

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TRANSPORT WORKERS UNION OF AMERICA, LOCAL 282
v.
BRISTOL TOWNSHIP SCHOOL DISTRICT

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: Case No. PERA-C-12-341-E
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FINAL ORDER

The Transport Workers Union of America, Local 282 (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on April 20, 2015, to a Proposed Decision and Order (PDO) issued on March 31, 2015. In the PDO, the Hearing Examiner concluded that Bristol Township School District (District) was not a joint employer of personal care assistants (PCAs), and therefore dismissed the Union's charge alleging violations of Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by the District. The District filed a timely response to the exceptions on May 7, 2015. After a thorough review of the record, the Board makes the following:

AMENDED FINDINGS OF FACT

7. On September 28, 2011, the Union filed a petition to accrete the PCAs into the existing unit of custodians, maintenance and warehouse workers of the District. Despite the Secretary of the Board first dismissing the petition, the matter eventually proceeded to a mail ballot election that concluded on April 24, 2012, in which the Union received a majority of the valid ballots cast. A Board certification of the Union as the exclusive representative of the PCAs was issued on May 2, 2012 in Case No. PERA-R-11-325-E.

15. On May 2, 2012, the Board certified the Union as the exclusive representative of the PCAs and accreted them into the existing nonprofessional unit. (N.T. 11, Case No PERA-R-11-325-E).

DISCUSSION

The Hearing Examiner's Findings of Fact, as amended herein, are summarized as follows. For years, the District had employed PCAs to provide one-on-one assistance during the school day to students with disabilities who receive an Individualized Education Plan (IEP). The assistance is generally of a non-instructional nature, including monitoring behavior and assisting with the use of medical equipment or devices where necessary. The District treated the PCAs as hourly employees who were paid in the range of \$9.00 to \$12.00 per hour. The District did not pay the PCAs fringe benefits such as health care coverage or short term disability insurance, paid vacation or other paid time off. The District enrolled the PCAs in the Public School Employees Retirement System (PSERS) if they worked over five hundred (500) hours per year. The PSERS contributions were automatically deducted from the employees' paychecks. At the end of each school year, the PCAs received letters of termination. The terminated PCAs did not receive pay or pension contributions for July and August, and their pay and pension would recommence only if they were hired for the following school year.¹

On September 28, 2011, the Union filed a petition, docketed at Case No. PERA-R-11-325-E, to accrete the PCAs into the existing unit of custodians, maintenance and warehouse workers of the District. By letter dated October 7, 2011, the Secretary of the Board dismissed the petition. The Union filed exceptions on October 31, 2011, and by order dated December 20, 2011, the Board remanded the petition for a hearing. In March 2012, prior to the hearing, the parties stipulated to the facts necessary to hold an election and an Order and Notice of Election was issued by the Board Representative on March 27, 2012.

¹ PCAs working in the Extended School Year program (ESY) continued to be paid and fully controlled by the District and received pension contributions until the end of the ESY in July.

On March 28, 2012, the District entered into an agreement with Substitute Teacher Service (STS), a private company, to provide PCAs for the District. On April 10, 2012, the District's Board of Directors discussed the STS agreement at a public meeting. On April 16, 2012, the Board of Directors publicly voted to approve the agreement and the Board Secretary executed the written agreement with STS on that date.

The Union's petition to accrete the PCAs into the bargaining unit proceeded to a mail ballot election. The ballots were opened and canvassed by the Board's Election Officer on April 24, 2012. A majority of the valid votes cast by the PCAs were in favor of representation by the Union.

On April 27, 2012, the District's Superintendent, Dr. Samuel Lee, sent a letter to all of the PCAs stating that the District contracted its PCA services through STS for the next school year. Dr. Lee's letter invited the PCAs to attend an information session with STS on May 3, 2012.

On May 2, 2012, the Board certified the Union as the exclusive representative of the PCAs and accreted them into the existing nonprofessional unit. The Board's certification at Case No. PERA-R-11-325-E identifies the Union as the exclusive representative of the District's full-time and regular part-time personal care assistants, maintenance employes, custodial employes and warehouse workers. Following the Board's certification of the Union as the representative of the PCAs, the District and the Union did not engage in bargaining over their wages, hours and working conditions.

At the May 3, 2012 information session, STS explained to the PCAs how its payroll would work and what benefits would be available to them as STS employes. The District's agreement with STS states, "[t]he everyday and substitute PCAs further shall not obtain the status of a participant in any pension program, including but not limited to the Public School Employees Retirement Fund [sic]."²

All PCAs who wished to work with STS had to fill out an employment application with STS. STS's hiring policies require FBI and child abuse clearances before it hires an employe. The District does not have, nor does it exercise, any discretion to decide the hiring of any PCAs based on clearances. STS hired about 54 PCAs who had been previously employed in that position by the District. The District did not participate in STS's hiring of the PCAs, and does not direct, control or screen the persons whom STS decides to hire to perform PCA work within the District. The District's personnel department does not provide any personnel function for the PCAs employed by STS and does not have any role in hiring or terminating their employment.

The District's contract with STS states that STS is to provide certain PCA services at the District's request. The type of services that are needed and the hours during which the students need assistance vary, depending on a child's need. Although the District's contract with STS provides that "[o]vertime will not be accumulated or paid unless approved in writing by a District official or District supervising authority[,]" the District has no involvement in how STS allocates its employes' work hours. In cases where PCA services may be needed for additional hours beyond the six or six and three-quarter hour school day, those additional hours are written directly into the student's IEP, and would be documented in the District's Request Form sent to STS.

