COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATION ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-19-202-E
	:	
ABINGTON HEIGHTS SCHOOL DISTRICT	:	

FINAL ORDER

Abington Heights School District (District) filed timely[1] exceptions with the Pennsylvania Labor Relations Board (Board) on October 26, 2020, challenging a Proposed Decision and Order (PDO) issued on October 5, 2020. The District excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by transferring the bargaining unit work of instructing high school students to employes of Johnson College. Pursuant to an extension granted by the Secretary of the Board, the District filed a brief in support of exceptions on November 16, 2020. Abington Heights Education Association (Association) filed a response to the exceptions and brief on December 4, 2020.

The facts of this case are summarized as follows. The Association is the certified bargaining representative of a unit of professional employes including teachers. (FF 3). For at least 37 years, the teachers have exclusively performed work related to the education, instruction, and teaching of the District's students. This work includes the presentation of academic material, impartment of knowledge and concepts, evaluation of academic progress, assessment and testing of student performance or grading, counseling, and providing any other guidance, supervision, or support necessary to ensure academic success. (FF 4). The courses that appear in the District's High School Curriculum Planning Guide and in the District's high school class schedules have always been taught exclusively by the bargaining unit teachers. (FF 6).

For decades, some of the District's high school students have taken classes at the Lackawanna County Career Technology Center (CTC). The CTC is recognized by the Commonwealth as offering a high school program and it receives students from numerous school districts including the District. (FF 9). The students who attend the CTC do so for three years in grades 10 through 12 and claim a major in a building trade. The CTC classes are for high school education only and are not used for credit toward postsecondary or collegiate education. (FF 10). The CTC does not offer any classes addressing the academic topics of English or Business Education. The students who attend the CTC must obtain their education in these academic areas at the District's high school from the bargaining unit teachers. (FF 11).

[1] The District's exceptions are timely because October 25, 2020, the twentieth day following issuance of the Secretary's decision, was a Sunday and is therefore excluded from computation of the twenty-day period for filing exceptions. 34 Pa. Code § 95.100(b).

In the past, the District offered dual enrollment courses where its students attended the University of Scranton, took college level courses, and received college credit. The dual enrollment program was offered pursuant to Act 46 of the Public School Code[2] on a "Concurrent Enrollment Agreement" between the District and the University of Scranton funded by a state grant. (FF 12). The students did not receive credit toward their high school graduation, and the dual enrollment courses did not replace the high school classes taught by the bargaining unit teachers. The students were required to take their full course load of high school instruction from classes taught by the bargaining unit teachers. The dual enrollment courses were taught outside the normal school day. (FF 13). However, as of February 2012, the state funding for the dual enrollment program was completely eliminated and it was uncertain whether the District would offer the same dual enrollment courses at the University of Scranton in the future. (FF 15).

For the past three years, the District had another dual enrollment program with Lackawanna College where high school students take classes and receive credit for high school and postsecondary education. The classes are taught by the bargaining unit teachers at the District's high school during the regular school day. (FF 16).

On May 15, 2019, Thomas Lavelle, the Association President, received an email from Superintendent Michael Mahon, requesting that Mr. Lavelle review a draft "Industry Fast Track Agreement" (Agreement) between the District and Johnson College and to communicate any concerns about the Agreement. (FF 18). The District's School Board was scheduled to approve the Agreement that same evening. (FF 19). Mr. Lavelle contacted Superintendent Mahon and stated that the Agreement was a removal of bargaining unit work. (FF 27). Despite the Association's concerns, Superintendent Mahon presented the Agreement to the School Board, which approved it. (FF 28).

Johnson College is a two year college that offers postsecondary or collegiate education to people who have graduated from high school. (FF 20). The Industry Fast Track Agreement, effective July 1, 2019 to June 30, 2022, states that Johnson College would offer its courses to the District's high school students. (FF 21, 26). The Agreement also provides that the District would award high school credit to students who successfully complete the Johnson College courses. The same courses are used for collegiate credit if the students attend Johnson College after high school. (FF 21).

