COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OIL CITY EDUCATION SUPPORT PROFESSIONALS, PSEA/NEA	:	
v.	:	Case No. PERA-C-17-362-W
OIL CITY AREA SCHOOL DISTRICT	:	

FINAL ORDER

The Oil City Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on November 27, 2018, from a Proposed Decision and Order (PDO) issued on November 7, 2018, in which the Hearing Examiner found that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA), by transferring bargaining unit cafeteria work to Nutrition, Inc. The Oil City Education Support Professionals, PSEA/NEA (Union) filed a response to the exceptions on December 19, 2018.

A hearing was held on May 23, 2018, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and are summarized as follows.

The Union is the exclusive bargaining agent for a unit of nonprofessional employes at the District. The Union and the District are parties to a collective bargaining agreement covering the nonprofessional employes, which is effective from July 1, 2015 through June 30, 2020. (FF 3 and 4).

The bargaining unit members have performed cafeteria work at the District for the past 25 years. The cafeteria work consists of monitoring duties, such as watching the students, lining students up for their lunches, helping students open condiment packets and other food items, making sure the students are sitting down and being safe, and serving as a cashier. (FF 5). The unit shared some of the cafeteria work with the District's teachers, who are in a different bargaining unit, until the beginning of the 2017-2018 school year. (FF 7). At the start of the 2017-2018 school year, the District began using employes of Nutrition, Inc. to perform cafeteria work with the bargaining unit employes. (FF 8).

Based on the parties' stipulations, the Hearing Examiner noted that the bargaining unit members have not performed the cafeteria work exclusively in the District, and that in the years prior to the 2017-2018 school year, the number of bargaining unit members performing the cafeteria work, and the proportion of the cafeteria work performed by the bargaining unit members, fluctuated from year to year. Although the Union only presented evidence regarding the 2016-2017 and 2017-2018 school year lunch room assignments, the Hearing Examiner stated that Union President Robin Echenoz testified that the hours spent by unit

members performing the cafeteria work did not vary widely over the years. Accordingly, the Hearing Examiner determined that the cafeteria work for the 2017-2018 school year amounted to a deviation from the past-practice for bargaining unit members, and concluded that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally removing bargaining unit work and significantly altering the extent to which unit members and non-unit personnel perform the cafeteria work. In the November 7, 2018 PDO, the Hearing Examiner directed the District to *inter alia,* "rescind the contract with Nutrition, Inc. to the extent it involves the nonmanagerial cafeteria work at the District's Middle School and three Elementary Schools, restore the status quo ante, and make whole any bargaining unit employes who have been adversely affected due to the District's unfair practices…."

On exceptions, the District argues that the Union failed to establish a change in the extent to which bargaining unit employes performed the lunch room monitoring duties. The District asserts that the parties stipulated that the assignment of bargaining unit members or other persons to the lunch room occurred on an annual basis and fluctuated from year to year. The District argues that the Union's evidence of a comparison of the lunch room monitoring duties between the 2016-2017 school year and the 2017-2018 school year was not sufficient to sustain the Union's burden of establishing a change in the extent to which bargaining unit members shared in the lunch room monitoring duties. Therefore, the District argues on exceptions that the Union did not sustain its evidentiary burden of proving that the District removed bargaining unit work or committed an unfair practice.

It is widely accepted that a public employer commits an unfair practice by transferring any amount of bargaining unit work to non-members of the bargaining unit without fulfilling its bargaining obligation with the employe representative. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). To establish that there has been an unlawful removal of bargaining unit work, the employe representative has the burden of proving that the employer unilaterally transferred or assigned to non-bargaining unit members, work that was exclusively performed by bargaining unit employes. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); Lake Lehman Educational Support Personnel Association v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006). The employe representative may sustain its burden of proof in one of two ways. The employe representative may show that the bargaining unit exclusively performed the duties at issue, such that assignment of those duties to non-members of the bargaining unit is a change in the assignment of the work. *See* City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). Alternatively, where the duties were shared by bargaining unit and non-unit employes, the employe representative can satisfy its burden of proof by establishing that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13, *supra.;* Lake Lehman School District, *supra.* As noted by the Commonwealth Court, it is logical to place the burden on the employe representative to demonstrate that it exclusively performs an identifiable quantity of the work at issue, because where there is a past practice of the work being shared by both bargaining unit and non-bargaining unit members, the employe representative has tacitly agreed to those shared work conditions.

