

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SHALER AREA EDUCATION :
ASSOCIATION, PSEA/NEA :
 : CASE NO. PERA-C-10-408-W
v. :
 :
SHALER AREA SCHOOL DISTRICT :

FINAL ORDER

The Shaler Area Education Association, PSEA/NEA (Association) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on March 11, 2014 to a Proposed Decision and Order (PDO) issued on February 18, 2014. The PDO dismissed the Association's Charge of Unfair Practices alleging that the Shaler Area School District (District) violated its bargaining obligation under Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA). The District filed a timely response and brief in opposition to the exceptions on March 27, 2014. After a thorough review of the exceptions and all matters of record, the Board makes the following

AMENDED AND ADDITIONAL FINDINGS OF FACT

11. District social workers perform group therapy services. The District refers individual therapy services to outside facilitators. The duties performed by Mercy employes at the District that overlap with the duties of the social workers are incidental to the Mercy employes' role as individual therapists. (N.T. 24, 102-103).
41. Neither Glade Run nor Mercy act as the District's liaison or as a representative of the District. (N.T. 94, 98).
42. Mercy employes contribute to the Pupil Personnel Services team concerning one of their clients when requested. (N.T. 95).
43. Mercy assists District social workers in facilitating development of Chapter 15 (504) service agreements for their clients with disabilities. Social workers develop these plans for students utilizing the services of Glade Run. (N.T. 94, 95).
44. District Social workers are responsible for coordinating alternative education placements and reentry into the District. Neither Mercy nor Glade Run performs these duties. (N.T. 98).
45. While Glade Run and Mercy employes have access to copies of the IEPs for their clients, District social workers secure and disseminate the District's pupil records in accordance with District policy and applicable law. (N.T. 100-101).
46. As mandated reporters, Glade Run and Mercy employes also report suspected child abuse. (N.T. 81).

DISCUSSION

The Association excepts to Hearing Examiner Findings of Fact 11 and 40. Finding of Fact 11 in the PDO states that District social workers do not perform therapy services. This Finding of Fact has been amended to clarify that while District social workers do not perform individual therapy, they do, in fact, provide group therapy services to students. Finding of Fact 40 in the PDO states that all of the duties performed by Glade Run Lutheran Services (Glade Run) that overlap the duties of the District social workers are incidental to Glade Run's performance of the non-bargaining unit work of providing individual therapy services to students. As discussed below, this Finding of Fact is supported by substantial evidence of record, and therefore is affirmed herein. In

addition to the Hearing Examiner's Findings of Fact showing where the duties of Mercy Behavioral Health (Mercy) and Glade Run overlap the duties of the District Social workers,¹ Findings of Fact 41 through 46 have been added to reflect duties of the District social workers that are **not** performed by either Mercy or Glade Run. Accordingly, the facts for purposes of addressing the exceptions to the PDO are summarized as follows.

The District's student assistance program is a program to which parents, students or teachers may refer a student having academic, emotional or behavioral difficulties. Also, any student may opt to participate in that program. (FF 15).

District social workers perform group therapy services available to all students, including those assigned to regular education, special education and emotional support. (FF 11 and 16). The position of social worker is in the bargaining unit represented by the Association. (FF 4 and 5).

The District's social workers assess the behavioral needs of students. They work with special education teachers and develop Individual Educational Plans (IEPs) and service claims for students and assist in developing 504 plans, which are plans for students with disabilities such as ADHD, diabetes, anxiety disorders or other mental health disorders. (FF 17). They also provide group therapy for emotional support students. Bargaining unit social workers do not and cannot provide individual therapy to students, and the Association does not claim that individual therapy for emotional support students is bargaining unit work. (FF 3).

If a mental health evaluation of a student shows that the student will benefit from individual therapy, the District's social worker offers the services of Mercy. The District is a licensed site for Mercy, which provides individual therapeutic services with licensed therapists for those students who are identified as requiring individual therapy or psychiatric services and qualify based on their insurance. (FF 9). If qualified, the student is assigned to one of the two Mercy therapists at the High School: April Redmond or Ann Giazsoni. (FF 10). All of the duties performed by Mercy employees that overlap with duties performed by the District social workers are an outgrowth of the individualized therapy. (FF 3).