The Agreement requires the students to be enrolled in the District's high school and complete Johnson College courses as a high school student. The Agreement also requires the students to make satisfactory progress toward fulfilling applicable secondary school graduation requirements by the high school. (FF 22). The Agreement lists 18 classes that Johnson College would provide to the District's high school students. Many of the classes are in vocational trades, such as construction, electricity, and pipefitting, while other classes are in core academic areas such as math and English. (FF 23). The classes listed in the Agreement address areas of instruction that are taught by the bargaining unit teachers at the high school, including math, English, and vocational technical trades. The Agreement provides that the

[2] 24 P.S. §§ 16-1601-B – 16-1615-B. A Concurrent Enrollment Program allows students to concurrently enroll in postsecondary courses and receive secondary and postsecondary credit for that course. 24 P.S. § 16-1602-B.

classes will be taught by the faculty and/or employes of Johnson College and held on the College campus. (FF 24, 25).

The District did not obtain grant money or funding in connection with the Agreement. Instead, the District pays Johnson College directly for the classes and has been given $35,000 from a local charitable foundation to help pay for the cost of the program. (FF 32). The District did not submit the Agreement to the Pennsylvania Department of Education for approval nor is there evidence that the Department of Education approved the Agreement. (FF 33).

Since July 1, 2019, eight high school students have taken classes at Johnson College pursuant to the Agreement. The classes are being taught by the faculty at Johnson College and appear on the students' high school report cards counting towards the students' high school education requirements. (FF 29). The District did not bargain with the Association over the use of Johnson College employes to teach high school classes. (FF 36).

The educational program with Johnson College serves a different student population than the educational program with the CTC. The students who attend the CTC do so for three years of high school (grades 10 to 12) for half days and claim a major in a building trade. The students who attend Johnson College do not attend the CTC and stay at the District's high school for full days until their senior year. The students then attend Johnson College during their senior year for half days. The students who attend either the CTC or Johnson College spend the other half of the day taking classes at the District's high school. (FF 30).

Since the implementation of the Agreement, the District has paid Johnson College to provide Business Education classes to the District's high school students, which is not one of the listed courses in the Agreement. Two bargaining unit high school teachers instruct in the area of Business Education and that course appears in the District's High School Curriculum Guide. (FF 35).

The Association filed its Charge of Unfair Practices on September 13, 2019, alleging that the District violated Section 1201(a)(1) and (5) of PERA by transferring the bargaining unit work of instructing certain high school courses to the employes of Johnson College. On October 1, 2019, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held before the Hearing Examiner on February 10, 2020. The hearing was held as scheduled, 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 District violated Section 1201(a)(1) and (5) of PERA when it unilaterally utilized Johnson College employes to teach certain high school classes for the 2019-2020 school year thereby removing that work from the bargaining unit teachers. By way of remedy, the Hearing Examiner ordered the District to return the work at issue to the bargaining unit, to rescind the Agreement with Johnson College, to restore the status quo and to make whole any bargaining unit employes who were adversely affected by the District's actions.

In its exceptions, the District alleges that the Hearing Examiner erred in finding that it violated Section 1201(a)(1) and (5) of PERA because the Association failed to prove that the bargaining unit teachers exclusively

performed the work at issue. Rather, the District asserts that the Association has permitted the CTC to teach building trades courses to the District's high school students for numerous years and, therefore, it was not required to bargain over its Agreement with Johnson College to teach those same courses.

