ¶ 25138 (Final Order, 1994). The Board's authority to remedy unfair practices is remedial in nature, and not punitive. **Uniontown Area School District v. PLRB**, 747 A.2d 1271 (Pa. Cmwlth. 2000).

The Hearing Examiner ordered the District to, among other things, reinstate the dental hygienist's fluoride distribution work and recordkeeping for that work to the bargaining unit and to pay Ms. Harrison the amount of wages and benefits she would have earned had the supplemental fluoride program and related recordkeeping duties not been transferred outside the bargaining unit. The Board finds the remedy in this case to be remedial and in furtherance of the purposes and policies of PERA.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 Penncrest Education Association, PSEA/NEA are hereby dismissed, and the June 16, 2014 Proposed Decision and Order be and the same is hereby 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 sixteenth day of December, 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.