On July 14, 2010, the District entered into a contract with Glade Run to provide individual therapy to emotional support students who do not have insurance covering receipt of services from Mercy. (FF 6 and 12). Lisa DeCarolis is a Glade Run employee who provides individual therapeutic services at the High School. (FF 13). Ms. DeCarolis has approximately 30-32 students assigned to her for individual therapy. As with the Mercy employees, all of the duties performed by Ms. DeCarolis are incidental to her responsibilities to provide individual therapy services to the students assigned to her. (FF 40).²

The bargaining unit social workers serve as the District's liaison or representative in dealing with families and outside agencies. Glade Run and Mercy employees do not act in this capacity for the District. (FF 41). District social workers facilitate development of Chapter 15 (504) service agreements for students with disabilities. While Mercy provides input for their clients, District social workers continue to develop these plans for students receiving individual therapy. (FF 17 and 43). District social workers are also responsible for coordinating alternative education placements and reentry into the District. Neither Mercy nor Glade Run employees perform these duties. (FF 44). While Glade Run and Mercy employees have access to copies of the IEPs for their clients, District social workers secure and disseminate the District's pupil records in accordance with District policy and applicable law. (FF 45).

District social workers function as members of the Pupil Personnel Services team to provide an interdisciplinary approach to the care of students with identified problems at

¹ FF 18, 19, 23, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, and 39.

² After contracting with Glade Run for an individual therapist at the High School, the District transferred one of the two District social workers who had been assigned to the High School to the Elementary School to fulfill a need there for a full-time social worker. (FF 8).

school or at home. Glade Run's role on the Pupil Personnel Services team is limited to its emotional support students in individual therapy and Mercy employees contribute to the Pupil Personnel Services team concerning one of their clients when requested. (FF 32 and 42). District social workers assist special education teachers in the development and implementation of behavior management plans to be effectuated both in and outside of school for emotional support students. Mercy and Glade Run employees assist special education teachers in the same manner with respect to their clients. (FF 33).

District social workers have contact with students' families, participate in parent education, and coordinate their efforts with outside providers and community resources including police, County Children, Youth and Family, Mental Health/Mental Retardation centers, the Office of Vocational Rehabilitation and hospitals. Glade Run and Mercy also coordinate their activity with County Children, Youth and Family, as well as hospitals, for the emotional support students who receive individual therapy. (FF 19). District social workers assist in referrals to child welfare in situations involving suspected child abuse, incorrigibility, truancy and unsafe or unfit living conditions. As mandated reporters, Glade Run and Mercy employees also report suspected child abuse. (FF 36 and 46). District social workers also provide support to foster children within the District when a referral is given for a specific problem. Glade Run and Mercy also provide support to foster children who are their clients for specific problems. (FF 35). District social workers provide crisis support to students, including the emotional support students, as part of their regular duties.³ Mercy and Glade Run employees perform crisis intervention if it involves a student under their care. (FF 18).

In addition to providing group therapy services available to the student body as a whole, District social workers maintain a regular work load of individual cases under their responsibility. (FF 37). Glade Run and Mercy employees also carry a regular workload of individual cases. Mercy's individual case load is limited to those students in need of individual therapy with qualifying insurance. Glade Run currently carries a case load of 30 - 32 students at the high school who are in need of individualized therapy but do not have qualifying insurance. (FF 31). All of the duties performed by Glade Run and Mercy that overlap the duties of District social workers are incidental to their responsibilities to provide individual therapy services to students. (FF 3 and 40).

Upon review of the record evidence, the Hearing Examiner, in reliance on **Plum Borough Educational Secretaries ESPA/PSEA v. Plum Borough School District**, 44 PPER 60 (Final Order, 2012), concluded as follows:

[T]he District has not engaged in unfair practices in violation of Section 1201(a)(1) and (5) of PERA. The work that is performed by [Glade Run], which is also performed by the bargaining unit, is work that was permissibly transferred to Glade Run because it is incidental to and in support of [its] performance of the non-unit work of providing individual therapy to emotional support students who did not possess qualifying insurance for Mercy. Also, the District's years of experience with Mercy has established that the work incidental to the provision of individual therapy services is not bargaining unit work because non-unit employees have been performing that work for many years.

(PDO at 7). The Association argues on exceptions that the Hearing Examiner erred by construing the Board's holding in **Plum Borough School District** too broadly in finding that the District had not unlawfully transferred bargaining unit work.

Plum Borough School District involved a unique set of facts. Plum Borough School District hired per diem substitutes to cover for employees on leave. If a per diem substitute was called and chose to work, district bargaining unit employees (the secretaries) would calculate the hours worked and issue pay checks to the per diem

³ Crisis support occurs when a therapist is called to a classroom to provide assistance for an out-of-control student.

substitutes. The district subsequently retained Kelley Services, which brought under its employ the roster of non-district employe per diem substitutes.⁴

Because per diem substitutes were never in the secretaries' bargaining unit, the employe representative of the secretaries could not, and did not, allege that the district's retaining of Kelley Services was an unfair practice. Rather, the charge of unfair practices filed by the employe representative in **Plum Borough School District** alleged that the district removed bargaining unit work related to timekeeping and payroll for per diem substitutes.