In this respect, the District initially asserts that Findings of Fact 4 and 6 are not supported by substantial evidence in the record because the bargaining unit teachers have not exclusively performed the work. For purposes of the exceptions, the Hearing Examiner's Findings of Fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942). Further, absent compelling circumstances, the Board will defer to its Hearing Examiner's credibility determinations supporting findings of fact. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

Finding of Fact 4 states, in relevant part, that "[f]or at least 37 years, the teachers in the Association's bargaining unit have exclusively performed work related to the education, instruction, and teaching of the District's students…." (PDO at 1). A review of the record supports the Hearing Examiner's finding that the bargaining unit teachers have exclusively performed the work of teaching and assessing students in the District. *See* Tredyffrin-Easttown Education Association v. Tredyffrin-Easttown School District, 43 PPER 11 (Final Order, 2011)(the bargaining unit work is not the specific course taught, but the teaching and assessment of students). The record also supports Finding of Fact 6, which states that "[t]he courses that appear in the District's High School Curriculum Planning Guide and in the District's Middle School and High School class schedules have always been taught exclusively by the Association's bargaining unit members." (PDO at 2). Upon review of the record, there are no compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations and the resultant Findings of Fact are supported by substantial evidence. Accordingly, the District's exceptions to the Hearing Examiner's factual findings are dismissed.

With regard to the Hearing Examiner's conclusion that the District violated Section 1201(a)(1) and (5) of PERA, a public employer commits an unfair practice when it transfers any bargaining unit work outside the unit without first bargaining with the employe representative. City of Harrisburg v. PLRB, 605 A.2d 440 (Pa. Cmwlth. 1992). An employe representative bears the burden of proving that an employer unilaterally transferred or removed work from the bargaining unit. City of Allentown v. PLRB, 851 A.2d 988 (Pa. Cmwlth. 2004). A removal of bargaining unit work may occur (1) when an employer unilaterally removes work that is exclusively performed by the bargaining unit or (2) when an employer alters a past practice regarding the extent to which bargaining unit employes and non-bargaining unit employes perform the same work. City of Jeannette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006)(citing AFSCME, Council 13, AFL-CIO v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992)). An employer is not relieved of its obligation to bargain the removal of work simply because the bargaining unit members are not furloughed or terminated as a result of the removal of the work from the bargaining unit. Tredyffrin-Easttown School District, *supra*. Indeed, for purposes of an unlawful removal of bargaining unit work, the bargaining unit's loss of the

work itself is sufficient for the finding of an unfair practice. AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Office of Administration, 20 PPER ¶ 20005 (Final Order, 1988), *aff'd sub. nom.*, Commonwealth of Pennsylvania v. PLRB, 568 A.2d 730 (Pa. Cmwlth. 1990), *appeal denied*, 592 A.2d 46 (Pa. 1991).

Contrary to the District's assertion, this case not only concerns the District's transfer of the teaching of building trades courses, but also the teaching of English and Business Education courses to the employes of Johnson College. Concerning the English and Business Education courses, the record shows that the bargaining unit teachers have exclusively taught English and Business Education courses to the District's high school students (FF 4, 6; Association Exhibit 6); that Johnson College taught both English and Business Education courses to the District's students for high school credit during the 2019-2020 school year (FF 23, 35; Association Exhibit 7); and that the District paid Johnson College to teach those courses to its students. (FF 32, 35). Further, the CTC does not offer any courses addressing the academic topics of English or Business Education and the students who attend the CTC must obtain their education in these courses at the District's high school from the bargaining unit teachers. (FF 11). Therefore, the District violated Section 1201(a)(1) and (5) of PERA by transferring the teaching of English and Business Education courses to Johnson College.

The District next alleges that the Hearing Examiner erred in concluding that it changed the extent to which non-bargaining unit employes teach building trades courses because the programs between the CTC and Johnson College serve the same student population.[3] In concluding that the District expanded the amount of work being removed from the bargaining unit, the Hearing Examiner stated, in relevant part, as follows:

> [T]he record shows that the CTC and Johnson College programs, while having some similarities, are also different in a number of significant respects. … Students who attend the CTC do so for three years in grades 10 through 12 and claim a major in a building trade. The CTC classes are for secondary or high school education only and are not used for credit

[3] The District alleges that Finding of Fact 30 is not supported by the record. The Hearing Examiner's Finding of Fact 30 states as follows:

> The educational program with Johnson College serves a different student population than the educational program with the CTC. Students who attend the CTC do so for three years of high school, grades 10 to 12 for half days, and claim a major in a building trade. Students who attend Johnson College do not attend the CTC, stay at the District's high school for full days until their senior year, and then attend Johnson College for one year, half days. Students have a choice between two different educational programs: CTC classes for three years in grades 10 through 12 or Johnson College classes for one year in grade 12.