AFSCME, Council 13, *supra.* Thus, to sustain its burden of proof, the employe representative must offer substantial evidence from which the Board may find that the bargaining unit members have developed an expectation in an identifiable proportion or amount of the shared work.

A basic concept derived from the Board case law regarding removal of bargaining unit work is that bargaining unit employes must, under the circumstances of the case, 'develop an expectation' of a level of shared work, which requires some showing a repeated assignment of a certain amount of the duties over time. Indeed, even in cases where the evidence of shared work duties took place within a one year period, there were several instances of repeat assignments of those duties to bargaining unit employes. For example, in Wyoming Valley West Education Support Personnel Association v. Wyoming Valley West School District, 32 PPER ¶32008 (Final Order, 2000), bargaining unit employes developed an expectation in cleaning the stadium because on thirty occasions during the preceding year, bargaining unit employes were assigned to work alongside volunteers when the stadium needed cleaned. In Palmerton Area Education Support Personnel Association v. Palmerton Area School District, 41 PPER 96 (Proposed Decision and Order, 2010), there was sufficient evidence of an expectation in taking inventory of the freezer where the inventory was conducted once a month for nine months out of the year, and three bargaining unit employes were consistently assigned to assist with each inventory. *See also*, Commonwealth of Pennsylvania (State Police), 27 PPER ¶27159 (Final Order, 1996) (in finding no unfair practice, the Board noted that the employer had filled bargaining unit vacancies at the communications desk with civilian employes on various occasions for at least the preceding year); and AFSCME, District Council 83 v. Center Township, 50 PPER 14 (Final Order, 2018) (the record in that case established that for the previous ten years, the township had at least four road crew employes who shared the road cleanup and maintenance duties with the township supervisors).

No similar repeated assignments, or developed expectation, of a particular amount of bargaining unit lunch monitoring duties may be discerned from this record. Here, the parties stipulated that in the years prior to the 2017-2018 school year, the number of bargaining unit members performing the lunch room duties in question, and the proportion of the work performed by bargaining unit members fluctuated from year to year. (FF 9 and 10; Joint Exhibit 1). Accordingly, under the parties' stipulations, although bargaining unit employes worked in the lunchroom on a daily basis, their assignment to lunch room duties occurred annually. This factual situation, as stipulated to by the parties, is unlike the Board's prior cases, where the bargaining unit members' assignment to the duties occurred, not annually, but each time the work at issue was to be performed. Wyoming Valley West School District, *supra.;* Palmerton Area School District, *supra.*

Additionally, while Union President Robin Echenoz has worked for the District for twenty-five years, Echenoz did not testify as to the number of bargaining unit employes assigned to the lunch room, or proportion of work they performed, for years prior to the 2016-2017 school year. (N.T. 20-24). Indeed, other than the 2016-2017 and 2017-2018 school years, there is no evidence or testimony regarding the number of bargaining unit employes assigned to the lunchroom, or the proportion of work performed by them on an annual basis. Upon a

thorough review of the entire record, there is no evidence from which the Board is able to discern any repeated trend or expectation in the number of bargaining unit employes, or proportion of work that they are annually assigned in the lunchroom.

Based on the parties' stipulations and the testimony presented at the hearing, the Board is compelled to find that the Union failed to establish a developed expectation in an amount or proportion of the lunch room duties to be assigned to the bargaining unit employes on an annual basis. Accordingly, after a thorough and exhaustive review of all matters of record, the Union has failed to sustain its burden of proving a violation of Section 1201(a)(1) and (5) of PERA, and the District's exceptions to the PDO must be sustained.

CONCLUSIONS

CONCLUSIONS 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside and the following additional conclusion is made:

5. The District has not committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

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 the Oil City Area School District are hereby sustained, and the Order on pages 6-7 of the November 7, 2018 PDO is vacated. It is further ordered that the Charge of Unfair Practices in the above captioned case be and hereby is dismissed, and the Complaint issued thereon is rescinded.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this nineteenth day of March, 2019. 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.

CHAIRMAN JAMES M. DARBY DISSENTS. I would affirm the decision of the Hearing Examiner.