In the final order, the Board held that because the per diem substitutes, who were not district employes, were now employed by Kelley Services, the duties and obligations with regard to paying those employes for time worked fell to Kelly Services as the employer, and thus the district had not unlawfully removed these payroll duties from the bargaining unit. The Board recognized, however, that the timekeeping and payroll for those per diem substitutes who were still employed by the district, albeit on lay off status, remained the obligation of the district, and therefore could not be removed from the bargaining unit without prior negotiation with the employe representative.

Where an employer lawfully enters into a contract for performance of non-bargaining unit work, the question of whether there has been an ancillary unlawful removal of work from the bargaining unit is dependent on whether the alleged bargaining unit duties performed by the contractor are incidental, *i.e.* flow from, the services provided by the contractor. If the contractor's duties overlap duties that were previously performed by the bargaining unit, but are a component to performance of the lawfully contracted service, the Board's decision in **Plum Borough** indicates that the employer does not violate PERA by lawfully contracting for non-bargaining unit services. **Keystone Central Education Support Personnel Association v. Keystone Central School District**, 28 PPER ¶28184 (Proposed Decision and Order, 1997).

The duties performed by Glade Run that overlap the duties of the bargaining unit social workers were found by the Hearing Examiner to be incidental to the lawfully contracted services of providing individual therapy to students. On this record, the duties performed by Mercy and Glade Run associated with student IEPs would be a component of the service of providing individual therapy, as individual therapy must comply with a student's IEP. Further, precluding Mercy or Glade Run employes from intervening in a crisis involving one of their clients could be detrimental to the individual therapy provided to that student, such that the obligation to intervene flows from the individual therapy. With respect to certain other duties of the Glade Run employes, the Association failed to establish that any of those duties are not incidental to the contracted individual therapy services, and thus are negotiable.

The Hearing Examiner reasonably inferred from the evidence that "[a]ll of the duties performed by [Glade Run] are incidental to [the] responsibilities to provide individual therapy services to students without qualifying insurance for Mercy Behavioral Health." (FF 40). See **Bristol Borough v. PLRB**, 613 A.2d 165 (Pa Cmwlth. 1992) (*quoting PLRB v. Kaufmann Department Stores, Inc.*, 345 Pa. 398, 400, 29 A.2d 90, 92 (1942), that "it is the function of the board not only to appraise conflicting evidence, to determine the credibility of witnesses, and to resolve primary issue of fact, but also to draw inferences from the established facts and circumstances"). There are no compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations. See **International Association of Fire Fighters, Local 955 v. City of Uniontown**, 41 PPER 113 (Final Order, 2010). The Hearing Examiner's finding of fact is supported by substantial, credible evidence of record. See **Kaufman Department Stores**, *supra*. (holding that substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

The Association's own witness, bargaining unit social worker Leann Guido, testified unequivocally, on direct and on cross-examination, that just as the duties performed by

⁴ Although most of the per diem substitutes were not district employes, a few of the substitutes were laid off employes of the district.

Mercy are an outgrowth of the individual therapy provided, the duties performed by Glade Run that the Association alleges have been unlawfully subcontracted, were incidental to, and flowed from, the individualized therapeutic services that Glade Run employees provided. Indeed, Ms. Guido testified as follows:

Q. And are all of the collateral services that you identified in response to Cross Examination, is it all provided as an outgrowth of that therapy?

A. You mean the things that Mercy does?

Q. Correct, that you also do?

A. That I also do. Is that a result of them being the therapist?

Q. Yes.

A. That's correct.

* * *

Q. You indicated that [Glade Run] performed certain duties that were similar to your job duties; correct?

A. Correct.

Q. And my question was, with respect to the job duties that [Glade Run] performs outside of therapy services ..., are the services ... incidental to [Glade Run's] therapeutic services?

A. Maybe I don't understand what you mean by incidental.

Q. Does it flow from?

A. Yes, that's what I assume, so yes.

(N.T. 87, 110-111).

Thus, the Hearing Examiner did not err in finding that the duties allegedly removed from the bargaining unit are incidental to Glade Run's performance of the lawfully contracted service of providing individual therapy to students. As such, the Hearing Examiner correctly held, in accordance with **Plum Borough School District**, that the District cannot be found to have violated Section 1201(a)(1) and (5) of PERA.

After a thorough review of the exceptions and all matters of record, the Association's exception to Finding of Fact 11 is sustained and that finding has been amended accordingly. However, based on the record evidence, the Hearing Examiner did not err in concluding that the Association failed to establish that the District violated Section 1201(a)(1) and (5) of PERA. Therefore, the Association's remaining exceptions shall be dismissed, and the Hearing Examiner's PDO dismissing the Charge of Unfair Practices against the District shall be made 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 Shaler Area Education Association are hereby sustained in part, and dismissed in part, and the February 18, 2014 Proposed Decision and Order, be and hereby is made absolute and final as amended herein.

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 twentieth day of May, 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.