(PDO at 4). Upon review of the record, the Hearing Examiner's finding is supported by substantial evidence and the District's exception is dismissed.

> toward postsecondary or collegiate education. … The educational program with Johnson College serves a different student population than the educational program with the CTC. Students who attend Johnson College do not attend the CTC, stay at the District's high school for full days until their senior year, and then attend Johnson College for one year, half days. Thus, students have a choice between two different educational programs: CTC classes for three years in grades 10 through 12 or Johnson College classes for one year in grade 12.

(PDO at 7). The record supports the Hearing Examiner's conclusion that the CTC and Johnson College serve different sets of students in that the students can only attend one program. Further, the focus here is not on the amount of students who choose to take courses at Johnson College, but the fact that the District is now having two different non-bargaining unit entities performing the work at issue. Clearly, the District has changed the extent to which non-bargaining unit employes are teaching building trades courses by having not one, but two entities performing the work.[4]

The District additionally alleges that the Hearing Examiner erred in concluding that the District's Agreement with Johnson College was not a dual enrollment program under Act 46 and that the Board's decision in Palisades Education Association v. Palisades School District, 37 PPER 168 (Final Order, 2006) does not apply. Under Act 46, a school district can enter into a concurrent or dual enrollment agreement with a postsecondary institution and apply for grant funds from the Pennsylvania Department of Education (PDE). 24 P.S. § 16-1603-B(c); 16-1611-B(c). In Palisades School District, the Board concluded that the manner in which a dual enrollment course is implemented under Act 46, including the selection of the teacher, is controlled by the postsecondary institution providing the course and not the school district. As such, the Board held that the school district in that case did not violate its duty to bargain when a non-bargaining unit professor of the postsecondary school taught courses to high school students for secondary and postsecondary credit.

Here, the uncontested findings of fact show that the District did not submit its Agreement with Johnson College to PDE for approval (FF 33) nor has it obtained grant money from PDE for its program with Johnson College. (FF 32). Instead, the District is paying for its high school students to attend the courses at Johnson College. (FF 32). Further, the District is not unaware of the requirements under Act 46 as it has previously obtained grant funding from PDE for its dual enrollment program with Scranton University. Indeed, Superintendent Mahon acknowledged that by stating "in

[4] The District cites to AFSCME, Council 13, AFL-CIO v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992) to support its argument that it did not expand the amount of bargaining unit work being performed by non-bargaining unit employes. In that case, the Commonwealth permitted individual counties to perform inspection services that its employes had previously performed. The Board concluded that the Commonwealth did not violate Section 1201(a)(1) and (5) of PERA because it had ceased performing those inspections and did not control the counties' performance of the services. That is not the case here where the District continues to provide building trades courses at its high school. Therefore, the District's reliance on this case is misplaced.

order to get access to that grant money, we had to go through some hoops at PDE." (N.T. 167). Concerning the District's program with Johnson College, Superintendent Mahon further went on to state that "if, in fact, those hoops need to be gone through again, we're happy to do it." Id. Based on the facts presented, the Hearing Examiner did not err in concluding that the District's dual enrollment program with Johnson College was not pursuant to Act 46. Therefore, the Board's decision in Palisades School District is inapplicable.[5]

The District also asserts that Act 46 permits it to enter into a dual enrollment program under Section 15-1525 of the Public School Code and that the Hearing Examiner's decision precludes it from doing so. Pursuant to Section 16-1611-B(f) of the Public School Code, a school district is not precluded from entering into a dual enrollment program under Section 15-1525 if it is unable to receive Act 46 grant funding. 24 P.S. § 16-1611-B(f). Section 15-1525 states, in relevant part, as follows:

> [A] school district may enter into an agreement with one or more institutions of higher education approved to operate in this Commonwealth in order to allow resident students to attend such institutions of higher education while the resident students are enrolled in the school district. The agreement may be structured so that high school students may receive credits toward completion of courses at the school district and at institutions of higher education….