STS maintains an independent office located in the District's administration building. That office is staffed by an STS employe who supervises the STS employes working within the District. Among other things, the on-site supervisor trains PCAs in how to fill out and deal with changes to Access³ logs, and addresses any errors or discrepancies in the Access logs. The on-site supervisor manages PCAs' work schedules and time off. If a PCA is leaving early, arriving late, or calls off, the employe is required

² The seven (7) PCAs who were vested in PSERS through the District had their pension contributions frozen and were not permitted to make further contributions as employes of STS.

³ Access is the program that the state government uses to reimburse providers for children with disabilities.

to contact the on-site supervisor, not the District. In the words of Kevin Kerns, Director of Operations for STS, the on-site supervisor's "job is to deal with our [STS] employees with regards to STS-related issues. If they are having a problem with their work assignments, all those types of things go through the site supervisor."

Based on the Findings of Fact, the Hearing Examiner determined that the District was not a joint employer with STS, and therefore did not have an obligation to bargain with the Union over wage, hours and working conditions for the PCAs employed by STS. Accordingly, the Hearing Examiner concluded that the District did not violate Section 1201(a)(1) and (5) of PERA as alleged by the Union.

On exceptions, the Union asserts that the Hearing Examiner erred in finding that the District was not a joint employer with STS. Specifically, the Union challenges Findings of Fact Nos. 24, 25 and 35, wherein the Hearing Examiner found that the District does not participate in the hiring of PCAs, does not direct, screen or control the persons whom STS assigns to perform PCA work, and has no involvement in how STS allocates the PCAs' work hours. The Union also challenges Findings of Fact Nos. 29, 32 and 33, in which the Hearing Examiner found that an STS employe supervises the PCAs, that the STS on-site supervisor addresses errors found in a PCA's Access log, and that the STS on-site supervisor manages the PCAs' work schedules and leave. The Union asserts that it is the District that controls the PCAs' hours of work and determines whether a PCA will continue to work with a student or in the District, and that the District teachers supervise the PCAs working in their classroom.

Upon review of the record, and the Hearing Examiner's cited references, we find that there is substantial evidence supporting Findings of Fact Nos. 24, 25, 29, 32, 33 and 35. Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." **PLRB v. Kaufman Department Stores**, 345 Pa. 398, 29 A.2d 90 (1942). The Board will not disturb the Hearing Examiner's Findings of Fact that are supported by substantial evidence in the record. **Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources**, 45 PPER 1 (Final Order, 2013); **Shaler Area Education Association, PSEA/NEA v. Shaler Area School District**, 46 PPER 51 (Final Order, 2014).

On the record, Mr. Kerns testified that the site supervisor for the PCAs is an STS employe. (N.T. 29). He also testified that if a PCA is going to be off work due to illness, or must arrive late or leave work early, the PCA contacts the STS site supervisor for approval. (N.T. 32 and 96). Mr. Kerns further testified that if the District's Access coordinator notices errors or discrepancies in the Access logs, those errors are brought to the attention of the STS site supervisor who then addresses the issue with the PCA. (N.T. 101). Mr. Kerns unequivocally stated that the District plays no role in the recruiting or hiring of PCAs. (N.T. 86). District Superintendent Dr. Lee corroborated that testimony, stating that STS does not seek the District's approval before assigning a PCA, and that the District does not screen potential PCAs before they are hired by STS. (N.T. 269). The District's Supervisor of Special Education, JoAnn Allison, also testified that the only role the District has in a PCA's scheduling and overtime is related solely to the student's IEP. (N.T. 167 and 169). As reflected in the cited testimony, there is ample evidence supporting the Hearing Examiner's Findings of Fact Nos. 24, 25, 29, 32 and 33. As such, the Union's exceptions thereto are dismissed.

Before the Hearing Examiner and on exceptions, the Union's sole claim is that the District is a joint employer and therefore must bargain wage, hours and working conditions for the PCAs employed by STS.⁴ However, the testimony and evidence proffered by the Union on exceptions makes evident that during the 2011-2012 school year and thereafter, the District's involvement with the PCAs is tangentially limited to overtime or classroom direction that is directly related to the fulfillment of a student's IEP. The District's incidental involvement with STS and the PCAs in fulfilling a student's IEP is insufficient to render the District a joint employer with STS, where the record

⁴ The Union has not alleged that the District's contract with STS was entered into because of union animus in violation of Section 1201(a)(3) of PERA, or that the District refused to bargain over the subcontracting of PCAs or removal of bargaining unit work in violation of Section 1201(a)(5) of PERA.

overwhelmingly establishes that the District has no direct control over the negotiable matters of the PCAs' wages, hours or working conditions.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the District was not a joint employer of the PCAs with STS, and thus the District did not violate its bargaining obligation under Section 1201(a)(1) and (5) of PERA as alleged by the Union. Accordingly, the Union's exceptions to the PDO are dismissed and the March 31, 2015 PDO 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 Transport Workers Union of America, Local 282 are hereby dismissed, and the March 31, 2015 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 twenty-first day of July, 2015. 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.