24 P.S. § 15-1525. As stated by the Hearing Examiner, the provisions of Act 46 do not apply to dual enrollment programs created under Section 15-1525. Further, unlike Act 46, Section 15-1525 does not vest control over implementation of and selection of the instructor for a dual enrollment course in the postsecondary institution. Contrary to the District's assertion, the Hearing Examiner's decision merely holds that the District must bargain with the Association over the assignment of teaching dual enrollment courses for high school credit and does not prevent the District from creating a dual enrollment program under this provision. Accordingly, the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (5) of PERA when it transferred the work at issue to the employes of Johnson College.

The District finally excepts to the remedy issued by the Hearing Examiner. Specifically, the District asserts that the Hearing Examiner's order to immediately restore the work to the bargaining unit is against public policy as it harms the students currently enrolled in courses at Johnson College. The District further asserts that it cannot comply with the make whole remedy because the Association failed to provide evidence of the amount of work lost by the bargaining unit and the Hearing Examiner's award of six percent interest is punitive.

[5] Neither the Board's or Hearing Examiner's decisions preclude the District from implementing an Act 46 dual enrollment program. Rather, the facts presented here do not demonstrate that the District's dual enrollment program with Johnson College was implemented pursuant to Act 46.

In order to effectuate the policies of PERA, the Board is authorized under Section 1303 to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action … as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000). It is within the Board's discretion to determine the appropriate relief for an employer's unfair practices. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994). Moreover, it is well established that the Board and its hearing examiners possess authority to issue "make whole" remedial orders restoring the status quo ante which existed prior to the commission of the unfair practices. Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978). The Board and its examiners frequently order the payment of interest as part of their discretion in fashioning an appropriate make-whole remedy. North Schuylkill Educational Support Personnel Association ESPA/PSEA/NEA v. North Schuylkill School District, 36 PPER 1 (Final Order, 2005).

The District's concern for the students currently taking courses at Johnson College is not a valid reason to overturn the Hearing Examiner's order to restore the work to the bargaining unit to remedy the unfair practice committed by the District. However, the Board will modify the Hearing Examiner's remedy to allow a reasonable amount of time to return the work to the bargaining unit. Further, the Board finds the remainder of the remedy issued by the Hearing Examiner is remedial and in furtherance of the purposes and policies of PERA to restore the status quo and to make any affected bargaining unit members whole for damages, if any, suffered due to the unlawful actions of the District. *See* Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 34 (Final Order, 2010).

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 (1) transferring the bargaining unit work of teaching English and Business Education courses to the employes of Johnson College and (2) changing the extent to which non-bargaining unit employes taught building trades courses to the District's high school students. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final as modified herein.

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 Abington Heights School District are hereby dismissed, and the October 5, 2020 Proposed Decision and Order be and the same is hereby made absolute and final.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that Abington Heights School District shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act;

2. Cease and desist from refusing to bargain collectively in good faith with the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussion of grievances with the exclusive representative.

3. Take the following affirmative action:

(a) Return the teaching work to the bargaining unit, rescind the Industry Fast Track Agreement with Johnson College, restore the status quo ante, and make whole any bargaining unit employes who have been adversely affected due to the District's unfair practices, together with six percent (6%) per annum interest;

(b) Post a copy of the Proposed Decision and Order and Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with the Final Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached Affidavit of Compliance upon the Association.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this sixteenth day of March, 2021. 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 on March 19, 2021.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATION ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-19-202-E
	:	
ABINGTON HEIGHTS SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of Sections 1201(a)(1) and (5) of the Public Employe Relations Act; that it has returned the bargaining unit teaching work at issue to the bargaining unit; that it has rescinded the Industry Fast Track Agreement with Johnson College; that it has restored the status quo and made whole any bargaining unit employes adversely affected by the District's unfair practices with six percent (6%) per annum interest; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on the 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